EVERY VOTE EQUAL

A State-Based Plan for Electing the President by National Popular Vote

John R. Koza Barry Fadem
Mark Grueskin Michael S. Mandell
Rob Richie Joseph F. Zimmerman

FOREWORD BY BIRCH BAYH

With Answers to 175 Myths about the National Popular Vote Compact

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ROADMAP FOR THIS BOOK

Chapter 1 discusses the shortcomings of the current system of electing the President of the United States, including the Electoral College and the prevailing winner-take-all method of awarding electoral votes.

Chapter 2 discusses the history of the Electoral College.

Chapter 3 describes how the Electoral College works.

Chapter 4 examines seven proposed presidential election reforms that have received widespread attention in the past. Each of these proposed approaches is examined in light of three criteria:

- whether the proposed approach accurately reflects the nationwide popular vote,
- whether every vote is equal, and
- whether the proposed approach gives presidential candidates a reason to campaign in every state.

Chapter 5 provides background on interstate compacts—a contractual arrangement authorized in the Constitution by which states can act together to address an issue that cannot be readily solved by unilateral action.

Chapter 6 presents a section-by-section description of the proposed interstate compact entitled the "Agreement Among the States to Elect the President by National Popular Vote" (also called the "National Popular Vote Compact").

Chapter 7 outlines the political and legal strategy for enacting the National Popular Vote Compact, including the Compact's current status and a discussion of the role of state legislatures and the potential role of the citizen-initiative process in the adoption of the Compact.

Chapter 8 discusses how general-election campaigns for President are currently run and how they would likely be run under a national popular vote.

Chapter 9 contains responses to 175 myths about the National Popular Vote Compact.

Chapter 10 is the epilogue.

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In this book, we have retained links to a small number of expired web pages in the expectation that the original link may aid researchers using archive services in locating the original web page.

FOREWORD

Birch Bayh

On January 10, 1977, I introduced Senate Joint Resolution 1 entitled "a proposed Amendment to the Constitution to abolish the Electoral College and provide for direct election of the President and Vice President of the United States." As Chairman of the Senate Subcommittee on Constitutional Amendments, I held five days of hearings on this and related proposals that year, receiving testimony from 38 witnesses and hundreds of pages of additional statements and academic studies. This series of hearings was not the first time the Subcommittee on Constitutional Amendments undertook a review of the workings and implications of the Electoral College. In fact, my Subcommittee held its first hearing on the process of electing the President on February 28, 1966, and had amassed a record on the need for electoral reform of nearly 2,600 pages prior to the 1977 hearings.

At the end of this process, I was even more firmly convinced that the Electoral College had outlived whatever positive role it once played as a choice of convenience and compromise. The President and Vice President should be chosen by the same method every other elective office in this country is filled—by citizen voters of the United States in a system that counts each vote equally. In 1979 we came close to getting Senate Joint Resolution 1 through the Senate but in the end we could not get enough votes to end the filibuster blocking the Resolution. Our effort, like many before it, was relegated to the Congressional history books.

Unfortunately, Congress has continued to block this basic reform that has long-standing, overwhelming public support. Gallup polls have shown strong public support for nationwide popular election of the President for over five decades. Numerous other polls have confirmed a high level of public support for this reform. Polls consistently show 60%–80% of Americans believe they should be able to cast votes in the direct election of the President. That is why I unequivocally support this new strategy to provide for the direct election of the President and Vice President. This new approach is consistent with the Constitution but does not rely on the arduous process of a Constitutional Amendment.

Today, more than ever, the Electoral College system is a disservice to the voters. With the number of battleground states steadily shrinking, we see candidates and their campaigns focused on fewer and fewer states. While running for the nation's highest office, candidates in 2004 completely ignored three-quarters of the states, including California, Texas, and New York, our three biggest states. Why should our

national leaders be elected by only reaching out to one-fourth of our states? It seems inherently illogical, and it is.

Opponents of direct election often point to the wisdom of the Founding Fathers in drafting the Constitution. No question, the Founders had incredible wisdom and foresight, but they were dealing with a much different society and the Electoral College was designed for the realities of the 18th century. The landmass of the country was huge; travel and communication were arduous and primitive; and education was limited at best. Lack of information about possible presidential candidates among the general public was a very real consideration. Also, there were issues involving slavery. At the time, 90% of the slave population lived in the South. Since the slaves could not vote, without the weighted vote of the Electoral College, the South faced electoral domination from northern states. While not the first choice of any Founder, the Electoral College system solved these tricky considerations with a compromise that allowed them to complete the monumental task of creating our country's Constitution.

However, it soon became apparent that the Electoral College process devised by the Founders was flawed. In 1804, the initial Electoral College system was changed through the adoption of the 12th Amendment. Additional weaknesses became apparent. In the 1800s, there were three instances when the popular vote winner lost the presidency. In 1824, John Quincy Adams was a minority vote winner over Andrew Jackson, as were Rutherford B. Hayes over Samuel J. Tilden (1876), and Benjamin Harrison over Grover Cleveland (1888). This anomaly is not that rare in the Electoral College system. In fact, a small shift of votes in one or two states would have thrown the election to the second-place vote winner five additional times in the last 60 years.

For example, in 1976, Jimmy Carter won the nationwide popular vote by 1.7 million votes. However, a change of only 25,579 votes in the states of Ohio and Mississippi would have reelected President Gerald Ford in the Electoral College. With a switch of 18,488 votes in the states of Ohio and Hawaii, the Electoral College normally would have produced a Ford victory. However, because a renegade elector from Washington State cast his vote for non-candidate Ronald Reagan, the final electoral vote count would have been Carter–268, Ford–269, and Reagan–1. Under this scenario, with no candidate receiving the necessary 270 electoral votes, the President would have been chosen by the House of Representatives.

In recent history, we all remember the 2000 election, which awarded the presidency to the candidate who came in second in the popular vote. In 2004, President Bush defeated Senator Kerry by more than 3 million votes nationwide. However, it is easy to overlook that a change of less than 60,000 votes would have put Ohio in the Kerry column under the Electoral College system and would have elected him President.

In the final analysis, the most compelling reason for directly electing our President and Vice President is one of principle. In the United States every vote must count equally. One person, one vote is more than a clever phrase, it's the cornerstone of

justice and equality. We can and must see that our electoral system awards victory to the candidates chosen by the most voters. In this day and age of computers, television, rapidly available news, and a nationwide public school system, we don't need nameless electors to cast our votes for president. The voters should cast them directly themselves. Direct election is the only system that counts every vote equally and where the voters cast their ballots directly for the candidates of their choice. It has the additional virtue of operating in the way most Americans think the electoral process operates—and is expected to operate.

It is heartening to see the *Every Vote Equal* strategy described in this book that will correct the flawed system we maintain for electing our top two leaders. Our federation of states must band together to solve this long-standing, vexatious problem. Since Congress has repeatedly refused to act, it's refreshing to know states have the ability under the Constitution to step up and create the sensible solution Americans have long been supporting. I hope you will join me in supporting this important effort.

The election of President of the United States should not be a contest between red states and blue states. The President should be chosen by a majority of our citizens, wherever they may live. Direct popular election would substitute clarity for confusion, decisiveness for danger, and popular choice for political chance.

Additional forewords to the 4th edition to this book by John B. Anderson, John Buchanan, Tom Campbell, Gregory G. Aghazarian, Saul Anuzis, Laura Brod, James L. Brulte, B. Thomas Golisano, Joseph Griffo, Ray Haynes, Robert A. Holmes, Dean Murray, Thomas L. Pearce, Christopher Pearson, and Jake Garn may be found at https://www.every-vote-equal.com/4th-edition.

BIOGRAPHIES

BIRCH BAYH (1928–2019) sponsored and led the efforts to adopt a federal constitutional amendment on direct nationwide election of the President in the 1960s and 1970s. He was an Indiana State Representative from 1955 to 1963, Speaker of the Indiana House of Representatives from 1961 to 1962, and U.S. Senator from Indiana from 1963 to 1980. Senator Bayh authored two amendments to the U.S. Constitution—the 25th Amendment on presidential and vice-presidential succession and the 26th Amendment lowering the voting age to 18. Starting in 2005, he worked with the authors of this book as a co-author of the National Popular Vote Compact described in this book and with the National Popular Vote organization in helping to get the Compact adopted by state legislatures.

BARRY FADEM is a partner in the law firm of Fadem & Associates in Lafayette, California. He specializes in all aspects of campaign and election law and provides expert consultation in the area of initiatives and referendums. He is President of National Popular Vote.

MARK GRUESKIN is a shareholder in the Denver law firm of Recht Kornfeld P.C. He regularly litigates matters of federal and state constitutional law. *Campaigns & Elections* magazine has called him "Colorado's best election lawyer, bar none." Formerly, he served as legal counsel to Colorado Governor Richard Lamm.

DR. JOHN R. KOZA, originator of the plan described in this book, received his Ph.D. in computer science from the University of Michigan in 1972. He published a board game involving Electoral College strategy in 1966. From 1973 through 1987, he was co-founder, chairman, and CEO of Scientific Games, where he co-invented the rub-off instant lottery ticket used by state lotteries. In the 1980s, he and attorney Barry Fadem (see above) were active in promoting the adoption of lotteries by various states through the citizen-initiative process and state legislative action. He taught a course on genetic algorithms and genetic programming

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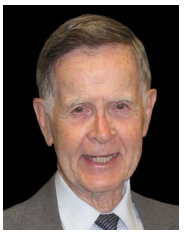
MICHAEL S. MANDELL is currently a Judge on the Maricopa County Superior Court, where he has served as both a Judge and a Court Commissioner since 2013. Before being appointed to the Trial Court by Governor Ducey, Michael was an associate with the law firm of Perkins Coie in Phoenix and the general counsel in both the Arizona State Senate and Arizona State House of Representatives. Michael received his J.D. with honors (Order of the Coif) from Arizona State University, where he was an editor of the *Arizona State Law Journal*.

ROB RICHIE is Senior Advisor of FairVote, an organization where, as its founding CEO from 1992–2023, he helped win and implement state and local electoral reforms. He is a frequent lecturer and media source, including on CBS, NBC, CNBC, CNN and NPR. His writings regularly appear in national publications, and he has contributed to 11 books. He is a graduate of Haverford College, where he serves on its Corporation. He and his wife Cynthia Terrell have three children.



JOSEPH F. ZIMMERMAN (1928–2022) was a Professor of Political Science at the State University of New York at Albany. He was author of numerous books, including *Interstate Cooperation: Compacts and Administrative Agreements* (2012), *Interstate Relations: The Neglected Dimension of Federalism* (1996), *Contemporary American Federalism: The Growth of National Power* (1992), *The Initiative: Citizen Law-Making* (1997), *The Referendum: The People Decide Public Policy* (1997), *The Recall: Tribunal of the People* (1997), *Interstate Economic Relations* (2004), *Interstate Disputes: The Supreme Court's Original Jurisdiction* (2006), *Horizontal Federalism: Interstate Relations* (2011), and *Interstate Water Compacts: Intergovernmental Efforts to Manage America's Water Resources* (2012). See https://www.albany.edu/rockefeller/news/2022-remembering-joseph-f-zimmerman

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David Leip's Atlas of U.S. Presidential Elections was the source for election statistics for many elections.

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Leonard S. Rosenbaum created the index for this book.

1 Shortcomings of the Current System of Electing the President

The seven shortcomings of the current system of electing the President stem from state-level "winner-take-all" laws that award all of a state's electoral votes to the presidential candidate who receives the most popular votes in that state.

(1) **Five of our 46 Presidents came into office without winning the most popular votes nationwide**. The loser of the national popular vote became President in two of the first six presidential elections of the 2000s, namely 2000 and 2016. Moreover, there were two near-miss elections during this period in which a shift of a small number of popular votes in one state in 2004 and three states in 2020 would have given the presidency to the loser of the national popular vote. Overall, there have been 13 such near-misses in the nation's 59 presidential elections. In short, the current state-by-state winner-take-all method of awarding electoral votes does not reliably reflect the will of the people of the United States. In contrast, the National Popular Vote Interstate Compact described in this book will guarantee the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia. This history is detailed in section 1.1.

(2) **Voters in three out of four states have been regularly ignored in the general-election campaign for President—and it's getting worse**. The winner-take-all method of awarding electoral votes compels presidential candidates to pay attention only to the voters in closely divided states. Candidates do not visit, advertise, build a grassroots organization, poll, or pay attention to the concerns of voters in states where they are safely ahead or hopelessly behind. The reason is that they have nothing to gain or lose in such states. In the six presidential elections of the 2000s, almost all (between 91% and 100%) of the general-election campaign events were concentrated in a dozen-or-so closely divided battleground states. The voters living in the remaining states were mere spectators to the presidential election. The ignored states include almost all of the small states, rural states, western states, southern states, and northeastern states. Governance—not just campaigning—is distorted when presidential campaigns concentrate on just a few states. Presidential candidates and sitting presidents contemplating their own reelection formulate public policy based on the concerns of the small handful of states that decide the presidency—not the nationwide constituency. Moreover, the electoral map has become nearly stagnant—41 states voted for the same party in the most recent four presidential elec-

tions. Viewed over the last half century, the presidential battleground has shrunk considerably. Looking forward, 80% or more of the country's voters will probably be ignored by the 2024 general-election campaign for President. The National Popular Vote Interstate Compact would make *every* voter in *every* state politically relevant in *every* presidential election (as explained in section 1.2).

(3) **A small number of votes in a small number of states regularly decides the presidency—thereby fueling post-election controversies that threaten democracy.** The fact that a few thousand votes in a handful of closely divided states regularly decide the presidency is an *inherently recurring* feature of the current state-by-state winner-take-all method of awarding electoral votes. The "state-by-state" nature of the current system divides the nation's voters into 51 separate state-level pools of votes. After this Balkanization, a certain relatively small number of the state-level races for President are closely divided. Inevitably, one, two, or three of these closely divided states end up being extremely close on Election Day. Then, a few thousand votes in a few closely divided states will decide the presidency. Razor-thin results in a few states, in turn, generate post-election doubt, controversy, litigation, and unrest over real, imagined, or manufactured irregularities. The 2016 and 2020 elections were each decided by fewer than 80,000 votes, despite multi-million nationwide margins. The presidency has been decided by an average of a mere 287,969 popular votes spread over an average of three states in the six presidential elections between 2000 and 2020. In contrast, the average margin of victory in the national popular vote was 4,668,496—16 times larger. The danger to our republic posed by post-election controversies is heightened because the country has been in an era of consecutive non-landslide presidential elections since 1992. All-or-nothing payoffs at the state level make the national outcome extremely sensitive to fraud, foreign interference, and random events. A sound election system should possess a high level of resistance to the impact of minor influences. The outcome of an election conducted under the National Popular Vote Interstate Compact would be based on multi-million-vote nationwide margins—not microscopic margins in a couple of states (as detailed in section 1.3).

(4) **Every vote is not equal throughout the United States under the current system**. There are five sources of inequality in the value of a vote for President under the current state-by-state winner-take-all method of awarding electoral votes, including

- inequality in the value of a vote arising from the two "senatorial" electoral votes that each state receives in addition to the number warranted by its population,
- inequality in the value of a vote because of imprecision in the process used to apportion U.S. House seats (and hence electoral votes) among the states,

- inequality in the value of a vote caused by the intra-decade population changes after each census that devalues voters in fast-growing states,
- inequality in the value of a vote created by voter-turnout differences that devalues voters in high-turnout states, and
- inequality in the value of a vote created by the fact that voters in one, two, or three states regularly decide presidential elections.

In contrast, every vote throughout the country would be equal under the National Popular Vote Compact, as discussed in section 1.4.

(5) **Voter participation is lower in spectator states than in battleground states**. Many voters realize that living in a spectator state makes them politically irrelevant in the current process of electing the President. As a result, voter turnout is considerably lower in spectator states than in closely divided states. Compared to the rest of the country, voter turnout in the battleground states was 11% higher in 2020, 11% higher in 2016, 16% higher in 2012, and 9% higher in 2008. See section 1.5.

(6) **The current system could result in the U.S. House of Representatives choosing the President on a one-state-one-vote basis**. If no candidate receives an absolute majority of the electoral votes (that is, 270 out of 538), the U.S. House of Representatives chooses the President with each state having one vote. Thus, the loser of the national popular vote could win the presidency in this process. In the six presidential elections of the 2000s, there have been numerous politically plausible combinations of states that could have produced a 269–269 tie in the Electoral College. Moreover, given the ever-increasing number of independent voters, there is a growing possibility that no candidate receives an absolute majority of the electoral votes in a multi-candidate race. The National Popular Vote Compact guarantees that one candidate will always receive a majority in the Electoral College, and therefore a presidential election will never be thrown into Congress (section 1.6).

(7) **Under the current system, an individual's vote for President is not counted as a vote for the presidential candidate preferred by that voter**. In virtually every election in the United States—except for President—every voter's vote is added directly into the count of the candidate favored by that voter. Then, the winner of the election is the candidate favored by most voters in the entire jurisdiction served by the office. However, under the current system of electing the President, a voter's choice gets reflected in the Electoral College only if that voter agrees with the choice made by a plurality of *other* voters in the voter's state. The votes of about 45% of the nation's voters are not counted as a vote in the Electoral College for the presidential candidate preferred by the individual voter. Under the National Popular Vote Compact, every individual's vote for President will be counted directly as a vote for the presidential candidate preferred by that individual voter (section 1.7).

1.1. THE CURRENT SYSTEM DOES NOT ACCURATELY REFLECT THE NATIONAL POPULAR VOTE.

1.1.1. Five wrong-winner elections

Five of the nation's 46 Presidents came into office without winning the most popular votes nationwide.

This outcome—called a "wrong winner," "second-place" or "divergent" election—occurs when a candidate wins an electoral-vote majority while losing the national popular vote.

Table 1.1 shows the five presidential elections in which the candidate with the most popular votes nationwide did not win the presidency.

- Column 4 shows the number of electoral votes required to win in that election.
- Column 5 shows the number of electoral votes above the required majority (the "cushion") received by the person who became President.
- Column 6 shows the popular vote lead in the decisive state(s) of the person who became President (with that state's number of electoral votes).
- Column 7 shows the total popular vote lead in the decisive state(s) of the person who became President—that is, the sum of the popular votes in column 6.
- Column 8 shows the relative value of a voter in the decisive state(s). This is the ratio of the national-popular-vote lead of the person who failed to become President (column 3) compared to the total popular vote lead in the decisive state(s) of the person who became President (column 7).

Based on the average of the numbers in the last column of the table, a voter in the decisive states was 222 times more important than a voter elsewhere in the country.

We now discuss these five wrong-winner elections in detail.

Table 1.1 Five wrong-winner presidential elections

Year	Person who became President	National-popular-vote lead of the candidate who did not become President	Electoral votes needed to win	Number of electoral votes above the required majority received by the person who became President	Popular vote lead in the decisive state(s) of the person who became President	Total popular vote lead in the decisive state(s) of the person who became President	Relative value of a popular vote in the decisive state(s)
2016	Trump	2,868,518 (Clinton)	270	36	10,704 in MI (16) 22,748 in WI (10) 44,292 in PA (20)	77,744	**37**
2000	Bush	543,816 (Gore)	270	1	537 in FL (25)	537	**1,013**
1888	Harrison	89,293 (Cleveland)	201	32	14,373 in NY (36)	14,373	**6**
1876	Hayes	254,694 (Tilden)	185	0	889 in SC (7) 922 in FL (4) 4,807 in LA (8)	6,618	**38**
1824	Adams	38,149 (Jackson)	131	NA	109 in MD (11) 244 in IL (3) 766 in OH (16) 1,467 in MO (3)	2,586	**15**
	Average	**758,894**				**20,372**	**222**

Figure 1.1 Herb Block cartoon of October 7, 1948[1]

2016 election

Donald Trump became President in 2016 even though Hillary Clinton won the national popular vote by 2,868,518 votes (as shown in column 3 of table 1.1).[2]

Trump's 306–232 lead[3] in the Electoral College came from carrying the following three decisive states by small popular vote margins (as shown in column 6 of the table 1.1).

- Michigan (16 electoral votes) by 10,704 popular votes,
- Wisconsin (10 electoral votes) by 22,748 popular votes, and
- Pennsylvania (20 electoral votes) by 44,292 popular votes.

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[1] The authors gratefully acknowledge the Herb Block Foundation for permission to use the copyrighted cartoon by Herb Block.

[2] In 2016, Donald Trump received 62,985,134 popular votes to Hillary Clinton's 65,853,652 popular votes.

[3] In 2016, Trump and Clinton did not actually receive all the electoral votes to which they were entitled, due to several faithless presidential electors. Because of two Republican faithless electors from Texas, Trump received only 304 electoral votes when the Electoral College met on December 19, 2016. Because of five Democratic faithless electors (four from Washington State and one from Hawaii), Clinton received only 227 electoral votes. See section 3.7.

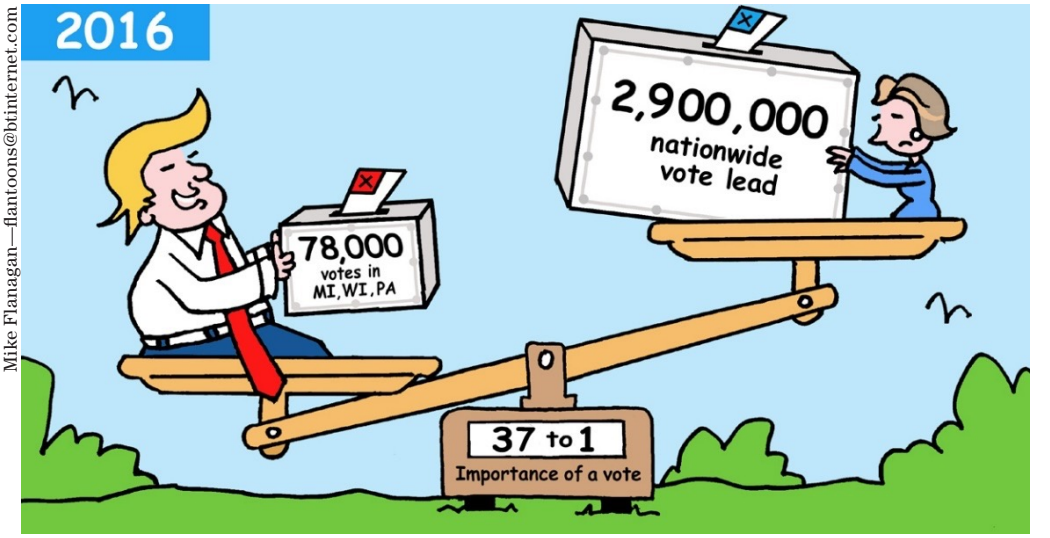

Figure 1.2 A vote in three decisive states in 2016 was 37 times more important than other votes.

Trump's total popular vote lead in these three decisive states was 77,744 (column 7 of the table).

If Clinton had won these three close states, she would have won the Electoral College by a 278–260 margin.

In short, the outcome of an election in which 137,125,484 people voted for President was decided by 77,744 popular votes in three states (column 7 of table 1.1).

Each of these 77,744 popular votes in the three decisive states was 37 times more important than the 2,868,518 votes that constituted Clinton's national-popular vote lead (as shown in figure 1.2).

Of course, there is no way to know whether Donald Trump would have won or lost if the 2016 election had been conducted based on the national popular vote. If the rules of the game had been different, the campaigns would have been run differently.

In the 2016 campaign, almost all (94%) of the general-election campaign events (375 of 399) occurred in 12 closely divided states.

The positions that the candidates took on the issues were designed to appeal to the voters of those critical dozen states—not to the voters of the entire country.

Thus, there is no way of knowing whether the Trump-Pence ticket or the Clinton-Kaine ticket would have received more popular votes nationwide in 2016 if they had campaigned head-to-head in every state.

Having said that, it is a fact that the Trump-Pence ticket won the popular vote by a 51%–49% margin in the 12 states where the two candidates actually campaigned head-to-head.[4]

[4] Of the 399 general-election campaign events in 2016, only 24 were outside the 12 battleground states. The miscellaneous reasons why the candidates made those 24 visits are discussed in section 1.2.1.

Table 1.2 Trump won the popular vote in the battleground states in 2016.

R Percent	Events	State	Trump (R)	Clinton (D)	R-Margin	D-Margin	R-EV	D-EV
55%	21	IA	800,983	653,669	147,314		6	
54%	48	OH	2,841,006	2,394,169	446,837		18	
52%	55	NC	2,362,631	2,189,316	173,315		15	
52%	10	AZ	1,252,401	1,161,167	91,234		11	
51%	71	FL	4,617,886	4,504,975	112,911		29	
50%	14	WS	1,405,284	1,382,536	22,748		10	
50%	54	PA	2,970,733	2,926,441	44,292		20	
50%	22	MI	2,279,543	2,268,839	10,704		16	
49.8%	21	NH	345,790	348,526		2,736		4
49%	17	NV	512,058	539,260		27,202		6
47%	19	CO	1,202,484	1,338,870		136,386		9
47%	23	VA	1,769,443	1,981,473		212,030		13
50.8%	**375**	**TOTAL**	**22,360,242**	**21,689,241**	**1,049,355**	**378,354**	**125**	**32**

Table 1.2 shows the results in these 12 states.

- Column 1 of the table shows Trump's percentage of the two-party popular vote in each state. The table is sorted in order of Trump's percentage.
- Column 2 shows each state's number of 2016 general-election campaign events.[5]
- Columns 4 and 5 show, respectively, each state's popular vote for Trump and Clinton.
- Columns 6 and 7 show, respectively, the popular vote margin of each state's winner. The eight battleground states that Trump carried are at the top, and the four states that Clinton carried are at the bottom.
- Columns 8 and 9 show, respectively, the number of electoral votes that Trump and Clinton received from each state.

As can be seen in the table, Trump won eight of the 12 battleground states—including all of the bigger ones. Overall, Trump led by 125–32 electoral votes in the 12 battleground states.

2000 election

Texas Governor George W. Bush became President in 2000 despite the fact that Vice President Al Gore won the national popular vote by 543,816.[6]

Bush won the presidency because he carried the decisive state of Florida by 537 popular votes.

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[5] See section 1.2.1 for a precise definition of a "general-election campaign event."

[6] In 2000. Bush received 50,460,110 popular votes to Vice President Gore's 51,003,926.

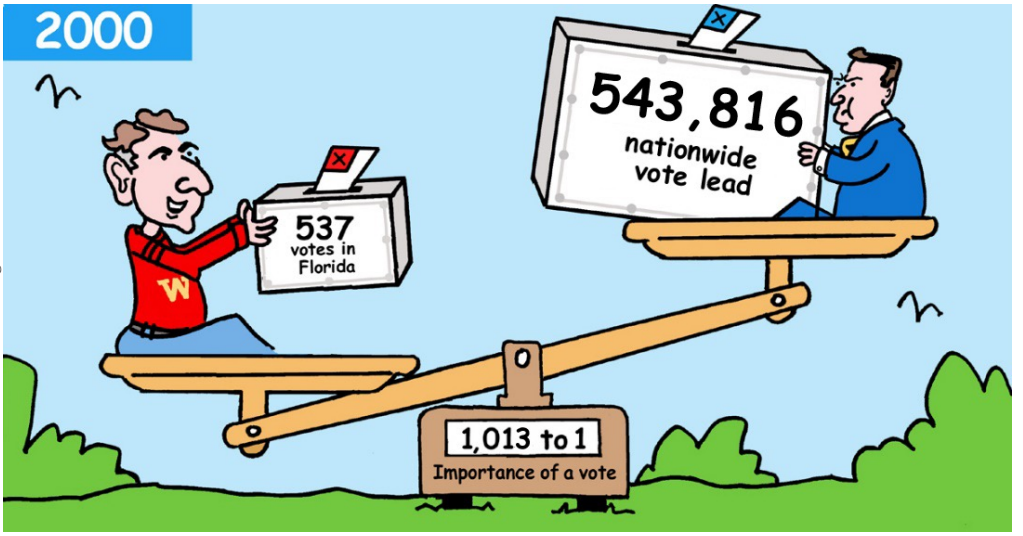

Figure 1.3 A vote in the one decisive state in 2000 (Florida) was 1,013 times more important than other votes.

As a result of narrowly winning Florida's 25 electoral votes, Bush won 271 votes in the Electoral College—one electoral vote more than the 270 needed for election.[7]

If Gore had won the popular vote in Florida, he would have won the Electoral College by a 292–246 margin.

Each of the 537 popular votes in the decisive state of Florida was 1,013 times more important than the 543,816 votes that constituted Gore's lead in the national popular vote (as shown in figure 1.3).

1888 election

Benjamin Harrison became President in 1888 despite the fact that incumbent President Grover Cleveland won the national popular vote by 89,293 votes.[8]

Harrison won the presidency because he carried the decisive state of New York (with 36 electoral votes) by the slender margin of 14,373 popular votes.

As a result of winning New York, Harrison won the Electoral College by a 233–168 margin (with 201 electoral votes needed for election at the time).

If Cleveland had carried New York, he would have been elected by a 204–197 margin in the Electoral College.

Each of the 14,373 popular votes in the decisive state of New York (column 7) was six times more important than the 89,293 votes that constituted Cleveland's national-popular-vote lead (as shown in figure 1.4).

---

[7] Bush won the Electoral College by a 271–267 margin. Because of the abstention by one faithless Democratic presidential elector from the District of Columbia in 2000, Gore actually received only 266 votes when the Electoral College met in December. See section 3.7.6 for a discussion of faithless electors.

[8] In 1888, Benjamin Harrison received 5,449,825 popular votes, compared to Grover Cleveland's 5,539,118 popular votes.

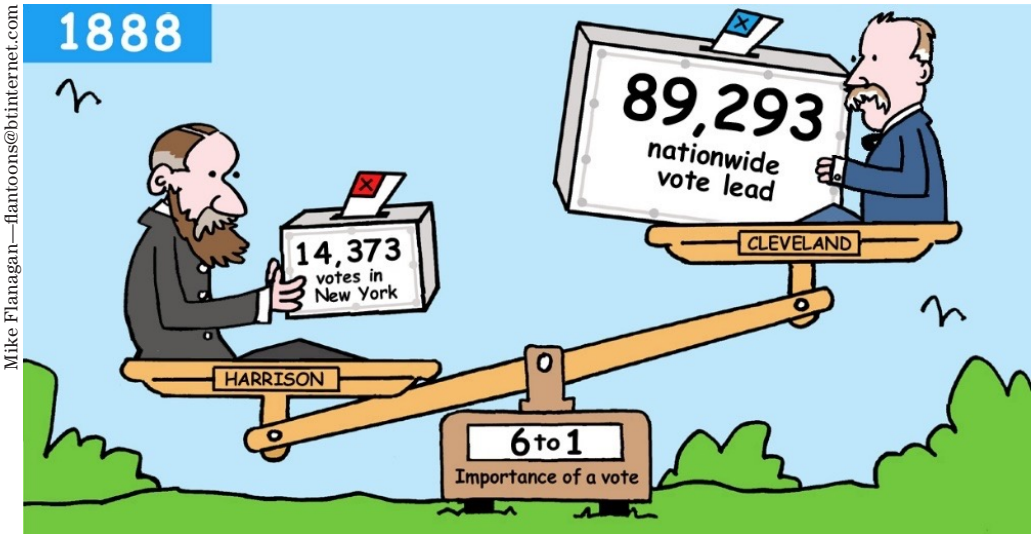

Figure 1.4 A vote in the one decisive state in 1888 (New York) was six times more important than other votes.

1876 election

Rutherford B. Hayes became President even though Samuel J. Tilden won the national popular vote by 254,694.[9]

Hayes won the presidency because he carried three hotly contested states:

- South Carolina (with seven electoral votes at the time) by 889 popular votes,
- Florida (four electoral votes) by 922 popular votes, and
- Louisiana (eight electoral votes) by 4,807 popular votes.[10]

Hayes' total lead in these three decisive states was 6,618 popular votes (column 7).

As a result of winning these three decisive states, Hayes won the Electoral College by a 185–184 margin (with 185 electoral votes needed for election).

Hayes won his one-vote lead in the Electoral College after a special 15-member Electoral Commission created by Congress awarded him all three contested states and dismissed technical eligibility issues involving presidential electors from Oregon and Vermont.[11,12,13,14]

Because Hayes won the Electoral College with no electoral votes to spare, Tilden

---

[9] In 1876, Hayes received 4,033,497 popular votes, compared to Tilden's 4,288,191 popular votes.

[10] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 125.

[11] Holt, Michael F. 2008. *By One Vote: The Disputed Presidential Election of 1876*. Lawrence, KS: University Press of Kansas.

[12] Rehnquist, William H. 2004. *Centennial Crisis: The Disputed Election of 1876*. New York, NY: Alfred A. Knopf. Pages 109–112.

[13] Morris, Roy B. 2003. *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*. Waterville, ME: Thorndike Press.

[14] Robinson, Lloyd. 1996. *The Stolen Election: Hayes versus Tilden—1876*. New York, NY: Tom Doherty Associates Books.

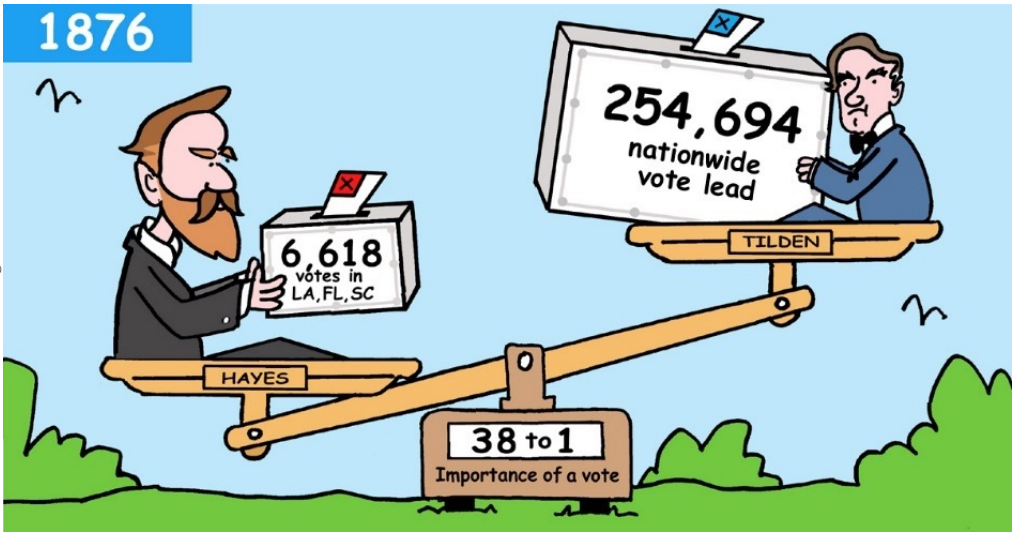

Figure 1.5 A vote in three decisive states in 1876 was 38 times more important than other votes.

would have won a majority in the Electoral College and become President if he had won any one of the three contested states (or either of two eligibility disputes).

Each of the 6,618 popular votes in the three contested states was 38 times more important than the 254,694 votes that constituted Tilden's national-popular-vote lead (as shown in figure 1.5).

1824 election

Four candidates received a substantial number of both popular votes and electoral votes in 1824.

- Andrew Jackson received 151,271 popular votes (41% of the national popular vote).
- John Quincy Adams received 113,122 popular votes (31%).
- Henry Clay received 47,531 popular votes (13%).
- William H. Crawford received 40,856 popular votes (11%).[15]

Jackson led Adams in popular votes and in the Electoral College by a 99–64 margin.[16] However, Jackson did not receive the required absolute majority of the electoral votes

[15] Other candidates accounted for an additional 13,053 popular votes (4%).

[16] A complete national popular vote total is not available for the 1824 election. Three-quarters of the then-24 states conducted popular elections for presidential electors in 1824. However, presidential electors were selected by the state legislatures of Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont. Historian Donald Ratcliffe has estimated the likely popular vote for President in these six states based on voting patterns for other offices in that same year. Ratcliffe estimates that Adams' percentage of the national popular vote would have been about 34%—still considerably less than Jackson's. See Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas. See table 3 on page 282 and also pages 209, 216, 233, and 234. See also Ratcliffe, Donald. 2014. Popular Preferences in the Presidential Election of 1824. *Journal of the Early Republic*. Volume 34. Pages 45–77.

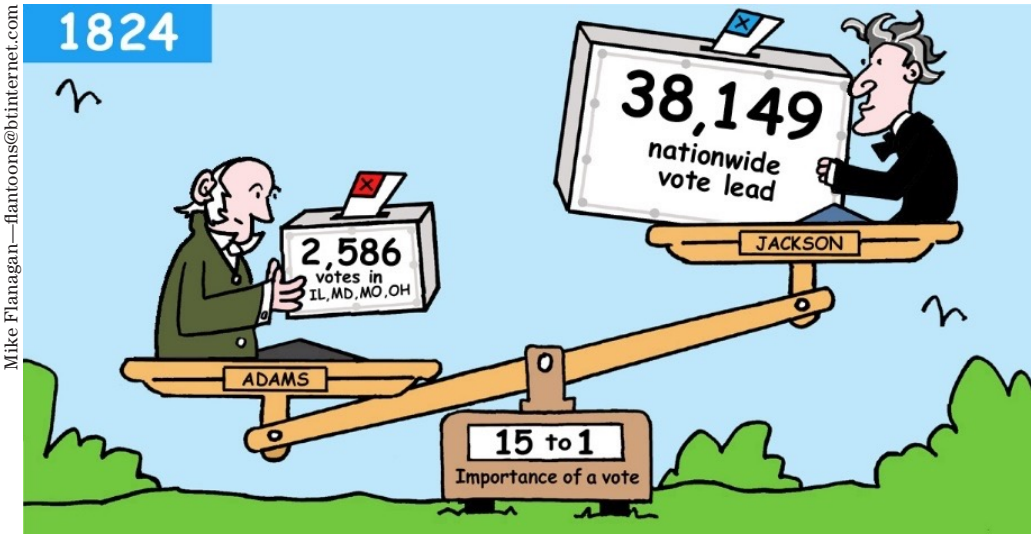

Figure 1.6 A vote in the four decisive states in 1824 was 15 times more important than other votes.

(131 of 261), because Crawford and Clay carried various states and received 41 and 37 electoral votes, respectively.

Jackson would have won an absolute majority of the electoral votes if he had received 2,586 additional popular votes in four states:

- 109 popular votes in Maryland (with 11 electoral votes at the time),
- 244 popular votes in Illinois (three electoral votes),
- 766 popular votes in Ohio (16 electoral votes), and
- 1,467 popular votes in Missouri (three electoral votes).

These four additional states would have given Jackson 132 electoral votes (one more than needed).

Each of the 2,586 popular votes in the four decisive states was 15 times more important than the 38,149 votes that constituted Jackson's national-popular-vote lead (as shown in figure 1.6).

In the absence of these 2,586 popular votes, no candidate received an absolute majority of the electoral votes. Consequently, the presidential election was thrown into the U.S. House of Representatives in which each state had one vote.

The 12th Amendment to the Constitution (ratified in 1804) limited the House's choice to the three candidates who received the most electoral votes—thus excluding House Speaker Henry Clay, who had come in third place in the national popular vote.

Speaker Clay helped the second-place candidate (John Quincy Adams) win the presidency in the House election. Adding yet another controversy to an already problematic election, President Adams then promptly appointed Clay as his Secretary of State—an action that became known as the "Corrupt Bargain."[17]

---

[17] Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas.

Mike Flanagan—flantoons@btinternet.com

Figure 1.7 Five Presidents have entered office without winning the national popular vote.

The controversial 1824 election spotlighted various undemocratic practices, including the selection of presidential electors by the state legislatures in a quarter of the states.[18] Within two presidential elections, the laws in every state except South Carolina were changed to empower the voters to choose the state's presidential electors.

1.1.2. The current era of close presidential elections

The country today is in an era of consecutive close presidential elections.

In the eight presidential elections between 1992 and 2020, the average national-popular-vote margin was only 4.3%.

Table 1.3 shows the first-place candidate's percentage lead in the national popular vote in the 50 presidential elections between 1824 and 2020.[19] The five negative numbers in the table correspond to the five wrong-winner elections (1824, 1876, 1888, 2000, and 2016).

As can be seen in the table, 40% of the elections in the table were "landslides"—that is, those with a 10% or larger margin of victory.

Moreover, almost half of the 20th century presidential elections (12 of 25) were landslides.

However, that period of landslide presidential elections has now been replaced by an era of close elections.

---

[18] Hopkins, James F. 2002. In Schlesinger, Arthur M., Jr., and Israel, Fred L. (editors). *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Volume 1. Pages 349–381.

[19] We start this table with 1824, because it was the first year in which a majority of the states conducted popular elections for presidential electors. In 1824, three-quarters of the 24 states conducted popular elections.

Table 1.3 First-place candidate's percentage lead in national popular vote over second-place candidate

Year	Person who became President	First-place candidate's percentage lead in the national popular vote over the second-place candidate
1824	J. Q. Adams	–10.4%
1828	Jackson	16.6%
1832	Jackson	14.2%
1836	Van Buren	14.2%
1840	W. H. Harrison	6.1%
1844	Polk	1.4%
1848	Taylor	4.8%
1852	Pierce	6.9%
1856	Buchanan	12.2%
1860	Lincoln	10.4%
1864	Lincoln	10.2%
1868	Grant	5.4%
1872	Grant	11.8%
1876	Hayes	–3.0%
1880	Garfield	0.1%
1884	Cleveland	0.7%
1888	B. Harrison	–0.8%
1892	Cleveland	3.0%
1896	McKinley	5.3%
1900	McKinley	6.2%
1904	T. Roosevelt	18.8%
1908	Taft	8.6%
1912	Wilson	14.4%
1916	Wilson	3.1%
1920	Harding	26.2%
1924	Coolidge	25.2%
1928	Hoover	17.4%
1932	F. D. Roosevelt	17.8%
1936	F. D. Roosevelt	24.3%
1940	F. D. Roosevelt	9.9%
1944	F. D. Roosevelt	7.5%
1948	Truman	4.4%
1952	Eisenhower	10.5%
1956	Eisenhower	15.4%
1960	Kennedy	0.2%
1964	Johnson	22.6%
1968	Nixon	0.7%
1972	Nixon	23.2%
1976	Carter	3.1%
1980	Reagan	9.7%
1984	Reagan	18.2%
1988	G. H. W. Bush	7.8%
1992	Clinton	5.6%
1996	Clinton	8.5%
2000	G. W. Bush	–0.5%
2004	G. W. Bush	2.4%
2008	Obama	7.2%
2012	Obama	3.9%
2016	Trump	–2.1%
2020	Biden	4.5%

Since 1992, the nation has been in an era of close presidential elections resembling those of the Gilded Age at the end of the 19th century.[20]

Given the current closely divided political environment, the state-by-state winner-take-all method of awarding electoral votes will almost inevitably create more near-miss elections and more wrong-winner elections.

Indeed, the 1991 book *Wrong Winner: The Coming Debacle in the Electoral College* by David Abbott and James P. Levine[21] correctly predicted that emerging political and demographic trends would lead to an increasing number of elections in which the candidate with the most popular votes nationwide would not win in the Electoral College.

[20] Kondik, Kyle. 2022. The Electoral College in the 21st Century. *Sabato's Crystal Ball*. December 15, 2022. https://centerforpolitics.org/crystalball/articles/the-electoral-college-in-the-21st-century/

[21] Abbott, David W., and Levine, James P. 1991. *Wrong Winner: The Coming Debacle in the Electoral College*. Westport, CT: Praeger.

Matthew Dowd discussed the possibility of a "wrong winner" election in 2004:

> "In 2004, during my tenure as chief strategist for the Bush–Cheney reelection campaign, I did some scenario planning on possible outcomes in a very close election. I had expected that election to be decided by 3 percentage points or less."
>
> "One scenario I raised as a real possibility internally was that George Bush could win the popular vote but lose the Electoral College (the exact opposite of what happened in 2000). And this scenario would have come to pass if the Bush margin in Ohio had changed by 120,000 votes. John Kerry would have won the Electoral College, 271 to 266, while Bush would have won the popular vote by approximately 3 million votes."
>
> "**Subtract 2.2 percent from the margin in each state in 2004 and Bush would have still barely won the popular vote (but by a bigger margin than Gore won the popular vote in 2000), but lost the Electoral College to Kerry, 283 to 254, because Ohio, Iowa, and New Mexico would have switched from Bush to Kerry.**"[22] [Emphasis added]

Dowd applied the same methodology in June 2012, while discussing the possibility of a "wrong winner" election that year:

> "So, let's do some similar scenario planning for 2012, when another tight election is expected. It is also expected to be decided by less than 3 percentage points, just like 2004."
>
> "In a very tight race this November, … **Romney could win the popular vote by more than 1 million votes and lose the Electoral College to Obama** by a margin of 272 to 266."
>
> "Let me show you how I arrived at this scenario. Obama won the popular vote by a national percentage of just over 7 points in 2008. If we subtract 8 points from the margin in every state, Romney would have a little less than a 1-point victory nationally (which gives you the 1 million vote margin for him in the popular vote).
>
> "And as we subtract 8 points from every state's margin, what happens to the Electoral College? It gets much, much closer, but Obama still wins it by six electoral votes. So, in one very possible scenario, Obama can lose the popular vote and still be reelected because he barely carries the Electoral College."
>
> "But keep in mind that in the very tight elections since 2000, we have been increasingly faced with a divergence of the popular vote and the Electoral College. This happened in 2000, it could have easily have happened in 2004, and

[22] Dowd, Matthew. How Obama could lose the popular vote and win the election. *Huffington Post*. June 6, 2012.

> it could definitely happen in 2012. But interestingly, **if there is a divergence in 2012, it is likely to benefit President Obama and not Mitt Romney**."[23] [Emphasis added]

Albert Hunt commented on Dowd's analysis on July 8, 2012:

> "If the race is decided by two percentage points or … less than that, the President [Obama] has a slight advantage with the map."[24]

The pre-election predictions made by both Dowd and Hunt were vindicated by the actual results of the 2012 election. As explained in detail in section 9.36.4, if Obama had received 1.96% fewer popular votes in each state (that is, an overall percentage reduction sufficient to create a tie in the national popular vote), he would still have won the Electoral College by a comfortable 285–253 margin.

1.1.3. Probability of wrong-winner elections

In a study entitled "Inversions in U.S. Presidential Elections," Michael Geruso, Dean Spears, and Ishaana Talesara of the University of Texas Electoral College Study reported:

> "Inversions—in which the popular vote winner loses the election—have occurred in four U.S. presidential races. We show that rather than being statistical flukes, inversions have been *ex ante* likely since the early 1800s. **In elections yielding a popular vote margin within 1 point** (one-eighth of presidential elections), **about 40 percent will be inversions** in expectation. We show this conditional probability is remarkably stable across historical periods—despite differences in which groups voted, which states existed, and which parties participated.
>
> "Our findings imply that the United States has experienced so few inversions merely because there have been so few elections (and fewer close elections)."[25]

Professor Samuel Wang, Director of the Princeton Election Consortium at Princeton University, and Jacob S. Canter noted in a 2020 study[26] that there have been two periods in American history with multiple consecutive close elections, each with two divergent presidential elections:

- Gilded Age: 1876–1892
- Current era: 1988–2020.

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[23] Dowd, Matthew. How Obama could lose the popular vote and win the election. *Huffington Post*. June 6, 2012.

[24] Hunt, Albert R. Electoral map doesn't always lead straight to White House. *Bloomberg View*. July 8, 2012.

[25] Geruso, Michael; Spears, Dean; and Ishaana Talesara. 2022. Inversions in U.S. Presidential Elections: 1836–2016. *American Economic Journal: Applied Economics*. Volume 14. Number 1. January 2022. Pages 327–357. Page 329. https://www.aeaweb.org/articles?id=10.1257/app.20200210

[26] Wang, Samuel and Canter, Jacob. 2020. The Best Laid Plans: Unintended Consequences of the American Presidential Selection System. *Harvard Law & Policy Review*. Volume 15. Number 1. Winter 2020. Pages 209–236. Page 221.

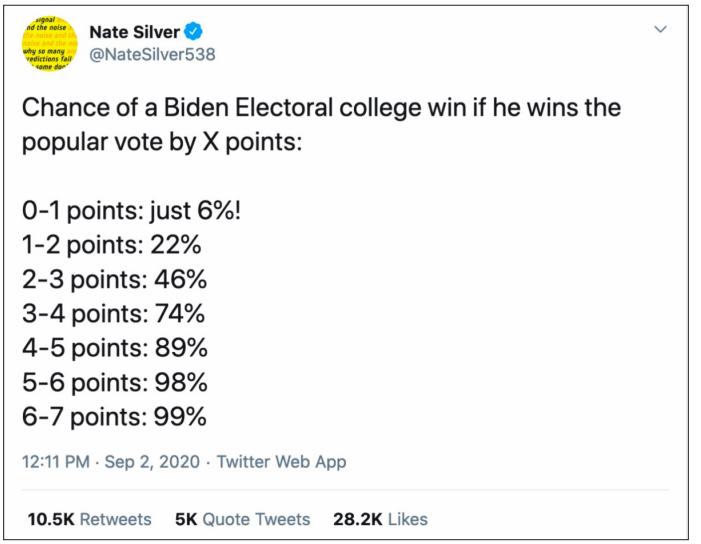
Based on earlier computer simulations by Vinod Bakthavachalam and Jake Fuentes at the Princeton Election Consortium,[27] Wang and Canter concluded:

"In elections where the popular vote margin across the country was less than 3%, the likelihood of a mismatch was approximately 3 in 10."[28]

Wang also observed:

"Even when the popular vote margin is up to 10%, a 1 in 7 chance of a loss."[29]

In September 2020, Nate Silver tweeted the results of his own simulations on the probability of a wrong-winner election:



1.1.4. Thirteen near-miss elections

The frequency of near-misses in the Electoral College is a reminder of the fragility of the state-by-state winner-take-all method of awarding electoral votes.

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[27] See also Bakthavachalam, Vinod and Fuentes, Jake. 2017. The Impact of Close Races on Electoral College and Popular Vote Conflicts in US Presidential Elections. Princeton Election Consortium. October 8, 2017. http://election.princeton.edu/wp-content/uploads/2017/10/bakthavachalam_fuentes17_MEVC_popular-electoral-split-model-8oct2017.pdf

[28] Wang, Samuel and Canter, Jacob. 2020. The Best Laid Plans: Unintended Consequences of the American Presidential Selection System. *Harvard Law & Policy Review*. Volume 15. Number 1. Winter 2020. Pages 209–236. Page 221. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP104.pdf

[29] Wang, Samuel. 2019. A Bug in Democracy: Real and Mythical Risks of the Electoral College. Harvard Law School panel on Electoral College. October 18, 2019. Slide 4. https://election.princeton.eduwp-content/uploads/2019/10/HLS-2019-Sam-Wang-Electoral-College-panel.pdf

[30] The authors gratefully acknowledge the Herb Block Foundation for permission to use the copyrighted cartoon by Herb Block.

Figure 1.8 Herb Block cartoon of September 15, 1970[30]

Table 1.4 shows the 13 presidential elections in which a candidate who lost the national popular vote would have won the presidency in the absence of the winner's relatively small popular vote lead in one, two, or three states.[31]

[31] Professor Robert Alexander's list of "hair breadth" elections mentions eight additional elections in which a shift of a relatively small number of popular votes in *more than three states* would have given a majority in the Electoral College to a candidate who lost the national popular vote. These eight elections are the 1828 election (involving small popular-vote shifts in five states), 1840 (four states), 1864 (seven states), 1868 (seven states), 1992 (five states), 1896 (six states), 1900 (seven states), and 1908 (eight states). Note that the 1880 election is on Alexander's list of hair breadth elections (but not in our table here) because of a slight difference in methodology. Alexander's list is based on a *shift* (or swift) by a certain number of people who actually voted for President, whereas our table is constructed on the basis of the *absence* of the leading candidate's margin. This can be the result from a voter's failure to come to the polls or an abstention for President by the voter—rather than only a change of mind of a voter who actually came to the polls and voted for President. Despite this slight difference in methodology, the overarching conclusion common to both Alexander's list and our table is that there have been a considerable number of near-miss and hair breadth elections. See table 5.4 on page 108 in Alexander, Robert M. 2019. *Representation and the Electoral College*. New York, NY: Oxford University Press.

Table 1.4 The 13 near-miss presidential elections

Year	Person who became President	National-popular-vote lead of person who became President	Electoral votes needed to win	Number of electoral votes above the required majority received by the person who became President	Popular vote lead in the decisive state(s) of the person who became President	Total popular vote lead in the decisive state(s) of the person who became President	Relative value of the decisive popular votes in the decisive state(s)
2020	Biden	7,052,711	270	36	10,457 in AZ (11) 11,779 in GA (16) 20,682 in WI (10)	42,918	**164**
2004	Bush	3,012,179	270	16	118,601 in OH (20)	118,601	**25**
1976	Carter	1,682,970	270	27	7,322 in HI (4) 11,116 in OH (25)	18,438	**91**
1968	Nixon	510,645	270	31	20,488 in MO (12) 134,960 in IL (26)	155,448	**3**
1960	Kennedy	118,574	269	34	8,858 in IL (27) 9,571 in SC (8)	18,429	**6**
1948	Truman	2,135,746	266	37	17,865 in CA (25) 7,107 in OH (25)	24,972	**85**
1916	Wilson	579,024	266	11	3,430 in CA (13)	3,430	**169**
1884	Cleveland	66,670	201	18	1,047 in NY (36)	1,047	**64**
1860	Lincoln	485,706	152	28	50,136 in NY (35)	50,136	**10**
1856	Buchanan	493,727	149	25	1,729 in DE (3) 9,253 in IL (11) 24,295 in IN (13)	35,277	**14**
1848	Taylor	137,933	146	17	13,544 in PA (26)	13,544	**10**
1844	Polk	39,490	138	32	5,106 in NY (36)	5,106	**8**
1836	Van Buren	213,360	148	22	28,247 in NY (42)	28,247	**8**
	Average	**1,271,144**				**39,675**	**51**

As seen in the table, votes cast in the decisive states were an average of 51 times more important than votes cast elsewhere in the country in these 13 elections.[32]

In short, these 13 near-miss elections illustrate both the precariousness of the current state-by-state winner-take-all method of awarding electoral votes and the enormous inequalities in the power of a vote to decide the national outcome.

Having discussed the five elections in which the national popular vote winner did not become President, we now discuss these 13 near-miss elections.

Note also that our table is constructed on the basis of the *smallest number of states* needed to reverse the national outcome. In some elections (such as 2004 and 1968), the national outcome would have been reversed by a smaller number of popular votes in a slightly larger number of states.

The data for elections between 1836 and 1976 in this table come from Congressional Quarterly. 2008. *Presidential Elections 1789–2008*. Washington, D.C.: CQ Press.

[32] The average shown in the lower-right corner of the table is the average of the numbers in the last column. If the average were computed based on the last row of the table, the decisive voters in the decisive states were 32 times more important than voters elsewhere (that is, 1,271,144 divided by 39,675).

2020 election

The recent 2020 presidential election was a near-miss.

Candidate Joe Biden received 81,268,586 popular votes to incumbent President Donald Trump's 74,215,875 popular votes. That is, Biden won the national popular vote by 7,052,711 votes.

Biden won the Electoral College by a 306–232 margin (with 270 electoral votes needed for election).

As shown in column 6 of table 1.4, Biden's victory depended on his carrying:

- Arizona (11 electoral votes) by 10,457 popular votes,
- Georgia (16 electoral votes) by 11,779 popular votes, and
- Wisconsin (10 electoral votes) by 20,682 popular votes.

That is, a total of 42,918 popular votes (column 7) in three states were decisive in electing Biden—not his lead of 7,052,711 votes nationwide.[33]

As shown in the last column of the table, each of the 42,918 popular votes was 164 times more important than the 7,052,711 votes that Biden received nationally.

These decisive 42,918 votes were 0.00027 of the 158,224,999 votes cast for President in 2020.[34]

On December 14, 2020, the Electoral College met and elected Joe Biden President by a margin of 306–232 electoral votes—that is, 36 electoral votes more than the 270 required for election.

It should be remembered that the Electoral College does not meet in one central location when it meets on the designated day in December. Instead, the Constitution requires that the presidential electors "meet in their respective states."[35]

Because the Constitution requires that the Electoral College meet in this geographically dispersed fashion, the electoral votes must necessarily be counted at some central location. The counting of the electoral votes takes place in a joint session of Congress on January 6 in what is ordinarily a perfunctory and ceremonial proceeding.

If Biden had not received the 37 electoral votes from Arizona, Georgia, and Wisconsin, there would have been a 269–269 tie in the Electoral College. In that case, the choice of President would have been thrown into the newly elected U.S. House of Representatives on January 6, 2021.

---

[33] Some political writers discuss close elections in terms of the number of voters who, if they had changed their minds, would have changed the national outcome. For example, if 5,229 voters in Arizona, 5,890 in Georgia, and 10,342 in Wisconsin had decided to vote for Trump instead of Biden, Trump would have won those three states and, therefore, been re-elected. That is, the national outcome would have been reversed if 21,461 voters in the three decisive states had changed their minds and voted for Trump instead of Biden. We prefer to focus on the number of votes that, *if absent*, would have changed the national outcome. We believe our approach is preferable, because it encompasses the possibility of voters who decided not to come to the polls at all or decided to abstain from voting for President after they came to the polls—not just voters who changed their minds. However, regardless of which methodology is used, the main point is that a small number of voters were in a position to reverse the national outcome.

[34] In addition to the votes cast for the two major-party candidates, 2,740,538 votes were cast for minor-party, independent candidates, write-in, and "none of the above" candidates in 2020.

[35] U.S. Constitution. Article II, section 1, clause 3. This same language appears in the 12th Amendment (ratified in 1804).

In the resulting so-called "contingent election" in the House, each state's delegation has one vote, and the District of Columbia has no vote at all. An absolute majority of the states (26 out of 50) is required for election. If the voting had paralleled the partisan composition of the House at the time, Donald Trump would have won a majority of state delegations and hence retained the presidency.[36]

If no vice-presidential candidate receives an absolute majority of the electoral votes appointed, the U.S. Senate elects the Vice President—with each Senator having one vote. The two new Democratic U.S. Senators elected in Georgia's January 5, 2021, run-off had not been seated by January 6. Thus, if the voting for Vice President had paralleled the Senate's partisan composition on January 6, Mike Pence would have been chosen by a 50–48 vote.

In short, a total of 42,918 popular votes from the states of Arizona, Georgia, and Wisconsin made the difference between the Biden-Harris ticket and the Trump-Pence ticket being inaugurated on January 20, 2021.

2004 election

In 2004, incumbent President George W. Bush had a nationwide lead over Senator John Kerry of 3,012,179 popular votes.

Nonetheless, the outcome of the election remained in doubt after Election Night, because it was not initially clear whether Bush or Kerry was going to win Ohio's 20 electoral votes. When all the votes were counted in Ohio, Bush had 118,601 more popular votes than Kerry—thus winning all of the state's 20 electoral votes. Those 20 electoral votes gave Bush a 286–252 majority in the Electoral College (with 270 electoral votes being required for election).

Bush's lead of 118,601 popular votes in Ohio decided the presidency. In the absence of Bush's lead in Ohio, Kerry would have won in the Electoral College (and hence the presidency). Each of these 118,601 votes in the decisive state of Ohio was 25 times more important than the 3,012,179 votes that constituted Bush's national-popular-vote margin.[37]

The decisive 118,601 popular votes in Ohio constituted a mere 0.097% of the 122,303,536 votes cast for President in 2004.[38]

Note that table 1.4 was constructed based on the popular vote margin in the *fewest* states needed to reverse the national outcome—the single state of Ohio in the case of the 2004 election. This widely used methodology is reasonable, but it is not the only way to look at things.

Indeed, 118,601 was not the smallest total number of popular votes needed to reverse the national outcome in 2004. For example, the national outcome in 2004 also would have been reversed in the absence of a mere 27,431 votes in the following three states:

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[36] A contingent election in the House might also have been triggered under one of the alternative scenarios outlined on page 5 of Professor John Eastman's January 3, 2021, memo entitled "January 6 Scenario." http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.–.jan.3.memo.on.jan.6.scenario.pdf

[37] To put it another way, if 59,301 voters in Ohio had decided to vote for Kerry instead of Bush, Kerry would have won the Electoral College with 272 electoral votes.

[38] In addition to the votes cast for the two major-party candidates, 1,234,493 votes were cast for minor-party, independent candidates, write-in, and "none of the above" candidates in 2004.

- 11,384 votes in Wisconsin (10 electoral votes),
- 5,988 in New Mexico (five electoral votes), and
- 10,059 in Iowa (six electoral votes).

Each of these 27,431 votes was 110 times more important than the 3,012,179 votes that constituted Bush's national-popular vote margin.

1976 election

In 1976, former Georgia Governor Jimmy Carter led incumbent President Gerald Ford by 1,682,970 votes nationwide. However, in the absence of Carter's lead of 7,322 popular votes in Hawaii and 11,116 in Ohio, Ford would have won in the Electoral College. Each of these 18,438 votes was 91 times more important than the 1,682,970 votes that constituted Carter's national-popular vote margin.

1968 election

The 1968 election was a three-way race in which segregationist Alabama Governor George Wallace received 13.5% of the national popular vote and carried five states with 45 electoral votes.[39]

Ultimately, former Vice President Richard Nixon led Vice President Hubert Humphrey by 510,645 popular votes nationwide. However, Humphrey would have won in the Electoral College in the absence of Nixon's lead of 20,488 popular votes in Missouri and 134,960 in Illinois.[40] Each of these 155,448 votes was three times more important than the 510,645 votes that constituted Nixon's national-popular vote margin.

In his 2016 book, *The Runner-Up Presidency*, Mark Weston describes how the 1968 election was almost thrown into Congress because of Wallace's third-party candidacy.[41]

1960 election

In 1960, Senator John F. Kennedy led Vice President Richard Nixon by 118,574 popular votes nationwide.[42] However, Nixon would have won in the Electoral College in the absence of Kennedy's lead of 8,858 popular votes in Illinois and 9,571 in South Carolina. Each of these 18,429 votes was six times more important than the 118,574 votes that constituted Kennedy's national-popular vote margin.[43]

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[39] Wallace received one additional electoral vote from a faithless Republican elector from North Carolina.

[40] Note that our table 1.4 is based on the popular-vote change in the *smallest* number of states needed to reverse the national outcome. For example, if three states are considered (instead of two), the 1968 election was decided by 106,063 votes (not 155,448). Specifically, the national outcome would have been reversed in the absence of Nixon's margin of 20,488 votes in Missouri, 24,314 in New Hampshire, and 61,261 in New Jersey.

[41] Weston, Mark. 2016. *The Runner-Up Presidency: The Elections That Defied American's Popular Will (and How Our Democracy Remains in Danger)*. Guilford, CT: Lyons Press. Pages 95–116.

[42] As explained in section 3.13 and section 9.30.12, neither Kennedy's nor Nixon's name appeared on the ballot in Alabama in 1960. The frequently quoted nationwide margin of 118,574 is the result of a widely used calculation that somewhat arbitrarily splits the popular vote cast for presidential electors.

[43] Greenfield, Jeff. 2024. How Kennedy Narrowly Defeated Nixon—and Why the Alternative History Would Have Been Devastating. *Politico*. February 4, 2024. https://www.politico.com/news/magazine/2024/02/04/1960-election-jfk-nixon-nuclear-war-00136763

1948 election

In 1948, incumbent President Truman led challenger New York Governor Thomas Dewey by 2,135,746 votes nationwide. However, in the absence of Truman's lead over Dewey of 17,865 popular votes in California and 7,107 in Ohio, Truman would have ended up with only 253 electoral votes. Because segregationist Strom Thurmond won 39 electoral votes, the presidential election would then have been thrown into the U.S. House. Each of the 24,972 votes that Truman received in California and Ohio was 85 times more important than the 2,135,746 votes that constituted Truman's national-popular vote margin.[44]

Truman's margin of 7,107 popular votes in Ohio was especially fraught in 1948, because an estimated 100,000 voters inadvertently spoiled their ballots because of the ballot's confusing design (Section 2.14).

1916 election

In 1916, incumbent President Woodrow Wilson led challenger Charles Evans Hughes by 579,024 votes nationwide.

Wilson went to bed on Election Night thinking he had lost to Hughes, but learned the next morning that he had won re-election by virtue of carrying California by 3,430 votes.

Hughes would have won in the Electoral College in the absence of Wilson's lead of 3,430 popular votes in California. Each of these 3,430 votes was 169 times more important than the 579,024 votes that constituted Wilson's national-popular-vote margin.[45,46]

1884 election

In 1884, Grover Cleveland led James G. Blaine by 66,670 votes nationwide. However, Blaine would have won in the Electoral College in the absence of Cleveland's lead of 1,047 popular votes in New York. Each of these 1,047 votes was 64 times more important than the 66,670 votes that constituted Cleveland's national-popular-vote margin.[47]

1860 election

In the four-way presidential contest of 1860, Republican Abraham Lincoln led his nearest competitor, Democratic Senator Stephen A. Douglas, by 485,706 popular votes nationwide—a margin of more than 10 percentage points.

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[44] For additional information, see Greenfield, Jeff. 2023. A Southern Rebellion in 1948 Almost Threw American Democracy into Disarray: The 1948 presidential election almost became a constitutional crisis. *Politico*. September 24, 2023. https://www.politico.com/news/magazine/2023/09/24/closest-calls-presidential-upset-1948-00114521

[45] Hughes' loss of California was attributed to his failure (perhaps accidental) to meet up with reformer Hiram Johnson, a candidate for Governor in the Republican primary, at a hotel where they were both staying. Gould, Lewis I. 2016. *The First Modern Clash over Federal Power: Wilson versus Hughes in the Presidential Election of 1916*. Lawrence, KS: University Press of Kansas. Pages 84–86 and footnote 49 on page 157. See also Greenfield, Jeff. 2023. The Closest Calls: How America Nearly Forged a Different Path in 1916: An accidental snub changed history. *Politico*. August 5, 2023. https://www.politico.com/news/magazine/2023/08/06/1916-election-hughes-wilson-00108288

[46] Greenfield, Jeff. 2023. The Closest Calls: How America Nearly Forged a Different Path in 1916: An accidental snub changed history. *Politico*. August 6, 2023. https://www.politico.com/news/magazine/2023/08/06/1916-election-hughes-wilson-00108288

[47] Ironically, Cleveland's narrow loss of this same critical state (New York) cost him re-election in 1888, despite his lead in the national popular vote.

Table 1.5 The 1860 election results

Candidate	Party	Popular votes	Electoral votes
Abraham Lincoln	Republican	**1,855,993**	180
Stephen A. Douglas	Northern Democratic	**1,381,944**	12
John C. Breckenridge	Southern Democratic	**851,844**	72
John Bell	Constitutional Union	**590,946**	39
Total		**4,680,727**	**303**

Lincoln won both the Electoral College and the national popular vote in 1860, as shown in table 1.5.[48]

Nonetheless, in the absence of Lincoln's lead of 50,136 popular votes in New York, Lincoln would not have received the constitutionally required absolute majority of the electoral votes, and the election would have been thrown into the U.S. House (with each state casting one vote).

Lincoln would almost certainly not have been elected President by the House. Under the constitutional provisions in effect at the time, the House elected two years earlier had power to select the President.[49] In the lame duck House, the Democrats controlled 17 of the 34 state delegations; the Republicans controlled 16; and the delegation from the slave state of Maryland was equally divided 3–3 between the Democratic Party and the Know-Nothing Party.[50] Thus, the U.S. House would almost certainly have been deadlocked.

Meanwhile, the choice of Vice President would have devolved upon the Senate. Under the Constitution, the Senate's choice for Vice President is limited to the two vice-presidential candidates who received the most electoral votes.

Although the Northern Democratic Douglas-Johnson ticket received considerably more popular votes than the southern Democratic Breckenridge-Lane ticket, it was the southern Democratic ticket that received the second largest number of electoral votes.

Thus, in the contingent election for Vice President, the Senate would have been forced to choose between Southern Democratic vice-presidential nominee Joseph Lane and Republican vice-presidential nominee Hannibal Hamlin. Given the composition of the Senate at the time, the Senate almost certainly would have chosen Lane.[51] Given that the House probably would have deadlocked on the choice of President, Southern Democratic vice-presidential nominee Lane would have become Acting President.

In the 1860 presidential election, each of Lincoln's 50,136 votes in New York was 10 times more important than the 485,706 votes that constituted Lincoln's national-popular-vote margin.

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[48] See table 9.31 for the state-by-state election returns for 1860.

[49] Under the 20th Amendment (ratified in 1933), the newly elected House (instead of the lame duck House) would select the President if the election is ever thrown into the House.

[50] *Wikipedia*. 1858–59 United States House of Representatives elections. Accessed April 9, 2023. https://en.wikipedia.org/wiki/1858%E2%80%9359_United_States_House_of_Representatives_elections

[51] Long, David. 2004. David Long on the Election of 1860. Ninth Annual Lincoln Forum. First aired on C-SPAN on December 27, 2004. https://www.c-span.org/video/?184446-2/david-long-election-1860

1856 election

In 1856, Democrat James Buchanan led John C. Fremont (the nominee of the newly created Republican Party) by 493,727 votes nationwide. However, Fremont would have won in the Electoral College in the absence of Buchanan's lead of 1,729 popular votes in Delaware, 9,253 in Illinois, and 24,295 in Indiana.

Each of these 35,277 votes was 14 times more important than the 493,727 votes that constituted Buchanan's national-popular-vote margin.

1848 election

In 1848, Zachary Taylor led Lewis Cass by 137,933 votes nationwide. However, in the absence of Taylor's lead of 13,544 popular votes in Pennsylvania, Cass would have won in the Electoral College.

Each of these 13,544 votes was 10 times more important than the 137,933 votes that constituted Taylor's national-popular-vote margin.

1844 election

In 1844, James K. Polk led Henry Clay by 39,490 votes nationwide. However, in the absence of Polk's lead of 5,106 popular votes in New York, Clay would have won in the Electoral College. Each of these 5,106 votes was eight times more important than the 39,490 votes that constituted Polk's national-popular-vote margin.

1836 election

In 1836, Martin Van Buren led William Henry Harrison by 213,360 votes nationwide. However, in the absence of Van Buren's lead of 28,247 popular votes in New York, Harrison would have won in the Electoral College. Each of these 28,247 votes was eight times more important than the 213,360 votes that constituted Van Buren's national-popular-vote margin.

1.2. VOTERS IN THREE OUT OF FOUR STATES HAVE BEEN REGULARLY IGNORED IN THE GENERAL-ELECTION CAMPAIGN FOR PRESIDENT—AND IT'S GETTING WORSE.

Virtually all general-election campaigning in the first six presidential elections of the 2000s occurred in the dozen-or-so states where support for the two leading candidates was within eight percentage points or less—that is, where the two-party vote was in the narrow eight-percentage-point range between 46% and 54%.

The reason why general-election campaigns for President are so highly concentrated is that one candidate receives all of a given state's electoral votes under the winner-take-all method of awarding electoral votes.

In their pursuit of electoral votes, presidential candidates have no reason to spend time, money, or effort soliciting votes in states where they are safely ahead or hopelessly behind.

Instead, candidates concentrate their campaigns on states where the outcome is close and uncertain—that is, in states where they might possibly win or lose electoral votes.

Most people who follow politics know that the general-election campaign for President is concentrated in a handful of closely divided battleground states. However, many people are not aware of how extreme this concentration is.

As Wisconsin Governor Scott Walker said while running for President in 2015:

> "The nation as a whole is not going to elect the next president. Twelve states are."[52]

Walker also observed:

> "Let's be honest.… You're not running for President—you're running for Governor in twelve states, and it just happens to be a presidential election."[53]

At a fund-raising dinner in Florida in 2012, Republican presidential nominee Mitt Romney noted the geographically limited scope of presidential campaigns:

> "All the money will be spent in 10 states, and this is one of them."[54]

Conversely, presidential candidates pay almost no attention to the concerns of voters in states that are not closely divided. In fact, presidential campaigns do not even bother to poll public opinion in spectator states, because those voters simply are not relevant to winning.

As Charlie Cook reported in 2004:

> "Senior Bush campaign strategist Matthew Dowd pointed out yesterday that the Bush campaign **hadn't taken a national poll in almost two years**; instead, it has been polling 18 battleground states."[55,56] [Emphasis added]

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[52] CNBC. 2015. 10 questions with Scott Walker. Speakeasy. September 1, 2015. Transcript of interview of Scott Walker by John Harwood https://www.cnbc.com/2015/09/01/10-questions-with-scott-walker.html. Video of quote is at timestamp 1:26 at https://www.youtube.com/watch?v=nNZp1g8oUOI. The full quotation is, "The nation as a whole is not going to elect the next president. Twelve states are. Wisconsin's one of them. I'm sitting in another one right now, New Hampshire. There's going to be Colorado, where I was born, Iowa, where I lived, Ohio, Florida, a handful of other states. In total, it's about 11 or 12 states that are going elect the next president."

[53] Quoted in Morrissey, Ed. 2016. *Going Red: The Two Million Voters Who Will Elect the Next President*. New York, NY: Crown Forum. Page 7.

[54] Video clip at https://youtu.be/tDk28e0fs9k. C-SPAN. 2012. Mitt Romney Fundraising Comments on Video in Boca Raton. *Road to the White House*. May 17, 2012. http://www.c-span.org/video/?308283-1/mitt-romney-fundraising-comments-video-boca-raton. This fund-raising dinner in Florida was the same one where Romney famously spoke about "the 47%." See also Corn, David. 2012. Secret Video: Romney Tells Millionaire Donors What He REALLY Thinks of Obama Voters. *Mother Jones*. September 17, 2012. https://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser/. Also see Full Transcript of the Mitt Romney Secret Video. *Mother Jones*. September 17, 2012. https://www.motherjones.com/politics/2012/09/full-transcript-mitt-romney-secret-video/. The full quotation is "Advertising makes a difference, and the president will engage in a personal character assassination campaign. And so we'll have to fire back one, in defense, and No. 2, in offense.… Florida will be one of those states that is the key state. And so all the money will get spent in 10 states, and this is one of them."

[55] Cook, Charlie. 2004. Convention dispatches—As the nation goes, so do swing states. *Cook's Political Report*. August 31, 2004.

[56] Kerry similarly pursued an 18-state strategy in 2004.

Kellyanne Conway, Trump's campaign manager in 2016, said:

> "When I took over as campaign manager in 2016, **we did zero—let me repeat the number—zero national polls**."[57] [Emphasis added]

Former White House Press Secretary Ari Fleischer summarized the importance of the closely divided battleground states by saying in 2009:

> "**If people don't like it, they can move from a safe state to a swing state** and see their president more."[58] [Emphasis added]

Although there is no precise definition of a "battleground state" in a general-election campaign for President, those states can be readily identified by observing:

- where the presidential and vice-presidential candidates spend their time campaigning,
- where they spend their money advertising (which usually closely parallels visits),
- where they conduct polls and focus groups to ascertain public opinion,
- where they organize their supporters to make door-to-door contact with voters and execute other elements of what is commonly called the "ground game,"
- where their family, supportive officeholders, celebrities, and other surrogates make campaign appearances,
- where they have fashioned policy positions that cater to particular states—sometimes contrary to the principles that they, or their party, have previously advocated, and
- where they open campaign offices for purposes other than raising money.

Political polls with a sample of about 800 respondents generally have a margin of error of approximately plus or minus 4%. Thus, another way to identify battleground states is that they are the states where the difference between the candidates is inside the margin of error of a typical political poll—that is, where the outcome is uncertain. In fact, the 19th-century term for battleground states was "doubtful states."

1.2.1. 2020 election

In 2020, three-quarters of the states and 69% of the nation's population were ignored in the 2020 presidential campaign.

Specifically, almost all (96%) of the 2020 general-election campaign events by the presidential and vice-presidential candidates occurred in 12 states where the Republican percentage of the final two-party presidential vote was in in the range of 46%–54%.

Figure 1.9 shows the number of general-election campaign events for each state by the presidential and vice-presidential candidates of the two major parties.[59]

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[57] Swain, Susan. 2022. Q&A Interview of Elliott Morris. *Q&A*. July 6, 2022. Timestamp 5:52. https://www.c-span.org/video/?521497-1/qa-elliott-morris

[58] *Washington Post*. June 21, 2009.

[59] This map of general-election campaign events for the major-party presidential and vice-presidential candidates (and other similar maps and tables in this book for the 2020, 2016, 2012, and 2008 elections) is based on a database created by FairVote (https://www.FairVote.org). The "general election" campaign period refers to the period starting on the day after the end of the later-to-occur major-party convention and ending

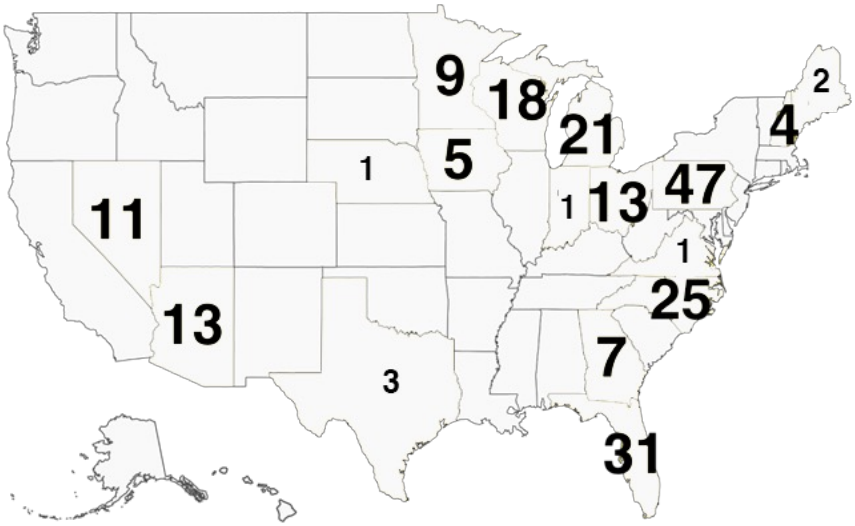

Figure 1.9 Number of general-election campaign events in 2020

The 12 larger numbers on the map together account for the 204 events (out of 212) that took place in the battleground states. The five smaller numbers together account for the eight scattered events that took place elsewhere.

Table 1.6 summarizes the 2020 presidential campaign. It shows, by state, the Republican percentage of the two-party popular vote, the number of general-election campaign events by the major-party presidential and vice-presidential candidates, the number of popular votes that they received, their popular vote margin, and their electoral-vote margin.[60,61]

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on Election Day. FairVote's definition of a "general-election campaign event" includes only *public* campaign events (e.g., public speeches, meetings, rallies) aimed at a state's electorate. Thus, the count does not include an in-and-out visit to a state solely to participate in a private fund-raising event; a nationally televised debate, townhall, interview; a speech to an organization's national convention; non-campaign events (e.g., the Al Smith Dinner in New York City); private meetings (e.g., campaign planning meetings); or an appearance in Washington, D.C., that is part of the candidate's current governmental position. Each event held at a different time and place within a given state is counted as a separate event. A joint appearance of both the presidential and vice-presidential candidate is counted as one event. The FairVote database for 2020 is at https://docs.google.com/spreadsheets/d/1oR_x3wGpFi1wO2V0BNMV529s_V-AgGH7tKd66DD7rrM/edit#gid=2025398596

[60] In 2020, Biden's nationwide margin was 7,052,711. This table does not include 2,740,538 votes cast for other candidates (bringing the total national popular vote to 158,224,999). In Maine, Trump won one electoral vote by carrying the 2nd congressional district (northern part of the state) with 54%. In Nebraska, Biden won one electoral vote by carrying the 2nd congressional district (Omaha area) with 53%. The election results are from 2020 Certificates of Ascertainment. The campaign event information is from FairVote at https://docs.google.com/spreadsheets/d/1oR_x3wGpFi1wO2V0BNMV529s_V-AgGH7tKd66DD7rrM/edit#gid=2025398596

[61] Statistics about the first six presidential elections of the 2000s are presented in several different ways in this book. For example, table 1.6 in section 1.2 shows each state's general-election campaign events, the Republican two-party percentage, each major-party's popular vote, each major-party's popular-vote margin, and the number of electoral votes won by each party. Table 4.14 in section 4.2 shows the number of popular votes for the two major-party candidates, the votes for the most significant minor-party candidates, and the combined vote total for all other minor-party candidates, write-ins, and "none of the above" votes from Nevada.

Table 1.6 Distribution of 2020 campaign events

R Percent	Events	State	Trump	Biden	R-Margin	D-Margin	R-EV	D-EV
72%		Wyoming	193,559	73,491	120,068		3	
70%		West Virginia	545,382	235,984	309,398		5	
67%		North Dakota	235,595	114,902	120,693		3	
67%		Oklahoma	1,020,280	503,890	516,390		7	
66%		Idaho	554,119	287,021	267,098		4	
64%		Arkansas	760,647	423,932	336,715		6	
63%		South Dakota	261,043	150,471	110,572		3	
63%		Kentucky	1,326,646	772,474	554,172		8	
63%		Alabama	1,441,170	849,624	591,546		9	
62%		Tennessee	1,852,475	1,143,711	708,764		11	
61%		Utah	865,140	560,282	304,858		6	
60%	1	Nebraska	556,846	374,583	182,263		4	1
59%		Louisiana	1,255,776	856,034	399,742		8	
58%		Montana	343,602	244,786	98,816		3	
58%		Mississippi	756,764	539,398	217,366		6	
58%	1	Indiana	1,729,516	1,242,413	487,103		11	
58%		Missouri	1,718,736	1,253,014	465,722		10	
57%		Kansas	771,406	570,323	201,083		6	
56%		South Carolina	1,385,103	1,091,541	293,562		9	
55%		Alaska	189,951	153,778	36,173		3	
54%	**5**	**Iowa**	**897,672**	**759,061**	**138,611**		**6**	
54%	**13**	**Ohio**	**3,154,834**	**2,679,165**	**475,669**		**18**	
53%	**3**	**Texas**	**5,890,347**	**5,259,126**	**631,221**		**38**	
52%	**31**	**Florida**	**5,668,731**	**5,297,045**	**371,686**		**29**	
51%	**25**	**North Carolina**	**2,758,775**	**2,684,292**	**74,483**		**15**	
50%	**7**	**Georgia**	**2,461,854**	**2,473,633**		**11,779**		**16**
50%	**13**	**Arizona**	**1,661,686**	**1,672,143**		**10,457**		**11**
50%	**18**	**Wisconsin**	**1,610,184**	**1,630,866**		**20,682**		**10**
49%	**47**	**Pennsylvania**	**3,377,674**	**3,458,229**		**80,555**		**20**
49%	**11**	**Nevada**	**669,890**	**703,486**		**33,596**		**6**
49%	**21**	**Michigan**	**2,649,852**	**2,804,040**		**154,188**		**16**
46%	**9**	**Minnesota**	**1,484,065**	**1,717,077**		**233,012**		**10**
46%	**4**	**New Hampshire**	**365,660**	**424,937**		**59,277**		**4**
45%	2	Maine	360,737	435,072		74,335	1	3
45%	1	Virginia	1,962,430	2,413,568		451,138		13
44%		New Mexico	401,894	501,614		99,720		5
43%		Colorado	1,364,607	1,804,352		439,745		9
42%		New Jersey	1,883,274	2,608,335		725,061		14
42%		Oregon	958,448	1,340,383		381,935		7
41%		Illinois	2,446,891	3,471,915		1,025,024		20
40%		Delaware	200,327	295,933		95,606		3
40%		Washington	1,584,651	2,369,612		784,961		12
40%		Connecticut	714,717	1,080,831		366,114		7
39%		Rhode Island	199,922	307,486		107,564		4
38%		New York	3,244,798	5,230,985		1,986,187		29
35%		California	6,006,429	11,110,250		5,103,821		55
35%		Hawaii	196,864	366,130		169,266		4
33%		Maryland	976,414	1,985,023		1,008,609		10
33%		Massachusetts	1,167,202	2,382,202		1,215,000		11
32%		Vermont	112,704	242,820		130,116		3
6%		D.C.	18,586	317,323		298,737		3
48%	**212**	**Total**	**74,215,875**	**81,268,586**		**7,052,711**	**232**	**306**

- Column 1 of the table shows the Republican percentage of the two-party popular vote in each state. The table is sorted in order of the Republican percentage of the state's popular vote—with Wyoming at the top. The closely divided battleground states (in bold) are found in the middle of the table. The Democratic states are found at the bottom.
- Column 2 shows each state's number of 2020 general-election campaign events (out of a nationwide total of 212).[62] The count of general-election campaign events started on the day after the end of the later major-party nominating convention and ended on Election Day.[63]
- Columns 4 and 5 show, respectively, incumbent President Trump's and former Vice President Biden's popular votes.[64]
- Columns 6 and 7 show, respectively, the popular vote margin of each state's winner.
- Columns 8 and 9 show, respectively, the number of electoral votes received by Trump and Biden from each state.[65]

As can be seen from the middle portion of this table, almost all of the general-election campaign events (204 of the 212 events shown in column 2) were concentrated in 12 states where the Republican share of the two-party vote was in the narrow eight-percentage-point range between 46% and 54% (column 1).

However, even these numbers understate the degree to which presidential campaigns are concentrated.

Among these 12 all-important battleground states, some were vastly more important than others.

Indeed, two-thirds of the campaigning was concentrated in the states where the race was within *two percentage points*.

Pennsylvania (which ended up as 51% Democratic and 49% Republican) received the most general-election campaign events of any state in 2020. Pennsylvania's 47 events constituted almost a quarter (22%) of the nationwide total of 212 events—even though the state has only 4% of the nation's population.

In fact, two thirds of the events (142 of 212) were focused on the seven states where the race was within *two percentage points*:

- Pennsylvania–47 events
- North Carolina–25 events
- Michigan–21 events

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[62] Because of the COVID pandemic, the total number of general-election campaign events in 2020 was considerably smaller than other recent elections—only 212. This compares to 399 in 2016 and 253 in 2012.

[63] In 2020, this period started on August 28—the day after the end of the Republican National Convention in Cleveland. Election Day in 2020 was November 3.

[64] The information for this table is from 2020 Certificates of Ascertainment at the National Archives website at https://www.archives.gov/electoral-college/2020?_ga=2.79064146.774453085.1607395607-1857190428.1606759205

[65] Note that Maine and Nebraska award all but two of their electoral votes by congressional district. In Maine, Trump won one electoral vote by carrying the 2nd congressional district (the northern part of the state) with 54%. In Nebraska, Biden won one electoral vote by carrying the 2nd congressional district (the Omaha area) with 53%.

- Wisconsin–18 events
- Arizona–13 events
- Nevada–11 events
- Georgia–7 events

In 2020, Biden carried six of these seven states, and they decided the presidency:

- Michigan–51% Democratic
- Nevada–51% Democratic
- Pennsylvania–51% Democratic
- Wisconsin–50% Democratic
- Arizona–50% Democratic
- Georgia–50% Democratic
- North Carolina–51% Republican

Similarly, in 2016, Trump carried six of these seven states on his way to winning the White House.

As previously mentioned, only eight of the 212 general-election campaign events in 2020 occurred outside the dozen battleground states.

Although those eight scattered events might, at first glance, seem like outliers or exceptions to the general rule, they were not.

In fact, those eight remaining events are a reminder of how meticulously presidential campaigns ration out their most valuable resource, namely the time of their presidential and vice-presidential nominees (and the millions of dollars that are spent in tandem with every general-election campaign event).

- **Nebraska and Maine:** Three of the eight seeming outlier events took place in the two states that award electoral votes by congressional district, namely Nebraska and Maine. Neither of these states is a battleground at the state level. Neither presidential candidate bothered to campaign broadly in these states. Instead, Biden visited Nebraska's closely divided 2nd congressional district (the Omaha area). On Election Day, Biden won one electoral vote by carrying that district with 53% of the two-party vote. Meanwhile, Biden lost Nebraska's other two congressional districts (as well as the statewide vote) in a landslide. Similarly, Trump visited Maine's closely divided 2nd congressional district (the northern part of the state). Trump won one electoral vote by carrying that district with 54% of the two-party vote. Meanwhile, Trump lost Maine's other congressional district (and statewide). These surgical visits to enclaves in Nebraska and Maine illustrate the fact that presidential candidates will go anywhere—even to an isolated congressional district—if they think that they might win just one electoral vote. Meanwhile, no candidate visited Nebraska's 1st district (which Trump won with 58%) or 3rd district (which Trump won with 77%)—each of which, of course, has almost exactly the same number of people as Nebraska's 2nd district. Likewise, no candidate visited Maine's 1st district (which Biden won with 62%). Biden's and Trump's visits to these particular two congressional districts is a reminder that voters are politically relevant to presidential candidates only if they live in a place where a candidate has the prospect of winning or losing one or more electoral votes.

- **Adjacent State Campaigning:** One general-election campaign event took place in Newport News, Virginia—even though Virginia was not a closely divided battleground state in 2020. The headline in *Politico* about this visit explains the rationale behind this isolated event in Virginia: "Trump schedules rally in Virginia to reach rural North Carolina."[66] Trump visited Newport News because its media market extends into several counties of the hotly contested battleground state of North Carolina. Neither party conducted any other general-election campaign events in Virginia in 2020—another indication that this isolated campaign in Virginia was directed toward North Carolina. Note that in 2016, 2012, and 2008, Virginia was a closely divided battleground state and received considerable attention (23, 36, and 23 events, respectively). Professor Stephen J. Farnsworth of the University of Mary Washington in Virginia and Emily Hemphill described Virginia's status as a "jilted battleground" in the *Richmond Times-Dispatch* as follows:

  > "Thanks to the Electoral College and to shifting partisan loyalties, **Virginia enjoyed being 'the belle of the ball' for three straight presidential elections**: 2008, 2012 and 2016. During those years, Old Dominion voters found themselves frequently courted by presidential and vice-presidential candidates. **But as quickly as those suitors came, they left.** In 2020, Virginia did not enjoy comparable attention from presidential candidates, as both parties viewed the Commonwealth as no longer all that competitive. Virginia's brief time as a purple state meant that we temporarily stood with Michigan, Pennsylvania and Florida as places that really mattered to presidential candidates."[67] [Emphasis added]

- **Last-Minute Opportunity:** It is not unusual to see presidential campaigns allocate a few last-minute campaign events in a long-shot effort to achieve a surprise result. The political makeup of Texas has been gradually shifting in recent presidential elections. The two-party vote in Texas was 62% Republican in 2004, 58% in 2012, 55% in 2016, and 53% in 2020. As a result, Democratic vice-presidential nominee Kamala Harris made three general-election campaign stops on a single day near the end of the campaign (October 30, 2020). Despite Harris' three last-minute visits to Texas, the Republican ticket did not take the bait and join the battle. They nonetheless won Texas. Similarly, Donald Trump and Mike Pence made three last-minute visits to New Mexico in 2016. Neither Hillary Clinton nor Tim Kaine responded, and they nonetheless carried the state. Similarly, in 2012, Mitt Romney and Paul Ryan conducted five events in Pennsylvania, but neither President Obama nor Vice President Biden bothered to visit the state. They nevertheless carried the state.

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[66] Isenstadt, Alex. 2020. Trump schedules rally in Virginia to reach rural North Carolina. Politico. September 22, 2020. https://www.politico.com/news/2020/09/22/trump-rally-virginia-rural-north-carolina-419911

[67] Farnsworth, Stephen J. and Hemphill, Emily. 2022. Sorry, Virginia, we're stuck with the Electoral College. *Richmond Times-Dispatch*. November 21, 2022. https://richmond.com/opinion/columnists/column-sorry-virginia-we-re-stuck-with-the-electoral-college/article_36a7bfed-84fd-55e1-9199-2c3da275fc3a.html

Table 1.7 The 2020 battleground states contained 31% of the nation's population

R-percent	Campaign events	State	Trump	Biden	Population
54%	5	Iowa	897,672	759,061	3,190,369
54%	13	Ohio	3,154,834	2,679,165	11,799,448
52%	31	Florida	5,668,731	5,297,045	21,538,187
51%	25	North Carolina	2,758,775	2,684,292	10,439,388
50%	7	Georgia	2,461,854	2,473,633	10,711,908
50%	13	Arizona	1,661,686	1,672,143	7,151,502
50%	18	Wisconsin	1,610,184	1,630,866	5,893,718
49%	47	Pennsylvania	3,377,674	3,458,229	13,002,700
49%	11	Nevada	669,890	703,486	3,104,614
49%	21	Michigan	2,649,852	2,804,040	10,077,331
46%	9	Minnesota	1,484,065	1,717,077	5,706,494
46%	4	New Hampshire	365,660	424,937	1,377,529
50%	**204**	**Total**	**26,760,877**	**26,303,974**	**103,993,188**

- **Home-State Campaigning:** In the past, home-state campaigning was far more prominent than it is today. For example, President George W. Bush conducted eight general-election campaign events in Texas in 2004 even though there was no doubt that he would carry the state. In 2020, only one general-election campaign event (out of 212 events nationally) took place in a candidate's home state. Although Indiana was not a closely divided battleground state in 2020, Vice President Mike Pence was the state's former Governor and sought to support the gubernatorial campaign of his successor, Eric Holcomb. The result was a general-election campaign event that the *Indianapolis Star* characterized as "an unusual campaign stop this close to the election."[68] As the *Star* noted, the location chosen for the event (Fort Wayne) was near the Ohio border; the event was held in an airport hangar, thereby minimizing Pence's time on the ground in Indiana and enabling him to make a quick getaway to a campaign event in the battleground state of Michigan.

Only 31% of the nation's population of 331,449,281 (2020 census) lived in the 12 battleground states of 2020, as shown in table 1.7.

In summary, three-quarters of the states and 69% of the nation's population were ignored by the 2020 presidential campaign.

1.2.2. 2016 election

In 2016, three-quarters of the states and 70% of the nation's population were ignored by the 2020 presidential campaign.

Almost all (94%) of the 2016 general-election campaign events (375 of 399) occurred in the 12 states where the Republican percentage of the final two-party presidential vote was in the narrow eight-percentage-point range between 47% and 55%.

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[68] Lange, Kaitlin. 2020. Five takeaways from Vice President Mike Pence's Fort Wayne visit. *Indianapolis Star*. October 22, 2020. https://www.indystar.com/story/news/politics/2020/10/22/mike-pence-fort-wayne-visit-5-takeaways-his-campaign-speech/3731210001/

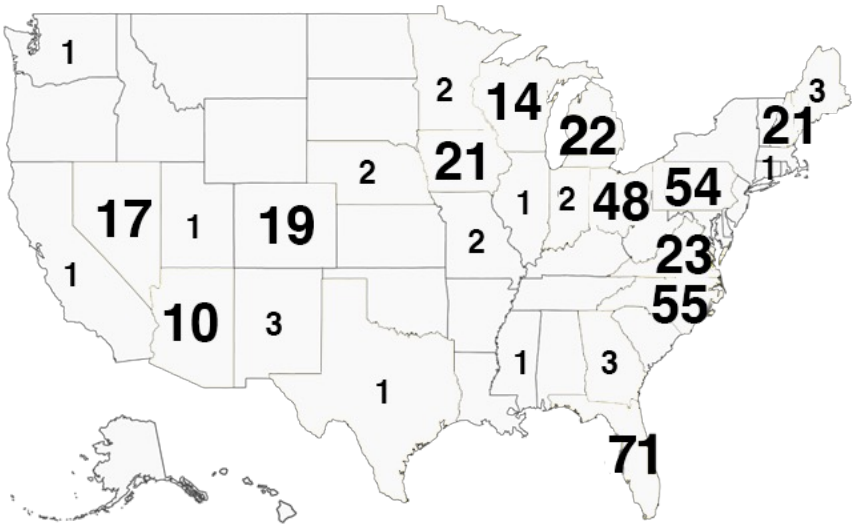

Figure 1.10 Number of general-election campaign events in 2016

Figure 1.10 shows the number of general-election campaign events for each state in 2016. The 12 large numbers on the map together account for the 375 events that took place in the dozen battleground states. The smaller numbers together account for 24 scattered events (6% of the total) that took place elsewhere.

Table 1.8 shows, for each state, the Republican percentage of the two-party popular vote, the number of general-election campaign events in 2016 conducted by the major-party presidential and vice-presidential candidates, the number of popular votes that they received, their popular vote margin, and their electoral-vote margin.[69]

As can be seen in the table, Florida received the most general-election campaign events of any state. Its 71 events constituted 18% of the nationwide total of 399 events.

Almost four-fifths (79%) of all the campaign events (315 of 399) took place in eight states:

- Florida–71 events
- North Carolina–55 events
- Pennsylvania–54 events
- Ohio–48 events
- Virginia–23 events
- Michigan–22 events
- Iowa–21 events
- New Hampshire–21 events

[69] This table does not include 8,286,698 votes cast for candidates other than the major-party nominees (bringing the total national popular vote to 137,125,484). The electoral votes in columns 8 and 9 do not reflect grand-standing votes cast on December 19, 2016, in the Electoral College by faithless electors from Colorado, Washington State, and Texas. In Maine, Donald Trump won one electoral vote by carrying the 2nd congressional district (in the northern part of the state). Election results from David Leip's *Atlas of U.S. Presidential Elections*. Campaign event data is from FairVote at https://docs.google.com/spreadsheets/d/14Lxw0vc4YBUwQ8cZouyewZvOGg6PyzS2mArWNe3iJcY/edit#gid=0

Table 1.8 Distribution of 2016 campaign events

R-Percent	Events	State	Trump	Clinton	R-Margin	D-Margin	R-EV	D-EV
76%	0	Wyoming	174,419	55,973	118,446		3	
72%	0	West Virginia	489,371	188,794	300,577		5	
70%	0	North Dakota	216,794	93,758	123,036		3	
69%	0	Oklahoma	949,136	420,375	528,761		7	
68%	0	Idaho	409,055	189,765	219,290		4	
66%	0	South Dakota	227,721	117,458	110,263		3	
66%	0	Kentucky	1,202,971	628,854	574,117		8	
64%	0	Alabama	1,318,255	729,547	588,708		9	
64%	0	Arkansas	684,872	380,494	304,378		6	
64%	0	Tennessee	1,522,925	870,695	652,230		11	
64%	2	Nebraska	495,961	284,494	211,467		5	
62%	1	Utah	515,231	310,676	204,555		6	
61%	0	Kansas	671,018	427,005	244,013		6	
61%	0	Montana	279,240	177,709	101,531		3	
60%	0	Louisiana	1,178,638	780,154	398,484		8	
60%	2	Indiana	1,557,286	1,033,126	524,160		11	
60%	2	Missouri	1,594,511	1,071,068	523,443		10	
59%	1	Mississippi	700,714	485,131	215,583		6	
58%	0	Alaska	163,387	116,454	46,933		3	
57%	0	South Carolina	1,155,389	855,373	300,016		9	
55%	**21**	**Iowa**	**800,983**	**653,669**	**147,314**		**6**	
55%	1	Texas	4,685,047	3,877,868	807,179		38	
54%	**48**	**Ohio**	**2,841,006**	**2,394,169**	**446,837**		**18**	
53%	3	Georgia	2,089,104	1,877,963	211,141		16	
52%	**55**	**North Carolina**	**2,362,631**	**2,189,316**	**173,315**		**15**	
52%	**10**	**Arizona**	**1,252,401**	**1,161,167**	**91,234**		**11**	
51%	**71**	**Florida**	**4,617,886**	**4,504,975**	**112,911**		**29**	
50%	**14**	**Wisconsin**	**1,405,284**	**1,382,536**	**22,748**		**10**	
50%	**54**	**Pennsylvania**	**2,970,733**	**2,926,441**	**44,292**		**20**	
50%	**22**	**Michigan**	**2,279,543**	**2,268,839**	**10,704**		**16**	
49.8%	**21**	**New Hampshire**	**345,790**	**348,526**		**2,736**		**4**
49%	2	Minnesota	1,323,232	1,367,825		44,593		10
49%	**17**	**Nevada**	**512,058**	**539,260**		**27,202**		**6**
48%	3	Maine	335,593	357,735		22,142	1	3
47%	**19**	**Colorado**	**1,202,484**	**1,338,870**		**136,386**		**9**
47%	**23**	**Virginia**	**1,769,443**	**1,981,473**		**212,030**		**13**
45%	3	New Mexico	319,667	385,234		65,567		5
44%	0	Delaware	185,127	235,603		50,476		3
44%	0	Oregon	782,403	1,002,106		219,703		7
43%	1	Connecticut	673,215	897,572		224,357		7
43%	0	New Jersey	1,601,933	2,148,278		546,345		14
42%	0	Rhode Island	180,543	252,525		71,982		4
41%	1	Washington	1,221,747	1,742,718		520,971		12
41%	1	Illinois	2,146,015	3,090,729		944,714		20
38%	0	New York	2,819,557	4,556,142		1,736,585		29
36%	0	Maryland	943,169	1,677,928		734,759		10
35%	0	Massachusetts	1,090,893	1,995,196		904,303		11
35%	0	Vermont	95,369	178,573		83,204		3
34%	1	California	4,483,814	8,753,792		4,269,978		55
33%	0	Hawaii	128,847	266,891		138,044		4
4%	0	D.C.	12,723	282,830		270,107		3
49%	**399**		**62,985,134**	**65,853,652**			**306**	**232**

Even the 24 scattered general-election campaign events (out of 399) that took place outside the 12 closely divided battleground states demonstrate how carefully presidential campaigns parcel out their nominee's time. There is a reason for each.

- **Nebraska and Maine:** Five events occurred in Maine and Nebraska. These states award electoral votes by congressional district, and each has one competitive district.
- **Adjacent State Campaigning:** Even though Illinois was not a closely divided state in 2016, one general-election campaign event took place in Illinois in 2016. The event was a Labor Day picnic held at a large park in Hampton, Illinois—across the Mississippi River from Davenport, Iowa. Although the event physically occurred in Illinois, it was targeted at voters in closely divided Iowa. Neither party conducted any other general-election campaign events anywhere else in Illinois in 2016. In fact, this was the only event in Illinois out of 1,164 general-election campaign events between 2008 and 2020. This event was the analog of Trump's visit to Newport News, Virginia in 2020.
- **Fire-Engine Visit:** Vice-presidential nominee Mike Pence's visit to Utah on October 26 was occasioned by a poll raising the possibility that Utah resident and independent conservative presidential candidate Evan McMullin might attract enough Republican votes to endanger Trump's anticipated win in Utah. In the end, McMullin received 21% of the state's vote, and the Trump-Pence ticket prevailed with 45% of the state's vote (compared to 75% for the Republican ticket in 2012). In 2004, a poll showing the race in Hawaii within one percentage point occasioned a similar hurried trip by Vice President Dick Cheney (and Kerry surrogates such as Al Gore and Alexandra Kerry).[70]
- **Last-Minute Opportunity:** Toward the end of the 2016 campaign, polls showed that Gary Johnson (a former Republican New Mexico Governor who was running as the Libertarian Party's national nominee) might attract enough votes to shift his home state into the Republican column. Accordingly, Pence made last-minute visits to New Mexico on October 20 and November 2, and Trump did so on October 30. Hillary Clinton and Tim Kaine did not respond, but nonetheless carried the state. Similarly, toward the end of the campaign, Trump conducted one last-minute event in Minnesota on November 6, and Pence held a follow-up event on November 7. Clinton and Kaine did not join the battle, but nevertheless carried the state.
- **Teething Problems:** At the very beginning of the 2016 general-election campaign, Trump (who had never previously run for public office) held rallies in four distinctly noncompetitive states, namely Connecticut (August 13), Texas (August 23), Mississippi (August 24), and Washington State (August 30). Vice-presidential nominee Mike Pence conducted one campaign event in California on September 8, two in Missouri on September 6, and three in Georgia (on August 29 and 30). These visits early in the campaign occasioned an outpouring of bafflement and criticism from seasoned campaign consultants and observers.

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[70] Borreca, Richard. 2004. Cheney, Gore headed here. *Starbulletin*. October 29, 2004. https://archives.starbulletin.com/2004/10/29/news/story1.html

Table 1.9 The battleground states of 2016 had 30% of the nation's population

R-percent	Campaign events	State	Trump	Clinton	Population
55%	21	Iowa	800,983	653,669	3,053,787
54%	48	Ohio	2,841,006	2,394,169	11,568,495
52%	55	North Carolina	2,362,631	2,189,316	9,565,781
52%	10	Arizona	1,252,401	1,161,167	6,412,700
51%	71	Florida	4,617,886	4,504,975	18,900,773
50%	14	Wisconsin	1,405,284	1,382,536	5,698,230
50%	54	Pennsylvania	2,970,733	2,926,441	12,734,905
50%	22	Michigan	2,279,543	2,268,839	9,911,626
49.8%	21	New Hampshire	345,790	348,526	1,321,445
49%	17	Nevada	512,058	539,260	2,709,432
47%	19	Colorado	1,202,484	1,338,870	5,044,930
47%	23	Virginia	1,769,443	1,981,473	8,037,736
51%	**375**	**Total**	**22,360,242**	**21,689,241**	**94,959,840**

In an August 23 article entitled "Trump Gets More Serious about Battleground States," *Politico* reported:

> "**Some Republicans have been scratching their heads lately over Trump's campaign schedule, which had been heavy on red states and relatively light on those states that could prove decisive on Election Day**."
>
> "The campaign on Tuesday rolled out a revamped schedule, making sure to emphasize—twice—that Trump is focusing on battleground states."[71] [Emphasis added]

- **Home-State Campaigning:** Mike Pence conducted two general-election campaign events in his home state of Indiana in 2016. Prior to his selection as the Republican vice-presidential nominee, Pence had been running for re-election as Governor of Indiana. Pence's appearance in Indiana bolstered the campaign of Eric Holcombe, the party's replacement candidate.

Only 30% of the nation's population of 308,745,538 people (2010 census) lived in the 12 battleground states of 2016, as shown in table 1.9.

1.2.3. 2012 election

In 2012, *all* of the 253 general-election campaign events occurred in the 12 states where the Republican percentage of the final two-party presidential vote was in the narrow six-percentage-point range between 45% and 51%.

Table 1.10 shows, for each state, the Republican percentage of the two-party popular vote, the number of general-election campaign events in 2012 by the presidential and vice-presidential candidates of the two major parties, the number of popular votes that they received, their popular vote margin, and their electoral-vote margin.[72]

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[71] Gass, Nick. 2016. Trump gets more serious about battleground states. *Politico*. August 23, 2016. https://www.politico.com/story/2016/08/trump-battleground-states-schedule-227318

[72] In 2012, Obama's nationwide margin was 4,983,775. This table does not include 2,232,223 votes cast for candidates other than the major-party nominees (bringing the total national popular vote for President to

Table 1.10 Distribution of 2012 campaign events

R-Percent	Events	State	Romney	Obama	R-Margin	D-Margin	R-EV	D-EV
75%	0	Utah	740,600	251,813	488,787		6	
71%	0	Wyoming	170,962	69,286	101,676		3	
67%	0	Oklahoma	891,325	443,547	447,778		7	
66%	0	Idaho	420,911	212,787	208,124		4	
64%	0	WV	417,584	238,230	179,354		5	
62%	0	Arkansas	647,744	394,409	253,335		6	
62%	0	Kentucky	1,087,190	679,370	407,820		8	
61%	0	Alabama	1,255,925	795,696	460,229		9	
61%	0	Kansas	692,634	440,726	251,908		6	
61%	0	Nebraska	475,064	302,081	172,983		5	
60%	0	ND	188,320	124,966	63,354		3	
60%	0	Tennessee	1,462,330	960,709	501,621		11	
59%	0	Louisiana	1,152,262	809,141	343,121		8	
59%	0	SD	210,610	145,039	65,571		3	
58%	0	Texas	4,569,843	3,308,124	1,261,719		38	
57%	0	Alaska	164,676	122,640	42,036		3	
57%	0	Montana	267,928	201,839	66,089		3	
56%	0	Mississippi	710,746	562,949	147,797		6	
55%	0	Arizona	1,233,654	1,025,232	208,422		11	
55%	0	Indiana	1,420,543	1,152,887	267,656		11	
55%	0	Missouri	1,482,440	1,223,796	258,644		10	
55%	0	SC	1,071,645	865,941	205,704		9	
54%	0	Georgia	2,078,688	1,773,827	304,861		16	
51%	**3**	**NC**	**2,270,395**	**2,178,391**	**92,004**		**15**	
50%	**40**	**Florida**	**4,162,341**	**4,235,965**		**73,624**		**29**
48%	**73**	**Ohio**	**2,661,407**	**2,827,621**		**166,214**		**18**
48%	**36**	**Virginia**	**1,822,522**	**1,971,820**		**149,298**		**13**
47%	**23**	**Colorado**	**1,185,050**	**1,322,998**		**137,948**		**9**
47%	**27**	**Iowa**	**730,617**	**822,544**		**91,927**		**6**
47%	**13**	**Nevada**	**463,567**	**531,373**		**67,806**		**6**
47%	**13**	**NH**	**329,918**	**369,561**		**39,643**		**4**
47%	**5**	**Pennsylvania**	**2,680,434**	**2,990,274**		**309,840**		**20**
47%	**18**	**Wisconsin**	**1,410,966**	**1,620,985**		**210,019**		**10**
46%	**1**	**Minnesota**	**1,320,225**	**1,546,167**		**225,942**		**10**
45%	**1**	**Michigan**	**2,115,256**	**2,564,569**		**449,313**		**16**
45%	0	New Mexico	335,788	415,335		79,547		5
44%	0	Oregon	754,175	970,488		216,313		7
42%	0	Maine	292,276	401,306		109,030		4
42%	0	Washington	1,290,670	1,755,396		464,726		12
41%	0	Connecticut	634,892	905,083		270,191		7
41%	0	Delaware	165,484	242,584		77,100		3
41%	0	Illinois	2,135,216	3,019,512		884,296		20
41%	0	New Jersey	1,478,088	2,122,786		644,698		14
38%	0	California	4,839,958	7,854,285		3,014,327		55
38%	0	Mass	1,188,314	1,921,290		732,976		11
37%	0	Maryland	971,869	1,677,844		705,975		10
36%	0	New York	2,485,432	4,471,871		1,986,439		29
36%	0	Rhode Island	157,204	279,677		122,473		4
32%	0	Vermont	92,698	199,239		106,541		3
28%	0	Hawaii	121,015	306,658		185,643		4
7%	0	D.C.	21,381	267,070		245,689		3
48.0%	**253**	**Total**	**60,930,782**	**65,897,727**			**206**	**332**

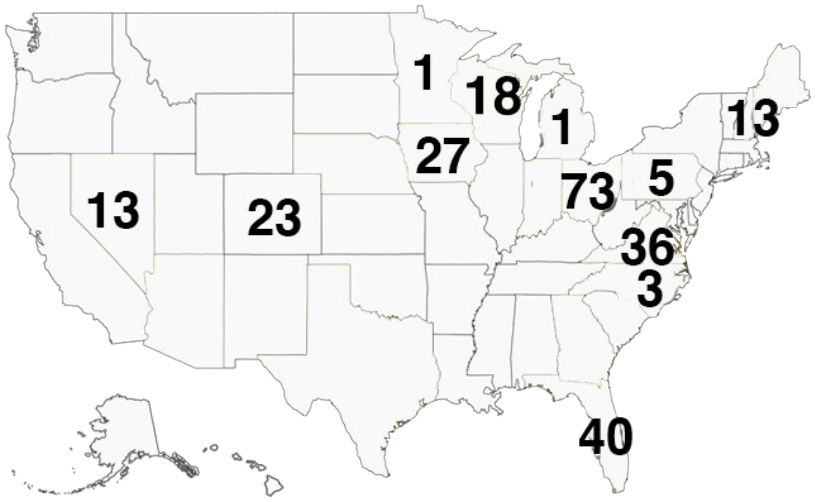

Figure 1.11 Number of general-election campaign events in 2012

As can be seen from the table, Ohio (with 4% of the nation's population) received the most general-election campaign events of any state. Its 73 events constituted 29% of the nationwide total of 253 events.

Seventy percent of the entire 2012 general-election campaign (176 of 253 events) was concentrated in four states:

- Ohio–73
- Florida–40
- Virginia–36
- Iowa–27

In 2012, Obama conducted general-election campaign events in just eight states after being nominated, and Romney did so in only 10 states.

Only 30% of the nation's population of 308,745,538 (2010 census) lived in the 12 battleground states of 2012, as shown in table 1.11.

Figure 1.11 shows the number of general-election campaign events for each state in 2012.

As one would expect, the money that presidential candidates spend generally parallels the distribution of their general-election campaign events.

Table 1.12 shows the advertising spending by the presidential campaign organizations and their supportive outside groups (e.g., super-PACs, 501(c)4 corporations) for each of the 12 states where at least one of the four candidates of the major parties (Obama, Romney, Biden, and Ryan) conducted at least one campaign event. The table is arranged in descending order according to the total advertising spending by state (shown in column 2). Column 3 shows each state's percentage of the total of $939,370,708 for the 12 states. Column 4 shows the total for the Obama campaign (Obama for America) and supportive Dem-

129,084,520). Election results are from David Leip's *Atlas of U.S. Presidential Elections*. Campaign event information is from http://archive3.fairvote.org/research-and-analysis/presidential-elections/2012chart

Table 1.11 The battleground states of 2012 had 30% of the nation's population

R-percent	Campaign events	State	Romney	Obama	Population
51%	3	North Carolina	2,270,395	2,178,391	9,535,483
50%	40	Florida	4,162,341	4,235,965	18,801,310
48%	73	Ohio	2,661,407	2,827,621	11,536,504
48%	36	Virginia	1,822,522	1,971,820	8,001,024
47%	23	Colorado	1,185,050	1,322,998	5,029,196
47%	27	Iowa	730,617	822,544	3,046,355
47%	13	Nevada	463,567	531,373	2,700,551
47%	13	New Hampshire	329,918	369,561	1,316,470
47%	5	Pennsylvania	2,680,434	2,990,274	12,702,379
47%	18	Wisconsin	1,410,966	1,620,985	5,686,986
46%	1	Minnesota	1,320,225	1,546,167	5,303,925
45%	1	Michigan	2,115,256	2,564,569	9,883,640
48%	**253**	**Total**	**21,152,698**	**22,982,268**	**93,543,823**

Table 1.12 General-election advertising spending in 12 states in 2012

State	Total	Percentage of total	Democratic	Republican
Ohio	$192,275,664	20.5%	$91,675,838	$100,599,826
Florida	$182,040,734	19.4%	$77,705,000	$104,335,734
Virginia	$149,217,380	15.9%	$66,767,983	$82,449,397
Colorado	$79,830,466	8.5%	$38,347,150	$41,483,316
Iowa	$71,150,666	7.6%	$28,586,032	$42,564,634
North Carolina	$69,374,780	7.4%	$24,184,071	$45,190,709
Nevada	$58,276,511	6.2%	$25,831,984	$32,444,527
Wisconsin	$45,784,603	4.9%	$14,749,375	$31,035,228
New Hampshire	$43,540,413	4.6%	$21,456,476	$22,083,937
Pennsylvania	$28,089,978	3.0%	$10,896,718	$17,193,260
Michigan	$17,483,109	1.9%	$461,008	$17,022,101
Minnesota	$1,499,045	0.2%	–	$1,499,045
Total	**$939,370,708**	**100.0%**	**$400,661,635**	**$538,709,073**

ocratic groups (Priorities USA Action and Planned Parenthood Action Fund).[73] Column 5 shows the total for the Romney campaign (Romney for President) and supportive Republican groups (American Crossroads, Restore Our Future, Crossroads GPS, Americans for Prosperity, Republican National Committee, Americans for Job Security, American Future Fund, and Concerned Women for America). The information here was compiled by *National Journal*[74] and covers the period between September 4, 2012 (the middle of the Democratic National Convention) and November 4, 2012 (two days before Election Day).[75]

[73] Note that the Democratic National Committee did not run any advertising for the 2012 Obama campaign.

[74] Bell, Peter and Wilson, Reid. Ad Spending in presidential battleground states. *National Journal*. November 4, 2012. http://www.nationaljournal.com/hotline/ad-spending-in-presidential-battleground-states-20120620. This web site also details the spending by each individual group.

[75] The cost per electoral vote of reaching voters in battleground states varies considerably from state to state. Television advertising is highly inefficient for many battleground states. For example, reaching voters in the populous southern part of the battleground state of New Hampshire (with four electoral votes) is highly inefficient, because it requires advertising on premium-priced metropolitan Boston TV stations (that primarily reaches politically irrelevant voters in Massachusetts and Rhode Island). Similarly, reaching the

The battle for the White House was not meaningfully joined in the three states in table 1.12 with the lowest advertising expenditures (Minnesota, Michigan, and Pennsylvania).

In Minnesota, Democrats spent nothing in pursuit of the state's 10 electoral votes, while Republicans spent a mere 5% of what they spent trying to win the 10 electoral votes in neighboring Wisconsin. Moreover, neither Obama, Romney, nor Biden conducted any general-election events in Minnesota (table 1.10).

In Michigan, Democrats spent next to nothing ($461,008) in pursuit of the state's 16 electoral votes, while Republicans spent (mostly at the last minute) a mere one-sixth of what they spent trying to win Ohio's 18 electoral votes. Congressman Ryan made one visit to Michigan (as shown in table 1.10).

Although Pennsylvania was a major battleground state in 2008 (receiving 40 of the 300 general-election campaign events), the battle was never meaningfully joined in Pennsylvania in 2012. Neither President Obama nor Vice President Biden conducted any general-election events in Pennsylvania (as shown in table 1.10). The three last-minute events by Republican presidential nominee Mitt Romney and the two last-minute events by his vice-presidential running mate Paul Ryan were a token effort (a tiny fraction of the 253 general-election campaign events). The spending in pursuit of Pennsylvania's 20 electoral votes (mostly last-minute) was less than one-sixth of what was spent in pursuit of Ohio's 18 electoral votes.

Overall, 98% of the $939,370,708 spent on advertising in the 12 states in 2012 shown in table 1.12 was concentrated in just 10 states, and 95% was spent in just nine states.

The location of field offices confirms the degree to which presidential campaigns concentrated their efforts on the battleground states.

As discussed in a report entitled "Tracking Presidential Campaign Field Operations" by Andrea Levien of FairVote,[76] President Obama's field operation had a total of 790 campaign offices, with at least one in every state. However, there was only one Obama office in 25 states.

Governor Romney's field operation had a total of 284 offices. All were located in just 16 states.

Table 1.13 shows that 87% of Obama's campaign offices (690 of 790) were in the 12 states where either President Obama, Vice President Biden, Governor Romney, or Congressman Ryan conducted at least one campaign event.

Table 1.14 shows that 92% of Romney's campaign offices (262 of 284) were in the 12 states where either President Obama, Vice President Biden, Governor Romney, or Congressman Ryan conducted at least one campaign event.

In summary, about 90% of all campaign offices were concentrated in 12 states in 2012.

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northern part of the battleground state of Virginia requires advertising on pricey metropolitan Washington stations (that reaches many politically irrelevant voters in Maryland and the District of Columbia). In contrast, television advertising in the states of Florida, Colorado, and Nevada is more efficient in that it is seen mostly by voters living inside those battleground states.

[76] Levien, Andrea. 2012. Tracking presidential campaign field operations. FairVote report. November 14, 2012. http://www.fairvote.org/tracking-presidential-campaign-field-operations/

Table 1.13 Location of 690 of Obama's 790 campaign offices in 2012

State	Obama offices
Colorado	62
Florida	104
Iowa	67
Michigan	28
Minnesota	12
Nevada	26
New Hampshire	22
North Carolina	54
Ohio	131
Pennsylvania	54
Virginia	61
Wisconsin	69
Total	**690**

Table 1.14 Location of 262 of Romney's 284 campaign offices in 2012

State	Obama offices
Colorado	13
Florida	48
Iowa	14
Michigan	24
Minnesota	0
Nevada	12
New Hampshire	9
North Carolina	24
Ohio	40
Pennsylvania	25
Virginia	29
Wisconsin	24
Total	**262**

1.2.4. 2008 election

In 2008, almost all (98%) of the general-election campaign events (293 of 300) occurred in the 14 states where the Republican percentage of the final two-party vote was in the narrow eight-percentage-point range between 42% and 50%.

Figure 1.12 shows the number of general-election campaign events for each state in 2008.

Table 1.15 shows, for each state, the Republican percentage of the two-party popular vote, the number of general-election campaign events in 2008 by the major-party presidential and vice-presidential candidates, the number of popular votes that they received, their popular-vote margin, and their electoral-vote margin.[77]

As the table shows, Ohio (with 4% of the nation's population) received the most general-election campaign events of any state. Its 62 events constituted 21% of the nationwide total of 300 events.

About three quarters (72%) of the entire 2008 presidential campaign (215 of 300 events) was concentrated in six states:

- Ohio—62 events
- Florida—46 events
- Pennsylvania—40 events
- Virginia—23 events
- Missouri—21 events
- Colorado—20 events.

[77] In 2008, Obama's nationwide margin was 9,549,976. This table does not include 2,011,830 votes cast for candidates other than the two major-party nominees (bringing the total national popular vote for President to 131,461,581). In Nebraska, Obama won one electoral vote by carrying the 2nd congressional district (the Omaha area). Election results are from David Leip's *Atlas of U.S. Presidential Elections*. Campaign event data is from FairVote.

Table 1.15 Distribution of 2008 campaign events

R-Percent	Events	State	McCain	Obama	R-Margin	D-Margin	R-EV	D-EV
67%		Wyoming	164,958	82,868	82,090		3	
66%		Oklahoma	960,165	502,496	457,669		7	
65%		Utah	596,030	327,670	268,360		5	
63%		Idaho	403,012	236,440	166,572		4	
61%		Alaska	193,841	123,594	70,247		3	
61%		Alabama	1,266,546	813,479	453,067		9	
60%		Arkansas	638,017	422,310	215,707		6	
59%		Louisiana	1,148,275	782,989	365,286		9	
58%		Kentucky	1,048,462	751,985	296,477		8	
58%	1	Tennessee	1,479,178	1,087,437	391,741		11	
58%		Kansas	699,655	514,765	184,890		6	
58%		Nebraska	452,979	333,319	119,660		4	1
57%	1	West Virginia	397,466	303,857	93,609		5	
57%		Mississippi	724,597	554,662	169,935		6	
56%		Texas	4,479,328	3,528,633	950,695		34	
55%		South Carolina	1,034,896	862,449	172,447		8	
54%		North Dakota	168,601	141,278	27,323		3	
54%		Arizona	1,230,111	1,034,707	195,404		10	
54%		South Dakota	203,054	170,924	32,130		3	
53%		Georgia	2,048,759	1,844,123	204,636		15	
51%		Montana	242,763	231,667	11,096		3	
50%	**21**	**Missouri**	**1,445,814**	**1,441,911**	**3,903**		**11**	
50%	**15**	**North Carolina**	**2,128,474**	**2,142,651**		**14,177**		**15**
49%	**9**	**Indiana**	**1,345,648**	**1,374,039**		**28,391**		**11**
49%	**46**	**Florida**	**4,045,624**	**4,282,074**		**236,450**		**27**
48%	**62**	**Ohio**	**2,677,820**	**2,940,044**		**262,224**		**20**
47%	**23**	**Virginia**	**1,725,005**	**1,959,532**		**234,527**		**13**
45%	**20**	**Colorado**	**1,073,589**	**1,288,576**		**214,987**		**9**
45%	**7**	**Iowa**	**682,379**	**828,940**		**146,561**		**7**
45%	**12**	**New Hampshire**	**316,534**	**384,826**		**68,292**		**4**
45%	2	Minnesota	1,275,409	1,573,354		297,945		10
45%	**40**	**Pennsylvania**	**2,655,885**	**3,276,363**		**620,478**		**21**
44%	**12**	**Nevada**	**412,827**	**533,736**		**120,909**		**5**
43%	**8**	**Wisconsin**	**1,262,393**	**1,677,211**		**414,818**		**10**
42%	**8**	**New Mexico**	**346,832**	**472,422**		**125,590**		**5**
42%		New Jersey	1,613,207	2,215,422		602,215		15
42%	**10**	**Michigan**	**2,048,639**	**2,872,579**		**823,940**		**17**
42%		Oregon	738,475	1,037,291		298,816		7
41%		Washington	1,229,216	1,750,848		521,632		11
41%	2	Maine	295,273	421,923		126,650		4
39%		Connecticut	629,428	997,773		368,345		7
38%		California	5,011,781	8,274,473		3,262,692		55
37%		Delaware	152,374	255,459		103,085		3
37%		Illinois	2,031,179	3,419,348		1,388,169		21
37%		Maryland	959,862	1,629,467		669,605		10
37%		Massachusetts	1,108,854	1,904,097		795,243		12
36%		New York	2,752,728	4,804,701		2,051,973		31
36%		Rhode Island	165,391	296,571		131,180		4
31%		Vermont	98,974	219,262		120,288		3
27%		Hawaii	120,566	325,871		205,305		4
7%	1	D.C.	17,367	245,800		228,433		3
46%	**300**	**Total**	**59,948,240**	**69,498,216**			**173**	**365**

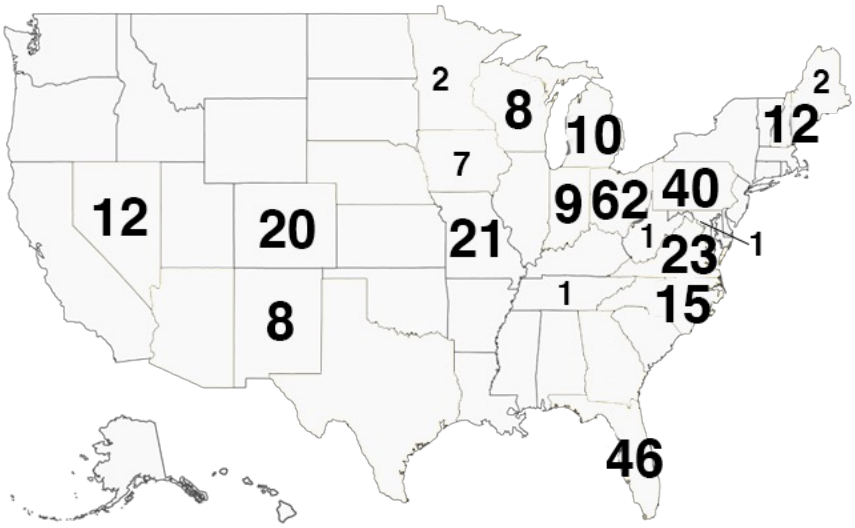

Figure 1.12 Number of general-election campaign events in 2008

Referring to the 2008 election, Professor George C. Edwards III pointed out in his book *Why the Electoral College Is Bad for America*:

> "**Barack Obama campaigned in only fourteen states**, representing only 33 percent of the American people, during the entire general election."[78] [Emphasis added]

Senator John McCain campaigned in only 19 states in the general-election period.

Tellingly, the list of 14 states that accounted for virtually the entire 2008 campaign was known as early as the spring of 2008—even before the nominating process was completed.[79]

However, on October 2, 2010, the McCain campaign abruptly pulled out of Michigan after it concluded that McCain could not win there. Thus, Michigan appears on this list even though it became a "jilted battleground" state in the midst of the fall campaign.

As one would expect, the money that presidential candidates spend in the various states generally parallels the distribution of their general-election campaign events.

Table 1.16 shows the states ranked in order of their peak-season candidate advertising expenses (using data compiled by CNN) covering the period from September 24, 2008 (two days before the first debate), to Election Day (using data from the Federal Elections Commission records compiled by FairVote).[80] Column 3 shows the percentage of total national peak-season candidate advertising expenses for each state.

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[78] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 3–5.

[79] Nagourney, Adam and Zeleny, Jeff. 2008. Already, Obama and McCain Map Fall Strategies. *New York Times*. May 11, 2008. https://www.nytimes.com/2008/05/11/us/politics/11strategy.html

[80] See http://www.fairvote.org/following-the-money-campaign-donations-and-spending-in-the-2008-presidential-race

Table 1.16 Campaign advertising spending for the 2008 election

State	Advertising expenditures	Percent of advertising	State	Advertising expenditures	Percent of advertising
Florida	$29,249,985	18.18%	Oklahoma	$4,170	0%
Pennsylvania	$24,903,675	15.48%	Kansas	$3,141	0%
Ohio	$16,845,415	10.47%	Oregon	$2,754	0%
Virginia	$16,634,262	10.34%	Louisiana	$2,279	0%
North Carolina	$9,556,598	5.94%	New York	$2,235	0%
Indiana	$8,964,817	5.57%	Arkansas	$1,897	0%
Wisconsin	$8,936,200	5.56%	Mississippi	$1,731	0%
Missouri	$7,970,313	4.95%	Alabama	$1,385	0%
Colorado	$7,944,875	4.94%	South Dakota	$980	0%
Nevada	$7,108,542	4.42%	South Carolina	$910	0%
Michigan	$5,780,198	3.59%	Nebraska	$807	0%
Minnesota	$4,262,784	2.65%	Kentucky	$635	0%
Iowa	$3,713,223	2.31%	Idaho	$368	0%
New Mexico	$3,134,146	1.95%	Alaska	$310	0%
New Hampshire	$2,924,839	1.82%	Utah	$66	0%
Montana	$971,040	0.60%	Massachusetts	$20	0%
Maine	$832,204	0.52%	D.C.	$0	0%
West Virginia	$733,025	0.46%	Maryland	$0	0%
Georgia	$177,805	0.11%	New Jersey	$0	0%
Arizona	$75,042	0.05%	Connecticut	$0	0%
Illinois	$53,896	0.03%	Hawaii	$0	0%
California	$28,288	0.02%	Vermont	$0	0%
North Dakota	$18,365	0.01%	Rhode Island	$0	0%
Tennessee	$9,955	0.01%	Delaware	$0	0%
Washington	$5,062	0%	Wyoming	$0	0%
Texas	$4,641	0%	**Total**	**$160,862,883**	**100.00%**

Table 1.16 shows that:

- 99.75% of all advertising spending was in just 18 states in 2008. This allocation substantially parallels the allocation of the 300 general-election campaign events to just 19 states.
- 32 states received a *combined* total of only ¼% of the total advertising money in 2008.

Table 1.17 shows the states ranked in order of their total donations (column 2) to the 2008 presidential campaign (using data from Federal Elections Commission records compiled by FairVote).[81] Column 3 shows the percentage of total national donations for each state. Column 4 shows the peak-season candidate advertising expenses (using data compiled by CNN) covering the period from September 24, 2008 (two days before the first

[81] http://www.fairvote.org/following-the-money-campaign-donations-and-spending-in-the-2008-presidential-race

Table 1.17 Campaign donations and advertising spending for 2008

State	Donations	Percent of donations	Ad spending	Percent of advertising
California	$151,127,483	17.76%	$28,288	0.02%
New York	$89,538,628	10.52%	$2,235	–
Illinois	$50,900,675	5.98%	$53,896	0.03%
Texas	$46,327,287	5.44%	$4,641	–
Virginia	$44,845,304	5.27%	$16,634,262	10.34%
D.C.	$44,275,246	5.20%	$0	–
Florida	$41,770,516	4.91%	$29,249,985	18.18%
Massachusetts	$36,230,225	4.26%	$20	–
Maryland	$28,723,600	3.37%	$0	–
Washington	$24,666,430	2.90%	$5,062	–
Pennsylvania	$23,929,821	2.81%	$24,903,675	15.48%
New Jersey	$22,756,469	2.67%	$0	–
Colorado	$18,800,854	2.21%	$7,944,875	4.94%
Connecticut	$16,526,530	1.94%	$0	–
Georgia	$16,507,714	1.94%	$177,805	0.11%
Ohio	$15,984,435	1.88%	$16,845,415	10.47%
Arizona	$15,334,618	1.80%	$75,042	0.05%
Michigan	$15,007,118	1.76%	$5,780,198	3.59%
North Carolina	$14,337,669	1.68%	$9,556,598	5.94%
Minnesota	$10,894,627	1.28%	$4,262,784	2.65%
Oregon	$10,155,182	1.19%	$2,754	–
Missouri	$9,997,747	1.17%	$7,970,313	4.95%
Wisconsin	$8,133,046	0.96%	$8,936,200	5.56%
Tennessee	$7,934,886	0.93%	$9,955	0.01%
New Mexico	$6,418,313	0.75%	$3,134,146	1.95%
Indiana	$6,225,848	0.73%	$8,964,817	5.57%
South Carolina	$5,744,471	0.67%	$910	–
Nevada	$5,273,523	0.62%	$7,108,542	4.42%
Hawaii	$5,045,151	0.59%	$0	–
Oklahoma	$4,359,169	0.51%	$4,170	–
Kentucky	$4,338,611	0.51%	$635	–
Alabama	$4,333,420	0.51%	$1,385	–
Louisiana	$4,330,756	0.51%	$2,279	–
New Hampshire	$4,045,877	0.48%	$2,924,839	1.82%
Iowa	$3,649,836	0.43%	$3,713,223	2.31%
Maine	$3,344,447	0.39%	$832,204	0.52%
Kansas	$3,333,235	0.39%	$3,141	–
Utah	$3,287,184	0.39%	$66	–
Vermont	$2,852,896	0.34%	$0	–
Arkansas	$2,446,323	0.29%	$1,897	–
Mississippi	$2,400,625	0.28%	$1,731	–
Rhode Island	$2,343,926	0.28%	$0	–
Montana	$1,882,200	0.22%	$971,040	0.60%
Nebraska	$1,867,197	0.22%	$807	–
Delaware	$1,745,123	0.21%	$0	–
Alaska	$1,611,031	0.19%	$310	–
Idaho	$1,610,072	0.19%	$368	–
Wyoming	$1,488,479	0.17%	$0	–
West Virginia	$1,236,993	0.15%	$733,025	0.46%
South Dakota	$758,626	0.09%	$980	–
North Dakota	$442,998	0.05%	$18,365	0.01%
Total	**$851,122,440**	**100.00%**	**$160,862,883**	**100.00%**

presidential debate) to Election Day. Column 5 shows the percentage of total national peak-season candidate advertising expenses for each state.

Table 1.17 shows that the top six "exporting states" (California, New York, Illinois, Texas, Virginia, and the District of Columbia) donated 60% of the money but received only 0.06% of the advertising money.

For example, California donors contributed $151,127,483 (about one-sixth of the national total), but California received a mere $28,288 in advertising. New York donors contributed $89,538,628 (about one-tenth of the national total), while New York received only $2,235 in advertising.

Table 1.17 also shows that the 18 net "importers" of campaign money (which received 99.75% of all advertising money) generated only 27.7% of all donations.

1.2.5. 2004 election

In 2004, almost all (91%) of the general-election campaign events (391 of 431) occurred in 16 states where the Republican percentage of the two-party vote was in the narrow eight-percentage-point range between 48% and 56%.[82]

Our source for campaign event data for 2004 and 2000 is University of Texas Professor Daron R. Shaw's book *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004*.

In 2000, Shaw was one of seven full-time professional members of the Bush campaign's strategy department headed by Karl Rove and Matthew Dowd.[83] During the 2004 election, he was a consultant to the 2004 Bush-Cheney campaign and the Republican National Committee.

Shaw's definition of a campaign "appearance"[84] is similar to the definition of "campaign event" used by FairVote for 2008, 2012, 2016, and 2020 and in this book. For example, Professor Shaw (like FairVote) excludes appearances at private fund-raisers and other private meetings. However, we made one adjustment to Shaw's data for 2004 (but no adjustments for 2000), as described in the footnote.[85]

Table 1.18 shows, for each state, the Republican percentage of the two-party popular vote, the number of general-election campaign events in 2004 by the major-party presidential and vice-presidential candidates, the number of popular votes that they received, their popular-vote margin, and their electoral-vote margin.[86]

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[82] Shaw, Daron R. 2006. *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004*. Chicago, IL: University of Chicago Press. Pages 86–87.

[83] Shaw, Daron R. 2006. *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004*. Chicago, IL: University of Chicago Press. Page 5.

[84] Shaw, Daron R. 2006. *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004*. Chicago, IL: University of Chicago Press. Page 77.

[85] Under Shaw's definition of "appearance," there were 22 appearances in Washington, D.C., and 10 appearances in New York in 2004, but none for either place in 2000. Neither New York nor the District of Columbia was a competitive jurisdiction in either the 2004 or 2000 presidential elections. Because these 32 appearances in 2004 were aimed at a national audience—as opposed to winning the votes from the New York or District of Columbia electorates—we excluded these 32 appearances in 2004 from our table.

[86] In 2004, Bush's nationwide margin was 3,012,179. The table does not include 1,234,493 votes cast for other candidates (bringing total national popular vote to 122,303,536). Election results from David Leip's *Atlas of*

Table 1.18 Distribution of 2004 campaign events

R-Percent	Events	State	Bush	Kerry	R-Margin	D-Margin	R-EV	D-EV
73%		Utah	663,742	241,199	422,543		5	
70%	5	Wyoming	167,629	70,776	96,853		3	
69%		Idaho	409,235	181,098	228,137		4	
67%		Nebraska	512,814	254,328	258,486		5	
66%	1	Oklahoma	959,792	503,966	455,826		7	
64%		North Dakota	196,651	111,052	85,599		3	
63%		Alaska	190,889	111,025	79,864		3	
63%		Alabama	1,176,394	693,933	482,461		9	
63%		Kansas	736,456	434,993	301,463		6	
62%	8	Texas	4,526,917	2,832,704	1,694,213		34	
61%		South Dakota	232,584	149,244	83,340		3	
61%		Montana	266,063	173,710	92,353		3	
60%		Indiana	1,479,438	969,011	510,427		11	
60%	1	Kentucky	1,069,439	712,733	356,706		8	
60%		Mississippi	684,981	458,094	226,887		6	
59%		South Carolina	937,974	661,699	276,275		8	
58%	9	Georgia	1,914,254	1,366,149	548,105		15	
57%	2	Louisiana	1,102,169	820,299	281,870		9	
57%		Tennessee	1,384,375	1,036,477	347,898		11	
56%	**10**	**West Virginia**	**423,778**	**326,541**	**97,237**		**5**	
56%	**5**	**North Carolina**	**1,961,166**	**1,525,849**	**435,317**		**15**	
55%	**6**	**Arizona**	**1,104,294**	**893,524**	**210,770**		**10**	
55%		Arkansas	572,898	469,953	102,945		6	
54%		Virginia	1,716,959	1,454,742	262,217		13	
54%	**9**	**Missouri**	**1,455,713**	**1,259,171**	**196,542**		**11**	
53%	**84**	**Florida**	**3,964,522**	**3,583,544**	**380,978**		**27**	
52%	**12**	**Colorado**	**1,101,256**	**1,001,725**	**99,531**		**9**	
51%	**10**	**Nevada**	**418,690**	**397,190**	**21,500**		**5**	
51%	**63**	**Ohio**	**2,859,768**	**2,741,167**	**118,601**		**20**	
50%	**13**	**New Mexico**	**376,930**	**370,942**	**5,988**		**5**	
50%	**38**	**Iowa**	**751,957**	**741,898**	**10,059**		**7**	
50%	**40**	**Wisconsin**	**1,478,120**	**1,489,504**		**11,384**		**10**
49%	**12**	**New Hampshire**	**331,237**	**340,511**		**9,274**		**4**
49%	**36**	**Pennsylvania**	**2,793,847**	**2,938,095**		**144,248**		**21**
48%	**25**	**Michigan**	**2,313,746**	**2,479,183**		**165,437**		**17**
48%	**21**	**Minnesota**	**1,346,695**	**1,445,014**		**98,319**		**10**
48%	**7**	**Oregon**	**866,831**	**943,163**		**76,332**		**7**
47%	5	New Jersey	1,670,003	1,911,430		241,427		15
46%	0	Washington	1,304,894	1,510,201		205,307		11
46%		Delaware	171,660	200,152		28,492		3
46%	1	Hawaii	194,191	231,708		37,517		4
45%	3	Maine	330,201	396,842		66,641		4
45%	2	California	5,509,826	6,745,485		1,235,659		55
45%	2	Illinois	2,345,946	2,891,550		545,604		21
45%		Connecticut	693,826	857,488		163,662		7
43%		Maryland	1,024,703	1,334,493		309,790		10
41%		New York	2,962,567	4,314,280		1,351,713		31
40%		Vermont	121,180	184,067		62,887		3
39%	1	Rhode Island	169,046	259,760		90,714		4
37%		Massachusetts	1,071,109	1,803,800		732,691		12
9%		D.C.	21,256	202,970		181,714		3
51%	**431**	**Total**	**62,040,611**	**59,028,432**			**286**	**252**

As can be seen from the table, Florida (6% of the nation's population at the time) received the most general-election campaign events of any state in 2004. Its 84 events constituted 19% of the nationwide total of 431 events.[87]

Seventy-one percent of the entire 2004 presidential campaign (307 of 431 events) was concentrated in seven states:

- Florida–84
- Ohio–63
- Wisconsin–40
- Iowa–38
- Pennsylvania–36
- Michigan–25
- Minnesota–21.

1.2.6. 2000 election

In 2000, almost all (92%) of the general-election campaign events (405 of 439) occurred in 20 states where the Republican percentage of the two-party vote was in the narrow nine-percentage-point range between 44% and 53%.

Table 1.19 shows, for each state, the Republican percentage of the two-party popular vote, the number of general-election campaign events in 2000 by the major-party presidential and vice-presidential candidates, the number of popular votes that they received, their popular-vote margin, and their electoral-vote margin.[88]

As can be seen from the table, Florida (6% of the nation's population at the time) received the most general-election campaign events of any state in 2000. Its 47 events constituted 11% of the nationwide total of 439 events.

Two-thirds (67%) of the entire 2000 presidential campaign (297 of 439 events) was concentrated in nine states:

- Florida–47
- Michigan–39
- Pennsylvania–36
- California–34
- Wisconsin–31

U.S. Presidential Elections. Event data comes from Shaw, Daron R. 2006. *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004*, except for the 2004 counts for Washington D.C., and New York (as explained above).

[87] A presidential or vice-presidential candidate's visit to a state is typically accompanied by a major expenditure in advertising and ground activity. For example, more advertising money was spent during the last five weeks of the 2004 campaign in Florida than in 45 other states combined. See FairVote. 2002. *Who Picks the President? Not You*. November 3, 2005. https://fairvote.org/press/who_picks_the_president_not_you/

[88] In 2000, Gore's nationwide lead was 543,816. This table does not include 3,953,439 votes cast for other candidates (bringing the total national popular vote to 105,417,475). The number of electoral votes shown in column 9 does not reflect the abstention by one faithless elector from the District of Columbia when the Electoral College met in December. The election results are from David Leip's *Atlas of U.S. Presidential Elections*. The campaign event information is from Shaw, Daron R. 2006. *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004*. Pages 86–87.

Table 1.19 Distribution of 2000 campaign events

R-Percent	Events	State	Bush	Gore	R-Margin	D-Margin	R-EV	D-EV
72%		Utah	515,096	203,053	312,043		5	
71%		Wyoming	147,947	60,481	87,466		3	
71%		Idaho	336,937	138,637	198,300		4	
68%		Alaska	167,398	79,004	88,394		3	
65%		Nebraska	433,862	231,780	202,082		5	
65%		North Dakota	174,852	95,284	79,568		3	
64%		Montana	240,178	137,126	103,052		3	
62%		South Dakota	190,700	118,804	71,896		3	
61%		Oklahoma	744,337	474,276	270,061		8	
61%		Texas	3,799,639	2,433,746	1,365,893		32	
61%		Kansas	622,332	399,276	223,056		6	
59%		Mississippi	573,230	404,964	168,266		7	
58%		South Carolina	786,426	566,039	220,387		8	
58%		Indiana	1,245,836	901,980	343,856		12	
58%	10	Kentucky	872,492	638,898	233,594		8	
58%		Alabama	944,409	695,602	248,807		9	
56%	4	North Carolina	1,631,163	1,257,692	373,471		14	
56%	3	Georgia	1,419,720	1,116,230	303,490		13	
54%	1	Colorado	883,745	738,227	145,518		8	
54%		Virginia	1,437,490	1,217,290	220,200		13	
54%	8	Louisiana	927,871	792,344	135,527		9	
53%	**1**	**Arizona**	**781,652**	**685,341**	**96,311**		**8**	
53%	**5**	**West Virginia**	**336,475**	**295,497**	**40,978**		**5**	
53%	**11**	**Arkansas**	**472,940**	**422,768**	**50,172**		**6**	
52%	**18**	**Tennessee**	**1,061,949**	**981,720**	**80,229**		**11**	
52%	**6**	**Nevada**	**301,575**	**279,978**	**21,597**		**4**	
52%	**27**	**Ohio**	**2,351,209**	**2,186,190**	**165,019**		**21**	
52%	**30**	**Missouri**	**1,189,924**	**1,111,138**	**78,786**		**11**	
51%	**7**	**New Hampshire**	**273,559**	**266,348**	**7,211**		**4**	
50%	**47**	**Florida**	**2,912,790**	**2,912,253**	**537**		**25**	
50%	**12**	**New Mexico**	**286,417**	**286,783**		**366**		**5**
50%	**31**	**Wisconsin**	**1,237,279**	**1,242,987**		**5,708**		**11**
50%	**24**	**Iowa**	**634,373**	**638,517**		**4,144**		**7**
50%	**16**	**Oregon**	**713,577**	**720,342**		**6,765**		**7**
49%	**5**	**Minnesota**	**1,109,659**	**1,168,266**		**58,607**		**10**
48%	**36**	**Pennsylvania**	**2,281,127**	**2,485,967**		**204,840**		**23**
47%	**39**	**Michigan**	**1,953,139**	**2,170,418**		**217,279**		**18**
47%	**9**	**Maine**	**286,616**	**319,951**		**33,335**		**4**
47%	**18**	**Washington**	**1,108,864**	**1,247,652**		**138,788**		**11**
45%		**Vermont**	**119,775**	**149,022**		**29,247**		**3**
44%	**29**	**Illinois**	**2,019,421**	**2,589,026**		**569,605**		**22**
44%	**34**	**California**	**4,567,429**	**5,861,203**		**1,293,774**		**54**
43%	2	Delaware	137,288	180,068		42,780		3
42%	6	New Jersey	1,284,173	1,788,850		504,677		15
42%		Maryland	813,797	1,145,782		331,985		10
41%		Connecticut	561,094	816,015		254,921		8
40%		Hawaii	137,845	205,286		67,441		4
37%		New York	2,403,374	4,107,907		1,704,533		33
35%		Massachusetts	878,502	1,616,487		737,985		12
34%		Rhode Island	130,555	249,508		118,953		4
10%		D.C.	18,073	171,923		153,850		3
49.7%	**439**	**Total**	**50,460,110**	**51,003,926**			**271**	**267**

- Missouri–30
- Illinois–29
- Ohio–27
- Iowa–24.

1.2.7. 2024 prospects

The results of the 2022 midterm elections and recent voting patterns strongly suggest that three states (Iowa, Ohio, and Florida) that were hotly contested battlegrounds in several recent elections are unlikely to continue to be presidential battlegrounds in 2024.

For example, Iowa's number of general-election campaign events by presidential and vice-presidential candidates has been declining in recent years because of the state's increasingly Republican predisposition:

- 27 events in 2012
- 21 events in 2016
- 5 events in 2020.

Iowa's Republican Governor Kim Reynolds' 16-point win and Republican Senator Grassley's 12-point win in 2022 suggest (as of the time of this writing) that presidential candidates will not regard Iowa as a battleground state in 2024 and that Iowa will, therefore, receive no general-election attention.[89]

Ohio's number of general-election campaign events has similarly declined in recent years:

- 73 events in 2012
- 48 events in 2016
- 13 events in 2020.

Ohio's Republican Governor DeWine's 26-point win and Republican Senator J.D. Vance's seven-point win in 2022 suggest (as of the time of this writing) that presidential candidates will not regard Ohio as competitive in 2024. If Ohio receives any general-election attention at all from presidential candidates, it will probably be occasioned by incumbent Senator Sherrod Brown's hotly contested re-election race.

Indeed, neither Iowa nor Ohio was among the eight states that Biden targeted in his $25,000,000 advertising campaign in late 2023 (namely Arizona, Florida, Georgia, Michigan, Nevada, North Carolina, Pennsylvania, and Wisconsin).[90]

Florida's status as a closely divided presidential battleground is also in doubt.

Trump won 51% of the two-party vote for President in 2016 in Florida, and he won 52% of the two-party vote in 2020. The closeness of those two elections would tend to suggest that Florida would be a presidential battleground in 2024.

However, Republican Governor DeSantis' 19-point win and Republican Senator Rubio's

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[89] Weisman, Jonathan. 2024. Why Iowa Turned So Red When Nearby States Went Blue. *New York Times*. January 8, 2024. https://www.nytimes.com/2024/01/08/us/politics/iowa-republicans-red.html

[90] Mauger, Craig. 2023. Biden campaign targets Michigan, other battleground states in $25M ad blitz. *The Detroit News*. August 20, 2023. https://www.detroitnews.com/story/news/local/michigan/2023/08/20/biden-targets-michigan-other-battleground-states-in-25m-ad-blitz/70635824007/

16-point win in 2022 strongly suggest (as of the time of this writing) that Florida will not be a battleground state in 2024.[91] The *Washington Post* reported:

> "After humbling midterm losses in a longtime battleground, Democrats are in a state of disorder and pessimistic about 2024."[92]

Indeed, *prior* to the 2022 midterm elections, three major national Democratic campaign organizations signaled Florida's declining status as a battleground state.

> "National Democratic groups mostly looked past Florida in the 2022 midterms, with the governor's race failing to become a priority for the **Democratic Governors Association** and the Senate race failing to attract much attention from the **Democratic Senatorial Campaign Committee** and its affiliated outside groups. The **DNC** also left the state off a list of likely 2024 battleground states that received extra investments for 2022."[93] [Emphasis added]

In late 2023, Florida was one of eight states targeted by Biden's exploratory $25 million advertising campaign.

However, in January 2024, Florida was not one of seven states targeted by Biden's subsequent $250 million advertising buy.[94]

Instead, a *New York Times* article entitled "Biden Super PAC Plans a Historic $250 Million Ad Blitz" listed only seven states as being part of the advertising effort (Arizona, Georgia, Michigan, Nevada, North Carolina, Pennsylvania, and Wisconsin).[95]

In March 2024, Florida was not one of the battleground states that Republican strategist Karl Rove listed in his op-ed entitled "The 2024 Presidential Election Comes Down to Only Seven States." Instead, Rove listed only Arizona, Georgia, Michigan, Nevada, North Carolina, Pennsylvania and Wisconsin as battleground states.[96]

Charlie Cook listed the same seven battleground states in March 2024.[97]

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[91] Breuninger, Kevin. 2022. Florida no longer looks like a swing state after DeSantis, Rubio lead big Republican wins. *CNBC*. November 18, 2022. https://www.cnbc.com/2022/11/18/desantis-win-in-florida-midterm-election-undercuts-swing-state-status.html

[92] Rodriguez, Sabrina and Scherer, Michael. 2023. There is no plan. There's nothing': Florida Democrats in despair over future. *Washington Post*. January 22, 2023. https://www.washingtonpost.com/politics/2023/01/22/florida-democrats-losses/

[93] Rodriguez, Sabrina and Scherer, Michael. 2023. 'There is no plan. There's nothing': Florida Democrats in despair over future. *Washington Post*. January 22, 2023. https://www.washingtonpost.com/politics/2023/01/22/florida-democrats-losses/

[94] Paybarah, Azi. 2024. Battleground ad blitz on TV and digital platforms planned by pro-Biden super PAC. *Washington Post*. January 30, 2024. https://www.washingtonpost.com/politics/2024/01/30/biden-ads-youtube-hulu-roku-vevo/

[95] Epstein, Reid J. and Goldmacher, Shane. 2024. Biden Super PAC Plans a Historic $250 Million Ad Blitz. *New York Times*. January 30, 2024. https://www.nytimes.com/2024/01/30/us/politics/biden-tv-ads-super-pac.html

[96] Rove, Karl. 2024. The 2024 Presidential Election Comes Down to Only Seven States. *Wall Street Journal*. March 20, 2024. https://www.wsj.com/articles/2024-presidential-election-comes-down-to-only-seven-states-65887e6a?mod=hp_opin_pos_3#cxrecs_s

[97] Cook, Charlie. 2024. Don't Sleep on Nebraska and Maine. *Cook Political Report*. March 21, 2024. https://www.cookpolitical.com/analysis/national/national-politics/dont-sleep-nebraska-and-maine

Having said that, there are some other potential presidential battlegrounds in 2024 beyond these seven states.

The Biden campaign has been paying attention to New Hampshire, as reported by the *Daily Beast* in March 2024:

> "The Biden campaign is going full steam ahead on hiring in the battleground states, approaching 100 field offices with more than 130 staffers spread across eight major battleground states: Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada, as well as North Carolina and **New Hampshire**."[98] [Emphasis added]

The general-election race in New Hampshire was extremely close in 2016, with Hillary Clinton getting only 50.2% of the two-party vote. The state received 21 general-election campaign events that year. In 2020, the Democratic lead in New Hampshire grew to eight percentage points (54%–46%)—putting the state at the boundary of what constitutes a battleground state.

Charlie Mahtenian wrote in *Politico* in 2022:

> "New Hampshire, which hasn't voted for a Republican presidential nominee since 2000, also appears to be moving in the wrong direction—at least for a Republican Party led by Trump. In his first bid for president in 2016, he lost the state by less than one-half of a percentage point. Four years later, that margin was eight points. This year, Trumpist candidates lost both House races by healthy margins and the Senate election by double-digits. All of this took place as GOP Gov. Chris Sununu, a Trump nemesis, routed his Democratic foe to win reelection."[99]

Minnesota is similar to New Hampshire in that Hillary Clinton received only 51% of the two-party vote in 2016. Like New Hampshire, the Democratic margin in Minnesota grew to eight percentage points (54%–46%) in 2020.

Minnesota has gone Democratic in every presidential election since 1976. Charlie Mahtenian wrote in *Politico* in 2022:

> "Minnesota is fool's gold for Republicans."
>
> "Strong Democratic midterm performances in … Minnesota—a state which offered former President Donald Trump a rare offensive opportunity in 2020—suggest [Minnesota] might not be worth contesting in 2024. **Minnesota, which some Republicans regarded as a Trump sleeper state in 2020, turned out to be a mirage**. This year, there was even more evidence of that: Democrats won every state constitutional office for the third straight election cycle. In

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[98] Lahut, Jake. 2024. The Biden Campaign Is Quietly Preparing a Trump Ambush. *Daily Beast*. March 27, 2024. https://www.thedailybeast.com/the-biden-campaign-is-quietly-preparing-a-trump-ambush

[99] Mahtenian, Charlie. 2022. What 2022 tells us about the 2024 electoral map. *Politico*. November 23, 2022. https://www.politico.com/newsletters/politico-nightly/2022/11/23/what-2022-tells-us-about-the-2024-electoral-map-00070805?nname=politico-nightly&nid=00000170-c000-da87-af78-e185fa700000&nrid=0000014e-f0ef-dd93-ad7f-f8ef66660001&nlid=2670445

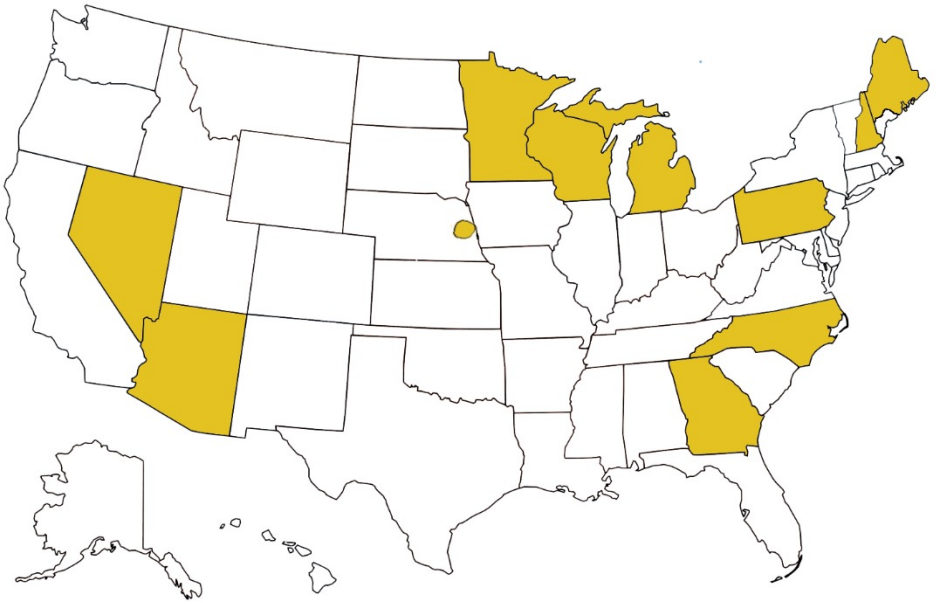

Figure 1.13 The nine likely 2024 battleground states and two likely battleground districts in Nebraska and Maine

> 2024, it will be 52 years since a Republican presidential nominee last carried Minnesota."[100] [Emphasis added]

Finally, Maine and Nebraska award two electoral votes statewide and one for each congressional district. It appears that Nebraska's 2nd congressional district and Maine's 2nd district are close enough to be considered to be presidential battlegrounds in 2024.[101]

In summary, if Iowa, Ohio, and Florida are not presidential battlegrounds, the 2024 presidential election could revolve around as few as nine states and two congressional districts.[102] In other words, 41 states and the District of Columbia would be mere spectators of the 2024 presidential contest.

Figure 1.13 shows these nine states and two battleground congressional districts.

Table 1.20 shows the nine likely 2024 battleground states and two congressional districts[103] as well as the 24 likely 2024 Republican states and the 18 likely Democratic jurisdictions (17 states and the District of Columbia).

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[100] *Ibid.*

[101] Nebraska and Maine are not considered competitive on a statewide basis.

[102] Brownstein, Ron. 2022. Why fewer states than ever could pick the next president. *CNN*. November 22, 2022. https://www.cnn.com/2022/11/22/politics/2022-preview-2024-presidential-election/index.html

[103] In the table, Maine's 2nd district and Nebraska's 2nd district are listed separately from the remainder of their states, because these two districts are competitive and, in fact, voted differently than the rest of their state in 2020. The table then shows Maine's remaining three electoral votes in the Democratic column, and Nebraska's remaining four electoral votes in the Republican column.

Table 1.20 Likely 2024 battleground states

Democratic	Battleground	Republican
17 states and D.C.	**9 states and 2 districts**	**24 states**
211 electoral votes	**109 electoral votes**	**218 electoral votes**
California (54)	**Arizona (11)**	Alabama (9)
Colorado (10)	**Georgia (16)**	Alaska (3)
Connecticut (7)	**Michigan (15)**	Arkansas (6)
Delaware (3)	**Minnesota (10)**	Florida (30)
District of Columbia (3)	**North Carolina (16)**	Iowa (6)
Hawaii (4)	**New Hampshire (4)**	Idaho (4)
Illinois (19)	**Nevada (6)**	Indiana (11)
Massachusetts (11)	**Pennsylvania (19)**	Kansas (6)
Maine–Remainder (3)[103]	**Wisconsin (10)**	Kentucky (8)
Maryland (10)	**Nebraska-2nd-district (1)[103]**	Louisiana (8)
New Jersey (14)	**Maine-2nd-district (1)[103]**	Missouri (10)
New Mexico (5)		Mississippi (6)
New York (28)		Montana (4)
Oregon (8)		Nebraska–Remainder (4)[103]
Rhode Island (4)		North Dakota (3)
Vermont (3)		Oklahoma (7)
Virginia (13)		Ohio (17)
Washington State (12)		South Carolina (9)
		South Dakota (3)
		Tennessee (11)
		Texas (40)
		Utah (6)
		Wyoming (3)
		West Virginia (4)
Population	**Population**	**Population**
133,356,804	**67,465,184**	**130,627,293**
Percent of U.S. population	**Percent of U.S. population**	**Percent of U.S. population**
40.2%	**20.4%**	**39.4%**

The nine likely 2024 battleground states have almost exactly 20% of the U.S. population.

Almost exactly 80% of the U.S. population lives in the 41 likely 2024 spectator states—with almost exactly 40% in the blue spectator states and 40% in the red spectator states.

If this configuration of battleground states comes to fruition in 2024, the projected percentage of the U.S. population living in the battleground states will be distinctly lower than the 30% or 31% seen in 2012, 2016, and 2020.

In December 2023, the *Cook Political Report* listed six states as "toss ups."[104,105]

After President Biden withdrew from the presidential race and the Harris-Walz ticket was nominated in August, the list of 2024 battleground states appeared to be just the seven states listed by Karl Rove in March.

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[104] 2024 CPR Electoral College Ratings. *Cook Political Report*. December 19, 2023. https://www.cookpolitical.com/ratings/presidential-race-ratings

[105] The Cook Political Report has a summary of battleground states between 1988 and 2020. Walter, Amy. 2023. Cook Political Report Releases Key Historical Electoral College Ratings (1988-2020). *Cook Political Report*. November 7, 2023. https://www.cookpolitical.com/analysis/national/national-politics/cook-political-report-releases-key-historical-electoral-college?

1.2.8. Governance is shaped by the winner-take-all rule.

Appealing to the interests and concerns of voters is an integral part of representative government.

In elections for Governor, U.S. Senator, Mayor, and County Executive, every voter in the jurisdiction covered by the office is equally important to an office seeker.

However, as we have seen earlier in this chapter, the current state-by-state winner-take-all method of awarding electoral votes compels presidential candidates to concentrate their campaigns in the states that they might win or lose. Thus, presidential candidates inevitably seek ways to appeal to the voters in the closely divided states.

Precisely because the battleground states are closely divided, issues that appeal to even a modest number of voters in these particular states can become very important to presidential candidates.

Republican strategist Karl Rove listed some of the state-specific issues that George W. Bush used in 2000 in his book *Courage and Consequence*.

> "We identified issues below the national media's radar that would draw support in key states or regions.
>
> "For example, mountaintop mining was an important issue in West Virginia."
>
> "Iowa and Missouri farmers, meanwhile, were concerned about efforts to withhold water flowing into the Missouri River. They depended on the water flows to ship their crops on barges.
>
> "New Mexicans were worried that environmentalists would shut down development in the state in order to save the Rio Grande minnow."
>
> "Communities in the Northwest were all spun up by both the failure of Clinton's Northwest Timber Plan to help their towns and by calls from environmentalists to destroy the region's dams, a source of jobs and inexpensive green power."
>
> "Banging away on these issues was vital to our efforts."
>
> "[We] plotted out a thematic calendar [that] showed when we would talk about what and in which battleground state."[106]

In West Virginia, for example, the 2000 Bush-Cheney campaign

> "[ran] months of television, [had] Bush visit the state at least three times, [had] his running mate stop at least twice, and [spent] a lot of money."[107]

On Election Day, Bush was rewarded by winning West Virginia with 53% and Missouri with 52%.

Similarly, a 2012 article entitled "Romney Campaign Releases 15 New Commercials in

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[106] Rove, Karl. 2010. *Courage and Consequence: My Life as a Conservative in the Fight*. New York, NY: Threshold Editions. Page 159.

[107] Rove, Karl. 2010. *Courage and Consequence: My Life as a Conservative in the Fight*. New York, NY: Threshold Editions. Page 165.

Eight States" illustrates how presidential candidates tailor their campaigns around issues relevant to voters in particular battleground states:

> "All 15 spots begin identically—with convention footage of Romney's acceptance speech."
>
> "**From there, it starts getting less generic**."
>
> "[The] Florida [ad discusses] … the importance of residential real estate to the state's economy.…
>
> "One of [the] commercials … deals with losses resulting from defense-budget cuts and sequestrations, is running in Colorado, Florida, North Carolina, Ohio and Virginia."
>
> "Another [commercial] discussing how government overregulation kills small-business jobs runs in Colorado and Iowa."
>
> "[Another commercial] about government regulatory, trade and tax policies … killing manufacturing jobs, runs in North Carolina and Ohio."
>
> "[There is] a New Hampshire commercial about high taxes and energy costs."
>
> "[There is] a Virginia [30-second ad] about how tax cuts can help the lives of middle-class families."[108] [Emphasis added]

The influence of the state-by-state winner-take-all method of awarding electoral votes extends beyond campaigning to governance.

Sitting Presidents contemplating their re-election (or the election of their preferred successor) make policy decisions with the closely divided battleground states in mind.

In *Presidential Pandering*, Brian Faughnan and John Hudak observed:

> "In American elections, not all states are created equal."
>
> "**Presidential campaigns avoid expending resources in most states because the outcome of the presidential race in those states is essentially predetermined**. On the other hand, campaigns target resources—staff, advertising, visits from candidates, local media appearances—in competitive swing states in an effort to boost the turnout of their base and persuade undecided voters.
>
> "However, **the structure of elections affects more than presidential campaign behavior. It also influences policy decisions**. Incumbent presidents use campaign resources to help achieve electoral success, but they can also use the powers of their office to do the same. As a result, policy outcomes often aim to benefit key constituencies in critical states. Research illustrates that

[108] Goldman, Bruce. 2012. Romney campaign releases 15 new commercials in eight states. *Examiner*. September 7, 2012.

> presidents influence the distribution of federal funds (Berry and Gersen 2011;[109] Hudak 2012;[110] Shor 2006),[111] the timing of fund distribution (Anagnoson 1982;[112] Hamman 1993),[113] and even the location of enforcement actions (Hudak and Stack 2012)[114] according to an electoral calculus. In the administration of such micro-level policy, we know presidents target key swing states specifically."[115] [Emphasis added]

The examples below show that this distortion is very real. The parochial interests and concerns of a small number of voters in a few closely divided states get far more attention than similar issues in other states.

Disaster declarations

After studying over three thousand disasters and almost a thousand presidential disaster declarations over more than two decades, Professor Andrew Reeves wrote:

> "The unilateral power studied here is the presidential disaster declaration, a power that belongs to the president alone. By statute, he does not require the approval of Congress, nor does he need to explain or justify his decision. Typically (but not necessarily) a governor must first request a declaration, and the president may grant or deny the request without explanation. Under a presidential disaster declaration, individuals are eligible for cash grants, low-interest loans, tax exemptions, unemployment benefits, crisis counseling, and legal advice from FEMA as well as loans from the Small Business Administration."[116]

Reeves found:

> "A state's electoral competitiveness influences whether they receive a disaster declaration from the president. **A highly competitive state can expect**

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[109] Berry, Christopher and Jacob Gersen. 2010. Agency Politicization and Distributive Politics. Typescript. Harris School of Public Policy, University of Chicago.

[110] Hudak, John Joseph. 2012. The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds. Ph.D. dissertation. Nashville, TN: Vanderbilt University. May 2012.

[111] Shor, Boris. 2006. Presidential Power and Distributive Politics: Federal Expenditures in the 50 States, 1983–2001. Typescript. University of Chicago.

[112] Anagnoson, J. Theodore. 1982. Federal Grant Agencies and Congressional Election Campaigns. *American Journal of Political Science.* 26 (3):547–61.

[113] Hamman, John A. 1993. Bureaucratic Accommodation of Congress and the President: Elections and the Distribution of Federal Assistance. *Political Research Quarterly.* 46 (4):863–79.

[114] Hudak, John Joseph and Kevin M. Stack. 2012. The President and the Politics of Agency Enforcement: The Case of Superfund. Prepared for Annual Meeting of the American Political Science Association in New Orleans, Louisiana (cancelled due to hurricane).

[115] Faughnan, Brian M. and Hudak, John. 2012. *Presidential Pandering: How Elections Determine the Exercise of Executive Power in the U.S. and Colombia*. Issues in Governance Series. Brookings Institution. Number 53. November 2012. Page 4. https://www.brookings.edu/wp-content/uploads/2016/06/2-us-colombia-election-hudak.pdf

[116] Reeves, Andrew. 2011. Political disaster: unilateral powers, electoral incentives, and presidential disaster declarations. *Journal of Politics*. 73(4):1142–1151. Page 1143. https://www.journals.uchicago.edu/doi/abs/10.1017/S0022381611000843

> **to receive twice as many presidential disaster declarations as an uncompetitive state**. This relationship has existed since the passage of the 1988 Stafford Act, which expanded the disaster declaration powers of the president. Additionally, I find that these decisions have the intended electoral benefits—voters react and reward presidents for presidential disaster declarations. **A president can expect over a one-point increase in a statewide contest in return for a single presidential disaster declaration**."[117] [Emphasis added]

Reeves concluded:

> "When the inauguration confetti is done falling, the campaign is over and the job of governing begins. But the campaign will come again. In four more years the president or his party designate, must again etch out a coalition of 270 electoral college votes if he wishes to remain (or keep his party) in the White House. The findings here show that the specter of the campaign persists well after the President-Elect thanks his opponent for a worthy contest. **Electoral incentives may guide policy to the detriment of the public good**."[118] [Emphasis added]

Presidentially controlled grants

The executive branch of the federal government has sole discretionary authority over the distribution of billions of dollars of discretionary grants.

In a study entitled "*The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*," Dr. John Hudak, working at the time at the Brookings Institution, observed:

> "**Because of the institutional design of the Electoral College, presidents do not face a national electorate, but instead a series of sub-national, state-level electorates**. Moreover, only a handful of states [are] competitive in presidential elections, reducing a huge national electorate to a much smaller set of competitive races.… **The small size of the truly competitive presidential electorate makes an electoral strategy that utilizes the distribution of government funds a feasible and appealing tactic**."[119] [Emphasis added]

Using a database of all federal grants by state between 1996 and 2008, Hudak concluded:

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[117] Reeves, Andrew. 2011. Political disaster: unilateral powers, electoral incentives, and presidential disaster declarations. *Journal of Politics*. 73(4):1142–1151. Page 1142. https://www.journals.uchicago.edu/doi/abs/10.1017/S0022381611000843

[118] Reeves, Andrew. 2011. Political disaster: unilateral powers, electoral incentives, and presidential disaster declarations. *Journal of Politics*. 73(4):1142–1151. Page 1150. https://www.journals.uchicago.edu/doi/abs/10.1017/S0022381611000843

[119] Hudak, John Joseph. 2011. *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*. Center for the Study of Democratic Institutions. Working Paper # 01-2011. Pages 10–11. http://www.vanderbilt.edu/political-science/graduate/CSDI-WP-01-2011.pdf

> "The President and his subordinates strategically direct federal funding toward electorally competitive states."
>
> "**The executive branch delivers more money and grants to swing states** than all other states.
>
> "Further, **the proximity of a presidential election enhances this swing state bias** in the distribution of funds."
>
> "Swing states are more likely to be benefactors of federal money than states that the president (or his party) has no chance of winning.
>
> "Through the strategic use of discretion, presidents influence the distribution of federal funds, essentially using them as a campaign resource.
>
> "Presidents strategically time grant allocation announcements in order to reap the maximum benefits in terms of credit claiming."[120] [Emphasis added]

In this study, "swing states are those which were decided by 10% or less in the previous election."[121]

Hudak reached the following conclusion regarding federal discretionary grants controlled by the executive branch:

> "Swing states receive between 7.3% and 7.6% more grants than do other states."
>
> "Swing states see a benefit of 5.7% more grant dollars than other states."[122]

In summary:

> "Presidents use their discretionary control over huge sums of federal grant dollars to target funds to swing states.…
>
> "Federal grants function as an incumbent-controlled pool of campaign funds that presidents are able to allocate strategically."[123]

Additional details are found in Hudak's 2012 study.[124]

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[120] Hudak, John Joseph. 2011. *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*. Center for the Study of Democratic Institutions. Working Paper # 01-2011. Pages 1–5. http://www.vanderbilt.edu/political-science/graduate/CSDI-WP-01-2011.pdf

[121] Hudak, John Joseph. 2011. *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*. Center for the Study of Democratic Institutions. Working Paper # 01-2011. Page 11. http://www.vanderbilt.edu/political-science/graduate/CSDI-WP-01-2011.pdf

[122] Hudak, John Joseph. 2011. *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*. Center for the Study of Democratic Institutions. Working Paper # 01-2011. Pages 10–11. http://www.vanderbilt.edu/political-science/graduate/CSDI-WP-01-2011.pdf.

[123] Hudak, John Joseph. 2011. *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*. Center for the Study of Democratic Institutions. Working Paper # 01-2011. Page 28. http://www.vanderbilt.edu/political-science/graduate/CSDI-WP-01-2011.pdf

[124] Hudak, John Joseph. 2012. *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds*. Ph.D. dissertation. Nashville, TN: Vanderbilt University. May 2012.

Medicare Part D legislation in 2003

The prescription drug issue had become a very important political issue in 2003.

As Gallup News Service reported:

> "A sizable proportion of the American adult population, 48%, uses prescription drugs, and that percentage reaches an extremely high 86% among those 65 and older. Most older Americans who use prescription drugs do so for a long-term illness.… [D]rugs are a continuing, regular and long-term expense for senior citizens. Indeed, Gallup Poll data show that the average senior citizen who uses prescription drugs pays more than $1,600 a year out of pocket for prescription drugs."
>
> "The high rate of prescription drug use and the high out-of-pocket costs incurred to help pay for them help explain why **expanding governmental Medicare coverage to include prescription drugs has become such an important political issue for Americans**.
>
> "At the beginning of this year, a Gallup Poll asked Americans to rate how important it was that Congress deal with a list of issues and concerns. **Prescription drugs for older Americans appeared near the top of the list**.
>
> "Dealing with terrorism was rated most important, … but prescription drugs was part of a group of issues that came in just below terrorism, with between 40% and 50% rating each as extremely important."[125] [Emphasis added]

As Karl Rove, Republican strategist and advisor to President George W. Bush, observed:

> "In late 2003, two major domestic issues took center stage … [including] a Medicare prescription drug benefit."[126]

Four factors converged to elevate the political importance of the prescription drug issue in 2003:

- A high percentage (86%) of senior citizens used prescription drugs.
- Voter turnout was highest among the senior-citizens age group.
- A presidential election was less than a year away.
- The battleground states of Florida and Pennsylvania contained especially high percentages of senior citizens. The fact that 537 votes in Florida had made George W. Bush President in 2000 was never far from the Bush Administration's thinking.

With Republicans controlling Congress and President George W. Bush in the White House, the public was looking to the Republican Party to address the issue.

However, the pending $400 billion prescription drug bill was the largest and most

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[125] Newport, Frank. 2003. Americans Favor Concept of Prescription Drug Coverage: Almost 9 in 10 seniors now use prescription drugs. *Gallup News Service*. December 3, 2003. https://news.gallup.com/poll/9826/americans-favor-concept-prescription-drug-coverage.aspx

[126] Rove, Karl. 2010. *Courage and Consequence: My Life as a Conservative in the Fight*. New York, NY: Threshold Editions. Page 372.

costly new federal social program since the 1960s. The bill created an enormous unfunded ongoing expense that was going to greatly enlarge the federal deficit and national debt.

Rove summarized the challenge of getting a Republican-controlled Congress to pass a program such as the proposed prescription drug program:

> "Some GOP members of Congress opposed the drug program because they believed it enlarged the welfare state."[127]

Indeed, one could hardly imagine a legislative proposal less in keeping with the long-standing principles of the party that controlled the White House and Congress at the time.

After considerable White House lobbying of Congress, the prescription drug bill survived a preliminary House roll call in the summer by one vote.

The final House debate started just before 10 P.M. on Friday November 21, 2003.[128]

> "Before last night's debate began, GOP **House leaders spent the day racing to cajole a skeptical core of conservatives** and other party members who reluctantly supported the original Medicare legislation that passed the chamber in June by one vote.
>
> "**The White House, hoping to tout a new Medicare law in President Bush's campaign next year**, applied similar pressure. Bush telephoned 'more than a handful' of House members from Air Force One as he returned from Britain, a White House spokesman said. And last night, Health and Human Services Secretary Tommy G. Thompson came to the Capitol to lobby in person for the measure's passage."[129] [Emphasis added]

Shortly after 3 A.M. on Saturday morning, the Speaker *Pro Tem* announced that there would be a

> "15-minute vote on adoption of the conference report."[130]

However, fifteen minutes was nowhere near enough time for the Republican leadership to round up the votes from reluctant conservatives. As Rove wrote:

> "The vote in the House on the night of November 21 took place as Bush returned from a visit to London.… He phoned wavering undecided congressmen from Air Force One high over the Atlantic.… The House finally voted between 3 A.M. and 5:55 A.M. on the morning of November 22.[131]

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[127] Rove, Karl. 2010. *Courage and Consequence: My Life as a Conservative in the Fight*. New York, NY: Threshold Editions. Page 373.

[128] *Congressional Record*. November 21, 2003. Pages H12230–H12297. https://www.govinfo.gov/content/pkg/CREC-2003-11-21/pdf/CREC-2003-11-21.pdf

[129] Goldstein, Amy and Dewar, Helen. 2003. House Set to Vote on Drug Bill. *Washington Post*. November 22, 2003. https://www.washingtonpost.com/archive/politics/2003/11/22/house-set-to-vote-on-drug-bill/f7359e75-0e53-4f73-b6f0-ae2160d64cc7/

[130] *Congressional Record*. November 21, 2003. Page H12295. https://www.govinfo.gov/content/pkg/CREC-2003-11-21/pdf/CREC-2003-11-21.pdf

[131] Rove, Karl. 2010. *Courage and Consequence: My Life as a Conservative in the Fight*. New York, NY: Threshold Editions. Page 373.

After the roll call was kept open for almost three hours, the bill passed the House by a 220–215 margin.

Congressman Steny Hoyer (D–Maryland) said:

> "This vote has now been held open longer than any vote that I can remember. I have been here 23 years."
>
> "Just as you cannot say on Tuesday of Election Day, we will keep the polls open for 15 more hours until we get the result we want, you ought not to be able to do it here."
>
> "Arms have been twisted and votes changed.[132]

Conservative Republican Congressman Tom Tancredo of Colorado was more direct in describing the passage of the bill:

> "**Today the chase for electoral votes is a force for corruption and special-interest payoffs**. I will never forget the torture of sitting in the House and watching as **our 'leadership' went about threatening, bribing and breaking arms of my colleagues until they got the requisite number of votes to pass Bush's trillion-dollar Medicare prescription drug plan**. A bigger piece of garbage I have never seen—especially one being pushed by the Republican Party.
>
> "One could rationally ask **why, in heaven's name, the party of smaller government would push so hard for what was, at the time, the biggest increase in government since the creation of Medicare**. Alas the reason was crystal clear: **Bush needed Florida for his reelection**.
>
> "I wish I could say that was the only time something like that happened, but, of course, it's not. **It is part of the routine practice of buying electoral votes.** I am sick of it. **Whether it's buying Pennsylvania's electoral votes with steel tariffs or Ohio's with 'No Child Left Behind,'** it all stinks to high heaven.…"[133] [Emphasis added]

As H.L. Mencken reportedly said:

> "In politics, a man must learn to rise above principle."

Steel quotas in 2002

Medicare Part D is not the only instance when the long-standing principles and positions of a political party conflicted with the political necessities imposed by the state-by-state winner-take-all method of electing the President.

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[132] *Congressional Record*. November 21, 2003. Page H12296. https://www.govinfo.gov/content/pkg/CREC-2003-11-21/pdf/CREC-2003-11-21.pdf

[133] Tancredo, Tom. 2011. Should every vote count? *WND*. November 11, 2011. http://www.wnd.com/index.php?pageId=366929

In March 2002, President George W. Bush, the free-trade President from the free-trade party, decided to impose steel quotas.

The quotas were set to last for a three-year period (that is, until shortly after the upcoming November 2004 presidential election).

Forbes magazine described the steel quotas as

> "**seeking political advantage in steel-industry states such as Pennsylvania and West Virginia**."[134,135] [Emphasis added]

As the *New York Times* reported in an article entitled "U.S. Admits That Politics Was Behind Steel Tariffs"

> "The United States trade representative, Robert B. Zoellick, told Brazilian business leaders today that **domestic politics was behind the new American tariffs on steel imports**."[136] [Emphasis added]

The Tax Foundation found:

> "If [the 2002] round of steel tariffs has anything to teach us, it is that the long-term impact of tariffs are higher prices and … lost business, reduced employment, and slower economic growth."[137,138]

The *Washington Post* reported:

> "George W. Bush put tariffs on a lot of steel imports in March 2002. Top Bush administration officials now say that was a mistake."
>
> "'I don't think it was smart policy to do it, to be honest,' said Andrew H. 'Andy' Card Jr., Bush's chief of staff from 2001 to 2006. 'The results were not what we anticipated in terms of its impact on the economy or jobs.'"[139]

As Senior Editor of the *National Review* Ramesh Ponnuru later wrote:

> "Bush's **steel tariffs, though widely judged to have been an economic failure, may have helped him** narrowly carry Ohio, and thus **win reelection, in 2004**."

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[134] *Forbes*. November 11, 2003.

[135] West Virginia was a battleground state in 2004 and received 10 general-election campaign events that year. See section 1.2.5.

[136] Rich, Jennifer L. New York Times. U.S. Admits That Politics Was Behind Steel Tariffs. March 14, 2002. http://www.nytimes.com/2002/03/14/business/us-admits-that-politics-was-behind-steel-tariffs.html

[137] York, Erica. 2018. Lessons from the 2002 Bush Steel Tariffs. Tax Foundation. March 12, 2018. https://taxfoundation.org/lessons-2002-bush-steel-tariffs/

[138] Francois, Joseph and Baughman, Laura M. 2003. The Unintended Consequences of U.S. Steel Import Tariffs: A Quantification of the Impact During 2002. February 7, 2003. http://www.tradepartnership.com/pdf_files/2002jobstudy.pdf

[139] Heather Long. 2018. Remember Bush's 2002 steel tariffs? His chief of staff warns Trump not to do the same. *Washington Post*. March 6, 2018. https://www.washingtonpost.com/news/wonk/wp/2018/03/06/remember-bushs-2002-steel-tariffs-his-chief-of-staff-warns-trump-not-to-do-the-same/

> **"The political virtue of tariffs is that while the costs may exceed the benefits, the costs are diffused and the benefits concentrated**."[140] [Emphasis added]

Obama's auto industry bailout

President Barack Obama's auto bailout is another example of a policy in which "the costs are diffused and the benefits concentrated."[141]

As Professors Douglas L. Kriner and Andrew Reeves wrote in *The Particularistic President*:

> "As the [2012] election year began, **the auto bailout was hardly popular nationwide**. A February 2012 Gallup poll showed only 44 percent of Americans approving 'of the financial bailout for US automakers that were in danger of failing,' contrasted with 51 disapproving…. **But things were different in Ohio. … The November election exit polls showed nearly 60 percent of Ohio voters supporting the bailouts, and of those supporters, roughly three-quarters voted to reelect the president**."[142] [Emphasis added]

Kriner and Reeves described the political environment leading up to Obama's 2012 re-election campaign:

> "In 2004, President George W. Bush narrowly won reelection by a 286–251 votes in the Electoral College. Ohio's twenty hotly contested electoral votes provided the slender margin of victory."
>
> "[In 2012] the country was divided, with most states either clearly blue or plainly red. **Ohio … stood to play a deciding role in the upcoming [2012] election**." [Emphasis added]

In *Presidential Pandering*, Brian Faughnan and John Hudak discussed the bailout of the automobile industry during President Obama's first term:

> **"The focus of the program—helping auto manufacturers—involved easily identifiable electoral implications…. The benefits of action were particularly concentrated in blue collar states in the Midwest such as Ohio, Indiana, Pennsylvania, Michigan, Wisconsin, Minnesota, and Illinois**. These states are all competitive in presidential elections, with the exception of the president's home state, Illinois. In fact, **after examining the**

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[140] Ponnuru, Ramesh. 2018. Trump's Tariffs Could Clinch the Electoral College: His trade war may sink the economy but improve his chances in 2020. December 6, 2018. *Bloomberg*. https://www.bloomberg.com/opinion/articles/2018-12-06/trump-s-tariffs-could-clinch-electoral-college

[141] Ponnuru, Ramesh. 2018. Trump's Tariffs Could Clinch the Electoral College: His trade war may sink the economy but improve his chances in 2020. December 6, 2018. *Bloomberg*. https://www.bloomberg.com/opinion/articles/2018-12-06/trump-s-tariffs-could-clinch-electoral-college

[142] Kriner, Douglas L. and Reeves, Andrew. 2015. *The Particularistic President: Executive Branch Politics and Political Inequality*. New York, NY: Cambridge University Press. Pages 7–8.

> **strategy and results of the 2008 presidential election, the electoral appeal of the decision becomes clearer**."
>
> "This policy move signaled a forward-thinking president laying the groundwork for reelection in the environment of the permanent campaign."
>
> "The bailout funding came from a controversial executive branch decision to use the Trouble Asset Relief Program (TARP). The use of TARP for this purpose was not the original intent of Congress. In fact, TARP was passed shortly after Congress failed to approve a legislative auto bailout."[143] [Emphasis added]

Obama's 2009 auto industry bailout became doubly rewarding after the 2012 Republican presidential nominee was decided. As it happened, a few days after the November 2008 election—in the depths of the financial crisis—former Massachusetts Governor Mitt Romney wrote an op-ed in the *New York Times* entitled "Let Detroit Go Bankrupt."[144] This op-ed played a prominent role in Obama's 2012 campaign ads.

Frigate contract in Wisconsin

The executive branch of the federal government controls the awarding of a vast number of contracts of various types, including military contracts.

A June 2020 article entitled "Trump Says Wisconsin Shipyard's 'Location' Swayed Navy's Frigate Award" reported:

> "The U.S. Navy picked Fincantieri Marinette Marine to build its new $5.5 billion frigate, in part, because the ship maker is located in Wisconsin, President Donald Trump said Thursday."
>
> "'**I hear the maneuverability is one of the big factors that you were chosen for the contract**,' Trump said at an afternoon speech to shipyard workers. '**The other is your location in Wisconsin, if you want to know the truth**.'"
>
> "To win the frigate contract, Marinette Marine beat out shipyards owned by Huntington Ingalls Industries, Austal, and General Dynamics. Ingalls Shipbuilding is in **Mississippi** and Austal in **Alabama, both considered Trump strongholds going into the 2020 presidential election**."
>
> "In 2016, Trump narrowly edged out Hillary Clinton to take Wisconsin's 10 Electoral College votes."[145] [Emphasis added]

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[143] Faughnan, Brian M. and Hudak, John. 2012. *Presidential Pandering: How Elections Determine the Exercise of Executive Power in the U.S. and Colombia*. Issues in Governance Series. Brookings Institution. Number 53. November 2012. Page 5–6. https://www.brookings.edu/wp-content/uploads/2016/06/2-us-colombia-election-hudak.pdf

[144] Romney, Mitt. 2008. Let Detroit Go Bankrupt. *New York Times*. November 18, 2008. https://www.nytimes.com/2008/11/19/opinion/19romney.html?searchResultPosition=1

[145] Weisgerber, Marcus. 2020. Trump Says Wisconsin Shipyard's "Location" Swayed Navy's Frigate Award. *Defense One*. June 25, 2020. https://www.defenseone.com/policy/2020/06/trump-says-wisconsin-shipyards-location-swayed-navys-frigate-award/166460/

A defense-industry publication, *Defense One*, took note of the pre-election timing of the contract award:

> "The Navy chose the company over three rival ship makers to build the new frigate in April, months ahead of schedule. **Service officials attributed the early decision to acquisition reforms, not politics**."[146] [Emphasis added]

Tank contract in Lima, Ohio

The *Associated Press* reported in March 2019:

> "President Donald Trump on Wednesday brought his reelection campaign to Ohio—a state essential to his 2020 strategy—touring a military tank plant and telling many of its cheering workers: '**You better love me. I kept this place open**.'"
>
> "Trump visited the Lima Army Tank Plant, which had been at risk for closure but is now benefiting from his administration's investments in defense spending."
>
> "The visit is part of a 2020 Trump strategy to appear in battleground states in his official White House capacity as much as possible this year, said a person with knowledge of the plans who was not authorized to speak publicly. Trump is expected to make similar trips throughout the year.… It's a strategy employed by previous presidents."[147] [Emphasis added]

Military spending in battleground states

A *Forbes* article in 2020 entitled "Impact Of Pentagon Weapons Spending On Jobs (And Votes) In Four Battleground States" stated:

> "If recent voting patterns persist, November's presidential election is likely to be decided by results in a handful of battleground states. Because the Electoral College aggregates outcomes by state rather than nationally, a small number of voters in a few states that are up for grabs—often called 'swing states'—can determine who the next president will be."
>
> "Political sentiment in such states is often so evenly split that small things can have big consequences."
>
> "Pentagon weapons spending can potentially play such a role. Major program

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[146] Weisgerber, Marcus. 2020. Trump Says Wisconsin Shipyard's "Location" Swayed Navy's Frigate Award. *Defense One*. June 25, 2020. https://www.defenseone.com/policy/2020/06/trump-says-wisconsin-shipyards-location-swayed-navys-frigate-award/166460/

[147] Associated Press. 2019. Trump says Ohio workers 'better love me,' renews McCain feud. *Associated Press*. March 20, 2019. https://apnews.com/article/north-america-donald-trump-ap-top-news-elections-politics-4d62899f5d3845e3b9a7ce94218295e8

> awards can be worth billions of dollars and generate thousands of jobs within a state."[148]

The *Forbes* article continued by highlighting military spending in other battleground states, including:

- Arizona with Raytheon, Motorola, Hughes Aircraft, and General Dynamics,
- Florida with Northrop Grumman, Lockheed Martin, and Pratt & Whitney,
- Pennsylvania with BAE Systems and Boeing, and
- Wisconsin with Fincantieri Marinette Marine shipyard and Oshkosh Defense.

Clean energy tax credits

In addition to grants and contracts, the executive branch of the federal government can award tax credits to promote clean energy.

The *Washington Post* reported in 2012:

> "It goes without saying that, every four years, presidential candidates shower battleground states with attention. This time around, it's Obama in Ohio, doling out the perks of office—all the time."
>
> "When the Obama administration awarded tax credits to promote clean energy, the $125 million taken home by Ohio companies was **nearly four times the average that went to other states**."[149] [Emphasis added]

Ricotta cheese factory in Ohio gets the Small Business Administration's largest loan

Grants, contracts, and tax credits are not the only things controlled by the Executive Branch of the federal government.

In 2011, Miceli's Dairy Products of Cleveland, Ohio, received a Small Business Administration loan for an

> "expansion of its operation … that will add 60 workers to its 138-employee work force within five years.
>
> "The first phase … is expected to be done by mid-2012, **enabling the company to double production of ricotta cheese**. The second phase, to be completed a few years later, includes a new mozzarella and provolone factory.
>
> "Those plans became a reality this week when the company was awarded a $5.49 million loan through the Small Business Administration's 504 program,

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[148] Thompson, Loren. 2020. Impact Of Pentagon Weapons Spending On Jobs (And Votes) In Four Battleground States. *Forbes*. July 30, 2020. https://www.forbes.com/sites/lorenthompson/2020/07/30/impact-of-pentagon-weapons-spending-on-jobs-and-votes-in-four-battleground-states/#6a7dccb742e4

[149] Markon, Jerry and Crites, Alice. 2012. Obama showering Ohio with attention and money. *Washington Post*. September 25, 2012. https://www.washingtonpost.com/politics/decision2012/obama-showering-ohio-with-attention-and-money/2012/09/25/8ab15a68-019e-11e2-b260-32f4a8db9b7e_story.html

> which helps small businesses with plant and equipment expansion. **The loan is the largest in the program's history**."[150] [Emphasis added]

President Obama, joined by several members of his cabinet[151] for a visit to Ohio in 2011, described the loan as:

> "'**One of the tastiest investments the government has ever made,'** the president joked as he mentioned the dairy and other businesses his administration has helped in the state."[152] [Emphasis added]

Rail corridors in Florida, Ohio, Wisconsin, Michigan, North Carolina, and Virginia

Shortly after President Obama took office in 2009, Congress passed the American Recovery and Reinvestment Act of 2009.

The Obama Administration awarded significant grants to 10 rail corridors in January 2010.[153]

Five of the 10 corridors were entirely or primarily in states that were closely divided battleground states at the time, including:

- Tampa–Orlando
- Cleveland–Columbus–Cincinnati[154]
- Madison–Milwaukee–Chicago
- Pontiac–Detroit–Chicago
- Raleigh—Charlotte

Concerning the new 84-mile high-speed train connecting Tampa and Orlando:

> "Critics … say **the need to link Tampa and Orlando pales in comparison with the need for** high-speed rail serving places that have received relatively little in federal economic stimulus funds for transportation projects, including **the busy Northeast rail corridor between Washington and Boston**."[155] [Emphasis added]

Eight out of nine states served by the existing Northeast rail corridor (Massachusetts,

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[150] Pledger, Marcia. 2011. Miceli Dairy Products describes plan for expansion in Cleveland. *Cleveland Plain Dealer*. January 6, 2011. https://www.cleveland.com/business/2011/01/miceli_dairy_products_describe.html

[151] CNN. Obama plugs small business at Ohio conference. February 22, 2011. http://www.cnn.com/2011/POLITICS/02/22/obama.business/index.html

[152] Markon, Jerry and Crites, Alice. 2012. Obama showering Ohio with attention and money. *Washington Post*. September 25, 2012. https://www.washingtonpost.com/politics/decision2012/obama-showering-ohio-with-attention-and-money/2012/09/25/8ab15a68-019e-11e2-b260-32f4a8db9b7e_story.html

[153] Freemark, Yonah. 2010. High-Speed Rail Grants Announced; California, Florida, and Illinois Are Lucky Recipients. *The Transport Politic*. January 28, 2010. https://www.thetransportpolitic.com/2010/01/28/high-speed-rail-grants-announced-california-florida-and-illinois-are-lucky-recipients/

[154] Markon, Jerry and Crites, Alice. 2012. Obama showering Ohio with attention and money. *Washington Post*. September 25, 2012. https://www.washingtonpost.com/politics/decision2012/obama-showering-ohio-with-attention-and-money/2012/09/25/8ab15a68-019e-11e2-b260-32f4a8db9b7e_story.html

[155] Williams, Timothy. 2011. Florida's Governor Rejects High-Speed Rail Line, Fearing Cost to Taxpayers. *New York Times*. February 16, 2011. https://www.nytimes.com/2011/02/17/us/17rail.html

Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, and the District of Columbia) have not been battleground states in any recent presidential election.[156]

Although Pennsylvania, the ninth state in the so-called Acela corridor, is sometimes a battleground state in presidential elections, it was not so in the immediately upcoming 2012 election. Indeed, neither President Obama nor Vice President Biden conducted any general-election events in Pennsylvania in 2012, and they won the state handily.

Interstate 11

The quality of the highway connection between Las Vegas and Phoenix is of considerable importance to the battleground states of Arizona and Nevada.

Today, Interstate 11 is a 23-mile segment of modern highway running from the suburbs of Las Vegas to the Arizona border. The remaining 250 miles to Phoenix are served by decidedly lower-grade roads, such as route 93.

In 2016, Donald Trump campaigned at a rally in Phoenix promising:

> "My infrastructure plan will provide help for projects like the proposed Interstate 11, which would connect Phoenix with Las Vegas and other areas."[157]

The *Las Vegas Sun* reported that Trump repeated that promise to a large audience in a Nevada casino (an obvious beneficiary of tourism from Arizona):

> "**Republican presidential nominee Donald Trump put a Nevada spin on his traditional stump speech** while rallying supporters today on the Las Vegas Strip, just nine days before Election Day.
>
> "Trump, speaking to a crowd of about 8,400 at the Venetian, **promised to prioritize infrastructure development, such as the Interstate 11 project** here in Nevada … and said he would make the military purchase new fighter jets while mentioning Nellis Air Force Base."[158] [Emphasis added]

NAFTA treaty revisions and Wisconsin dairy farmers

The Canadian Broadcasting Corporation reported in September 2020:

> "Wisconsin, a swing state, will be decided not just by whether Trump wins a majority of votes in the rural, milk-producing areas—as he almost certainly will.
>
> "The other factor is whether Trump racks up enough of a lead here to offset his likely deficits in urban areas, like Milwaukee and Madison.
>
> "**And the dairy deal with Canada is central to Trump's reelection message here**.

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[156] Amtrak Acela. https://www.amtrak.com/acela-train

[157] Trump, Donald. Prepared remarks. Phoenix, Arizona. October 29, 2016.

[158] Messerly, Megan. 2016. Trump plugs Interstate 11, Nellis Air Force Base during Las Vegas rally. *Las Vegas Sun*. October 30, 2016. http://lasvegassun.com/news/2016/oct/30/trump-plugs-interstate-11-nellis-air-force-base-du/

> "In speeches last month in different parts of the country, Trump promoted the new NAFTA as a turning point—he said, in one, that Canada used to take advantage of the U.S. when it came to dairy, 'but not anymore.'"[159] [Emphasis added]

Tariffs in 2017–2020

In a 2018 article entitled "Trump's Tariffs Could Clinch the Electoral College," *National Review* senior editor Ramesh Ponnuru astutely observed why the tariff issue is particularly attractive to presidential candidates:

> "The political virtue of tariffs is that while the costs may exceed the benefits, **the costs are diffused and the benefits concentrated**."
>
> "**The benefits can be concentrated geographically … in an electorally advantageous way.** Trump will probably be following a narrow path to re-election in the Electoral College, one that again runs through the industrial Midwest. He will need the renewed strong support of working-class white voters in Michigan, Wisconsin and Pennsylvania (and may make a play for their counterparts in Minnesota).… These voters are not overjoyed by the Republican tax cuts that Trump signed into law or the deregulation his administration has implemented. **Tariffs are one of the few policies Trump has pursued that directly benefit a lot of them—one of the few ways that he can illustrate that he is fighting for their material interests**."[160] [Emphasis added]

The current state-by-state winner-take-all method of awarding electoral votes provides an effective mechanism for surgically targeting the political rewards of campaign promises concerning tariffs (or a sitting president's actions) for particular states.

Ban on off-shore oil drilling in Florida

The ban on off-shore drilling in Florida provides another example of the abandonment during a presidential campaign of a political party's long-standing position on an issue of concern to a closely divided battleground state.

A September 2020 *Politico* article reminded readers of the

> "**vows by a series of Republican presidents—Ronald Reagan, George W. Bush and now Trump—to open up more of the U.S. coast to drilling to foster American energy independence**."[161] [Emphasis added]

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[159] Panetta, Alexander. 2020. How Trump's dairy deal with Canada is viewed in swing-state Wisconsin. *Canadian Broadcasting Network News*. September 13, 2020. https://www.cbc.ca/news/world/wisconsin-dairy-canada-1.5718963

[160] Ponnuru, Ramesh. 2018. Trump's Tariffs Could Clinch the Electoral College: His trade war may sink the economy but improve his chances in 2020. December 6, 2018. *Bloomberg*. https://www.bloomberg.com/opinion/articles/2018-12-06/trump-s-tariffs-could-clinch-electoral-college

[161] Lefebvre, Ben and Colman, Zack. 2020. Trump expands oil drilling moratorium for Florida. *Politico*. September 8, 2020. https://www.politico.com/news/2020/09/08/trump-oil-drilling-florida-410042

The article then reported:

> "President Donald Trump announced on Tuesday a decade-long ban on oil drilling off the coast of Florida, Georgia and South Carolina—**a decision that surprised energy industry executives by reversing the administration's earlier pledges to open those waters to exploration**. The move, announced at a campaign appearance in Jupiter, Fla., represents an election-year victory for drilling opponents in the crucial presidential swing state, where fear of oil slicks fouling the beaches has run high for decades among people in both political parties." [Emphasis added]

Politico continued:

> "'It's a complete ambush,' said one industry official.… 'Nobody knows where this came from. It totally seems like a campaign sort of thing.'"

Yucca Mountain in Nevada

Nevada provided yet another example in 2020 of a presidential candidate abandoning his own party's long-standing position in trying to win a closely divided battleground state.

Prominent Nevada Democrats have long opposed the storage in Nevada of highly toxic nuclear waste produced in other states.[162]

As *Politico* reported in February 2020:

> "**President Donald Trump is seeking to woo Nevada voters by abandoning the GOP's decades of support for storing the nation's nuclear waste under a mountain northwest of Las Vegas**."
>
> "Trump, who is targeting a state that he narrowly lost to Hillary Clinton in 2016, **announced the turnabout** in a tweet this month, writing:
>
> 'Nevada, I hear you on Yucca Mountain and my Administration will RESPECT you!'
>
> "He also pledged to find 'innovative approaches to find a new place to store the 90,000 metric tons of nuclear plant leftovers stranded at 120 temporary storage sites—an impasse that is on course to cost taxpayers tens of billions of dollars.
>
> "The statement surprised people involved in the debate because **developing a permanent nuclear repository at Yucca has long been a priority of Republicans, and even Trump's own budget proposals in previous years had sought money to keep it alive**."[163] [Emphasis added]

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[162] Ritter, Ken. 2022. Nevada wants feds to declare mothballed nuke dump plan dead. *Associated Press*. September 21, 2022. https://apnews.com/article/health-mountains-nevada-congress-23f08c52363ccfb828eff7ce10153ba1?utm_source=National+Conference+of+State+Legislatures&utm_campaign=8a27aeef88-Today_Sept_23&utm_medium=email&utm_term=0_1716623089-8a27aeef88-377929016

[163] Wolff, Eric and Adragna, Anthony. 2020. Trump's Nevada play leaves nation's nuclear waste in limbo. *Politico*. February 22, 2020. https://www.politico.com/news/2020/02/22/trump-nevada-nuclear-waste-yucca-mountain-116663

Great Lakes Restoration Initiative

In 2019, *Crain's Cleveland Business* reported on President Donald Trump's

> "**change of heart on the Great Lakes Restoration Initiative**, which was launched in 2010 to accelerate efforts to protect and restore the Great Lakes, which collectively represent the country's largest system of fresh surface water.
>
> "Two months ago, the president wanted a 90% cut in the program. Plus, the Trump administration is hostile to all sorts of other environmental programs and regulations.… **Of course, he's just trying to collect more votes in the electoral vote-rich industrial Midwest**.
>
> "On Monday, May 13, Trump tweeted this: 'We must protect our Great Lakes, keeping them clean and beautiful for future generations. That's why I am fighting for $300 million in my updated budget for the Great Lakes Restoration Initiative.' **He made a similar promise about the Everglades, in the swing state of Florida**."[164] [Emphasis added]

No Child Left Behind exemptions

A *Wall Street Journal* commentary noted the pattern in federal exemptions from the No Child Left Behind law:

> "The purple state balance of the Obama administration's exemptions appears to be based on a '**no swing state left behind**' calculation."[165] [Emphasis added]

Superfund enforcement actions

In the same vein, Professor Kevin Stack of Vanderbilt University and Dr. John Hudak uncovered a similar relationship between the location of Superfund enforcement actions and a state's battleground status.[166]

FEMA and Hurricane Frances in Florida in 2004

An article entitled "Did FEMA 'Buy' Votes for Bush?" said:

> "Possibly the most egregious of [FEMA's] largely under-reported fiascos was the revelation that FEMA made 31 million dollars in questionable payments to residents of Florida's Miami-Dade County for damage from Hurricane Frances in September 2004, even though the storm caused only minimal damage in that area.

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[164] Suttell, Scott. 2019. Trump takes a 2020 turn into environmental protection—at least with respect to the Great Lakes Restoration Initiative. *Crain's Cleveland Business*. May 17, 2019. https://www.crainscleveland.com/scott-suttell-blog/trump-takes-2020-turn-environmental-protection-least-respect-great-lakes

[165] Ross, Dana. President Obama's 'No swing state left behind' policy. *Wall Street Journal On-Line*. June 5, 2012.

[166] Hudak, John Joseph and Stack, Kevin M. *The President and the Politics of Agency Enforcement: The Case of Superfund*. Conference draft. August 19, 2012.

> "J. Robert Hunter, director of insurance for the Consumer Federation of America, who was a top federal flood-insurance official in the 1970s and 1980s, said that **the Frances overpayments 'are questionable given the timing of the election and Florida's importance as a battleground state**.'
>
> "According to a report by the Department of Homeland Security's Inspector General (IG), more than eight million dollars was given to 4,300 people to rent temporary housing even though they had not asked for the money, and in many cases their homes were almost completely undamaged by the storm."
>
> "The [Senate Homeland Security and Governmental Affairs] Committee's chairperson, Sen. Susan Collins, a Maine Republican, said, 'FEMA paid to replace thousands of televisions, air conditioners, beds and other furniture, as well as a number of cars, without receipts, or proof of ownership or damage, and based solely on verbal statements by the residents, sometimes made in fleeting encounters at fast-food restaurants. It was a pay first, ask questions later approach,' Collins added.[167] [Emphasis added]

Immigration policy and prosecutorial discretion

In 2012, President Obama upstaged one of his possible vice-presidential opponents in the upcoming election (Senator Marco Rubio) at a moment when both men were seeking to "pander to [the same] key electoral constituency."[168]

President Obama was the first to announce his support for the Deferred Action for Childhood Arrivals (DACA) policy, which then became firmly associated in the public mind with Obama.

Writing in the Brookings Institution's Issues in Governance Series, Brian Faughnan and John Hudak described the situation in the summer of 2012:

> "There is no question that President Obama's strategy for reelection includes an emphasis on support and turnout among Latinos. Moreover, Latino populations are growing across the country and compose large segments of the populations of several swing states. There are 7.7 million Latinos in the nine swing states that President Obama and Governor Romney are targeting. In Colorado, Latinos make up over 18% of the population. Florida's population is 21% Latino. And more than 1 in 4 Nevadans are Latino."
>
> "In several states, the Obama campaign believes that Latino support will make the difference in capturing electoral votes."

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[167] Fisher, William. 2005. Did FEMA "Buy" Votes for Bush?" Inter Press Service. September 12, 2005. www.ipsnews.net, http://www.ipsnews.net/2005/09/politics-us-did-fema-buy-votes-for-bush

[168] Faughnan, Brian M. and Hudak, John. 2012. Presidential Pandering: How Elections Determine the Exercise of Executive Power in the U.S. and Colombia. Issues in Governance Series. Brookings Institution. Number 53. November 2012. Pages 7–8. https://www.brookings.edu/wp-content/uploads/2016/06/2-us-colombia-election-hudak.pdf

> "On June 15, 2012, Homeland Security Secretary Janet Napolitano, at the direction of the White House, issued a memorandum … [declaring] that undocumented individuals can apply to stay in the US without threat of deportation if they meet specific criteria.… The goal of this order was, in President Obama's words, to avoid punishing people who, 'studied hard, worked hard, maybe even graduated at the top of [their] classes—a clear reference to a story earlier in the year about an undocumented Latina student at a Miami-area high school."
>
> "While the electoral implications of this move are clear *prima facie*, the precise timing of this memorandum provides additional evidence. **The administration issued the memorandum days before Republican Senator and then-Vice-Presidential prospect Marco Rubio (FL) planned a public introduction of similar legislation. The Obama administration capitalized on the [power of] prosecutorial discretion in order to stop a Republican Senator—a Latino himself—from introducing legislation that panders to this key electoral constituency.**[169] [Emphasis added]

Cuban policy

United States policy toward the small country of Cuba is perennially far more prominent in presidential campaigns than the country's foreign policy toward major trading partners and major military powers.

As *The Hill* reported in 2020:

> "Cuban Americans are a vital constituency in Florida. There are more than 1 million Cuban Americans in the state, the vast majority of whom either themselves fled the Caribbean island after the 1959 revolution that brought Fidel Castro to power or are descended from those who did so.
>
> "**Cuban Americans typically cast around 6 percent of all votes in Florida—a state that has been decided by 3 points or less** in the three most recent presidential elections.
>
> "Cuban emigrés have traditionally leaned heavily Republican, unlike most other Latino groups. There are signs this is changing in younger generations, but exit polls suggest Trump won a majority of the Cuban American vote in Florida in 2016.
>
> "The [2020 Republican National] Convention has encompassed concerted efforts to hold on to that edge; **Castro got prime-time mentions** on both

[169] Faughnan, Brian M. and Hudak, John. 2012. Presidential Pandering: How Elections Determine the Exercise of Executive Power in the U.S. and Colombia. Issues in Governance Series. Brookings Institution. Number 53. November 2012. Pages 7–8. https://www.brookings.edu/wp-content/uploads/2016/06/2-us-colombia-election-hudak.pdf

> Monday and Tuesday—**an accomplishment, of sorts, for a leader of a nation of 12 million people who died in 2016**."[170] [Emphasis added]

Steve Chapman wrote in 2014:

> "**What does the Electoral College have to do with our shunning of Cuba? Plenty**. Cuban-Americans make up just 0.6 percent of the American population—hardly enough, you'd think, to warrant much notice from politicians. But they have nonetheless been able to dictate Washington's stance on Cuba.
>
> "Why? First, because for a long time they were united in their strong antipathy toward the Castro regime. Second, because they let candidates know any deviation on that issue was a deal-breaker.
>
> "None of this would have mattered, though, except for the Electoral College. Cuban-Americans are concentrated in Florida, where they make up more than 6 percent of the population—enough to decide an election. It's a crucial swing state that is rich in electoral votes.
>
> "**Presidential candidates of either party knew that if they urged a less hostile policy toward the Cuban regime, they would lose the Cuban-American vote, which could mean losing Florida, which could mean losing the election. They also knew that it cost them nothing to appease the Cuba lobby, because the issue is of minor importance to anyone else.**
>
> "So they did the politically prudent thing. As Texas A&M University political scientist George C. Edwards III, author of *Why the Electoral College Is Bad for America*, told me, 'The Electoral College allowed a minority in a large state to determine U.S. foreign policy.'"[171] [Emphasis added]

Eric Black wrote in 2012:

> "A first-term president who expects to have a tough reelection fight (as they all at least expect to) but who wanted to establish diplomatic and trade relations with Cuba (broken in 1960) would have to consider the possibility that such a policy might cost him Florida and therefore a second term. Perhaps this helps explain why long after Washington normalized relations with the Soviet Union, China and other governments that formerly or presently call themselves Communists, Cuba remains on the do-not-call list."[172]

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[170] Stanage, Niall. 2020. Trump uses convention to target key states. *The Hill*. August 27, 2020. https://thehill.com/homenews/the-memo/513893-the-memo-gop-uses-convention-to-target-key-states?fbclid=IwAR3AZ88HcrXXwQiPcudtVPbqKGQ3HSrTORTReDzdVKlOrxa7NyxwjcRGT5M

[171] Chapman, Steve. 2014. The Strange Source of Our Cuba Policy: What does the Electoral College have to do with our shunning of Cuba? Plenty. December 22, 2014. *Reason*. http://reason.com/archives/2014/12/22/the-strange-source-of-our-cuba-policy

[172] Black, Eric. 2012. 10 reasons why the Electoral College is a problem. *MinnPost*. October 16, 2012. https://www.minnpost.com/eric-black-ink/2012/10/10-reasons-why-electoral-college-problem

Lobster tariffs and the European Union

Since 1969, Maine has awarded one electoral vote to the presidential candidate who receives the most popular votes in each of its two congressional districts (while awarding the state's two senatorial electoral votes to the statewide winner).

For the 11 presidential elections between 1972 and 2012, all four of Maine's electoral votes went to the same presidential candidate.

Although the state of Maine as a whole was not competitive in either 2016 or 2020, the state's 2nd congressional district (the northern part of the state) was closely divided. In fact, Donald Trump won the 2nd district in both elections (while the Democratic presidential nominee won the state's remaining three electoral votes).

In an article entitled "How Trump's attention to Maine's lobster industry might win him an electoral vote," the *Bangor Daily News* reported in August 2020:

> "**When President Trump sat down with fishermen at the Bangor airport** in June, he promised several actions to shore up the seafood industry. That included trying to lower European tariffs on American lobster that put Maine boats at a competitive disadvantage with their Canadian counterparts.
>
> "Political observers say that by identifying himself with the iconic, independent lobster harvester, Trump could burnish his image as a fighter for the beleaguered working class, and maybe also bolster his chances of winning a key electoral vote from Maine's red-leaning 2nd Congressional District."
>
> "Last week, Trump delivered. U.S. and EU trade negotiators announced a deal that, if ratified, would end the tariffs on lobster sold to member countries."[173] [Emphasis added]

Department of Transportation discretionary grants

The Department of Transportation administers a discretionary grants program for transportation infrastructure called BUILD—Better Utilizing Investments to Leverage Development.[174]

In a September 2020 article entitled "Potential swing states cash in with DOT's latest grant round," *Politico* reported that 9.1% of discretionary grants went to places with 1.4% of the nation's population:

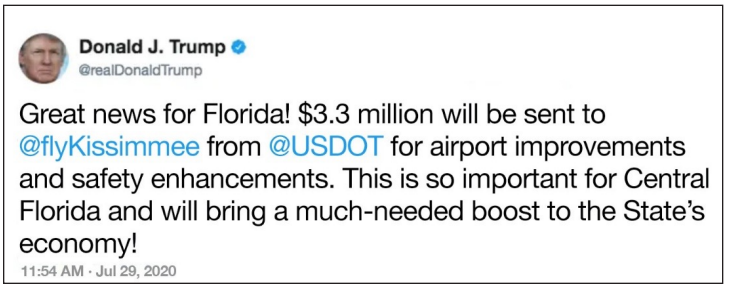
> "Coincidentally or not, Iowa, with less than 1 percent of the U.S. population, received 4.6 percent of the BUILD grant cash. **Maine, with just 0.4 percent of the nation's population, received 4.5 percent of the money for six**

[173] Bever, Fred. 2020. How Trump's attention to Maine's lobster industry might win him an electoral vote. *Bangor Daily News*. August 25, 2020. https://bangordailynews.com/2020/08/25/politics/how-trumps-attention-to-maines-lobster-industry-might-win-him-an-electoral-vote/

[174] Department of Transportation. Better Utilizing Investments to Leverage Development (BUILD). Accessed August 20, 2022. https://www.transit.dot.gov/funding/grants/better-utilizing-investments-leverage-development-build-transportation-grants-program

> **bridge projects, primarily in the rural part of the state [where there is an] independently counted electoral vote**."[175] [Emphasis added]

President Trump tweeted about grants for Florida airports.[176]



President Trump then tweeted about grants for Ohio airports.[177]

President Trump then tweeted about airport grants in the battleground state of Pennsylvania.[178]

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[175] Snyder, Tanya. 2020. Potential swing states cash in with DOT's latest grant round. *Politico*. September 17, 2020. https://www.politico.com/news/2020/09/17/potential-swing-states-cash-in-with-dots-latest-grant-round-417057?fbclid=IwAR17G6T5p8rJGL91TBggeZ-PelsoMcUvDiXhJAp7SGWo7o9JXbtLASM6Cpo https://www.politico.com/news/2020/09/17/potential-swing-states-cash-in-with-dots-latest-grant-round-

[176] Trump, Donald J. 2020. Tweet. July 29, 2020. https://twitter.com/realDonaldTrump/status/1288503057999749121

[177] Trump, Donald J. 2020. Tweet. July 29, 2020. https://twitter.com/realDonaldTrump/status/1288503162404397061

[178] Trump, Donald J. 2020. Tweet. July 29, 2020. https://twitter.com/realDonaldTrump/status/1288502990798639105

Infrastructure projects

Airports are not the only infrastructure projects that Presidents talk about in election years. In January 2024, the *New York Times* reported:

> "President Biden, who traveled to the shores of a bay near Lake Superior on Thursday to stand at the foot of the Blatnik Bridge, a structure that his administration said would have failed by 2030 without a $1 billion infusion provided by the bipartisan infrastructure law that Mr. Biden championed."
>
> "Mr. Biden and his advisers believe projects like the Blatnik, taking place in the backyards of Americans living **in battleground states like Wisconsin**, could be enough to bolster optimism and overcome pervasive skepticism about the state of the economy.
>
> "In his event, Mr. Biden talked about **the $6.1 billion that had been invested in Wisconsin** and the $5.7 billion in Minnesota, located just over the bridge, which supports agriculture, shipping and forestry industries in the upper Midwest."[179] [Emphasis added]

Hurricane Maria in Puerto Rico

Puerto Ricans are American citizens. When they reside in Puerto Rico, they have no vote for President. However, when they move to any of the 50 states or the District of Columbia, they become eligible to vote.

Large numbers of Puerto Ricans moved to Florida after Hurricane Maria in 2017—increasing Florida's population by about five percent.

In September 2020, the *Washington Post* reported:

> "After Hurricane Maria devastated Puerto Rico in 2017, President Trump repeatedly balked at the idea of sending more aid to the U.S. territory, citing its demonstrated history of corruption.
>
> "On Friday, Trump apparently got over whatever hang-ups he had about that corruption at an extremely convenient time—for Trump.
>
> "The administration just announced it has released $13 billion in Federal Emergency Management Agency (FEMA) grants for Puerto Rico's education and electrical systems."
>
> "The grants come a month and a half before the 2020 election, with polls suggesting Trump's opponent Joe Biden lags behind past Democratic candidates on the Hispanic vote—and with Puerto Rican voters playing a particularly large role in the all-important swing state of Florida, which polls show currently rests on a razor's edge.[180]

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[179] Rogers, Katie. 2024. Taking on Trump, Biden Promotes 'Infrastructure Decade' in Wisconsin. *New York Times*. January 25, 2024. https://www.nytimes.com/2024/01/25/us/politics/taking-on-trump-biden-promotes-infrastructure-decade-in-wisconsin.html

[180] Blake, Aaron. 2020. Trump's Puerto Rico aid reversal is very conveniently timed—for Trump. *Washington Post*. September 18, 2020. https://www.washingtonpost.com/politics/2020/09/18/trumps-puerto-rico-aid-reversal-is-very-conveniently-timed-trump/

No-sail order for cruise ships during COVID

In the midst of the COVID pandemic in September 2020,

> "The White House has blocked a new order from the Centers for Disease Control and Prevention to keep cruise ships docked until mid-February, **a step that would have displeased the politically powerful tourism industry in the crucial swing state of Florida**.
>
> "The current 'no sail' policy, which was originally put in place in April and later extended, is set to expire on Wednesday. Dr. Robert R. Redfield, the director of the C.D.C., had recommended the extension, worried that cruise ships could become viral hot spots, as they did at the beginning of the pandemic."[181] [Emphasis added]

The early 2024 campaign

The opening months of the 2024 presidential campaign produced a number of examples of how an incumbent President pays close attention to battleground states.

A *Politico* article in 2024 entitled "Biden Deploys $6.6B to Boost Global Chipmaker in Key Swing State" describes a grant under the CHIPS Act to the Taiwan Semiconductor Manufacturing Company for a new plant in the closely divided state of Arizona.[182]

A *New York Times* article in 2024 entitled "Federal Money Is All Over Milwaukee. Biden Hopes Voters Will Notice" describes the Biden Administration's activities in the closely divided state of Wisconsin.[183]

A *Politic*o article in 2024 entitled "The Rust Belt road to the White House" reported:

> "It's long been assumed in Washington that President Joe Biden's international trade policy is driven almost exclusively by electoral anxiety — specifically, anxiety over the Rust Belt states that Donald Trump flipped in 2016.
>
> "Early in the administration, we reported that U.S. Trade Representative Katherine Tai told her colleagues that she believes free trade policies—specifically, the defunct Trans-Pacific Partnership—were a key reason Hillary Clinton's Midwestern 'blue wall' came crumbling down during that election.
>
> "That fear has animated just about every trade policy decision she and the White House have made since—from preserving Trump's tariffs on China to walking away from their own Asia-Pacific trade talks last year at the urging of Midwestern Democrats.

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[181] Kaplan, Sheila. 2020. White House Blocked C.D.C. Order to Keep Cruise Ships Docked: The C.D.C. director wanted a "no sail" order extended until February, a policy that would have upset the tourism industry in the crucial swing state of Florida. *New York Times*. September 30, 2020. https://www.nytimes.com/2020/09/30/health/COVID-cruise-ships.html

[182] Mui, Christine. 2024. Biden deploys $6.6B to boost global chipmaker in key swing state. *Politico*. April 8, 2024. https://www.politico.com/news/2024/04/08/biden-funding-taiwan-chipmaker-arizona-00150991

[183] DePillis, Lydia. 2024. Federal Money Is All Over Milwaukee. Biden Hopes Voters Will Notice. *New York Times*. May 1, 2024. https://www.nytimes.com/2024/05/01/business/economy/federal-money-milwaukee-biden.html

> "But now, as Biden nears a rematch with Trump, that electoral angst over trade is reaching a fever pitch—both for the president and the Midwestern senators who will join him on the ballot this November.
>
> "The latest flashpoint: U.S. Steel's proposed acquisition by Japanese rival Nippon Steel."[184]

In a March 2024 op-ed entitled "The 2024 Presidential Election Comes Down to Only Seven States." Republican strategist Karl Rove listed only Arizona, Georgia, Michigan, Nevada, North Carolina, Pennsylvania and Wisconsin as battleground states. Rove said:

> "That the 2024 race has so few battlegrounds will have huge consequences for how the election plays out. **Each candidate will concentrate his travel, organization, and hundreds of millions of dollars in advertising in those seven states**. The only reasons for either to go to non-battleground states will be to raise money, sleep in his own bed, participate in debates (if they happen) or attend events with national impact.
>
> "That there are so few battlegrounds will put more pressure on candidates to focus on issues specific to those seven states. In Michigan, they'll talk about the auto industry; in Pennsylvania, natural-gas production. In Nevada, candidates must explain their view on the Yucca Mountain nuclear-waste facility, while in Arizona, besides the border, water issues will matter."[185] [Emphasis added]

Harris' July 2024 vice-presidential choice

After Biden's unexpected withdrawal from the 2024 presidential race on July 21, 2024, Vice President Kamala Harris quickly cleared the field of potential rivals for the Democratic presidential nomination.

In reviewing Harris' possible choices for the Vice President, the *Washington Post* profiled potential running mates on July 23 and asked

> "what they would … bring to the ticket."[186]

Concerning Governor Josh Shapiro of Pennsylvania (with 19 electoral votes), the *Post* article noted:

> "Perhaps nobody in the Democratic Party right now is a bigger rising star, and **perhaps nobody on this list could do more to help Harris win lots of**

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[184] Bade, Gavin. 2024. The Rust Belt road to the White House. *Politico*. March 22, 2024. https://www.politico.com/newsletters/politico-nightly/2024/03/22/the-rust-belt-road-to-the-white-house-00148677

[185] Rove, Karl. 2024. The 2024 Presidential Election Comes Down to Only Seven States. *Wall Street Journal*. March 20, 2024. https://www.wsj.com/articles/2024-presidential-election-comes-down-to-only-seven-states-65887e6a?mod=hp_opin_pos_3#cxrecs_s

[186] Blake, Aaron. 2024. Seven options for Harris's VP pick, broken down. *Washington Post*. July 23, 2024. https://www.washingtonpost.com/politics/2024/07/23/kamala-harris-vp-pick/

> **electoral votes (19) in a key state**. Shapiro won his 2022 campaign by nearly 15 points."[187] [Emphasis added]

Concerning U.S. Senator Mark Kelly of Arizona (with 11 electoral votes), the article observed:

> "Kelly also **comes from a swing state** that Democrats won in 2020 for just the second time since 1948." [Emphasis added]

Concerning Governor Roy Cooper of North Carolina (15 electoral votes), the article said:

> "Most striking, Cooper has **won five statewide campaigns** the same years that Republicans have carried North Carolina at the presidential level. **He over-performed Biden's margin by six points in 2020**." [Emphasis added]

Concerning Governor Tim Walz of Minnesota (10 votes), the article said:

> "Minnesota is looking more competitive than usual."

Indeed, Donald Trump lost Minnesota by a slender 51%–49% vote in 2016. He has repeatedly mentioned it as a state he hoped to win in 2024. Vice President Kamala Harris' designation of Walz as her running mate likely solidified her position in Minnesota in 2024.

Bank merger in Texas in 1964

Between 1872 and 1948, Texas voted Democratic in presidential elections with the sole exception of 1928. However, it voted Republican for President in 1952 and 1956.

The selection of Texas Senator Lyndon B. Johnson to be John F. Kennedy's vice-presidential running mate at the 1960 Democratic National Convention was motivated, in large part, by the hope of returning the 24 electoral votes of Texas to the Democratic column.

That hope was realized when the Kennedy-Johnson ticket carried Texas—with 50.5% of the vote in November 1960.

As the 1964 election approached, polls indicated that Texas continued to be a closely divided battleground state. In fact, the political precariousness of Texas occasioned President Kennedy's first and tragically last campaign trip of the 1964 campaign, namely his trip to Texas on November 21 and 22, 1963.

Five weeks later—during the week after Christmas—President Johnson held a meeting at his Texas ranch with politically important Houston businessman John T. Jones, Jr.

Jones was both the president of the Houston National Bank of Commerce and the president of the state's largest newspaper—the *Houston Chronicle*.

The *Chronicle* had endorsed the Republican Nixon-Lodge ticket over the Democratic Kennedy-Johnson ticket in 1960. The paper continued as a relentless critic of Johnson after that election.

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[187] *Ibid*. All the remaining quotes in this sub-section are from the same *Washington Post* article.

As Robert Caro related in his book *The Years of Lyndon Johnson: The Passage of Power*, President Johnson told a Texas businessman involved in the December 1963 discussions between Johnson and Jones:

> "This fellow here [Jones] is important to us and **we've got to carry this state**."[188] [Emphasis added]

As it happened, Jones' bank wanted to merge with another bank in Houston.

However, earlier in 1963—before Johnson became President—both the Federal Reserve Bank and the Antitrust Division of the Department of Justice had gone on record vigorously opposing the merger because of its adverse effect on competition.

As Robert Caro relates in his book:

> "With the Federal Reserve and Justice opposed, presidential intervention would be necessary to obtain the approval. And Johnson wanted Jones to pay for the intervention—with the written guarantee of the newspaper's support."[189]

Johnson received the requested written assurance of support from the newspaper in early January 1964, and he quickly approved the bank merger.

Civil War mortality rates

In a study entitled "Political influence on civil war mortality rates: The electoral college as a battlefield,"[190] Gary M. Anderson and Robert D. Tollison

> "examine[d] the allocation of Civil War causalities across the northern states. Given that the northern troops were organized by states and that President Lincoln sought to be reelected, these authors found that northern causalities were partly determined by electoral votes in 1864. **Troops from close states were much less likely to suffer causalities**."[191] [Emphasis added]

Connection between presidential vetoes and positions of U.S. Senators from large battleground states

Broadly speaking, U.S. Senators tend to reflect the views of the voters of their state.

Almost all presidential electors (530 out of 538) are elected by the same constituencies that elect U.S. Senators.[192] That is, Presidents are elected from U.S. Senate districts (weighted by the state's number of electoral votes).

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[188] Caro, Robert C. 2012. *The Years of Lyndon Johnson: The Passage of Power*. New York, NY: Alfred A. Knopf. Page 526.

[189] Caro, Robert C. 2012. *The Years of Lyndon Johnson: The Passage of Power*. New York, NY: Alfred A. Knopf. Page 524.

[190] Anderson, Gary M. and Tollison, Robert D. 1991. Political influence on civil war mortality rates: The electoral college as a battlefield. *Defence Economics*. Volume 2. Number 3. Pages 219–233. http://dx.doi.org/10.1080/10430719108404694

[191] Voting in U.S. Presidential Elections. *What When How*. http://what-when-how.com/public-choice/voting-in-u-s-presidential-elections-public-choice/ Accessed August 18, 2022.

[192] The eight presidential electors whose voters do not coincide with state boundaries are in the District of Columbia (with three electoral votes), Maine (where two electors are elected by congressional district), and Nebraska (where three electors are elected by congressional district).

Admittedly, numerous factors influence whether a President signs or vetoes a bill passed by Congress.

Nonetheless, Professors Grier, McDonald, and Tollison[193] explored the correlation between a sitting President's decision to sign or veto a bill and the positions taken on the bill by Senators from closely divided battleground states.

> "[They studied whether] winner-take-all voting in states and the unequal distribution of electoral votes across states in presidential elections makes incumbent **presidents rationally place more weight on the preference of voters in closely contested, larger states when making policy decisions**.
>
> "They tested this hypothesis by examining whether presidential veto decisions are influenced by the floor votes of Senators from these electorally crucial states. In a pooled sample of 325 individual bills from 1970 through 1988, they found significant evidence of this behavior by incumbent presidents. That is, **the more Senators from electorally important states oppose a bill, the more likely the president is to veto it**, even when controlling for a wide variety of conditioning variables, including the overall vote on the bill."[194] [Emphasis added]

Additional impact of travel on governance

Former Illinois Governor Jim Edgar (R) observed in 2011:

> "**People who are in elected office remember what they learned when they were campaigning**."
>
> "After serving in government, I learned first-hand how important it is for the candidate to know the district, or the state, or the nation they're running in. And know all of it, not just parts of it. And it's even more important after the election."
>
> "**When you're governing,** when you're doing your duty, **you remember particularly where you campaigned**. **You remember who you met during the campaign. You remember the issues that were raised. It's just human nature. You're going to remember that, because that was very important to you during the campaign.**"
>
> "We need a President who is a President for all the nation—not just the battleground states."[195] [Emphasis added]

Of course, three out of four states and 70% or more of the voters in the United States will not be "remembered"—because presidential candidates simply ignore them in the general-election campaign.

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[193] Grier, Kevin B., McDonald, Michael, and Tollison, Robert D. 1995. Electoral Politics and the Executive Veto: A Predictive Theory. *Economic Inquiry*. Volume 33, Issue 3. Pages 427–440. July 1995. https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1465-7295.1995.tb01872.x

[194] Voting in U.S. Presidential Elections. *What When How*. http://what-when-how.com/public-choice/voting-in-u-s-presidential-elections-public-choice/ Accessed August 18, 2022.

[195] Press conference at the National Press Club in Washington D.C. on May 12, 2011. http://www.nationalpopularvote.com/pages/misc/hl_20110514_thompson-culver-edgar.php

1.2.9. Travel patterns of a President seeking re-election

Closely divided battleground states start exerting their magnetic attraction shortly after a newly elected President's inauguration.

Presidential travel in a President's first year

The *Washington Post* reported in June 2009 that 14 of the 16 travel destinations during Obama's first five months in office were located in closely divided states.

> "During his first five months in office, **public policy and electoral politics have come together seamlessly in his domestic travel itinerary**. On nearly every trip he has taken, **Obama has followed the timeworn path of presidential travel—go where the votes matter most**….
>
> "Of the 16 states Obama has visited, nine shifted from the Republican to Democratic column in 2008. Five of the states are among the six that posted the narrowest margins of victory for either Obama or Sen. John McCain (R-Ariz.), and are **likely to remain the most closely divided through the coming campaign cycles**."[196] [Emphasis added]

Presidential travel is, of course, motivated by a wide variety of factors.

Many presidential trips are scheduled at the last minute in response to unexpected events, such as funerals, natural disasters, and man-made disasters (e.g., shootings, acts of terrorism).

However, a great many other presidential trips are pre-planned appearances for purposes such as commemorating historical events, opening major new facilities, and attending important meetings.

While certainly not all presidential travel is influenced by battleground states,[197] the battleground states are major attractions.

Presidential travel in the year before re-election

The allure of the closely divided battleground states increases as the next presidential election approaches.

In his 2012 book *The Rise of the President's Permanent Campaign*,[198] Professor Brendan Doherty of the United States Naval Academy tracked presidential travels for three incumbents during the year *before* their re-election campaigns:

- President Bill Clinton in 1995,
- President George W. Bush in 2003, and
- President Barack Obama in 2011.

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[196] Wilson, Scott. Obama's travel mixes policy, politics: States with close electoral results getting most of his visits. *Washington Post*. June 21, 2009.

[197] A President's home and preferred vacation spots (e.g., President George W. Bush's trips to his ranch in Texas, Obama's vacations in Hawaii, Trump's trips to his golf courses in Florida and New Jersey, and Biden's visit to his home in Delaware) are, of course, not dictated by politics.

[198] Doherty, Brendan J. 2012. *The Rise of the President's Permanent Campaign*. Lawrence, KS: University Press of Kansas.

Table 1.21 Presidential travel during the year before their re-election

State	Clinton 1995	Bush 2003	Obama 2011	State	Clinton 1995	Bush 2003	Obama 2011
Alabama	0	1	1	Nebraska	0	1	0
Alaska	0	0	0	Nevada	0	1	2
Arizona	0	2	1	New Hampshire	1	1	1
Arkansas	9	2	0	New Jersey	2	2	1
California	13	8	8	New Mexico	0	2	0
Colorado	3	2	3	New York	4	3	12
Connecticut	2	2	1	North Carolina	1	3	5
Delaware	0	0	1	North Dakota	0	0	0
Florida	3	5	4	Ohio	2	5	4
Georgia	3	3	0	Oklahoma	1	0	0
Hawaii	4	1	4	Oregon	1	1	1
Idaho	0	0	0	Pennsylvania	3	6	8
Illinois	4	3	4	Rhode Island	0	0	0
Indiana	0	2	1	South Carolina	0	2	0
Iowa	4	0	3	South Dakota	0	0	0
Kansas	0	0	1	Tennessee	1	2	1
Kentucky	0	2	1	Texas	3	8	2
Louisiana	0	0	0	Utah	0	0	0
Maine	0	1	0	Vermont	1	0	0
Maryland	NA	NA	6	Virginia	NA	NA	14
Massachusetts	2	0	4	Washington	0	1	1
Michigan	1	5	4	West Virginia	0	1	0
Minnesota	1	2	2	Wisconsin	0	1	1
Mississippi	0	2	0	Wyoming	3	0	0
Missouri	0	5	2	**Total**	**74**	**88**	**104**
Montana	2	0	0				

Table 1.21 shows, for each state, the distribution of presidential travel during the year before the re-election campaigns of these three Presidents.[199]

The states likely to be closely divided in the upcoming election are a major influence on presidential travel in the year before the election.

Recall that all of the general-election campaign events in 2012 were in just 12 closely divided battleground states (containing 30% of the nation's population). Also recall that all 12 of those states had been closely divided in 2008. Thus, it was hardly surprising that, in 2011, the Obama campaign organization (correctly) surmised that the outcome of the 2012 presidential election would be largely determined by those same states.

Given the enormous variety of reasons for presidential travel, it is striking that *almost half* (49%) of all presidential travel in 2011 was to the particular 12 states that ended up receiving all of the general-election campaign events in 2012.

[199] The authors gratefully acknowledge Professor Brendan Doherty of the United States Naval Academy for permission to include data on presidential travel found in the table.

Table 1.22 shows the distribution of presidential travel away from Washington, D.C., in 2011.

- Column 2 shows each state's 2010 resident population,[200] and column 3 shows each state's percentage share of the population of the 50 states. Note that the District of Columbia is not included in this table because Professor Doherty did not consider events in the District by a sitting President as "travel."
- Column 4 is the number of President Obama's visits away from Washington, D.C., in 2011 (that is, the same information as in column 4 of table 1.21).
- Column 5 shows each state's percentage share of the 104 presidential trips in 2011.
- Column 6 shows the "index" of 2011 presidential travel in relation to state population. The index is computed by dividing a state's share of presidential visits (column 5) by its share of the nation's population (column 3), and then multiplying by 100. An index above 100 means that a state received proportionately more visits than its share of the nation's population. Conversely, an index below 100 indicates that a state received proportionately fewer visits.

The table is sorted by the index (column 6), thereby placing the states receiving more attention than their population alone would warrant at the top of the table.

The 12 battleground states that attracted 100% of the campaign events in 2012 are highlighted in bold.

A quick glance at the table shows the following:

- Ten of the 12 closely divided battleground states of 2012 (in bold) had an index above 100 in the table—that is, their share of the 104 visits was greater than warranted by their share of the nation's population.
- None of the 12 battleground states of 2012 was ignored in 2011.
- Nineteen states (containing one in six Americans) were ignored during 2011.[201]

The mesmerizing attraction of the battleground states is more clearly shown in table 1.23 cataloging the travel in the year before the presidential election to the 12 states that eventually accounted for 100% of the general-election campaign events in 2012.

Thus, in total, 49% of the presidential trips away from Washington in 2011 (51 of the 104) were to the 12 closely divided battleground states of 2012, even though they contained only 30% of the population of the 50 states.

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[200] https://www.census.gov/data/tables/2010/dec/2010-apportionment-data.html

[201] In fact, seven states did not receive any presidential travel in 1995, 2003, and 2011, namely Alabama, Idaho, Louisiana, North Dakota, Rhode Island, South Dakota, and Utah. Seven additional states did not receive any campaign events in two of those three years, namely Maine, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, and South Carolina. Arkansas would also be on that list except for the fact that President Bill Clinton's home state was Arkansas (and hence received nine of Clinton's visits in 1995).

Table 1.22 President Obama's travels in 2011

State	Population	Share of 50-state population	Obama trips 2011	Share of Obama 2011 trips	Index
Hawaii	1,360,301	0.44%	4	3.85%	871
Virginia	**8,001,024**	**2.60%**	**14**	**13.46%**	**518**
Delaware	897,934	0.29%	1	0.96%	330
Maryland	5,773,552	1.87%	6	5.77%	308
Iowa	**3,046,355**	**0.99%**	**3**	**2.88%**	**292**
New Hampshire	**1,316,470**	**0.43%**	**1**	**0.96%**	**225**
Nevada	**2,700,551**	**0.88%**	**2**	**1.92%**	**219**
Pennsylvania	**12,702,379**	**4.12%**	**8**	**7.69%**	**187**
New York	19,378,102	6.29%	12	11.54%	183
Massachusetts	6,547,629	2.12%	4	3.85%	181
Colorado	**5,029,196**	**1.63%**	**3**	**2.88%**	**177**
North Carolina	**9,535,483**	**3.09%**	**5**	**4.81%**	**155**
Michigan	**9,883,640**	**3.21%**	**4**	**3.85%**	**120**
Minnesota	**5,303,925**	**1.72%**	**2**	**1.92%**	**112**
Kansas	2,853,118	0.93%	1	0.96%	104
Ohio	**11,536,504**	**3.74%**	**4**	**3.85%**	**103**
Missouri	5,988,927	1.94%	2	1.92%	99
Illinois	12,830,632	4.16%	4	3.85%	92
Connecticut	3,574,097	1.16%	1	0.96%	83
Oregon	3,831,074	1.24%	1	0.96%	77
Kentucky	4,339,367	1.41%	1	0.96%	68
California	37,253,956	12.09%	8	7.69%	64
Florida	**18,801,310**	**6.10%**	**4**	**3.85%**	**63**
Alabama	4,779,736	1.55%	1	0.96%	62
Wisconsin	**5,686,986**	**1.85%**	**1**	**0.96%**	**52**
Tennessee	6,346,105	2.06%	1	0.96%	47
Arizona	6,392,017	2.07%	1	0.96%	46
Indiana	6,483,802	2.10%	1	0.96%	46
Washington	6,724,540	2.18%	1	0.96%	44
New Jersey	8,791,894	2.85%	1	0.96%	34
Texas	25,145,561	8.16%	2	1.92%	24
Alaska	710,231	0.23%	0	0.00%	0
Arkansas	2,915,918	0.95%	0	0.00%	0
Georgia	9,687,653	3.14%	0	0.00%	0
Idaho	1,567,582	0.51%	0	0.00%	0
Louisiana	4,533,372	1.47%	0	0.00%	0
Maine	1,328,361	0.43%	0	0.00%	0
Mississippi	2,967,297	0.96%	0	0.00%	0
Montana	989,415	0.32%	0	0.00%	0
Nebraska	1,826,341	0.59%	0	0.00%	0
New Mexico	2,059,179	0.67%	0	0.00%	0
North Dakota	672,591	0.22%	0	0.00%	0
Oklahoma	3,751,351	1.22%	0	0.00%	0
Rhode Island	1,052,567	0.34%	0	0.00%	0
South Carolina	4,625,364	1.50%	0	0.00%	0
South Dakota	814,180	0.26%	0	0.00%	0
Utah	2,763,885	0.90%	0	0.00%	0
Vermont	625,741	0.20%	0	0.00%	0
West Virginia	1,852,994	0.60%	0	0.00%	0
Wyoming	563,626	0.18%	0	0.00%	0
Total	**308,143,815**	**100.00%**	**104**	**100.00%**	**100**

Table 1.23 President Obama's travels in 2011 to the 12 battleground states of 2012

State	Population	Share of 50-state population	Obama trips 2011	Share of Obama 2011 trips	Index
Virginia	8,001,024	2.60%	14	13.46%	518
Iowa	3,046,355	0.99%	3	2.88%	292
New Hampshire	1,316,470	0.43%	1	0.96%	225
Nevada	2,700,551	0.88%	2	1.92%	219
Pennsylvania	12,702,379	4.12%	8	7.69%	187
Colorado	5,029,196	1.63%	3	2.88%	177
North Carolina	9,535,483	3.09%	5	4.81%	155
Michigan	9,883,640	3.21%	4	3.85%	120
Minnesota	5,303,925	1.72%	2	1.92%	112
Ohio	11,536,504	3.74%	4	3.85%	103
Florida	18,801,310	6.10%	4	3.85%	63
Wisconsin	5,686,986	1.85%	1	0.96%	52
Total	**93,543,823**	**30.36%**	**51**	**49.03%**	**161**

Presidential travel in the first six months of a re-election year

Incumbent Presidents who seek re-election generally do not encounter serious challenges for re-nomination. This pattern prevailed in both 2020 and 2012.

Meanwhile, the opposing party typically spends the first half of a re-election year with contested primaries and caucuses to determine its presidential nominee.

In 2020, President Donald Trump made 49 domestic trips in the first six months of the year, and 53% of these visits (26 out of 49) were to the dozen states that turned out to be the battleground states of 2020 (section 1.2.1).

Table 1.24 shows President Trump's travels in the first six months of 2020. The dozen battleground states of 2020 are highlighted in bold. The table is sorted by the index (column 6).[202]

As can be seen in the table, 11 of the 12 battleground states of 2020 received one or more presidential visits in the first six months of 2020.

Nine of the 12 battleground states had an index above 100—that is, their share of the 49 visits was greater than their share of the nation's population.

Note that President Trump made one visit to Bangor, Maine, during this period. Maine is one of the states that awards electoral votes by congressional district, and Bangor is located in the state's closely divided 2nd congressional district. President Trump carried this district in 2016 and again in November 2020, and thereby received one of Maine's electoral votes. Meanwhile, the Democratic presidential nominee carried the state as a whole and the 1st congressional district in both 2016 and 2020.

The pattern of travel for an incumbent President seeking re-election was similar during the first six months of 2012—that is, President Obama's re-election year.

[202] *Wikipedia*. List of presidential trips made by Donald Trump (2020–2021). Accessed August 20, 2022. https://en.wikipedia.org/wiki/List_of_presidential_trips_made_by_Donald_Trump

Table 1.24 President Trump's travels in the first six months of 2020

State	Population	Share of 50-state population	Trump trips in first half of 2020	Share of trips	Index
Delaware	897,934	0.29%	1	2.04%	704
Nevada	**2,700,551**	**0.88%**	**3**	**6.12%**	**696**
Maine	1,328,361	0.43%	1	2.04%	475
New Hampshire	**1,316,470**	**0.43%**	**1**	**2.04%**	**475**
Virginia	8,001,024	2.60%	5	10.20%	392
Maryland	5,773,552	1.87%	3	6.12%	327
Arizona	**6,392,017**	**2.07%**	**3**	**6.12%**	**296**
Florida	**18,801,310**	**6.10%**	**8**	**16.33%**	**268**
Wisconsin	**5,686,986**	**1.85%**	**2**	**4.08%**	**221**
New Jersey	8,791,894	2.85%	3	6.12%	215
Iowa	**3,046,355**	**0.99%**	**1**	**2.04%**	**206**
Oklahoma	3,751,351	1.22%	1	2.04%	167
Louisiana	4,533,372	1.47%	1	2.04%	139
South Carolina	4,625,364	1.50%	1	2.04%	136
North Carolina	**9,535,483**	**3.09%**	**2**	**4.08%**	**132**
Michigan	**9,883,640**	**3.21%**	**2**	**4.08%**	**127**
Colorado	5,029,196	1.63%	1	2.04%	125
Pennsylvania	**12,702,379**	**4.12%**	**2**	**4.08%**	**99**
Tennessee	6,346,105	2.06%	1	2.04%	99
Georgia	**9,687,653**	**3.14%**	**1**	**2.04%**	**65**
Ohio	**11,536,504**	**3.74%**	**1**	**2.04%**	**55**
Texas	25,145,561	8.16%	2	4.08%	50
California	37,253,956	12.09%	2	4.08%	34
New York	19,378,102	6.29%	1	2.04%	32
Alabama	4,779,736	1.55%		0.00%	0
Alaska	710,231	0.23%		0.00%	0
Arkansas	2,915,918	0.95%		0.00%	0
Connecticut	3,574,097	1.16%		0.00%	0
Hawaii	1,360,301	0.44%		0.00%	0
Idaho	1,567,582	0.51%		0.00%	0
Illinois	12,830,632	4.16%		0.00%	0
Indiana	6,483,802	2.10%		0.00%	0
Kansas	2,853,118	0.93%		0.00%	0
Kentucky	4,339,367	1.41%		0.00%	0
Massachusetts	6,547,629	2.12%		0.00%	0
Minnesota	**5,303,925**	**1.72%**		**0.00%**	**0**
Mississippi	2,967,297	0.96%		0.00%	0
Missouri	5,988,927	1.94%		0.00%	0
Montana	989,415	0.32%		0.00%	0
Nebraska	1,826,341	0.59%		0.00%	0
New Mexico	2,059,179	0.67%		0.00%	0
North Dakota	672,591	0.22%		0.00%	0
Oregon	3,831,074	1.24%		0.00%	0
Rhode Island	1,052,567	0.34%		0.00%	0
South Dakota	814,180	0.26%		0.00%	0
Utah	2,763,885	0.90%		0.00%	0
Vermont	625,741	0.20%		0.00%	0
Washington	6,724,540	2.18%		0.00%	0
West Virginia	1,852,994	0.60%		0.00%	0
Wyoming	563,626	0.18%		0.00%	0
Total	**308,143,815**	**100.00%**	**49**	**100.00%**	**100**

In 2012, President Obama made 31 domestic trips in the first six months of the year, and 68% of them (21 out of 31) were to the states that turned out to be the dozen battleground states of 2012 (section 1.2.3).

Table 1.25 shows Obama's domestic travels in the first six months of 2012. The dozen battleground states of 2012 are highlighted in bold. The table is sorted by the index (column 6).[203]

As can be seen in the table, 10 of the 12 battleground states of 2020 received one or more presidential visits in the first six months of 2012.

Ten of the 12 battleground states had an index above 100—that is, their share of the 31 visits was greater than their share of the nation's population.

Cabinet travel

The travel patterns of a President seeking re-election are mirrored by other administration officials.

Politico pointed out that roughly half of travel by cabinet members was to battleground states in the first five months of 2012.

> "A half-dozen Cabinet members have made more than 85 trips this year to electoral battlegrounds such as Colorado, Florida, Nevada, North Carolina, Ohio and Pennsylvania, according to a *Politico* review of public speeches and news clippings. Those **swing-state visits represent roughly half of all travel for those six Cabinet officials this year**."[204] [Emphasis added]

An article entitled "Trump's Energy And Environment Chiefs Have Been Keeping Busy In States That Just Happen To Be Key To Trump's Reelection" reported that Energy Secretary Dan Brouillette and Interior Secretary David Bernhardt (along with Environmental Protection Agency Administrator Andrew Wheeler) traveled to battleground states, including Florida, Pennsylvania, Ohio, Nevada, North Carolina, Georgia, and Wisconsin during October 2020.[205]

Presidential interviews with local news stations

The *Wall Street Journal* observed that a majority of presidential interviews with local news stations were in battleground states.

> "Mr. Obama also has granted about 50 interviews [in 2011] with local news outlets, **the majority from swing states**."[206] [Emphasis added]

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[203] *Wikipedia*. List of presidential trips made by Barack Obama (2012). Accessed August 30, 2022. https://en.wikipedia.org/wiki/List_of_presidential_trips_made_by_Barack_Obama_(2012)

[204] Samuelsohn, Darren. Obama's cabinet members mix policy, politics. *Politico*. June 7, 2012.

[205] Hirji, Zahra.2020. Trump's Energy And Environment Chiefs Have Been Keeping Busy In States That Just Happen To Be Key To Trump's Reelection. *BuzzFeedNews*. October 29, 2020. https://www.buzzfeednews.com/article/zahrahirji/energy-environment-swing-states-fracking

[206] Weisman, Daniel and Lee, Carol E. Obama swing-state visits surpass presidential record. *Wall Street Journal*. November 28, 2011.

Table 1.25 President Obama's travels in the first six months of 2012

State	Population	Share of 50-state population	Obama trips in first half of 2012	Share of trips	Index
Vermont	625,741	0.20%	1	3.23%	1613
Maine	1,328,361	0.43%	1	3.23%	750
New Hampshire	**1,316,470**	**0.43%**	**1**	**3.23%**	**750**
Nevada	**2,700,551**	**0.88%**	**2**	**6.45%**	**733**
Iowa	**3,046,355**	**0.99%**	**2**	**6.45%**	**652**
New Mexico	2,059,179	0.67%	1	3.23%	481
Colorado	**5,029,196**	**1.63%**	**2**	**6.45%**	**396**
Ohio	**11,536,504**	**3.74%**	**4**	**12.90%**	**345**
Oklahoma	3,751,351	1.22%	1	3.23%	264
Virginia	**8,001,024**	**2.60%**	**2**	**6.45%**	**248**
Illinois	12,830,632	4.16%	3	9.68%	233
North Carolina	**9,535,483**	**3.09%**	**2**	**6.45%**	**209**
Georgia	9,687,653	3.14%	2	6.45%	205
Wisconsin	**5,686,986**	**1.85%**	**1**	**3.23%**	**174**
Florida	**18,801,310**	**6.10%**	**3**	**9.68%**	**159**
Arizona	6,392,017	2.07%	1	3.23%	156
Washington	6,724,540	2.18%	1	3.23%	148
Michigan	**9,883,640**	**3.21%**	**1**	**3.23%**	**100**
Alabama	4,779,736	1.55%		0.00%	0
Alaska	710,231	0.23%		0.00%	0
Arkansas	2,915,918	0.95%		0.00%	0
California	37,253,956	12.09%		0.00%	0
Connecticut	3,574,097	1.16%		0.00%	0
Delaware	897,934	0.29%		0.00%	0
Hawaii	1,360,301	0.44%		0.00%	0
Idaho	1,567,582	0.51%		0.00%	0
Indiana	6,483,802	2.10%		0.00%	0
Kansas	2,853,118	0.93%		0.00%	0
Kentucky	4,339,367	1.41%		0.00%	0
Louisiana	4,533,372	1.47%		0.00%	0
Maryland	5,773,552	1.87%		0.00%	0
Massachusetts	6,547,629	2.12%		0.00%	0
Minnesota	**5,303,925**	**1.72%**		**0.00%**	**0**
Mississippi	2,967,297	0.96%		0.00%	0
Missouri	5,988,927	1.94%		0.00%	0
Montana	989,415	0.32%		0.00%	0
Nebraska	1,826,341	0.59%		0.00%	0
New Jersey	8,791,894	2.85%		0.00%	0
New York	19,378,102	6.29%		0.00%	0
North Dakota	672,591	0.22%		0.00%	0
Oregon	3,831,074	1.24%		0.00%	0
Pennsylvania	**12,702,379**	**4.12%**		**0.00%**	**0**
Rhode Island	1,052,567	0.34%		0.00%	0
South Carolina	4,625,364	1.50%		0.00%	0
South Dakota	814,180	0.26%		0.00%	0
Tennessee	6,346,105	2.06%		0.00%	0
Texas	25,145,561	8.16%		0.00%	0
Utah	2,763,885	0.90%		0.00%	0
West Virginia	1,852,994	0.60%		0.00%	0
Wyoming	563,626	0.18%		0.00%	0
Total	**308,143,815**	**100.00%**	**31**	**100.00%**	**100**

We are not aware of documentary evidence that any administration specifically issued a "rule of thumb" that roughly half of all the President's visibility-creating activity should be directed toward battleground states. However, such a rule would make sound political sense and may simply be considered so obvious that it has never needed to be made explicit.

Fluctuating role of Maryland and Virginia for staging presidential photo opportunities

Both Maryland and Virginia provide a sitting President with a wide variety of photogenic backdrops for presidential appearances while minimizing travel time (e.g., factories, military bases, schools, historical sites, governmental facilities).

In the decades prior to 2008, neither Maryland nor Virginia was a presidential battleground state.

However, in 2008, Virginia burst onto the stage as a battleground state. In that campaign, Virginia received 23 of the nation's 300 general-election campaign events. That is, a state with 2.6% of the nation's population received 7.6% of the nation's total campaign events.

As Paul West observed in the *Baltimore Sun* in 2009:

> "Recent presidents have divided their time more or less evenly between Maryland and Virginia. But [now] Obama, by a lopsided margin, is favoring the commonwealth on the other side of the Potomac."
>
> **"Obama has shown Virginia far more love than Maryland since taking office.**
>
> "**Presidents of both parties frequently use the neighboring states as sites for their public events**. Since many Americans revile the capital city, it is often necessary to escape to a more suitable 'real world' locale. Next-door Maryland and Virginia are obvious choices, since they are only a quick trip away (time is a president's scarcest resource).
>
> "Today, for example, the White House announced that Obama plans to deliver a national back-to-school address next Tuesday from a high school in northern Virginia."
>
> "**There isn't much mystery in Obama's apparent preference for Virginia over Maryland**….
>
> "**Obama has concentrated his domestic travels on key electoral states—favoring those that will matter in 2012, while largely ignoring states that are either out of reach (such as those in the Deep South) or are safely Democratic** …."[207] [Emphasis added]

[207] West, Paul. Maryland politics: Obama favoring purple Virginia over blue Maryland by 8-1 margin. *Baltimore Sun*. September 2, 2009.

1.2.10. The stagnant battleground

If one examines the list of closely divided battleground states for two, three, or four consecutive presidential elections, the list appears to be largely stagnant.

However, when the list is viewed over a slightly longer period, it is apparent that the battleground status is fickle and fleeting.

When viewed over an even longer period, it becomes apparent that the list of closely divided states has been shrinking dramatically.

Let's start by examining the list of battleground states on a short-term basis.

Three-quarters of general-election campaign events in the four presidential elections between 2008 and 2020 were concentrated in just nine states.[208]

Table 1.26 shows, by state, the distribution of the 1,164 general-election campaign events of the major-party presidential and vice-presidential nominees in the four presidential elections between 2008 and 2020. The table is sorted according to each state's total number of events over the four elections (column 1).

Figure 1.14 is a map showing the same information as table 1.26, namely the distribution of the 1,164 general-election campaign events between 2008 and 2020.

As can be seen from the table and the map, about three-quarters (77%) of all the events in the four elections (903 of 1,164) were concentrated in nine states (highlighted in bold):

- Ohio—196 events
- Florida—188
- Pennsylvania—146
- North Carolina—98
- Iowa—60
- Wisconsin—58
- Michigan—54
- Nevada—53
- New Hampshire—50

The bottom portion of table 1.26 shows that 31 states were almost totally ignored in the four presidential elections between 2008 and 2020. Specifically:

- 22 states were totally ignored in all four elections, and
- nine additional states each received only a single visit (out of the total of 1,164) during the entire four-election period.

The calcification of the Electoral College map is illustrated by the fact that 41 states voted for the same party in the four presidential elections between 2008 and 2020.

[208] Note that Colorado and Virginia were closely divided battleground states for only three of the four elections.

Table 1.26 The 1,164 general-election campaign events 2008–2020

Total events	State	2008	2012	2016	2020
196	**Ohio**	**62**	**73**	**48**	**13**
188	**Florida**	**46**	**40**	**71**	**31**
146	**Pennsylvania**	**40**	**5**	**54**	**47**
98	**North Carolina**	**15**	**3**	**55**	**25**
83	Virginia	23	36	23	1
62	Colorado	20	23	19	
60	**Iowa**	**7**	**27**	**21**	**5**
58	**Wisconsin**	**8**	**18**	**14**	**18**
54	**Michigan**	**10**	**1**	**22**	**21**
53	**Nevada**	**12**	**13**	**17**	**11**
50	**New Hampshire**	**12**	**13**	**21**	**4**
23	Arizona			10	13
23	Missouri	21		2	
14	Minnesota	2	1	2	9
12	Indiana	9		2	1
11	New Mexico	8		3	
10	Georgia			3	7
7	Maine	2		3	2
4	Texas			1	3
3	Nebraska			2	1
1	California			1	
1	Connecticut			1	
1	D.C.	1			
1	Illinois			1	
1	Mississippi			1	
1	Tennessee	1			
1	Utah			1	
1	Washington			1	
1	West Virginia	1			
	Alabama				
	Alaska				
	Arkansas				
	Delaware				
	Hawaii				
	Idaho				
	Kansas				
	Kentucky				
	Louisiana				
	Maryland				
	Massachusetts				
	Montana				
	New Jersey				
	New York				
	North Dakota				
	Oklahoma				
	Oregon				
	Rhode Island				
	South Carolina				
	South Dakota				
	Vermont				
	Wyoming				
1,164	**Total**	**300**	**253**	**399**	**212**

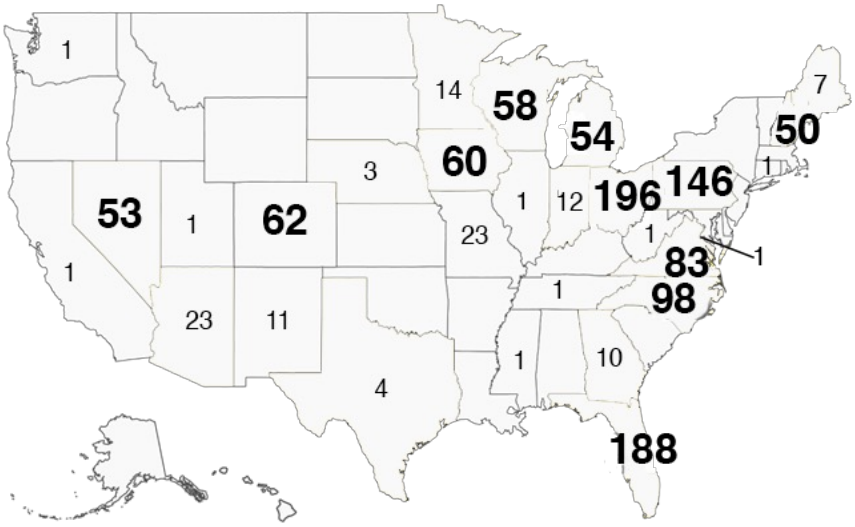

Figure 1.14 The 1,164 general-election campaign events 2008–2020

Table 1.27 shows the numbers of times that a state has voted Democratic or Republican in the four presidential elections between 2008 and 2020.[209]

Table 1.27 shows the following:

- Forty-one states voted for the same party in all four presidential elections between 2008 and 2020.
- Seven states voted for the same party in three of these four elections.
- Only three states (Florida, Iowa, and Ohio) voted twice for each party.

The same pattern holds if we look back over six elections. Thirty-six states voted for the same party in the six elections between 2000 and 2020.

Table 1.28 shows the numbers of times that a state (or parts of a state in the cases of Nebraska and Maine) have voted Democratic or Republican in the six presidential elections between 2000 and 2020.

Table 1.28 shows the following:

- Thirty-six states voted for the same party in all six presidential elections between 2000 and 2020.
- Nine states for the same party in five of the six elections.
- Seven states voted for the same party in four of the six elections.
- Only one state (Iowa) voted three times for each party.

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[209] The number of electoral votes shown in the table are for 2012, 2016, and 2020 elections. Maine and Nebraska award some of their electoral votes by congressional district. Maine's 2nd congressional district (the northern part of the state) and Nebraska's 2nd congressional district (the Omaha area) have a history of voting differently from the rest of their states. Therefore, these two districts (each with one electoral vote) are shown separately in this table (and elsewhere in this section). They are identified as "ME-CD2 (1)" and "NE-CD2 (1)," respectively. The remainder of Maine (three safely Democratic electoral votes) is shown separately as "ME (3)." Similarly, the remainder of Nebraska (four safely Republican electoral votes) is shown separately as "NE (4)."

Table 1.27 Forty-one states voted for the same party in the four presidential elections 2008–2020.

4 times Democratic	3 times Democratic	2 times Democratic	1 time Democratic	0 times Democratic
21 places	**3 places**	**5 places**	**4 places**	**20 places**
CA (55)	MI (16)	**IA (6)**	AZ (11)	AL (9)
CO (9)	PA (20)	**FL (29)**	GA (16)	AK (3)
CT (7)	WI (10)	**OH (18)**	IN (11)	AR (6)
DE (3)		**NE-CD2 (1)***	NC (15)	ID (4)
DC (3)**		**ME-CD2 (1)***		KS (6)
HI (4)				KY (8)
IL (20)				LA (8)
MA (11)				MO (10)
ME (3)*				MS (6)
MD (10)				MT (3)
MN (10)				NE (4)*
NH (4)				ND (3)
NJ (14)				OK (7)
NM (5)				SC (9)
NV (6)				SD (3)
NY (29)				TN (11)
OR (7)				TX (38)
RI (4)				UT (6)
VT (3)				WY (3)
VA (13)				WV (5)
WA (12)				
232 EV	**46 EV**	**55 EV**	**53 EV**	**152 EV**

Table 1.28 Thirty-six states voted for the same party in the six presidential elections 2000–2020.

6 times Democratic	5 times Democratic	4 times Democratic	3 times Democratic	2 times Democratic	1 time Democratic	0 times Democratic
16 places	**5 places**	**3 places**	**1 place**	**3 places**	**4 places**	**20 places**
CA (55)	MI (16)	CO (9)	**IA (6)**	FL (29)	AZ (11)	AL (9)
CT (7)	NH (4)	NV (6)		OH (18)	GA (16)	AK (3)
DE (3)	NM (5)	VA (13)		NE-CD2 (1)*	IN (11)	AR (6)
DC (3)	PA (20)	ME-CD2 (1)*			NC (15)	ID (4)
HI (4)	WI (10)					KS (6)
IL (20)						KY (8)
MA (11)						LA (8)
ME (3)*						MO (10)
MD (10)						MS (6)
MN (10)						MT (3)
NJ (14)						NE (4)*
NY (29)						ND (3)
OR (7)						OK (7)
RI (4)						SC (9)
VT (3)						SD (3)
WA (12)						TN (11)
						TX (38)
						UT (6)
						WY (3)
						WV (5)
195 EV	**55 EV**	**29 EV**	**6 EV**	**48 EV**	**53 EV**	**152 EV**

Table 1.29 Twenty-nine states voted for the same party in the eight presidential elections 1992–2020.

8 times Democratic	7 times Democratic	6 times Democratic	5 times Democratic	4 times Democratic	3 times Democratic	2 times Democratic	1 time Democratic	0 times Democratic
16 places	**5 places**	**2 places**	**2 places**	**2 places**	**1 place**	**9 places**	**3 places**	**13 places**
CA (55)	MI (16)	NV (6)	IA (6)	OH (18)	FL (29)	AR (6)	IN (11)	AL (9)
CT (7)	NH (4)	ME-CD(1)*	CO (9)	VA (13)		AZ (11)	MT (3)	AK (3)
DE (3)	NM (5)					GA (16)	NC (15)	ID (4)
DC (3)	PA (20)					KY (8)		KS (6)
HI (4)	WI (10)					LA (8)		MS (6)
IL (20)						MO (10)		NE (4)*
MA (11)						TN (11)		ND (3)
ME (3)*						WV (5)		OK (7)
MD (10)						NE-CD(1)*		SC (9)
MN (10)								SD (3)
NJ (14)								TX (38)
NY (29)								UT (6)
OR (7)								WY (3)
RI (4)								
VT (3)								
WA (12)								
195 EV	**55 EV**	**7 EV**	**15 EV**	**31 EV**	**29 EV**	**76 EV**	**29 EV**	**101 EV**

If we go back over eight elections, we see that almost two-thirds of the states voted for the same party.

Table 1.29 shows the number of times that a state (or parts of a state in the case of Nebraska and Maine) voted Democratic or Republican in the eight presidential elections between 1992 and 2020.

Table 1.29 shows the following:

- Twenty-nine states voted for the same party in the eight presidential elections between 1992 and 2020.
- Eight states voted for the same party in seven of the eight elections.
- Nine states voted for the same party in six of the eight elections.
- Three states voted for the same party in five of the eight elections.
- Only two states (Ohio and Virginia) voted four times for each party.

1.2.11. The shrinking battleground

Although the group of battleground states is relatively stable over the short term, the battleground status of several states has changed over the four presidential elections between 2008 and 2020.

During that period, there were:

- five "jilted battlegrounds" and
- four "emerging battlegrounds."

Jilted battlegrounds

"Jilted battlegrounds" are states that previously received considerable attention at the beginning of the period but found themselves virtually ignored by the end of the period.

Five jilted battlegrounds accounted for one-sixth of the general-election events (191 of 1,164) over the four-election period:[210]

- Virginia—83 events
- Colorado—62
- Missouri—23
- Indiana—12
- New Mexico—11

By the end of the period (2020), Colorado, Missouri, and New Mexico received no visits. Virginia and Indiana each received a single visit in 2020 for reasons unrelated to their being battleground states (as detailed in section 1.2.1).

Emerging battlegrounds

"Emerging battlegrounds" are states that were spectator states at the beginning of the period, but that received significant attention toward the end of the period. Four emerging battlegrounds accounted for 4% of all the events (51 of 1,164) over the four-election period.

- Arizona—23 general-election events
- Minnesota—14
- Georgia—10
- Texas—4

In 2008 and 2012, Arizona, Georgia, and Texas received no visits, and Minnesota received eight.

Presidential elections became even more geographically concentrated between 2008 and 2020.

A comparison of the jilted battlegrounds versus the emerging battlegrounds reveals that there were four times more events in the jilted battlegrounds than the emerging battlegrounds (16% versus 4%) during the four-election period. That is, presidential elections became even more geographically concentrated between 2008 and 2020.

In fact, this recent shrinkage of presidential battlegrounds in the short term is a continuation of the multi-decade long-term shrinkage of presidential battleground states.

One possible explanation of this polarization is the tendency—discussed in Bill Bishop's book *The Big Sort*—of like-minded Americans to cluster together geographically.[211]

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[210] See section 1.2.1 for a discussion of the one isolated campaign event received by Virginia in 2020 and section 1.2.2 for a discussion of the three events received by New Mexico in 2016.

[211] Bishop, Bill. 2008. *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart*. Boston, MA: Houghton Mifflin Harcourt.

Comparison to 1960 election

Looking back at the 1960 general-election campaign:

- Richard M. Nixon personally campaigned in all 50 states.
- John F. Kennedy did so in 43 states.

In contrast, in the six presidential elections between 2000 and 2020, virtually all (94% to 100%) general-election campaign events (counting both the presidential and vice-presidential nominees) were concentrated in a dozen-or-so states.

The distribution of 1960 general-election campaign events for the two major-party presidential nominees is shown in table 1.30.

- Column 1 of the table shows the Republican percentage of the two-party popular vote in each state.[212] The table is sorted in order of the Republican percentage of the state's popular vote—with Nixon's best state (Nebraska) at the top.
- Column 2 shows the number of campaign events between August 1, 1960 and November 8 (Election Day).[213] These counts were obtained from a compendium of all the public speeches by Kennedy[214] and Nixon[215] published by the U.S. Senate Committee on Commerce in 1961.

Note that this table does not include the activities of the vice-presidential nominees (in contrast to the data that we presented for the 2000–2020 period in previous sections). The addition of vice-presidential data would show that the 1960 campaign was even broader than shown in the table. For example, Democratic vice-presidential nominee Lyndon Johnson campaigned extensively in various southern, border, and western states that Kennedy ignored.

Table 1.30 shows several other differences between the 1960 electoral map and today's map.

In the 1960 presidential election, there were only 17 states where the difference between the major-party candidates was 10 percentage points or greater—a margin that is usually referred to as a "landslide." In contrast, in 2020, there were 36 landslide states (section 1.2.1).

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[212] The election returns are from David Leip's *Atlas of U.S. Presidential Elections*. Note that neither Kennedy's name nor Nixon's name appeared on the ballot in Alabama in 1960. Moreover, the state's 11 winning presidential electors (all Democrats) were divided between a group loyal to the National Democratic Party (that is, to Kennedy) and a segregationist contingent who ultimately voted for Virginia Senator Byrd in the Electoral College. As discussed in detail in section 3.13 and section 9.30.12, various almanac writers and journalists have adopted different procedures for estimating candidate sentiment in Alabama in 1960. The popular vote estimates shown in this table are from Leip's *Atlas*.

[213] August 1, 1960, was the Monday after the end of the Republican National Convention (which was held on July 25–28). Kennedy was nominated at the Democratic National Convention held two weeks earlier (on July 11–15).

[214] U.S. Senate Committee on Commerce. 1961. *The Speeches, Remarks, Press Conferences, and Statements of Senator John F. Kennedy, August 1 Through November 7, 1960*. 87th Congress. 1st Session. Report 994—Part I. September 13, 1961. Washington, D.C.: U.S. Government Printing Office.

[215] U.S. Senate Committee on Commerce. 1961. *The Speeches, Remarks, Press Conferences, and Statements of Vice President Richard M. Nixon, August 1 Through November 7, 1960*. 87th Congress. 1st Session. Report 994—Part II. September 13, 1961. Washington, D.C.: U.S. Government Printing Office.

Table 1.30 Distribution of 1960 campaign events

R–Percent	Events	State	Nixon	Kennedy	R-Margin	D-Margin	R-EV	D-EV
62.1%	1	Nebraska	380,553	232,542	148,011		6	
60.7%	2	Kansas	561,474	363,213	198,261		8	
59.0%	3	Oklahoma	533,039	370,111	162,928		7	
58.6%	1	Vermont	98,131	69,186	28,945		3	
58.2%	4	South Dakota	178,417	128,070	50,347		4	
57.0%	7	Maine	240,608	181,159	59,449		5	
56.7%	16	Iowa	722,381	550,565	171,816		10	
55.6%	5	Arizona	221,241	176,781	44,460		4	
55.5%	2	North Dakota	154,310	123,963	30,347		4	
55.2%	9	Indiana	1,175,120	952,358	222,762		13	
55.0%	2	Wyoming	77,451	63,331	14,120		3	
54.9%	3	Colorado	402,242	330,629	71,613		6	
54.8%	4	Utah	205,361	169,248	36,113		4	
53.8%	3	Idaho	161,597	138,853	22,744		4	
53.6%	9	Tennessee	556,577	481,453	75,124		11	
53.6%	9	Kentucky	602,607	521,855	80,752		10	
53.4%	**5**	**NH**	**157,989**	**137,772**	**20,217**		**4**	
53.3%	**46**	**Ohio**	**2,217,611**	**1,944,248**	**273,363**		**25**	
52.8%	**7**	**Virginia**	**404,521**	**362,327**	**42,194**		**12**	
52.6%	**8**	**Oregon**	**408,060**	**367,402**	**40,658**		**6**	
51.9%	**10**	**Wisconsin**	**895,175**	**830,805**	**64,370**		**12**	
51.5%	**8**	**Florida**	**795,476**	**748,700**	**46,776**		**10**	
51.3%	**2**	**Montana**	**141,841**	**134,891**	**6,950**		**4**	
51.2%	**9**	**Washington**	**629,273**	**599,298**	**29,975**		**9**	
50.9%	**5**	**Alaska**	**30,953**	**29,809**	**1,144**		**3**	
50.3%	**59**	**California**	**3,259,722**	**3,224,099**	**35,623**		**32**	
49.97%	**7**	**Hawaii**	**92,295**	**92,410**		**115**		**3**
49.9%	**50**	**Illinois**	**2,368,988**	**2,377,846**		**8,858**		**27**
49.7%	**16**	**Missouri**	**962,221**	**972,201**		**9,980**		**13**
49.6%	**2**	**New Mexico**	**153,733**	**156,027**		**2,294**		**4**
49.6%	**25**	**New Jersey**	**1,363,324**	**1,385,415**		**22,091**		**16**
49.3%	**11**	**Minnesota**	**757,915**	**779,933**		**22,018**		**11**
49.2%	**3**	**Delaware**	**96,373**	**99,590**		**3,217**		**3**
49.0%	**41**	**Michigan**	**1,620,428**	**1,687,269**		**66,841**		**20**
49.0%	**20**	**Texas**	**1,121,310**	**1,167,567**		**46,257**		**24**
48.8%	**1**	**Nevada**	**52,387**	**54,880**		**2,493**		**3**
48.8%	**62**	**Pennsylvania**	**2,439,956**	**2,556,282**		**116,326**		**32**
48.8%	**2**	**SC**	**188,558**	**198,129**		**9,571**		**8**
47.9%	**11**	**NC**	**655,420**	**713,136**		**57,716**		**14**
47.4%	**86**	**New York**	**3,446,419**	**3,830,085**		**383,666**		**45**
47.3%	**4**	**West Virginia**	**395,995**	**441,786**		**45,791**		**8**
46.4%	5	Maryland	489,538	565,808		76,270		9
46.3%	8	Connecticut	565,813	657,055		91,242		8
46.2%	2	Arkansas	184,508	215,049		30,541		8
42.8%	1	Alabama	237,981	318,303		80,322		5
40.4%	2	Mississippi	73,561	108,362		34,801		
39.6%	3	Massachusetts	976,750	1,487,174		510,424		16
37.4%	4	Georgia	274,472	458,638		184,166		12
36.4%	3	Rhode Island	147,502	258,032		110,530		4
36.2%	2	Louisiana	230,980	407,339		176,359		10
49.92%	**610**	**Total**	**34,108,157**	**34,220,984**			**219**	**303**

In other words, the number of landslide states increased from one-third of the states in 1960 to over two-thirds today.

In the 1960 presidential election, the most Republican state (Nebraska) was 62% Republican, and only one other state (Kansas) was more than 60% Republican. In contrast, in 2020, the most Republican state (Wyoming) was 72% Republican, and 12 additional states were more than 60% Republican.

In 1960, the most Democratic state (Louisiana) was 64% Democratic, and only three other states were more than 60% Democratic. In contrast, in 2020, the most Democratic state (Vermont) was 68% Democratic, and seven additional states were more than 60% Democratic.[216]

In other words, the dominant party in the landslide states has become far more dominant in those states.

Although the 1960 presidential battleground was considerably broader than it is today, the winner-take-all method of awarding electoral votes inevitably concentrated general-election campaigning in the closer states.

Table 1.30 shows that the two major-party candidates were within seven percentage points of one another in 25 of the 50 states in 1960.

In table 1.31, the Republican states in 1960 outside the seven-percentage point range between 46.5% and 53.5% are shown in red; the Democratic states outside this range are shown in blue; and the battleground states are shown in black.

As can be seen in the table, 82% of the general-election campaign events (500 out of 610) were conducted in states where the Republican share of the two-party votes was in the competitive range.

In a 2013 article in *Presidential Studies Quarterly*, Rob Richie and Andrea Levien wrote:

> "In addition to being more rigidly defined, today's presidential election swing states are also far fewer in number and less populous than a generation ago. In 1960, for example, the major party candidates' vote percentages were within 3% of the national average (swing state status) in 23 states, with a total 319 electoral votes. In 1976, 24 states controlling a total of 345 electoral votes met this same swing state definition. As recently as 1988, there were still 21 swing states that together represented more than half the population and a total of 272 electoral votes."[217]

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[216] The District of Columbia could not vote for President in 1960.

[217] Richie, Robert and Levien, Andrea. 2013. The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan. *Presidential Studies Quarterly*. Volume 43. Issue 2. Page 362. May 2, 2013. https://onlinelibrary.wiley.com/action/doSearch?AllField=Andrea+Levien&SeriesKey=17415705

Table 1.31 Distribution of 1960 campaign events

R–Percent	R-Events	D-Events	State	R-EV	D-EV
62.1%	1	0	Nebraska	6	
60.7%	2	0	Kansas	8	
59.0%	1	2	Oklahoma	7	
58.6%	1	0	Vermont	3	
58.2%	2	2	South Dakota	4	
57.0%	2	5	Maine	5	
56.7%	7	9	Iowa	10	
55.6%	2	3	Arizona	4	
55.5%	1	1	North Dakota	4	
55.2%	2	7	Indiana	13	
55.0%	1	1	Wyoming	3	
54.9%	1	2	Colorado	6	
54.8%	1	3	Utah	4	
53.8%	1	2	Idaho	4	
53.6%	3	6	Tennessee	11	
53.6%	1	8	Kentucky	10	
53.4%	**1**	**4**	**NH**	**4**	
53.3%	**19**	**27**	**Ohio**	**25**	
52.8%	**2**	**5**	**Virginia**	**12**	
52.6%	**2**	**6**	**Oregon**	**6**	
51.9%	**6**	**4**	**Wisconsin**	**12**	
51.5%	**3**	**5**	**Florida**	**10**	
51.3%	**1**	**1**	**Montana**	**4**	
51.2%	**3**	**6**	**Washington**	**9**	
50.9%	**1**	**4**	**Alaska**	**3**	
50.3%	**20**	**39**	**California**	**32**	
49.97%	**7**	**0**	**Hawaii**		**3**
49.9%	**20**	**30**	**Illinois**		**27**
49.7%	**5**	**11**	**Missouri**		**13**
49.6%	**1**	**1**	**New Mexico**		**4**
49.6%	**9**	**16**	**New Jersey**		**16**
49.3%	**3**	**8**	**Minnesota**		**11**
49.2%	**1**	**2**	**Delaware**		**3**
49.0%	**14**	**27**	**Michigan**		**20**
49.0%	**7**	**13**	**Texas**		**24**
48.8%	**1**	**0**	**Nevada**		**3**
48.8%	**20**	**42**	**Pennsylvania**		**32**
48.8%	**1**	**1**	**SC**		**8**
47.9%	**4**	**7**	**NC**		**14**
47.4%	**28**	**58**	**New York**		**45**
47.3%	**2**	**2**	**West Virginia**		**8**
46.4%	1	4	Maryland		9
46.3%	4	4	Connecticut		8
46.2%	1	1	Arkansas		8
42.8%	1	0	Alabama		5
40.4%	2	0	Mississippi		
39.6%	1	2	Massachusetts		16
37.4%	1	3	Georgia		12
36.4%	1	2	Rhode Island		4
36.2%	2	0	Louisiana		10
49.92%	**224**	**386**	**Total**	**219**	**303**

The shrinking presidential battleground is discussed in additional detail in FairVote's 2005 report *The Shrinking Battleground*[218] as well as *The Cook Political Report*,[219,220] and articles by Olson[221] and Byler.[222]

1.3. A SMALL NUMBER OF VOTES IN A SMALL NUMBER OF STATES REGULARLY DECIDES THE PRESIDENCY—THEREBY CREATING POST-ELECTION CONTROVERSIES THAT THREATEN DEMOCRACY.

The current system of electing the President regularly enables a few thousand votes in one, two, or three states to decide the presidency.

Close results, in turn, generate doubt, controversy, litigation, and unrest over real, imagined, or manufactured irregularities.

Razor-close elections in a few states are *an inevitable and recurring* feature of the current state-by-state winner-take-all method of awarding electoral votes.

The reason is that the state-by-state nature of the current system begins by dividing the nation's voters into 51 separate state-level pools of votes.

After this Balkanization, most state-level races will not be close, although a few will be.

Under the winner-take-all method of awarding electoral votes, closely divided states are the only places where candidates have any prospect of gaining or losing electoral votes. Thus, virtually all campaigning is channeled into the closely divided states.

Then, almost inevitably, a few thousand votes in a few of these closely divided states determine the national outcome.

Let's look at the facts about the first six presidential elections of the 2000s.

There were 306 state-level races for President during this period (six times 51).

The two-party vote for President ended up in the competitive 47%–53% range for 65 of these 306 state-level races.

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[218] FairVote. 2005. *The Shrinking Battleground: The 2008 Presidential Election and Beyond*. Takoma Park, MD: The Center for Voting and Democracy. http://archive.fairvote.org/?page=1555

[219] In late 1999, the Cook Political Report listed 28 states are either toss-ups or leaning to one party or the other in the upcoming 2000 presidential race. Walter, Amy. 2023. Digging through some old @CookPolitical files and found this gem from December of 1999. *Twitter*. January 23, 2023. 9:55AM. https://twitter.com/amyewalter/status/1617581909839577100?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1617581909839577100%7Ctwgr%5Eb7fe2df1ca0ef9e2b054eeab8636f9d6173622ad%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.washingtonpost.com%2Fpolitics%2F2023%2F04%2F08%2Fhouse-polarization-partisanship%2F

[220] Kane, Paul. 2023, New report outlines the deep political polarization's slow and steady march. *Washington Post*. April 8, 2023. https://www.washingtonpost.com/politics/2023/04/08/house-polarization-partisanship/

[221] Olson, Randall S. 2015. The Shrinking Battleground: Every 4 years, fewer states determine the outcome of the Presidential election. January 12, 2015. http://www.randalolson.com/2015/01/12/the-shrinking-battleground-presidential-elections/

[222] Byler, David. 2015. Are Swing States Disappearing? *Real Clear Politics*. February 4, 2015. http://www.realclearpolitics.com/articles/2015/02/04/are_swing_states_disappearing_125487.html

In table 1.32:

- Column 1 shows the Republican percentage of the two-party vote. The table is sorted according to this percentage.
- Columns 2 and 3 show the state and year, respectively.
- Columns 4 and 5 show the Republican and Democratic vote for President, respectively.
- Column 6 shows the Republican margin of victory for the states that the Republican presidential nominee carried, and column 7 shows the Democratic margin of victory for states that the Democratic presidential nominee carried.
- Column 8 shows the number of general-election campaign events for the state-level race involved.

There were 2,034 general-election campaign events in the six presidential elections between 2000 and 2020.

Table 1.32 The 65 state-level elections between 2000 and 2020 in the competitive 47%–53% range

R-percent	State	Year	R-votes	D-votes	R-margin	D-margin	Events
52.8%	Texas	2020	5,890,347	5,259,126	631,221		3
52.8%	Arkansas	2000	472,940	422,768	50,172		11
52.7%	Georgia	2016	2,089,104	1,877,963	211,141		3
52.6%	Georgia	2008	2,048,759	1,844,123	204,636		
52.5%	Florida	2004	3,964,522	3,583,544	380,978		84
52.4%	Colorado	2004	1,101,256	1,001,725	99,531		12
52.0%	Tennessee	2000	1,061,949	981,720	80,229		18
51.9%	North Carolina	2016	2,362,631	2,189,316	173,315		55
51.9%	Arizona	2016	1,252,401	1,161,167	91,234		10
51.9%	Nevada	2000	301,575	279,978	21,597		6
51.8%	Ohio	2000	2,351,209	2,186,190	165,019		27
51.7%	Missouri	2000	1,189,924	1,111,138	78,786		30
51.7%	Florida	2020	5,668,731	5,297,045	371,686		31
51.3%	Nevada	2004	418,690	397,190	21,500		10
51.2%	Montana	2008	242,763	231,667	11,096		
51.1%	Ohio	2004	2,859,768	2,741,167	118,601		63
51.0%	North Carolina	2012	2,270,395	2,178,391	92,004		3
50.7%	North Carolina	2020	2,758,775	2,684,292	74,483		25
50.7%	New Hampshire	2000	273,559	266,348	7,211		7
50.6%	Florida	2016	4,617,886	4,504,975	112,911		71
50.4%	Wisconsin	2016	1,405,284	1,382,536	22,748		14
50.4%	New Mexico	2004	376,930	370,942	5,988		13
50.4%	Pennsylvania	2016	2,970,733	2,926,441	44,292		54
50.3%	Iowa	2004	751,957	741,898	10,059		38
50.1%	Michigan	2016	2,279,543	2,268,839	10,704		22
50.1%	Missouri	2008	1,445,814	1,441,911	3,903		21
50.0%	Florida	2000	2,912,790	2,912,253	537		47
50.0%	New Mexico	2000	286,417	286,783		366	12

(Continued)

Table 1.32 (Continued)

R-percent	State	Year	R-votes	D-votes	R-margin	D-margin	Events
49.9%	Wisconsin	2000	1,237,279	1,242,987		5,708	31
49.9%	Georgia	2020	2,461,854	2,473,633		11,779	7
49.8%	Arizona	2020	1,661,686	1,672,143		10,457	13
49.8%	Iowa	2000	634,373	638,517		4,144	24
49.8%	North Carolina	2008	2,128,474	2,142,651		14,177	15
49.8%	Wisconsin	2004	1,478,120	1,489,504		11,384	40
49.8%	New Hampshire	2016	345,790	348,526		2,736	21
49.8%	Oregon	2000	713,577	720,342		6,765	16
49.7%	Wisconsin	2020	1,610,184	1,630,866		20,682	18
49.6%	Florida	2012	4,162,341	4,235,965		73,624	40
49.5%	Indiana	2008	1,345,648	1,374,039		28,391	9
49.4%	Pennsylvania	2020	3,377,674	3,458,229		80,555	47
49.3%	New Hampshire	2004	331,237	340,511		9,274	12
49.2%	Minnesota	2016	1,323,232	1,367,825		44,593	2
48.8%	Nevada	2020	669,890	703,486		33,596	11
48.7%	Pennsylvania	2004	2,793,847	2,938,095		144,248	36
48.7%	Minnesota	2000	1,109,659	1,168,266		58,607	5
48.7%	Nevada	2016	512,058	539,260		27,202	17
48.6%	Michigan	2020	2,649,852	2,804,040		154,188	21
48.6%	Florida	2008	4,045,624	4,282,074		236,450	46
48.5%	Ohio	2012	2,661,407	2,827,621		166,214	73
48.4%	Maine	2016	335,593	357,735		22,142	3
48.3%	Michigan	2004	2,313,746	2,479,183		165,437	25
48.2%	Minnesota	2004	1,346,695	1,445,014		98,319	21
48.0%	Virginia	2012	1,822,522	1,971,820		149,298	36
47.9%	Oregon	2004	866,831	943,163		76,332	7
47.9%	Pennsylvania	2000	2,281,127	2,485,967		204,840	36
47.7%	Ohio	2008	2,677,820	2,940,044		262,224	62
47.4%	Michigan	2000	1,953,139	2,170,418		217,279	39
47.3%	Colorado	2016	1,202,484	1,338,870		136,386	19
47.3%	Pennsylvania	2012	2,680,434	2,990,274		309,840	5
47.3%	Maine	2000	286,616	319,951		33,335	9
47.2%	Colorado	2012	1,185,050	1,322,998		137,948	23
47.2%	Virginia	2016	1,769,443	1,981,473		212,030	23
47.2%	New Hampshire	2012	329,918	369,561		39,643	13
47.1%	Washington	2000	1,108,864	1,247,652		138,788	18
	Total						**1,560**

As can be seen in table 1.32, about three-quarters (1,560 of the 2,034) of the general-election campaign events in these six elections were concentrated in the 65 state-level races where the Republican percentage of the vote was between 47% and 53%.

An average of about 11 states were in the competitive 47%–53% range in each election.

Almost inevitably, a few thousand votes in a few of these closely divided states end up deciding the presidency.

It turns out that there were 19 decisive state-level races in the six presidential elections between 2000 and 2020.

That is, out of 306 state-level races, only 65 were in the competitive 47%–53% range, and only 19 were decisive.

Table 1.33 Decisive votes in decisive states 2000–2020

Year	Person who became President	Number of decisive states	Number of electoral votes above 270 received by the person who became President	Lead of the first-place candidate in the national popular vote	Popular vote lead in the decisive state(s) of the person who became President	Total popular vote lead in the decisive state(s) of the person who became President	Relative value of the decisive popular votes in the decisive state(s)
2020	Biden	3	36	7,052,711	10,457 in AZ (11) 11,779 in GA (16) 20,682 in WI (10)	42,918	164
2016	Trump	3	36	2,868,518	10,704 in MI (16) 22,748 in WI (10) 44,292 in PA (20)	77,744	37
2012	Obama	4	62	4,983,775	73,624 in FL (29) 166,214 in OH (18) 149,298 in VA (13) 39,643 in NH (4)	428,779	12
2008	Obama	7	95	9,549,976	236,450 in FL (27) 262,224 in OH (20) 14,177 in NC (15) 234,527 in VA (13) 28,391 in IN (11) 214,987 in CO (9) 68,292 in NH (4)	1,059,048	9
2004	Bush	1	16	3,012,179	118,601 in OH (20)	118,601	25
2000	Bush	1	1	543,816	537 in FL (25)	537	1,013
	Average	**3**		**4,668,496**		**287,969**	**210**

Table 1.33 shows the decisive states in each of the six presidential elections between 2000 and 2020.

- Column 3 shows the number of decisive states for a given presidential election.
- Column 4 shows the number of electoral votes received by the person who became President above the required majority (270).
- Column 5 shows the lead of the first-place candidate in the national popular vote.
- Column 6 lists the decisive state(s), the popular vote lead in the decisive state(s) of the person who became President, and the number of electoral votes from the decisive state(s).
- Column 7 shows the sum of the popular-vote leads of the person who became President in the decisive state(s).
- Column 8 shows the relative value of the decisive popular votes in the decisive state(s).

As can be seen from the table, the presidency has been decided by an average of a mere 287,969 popular votes spread over an average of three states in the six presidential elections between 2000 and 2020.

In contrast, the winner's average margin of victory in the national popular vote in these six elections was 4,668,496—16 times larger than 287,969.

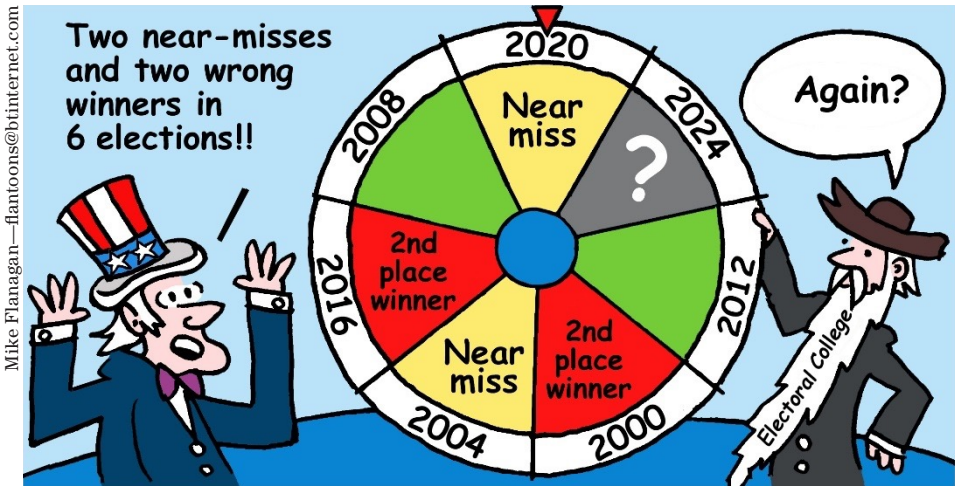

Figure 1.15 There have been two wrong-winner and two near-miss elections since 2000.

The table also shows that the decisive voters in the decisive states were an average of 210 times more impactful than votes cast elsewhere in the country in these six elections.

In the sections below, we provide additional details about the decisive states of the six presidential elections between 2000 and 2020.

1.3.1. 2020 election

In 2020, for example, a mere 42,918 popular votes gave Joe Biden the electoral votes that decided the presidency.

As shown in Figure 1.16, Biden's margins in the decisive states in 2020 were:

- 10,457 popular votes in Arizona (11 electoral votes),
- 11,779 votes in Georgia (16 electoral votes), and
- 20,682 votes in Wisconsin (10 electoral votes).

In the absence of Biden's margins in these states, there would have been a 269–269 tie in the Electoral College.[223] That is, the national outcome was determined by these 42,918 votes cast in three decisive states—out of 158,224,999 votes cast nationally.

Each of these 42,918 votes was 164 times more important than the 7,052,711 votes that constituted Biden's national-popular-vote margin in 2020.

1.3.2. 2016 election

In 2016, 77,744 popular votes (out of 137,125,484 nationwide) gave Donald Trump the electoral votes that decided the President.

[223] As discussed in section 1.6, when there is a 269–269 tie in the Electoral College, the U.S. House selects the President on a one-state-one-vote basis. Based on the partisan composition of the House delegations on Janauary 6, 2021, Trump would have been selected.

Figure 1.16 The three decisive states in 2020

As shown in figure 1.17, the margins in the decisive states in 2016 were:

- 10,704 popular votes in Michigan (16 electoral votes),
- 22,748 votes in Wisconsin (10 electoral votes), and
- 44,284 votes in Pennsylvania (20 electoral votes).

If Hillary Clinton had won these three states, she would have won the Electoral College by a 278–260 margin.

Each of these 77,744 popular votes was 37 times more important than the 2,868,518 votes that constituted Clinton's national-popular-vote margin in 2016.

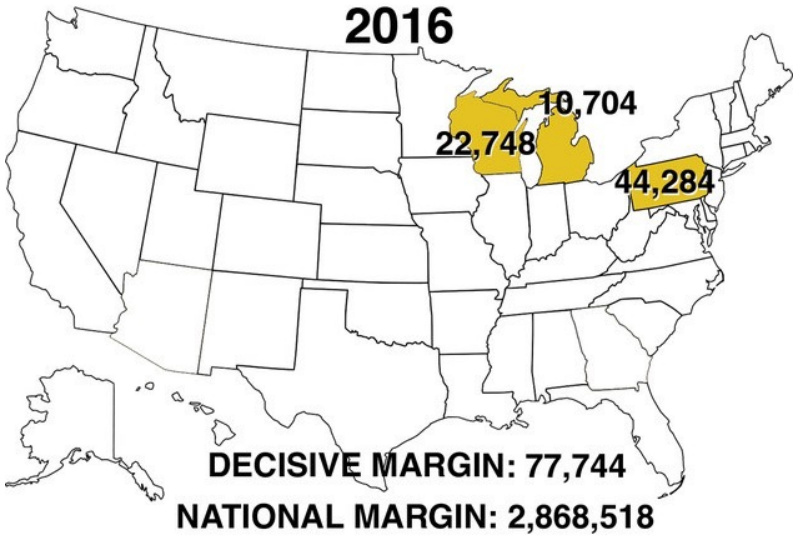

Figure 1.17 The three decisive states in 2016

1.3.3. 2012 election

In 2012, the state-level margins of victory that gave Obama the electoral votes of the four states that decided the election are shown in figure 1.18, namely:

- 73,624 votes in Florida (29 electoral votes),
- 166,214 votes in Ohio (18 electoral votes),
- 149,298 votes in Virginia (13 electoral votes), and
- 39,643 votes in New Hampshire (4 electoral votes)

In the absence of these margins in these states, Mitt Romney would have had the bare 270 electoral votes required for election. That is, the national outcome was determined by these 428,779 votes cast in four decisive states—out of 129,084,520 votes cast nationally. Each of these 428,779 votes was 12 times more important than the 4,983,775 votes that constituted Obama's national-popular-vote margin in 2012.

Figure 1.18 The four decisive states in 2012

1.3.4. 2008 election

In 2008, Obama's margin of victory in the national popular vote (9,549,976) was the highest among the six presidential elections between 2000 and 2020.

The state-level margins of victory that gave Obama the electoral votes of the seven states that decided the election are shown in figure 1.19, namely:

- 236,450 popular votes in Florida (27 electoral votes),
- 262,224 votes in Ohio (20 electoral votes),
- 14,177 votes in North Carolina (15 electoral votes),
- 234,527 votes in Virginia (13 electoral votes),
- 28,391 votes in Indiana (11 electoral votes),
- 214,987 votes in Colorado (9 electoral votes), and
- 68,292 votes in New Hampshire (4 electoral votes).

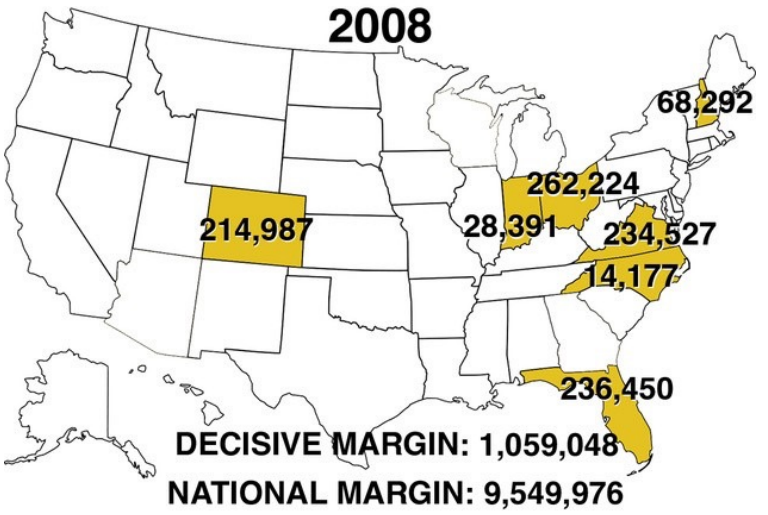

Figure 1.19 The six decisive states in 2008

1.3.5. 2004 election

In 2004, the margin of victory that gave George W. Bush the 20 electoral votes of the one state (Ohio) that decided the presidency was 118,601 popular votes, as shown in figure 1.20.

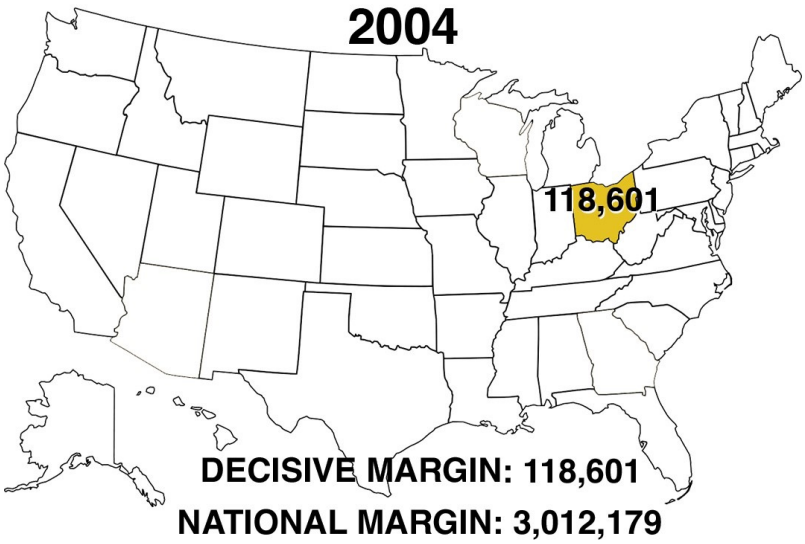

Figure 1.20 The one decisive state in 2004

1.3.6. 2000 election

In 2000, the margin of victory that gave George W. Bush the 25 electoral votes of the one state (Florida) that decided the presidency was 537 popular votes, as shown in figure 1.21.

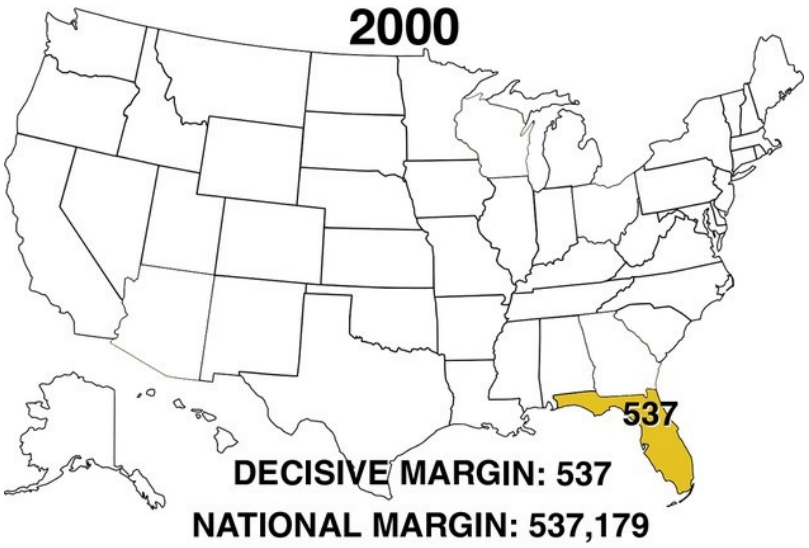

Figure 1.21 The one decisive state in 2000

1.3.7. Foreign interference and disinformation campaigns are facilitated when the presidency is decided by a few thousand votes in a few states.

The fact that the national outcome of a presidential election is regularly decided by a few thousand votes in a small number of states facilitates foreign interference in our elections.

In an op-ed entitled "The Electoral College Is a National Security Threat," former general counsel at the National Security Agency Matthew Olsen and former Army intelligence officer Benjamin Haas wrote:

> "The Electoral College system provides ripe microtargeting grounds for foreign actors who intend to sabotage presidential elections via information and disinformation campaigns, as well as by hacking our voting infrastructure. One reason is that citizens in certain states simply have more voting power than citizens in other states.
>
> "But what if the national popular vote determined the president instead of the Electoral College? No voter would be more electorally powerful than another. It would be more difficult for a foreign entity to sway many millions of voters scattered across the country than concentrated groups of tens of thousands of voters in just a few states. And it would be more difficult to tamper with voting systems on a nationwide basis than to hack into a handful of databases in crucial swing districts, which could alter an election's outcome. Yes, a foreign entity could disseminate messages to major cities across the entire country

> or try to carry out a broad-based cyberattack, but widespread actions of this sort would be not only more resource-intensive, but also more easily noticed, exposed and addressed.[224]

In June 2024, Elaine Kamarck and Darrell West made a similar point in connection with disinformation campaigns in the *Brookings Institution Commentary*:

> "It is due to the existence of the Electoral College that **the 2024 election could come down to a small group of voters in swing areas and enable disinformation disseminators to run highly targeted campaigns with questionable appeals in those places**."
>
> "False news purveyors don't have to persuade 99% of American voters to be influential but simply a tiny amount in Michigan, New Hampshire, or Wisconsin. In each of those places, a shift of one percent of the vote or less based on false narratives would have altered the outcome."[225] [Emphasis added]

1.3.8. The reward for fraud and the ability to execute it without detection are increased when the presidency is decided by a few thousand votes in a few states.

The fact that the national outcome of a presidential election is regularly decided by a few thousand votes in a small number of states increases the reward for fraud and the ability to execute fraud without detection.

In a 1979 Senate speech about his proposed constitutional amendment for a national popular vote for President, Senator Birch Bayh (D–Indiana) said:

> "Fraud is an ever present possibility in the electoral college system, even if it rarely has become a proven reality. With the electoral college, relatively few irregular votes can reap a healthy reward in the form of a bloc of electoral votes, because of the unit rule or winner-take-all rule. **Under the present system, fraudulent popular votes are much more likely to have a great impact by swinging enough blocs of electoral votes to reverse the election.** A like number of fraudulent popular votes under direct election would likely have little effect on the national vote totals.
>
> "I have said repeatedly in previous debates that there is no way in which anyone would want to excuse fraud. We have to do everything we can to find it, to punish those who participate in it; but **one of the things we can do to limit fraud is to limit the benefits to be gained by fraud."**

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[224] Olsen, Matthew and Haas, Benjamin. 2017. The Electoral College Is a National Security Threat. *Politico*. September 20, 2017. http://www.politico.com/magazine/story/2017/09/20/electoral-college-threat-national-security-215626

[225] Kamarck, Elaine and West, Darrell M. 2024. How the Electoral College increases disinformation risks. *Brookings Institution Commentary*. June 5, 2024. https://www.brookings.edu/articles/how-the-electoral-college-increases-disinformation-risks/

> "A little bit of fraud … can have the impact of turning a whole electoral block, a whole state operating under the unit rule."[226] [Emphasis added]

Post-election legal challenges have become more prevalent than ever. In a multi-year study of election litigation, Professor Richard Hasen wrote:

> "Election litigation rates in the United States have been soaring, with rates nearly tripling from the period before the 2000 election compared to the post-2000 period."[227]

1.3.9. Extraordinarily small random factors frequently decide presidential elections.

A system for filling an important public office should possess a high level of resistance to the impact of minor perturbations.

The current state-by-state winner-take-all method of awarding electoral votes does not have this characteristic. Instead, it is extraordinarily sensitive to decisions and events that should not decide national elections.

The choice in 1911 of size for the U.S. House of Representatives decided four presidential elections.

The person who became President in 2000, 1976, 1916, and 1876 would have been different if the U.S. House of Representatives had been a slightly different size at the times of those elections.

That is, four of the nation's 59 presidential elections were decided by an arbitrary decision—made years earlier for reasons unrelated to presidential politics—concerning the number of seats in the U.S. House of Representatives.

The size of the House (currently 435) is established by federal law. The current size (435) was adopted in 1911 and readopted in 1929.[228]

After each census, House seats are apportioned among the states based on population.

A state's number of electoral votes is equal to its number of U.S. Representatives plus its number of U.S. Senators (two). Thus, the distribution of electoral votes among the states varies depending on the size of the House.

The University of Texas Electoral College Study of "inversions" (that is, presidential election in which the candidate who received the most popular votes nationwide did not win the Electoral College) concluded:

> "The number of [presidential] electors depends on the number of Representatives in the House. … If the exact same [popular] votes were cast by the same

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[226] *Congressional Record*. March 14, 1979. Page 5000. https://www.congress.gov/bound-congressional-record/1979/03/14/senate-section

[227] Hasen, Richard L. 2022. Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come? *Election Law Journal*. Volume 21. Number 2. https://www.liebertpub.com/doi/abs/10.1089/elj.2021.0050

[228] An Act to provide for the fifteenth and subsequent decennial census and to provide for apportionment of Representatives in Congress." Approved June 18, 1929. 2 U.S.C. 2a(a). https://uscode.house.gov/view.xhtml?req=(title:2%20section:2a%20edition:prelim)

> voters for the same candidates, the elections of **1916 and 1976 would have been inversions … if the size of the House had been different**. Moreover, the elections of **1876 and 2000 would not have been inversions** for some House sizes."[229] [Emphasis added]

Specifically, if the size of the House had been slightly different, two candidates who lost both the national popular vote and the Electoral College (Republican Charles Evans Hughes in 1916 and Republican Gerald Ford in 1976) would have won in the Electoral College and become President—that is, there would have been an inversion.

If the size of the House had been slightly different, two candidates who won the most popular votes nationwide but lost the Electoral College (Democrat Samuel Tilden in 1876 and Democrat Al Gore in 2000) would have won in the Electoral College and become President—that is, there would not have been an inversion.

Drew Spencer Penrose analyzed the 2000 election by applying the statutory algorithm for distributing House seats to the states for House sizes between 492 and 598. He determined that Al Gore would have won the Electoral College in 2000 if the U.S. House had been any of the following sizes:

- 492
- 494–502
- 504
- 534
- 540
- 548–550
- 574–584
- 586
- 592
- 598 or above.[230]

That is, Al Gore would have won the Electoral College if the House had been any of 73 of these 107 possible sizes. Conversely, Gore would have lost the Electoral College if the House had been any of 34 of these sizes.

The choice of ballot arrangement by one Florida county official decided the 2000 presidential election.

In 2000, a Democratic election administrator in one of Florida's 67 counties designed a ballot that presented the names of the presidential candidates in an especially confusing manner—the so-called "butterfly ballot."

The ballot's confusing arrangement resulted in Reform Party presidential candidate Pat Buchanan receiving thousands of votes that, as Buchanan himself readily acknowl-

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[229] Geruso, Michael; Spears, Dean; and Talesara, Ishaana. 2019. *Inversions in US Presidential Elections: 1836-2016.* University of Texas Electoral College Study Brief No. 3. September 2019. http://utecs.org/wp-content/uploads/Brief3.pdf

[230] These calculations were done in June 2020 by Drew Spencer Penrose while he was at FairVote. As of January 2024, he was at Project Democracy.

edged, were almost certainly intended for Al Gore. As Buchanan said on NBC's *Today* show:

> "I don't want any votes that I did not receive, and I don't want to win any votes by mistake. … It seems to me that these 3,000 votes people are talking about—most of those are probably not my vote, and that may be enough to give the margin to Mr. Gore."[231]

A paper in the *American Political Science Review* agreed with Buchanan's assessment and concluded that the ballot layout alone was sufficient to cause Gore to lose Florida (and hence the presidency):

> "The butterfly ballot used in Palm Beach County, Florida, in the 2000 presidential election caused more than 2,000 Democratic voters to vote by mistake for Reform candidate Pat Buchanan, a number larger than George W. Bush's certified margin of victory in Florida [537 votes]."
>
> "In Palm Beach County, Buchanan's proportion of the vote on election-day ballots is four times larger than his proportion on absentee (non-butterfly) ballots, but Buchanan's proportion does not differ significantly between election-day and absentee ballots in any other Florida county.
>
> "Unlike other Reform candidates in Palm Beach County, Buchanan tended to receive election-day votes in Democratic precincts and from individuals who voted for the Democratic U.S. Senate candidate."
>
> "Among 3,053 U.S. counties where Buchanan was on the ballot, Palm Beach County has the most anomalous excess of votes for him."[232]

As Nate Cohn wrote in the *New York Times* in 2024:

> "As far as the data goes, the case is a slam dunk: At least 2,000 voters who meant to vote for Gore-Lieberman ended up voting for Mr. Buchanan. All else being equal, **that would have been enough to decide the election**."[233] [Emphasis added]

Similarly, a different defect in the layout of a ballot in one county resulted in the invalidation of 21,942 votes in Duval County, Florida.

> "The Duval County ballot listed Mr. Gore on the first page, along with Mr. Bush, Ralph Nader and two other candidates. Then on the second page were the names of five other presidential candidates. After voting for Mr. Gore,

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[231] Reuters News Serivce. 2000. Buchanan says disputed Florida votes are Gore's. *Deseret News*. November 9, 2000. https://www.deseret.com/2000/11/9/19538149/buchanan-says-disputed-florida-votes-are-gore-s/

[232] Wand, Jonathan N.; Shotts, Kenneth W.; Sekhon, Jasjeet S.; Mebane, Walter R.; Herron, Michael C.; and Brady, Henry E. The butterfly did it: The aberrant vote for Buchanan in Palm Beach County, Florida. *American Political Science Review*. Volume 95. Number 1. December 2001.

[233] Cohn, Nate. 2024. Revisiting Florida 2000 and the Butterfly Effect. *New York Times*. March 30, 2024. https://www.nytimes.com/2024/03/30/upshot/florida-2000-gore-ballot.html?searchResultPosition=1

> many Democratic voters turned the page and voted for one of the remaining names."[234]

An ill-advised administrative decision involving ballot layout and affecting a few thousand votes would be unlikely to decide the presidency in a nationwide election. Indeed, the winner's margin of victory in the national popular vote has averaged 4,668,496 in the six presidential elections between 2000 and 2020.

However, an error of a few thousand votes can easily decide the presidency when the winner-take-all rule is applied to 51 relatively small separate state-level pools of votes.

Rain in part of one state decided the 2000 presidential election.

There is evidence that the weather affected the national outcome of the 2000 presidential election in which George W. Bush became President as a result of a lead of 537 popular votes in Florida.

The Oklahoma Weather Lab at the University of Oklahoma conducted a county-by-county study of the effect of weather on presidential elections under the current state-by-state winner-take-all system. An article entitled "The Weather and the Election" in the *Journal of Politics* reported:

> "Gomez et al. collected meteorological data recorded at weather stations across the lower 48 United States for presidential election days between 1948 and 2000, and interpolated these data to get rain and snowfall totals for each election day for each county in the entire nation. They then compared the rain and snowfall data with voter turnout for each county, and performed statistical regressions to determine whether or not rain and snow (bad weather) had a negative impact on voter turnout.
>
> "What they found was that **each inch of rain experienced on election day drove down voter turnout by an average of just under 1%**, while each inch of snow knocked 0.5% off turnout. Though the effect of snow is less on a 'per inch' basis, since multiple-inch snowfall totals are far more common than multiple-inch rainfall events, we can conclude that **snow is likely to have a bigger negative impact on voter turnout**.
>
> "Furthermore, Gomez et al. noted that when bad weather did suppress voter turnout, it tended to do so in favor of the Republican candidate, to the tune of around 2.5% for each inch of rainfall above normal. In fact, when they simulated the 14 presidential elections between 1948 and 2000 with sunny conditions nationwide, they found two instances in which **bad weather likely changed the electoral college outcome—**once in North Carolina in 1992, and once **in Florida in 2000. The latter change is particularly notable, as**

[234] Bonner, Raymond and Barbanel, Josh. 2000. Democrats Rue Ballot Foul-Up In a 2nd County. *New York Times*. November 17, 2000. https://www.nytimes.com/2000/11/17/us/counting-the-vote-duval-county-democrats-rue-ballot-foul-up-in-a-2nd-county.html?searchResultPosition=1

> **it would have resulted in Al Gore rather than George Bush winning the presidential election that year**."[235,236] [Emphasis added]

A weather-related loss of a few thousand votes in one localized area of the country would not be likely to decide the presidency in a nationwide election in which the winner's margin of victory has averaged 4,668,496 in recent elections. However, a few thousand weather-related votes can easily decide—and have decided—the presidency under the current state-by-state winner-take-all method of awarding electoral votes.

Hanging chads in Florida in 2000

Election experts foresaw the weaknesses of punched-card voting long before the 2000 presidential election.

> "In a 132-page report[237] published in 1988, Mr. [Roy] Saltman detailed how hanging chads—the tiny pieces of cardboard that sometimes aren't totally punched out on ballots—had plagued several recent elections, including a 1984 race for property appraiser in Palm Beach County, Fla.
>
> "'**It is recommended**, Mr. Saltman wrote, '**that the use of pre-scored punch card ballots be ended**.'
>
> "As with many recommendations issued from the bowels of the federal bureaucracy, Mr. Saltman's report was paid little to no attention."[238] [Emphasis added]

1.3.10. Post-election litigation is shifting the choice of President from the voters to lawyers, politicians, and courts.

In recent years, both the quantity and quality of post-election litigation has changed dramatically.

In a multi-year study of election litigation, Professor Richard Hasen wrote:

> "Election litigation rates in the United States have been soaring, with rates nearly tripling from the period before the 2000 election compared to the post-2000 period."[239]

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[235] The weather and the election. 2008. Oklahoma Weather Lab at the University of Oklahoma. http://hoot.metr.ou.edu/archive/story&docId=21. See also http://www.thorntonweather.com/blog/local-news/will-the-weather-determine-the-next-president/.

[236] Brad T. Gomez, Brad T.; Hansford, Thomas G.; and Krause, George A. 2007. The Republicans should pray for rain: weather, turnout, and voting in U.S. Presidential Elections. *The Journal of Politics*. Volume 69, number 3. August 2007. Pages 649–663. https://www.journals.uchicago.edu/doi/abs/10.1111/j.1468-2508.2007.00565.x

[237] Saltman, Roy G. 1988. Accuracy, Integrity, and Security in Computerized Vote-Tallying. National Institute of Standards and Technology. Special Publication (NIST SP) - 500-158. August 1, 1988. https://www.nist.gov/publications/accuracy-integrity-and-security-computerized-vote-tallying

[238] Rosenwald, Michael S. 2023. Roy Saltman, election expert who warned of hanging chads, dies at 90. *Washington Post*. April 26, 2023. https://www.washingtonpost.com/obituaries/2023/04/26/roy-saltman-hanging-chads-dead/

[239] Hasen, Richard L. 2022. Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come? *Election Law Journal*. Volume 21. Number 2. https://www.liebertpub.com/doi/abs/10.1089/elj.2021.0050

The fact that the current state-by-state winner-take-all method of awarding electoral votes repeatedly enables a few thousand votes in one, two, or three states to decide the presidency has also changed the nature of post-election litigation.

As recently as 2016, a discussion of prominent post-election cases would have mainly focused on recounts of close elections. Examples would be the post-election litigation surrounding George W. Bush's margin of 537 popular vote in Florida in 2000 and the post-election litigation that prevented recounts in Michigan and Pennsylvania in 2016.

Of course, recounts change very few votes and rarely reverse the outcome, as discussed in detail in section 9.34.1. During the 24-year period from 2000 to 2023, there were only 36 recounts among the 6,929 statewide general-election races. The magnitude of the average change in the initial winner's number of votes due to a recount was only 551 votes. Moreover, only three of these 36 recounts reversed the original result.

Starting in 2020, the emphasis of post-election litigation has not been merely verifying the accuracy of ballot counting. Instead, the focus today is on throwing out large batches of ballots on the basis of hair-splitting legal issues.

For example, in Pennsylvania in 2020, the State Supreme Court issued a ruling before Election Day saying that mail-in ballots would be counted if they arrived within three days after Election Day, provided that they were postmarked by Election Day. The ruling was challenged in federal court by lawyers supporting the Trump campaign who believed (correctly) that the majority of absentee ballots that would be cast in the midst of the COVID pandemic would be Democratic. The result was the creation of a sequestered pool containing an estimated six thousand late-arriving absentee ballots whose validity would be decided *after* Election Day. Given that Pennsylvania was a closely divided battleground state in 2020, the outcome of a hair-splitting legal issue might very well have decided how Pennsylvania's electoral votes would get allocated under the winner-take-all rule. The disposition of Pennsylvania's electoral votes had the potential to decide the national outcome of the 2020 presidential election.

Similarly, in the closely divided battleground state of Wisconsin in 2020, lawyers sought to overturn Biden's 20,682-vote margin in the state by complaining that some county clerks had instructed voters to request absentee ballots using the wrong form.

In 2020, 64 judicial and administrative proceedings were initiated by Donald Trump and his advocates after Election Day.[240]

Moreover, after the 2020 election, several states made changes in their election laws so as to create new ways by which lawyers, judges, and politicians could invalidate already-cast ballots.

For example, Texas created 26 new election crimes.[241] Georgia even criminalized the

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[240] Eight conservative former judges, lawyers, and Senators examined all 64 cases and wrote "Our conclusion is unequivocal: Joe Biden was the choice of a majority of the Electors, who themselves were the choice of the majority of voters in their states." See Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

[241] Lerner, Kera. 2022. Criminalizing the vote: GOP-led states enacted 102 new election penalties after 2020. *News from the States*. July 14, 2022. https://www.newsfromthestates.com/article/criminalizing-vote-gop-led-states-enacted-102-new-election-penalties-after-2020 Also see spreadsheet entitled "New and elevated

providing of water to voters standing in line to vote. The proliferation of such laws provide lawyers, politicians, and judges with new ways to argue—after seeing the results on Election Day—that certain batches of votes should be invalidated.

The fact that the national outcome of a presidential election is regularly decided by a few thousand votes in one, two, or three states encourages hair-splitting legal challenges based on exaggerated, contrived, or imaginary issues.

The events of January 6, 2021, made everyone aware of how post-election maneuvering under the current system can be exploited to shift the choice of President from the voters on Election Day to lawyers, judges, and politicians.

The danger posed by hair-splitting post-election controversies in extremely close states is a continuing threat, because the country is currently in an era of consecutive non-landslide elections (section 1.1.2).

None of these maneuvers would be practical if the choice of President were based on massive nationwide margins, instead of slender margins in one to three states.

In short, the current state-by-state winner-take-all method of electing the President presents a threat to the country's stability.

As of August 2024, it appeared that the presidential race could be decided in seven closely divided states. Vice President Kamala Harris embarked on visits to seven closely divided states immediately after announcing her choice of Minnesota Governor Tim Walz to be her running mate on August 6.

As Jeh Johnson, former Secretary of Homeland Security, pointed out in an interview with Nicolle Wallace on *Deadline White House* on August 8, 2024:

> "[T]he outcome of a presidential election dances on the head of a pin. This election will almost certainly be decided in somewhere between five and seven states. … The critical juncture is the process through which we count those votes and then select electors to represent the states."
>
> "There are points in this process where someone engaging in a criminal conspiracy, an anti-democratic effort, could try to alter the result of a national election. They tried it in 2020. They failed. And, as you pointed out, lawyers were part of the problem. They were part of the conspiracy. And, now we're calling on lawyers to be part of the solution."

Former federal appeals court judge Michael Luttig said in the same interview:

> "[A] score or more of American lawyers played an ignoble role in the 2020 effort by the former president to overturn that presidential election. And, the rest of the 1.23 million lawyers here in America are bearing the burden of that egregious lawyerly conduct four years ago. … American democracy and the rule of law are under attack."

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election-related crimes since 2020: at https://docs.google.com/spreadsheets/d/1wtN6RpLW_-g1gBYwWd5HaYiL6MtmG_nwC6kpIhzickU/edit#gid=0

1.4. EVERY VOTE IS NOT EQUAL THROUGHOUT THE UNITED STATES UNDER THE CURRENT SYSTEM.

There are five built-in sources of inequality in the current system of electing the President.

Each of these five inequalities is vastly greater than the inequalities that courts tolerate when reviewing the constitutionality of congressional, state, and local legislative districts under the one-person-one-vote principle.

For example, after the 2020 census, the largest allowable difference in population between congressional districts within any state was 0.76%—that is, an inequality of 1.0076-to-1 in the value of a vote.[242]

For state legislative districts, deviations as large as 10% (that is, 1.1-to-1) were generally allowed.

> "Over a series of cases, it has become accepted that a plan will be constitutionally suspect if the largest and smallest districts are more than **ten percent apart**."[243] [Emphasis added]

The five inequalities that are built into the current system of electing the President are a:

- 3.81-to-1 inequality in the value of a vote arising from the two senatorial electoral votes that each state receives in addition to the number warranted by its population;
- 1.72-to-1 inequality in the value of a vote because of the process used to apportion U.S. House seats among the states (and hence electoral votes);
- 1.39-to-1 inequality in the value of a vote caused by the intra-decade population changes after each census;
- 1.67-to-1 inequality in the value of a vote created by voter-turnout differences from state to state; and
- 210-to-1 inequality in the power of a vote to decide the national outcome under the current state-by-state winner-take-all method of awarding electoral votes.

1.4.1. Inequality because of the two senatorial electoral votes

The U.S. Constitution specifies that each state's number of electoral votes is the sum of its number of members in the U.S. House of Representatives plus its number of Senators (two).

That is, each state receives two electoral votes above the number of electoral votes warranted by its population.

Because of these senatorial electoral votes, a vote cast in a small state has mathematically more weight than a vote cast in a large state.

For example, Wyoming is the smallest state with a population of 576,851 (according to the 2020 census). It has three electoral votes in the 2024 and 2028 presidential elections. California is the largest state (population 39,538,223) and has 54 electoral votes.

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[242] National Conference of State Legislatures. 2012. 2010 Redistricting Table. https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx

[243] Spencer, Doug. 2022. Equal Population. *Prof. ~~Justin Levitt's~~ Doug Spencer's Guide to Drawing Electoral Lines*. Accessed September 4, 2022. https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/

That is, there is one presidential elector for 192,283 people in Wyoming, compared to one presidential elector for 732,189 people in California.

Thus, because of the existence of senatorial electoral votes, the ratio of the number of persons per electoral vote for Wyoming to the number of persons per electoral vote for California is 3.81-to-1.

Table 1.34 shows, for each state, the ratio of the number of persons per electoral vote, compared to the number of persons per electoral vote for the nation's smallest state (Wyoming).

- Column 2 shows the population of each state according to the 2020 census;
- Column 3 shows the state's number of electoral votes in the 2024 and 2028 presidential elections;
- Column 4 shows the number of persons per electoral vote for each state;
- Column 5 shows the ratio of the number of persons per electoral vote for each state to the number of persons per electoral vote for the nation's smallest state (Wyoming).

The table is sorted from the state with the highest ratio (California), down to the state with the lowest ratio (Wyoming).[244]

The practical *political* effect, as compared to the *arithmetic* ratios shown in this table, is discussed later in section 9.3.1.

1.4.2. Inequality because of imprecision in the apportionment of U.S. House seats

The Constitution specifies:

> "**Representatives … shall be apportioned** among the several States which may be included within this Union, **according to their respective Numbers**…."[245] [Emphasis added]

Nonetheless, the actual process of apportioning Representatives among the states introduces inequalities into the current system for electing the President in three ways:

- Because a relatively small number of House seats (435) must be distributed over a relatively large number of states (50), any mathematical formula used to apportion House seats (and hence electoral votes) will necessarily create significant differences among the states in terms of the number of people per congressional district.
- Additional inequalities are introduced by the peculiarities of the particular mathematical formula currently used (one of four methods that have been used historically).
- The essentially arbitrary choice of the number of House seats (made in 1911) alone altered the outcome of four presidential elections.[246]

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[244] Table 4.7 is similar to this table, except that the comparison is made in terms of the value of a vote in each state.

[245] U.S. Constitution. Article I, section 2, clause 3.

[246] Apportionment Act of 1911. Public Law 62-5. https://uslaw.link/citation/us-law/public/62/5

Table 1.34 Ratio of number of persons per electoral vote compared to the nation's smallest state

State	2020 population	Electoral votes 2024–2028	Persons per electoral vote	Comparison to smallest state
California	39,538,223	54	732,189	3.81
Texas	29,145,505	40	728,638	3.79
New York	20,201,249	28	721,473	3.75
Florida	21,538,187	30	717,940	3.73
Ohio	11,799,448	17	694,085	3.61
Pennsylvania	13,002,700	19	684,353	3.56
Illinois	12,812,508	19	674,343	3.51
Michigan	10,077,331	15	671,822	3.49
Georgia	10,711,908	16	669,494	3.48
Virginia	8,631,393	13	663,953	3.45
New Jersey	9,288,994	14	663,500	3.45
North Carolina	10,439,388	16	652,462	3.39
Arizona	7,151,502	11	650,137	3.38
Washington	7,705,281	12	642,107	3.34
Massachusetts	7,029,917	11	639,083	3.32
Tennessee	6,910,840	11	628,258	3.27
Maryland	6,177,224	10	617,722	3.21
Indiana	6,785,528	11	616,866	3.21
Missouri	6,154,913	10	615,491	3.20
Wisconsin	5,893,718	10	589,372	3.07
Louisiana	4,657,757	8	582,220	3.03
Colorado	5,773,714	10	577,371	3.00
Minnesota	5,706,494	10	570,649	2.97
South Carolina	5,118,425	9	568,714	2.96
Oklahoma	3,959,353	7	565,622	2.94
Kentucky	4,505,836	8	563,230	2.93
Alabama	5,024,279	9	558,253	2.90
Utah	3,271,616	6	545,269	2.84
Iowa	3,190,369	6	531,728	2.77
Oregon	4,237,256	8	529,657	2.75
Nevada	3,104,614	6	517,436	2.69
Connecticut	3,605,944	7	515,135	2.68
Arkansas	3,011,524	6	501,921	2.61
Mississippi	2,961,279	6	493,547	2.57
Kansas	2,937,880	6	489,647	2.55
Idaho	1,839,106	4	459,777	2.39
West Virginia	1,793,716	4	448,429	2.33
New Mexico	2,117,522	5	423,504	2.20
Nebraska	1,961,504	5	392,301	2.04
Hawaii	1,455,271	4	363,818	1.89
New Hampshire	1,377,529	4	344,382	1.79
Maine	1,362,359	4	340,590	1.77
Delaware	989,948	3	329,983	1.72
South Dakota	886,667	3	295,556	1.54
Rhode Island	1,097,379	4	274,345	1.43
Montana	1,084,225	4	271,056	1.41
North Dakota	779,094	3	259,698	1.35
Alaska	733,391	3	244,464	1.27
D.C.	689,545	3	229,848	1.20
Vermont	643,077	3	214,359	1.11
Wyoming	576,851	3	192,284	1.00
Total	**331,449,281**	**538**		

Table 1.35 Comparison of value of a vote in the seven jurisdictions with three electoral votes in 2024–2028

State	2020 population	Electoral votes 2024–2028	Persons per electoral vote	Comparison to smallest state
Delaware	989,948	3	329,983	1.72
South Dakota	886,667	3	295,556	1.54
North Dakota	779,094	3	259,698	1.35
Alaska	733,391	3	244,464	1.27
D.C.	689,545	3	229,848	1.20
Vermont	643,077	3	214,359	1.11
Wyoming	576,851	3	192,284	1.00

As a result, a vote for President in certain states has considerably greater value than a vote in other states—even among states possessing the same number of electoral votes.

As an illustration, consider the six smallest states and the District of Columbia—each of which has three electoral votes in the 2024 and 2028 presidential elections.

Table 1.35 compares the number of persons per electoral vote in these seven jurisdictions with three electoral votes.

- Column 2 shows the population of each state (2020 census). The table is sorted from the state with the highest population among states with three electoral votes (i.e., Delaware) down to the state with the lowest population (i.e., Wyoming).
- Column 3 shows each state's number of electoral votes.
- Column 4 shows the number of persons per electoral vote for each state.
- Column 5 shows the ratio of the number of persons per electoral vote for each state to the number of persons per electoral vote for the smallest state with three electoral votes (Wyoming).

As can be seen from the table, one electoral vote corresponds to 329,983 people in Delaware, but only 192,284 people in Wyoming.

The ratio of the number of people per electoral vote for Delaware to the number of people per electoral vote for Wyoming is 1.72-to-1.

Similarly, the ratio of the number of people per electoral vote for South Dakota to the number of people per electoral vote for Wyoming is 1.54-to-1.

There are lesser (but still considerable) disparities in the value of a vote for the remaining states in this group (namely North Dakota, Alaska, the District of Columbia, and Vermont).

An almost identically large disparity (up to 1.70-to-1) appears in the group of seven states with four electoral votes.

Table 1.36 compares the number of persons per electoral vote in the seven states with four electoral votes.

As shown in this table, one electoral vote corresponds to 459,777 people in Idaho, but only 271,056 in Montana—a 1.70-to-1 variation.

Table 1.36 Comparison of value of a vote in the seven states with four electoral votes in 2024–2028

State	2020 population	Electoral votes 2024–2028	Persons per electoral vote	Comparison to smallest state
Idaho	1,839,106	4	459,777	1.70
West Virginia	1,793,716	4	448,429	1.65
Hawaii	1,455,271	4	363,818	1.34
New Hampshire	1,377,529	4	344,382	1.27
Maine	1,362,359	4	340,590	1.26
Rhode Island	1,097,379	4	274,345	1.01
Montana	1,084,225	4	271,056	1.00

Table 1.37 compares the number of persons per electoral vote in the two states with five electoral votes. As can be seen in this table, one electoral vote corresponds to 423,504 people in New Mexico, but only 392,301 in Nebraska—a 1.08-to-1 variation.

Table 1.37 Comparison of value of a vote in the two states with five electoral votes in 2024–2028

State	2020 population	Electoral votes 2024–2028	Persons per electoral vote	Comparison to smallest state
New Mexico	2,117,522	5	423,504	1.08
Nebraska	1,961,504	5	392,301	1.00

Table 1.38 the number of persons per electoral vote in the six states with six electoral votes. As shown in this table, one electoral vote corresponds to 545,269 people in Utah, but only 489,647 in Kansas—a 1.11-to-1 variation.

Table 1.38 Comparison of value of a vote in the six states with six electoral votes in 2024–2028

State	2020 population	Electoral votes 2024–2028	Persons per electoral vote	Comparison to smallest state
Utah	3,271,616	6	545,269	1.11
Iowa	3,190,369	6	531,728	1.09
Nevada	3,104,614	6	517,436	1.06
Arkansas	3,011,524	6	501,921	1.03
Mississippi	2,961,279	6	493,547	1.01
Kansas	2,937,880	6	489,647	1.00

Similar variations exist within other groups of states possessing the same number of electoral votes.

Effect of 1941 choice of the mathematical formula

An additional source of inequalities is the choice—made in 1941—of the particular mathematical formula used to apportion the House.

> "Historically, the United States has used four different apportionment methods that fall into two categories: Hamilton's method (a quota method), Huntington-Hill's method (a divisor method), Jefferson's method (a divisor method), and Webster's method (also a divisor method)."[247]

If the reapportionment based on the 2020 census had been based on Webster's method instead of Huntington-Hill's method, Ohio and New York each would have received one fewer House seat, while Montana and Rhode Island would each have received an additional seat.[248]

> "In 1941, Webster's method lost to Huntington-Hill's method in part because of an erroneous understanding of the apportionment methods' mathematical properties, in part because of Harvard Professor Edward Huntington's personal charisma, and in part because of the immediate political advantage that Huntington-Hill's method afforded the party in power at the time. What tipped President Franklin D. Roosevelt and his fellow Democrats in favor of Huntington-Hill's method was that if it were adopted, it would take a seat from a Republican state (Michigan) and give it to a Democratic state (Arkansas)."[249]

Effect of 1911 choice of number of seats

Another source of the above inequalities is the choice—made in 1911—of the size of the House (currently 435). This choice has decided four presidential elections, as discussed in section 1.3.9.

1.4.3. Inequality because of population changes after each census

Even though the number of people living in each state changes from year to year, a state's number of votes in the Electoral College is only adjusted once every 10 years.

Consider the fast-growing state of Utah that grew by:

- 30% during the decade between the 1990 and 2000
- 24% during the decade between 2000 and 2010
- 18% during the decade between 2010 and 2020.

Despite the considerable intra-decade growth, Utah's number of votes in the Electoral College remained static during the entire 10-year period after each census.

For example, the 2020 presidential election was conducted using a 10-year-old allocation of electoral votes based on the 2010 census. The 2008 presidential election was conducted on the basis of eight-year-old data.

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[247] Li, Ruoxi. 2022. The Malapportionment of the US House of Representatives: 1940–2020. *PS: Political Science & Politics*. Cambridge University Press. Volume 55. Issue 4. October 2022. Pages 647–654. https://doi.org/10.1017/S1049096522000701

[248] See table 6. Li, Ruoxi. 2022. The Malapportionment of the US House of Representatives: 1940–2020. *PS: Political Science & Politics*. Cambridge University Press. Volume 55. Issue 4. October 2022. Pages 647–654. https://doi.org/10.1017/S1049096522000701

[249] Li, Ruoxi. 2022. The Malapportionment of the US House of Representatives: 1940–2020. *PS: Political Science & Politics*. Cambridge University Press. Volume 55. Issue 4. October 2022. Pages 647–654. https://doi.org/10.1017/S1049096522000701

The intra-decade inequality is usually relatively small for a presidential election occurring in the second year of a decade—when the census is only two years out-of-date. However, this inequality typically reaches a peak when a presidential election is held in the eighth or tenth year of a decade.

Table 1.39 compares the number of voters per electoral vote in the presidential election held in the final year of the decade (2000) in the four states with five electoral votes at the time, namely Utah, Nebraska, West Virginia, and New Mexico.

- Column 2 shows the population of each state according to the 1990 census.
- Column 3 shows the population according to the April 2000 census.[250]
- Column 4 shows the number of popular votes cast in the 2000 presidential election in each state.
- Column 5 shows the number of popular votes corresponding to one electoral vote for each state.
- Column 6 shows, for each state, the ratio of the number of voters represented by one electoral vote to that of the lowest in the table (New Mexico).

As can be seen from the table, one electoral vote in 2000 corresponded to 150,800 popular votes in Utah, but only 118,890 popular votes in New Mexico. The ratio of the number of voters in 2000 per electoral vote for Utah to the corresponding number for New Mexico is 1.27-to-1.

Table 1.39 Comparison of the number of voters per electoral vote in 2000 in states with five electoral votes

State	1990 population	2000 population	Votes cast in 2000 presidential election	Popular votes per electoral vote in 2000	Comparison to lowest
Utah	1,722,850	2,233,169	753,999	150,800	1.27
Nebraska	1,578,385	1,711,263	690,182	138,036	1.16
West Virginia	1,793,477	1,808,344	642,652	128,530	1.08
New Mexico	1,515,069	1,819,046	594,451	118,890	1.00

The same thing happened in the decade after the 2010 census.

Utah was one of six states that had six electoral votes in the 2012, 2016, and 2020 presidential elections.

Table 1.40 compares the number of voters per electoral vote in the presidential election held in the final year of the decade (2020) in the six states with six electoral votes at the time.

As can be seen from the table, one electoral vote in 2020 corresponded to 281,812 popular votes in Iowa, but only 203,178 popular votes in Arkansas. The ratio of the number of voters in 2000 per electoral vote for Iowa to the corresponding number for Arkansas is 1.39-to-1.

[250] Note that the census count in April 2000 closely approximated a state's population at the time of the presidential election in November 2000.

Table 1.40 Comparison of the number of voters per electoral vote in 2020 in states with six electoral votes

State	2010 population	2020 population	Votes cast in 2020 presidential election	Popular votes per electoral vote in 2020	Comparison to lowest turnout state
Iowa	3,046,355	3,190,369	1,690,871	281,812	1.39
Utah	2,763,885	3,271,616	1,505,931	250,989	1.24
Nevada	2,700,551	3,104,614	1,405,376	234,229	1.15
Kansas	2,853,118	2,937,880	1,377,484	229,581	1.13
Mississippi	2,967,297	2,961,279	1,314,475	219,079	1.08
Arkansas	2,915,918	3,011,524	1,219,069	203,178	1.00

1.4.4. Inequality because of voter-turnout differences

Under the current system of electing the President, a vote cast in a low-turnout state has greater value than a vote cast elsewhere.

As detailed later in this chapter (in section 1.5), voter turnout in presidential election years varies significantly, depending on whether a state is a closely divided battleground state or a spectator state.

Thus, in order to illustrate the effect of turnout on the value of a vote from state to state, we need to eliminate the effect of a state's presidential battleground status. We can accomplish this by using data from a midterm election.

Table 1.41 shows, by state, the percentage of the population that voted in the November 2018 midterm elections.[251,252] The table is sorted from the state with the highest percentage (52%) to the state with lowest percentage (31%), as shown in column 4. Column 5 is the ratio of each state's turnout to the lowest state's turnout (Hawaii).

As can be seen from the table, the highest voter turnout percentage is 52%, and the lowest is 31. The ratio 52% to 31% is 1.67-to-1.

1.4.5. Inequality in the power of a voter to decide the national outcome under the current system

The previous four sections discussed inequalities of 3.81-to-1, 1.72-to-1, 1.39-to-1, and 1.67-to-1 that are inherent in the current system.

These inequalities are all substantial.

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[251] See section 1.5 for tables showing voter turnout in presidential election years.

[252] U.S. Census Bureau. *Voting and Registration in the Election of November 2018*. April 2019. table 4a. https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html There are, of course, numerous (slightly) different ways to compute voter turnout. In fact, this citation to the Census Bureau web site contains data for computing turnout in three different ways. The calculation in the table here is based on the state's population, compared to the number of people who voted in that state. Alternatively, voter turnout can be computed based on voting-age population, estimates of citizens of voting age in each state, or the actual number of registered voters. Regardless of the method used, there is considerable variation in voter turnout from state to state.

Table 1.41 Percent of population that voted in 2018

State	Population 2010	Total voters (thousands)	Percent of population that voted	Comparison to lowest turnout state
Montana	994,416	518	52%	1.67
D.C.	601,723	313	52%	1.67
Maine	1,333,074	693	52%	1.66
Oregon	3,848,606	1,918	50%	1.60
North Dakota	675,905	335	50%	1.59
Wisconsin	5,698,230	2,776	49%	1.56
Washington	6,753,369	3,234	48%	1.53
Minnesota	5,314,879	2,523	47%	1.52
Colorado	5,044,930	2,342	46%	1.49
Michigan	9,911,626	4,418	45%	1.43
Utah	2,770,765	1,214	44%	1.40
Iowa	3,053,787	1,335	44%	1.40
Arizona	6,412,700	2,800	44%	1.40
New Hampshire	1,321,445	576	44%	1.40
Vermont	630,337	273	43%	1.39
Georgia	9,727,566	4,084	42%	1.34
Florida	18,900,773	7,918	42%	1.34
Missouri	6,011,478	2,509	42%	1.34
Massachusetts	6,559,644	2,731	42%	1.33
Virginia	8,037,736	3,319	41%	1.32
Delaware	900,877	369	41%	1.31
North Carolina	9,565,781	3,899	41%	1.30
Pennsylvania	12,734,905	5,173	41%	1.30
South Dakota	819,761	331	40%	1.29
Kansas	2,863,813	1,152	40%	1.29
Kentucky	4,350,606	1,746	40%	1.28
Maryland	5,789,929	2,320	40%	1.28
Mississippi	2,978,240	1,180	40%	1.27
South Carolina	4,645,975	1,836	40%	1.27
Ohio	11,568,495	4,538	39%	1.26
Tennessee	6,375,431	2,487	39%	1.25
Wyoming	568,300	220	39%	1.24
New Jersey	8,807,501	3,384	38%	1.23
Connecticut	3,581,628	1,370	38%	1.22
Rhode Island	1,055,247	403	38%	1.22
Alabama	4,802,982	1,830	38%	1.22
Idaho	1,573,499	587	37%	1.19
Nevada	2,709,432	1,006	37%	1.19
Nebraska	1,831,825	676	37%	1.18
Illinois	12,864,380	4,740	37%	1.18
Alaska	721,523	263	36%	1.17
Louisiana	4,553,962	1,656	36%	1.16
Indiana	6,501,582	2,364	36%	1.16
Oklahoma	3,764,882	1,350	36%	1.15
California	37,341,989	13,240	35%	1.13
Texas	25,268,418	8,886	35%	1.13
New York	19,421,055	6,775	35%	1.12
New Mexico	2,067,273	715	35%	1.11
West Virginia	1,859,815	610	33%	1.05
Arkansas	2,926,229	919	31%	1.01
Hawaii	1,366,862	427	31%	1.00
Total	**309,785,186**	**122,281**	**39%**	

However, there is a considerably larger source of inequality inherent in the current system—namely the power of a voter to decide the presidency under the state-by-state winner-take-all method of awarding electoral votes.

In the first six presidential elections of the 2000s, the presidency was decided by an average of 287,969 popular votes distributed over an average of just three decisive states, as shown in table 1.33.

As shown in the table, there is a 210-to-1 inequality in the power of a vote to decide the national outcome under the current state-by-state winner-take-all method of awarding electoral votes.

1.5. VOTER PARTICIPATION IS LOWER IN SPECTATOR STATES THAN IN BATTLEGROUND STATES.

Many voters have come to understand that they are politically irrelevant in the general-election for President.

Voter turnout was considerably higher in the closely divided battleground states than in the rest of the country. Specifically, it was:

- 11% higher in 2020
- 11% higher in 2016
- 16% higher in 2012
- 9% higher in 2008.

Details follow for each election.

1.5.1. 2020 election

In 2020, voter turnout in the 12 closely divided battleground states was 11% higher than in the 39 spectator states.

Voter turnout was 67.94% nationally in 2020. This percentage was computed from the following statistics:

- The civilian voting-age population (CVAP), as computed by the U.S. Census Bureau, was 235,418,734.
- A total of 159,934,200 people turned out to vote in the 2020 presidential election.[253]

As previously mentioned, virtually all (96%) of the 2020 general-election campaign events (204 of the 212 events) occurred in 12 closely divided battleground states (section 1.2.1). Each of the battleground states received between four and 47 campaign events. The other 38 states and the District of Columbia were almost totally ignored.

[253] The total number of votes cast for President in 2020 was 158,224,999. That is, 98.9% of the people who turned out to vote in 2020 voted for President (and 1.1% abstained in the presidential race).

Table 1.42 shows voter turnout in 2020 in the 12 battleground states.

- Column 4 of the table shows the state's civilian voting-age population (CVAP) as reported by the U.S. Election Assistance Commission.[254]
- Column 5 shows the number of people who voted in the state.
- Column 1 shows each state's voter turnout percentage—that is, column 5 divided by column 4.
- Column 2 shows the number of presidential general-election campaign events for each state. .

Turnout in the 12 battleground states in 2020 was 54,173,497 people out of a total civilian voting-age population of 76,309,782—that is, turnout was 70.99%.

Table 1.42 Voter turnout in the 12 battleground states in 2020

Turnout percent	2020 events	State	CVAP	Voter turnout
71%	47	Pennsylvania	9,810,201	6,973,951
72%	31	Florida	15,507,315	11,137,676
72%	25	North Carolina	7,729,644	5,543,405
74%	21	Michigan	7,562,464	5,579,317
75%	18	Wisconsin	4,412,888	3,308,331
67%	13	Ohio	8,879,469	5,974,121
67%	13	Arizona	5,137,474	3,420,481
67%	11	Nevada	2,111,932	1,407,761
79%	9	Minnesota	4,157,556	3,290,013
66%	7	Georgia	7,581,837	5,023,812
72%	5	Iowa	2,348,787	1,700,130
76%	4	New Hampshire	1,070,215	814,499
70.99%	**204**	**Total**	**76,309,782**	**54,173,497**

Table 1.43 shows the voter turnout in the 38 spectator states and the District of Columbia. The table is sorted based on the number of general-election campaign events in column 2 (and secondarily by the turnout percentage in column 1). Thirty-four of these 39 spectator jurisdictions were totally ignored. Five of these 39 places together received only eight of the nation's 212 general-election campaign events.

As can be seen from the table, turnout in the 38 spectator states and the District of Columbia in 2020 was 105,760,703 people out of a total civilian voting-age population of 159,108,952—that is, turnout was 66.47%.

We now compare turnout in the battlegrounds with the rest of the country.

The ratio of 70.99% (the turnout in the 12 battleground states) to 66.47% (the turnout in the 38 spectator states and the District of Columbia) is 1.11-to-1.

That is, 11% more people turned out to vote in the 12 battleground states than in the 38 spectator states and the District of Columbia in 2020.

Battleground status is not, of course, the sole factor in determining voter turnout.

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[254] U.S. Election Assistance Commission. 2021. *The Election Administration and Voting Survey: 2020 Comprehensive Report*. Pages 27–28. https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf. Also see https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys

Table 1.43 Voter turnout in the 39 spectator states in 2020

Turnout percent	2020 events	State	CVAP	Voter turnout
61%	3	Texas	18,875,542	11,449,044
76%	2	Maine	1,078,770	822,534
72%	1	Virginia	6,226,623	4,487,338
70%	1	Nebraska	1,388,950	966,786
62%	1	Indiana	4,978,356	3,103,284
78%		Colorado	4,244,210	3,320,607
76%		Washington	5,409,035	4,116,055
76%		Oregon	3,162,204	2,396,123
74%		Vermont	498,705	368,075
74%		Montana	831,760	612,141
73%		New Jersey	6,170,130	4,494,659
72%		Massachusetts	5,057,192	3,658,005
72%		Utah	2,134,249	1,542,529
71%		Connecticut	2,619,474	1,863,479
71%		Delaware	725,178	514,656
71%		Maryland	4,316,921	3,059,603
69%		Missouri	4,650,318	3,201,458
68%		Idaho	1,282,630	878,527
68%		California	26,032,160	17,720,746
68%		Alaska	533,151	361,400
68%		Illinois	9,088,036	6,140,545
66%		Kansas	2,103,748	1,379,623
65%		South Dakota	653,394	427,406
65%		Rhode Island	800,798	519,412
65%		South Carolina	3,892,341	2,523,856
65%		D.C.	536,768	346,491
64%		North Dakota	567,545	364,499
64%		Wyoming	434,852	278,503
64%		Kentucky	3,367,502	2,149,444
63%		New York	13,810,830	8,701,749
63%		Louisiana	3,463,372	2,169,354
62%		Alabama	3,731,336	2,329,047
61%		New Mexico	1,522,171	928,230
60%		Tennessee	5,129,580	3,074,692
59%		Mississippi	2,246,323	1,334,155
57%		Hawaii	1,014,035	580,098
56%		West Virginia	1,420,289	801,667
54%		Oklahoma	2,875,059	1,564,886
54%		Arkansas	2,235,415	1,209,997
66.47%	**8**	**Total**	**159,108,952**	**105,760,703**

Table 1.44 shows each state's voter turnout for the 2020 election. The 12 battleground states are highlighted in bold. The table is sorted according to the state's voter turnout (column 1). Minnesota is at the top (with 79% turnout), and Arkansas is at the bottom (with 54% turnout).

A glance at table 1.44 shows that none of the 12 battleground states (highlighted in bold) is among the 20 low-turnout states at the bottom of the table. Two-thirds of the battleground states had above-average turnout—that is, turnout above 67.94%.

However, the table also indicates that a state's voter turnout is influenced by factors other than the state's battleground status.

For example, voter turnout was usually higher in the states where every voter received a ballot by mail in 2020.[255] Turnout in five of the eight "vote by mail" states (Colorado, Oregon, Utah, Vermont, and Washington) was higher than the national average.[256]

A state's demographics (particularly education and income) play an important role in voter turnout. A glance at the bottom portion of the table shows numerous low-turnout states with below-average levels of education and income.

Although difficult to quantify, the ease of voting also impacts turnout.

Another intangible factor is that some states historically have had a culture of greater civic participation. For example, Minnesota appears near the top of the list in all four of the presidential elections between 2008 and 2020—even though it received almost no attention from presidential campaigns in three of those four elections (namely, 2008, 2012, and 2016, as shown in tables later in this section).

Nonetheless, presidential campaigning in a state exerts a major impact on voter turnout, and turnout in the 12 battleground states was 11% higher in 2020 than in the 38 spectator states and the District of Columbia.

1.5.2. 2016 election

In 2016, voter turnout in the 12 closely divided battleground states was 11% higher than in the 38 spectator states and the District of Columbia. This is the same percentage difference as 2020.

Voter turnout in 2016 was 62.2% nationally.

Specifically, 138,467,690 people turned out to vote, out of a civilian voting-age population of 222,469,187.[257]

In 2016, virtually all (94%) of the general-election campaign events (375 of the 399 events) occurred in the 12 states that were closely divided that year. Each of these 12 battleground states received a considerable number of events (i.e., between 10 and 71). In

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[255] National Conference of State Legislatures. 2022. Vote-by-Mail States. https://www.ncsl.org/research/elections-and-campaigns/vopp-table-18-states-with-all-mail-elections.aspx

[256] "Vote by mail" alone does not guarantee above-average turnout. In 2020, three of the vote-by-mail states (Hawaii, Nevada, and California) did not have above-average turnout. These three states did, however, experience significant increases in their turnout, compared to 2016, when they did not use vote by mail. Specifically, Hawaii's low turnout increased from 44% in 2016 without "vote by mail" to 57% with it; Nevada's turnout increased from to 61% to 67%; and California's turnout increased from 60% to 68%.

[257] U.S. Election Assistance Commission. 2017. *The Election Administration and Voting Survey*: *2016 Comprehensive Report*. Pages 20–21. https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf

Table 1.44 Voter turnout in 2020

Turnout percent	2020 events	State	CVAP	Voter turnout
79%	**9**	**Minnesota**	**4,157,556**	**3,290,013**
78%		Colorado	4,244,210	3,320,607
76%	2	Maine	1,078,770	822,534
76%	**4**	**New Hampshire**	**1,070,215**	**814,499**
76%		Washington	5,409,035	4,116,055
76%		Oregon	3,162,204	2,396,123
75%	**18**	**Wisconsin**	**4,412,888**	**3,308,331**
74%		Vermont	498,705	368,075
74%	21	Michigan	7,562,464	5,579,317
74%		Montana	831,760	612,141
73%		New Jersey	6,170,130	4,494,659
72%	5	Iowa	2,348,787	1,700,130
72%		Massachusetts	5,057,192	3,658,005
72%		Utah	2,134,249	1,542,529
72%	1	Virginia	6,226,623	4,487,338
72%	**31**	**Florida**	**15,507,315**	**11,137,676**
72%	**25**	**North Carolina**	**7,729,644**	**5,543,405**
71%		Connecticut	2,619,474	1,863,479
71%	47	Pennsylvania	9,810,201	6,973,951
71%		Delaware	725,178	514,656
71%		Maryland	4,316,921	3,059,603
70%	1	Nebraska	1,388,950	966,786
69%		Missouri	4,650,318	3,201,458
68%		Idaho	1,282,630	878,527
68%		California	26,032,160	17,720,746
68%		Alaska	533,151	361,400
68%		Illinois	9,088,036	6,140,545
67%	**13**	**Ohio**	**8,879,469**	**5,974,121**
67%	**11**	**Nevada**	**2,111,932**	**1,407,761**
67%	**13**	**Arizona**	**5,137,474**	**3,420,481**
66%	**7**	**Georgia**	**7,581,837**	**5,023,812**
66%		Kansas	2,103,748	1,379,623
65%		South Dakota	653,394	427,406
65%		Rhode Island	800,798	519,412
65%		South Carolina	3,892,341	2,523,856
65%		D.C.	536,768	346,491
64%		North Dakota	567,545	364,499
64%		Wyoming	434,852	278,503
64%		Kentucky	3,367,502	2,149,444
63%		New York	13,810,830	8,701,749
63%		Louisiana	3,463,372	2,169,354
62%		Alabama	3,731,336	2,329,047
62%	1	Indiana	4,978,356	3,103,284
61%		New Mexico	1,522,171	928,230
61%	3	Texas	18,875,542	11,449,044
60%		Tennessee	5,129,580	3,074,692
59%		Mississippi	2,246,323	1,334,155
57%		Hawaii	1,014,035	580,098
56%		West Virginia	1,420,289	801,667
54%		Oklahoma	2,875,059	1,564,886
54%		Arkansas	2,235,415	1,209,997
67.94%	**212**	**Total**	**235,418,734**	**159,934,200**

Table 1.45 Voter turnout in the 12 battleground states in 2016

Turnout percent	2016 events	State	CVAP	Voter Turnout
69%	71	Florida	13,933,052	9,613,669
66%	55	North Carolina	7,107,998	4,690,195
64%	54	Pennsylvania	9,710,416	6,223,150
64%	48	Ohio	8,709,050	5,607,641
67%	23	Virginia	5,953,612	3,996,302
66%	22	Michigan	7,380,136	4,874,619
74%	21	New Hampshire	1,020,130	757,669
69%	21	Iowa	2,285,126	1,581,371
77%	19	Colorado	3,750,953	2,884,199
61%	17	Nevada	1,863,799	1,128,492
70%	14	Wisconsin	4,294,321	2,993,000
60%	10	Arizona	4,526,594	2,722,660
66.7%	**375**	**Total**	**70,535,187**	**47,072,967**

contrast, the states that received the remaining 24 events (a mere 6% of the total of 375 events) received no more than three events each.[258]

Table 1.45 shows voter turnout in the 12 battleground states in 2016. It is sorted according to the state's number of general-election campaign events (shown in column 2).

As can be seen from the table, 47,072,967 people voted, out of a total civilian voting-age population (CVAP) of 70,535,187. That is, the turnout in 2016 in the 12 battleground states was 66.7%.

Table 1.46 shows voter turnout in 2016 in the 38 spectator states and the District of Columbia. It is sorted based on the number of general-election campaign events in column 2 (and secondarily by the turnout percentage in column 1).

The table shows that 91,394,723 people voted, out of a total civilian voting-age population of 151,934,000. That is, the turnout in the 38 spectator states and the District of Columbia in 2016 was 60.2%.

The ratio of 66.7% (the turnout in the 12 battleground states) to 60.2% (the turnout in the 38 spectator states and the District of Columbia) is 1.11-to-1.

Thus, turnout in 2016 in the 12 battleground states was 11% higher than in the 38 spectator states and the District of Columbia.

Table 1.47 shows each state's voter turnout for the 2016 election. The 12 battleground states are highlighted in bold. The table is sorted according to the state's voter turnout (column 1).

[258] The battleground states vary slightly from election to election. Of the dozen battleground states that together accounted for almost all of the entire general-election campaign in 2016, all but two appeared on the list for 2020. Specifically, Colorado and Virginia (which had been closely divided in 2016, 2012, and 2008) were both safely Democratic in 2020—and therefore virtually ignored in 2020. Meanwhile, two other states (Minnesota and Georgia) joined the list of the dozen battleground states that together accounted for almost the entire campaign in 2020. In 2016, Minnesota and Georgia received only three and two events (out of a national total of 399), respectively.

Table 1.46 Voter turnout in the 39 spectator states in 2016

Turnout percent	2016 events	State	CVAP	Voter Turnout
74%	3	Maine	1,048,274	771,892
59%	3	Georgia	6,978,660	4,147,161
55%	3	New Mexico	1,457,632	804,073
75%	2	Minnesota	3,950,807	2,973,744
66%	2	Missouri	4,525,035	2,973,855
65%	2	Nebraska	1,333,860	869,815
59%	2	Indiana	4,801,113	2,831,540
68%	1	Washington	4,937,212	3,363,452
65%	1	Connecticut	2,574,178	1,675,955
62%	1	Illinois	8,979,999	5,562,009
60%	1	California	24,280,349	14,610,494
60%	1	Utah	1,868,008	1,114,567
55%	1	Mississippi	2,210,424	1,209,357
52%	1	Texas	16,864,962	8,701,152
72%		Oregon	2,867,670	2,051,452
70%		Massachusetts	4,850,598	3,378,801
67%		Maryland	4,182,241	2,807,326
66%		Montana	781,250	516,901
66%		Delaware	681,606	448,217
66%		Vermont	493,124	323,623
65%		New Jersey	6,053,893	3,957,303
64%		D.C.	485,116	311,841
64%		North Dakota	546,486	349,945
63%		Idaho	1,130,550	710,495
62%		Alaska	523,747	323,288
60%		Rhode Island	776,565	469,547
60%		Louisiana	3,410,634	2,049,802
60%		South Dakota	621,461	372,988
60%		Wyoming	430,026	256,553
60%		South Carolina	3,566,508	2,124,952
60%		Kansas	2,053,919	1,223,491
59%		Kentucky	3,297,108	1,949,254
59%		Alabama	3,620,994	2,137,452
58%		New York	13,531,404	7,793,078
53%		Oklahoma	2,768,561	1,465,505
53%		Tennessee	4,828,366	2,545,271
50%		West Virginia	1,455,848	732,362
48%		Arkansas	2,164,083	1,048,513
44%		Hawaii	1,001,729	437,697
60.2%	**24**	**Total**	**151,934,000**	**91,394,723**

A glance at the table shows that the 12 battleground states (in bold) tend to appear near the top part of the table. All but two (Arizona and Nevada) had turnout above the national average of 62.2%.

Table 1.47 Voter turnout in 2016

Turnout percent	2016 events	State	CVAP	Voter Turnout
77%	**19**	**Colorado**	**3,750,953**	**2,884,199**
75%	2	Minnesota	3,950,807	2,973,744
74%	**21**	**New Hampshire**	**1,020,130**	**757,669**
74%	3	Maine	1,048,274	771,892
72%		Oregon	2,867,670	2,051,452
70%	**14**	**Wisconsin**	**4,294,321**	**2,993,000**
70%		Massachusetts	4,850,598	3,378,801
69%	**21**	**Iowa**	**2,285,126**	**1,581,371**
69%	**71**	**Florida**	**13,933,052**	**9,613,669**
68%	1	Washington	4,937,212	3,363,452
67%		Maryland	4,182,241	2,807,326
67%	**23**	**Virginia**	**5,953,612**	**3,996,302**
66%		Montana	781,250	516,901
66%	**22**	**Michigan**	**7,380,136**	**4,874,619**
66%	**55**	**North Carolina**	**7,107,998**	**4,690,195**
66%		Delaware	681,606	448,217
66%	2	Missouri	4,525,035	2,973,855
66%		Vermont	493,124	323,623
65%		New Jersey	6,053,893	3,957,303
65%	2	Nebraska	1,333,860	869,815
65%	1	Connecticut	2,574,178	1,675,955
64%	**48**	**Ohio**	**8,709,050**	**5,607,641**
64%		D.C.	485,116	311,841
64%	**54**	**Pennsylvania**	**9,710,416**	**6,223,150**
64%		North Dakota	546,486	349,945
63%		Idaho	1,130,550	710,495
62%	1	Illinois	8,979,999	5,562,009
62%		Alaska	523,747	323,288
61%	**17**	**Nevada**	**1,863,799**	**1,128,492**
60%		Rhode Island	776,565	469,547
60%	1	California	24,280,349	14,610,494
60%	**10**	**Arizona**	**4,526,594**	**2,722,660**
60%		Louisiana	3,410,634	2,049,802
60%		South Dakota	621,461	372,988
60%	1	Utah	1,868,008	1,114,567
60%		Wyoming	430,026	256,553
60%		South Carolina	3,566,508	2,124,952
60%		Kansas	2,053,919	1,223,491
59%	3	Georgia	6,978,660	4,147,161
59%		Kentucky	3,297,108	1,949,254
59%		Alabama	3,620,994	2,137,452
59%	2	Indiana	4,801,113	2,831,540
58%		New York	13,531,404	7,793,078
55%	3	New Mexico	1,457,632	804,073
55%	1	Mississippi	2,210,424	1,209,357
53%		Oklahoma	2,768,561	1,465,505
53%		Tennessee	4,828,366	2,545,271
52%	1	Texas	16,864,962	8,701,152
50%		West Virginia	1,455,848	732,362
48%		Arkansas	2,164,083	1,048,513
44%		Hawaii	1,001,729	437,697
62.2%	**399**	**Total**	**222,469,187**	**138,467,690**

Table 1.48 Voter turnout in the 12 battleground states in 2012

Turnout percent	2012 events	State	ECVAP	Voter Turnout
65%	73	Ohio	8,678,945	5,632,423
63%	40	Florida	13,534,127	8,557,692
66%	36	Virginia	5,883,341	3,896,846
70%	27	Iowa	2,280,022	1,589,951
71%	23	Colorado	3,654,799	2,594,628
72%	18	Wisconsin	4,271,926	3,078,135
71%	13	New Hampshire	1,014,537	718,700
56%	13	Nevada	1,804,094	1,017,772
60%	5	Pennsylvania	9,700,796	5,783,621
65%	3	North Carolina	7,013,407	4,539,729
75%	1	Minnesota	3,920,519	2,950,780
65%	1	Michigan	7,347,850	4,780,701
65.3%	**253**	**12 states**	**69,104,363**	**45,140,978**

1.5.3. 2012 election

In 2012, voter turnout in the 12 battleground states was 16% higher than in the 38 spectator states and the District of Columbia.

Voter turnout in 2012 was 59.1% nationally. Specifically, 129,664,614 people turned out to vote, out of an estimated civilian voting-age population of 219,493,648.[259]

In 2012, 100% of the 253 general-election campaign events occurred in the 12 closely divided battleground states.[260]

Table 1.48 shows voter turnout in the 12 battleground states in 2012. The table is sorted according to the state's number of general-election campaign events (shown in column 2).

The table shows that 45,140,978 people voted, out of an estimated civilian voting-age population (ECVAP) of 69,104,363. That is, turnout was 65.3% in the 12 battleground states in 2012.

Table 1.49 shows voter turnout in the 38 spectator states and the District of Columbia in 2012. The table shows that 84,523,636 people voted, out of a total civilian voting-age population of 150,389,285. That is, the turnout was 56.2%. This table is sorted according to the turnout percentage (column 1).

All of the general-election campaign events were concentrated in the 12 battleground states in 2012, so none of these 39 jurisdictions received any campaign events (column 2).

The ratio of 65.3% (the turnout in the 12 battleground states) to 56.2% (the turnout in the 38 spectator states and the District of Columbia) is 1.16.

Thus, turnout in the 12 battleground states was 16% higher than in the 38 spectator states and the District of Columbia in 2012.

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[259] U.S. Election Assistance Commission. 2013. The Election Administration and Voting Survey: 2012 Comprehensive Report. Pages 20–21. https://www.eac.gov/sites/default/files/Research/EAC_2012VoterSurvey.pdf

[260] The battleground states vary slightly from election to election. Of the dozen battleground states that together accounted for the entire general-election campaign in 2012, all but Minnesota appeared on the list for 2016 (when Arizona appeared on the list).

Table 1.49 Voter turnout in the 39 spectator states in 2012

Turnout percent	2012 events	State	ECVAP	Voter Turnout
69%		Maine	1,046,057	724,759
67%		Massachusetts	4,784,241	3,184,196
66%		Maryland	4,153,057	2,734,189
66%		Washington	4,879,174	3,206,490
64%		Oregon	2,822,652	1,820,507
63%		Montana	774,966	491,966
63%		Missouri	4,505,205	2,840,776
62%		D.C.	473,487	294,254
62%		Delaware	672,175	417,631
62%		Vermont	491,789	304,509
61%		Nebraska	1,329,041	815,568
61%		New Jersey	6,012,270	3,677,463
61%		North Dakota	536,097	326,239
61%		Connecticut	2,565,067	1,560,640
60%		Illinois	8,916,661	5,339,488
60%		Idaho	1,114,631	666,290
60%		South Dakota	619,251	368,816
59%		Louisiana	3,396,443	2,014,511
59%		Rhode Island	768,684	451,593
58%		Alaska	519,629	302,465
58%		Wyoming	430,996	250,701
58%		Alabama	3,595,400	2,083,309
57%		Georgia	6,867,525	3,910,557
57%		South Carolina	3,506,606	1,981,516
56%		Utah	1,829,834	1,023,036
56%		Indiana	4,780,336	2,663,373
56%		California	23,546,880	13,096,097
55%		Kentucky	3,283,865	1,815,896
54%		Kansas	2,053,815	1,115,281
53%		New York	13,408,596	7,128,852
53%		Arizona	4,376,217	2,323,579
52%		Tennessee	4,790,345	2,480,182
50%		Arkansas	2,159,446	1,080,809
49%		Oklahoma	2,757,440	1,343,380
48%		Texas	16,518,813	7,993,851
47%		West Virginia	1,460,372	685,099
47%		New Mexico	1,448,740	679,080
44%		Hawaii	993,045	436,774
40%		Mississippi	2,200,437	889,914
56.2%	**0**	**Total**	**150,389,285**	**84,523,636**

Table 1.50 Voter turnout in 2012

Turnout percent	2012 events	State	ECVAP	Voter Turnout
75%	**1**	**Minnesota**	**3,920,519**	**2,950,780**
72%	**18**	**Wisconsin**	**4,271,926**	**3,078,135**
71%	**23**	**Colorado**	**3,654,799**	**2,594,628**
71%	**13**	**New Hampshire**	**1,014,537**	**718,700**
70%	**27**	**Iowa**	**2,280,022**	**1,589,951**
69%		Maine	1,046,057	724,759
67%		Massachusetts	4,784,241	3,184,196
66%	**36**	**Virginia**	**5,883,341**	**3,896,846**
66%		Maryland	4,153,057	2,734,189
66%		Washington	4,879,174	3,206,490
65%	**1**	**Michigan**	**7,347,850**	**4,780,701**
65%	**73**	**Ohio**	**8,678,945**	**5,632,423**
65%	**3**	**North Carolina**	**7,013,407**	**4,539,729**
64%		Oregon	2,822,652	1,820,507
63%		Montana	774,966	491,966
63%	**40**	**Florida**	**13,534,127**	**8,557,692**
63%		Missouri	4,505,205	2,840,776
62%		D.C.	473,487	294,254
62%		Delaware	672,175	417,631
62%		Vermont	491,789	304,509
61%		Nebraska	1,329,041	815,568
61%		New Jersey	6,012,270	3,677,463
61%		North Dakota	536,097	326,239
61%		Connecticut	2,565,067	1,560,640
60%		Illinois	8,916,661	5,339,488
60%		Idaho	1,114,631	666,290
60%	**5**	**Pennsylvania**	**9,700,796**	**5,783,621**
60%		South Dakota	619,251	368,816
59%		Louisiana	3,396,443	2,014,511
59%		Rhode Island	768,684	451,593
58%		Alaska	519,629	302,465
58%		Wyoming	430,996	250,701
58%		Alabama	3,595,400	2,083,309
57%		Georgia	6,867,525	3,910,557
57%		South Carolina	3,506,606	1,981,516
56%	**13**	**Nevada**	**1,804,094**	**1,017,772**
56%		Utah	1,829,834	1,023,036
56%		Indiana	4,780,336	2,663,373
56%		California	23,546,880	13,096,097
55%		Kentucky	3,283,865	1,815,896
54%		Kansas	2,053,815	1,115,281
53%		New York	13,408,596	7,128,852
53%		Arizona	4,376,217	2,323,579
52%		Tennessee	4,790,345	2,480,182
50%		Arkansas	2,159,446	1,080,809
49%		Oklahoma	2,757,440	1,343,380
48%		Texas	16,518,813	7,993,851
47%		West Virginia	1,460,372	685,099
47%		New Mexico	1,448,740	679,080
44%		Hawaii	993,045	436,774
40%		Mississippi	2,200,437	889,914
59.1%	**253**	**Total**	**219,493,648**	**129,664,614**

Table 1.50 shows each state's turnout data for the 2012 election.[261] The table is sorted according to the state's voter turnout (column 1).

A glance at the table shows that almost all of the battleground states (in bold) were in the top of the table.

1.5.4. 2008 election

In this section, we will see that turnout in 2008 in the 14 battleground states was 9% higher than in the 36 spectator states and the District of Columbia.

In 2008, 131,924,177 people turned out to vote, out of an estimated civilian voting-age population (ECVAP) of 210,476,000. That is, voter turnout was 62.7% nationally.

Virtually all (98%) of the general-election campaign events (293 of the 300 events) occurred in 14 closely divided battleground states. Each of these 14 battleground states received between seven and 62 events. There was a dramatic difference between the number of events in these 14 battleground states, compared to the number of events in the remaining states. The jurisdictions that received the remaining seven events (a mere 2% of the national total of 300 events) received only one or two events each. No other states received any events.[262]

Table 1.51 shows the voter turnout in the 14 battleground states in 2008. The table is sorted according to the number of general-election campaign events in column 2 (and, secondarily, according to turnout percentage shown in column 1).

The table shows that 48,462,271 people voted, out of a total estimated civilian voting-age population (ECVAP) of 72,985,000. That is, turnout was 66.4% in the 14 battleground states in 2008.

Table 1.51 Voter turnout in the 14 battleground states in 2008

Turnout percent	2008 events	State	CVAP	Voter Turnout
66%	62	Ohio	8,569,000	5,671,438
67%	46	Florida	12,643,000	8,514,809
65%	40	Pennsylvania	9,400,000	6,071,357
68%	23	Virginia	5,546,000	3,750,065
68%	21	Missouri	4,391,000	2,992,023
71%	20	Colorado	3,434,000	2,426,253
66%	15	North Carolina	6,586,000	4,338,197
73%	12	New Hampshire	988,000	719,403
58%	12	Nevada	1,665,000	970,019
69%	10	Michigan	7,334,000	5,039,080
60%	9	Indiana	4,643,000	2,805,986
72%	8	Wisconsin	4,190,000	2,996,869
45%	8	New Mexico	1,370,000	620,289
69%	7	Iowa	2,226,000	1,546,483
66.4%	**293**	**Total**	**72,985,000**	**48,462,271**

[261] U.S. Election Assistance Commission. *The 2012 Election Administration and Voting Survey*. September 2013. Page 29–30. https://www.eac.gov/sites/default/files/eac_assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf

[262] The number of battleground states has been shrinking for decades. FairVote. 2005. *The Shrinking Battleground: The 2008 Presidential Election and Beyond*. Takoma Park, MD: The Center for Voting and Democracy. http://archive.fairvote.org/?page=1555

Table 1.52 shows voter turnout in the 36 spectator states and the District of Columbia in 2008. As can be seen, only the five jurisdictions at the top of this table received any campaign events, and the other 32 jurisdictions received no events at all.

The table shows that 83,461,906 people voted, out of a total estimated civilian voting-age population of 137,491,000. That is, turnout in the 36 spectator states and the District of Columbia in 2008 was 60.7%.

Table 1.52 Voter turnout in the 37 spectator states in 2008

Turnout percent	2008 events	State	ECVAP	Voter Turnout
77%	2	Minnesota	3,799,000	2,920,214
73%	2	Maine	1,025,000	744,456
57%	1	Tennessee	4,591,000	2,618,238
52%	1	D.C.	433,000	226,871
52%	1	West Virginia	1,418,000	736,622
69%		Vermont	482,000	333,839
68%		Oregon	2,711,000	1,845,251
68%		Alaska	485,000	328,957
67%		Maryland	3,957,000	2,661,905
67%		Montana	740,000	497,599
67%		Massachusetts	4,621,000	3,102,995
67%		New Jersey	5,851,000	3,910,220
67%		Washington	4,609,000	3,071,587
66%		Connecticut	2,480,000	1,644,845
66%		Delaware	632,000	415,696
65%		North Dakota	490,000	318,425
65%		South Dakota	598,000	387,355
64%		Wyoming	397,000	256,035
64%		Arkansas	2,083,000	1,341,795
64%		Nebraska	1,278,000	811,780
63%		Illinois	8,830,000	5,577,509
63%		Kansas	2,005,000	1,263,202
63%		Rhode Island	757,000	475,428
63%		Idaho	1,063,000	667,506
62%		California	22,224,000	13,798,557
61%		Louisiana	3,237,000	1,980,814
61%		Alabama	3,462,000	2,105,622
60%		Georgia	6,614,000	3,975,986
58%		New York	13,206,000	7,722,019
58%		South Carolina	3,303,000	1,930,359
58%		Kentucky	3,198,000	1,861,577
56%		Oklahoma	2,630,000	1,474,694
55%		Arizona	4,205,000	2,320,851
55%		Utah	1,759,000	960,299
53%		Texas	15,254,000	8,059,731
50%		Hawaii	919,000	456,009
31%		Mississippi	2,145,000	657,058
60.7%	**5**	**Total**	**137,491,000**	**83,461,906**

The ratio of 66.4% (the turnout in the 14 battleground states) to 60.7% (the turnout in the 36 spectator states and the District of Columbia) was 1.09.

That is, turnout in the 14 battleground states was 9% higher than in the 36 spectator states and the District of Columbia in 2008.

Table 1.53 shows each state's turnout data for the 2008 election.[263]

A glance at the table shows that the 14 battleground states (in bold) are concentrated at the top of the table. All but three of the 14 battleground states in 2008 had above-average turnout (that is, above 62.7%).

1.5.5. 1824 election

It is no mystery as to why voter turnout is higher in battleground states, compared to the rest of the country. The reason is the same today as it was in 1824.

The 1824 election was the first election in which presidential electors were chosen by the people in more than half of the states. Three-quarters of the 24 states conducted popular elections, while state legislatures appointed the electors in the remaining six.

Discussing voter turnout in 1824, historian Donald Ratcliffe wrote:

> "The overall level of turnout in the election was low.… **The reason was that in most states, the outcome in the [presidential election] was already fairly clear, and voting did not seem a priority. Only half a dozen states experienced a real popular contest**: in the Old Northwest (Ohio, Indiana, and Illinois), in New Jersey and Maryland, and in North Carolina. In these states, turnout in the presidential election rose to over **40 percent**, compared with less than **24 percent** in the ten other states[264] that held a popular election."[265] [Emphasis added]

The ratio of 40% to 24% is 1.67. That is, turnout in the six contested states was 67% higher than in the 10 spectator states in 1824.

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[263] U.S. Election Assistance Commission. 2008. *The 2008 Election Administration and Voting Survey*. November 2009. Pages 28–29. https://www.eac.gov/sites/default/files/eac_assets/1/28/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf

[264] Note that there was no popular vote for President in 1824 in six states (Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont). Instead, the legislatures appointed the state's presidential electors. In fact, 1824 was the last election in which a substantial number of state legislatures appointed presidential electors. By 1828, only two state legislatures appointed their state's presidential electors (Delaware and South Carolina).

[265] Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas. Page 21.

Table 1.53 Voter turnout in 2008

Turnout percent	2008 events	State	ECVAP	Voter Turnout
77%	2	Minnesota	3,799,000	2,920,214
73%	**12**	**New Hampshire**	**988,000**	**719,403**
73%	2	Maine	1,025,000	744,456
72%	**8**	**Wisconsin**	**4,190,000**	**2,996,869**
71%	**20**	**Colorado**	**3,434,000**	**2,426,253**
69%	**7**	**Iowa**	**2,226,000**	**1,546,483**
69%		Vermont	482,000	333,839
69%	10	Michigan	7,334,000	5,039,080
68%	21	Missouri	4,391,000	2,992,023
68%		Oregon	2,711,000	1,845,251
68%		Alaska	485,000	328,957
68%	23	Virginia	5,546,000	3,750,065
67%	46	Florida	12,643,000	8,514,809
67%		Maryland	3,957,000	2,661,905
67%		Montana	740,000	497,599
67%		Massachusetts	4,621,000	3,102,995
67%		New Jersey	5,851,000	3,910,220
67%		Washington	4,609,000	3,071,587
66%		Connecticut	2,480,000	1,644,845
66%	**62**	**Ohio**	**8,569,000**	**5,671,438**
66%	**15**	**North Carolina**	**6,586,000**	**4,338,197**
66%		Delaware	632,000	415,696
65%		North Dakota	490,000	318,425
65%		South Dakota	598,000	387,355
65%	40	Pennsylvania	9,400,000	6,071,357
64%		Wyoming	397,000	256,035
64%		Arkansas	2,083,000	1,341,795
64%		Nebraska	1,278,000	811,780
63%		Illinois	8,830,000	5,577,509
63%		Kansas	2,005,000	1,263,202
63%		Rhode Island	757,000	475,428
63%		Idaho	1,063,000	667,506
62%		California	22,224,000	13,798,557
61%		Louisiana	3,237,000	1,980,814
61%		Alabama	3,462,000	2,105,622
60%	9	Indiana	4,643,000	2,805,986
60%		Georgia	6,614,000	3,975,986
58%		New York	13,206,000	7,722,019
58%		South Carolina	3,303,000	1,930,359
58%	12	Nevada	1,665,000	970,019
58%		Kentucky	3,198,000	1,861,577
57%	1	Tennessee	4,591,000	2,618,238
56%		Oklahoma	2,630,000	1,474,694
55%		Arizona	4,205,000	2,320,851
55%		Utah	1,759,000	960,299
53%		Texas	15,254,000	8,059,731
52%	1	D.C.	433,000	226,871
52%	1	West Virginia	1,418,000	736,622
50%		Hawaii	919,000	456,009
45%	**8**	**New Mexico**	**1,370,000**	**620,289**
31%		Mississippi	2,145,000	657,058
62.7%	**300**	**Total**	**210,476,000**	**131,924,177**

1.5.6. Additional studies of voter turnout

Numerous other studies have noted the correlation between a state's battleground status and voter turnout.

A 2005 Brookings Institution report pointed out:

> "The electoral college can depress voter participation in much of the nation. Overall, the percentage of voters who participated in last fall's election was almost 5 percent higher than the turnout in 2000. Yet, most of the increase was limited to the battleground states. **Because the electoral college has effectively narrowed elections like the last one to a quadrennial contest for the votes of a relatively small number of states, people elsewhere are likely to feel that their votes don't matter.**"[266] [Emphasis added]

In 2012, *USA Today* reported the following about that year's election:

> "Swing-state voters are a bit more enthusiastic about voting this year than those living elsewhere, perhaps reflecting the attention they're given in TV ads and candidate visits. Nearly half of those in battleground states are extremely or very enthusiastic about voting for president this year."[267]

Other analysts of voter turnout employ slightly different definitions of the battleground states from ours, or use statistics other than the Civilian Voting Age Population (CVAP) data compiled by the U.S. Census Bureau.[268]

For example, the late Curtis Gans discussed the turnout in the 2012 election during a televised panel on November 9, 2012, at the Bipartisan Policy Center:

> "Because of the Electoral College, we limit the number of states where we have campaigns. In the … **10 battleground states, the turnout was 62.8%, In the rest, turnout was 54.8%.**"[269] [Emphasis added]

The ratio of 62.8% to 54.8% is 1.15. Thus, using Gans' list of 10 battleground states, the turnout was 15% higher than in the rest of the country. Note that this is almost the same as the 16% difference in turnout that we computed using our list of 12 battleground states.

The Nonprofit Vote organization studied turnout for the six presidential elections between 2000 and 2020 and concluded:

> "Battleground states consistently show turnout advantages."[270]

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[266] Nivola, Pietro S. 2005. *Thinking About Political Polarization*. Washington, D.C.: The Brookings Institution. Policy Brief 139. January 2005.

[267] Page, Susan. 2012. Swing states poll: Amid barrage of ads, Obama has edge. *USA Today*. July 8, 2012.

[268] For example, the studies by the U.S. Elections Project overseen by Professor Michael P. McDonald of the University of Florida use the "voter-eligible population" (VEP) on their extensive web site at https://www.electproject.org/election-data/voter-turnout-data

[269] Bipartisan Policy Center Post-Election Analysis. C-SPAN. November 9, 2012. Timestamp 36.50. https://www.c-span.org/video/?309358-1/bipartisan-policy-center-post-election-analysis

[270] Nonprofit Vote. 2020. *America Goes to the Polls 2020: Policy and Voter Turnout in the 2020 Election*. Page 24. https://www.nonprofitvote.org/wp-content/uploads/2021/03/america-goes-polls-2020-7.pdf

1.6. THE CURRENT SYSTEM COULD RESULT IN THE U.S. HOUSE CHOOSING THE PRESIDENT ON A ONE-STATE-ONE-VOTE BASIS.

A presidential election can be thrown into Congress in two ways:

- There is a 269–269 tie in the Electoral College.
- A multi-candidate race in which no candidate receives an absolute majority of the electoral votes—a growing possibility given the ever-increasing number of independent voters.[271,272]

If no candidate for President receives an absolute majority of electoral votes (that is, 270 of 538), the choice of President is thrown into the U.S. House of Representatives—with each state having one vote.[273] This has happened twice—in 1800 and 1824.

Depending on the number of state delegations controlled by each party in the House, the candidate who loses the national popular vote could easily be selected to be President.

If no candidate for Vice President wins an absolute majority of the electoral votes, the Senate chooses the Vice President. This happened after the 1836 election (section 3.7.4).

As will be detailed later in this section, there have been many politically plausible combinations of states that could have yielded a 269–269 tie in each of the six presidential elections between 2000 and 2020. Moreover, there are some especially plausible political and geographic combinations of states that could yield a 269–269 tie in 2024.

As for multi-candidate races, a third-party or independent candidate has won electoral votes on eight occasions since the adoption in 1804 of the current voting procedure for the Electoral College (the 12th Amendment). However, out of those eight occasions (1968, 1948, 1912, 1860, 1856, 1836, 1832, and 1824), one candidate received an absolute majority of the electoral votes in every case except 1824.

Surprisingly, if a presidential election is thrown into the U.S. House, the presidency could easily go to the candidate who comes in *third* place in a multi-candidate presidential contest.

Consider the situation in 1992 when Ross Perot ran against incumbent President George H.W. Bush and Arkansas Governor Bill Clinton.

The *New York Times* reported that a nationwide poll taken on June 4–8, 1992, showed

- Ross Perot—39%
- George H.W. Bush—31%
- Bill Clinton—25% support.[274]

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[271] Third Way. 2022. *The Dangerous Illusion of a Presidential Third Party in 2024*. December 8, 2022. https://www.thirdway.org/report/the-dangerous-illusion-of-a-presidential-third-party-in-2024

[272] Wegman, Jesse. 2023. The Real Danger in Robert F. Kennedy Jr.'s Independent Run. *New York Times*. October 14, 2023. https://www.nytimes.com/2023/10/14/opinion/the-real-danger-in-robert-f-kennedy-jrs-independent-run.html

[273] More precisely, an absolute majority of the "number of electors *appointed*" is required. There have been two elections in which some presidential electors were not appointed. During the Civil War, the 11 Confederate states did not appoint any presidential electors in 1864. Lincoln received an absolute majority of the "number of electors appointed" and was therefore re-elected. In the nation's first presidential election in 1789, the New York legislature could not agree on a method for choosing its presidential electors, and New York state therefore cast no votes in the Electoral College. See section 2.2 for additional details.

[274] On the Trail: Poll gives Perot a clear lead. *New York Times*. June 11, 1992. https://www.nytimes.com/1992/06/11/us/the-1992-campaign-on-the-trail-poll-gives-perot-a-clear-lead.html The same article reported that,

Minnesota Secretary of State Steve Simon described the political situation in 1992 in his testimony before a committee of his state legislature in 2023 in favor of the National Popular Vote Compact.

> "My personal story … is relevant to this legislation. In 1992, I deferred school for a year, and I moved to Little Rock, Arkansas, to join the Bill Clinton for President campaign.… Bill Clinton had sewn up the nomination when I arrived in the first week in June, but he wasn't formally the nominee yet.
>
> "And I remember the week that I arrived in Little Rock, Arkansas, a national poll came out. It showed that the first-place person in the poll was billionaire independent candidate Ross Perot. Remember him? The second-place candidate, at that time, in the first week of June in 1992, was the incumbent President George H.W. Bush. And third-place was the candidate I was supporting, Governor of Arkansas Bill Clinton."
>
> "I remember hanging out during that first week or thereabouts, in a restaurant that was kind of a hangout among campaign workers in downtown Little Rock, called Your Mama's Restaurant.… And we were hanging out there, and the subject of the poll came up."
>
> "There were several of my colleagues on the campaign who thought nothing of the poll. In fact, they said it doesn't matter. It doesn't matter at all, because **in a three-way race, even if our guy Bill Clinton is in third place, we can still win**."
>
> "As all of you know from your civics lessons, if no one gets to 270, what happens, it goes to the U.S. House. And at that time, the U.S. House was firmly in control of the Democratic Party.
>
> "So, their view was, 'Who cares if Bill Clinton is in third place?' And I myself—and not just me, but many others—were appalled, absolutely appalled by that attitude. I signed up to help get this guy elected President, but that's no way to win. The winner of the presidency of the United States should always be the person who most Americans have chosen as President of the United States. Regardless of party, regardless of circumstance."[275] [Emphasis added]

If the presidential election had been held at the time of the June 1992 poll, Perot, Bush, and Clinton would each have carried numerous states, and thus each would have won a significant number of electoral votes.

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in a previous Gallup poll in late May, Bush and Perot were tied at 35 percent each, with Clinton at 25 percent.

[275] Testimony of Minnesota Secretary of State Steve Simon before the Minnesota Senate Election Committee. January 31, 2023. Timestamp 6:06. https://www.youtube.com/watch?v=ZioPI__L-BM

If no candidate had received 270 electoral votes, the presidential election would have been thrown into the House. At that time, the Democrats controlled an absolute majority of the state delegations, and they would have chosen Bill Clinton—the third-place candidate in terms of the national popular vote.

Having said that, Perot's eight percentage-point nationwide lead over Bush was substantial. It could well have given him an absolute majority of the electoral votes, as suggested by the following facts:

- In 1988, George H.W. Bush's eight percentage-point nationwide lead over Dukakis gave Bush a 426—112 lead in the Electoral College.
- In 1980, Reagan's 9.7% nationwide lead over Carter gave Reagan a 489–49 lead in the Electoral College.
- In 2008, Obama's 7.2% nationwide lead over McCain game Obama a 365–173 lead in the Electoral College.

Moreover, Perot's 39% share of the national popular vote was equal to Lincoln's in 1860, and Lincoln won an absolute majority of the Electoral College in a race in which four different presidential candidates won electoral votes.[276,277]

It is a common misconception that the current Electoral College inherently discriminates against minor-party candidacies and independent candidacies.

This misconception has arisen because most minor-party and independent candidates have historically won an insignificant percentage of the popular vote, and hence won no electoral votes. However, in a multi-candidate race, there is no reason why a minor-party or independent candidate cannot win an absolute majority of the electoral votes—provided the candidate is popular.

1.6.1. Procedure for conducting a contingent election in Congress for President and Vice President

If no candidate wins an absolute majority of the electoral votes, the election in Congress of the President and Vice President would unfold after Election Day.

The Electoral College would meet in mid-December.

The new House and new members of the Senate would be sworn in on January 3.

The newly constituted House and Senate would then meet in a joint session of Congress on January 6 to count the electoral votes.

If no presidential candidate receives the required majority in the counting of electoral votes on January 6, there is a so-called "contingent election" for President in the House.

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[276] Holt, Michael F. 2017. *The Election of 1860: A Campaign Fraught with Consequences*. Lawrence, KS: University Press of Kansas.

[277] In 1856, John Fremont received 33% of the popular vote to Buchanan's 45% and managed to win a very respectable 114 electoral votes, compared to Democrat James Buchanan's 174. Bicknell, John. 2017. *Lincoln's Pathfinder: John C. Fremont and the Violent Election of 1856*. Chicago, IL: Chicago Review Press.

- When the House chooses the President, each state has one vote—regardless of its population.
- The House's choice is limited to the three presidential candidates who received the most electoral votes in the Electoral College.[278,279]
- The District of Columbia has no vote in the House and therefore has no voice in this process.
- An absolute majority of the states (26 of 50) is required to elect a President, regardless of how many states vote.

Many other aspects of a contingent election in the House are not clear.

Each state's House delegation meets separately to decide how the state's vote will be cast. There is no current law that settles the politically important question about how a state delegation decides how to allocate its one vote.

One question is whether a plurality, absolute majority, or super-majority of a state's congressional delegation is required in order to cast the state's vote.[280,281] Under the rules adopted for use in 1800 and 1824, an absolute majority of the state's delegation was required. That is, a state loses its vote in the process if no presidential candidate can muster an absolute majority of a state's delegation—either because of a tie in a state delegation with an even number of members or because of a three-way division of sentiment within the delegation. However, there is no constitutional requirement that the rules used in 1800 and 1824 be used in the future.

The Constitution makes clear that 26 votes (out of 50) on the House floor are required, regardless of how many delegations may be deadlocked.

In a closely divided House, it is entirely possible for one political party to control a majority of the 435 House members, but another party to control a majority of the House delegations. Indeed, that was precisely the situation on January 6, 2021, when the Democrats controlled the House chamber, but the Republicans had a majority of the delegations. The rules governing the House election could thus be under the control of one political party, while a majority of the 50 House delegations could be controlled by the other party.

The House took 36 ballots before choosing Thomas Jefferson after the 1800 election, and it elected John Quincy Adams in one ballot after the 1824 election.

---

[278] Under the original Constitution, the House was allowed to choose from among the top five candidates. The 12th Amendment (ratified in 1804) limited the House's choice to the top three candidates. Because Clay came in fourth place in terms of electoral votes in 1824, this seemingly minor change prevented Clay (Speaker of the House at the time) from being considered by the House.

[279] In most recent presidential elections, no minor-party or independent candidate has received any electoral votes. In 1968, segregationist Alabama Governor George Wallace carried five southern states (with 45 electoral votes) and received one additional electoral vote from a faithless Republican presidential elector from North Carolina.

[280] Tremitiere, Beau and Woodward, Aisha. 2023. Danger in Plain Sight: The Risk of Triggering a Contingent Election in 2024. *Lawfare*. October 30, 2023. https://www.lawfaremedia.org/article/danger-in-plain-sight-the-risk-of-triggering-a-contingent-election-in-2024

[281] United to Protect Democracy. 2023. *The Risk of Triggering a Contingent Election: Hidden Dangers in the 2024 Race for the White House*. September 2023. https://unitedtoprotectdemocracy.org/contingentelection.pdf

When the U.S. Senate chooses the Vice President, the Constitution limits the Senate's choice to the two vice-presidential candidates with the most electoral votes. The only time that the Senate has selected a Vice President was after the 1836 election (section 3.7.4).[282]

Moreover, the Constitution is not clear whether the sitting Vice President is entitled to vote in the contingent election in the Senate. An outgoing Vice President was a candidate for President or re-election as Vice President on January 6 in 2021, 2001, 1989, 1969, 1961, and numerous other years. Indeed, this will again be the case in 2025 if Vice President Harris is herself a candidate for re-election.

If the House is deadlocked in a choice for President, the Vice President chosen by the Senate becomes the acting President. The acting President's time in office would last until the time, if any, when the deadlock in the House is resolved. To put it another way, the acting President could be abruptly removed at any time if the House ever resolves its deadlock.[283] That is, the acting President's continuance in office for the entire four-year period would depend on an exceedingly small number of strategically placed House members in a very small number of delegations.

Turning our attention back to the Senate, a contingent election in the Senate might be subject to a filibuster—thereby creating the possibility that one political party might find it advantageous to prevent the election of a Vice President.

The 20th Amendment (ratified in 1933) empowers Congress to pass legislation dealing with the possibility that one of the top three candidates has died or become disabled.

> "If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."

However, Congress has never passed legislation to implement this section of the 20th Amendment.[284]

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[282] As for a tie in the Senate, Article I, section 3, clause 4 of the Constitution provides: "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." If the Senate is tied, this provision apparently applies, although some have argued that the sitting Vice President does not have tie-breaking power in this situation. Of course, the sitting Vice President is himself frequently a candidate for President or re-election as Vice President.

[283] Kosar, Kevin R. 2023. The horrific nightmare scenario where Congress picks our next president. *The Hill*. October 10, 2012. https://thehill.com/opinion/white-house/4245591-the-horrific-nightmare-scenario-where-congress-picks-our-next-president/

[284] Kosar, Kevin. 2023. The Electoral Count Act is fixed: Presidential transition remains in jeopardy. *The Hill*. January 10, 2023. https://thehill.com/opinion/white-house/3806788-the-electoral-count-act-is-fixed-presidential-transition-remains-in-jeopardy/

1.6.2. Opportunities for mischief in a House presidential election

In 2023 and early 2024, the No Labels organization was considering running a bipartisan slate that conceivably could throw the presidential election into the U.S. House.[285,286]

As NBC News reported in December 2023, if a presidential election were thrown into the House, there would be unprecedented opportunities for political mischief.

> "No Labels, the organization attempting to assemble a third-party presidential unity ticket, is openly floating the prospect of a 'coalition government' forming after the 2024 election if no candidate reaches the 270 Electoral College votes necessary to win the White House.
>
> "Officials with the group are mapping out an unlikely and largely unprecedented scenario where they could be in a position to **cut deals on policy, Cabinet posts or even the vice presidency** if their still-unformed ticket manages to win electoral votes and blocks a major-party nominee from winning the presidency outright."
>
> "Former Republican U.S. Rep. Tom Davis, a co-founder of No Labels, expanded on the group's view of this potential scenario in an interview with NBC News on Thursday, suggesting the No Labels ticket could 'cut a deal' with one of the major parties' tickets.
>
> "It could be Cabinet posts. **It could be a policy concession.** That's the kind of thing it could be," Davis said, adding the vice-presidential position could also be part of the discussions."
>
> "It could be, for example: 'We're going to build a border wall [and] not run deficits. Any number of things,' Davis said."
>
> "He noted, as an example, that a state with one House member could 'hold out' on its initial support of a ticket.
>
> "[They could] say, 'Well, I'm not going to—I'm not going to be the 26th state on this unless you make certain concessions,' or 'I'm going to need a Cabinet [post]. **I'm going to need a judgeship**.'" [287] [Emphasis added]

It is, of course, not just the House members from the seven states with one House member who could engage in the behind-the-scenes post-election deal-making that No Labels describes. At any given time, there is usually a tie or only a one-vote majority in many of the other 43 House delegations.

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[285] Third Way. 2023. The No Labels Party's Radical New Plan to Force a Contingent Election. October 24, 2023. https://www.thirdway.org/memo/the-no-labels-partys-radical-new-plan-to-force-a-contingent-election

[286] Jones, Doug. 2023. Who in their right mind wants the House to pick our next president? *CNN*. October 27, 2023. https://www.cnn.com/2023/10/27/opinions/house-speaker-trump-biden-2024-presidency-jones/index.html

[287] Hillyard, Vaughn and Gallo, Dan. 2023. No Labels floats the possibility of a coalition government or Congress selecting the president in 2024. *NBC News*. December 21, 2023. https://www.nbcnews.com/politics/2024-election/no-labels-coalition-government-electoral-college-rcna130709

1.6.3. Review of recent elections

We now review some of the numerous politically plausible combinations of states that could have resulted in Congress picking the President and Vice President in recent elections.

2020 election

On Election Day in 2020, 306 Democratic and 232 Republican presidential electors were elected.

That is, Biden had 36 electoral votes more than the 270 required for election.

Biden won 37 electoral votes, because he carried three decisive states by small popular-vote margins.

- Arizona (11 electoral votes) by 10,457 popular votes,
- Georgia (16 electoral votes) by 11,779 popular votes, and
- Wisconsin (10 electoral votes) by 20,682 popular votes.

As *Politico* noted:

> "In 2020, the presidential election was closer to finishing in an Electoral College tie than is widely recognized. **Had Trump won Arizona, Georgia and Wisconsin—the sites of Biden's three narrowest wins—both candidates would have ended up with exactly 269 electoral votes**. That's one vote short of an Electoral College majority, which would have thrown the race to the House of Representatives to decide."[288] [Emphasis added]

On January 6, 2021, the Democratic Party had a majority of the 435 House members (and hence control of the chamber). However, the Republican Party had a majority of the state delegations and was thus in a position to pick Trump as President.[289]

2016 election

On Election Day in 2016, 306 Republican and 232 Democratic presidential electors were elected (coincidentally the same numbers as 2020).

This 36-vote margin was the result of Trump's carrying two decisive states by small popular-vote margins.

- Michigan (16 electoral votes) by 10,704 popular votes, and
- Pennsylvania (20 electoral votes) by 44,292 popular votes.

If Trump had not won these two states, there would have been only 270 Republican presidential electors—the exact number required for election.

Two weeks before the Electoral College meeting scheduled for December 19, 2016, one of the Republican presidential electors who had been elected from Texas on Election Day (Christopher Suprun) wrote an op-ed in the *New York Times* saying that he would not vote for Trump.

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[288] Mahtesian, Charlie. 2023. Joe Biden's mission to Maine. *Politico*. July 27, 2023. https://www.politico.com/newsletters/politico-nightly/2023/07/27/joe-bidens-mission-to-maine-00108653

[289] One interesting, but unresolved, question is whether the party with a majority of the House could prevent the convening of the joint session of Congress for counting the electoral votes on January 6.

> "Alexander Hamilton … [in] … *Federalist* 68 argued that an Electoral College should determine if candidates are qualified, not engaged in demagogy, and independent from foreign influence. Mr. Trump shows us again and again that he does not meet these standards."[290]

When the Electoral College actually met on December 19, Suprun voted for Republican Ohio Governor John Kasich.

In addition, a second Texas Republican elector (Bill Greene) voted for former Texas Republican Congressman Ron Paul (section 3.7.6).

2012 election

In 2012, Dan Amira described "16 Plausible Ways the Electoral College Could Tie."

> "Take a look at one of the most horrible flaws of the Electoral College system: You can have a tie. It happened before, in 1800, and it can happen again. **There's nothing particularly special about 2012—a tie is a possibility in every presidential election.** But just imagine the chaos if it actually happened. How would America react if the next president is selected by the House of Representatives, and the vice-president by the Senate."[291] [Emphasis added]

In a similar vein, Nate Silver wrote an article for *FiveThirtyEight* in 2012 entitled "New Polls Raise Chance of Electoral College Tie."[292]

Sean Trende described another tie scenario in *RealClearPolitics*.[293]

Meanwhile, CNN reported:

> "The likelihood that President Barack Obama and Mitt Romney will each net 269 electoral votes in November, instead of the 270 needed to win, is actually not so farfetched—and for close observers of the Electoral College system, a tie would set off a wave of constitutional and political mayhem that would make the 2000 Florida recount seem like a tidy affair."
>
> "'What it would reveal is that we have, in some sense, a profoundly undemocratic mechanism for dealing with a tie,' said Alex Keyssar, a professor of history and social policy at Harvard University."[294]

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[290] Suprun, Christopher. 2016. Op-Ed: Why I Will Not Cast My Electoral Vote for Donald Trump. *New York Times*. December 5, 2016. https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html?_r=0

[291] Amira, Dan. 2010. 16 Plausible ways the electoral college could tie in 2012. *New York*. December 23, 2010. https://nymag.com/intelligencer//2010/12/electoral_college_tie.html

[292] Silver, Nate. 2012. New Polls Raise Chance of Electoral College Tie. *New York Times*. October 1, 2012. https://archive.nytimes.com/fivethirtyeight.blogs.nytimes.com/2012/10/01/new-polls-raise-chance-of-electoral-college-tie/

[293] Trende, Sean. 2012. Mitt Romney's One-Vote Edge? *RealClearPolitics*. August 30, 2012. http://www.realclearpolitics.com/articles/2012/08/30/mitt_romneys_one-vote_edge_115269.html

[294] Hamby, Peter. 2012. Electoral College tie possible in Obama-Romney race. *CNN*. July 30, 2012. https://www.cnn.com/2012/07/26/politics/electoral-college-tie/

2008 election

The *Cook Political Report*'s Electoral Vote Scorecard of April 3, 2008, rated:

- 78 electoral votes in seven states as "toss ups"
- 238 electoral votes as "solid," "likely," or "lean" Democratic
- 222 electoral votes in states with corresponding Republican ratings.[295]

A 269–269 tie in the Electoral College would have occurred in 2008 if the Democratic nominee had won 31 electoral votes from the "toss up" states.

The possible combinations of closely divided states that could have produced this outcome included, but were not limited to:

- Florida (27 electoral votes) and New Hampshire (4)
- Iowa (7), New Hampshire (4), and Ohio (20)
- Iowa (7), Nevada (5), New Hampshire (4), New Mexico (5), Wisconsin (10).

2004 election

In 2004, Bush received 286 votes in the Electoral College—16 more than required for election.

The *Cook Political Report*'s Electoral Vote Scorecard of September 10, 2004, listed:

- 109 electoral votes in nine states as "toss ups,"
- 207 electoral votes with ratings of "solid," "likely," or "lean" Democratic, and
- 222 electoral votes in states with corresponding Republican ratings.[296]

A 269–269 tie in the Electoral College would have occurred in 2004 if the Democratic nominee (John Kerry) had won 62 electoral votes from the "toss up" category. There were many possible combinations of the nine toss-up states that could have produced a 269–269 tie in the Electoral College, including, but not limited to:

- Iowa (7), Ohio (20), Pennsylvania (21), Minnesota (10), and New Hampshire (4);
- Florida (27), Minnesota (10), Ohio (20), and New Mexico (5);
- Iowa (7), Minnesota (10), Nevada (5), New Hampshire (4), New Mexico (5), Pennsylvania (21), and Wisconsin (10).

2000 election

In 2000, Bush received 271 votes in the Electoral College—one more than required for election.

There would have been a 269–269 tie in the Electoral College in 2000 if Bush had won Wisconsin's 11 electoral votes (which he lost by 0.2%), while also

- losing West Virginia's five electoral votes (which he unexpectedly won by 6.3%) and
- losing either New Hampshire's four electoral votes (which he won by 1.3%) or Nevada's four electoral votes (which he won by 3.5%).

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[295] Electoral College Scorecard. 2008, *Cook Political Report*. April 3, 2008.

[296] Electoral College Scorecard. 2004, *Cook Political Report*. September 10, 2004.

1.6.4. Prospects for a contingent election in 2024

There are numerous politically and geographically plausible combinations of states that could yield a 269–269 tie in the Electoral College in 2024.

Recall that table 1.20 showed the probable 2024 Electoral College starting line-up (as of May 2024):

- 218 likely Republican electoral votes from 24 states,
- 211 likely Democratic electoral votes from 17 states and the District of Columbia, and
- 109 electoral votes from nine likely battleground states and two likely battleground congressional districts (one each in Maine and Nebraska).

The northern-sunbelt combination

There is an unusually coherent and plausible geographic and demographic combination of states that could produce a 269–269 tie in the Electoral College in 2024 (as shown in figure 1.22).

- **Five northern states:** If the Democrats win Minnesota (10 electoral votes), Wisconsin (10), Michigan (15), Pennsylvania (19), and New Hampshire (4), their nominee's electoral-vote count would increase from the number in table 1.20 by 58—that is, from 211 to 269.
- **Four sunbelt states and two rural congressional districts:** If the Republicans win North Carolina (16), Georgia (16), Arizona (11), Nevada (6), Nebraska's 2nd congressional district, and Maine's 2nd congressional district, their nominee's electoral vote count would increase from the number in table 1.20 by 51—that is, from 218 to 269.

During the spring of 2024, Nebraska's Republican Governor Jim Pillen and former President Donald Trump attempted to get the Nebraska state legislature to repeal the state's congressional-district method of awarding electoral votes and replace it with a winner-take-all law.

If Nebraska were to adopt the winner-take-all method of awarding its five electoral votes, all five of its votes would assuredly go to the Republican nominee—potentially producing a 270–268 win in the Electoral College for the Republicans.

About two-thirds of the members of the Nebraska legislature (although nominally nonpartisan) are Republicans.

Nonetheless, the legislature voted against the winner-take-all bill and adjourned.[297,298]

After adjournment, Governor Pillen suggested he might call the legislature into a special session in an effort to make the change prior to the November 2024 election.

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[297] Hughes, Paul. 2024. Dover not sure if votes are there for electoral college winner-take-all method. *WJAG Radio*. May 1, 2024. https://www.norfolkneradio.com/news/dover-not-sure-if-votes-are-there-for-electoral-college-winner-take-all-method/article_35af7872-071a-11ef-bac6-ffd922f44ab3.html

[298] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

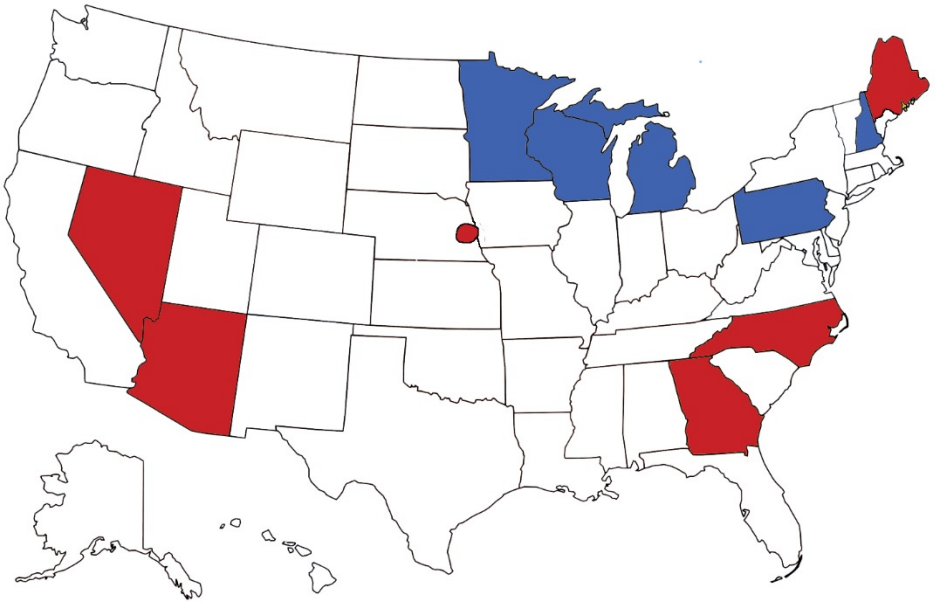

Figure 1.22 Combination of battleground states and congressional districts that could yield a 269–269 tie in the Electoral College

As *Politico* reported, the Nebraska Governor's suggestion was quickly countered:

> "The [Maine] state House majority leader, Maureen Terry, said in a statement on Friday that the Democratic-controlled Legislature would 'be compelled to act in order to restore fairness,' should Nebraska's Republican governor sign legislation that made the state a winner-take-all election in 2024."[299]

Under section 5 of the Electoral Count Reform Act of 2022, a state must choose its presidential electors:

> "under and in pursuance of the laws of such State providing for such appointment and ascertainment **enacted prior to election day**."[300] [Emphasis added]

Thus, it is possible for either or both states to change their method of awarding electoral votes *before* Election Day.

Three additional plausible combinations from *Sabato's Crystal Ball*

In March 2023, Kyle Kondik and J. Miles Coleman presented three additional combinations of states that could produce a 269–269 tie in the Electoral College in 2024.[301]

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[299] Stein, Sam. 2024. Maine Dems say they'll consider cutting off Trump's path, if Nebraska moves to hurt Biden. *Politico*. April 26, 2024. https://www.politico.com/news/2024/04/26/maine-nebraska-electoral-votes-trump-00154645

[300] The Electoral Count Reform Act of 2022 may be found in appendix B of this book.

[301] Kondik, Kyle and Coleman, J. Miles. 2023. Notes on the State of Politics. *Sabato's Crystal Ball*. March 1, 2023. https://centerforpolitics.org/crystalball/articles/notes-on-the-state-of-politics-march-1-2023/

All three Kondik–Coleman scenarios assume the same starting point as table 1.20, namely:

- 218 likely Republican electoral votes from 24 states, and
- 211 likely Democratic electoral votes from 17 states and the District of Columbia.

All three Kondik–Coleman scenarios also assume the Republican presidential nominee will win Maine's 2nd congressional district and that the Democratic nominee will win Nebraska's 2nd district.

Thus, all three Kondik–Coleman scenarios start with:

- 219 likely Republican electoral votes from 24 states and Maine's 2nd district,
- 212 likely Democratic electoral votes from 17 states, the District of Columbia, and Nebraska's 2nd district, and
- 107 electoral votes from nine likely battleground states and two battleground congressional districts (one each in Maine and Nebraska).

In the first Kondik–Coleman scenario, the Republican nominee wins Nevada and the three states that put Trump over the top in 2016 (namely Pennsylvania, Michigan, and Wisconsin)—for a total of 269 electoral votes. Meanwhile, the Democratic nominee wins Arizona, Georgia, Minnesota, New Hampshire, and North Carolina—for a total of 269 electoral votes.

In the second Kondik–Coleman scenario, the Republican nominee wins Michigan, North Carolina, and Pennsylvania. Meanwhile, the Democratic nominee wins Arizona, Georgia, Minnesota, Nevada, New Hampshire, and Wisconsin.

The third Kondik–Coleman scenario is identical to the second, except that the Republican nominee wins Georgia (16 electoral votes), while the Democratic nominee wins North Carolina (16).

Likely composition of House delegations in 2025

If there is a 269–269 tie in the Electoral College, the House of Representatives elected on November 5, 2024 (and seated on January 3, 2025) would pick the President immediately after the counting of the electoral votes on January 6, 2025.

Although we do not know how many House delegations each party will control after the November 2024 elections, the partisan division of the delegations as of May 2024 shown in table 1.54 strongly suggests that the Republican Party is likely to control a majority of them (regardless of which party controls the House chamber).

As can be seen, the Republican Party controls a bare majority of the delegations (26 of 50) in the 2023–2024 House; the Democrats control 22 delegations; and two delegations (Minnesota and North Carolina) are tied.

There are eight states with an odd number of House members where a change of one seat in November 2024 would flip the partisan control of the state's delegation. Of course, the single seats in North Dakota, South Dakota, and Wyoming are likely to remain in Republican hands, and the single seats in Delaware and Vermont are likely to remain in Democratic hands. On the other hand, the Democrats have a one-seat edge in three states (Alaska, Michigan, and Pennsylvania) that seem very susceptible to change.

Table 1.54 Partisan make-up of House delegations as of May 2024

	Democratic delegations	Republican delegations	Tied delegations
Alaska	1		
Alabama		1	
Arkansas		1	
Arizona		1	
California	1		
Colorado	1		
Connecticut	1		
Delaware	1		
Florida		1	
Georgia		1	
Hawaii	1		
Iowa		1	
Idaho		1	
Illinois	1		
Indiana		1	
Kansas		1	
Kentucky		1	
Louisiana		1	
Massachusetts	1		
Maryland	1		
Maine	1		1
Michigan	1		
Minnesota			1
Missouri		1	
Mississippi		1	
Montana		1	
North Carolina			1
North Dakota		1	
Nebraska		1	
New Hampshire	1		
New Jersey	1		
New Mexico	1		
Nevada	1		
New York	1		
Ohio		1	
Oklahoma		1	
Oregon	1		
Pennsylvania	1		
Rhode Island	1		
South Carolina		1	
South Dakota		1	
Tennessee		1	
Texas		1	
Utah		1	
Virginia	1		
Vermont	1		
Washington	1		
Wisconsin		1	
West Virginia		1	
Wyoming		1	
Total	**22**	**26**	**2**

There are also 12 states with an even number of House members where a change of one seat in November 2024 could create a tie in the state's delegation. The Republican edges in the House delegations of Idaho, Kansas, Mississippi, and West Virginia seem secure. Similarly, the Democratic edges in Colorado, Hawaii, and Oregon appear equally secure. The Democratic edges in four states (Maine, New Hampshire, Nevada, and Rhode Island) are susceptible to change. In contrast, Montana is the only state among these 12 states where the Republican edge might possibly be endangered. The Republican incumbent in the 1st congressional district (Ryan Zinke) won by only three percentage points in November 2022, and the election of a Democrat in 2024 would create a tie in the state's two-member delegation.

In summary, there are seven states where the loss of one Democratic seat could change the partisan balance of the state's delegation in the House, but only one such Republican state. This suggests that the Republicans are likely to retain the ability to pick the President if the election ends up in the House after the November 2024 election (regardless of which party has an overall majority in the House).

A March 2023 article in *Sabato's Crystal Ball* by Kyle Kondik predicted that the Republicans will likely continue to control a majority of state delegations in the House in 2025.

> "If there is a tie, Republicans continue to have an advantage in the House tie-breaking procedure, and they are very likely to retain it following the 2024 election, regardless of which party wins the overall House majority."[302]

There are still other uncertainties surrounding a contingent election in the House.

It is entirely possible that one party could possess a majority in the House, but the other party could have a majority of the state delegations.

1.7. UNDER THE CURRENT SYSTEM, AN INDIVIDUAL'S VOTE FOR PRESIDENT IS NOT COUNTED AS A VOTE FOR THE PRESIDENTIAL CANDIDATE PREFERRED BY THAT VOTER.

In virtually every election in the United States—except for President—every voter's vote is added directly to the count of the candidate favored by that voter. Then, the winner of the election is the candidate favored by most voters in the entire jurisdiction served by the office.

However, under the current system of electing the President, an individual's vote is counted as a vote for a "presidential elector"—an intermediary whose identity is generally unknown to the voter.

Only if a voter's vote for President agrees with the choice made by a plurality of *other* voters in the state does that voter's vote benefit that voter's choice for President.

Under the current system, an individual's vote for President is cancelled if it disagrees with the choice made by a plurality of *other* voters in the state. That is, the individual voter's choice is zeroed out below the level of the entire jurisdiction served by the office.

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[302] Kondik, Kyle. 2023. Republicans Retain Edge in Electoral College Tie. *Sabato's Crystal Ball*. March 1, 2023. https://centerforpolitics.org/crystalball/articles/republicans-retain-edge-in-electoral-college-tie/

The current system creates an artificial unanimity at the state level, even though the state's voters are not unanimous.

In each of the first six presidential elections of the 2000s, the votes cast by about 45% of the nation's voters were taken away from the presidential candidate for whom the voter voted and credited to the candidate who received the most votes in the state.

1.7.1. 2020 election

For example, consider North Carolina in 2020:

- Trump received 2,758,775 (50.1%)
- Biden received 2,684,292 popular votes (48.7%)
- various other candidates received 68,422 (1.2%).

Because Trump received the most popular votes in the state, all 15 presidential electors from North Carolina were Trump supporters. That is, the winner-take-all rule zeroed out the choice of 2,684,292 Biden voters as well as 68,422 supporters of other candidates.[303]

On a nationwide basis in 2020, the winner-take-all rule resulted in 68,942,639 voters being zeroed out at the state level—44% out of the nation's 158,224,999 voters.

In the six presidential elections between 2000 and 2020, an average of 45% of the nation's voters were similarly zeroed out at the state level. They never contributed to the national count of the candidate whom those voters supported. Specifically, the percentages were:

- 44% in 2020
- 46% in 2016
- 44% in 2012
- 44% in 2008
- 45% in 2004
- 46% in 2000

In short, the votes of every voter who did not vote for the statewide plurality winner were counted, but then immediately discarded.

Under the National Popular Vote Compact, every individual's vote for President will be counted as a vote for the presidential candidate preferred by that voter.

Missouri Senator Thomas Hart Benton described the current winner-take-all method of awarding electoral votes as follows in 1824:

> "The general ticket system, now existing in 10 States was the offspring of policy, and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States, to enable them to consolidate the vote of the State.…**The rights of minorities are violated** because a majority of one will carry the vote of the whole State.… **This is … a case … of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed**."[304] [Emphasis added]

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[303] Similar zeroing out occurs at the congressional-district level in Maine's two districts and Nebraska's three districts, as explained in section 2.15.6.

[304] 41 *Annals of Congress* 169. February 3, 1824. https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=041/llac041.db&recNum=2

Table 1.55 shows the number of voters in 2020 who had their vote zeroed out at the state level.

- Columns 2, 3, and 4 show, by state, the number of votes for Donald Trump (R), Joe Biden (D), and all other candidates, respectively.
- Column 5 shows which party (R or D) received the most popular votes in each separate state.
- Column 6 contains entries for the 25 states in which the Republican nominee (Trump) won the most popular votes in alphabetical order. This column shows the number of votes cast for the Democratic nominee (Biden) and all other candidates that were not credited to those candidates because of the operation of the winner-take-all rule.
- Column 7 contains entries for the 26 jurisdictions (25 states and the District of Columbia) in which the Democratic nominee (Biden) won the most popular votes in alphabetical order. This column shows the number of votes cast for the Republican nominee (Trump) and all other candidates that were not credited to those candidates because of the operation of the winner-take-all rule.

As can be seen from the table for 2020, the state-by-state winner-take-all method of awarding electoral votes resulted in zeroing out a total of 29,191,404 voters at the state level who did not vote for the Republican nominee (Trump) and similarly zeroing out a total of 39,751,235 votes at the state level who did not vote the Democratic nominee (Biden). Overall, a total of 68,942,639 voters (44% out of 158,224,999) were zeroed out at the state level in 2020.

1.7.2. 2016 election

The same pattern persisted in 2016 and earlier elections.

In 2016, the state-by-state winner-take-all method of awarding electoral votes resulted in zeroing out 36,695,603 votes at the state level who did not vote for the Republican nominee (Trump), and similarly zeroing out 26,218,563 votes at the state level who did not vote for the Democratic nominee (Clinton). Overall, a total of 62,914,166 voters (46% out of 137,125,484) were zeroed out at the state level in 2016.

1.7.3. 2012 election

In 2012, the state-by-state winner-take-all rule resulted in zeroing out 18,997,372 voters at the state level who did not vote for Republican nominee (Romney) and similarly zeroing out 37,369,571 votes at the state level who did not vote for the Democratic nominee (Obama). Overall, a total of 56,366,943 voters (44% out of 129,084,520) were zeroed out at the state level in 2012.

1.7.4. 2008 election

In 2008, the state-by-state winner-take-all method of awarding electoral votes resulted in zeroing out 16,618,777 voters at the state level who did vote for the Republican nominee (McCain) from voters who did not vote for him, and similarly zeroing out 40,409,644 voters who did not vote the Democratic nominee (Obama). Overall, a total of 57,028,421 voters (44% out of 131,461,581) were zeroed out at the state level in 2008.

Table 1.55 The votes of 68,942,639 voters (44% of 158,224,999) were zeroed out at the state level in 2020

State	Trump	Biden	Others	Party winning the state	Treated as if R	Treated as if D
Alabama	1,441,170	849,624	32,488	R	882,112	
Alaska	189,951	153,778	13,840	R	167,618	
Arkansas	760,647	423,932	34,490	R	458,422	
Florida	5,668,731	5,297,045	101,680	R	5,398,725	
Idaho	554,119	287,021	26,091	R	313,112	
Indiana	1,729,516	1,242,413	61,183	R	1,303,596	
Iowa	897,672	759,061	29,801	R	788,862	
Kansas	771,406	570,323	30,574	R	600,897	
Kentucky	1,326,646	772,474	37,608	R	810,082	
Louisiana	1,255,776	856,034	36,252	R	892,286	
Mississippi	756,764	539,398	17,597	R	556,995	
Missouri	1,718,736	1,253,014	54,212	R	1,307,226	
Montana	343,602	244,786	15,252	R	260,038	
Nebraska	556,846	374,583	20,283	R	394,866	
North Carolina	2,758,775	2,684,292	68,422	R	2,752,714	
North Dakota	235,595	114,902	11,322	R	126,224	
Ohio	3,154,834	2,679,165	88,203	R	2,767,368	
Oklahoma	1,020,280	503,890	36,529	R	540,419	
South Carolina	1,385,103	1,091,541	36,685	R	1,128,226	
South Dakota	261,043	150,471	11,095	R	161,566	
Tennessee	1,852,475	1,143,711	57,665	R	1,201,376	
Texas	5,890,347	5,259,126	165,583	R	5,424,709	
Utah	865,140	560,282	62,867	R	623,149	
West Virginia	545,382	235,984	13,365	R	249,349	
Wyoming	193,559	73,491	7,976	R	81,467	
Arizona	1,661,686	1,672,143	53,497	D		1,715,183
California	6,006,429	11,110,250	384,192	D		6,390,621
Colorado	1,364,607	1,804,352	88,021	D		1,452,628
Connecticut	714,717	1,080,831	28,309	D		743,026
D.C.	18,586	317,323	8,447	D		27,033
Delaware	200,327	295,933	7,421	D		207,748
Georgia	2,461,854	2,473,633	62,229	D		2,524,083
Hawaii	196,864	366,130	11,475	D		208,339
Illinois	2,446,891	3,471,915	114,632	D		2,561,523
Maine	360,737	435,072	23,565	D		384,302
Maryland	976,414	1,985,023	56,482	D		1,032,896
Massachusetts	1,167,202	2,382,202	65,671	D		1,232,873
Michigan	2,649,852	2,804,040	85,392	D		2,735,244
Minnesota	1,484,065	1,717,077	67,308	D		1,551,373
Nevada	669,890	703,486	17,921	D		687,811
New Hampshire	365,660	424,937	13,236	D		378,896
New Jersey	1,883,274	2,608,335	57,744	D		1,941,018
New Mexico	401,894	501,614	20,457	D		422,351
New York	3,244,798	5,230,985	115,574	D		3,360,372
Oregon	958,448	1,340,383	58,401	D		1,016,849
Pennsylvania	3,377,674	3,458,229	79,380	D		3,457,054
Rhode Island	199,922	307,486	10,349	D		210,271
Vermont	112,704	242,820	11,904	D		124,608
Virginia	1,962,430	2,413,568	64,761	D		2,027,191
Washington	1,584,651	2,369,612	106,116	D		1,690,767
Wisconsin	1,610,184	1,630,866	56,991	D		1,667,175
Total	**74,215,875**	**81,268,586**	**2,740,538**		**29,191,404**	**39,751,235**

1.7.5. 2004 election

In 2004, the state-by-state winner-take-all method of awarding electoral votes resulted in zeroing out of 27,073,384 voters at the state level who did not vote for the Republican nominee (George W. Bush), and similarly zeroing out 27,430,729 voters at the state level who did not vote for the Democratic nominee (Kerry).

Overall, a total of 54,504,113 voters (45% out of 122,303,536) were zeroed out at the state level in 2004.

1.7.6. 2000 election

In 2000, the state-by-state winner-take-all method of awarding electoral votes resulted in zeroing out a total of 23,361,173 voters at the state level who did not vote for the Republican nominee (George W. Bush), and similarly zeroing out 25,116,609 votes at the state level who did not vote for the Democratic nominee (Gore).

Overall, a total of 48,477,782 voters (46% out of 105,417,475) were zeroed out at the state level in 2000.

1.8. SUMMARY

In electing the President of the United States, the authors of this book believe that:

- The candidate who receives the most popular votes throughout the United States should win.
- Every voter in every state should be politically relevant in every election—that is, the electoral system should give presidential candidates a compelling reason to pay attention to voters in all 50 states and the District of Columbia.
- The system should not permit a few thousand votes in a few states to decide the presidency, thereby fueling post-election controversies and threatening the country's stability. The system should not enable extraordinarily small factors to decide the presidency.
- Every vote should be equal throughout the country.
- Civic participation should be encouraged.
- Congress should never choose the President.
- A voter's vote should count directly for the candidate supported by that voter.

This book presents a politically practical way by which to bring presidential elections into conformity with these principles, namely the National Popular Vote Interstate Compact.

2 History of the Electoral College

In 1787, the Constitutional Convention considered a variety of methods for choosing the President and Vice President, including selection by:

- Congress,
- state Governors,
- state legislatures,
- popular vote,
- presidential electors elected in popular elections by district, and
- presidential electors selected in a manner chosen by each state legislature.

The delegates debated the method of electing the President on 22 separate days and held 30 votes on the topic.[1,2] As Professor George C. Edwards wrote:

> "The delegates were obviously perplexed about how to select the president. … On July 17, for example, the delegates voted for selection of the president by the national legislature. Two days later they voted for selection by electors chosen by state legislatures. Five days after that, they again voted for selection by the national legislature, a position they rejected the next day and then adopted again the day after that. Then, just when it appeared that the delegates had reached a consensus, they again turned the question over to a committee. This committee changed the convention's course once more and recommended selection of the president by electors."[3]

In the closing days of the Constitutional Convention in September 1787, the delegates decided to create a system in which a small number of eminent people (called "presidential electors") would choose the President. The resulting body—called the "Electoral College"—was described in 1788 by John Jay (the presumed author of *Federalist No. 64*):

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

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[1] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 28–57.

[2] Longley, Lawrence D., and Braun, Alan G. 1972. *The Politics of Electoral College Reform*. New Haven, CT: Yale University Press. Pages 22–41.

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

The composition of the Electoral College resembled a joint session of Congress in the sense that each state would be entitled to a number of presidential electors equal to its number of U.S. Representatives and U.S. Senators.

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

> "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:
>
> "**Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." [Emphasis added]

Note that the Constitution is totally silent as to the method of selecting the members of the Electoral College. In particular, the Constitution did not say whether the voters would be allowed to vote for presidential electors. Moreover, if the presidential electors were to be popularly elected, the Constitution provided no guidance as to how the election would be conducted.

2.1. THE STATES HAVE USED 12 DIFFERENT METHODS FOR SELECTING PRESIDENTIAL ELECTORS.

The states have used 12 different methods for selecting presidential electors since the first presidential election in 1789.

Six different methods were used in 1789, and they appear at the top of the list below:

- appointment of the state's presidential electors by the Governor and his Council (GC),
- appointment by the state legislature (L),
- popular election of presidential electors from single-elector districts (DPE),
- popular election of one presidential elector from each county in the state (DCO),
- popular vote in each congressional district, but with the legislature making the final choice between each district's two leading candidates, and appointment of the state's remaining two electors by the legislature (DL),
- popular election of all of the state's presidential electors on a statewide winner-take-all basis (W),
- popular election using multi-elector districts (DM),
- popular election using congressional districts, and appointment of the state's remaining two electors by the legislature (DCL),
- popular election from congressional districts and a statewide popular election for the state's remaining two electors (DCS),
- popular election from congressional districts with those presidential electors, in turn, selecting the state's remaining two electors (DX),
- appointment by a "Grand Committee" consisting of the Governor, his Council, and the state House of Representatives (GCL), and
- appointment of presidential electors by "baby electoral colleges" (BEC).

Table 2.1 Methods of appointing presidential electors 1789–1836

	1789	1792	1796	1800	1804	1808	1812	1816	1820	1824	1828	1832	1836
NH	W	W	W	L	W	W	W	W	W	W	W	W	W
MA	DL	DM	DCL	L	W	L	DM	L	DCS	W	W	W	W
CT	L	L	L	L	L	L	L	L	W	W	W	W	W
NJ	GC	L	L	L	W	W	L	W	W	W	W	W	W
PA	W	W	W	L	W	W	W	W	W	W	W	W	W
DE	DCO	L	L	L	L	L	L	L	L	L	L	W	W
MD	W	W	DPE	DPE	DM	DM	DM	DM	DM	DM	DM	DM	W
VA	DPE	DPE	DPE	W	W	W	W	W	W	W	W	W	W
SC	L	L	L	L	L	L	L	L	L	L	L	L	L
GA	L	L	W	L	L	L	L	L	L	L	W	W	W
NY		L	L	L	L	L	L	L	L	L	DX	W	W
RI		L	L	W	W	W	W	W	W	W	W	W	W
NC		L	DPE	DPE	DPE	DPE	L	W	W	W	W	W	W
VT		GCL	GCL	GCL	GCL	GCL	GCL	GCL	GCL	GCL	W	W	W
KY		DPE	DPE	DPE	DM	DM	DM	DM	DM	DM	W	W	W
TN			BEC	BEC	DPE	DPE	DPE	DPE	DPE	DPE	DPE	W	W
OH					W	W	W	W	W	W	W	W	W
LA							L	L	L	L	W	W	W
IN								L	L	W	W	W	W
MS									W	W	W	W	W
IL									DPE	DPE	W	W	W
AL									L	W	W	W	W
ME									DCS	DCS	DCS	W	W
MO									L	DPE	W	W	W
AR													W
MI													W

Table 2.1 shows the method for appointing presidential electors used in each state in the presidential elections between 1789 and 1836.

Overall, the table shows:

- Twenty-one of the 26 states changed their method of selecting presidential electors at least once between the 1789 and 1836 presidential elections.
- Between 1789 and 1836, an increasing number of states permitted their voters to select presidential electors.
- By 1836, South Carolina was the only state where the legislature continued to select presidential electors.
- The 1828 election was the first time that a majority of the states used the winner-take-all method of electing presidential electors. This method became predominant by 1832.
- Massachusetts changed its method in each of the first 10 presidential elections.

We now describe the 12 methods in greater detail.

2.1.1. Appointment of presidential electors by the Governor and his Council

On November 21, 1788, the New Jersey state legislature passed a law empowering the Governor and his Council to appoint the state's six presidential electors.

> "[I]t shall and may be lawful for **the Governor and Council of this State to meet on the first Wednesday in January** next at Princeton, … and then and there, by Plurality of Votes, to **nominate, elect and appoint, six Citizens of this state**, being Freeholders and Residents in the state, and otherwise qualified **to be the Electors** for the Purposes mentioned in the said Constitution, whom the Governor for the Time being shall commission under the Great Seal of the State, and make known the same by Proclamation; and **the said Electors, so chosen and appointed as aforesaid, shall meet together at Trenton**, in the County of Hunderdon, **on the first Wednesday in February** next, and then and there proceed to vote by Ballot for two Persons mentioned in the first Section of the second Article of the said Constitution."[4]

On Election Day (January 7, 1789), Governor William Livingston issued the required proclamation certifying the choice that he and his Council made that day.

> "Be it made known, that on this day, the honorable David Brearley, James Kinsey, John Neilson, David Moore, John Rutherford, and Matthew Ogden, Esquires, **were duly appointed by the Governor and Council of this state**, according to an act of the Legislature thereof, Electors on behalf of this state, for the purpose of choosing a President and Vice President of the United States."[5] [Emphasis added]

Note that many histories incorrectly say that New Jersey's presidential electors were appointed by the state legislature in 1789.[6]

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[4] An Act for carrying into effect, on the part of the state of New Jersey, the Constitution of the United States. November 21, 1788. *Acts of the General Assembly of the State of New Jersey*. Legislature number 13. Chapter CCXLI. Section 8. Page 481. https://njlaw.rutgers.edu/cgi-bin/diglib.cgi?collect=njleg&file=013&page=0481&zoom=120

[5] DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 31.

[6] For example, in its historical review of methods used to appoint presidential electors in 1789, the U.S. Supreme Court's opinion in *McPherson v. Blacker* in 1892 (incorrectly) stated, "At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, **Delaware,** Georgia, **New Jersey,** and South Carolina." [Emphasis added]. 146 U.S. 1 at 29. A possible source of this misinformation about New Jersey and Delaware may be page 19 of the plaintiff's brief. See *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892.

2.1.2. Appointment of presidential electors by the state legislature

In 1789, the legislatures of Connecticut,[7] Georgia,[8,9] and South Carolina[10] designated themselves as the appointing authority for all of their state's presidential electors.

The appointment of presidential electors by a state legislature—without any direct involvement by the voters—did not seem as odd in 1789 as it would today. At the time, state legislatures elected the Governor in all but five states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island).[11] State legislatures appointed the delegates to the 1787 Constitutional Convention. Under the newly ratified Constitution, state legislatures chose United States Senators.[12] Moreover, the Founders were familiar with the fact that the British Parliament selected the Prime Minister.

Numerous state legislatures appointed presidential electors in the early years of the Republic. This practice had almost entirely disappeared by 1836. No state legislature has appointed presidential electors since Colorado did so in 1876.

2.1.3. Popular election of presidential electors from presidential-elector districts

In 1789, Virginia had 10 congressional districts and hence 12 electoral votes. The Virginia legislature passed a law creating 12 presidential-elector districts, and the voters elected one presidential elector from each.[13]

The use of the district method (subsequently copied by North Carolina) turned out to be decisive in determining the outcome of the nation's third presidential election in 1796 and, as will be seen below, led to the system for electing the President that we have today.

2.1.4. Popular election of presidential electors by county

In 1789, Delaware voters chose the state's presidential electors—with one presidential elector being elected from each of the state's three counties.

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[7] Laburee, Leonard Woods. 1945. *The Public Records of the State of Connecticut from May, 1785, through January, 1789*. Pages 495-496. January 7, 1789. https://babel.hathitrust.org/cgi/pt?id=wu.89067359778&view=1up&seq=523&q1=electors

[8] *Georgia State Gazette*. December 13, 1788. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn84020084/1788-12-13/ed-1/seq-2/#sort=date_asc&index=9&ro%20%20THws=12&proxtext=electors&sequence=0&words=electors&page=3

[9] The appointment of presidential electors by the Georgia legislature was reported in *Georgia State Gazette*. January 10, 1789. Page 2. Column 2. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn84020084/1789-01-10/ed-1/seq-2/

[10] The appointment of presidential electors by the South Carolina legislature was reported in *Georgia State Gazette*. January 31, 1789. Image 2. Column 3. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn84020084/1789-01-31/ed-1/seq-2/#sort=date_asc&index=2&rows=12&proxtext=electors&sequence=0&words=electors&page=4

[11] State constitutions were changed over the years so that, today, the voters directly elect all state Governors.

[12] The ratification of the 17th Amendment in 1913 permitted the voters to directly elect U.S. Senators.

[13] An Act for the appointment of electors to choose a President pursuant to the constitution of government for the United States. November 17, 1788. Pages 648–653. https://babel.hathitrust.org/cgi/pt?id=hvd.hxh5ud&view=1up&seq=716

On October 28, 1788, the Delaware legislature passed a law providing:

> "Every person coming to vote for … [presidential Elector] … shall deliver in writing on one ticket or piece of paper, the [name] of one … person to be voted for as one of the Electors … said Elector shall be an Inhabitant of the same County."[14]

The elections were held at one location in each county:

- the home of Robert Griffith in Sussex County,
- the Kent County Court House in Dover, and
- the New Castle Court House in New Castle.

The *Delaware Gazette* of January 10, 1789, reported the results of the election of the state's three presidential electors:

- Gunning Bedford Sr. from New Castle County with 163 votes;
- George Mitchell from Sussex County with 522 votes; and
- John Banning from Kent County with unanimous support.[15]

Note how few people voted out of Delaware's population of 59,094 (according to the 1790 census).

Note that the voter had to bring a piece of paper to the polling place. There were no government-printed ballots in Delaware or anywhere else in the United States until 1888, and there were no government-printed ballots for President anywhere until 1892.[16] Instead, votes in most states were cast by means of hand-written or printed pieces of paper (called "tickets") supplied by the voter. In some states, voting was *viva voce*.

Note that some sources incorrectly state that Delaware's presidential electors in 1789 were appointed by the state legislature.[17]

2.1.5. Popular voting by congressional district, but with the legislature making the final choice

In 1789, Massachusetts voters voted for presidential-elector candidates in each of the state's eight congressional districts. The state legislature then made the final choice between the two candidates receiving the most popular votes in each district. In effect, the voters nominated two candidates for consideration by the legislature.[18]

One can argue whether this procedure (which was never used again) qualifies as a popular election. In any case, the heavy-handed involvement of the Massachusetts legisla-

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[14] Delaware election law passed on October 28, 1788. DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1984. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 2. Page 71.

[15] *Delaware Gazette*. January 10, 1789. DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1984. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 2. Page 83.

[16] See section 3.11 for a discussion of government-printed ballots.

[17] See footnote 6 above concerning New Jersey.

[18] Resolve for Organizing the Federal Government. 1788. *Acts and Resolves passed by the General Court, 1788-89*. Boston, MA: Secretary of the Commonwealth. November 20, 1788. Chapter 49. Page 258. https://archive.org/details/actsresolvespass178889mass/page/256/mode/2up?q=electors

ture had little practical political impact in 1789, given that George Washington was poised to win the unanimous support of all of the nation's presidential electors, and that John Adams of Massachusetts was destined to win unanimous support of the presidential electors from his home state.

The state's two senatorial electors were appointed by the state legislature in 1789 without any involvement by the voters.

2.1.6. Popular election on a statewide winner-take-all basis

In New Hampshire, Maryland, and Pennsylvania, all of the state's presidential electors were elected on a statewide winner-take-all basis in 1789.

These three winner-take-all laws each differed somewhat from present-day practice.

For example, in New Hampshire, an absolute majority of the popular vote was necessary to elect a presidential elector. In the absence of the required majority, the state legislature made the selection after Election Day.[19] As it happened, no candidate for presidential elector in New Hampshire in 1789 received the required absolute majority, and the legislature ended up choosing all of the state's electors.

In 1845, Congress debated legislation to establish a uniform nationwide Election Day for choosing presidential electors. The existence of New Hampshire's absolute-majority requirement (copied, by then, by two other states) required Congress to address the possibility that some state legislatures might become involved in choosing their state's presidential electors after Election Day. The result was a vaguely worded exception that was couched in terms of the voters' "failure to make a choice" on Election Day. This 1845 "carve out" played an important role in the tumultuous events of January 6, 2021 (section 3.1.3).

Maryland added a regional twist to its winner-take-all rule. All of Maryland's voters were permitted to vote for all eight of the state's presidential electors—thereby enabling a statewide plurality of voters to control the disposition of all of the state's electoral votes. However, each voter was required to vote for three electors from the Eastern Shore and five from the Western Shore, thereby ensuring a regional distribution of presidential electors.

> "Every person coming to vote for Elections of President and Vice President … shall have a right to vote for eight persons, five of whom shall be residents of the Western Shore, and three of the Eastern Shore, and the five persons residents of the Western Shore having the greatest number of votes of all the Candidates on that shore [and] those persons residents of the Eastern Shore, having the greatest number of votes of all the candidates on that shore shall be declared to be duly elected."[20]

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[19] An act for carrying into effect an ordenance of Congress of the 13th September relative to the Constitution of the United States. *Laws of New Hampshire 1784–1792*. 1916. Volume Five. Manchester, NH: The John B. Clarke Company. November 12, 1788. Page 333. https://archive.org/details/lawsofnewhampshi05new h/page/332/mode/2up?q=electors

[20] An act directing the time, places and manner, of holding elections for representatives of this state in the congress of the United States, and for appointing electors on the part of this state for choosing a president and vice-president of the United States, and for the regulation of the said elections. 1788. *Laws of Maryland*,

Pennsylvania's winner-take-all law was especially inconvenient.

Voters in 1789 (and well into the 20th century) did not vote for their choice for President and Vice President but, instead, voted for individual candidates for the position of presidential elector.

Thus, in a state such as Pennsylvania with 10 electoral votes, the voter was expected to vote for 10 individual candidates for presidential elector.

Pennsylvania's winner-take-all law required that the voter's choices had to be *handwritten*—thus preventing the voter from bringing a printed "ticket" to the polling place—a convenience permitted by other states.

> "Every person coming to vote for electors … shall deliver **in writing** on ticket or piece of paper the names of ten person to be voted for as electors."[21] [emphasis added]

Today, all states use the so-called "short presidential ballot" that enables voters to conveniently cast a single vote for the presidential-vice-presidential slate of their choice (section 2.14).

2.1.7. Popular election using multi-elector districts

Starting in 1792, additional methods for appointing presidential electors emerged.

In 1792, Massachusetts had 16 electoral votes (as a result of the 1790 census). The voters directly elected all of the state's presidential electors. The state was divided into four regional districts for this purpose. In two districts, the voters elected five presidential electors. In the other two districts, the voters elected three presidential electors.[22]

The 1792 Massachusetts law specified that if a candidate failed to receive an absolute majority, the legislature would then make the choice after Election Day. Because of the absolute-majority requirement, the voters chose five of the state's 16 presidential electors, and the legislature chose eleven.[23]

1785-1791. Archives of Maryland Online. Volume 204. Chapter X. Page 319. https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000204/html/am204–319.html

[21] An act directing the time, places, and manner of holding elections for representatives of this state in the Congress of the United States and for appointing electors on the part of this state for choosing a president and Vice President of the United States. Act 1373. Passed Oct. 4, 1788. *The Statutes at Large of Pennsylvania*, *Regular Session of 1788*, *General Laws*. Volume 13. Page 142. https://palrb.gov/Preservation/Statutes-at-Large/View-Document/17001799/1788/0/act/1373.pdf

[22] Resolve for districting the commonwealth, for the purpose of choosing electors of President and Vice President. Passed June 30, 1792. *Massachusetts Acts and Resolves*, *1792 Session*. Pages 189-191. https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors

[23] Crocker, Matthew H. 2007. *A New Nation Votes: American Election Returns 1787–1825. Lampi Collection of American Electoral Returns, 1787–1825.* American Antiquarian Society. https://elections.lib.tufts.edu/?f%5Boffice_id_ssim%5D%5B%5D=ON056&f%5Bstate_name_sim%5D%5B%5D=Massachusetts&range%5Bpub_date_facet_isim%5D%5Bbegin%5D=1792&range%5Bpub_date_facet_isim%5D%5Bend%5D=1792

2.1.8. Popular election using congressional districts, with the legislature appointing the state's senatorial electors

Massachusetts has the distinction of having changed its method of awarding its electoral votes more times than any other state—a grand total of 11 times. It changed its method in every one of the nation's first ten presidential elections.[24]

In the nation's third presidential election in 1796, Massachusetts voters elected one presidential elector from each congressional district.[25]

The state's two senatorial electors were then appointed by the state legislature.

2.1.9. Popular election from congressional districts and a statewide popular election for the state's senatorial electors

In 1820, Massachusetts voters elected one presidential elector from each congressional district and two on a statewide basis—essentially the method used by Maine and Nebraska today.[26]

2.1.10. Popular election from congressional districts with the chosen presidential electors selecting the state's remaining electors

In 1828, New York voters elected presidential electors by congressional district. The resulting district-level electors then chose the state's two senatorial electors.[27]

2.1.11. Appointment by "grand committee" consisting of the Governor, his Council, and the House of Representatives

Vermont became a state in time to participate in the 1792 presidential election.

Vermont was the second state to involve the Governor and his cabinet in the selection of presidential electors.

In Vermont, the presidential electors were appointed by a "Grand Committee" consisting of the Governor, his 12-member Council, and all of the members of the state House of Representatives.[28]

Note that Vermont had a unicameral legislature at the time.

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[24] The 11th occasion was on August 4, 2010, when Massachusetts Governor Deval Patrick signed the National Popular Vote Compact into law.

[25] Resolve for the choice of electors for President and Vice President of the United States. Massachusetts Acts and Resolves, Passed June 16, 1796. *Massachusetts Acts and Resolves, 1796 May Session*. Chapter 20. Page 226. https://ia804609.us.archive.org/29/items/actsresolvespass179697mass/actsresolvespass179697mass.pdf

[26] Resolve regulating the choice of electors of President and Vice President of the United States. *Acts and Resolves passed by the General Court of Massachusetts*. May 1819-Feb 1824. Passed June 15, 1820. Chapter 6. Page 245. https://archive.org/details/actsresolvespass181924mass/page/244/mode/2up?q=electors

[27] Election of Representatives in Congress, Electors of President and Vice President, and Senators in Congress. 1827. *Laws of the State of New York Passed at the Second Meeting of the Fiftieth Session of the Legislature.* Pages 25–27. https://babel.hathitrust.org/cgi/pt?id=uc1.b4375246&view=1up&seq=59&q1=electors

[28] An Act directing the mode of appointing electors to elect a President and Vice President of the United States. Passed November 3, 1791. *Laws of 1791*. Page 43.

2.1.12. Appointment of presidential electors by "baby electoral colleges"

The multi-layered system used by Tennessee in 1796 (and again in 1800) was perhaps the most unusual system ever used by any state.

The legislative act establishing this system asserted that the state's presidential electors would

> "be elected with as little trouble to the citizens as possible."[29,30]

Tennessee's law established three regional "baby electoral colleges"—each empowered to select one of the state's presidential electors.

Then, the Tennessee law named several prominent local individuals from Washington, Sullivan, Green, and Hawkins Counties to meet and select one presidential elector from their part of the state.

Then, it named another group of prominent local individuals from Knox, Jefferson, Sevier, and Blount Counties to select their area's presidential elector.

Finally, it named yet another group of individuals from Davidson, Sumner, and Tennessee Counties to select a presidential elector from their area.

The three regional electoral colleges met, and each selected one presidential elector.

The three presidential electors then met later and cast their votes for President and Vice President.

2.2. 1789—THE FIRST PRESIDENTIAL ELECTION

Only 10 states participated in the nation's first presidential election on January 7, 1789.

Rhode Island and North Carolina did not participate, because neither had ratified the Constitution by the time of the election.

New York had ratified the Constitution by the time of the 1789 presidential election. However, it did not participate in the election, because the legislature could not agree on a method for choosing presidential electors.

The state had been closely divided on the question of ratifying the Constitution.

At the time, the lower house of the legislature (the Assembly) was elected by freemen; however, there were significant wealth qualifications in order to vote for State Senators.

Given the different electorates for the two chambers, a majority of the Senate were Federalists who had strongly backed the ratification of the Constitution. Meanwhile, the Assembly was dominated by Anti-Federalists who were still actively seeking substantial changes in the newly ratified Constitution.

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[29] *Acts Passed at the Second Session of the First General Assembly of the State of Tennessee*. 1796. Chapter IV. Knoxville, TN: George Roulstone Printers. See page 10:9 at https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74276090 For the 1799 law used in the 1800 presidential election, see page 108:107 at https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74276298

[30] At the first session of its legislature in March 1796, Tennessee enacted a law designating a joint session of the state legislature as the authority for appointing presidential electors. An Act Providing for the Appointment of Electors to Elect the Prefident and Vice Prefident of the United States. Chapter XI. This first law can be found at pages 30:29 at https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74275932 Before ever being used, this first law was replaced during the legislature's second session by the "baby electoral college" system. The replacement bore the same name as the old law and can be found on pages 10:9 and 12:11 at https://llmc.com/OpenAccess/docDisplay5.aspx?textid=7427609

Table 2.2 Methods of appointing presidential electors in 1789

State	Method of choosing presidential electors
Connecticut	Legislature (L)
Delaware	Popular election in one-county-one-elector districts (DCO)
Georgia	Legislature (L)
Maryland	Popular voting on statewide winner-take-all basis (W), with geographic restriction
Massachusetts	Popular voting by congressional districts with legislature selecting from the two leading candidates from each district, and with the legislature appointing the two senatorial electors (DL)
New Hampshire	Popular voting on statewide winner-take-all basis (W)
New Jersey	Governor and his Council (GC)
Pennsylvania	Popular voting on statewide winner-take-all basis (W)
South Carolina	Legislature (L)
Virginia	Popular voting in presidential-elector districts (DPE)

Both chambers of the state legislature agreed that the legislature should appoint the state's presidential electors—rather than the voters, the Governor, or anyone else.

With the Anti-Federalists and the Federalists each controlling one chamber, the legislature deadlocked over the method for picking the state's presidential electors. The competing approaches were:

- picking the presidential electors in a joint session consisting of all the Assemblymen and Senators meeting together—with each member having one vote, and
- a procedure requiring that a list of presidential electors be separately approved by each chamber.

Given that the Anti-Federalists held a substantial majority in the Assembly, while the Federalists held only a narrow majority in the Senate, the use of a joint session would have given the Anti-Federalists the power to pick all of the state's presidential electors.[31]

On the other hand, if the chambers acted separately, the state's eventual list of presidential electors would necessarily be the product of negotiation and compromise between the two chambers.

Election Day (January 7, 1789) came and went without any agreement. As a result, New York did not cast any electoral votes in the nation's first presidential election.

Table 2.2 shows the six different methods of appointing presidential electors used by the 10 states that participated in the 1789 presidential election.

2.3. THE DELIBERATIVE NATURE OF THE ELECTORAL COLLEGE

The Founding Fathers anticipated that the Electoral College would act as a deliberative body in which the presidential electors would exercise independent and detached judgment in order to select the best persons to serve as President and Vice President.

[31] Kuroda, Tadahisa. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787–1804*. Westport, CT: Greenwood Press. Pages 39–49.

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

> "[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **A small number of persons**, selected by their fellow-citizens from the general mass, will be most likely to possess **the information and discernment requisite to such complicated investigations**." [Emphasis added]

There was no meaningful deliberation in the Electoral College in 1789 concerning the choice for President, because George Washington was the unanimous choice of the 69 presidential electors who voted.[32]

However, the race for Vice President was very competitive, and the Electoral College acted in an arguably deliberative manner with respect to its choice of Vice President in 1789.

Under the original Constitution, each presidential elector had two votes.

Eleven candidates other than Washington received votes from the 69 presidential electors.[33]

John Adams was elected as the nation's first Vice President with 34 of 69 electoral votes.[34]

In six of the 10 states that participated in the 1789 election, the presidential electors split their votes among two or more candidates for Vice President. That is, the electors did not vote in lockstep but instead exhibited a degree of independent judgment, as shown in table 2.3.

Meanwhile, the presidential electors voted in lockstep in four states (table 2.4).

In contrast, in the 1792 election, only two of the 132 electors deviated from the choice for Vice President made by the rest of their state's delegation (one in Pennsylvania and one in South Carolina).[35]

2.4. 1792—THE SECOND PRESIDENTIAL ELECTION

By 1792, New York had resolved the dispute between its two legislative chambers that had prevented the state from appointing any presidential electors in the nation's first presidential election.

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[32] In addition to New York state not casting any votes in the Electoral College in 1789, two presidential electors from Maryland and two from Virginia failed to vote that year.

[33] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 27.

[34] Note that John Adams was elected Vice President in 1789 without receiving an absolute majority of the presidential electors "appointed." The original Constitution (Article II, section 1, clause 3) required an absolute majority of the presidential electors "appointed" to elect the President, but required only the second largest number of electoral votes to choose the Vice President. Thus, Adams' 34 electoral votes (out of 69) were sufficient. The 12th Amendment (ratified in 1804) required an absolute majority of the presidential electors "appointed" to elect both the President and Vice President.

[35] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 29.

Table 2.3 The six states where presidential electors scattered their votes for Vice President in 1789

State	Result
Connecticut	John Adams–5, Samuel Huntington–2
Georgia	John Milton–2, James Armstrong–1, Edward Telfair–1, Benjamin Lincoln–1
New Jersey	John Jay–5, John Adams–1
Pennsylvania	John Adams–8. John Hancock–2
South Carolina	John Rutledge–6, John Hancock–1
Virginia	John Adams–5, John Jay–1, John Hancock–1, George Clinton–3

Table 2.4 The four states where presidential electors voted in lockstep for Vice President in 1789

State	Result
Delaware	John Jay–3
Maryland	Robert H. Harrison–6
Massachusetts	John Adams–10
New Hampshire	John Adams–5

New York's 1792 law authorized the legislature to appoint presidential electors in the same way that the state had previously appointed delegates to the Confederation Congress:

> "The senate and assembly shall each openly nominate as many persons as shall be equal to the whole number of Delegates to be appointed; after which nomination they shall meet together, and those persons named in both lists shall be Delegates; and out of those persons whose names are not on both lists, one-half shall be chosen by the joint ballot of the senators and members of assembly so met together as aforesaid."[36,37]

Rhode Island and North Carolina had ratified the Constitution by 1792. The legislatures chose the presidential electors in both Rhode Island[38] and North Carolina[39] for the second presidential election.

Vermont became a state in time for the 1792 election. Its presidential electors were appointed by a "Grand Committee" consisting of the Governor, his 12-member Council, and all of the members of the state House of Representatives.

Kentucky had also become a state in time for the 1792 election. The state was divided

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[36] An Act for appointing electors in this state for the election of a president and vice president of the United States of America. Passed April 12, 1792. *Laws of New York—Fifteenth Session*. Pages 481–482.

[37] Constitution of New York of 1777. Section XXX.

[38] *Acts and Resolves of the Rhode Island General Assembly, October 1792*. Page 5.

[39] An act directing the manner of appointing electors to vote for a Prefident and Vice Prefident of the United States. *Laws of North Carolina*. November 15, 1792. Chapter 15, Page 8. https://digital.ncdcr.gov/Documents/Detail/laws-of-north-carolina-1792-november/3691870?item=4230925

into four presidential-elector districts, and voters chose one presidential elector from each district.[40]

Three of the 10 states that participated in the 1789 presidential election changed their method of selecting presidential electors in time for the 1792 election.

In 1792, the Delaware legislature took the power to elect the state's presidential electors away from the voters and vested it in itself. It was not until 1832 that the legislature again allowed its voters to select the state's presidential electors.

The New Jersey legislature took the power to appoint presidential electors away from the Governor and his Council and vested it in themselves.

Massachusetts created several multi-elector districts and allowed the voters to choose those presidential electors.[41]

Three states continued to use the statewide winner-take-all system (New Hampshire, Pennsylvania, and Maryland).

The legislatures in a total of eight states appointed the presidential electors (Connecticut, Delaware, Georgia, New Jersey, New York, North Carolina, and Rhode Island, and South Carolina).[42]

In 1792, George Washington again received a vote from all of the presidential electors who voted.

In only two of the 15 states participating in the 1792 presidential election did the Electoral College act in an arguably deliberative manner with respect to the choice of Vice President—compared to six in 1789.

The split voting for Vice President in two states in 1792 was the last time when the Electoral College acted as the deliberative body envisioned by the Founders.

2.5. 1796—THE FIRST CONTESTED PRESIDENTIAL ELECTION AND THE EMERGENCE OF POLITICAL PARTIES

For the 1796 election, Massachusetts abandoned the multi-elector districts that it used in 1792 and switched to a system in which the voters elected the presidential electors by congressional district. If no candidate for presidential elector received an absolute majority of the popular votes cast in a district, the legislature made the choice. The state legislature also appointed the state's two senatorial electors without any involvement by the voters.[43]

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[40] An Act for the appointment of electors to chufe a Prefident and Vice-Prefident of the United States. June 28, 1792. *Acts (of a General Nature) Passed at the Second Session of the Sixth General Assembly of the Commonwealth of Kentucky*. Lexington, KY: John Bradford Printers. Pages 15–17.

[41] Resolve for districting the commonwealth, for the purpose of choosing electors of President and Vice President. Passed June 30, 1792. *Massachusetts Acts and Resolves*, *1792 Session*. Pages 189-191. https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors https://archive.org/details/actsresolvespass179293mass/page/188/mode/2up?q=electors

[42] An Act prescribing on the part of this state, the time, place and manner of appointing electors of a President and Vice president of the United States. *South Carolina*, *1792-93. December Session: 3-86.* Page 3. Retrieved from Hein Online Session Laws.

[43] Resolve for the Choice of Electors for the President and Vice President of the United States. *Acts and Resolves of Massachusetts 1796–1797*. Boston, MA: Secretary of the Commonwealth. Pages 225–227. June 13, 1796. https://ia804609.us.archive.org/29/items/actsresolvespass179697mass/actsresolvespass179697mass.pdf. For election returns, see https://ia804609.us.archive.org/29/items/actsresolvespass179697mass/actsresolvespass179697mass.pdf

Maryland switched from popular election of presidential electors on a statewide winner-take-all basis to popular election using presidential-elector districts.[44]

Georgia switched from legislative appointment to statewide popular election on a winner-take-all basis.[45]

Thus, the number of states that used the statewide winner-take-all system remained at three for the 1796 election (New Hampshire, Pennsylvania, and Georgia).

The recently admitted state of Tennessee used the "baby electoral college" system (section 2.1.11).

George Washington's decision not to run for a third term in 1796 opened the way for the nation's first contested presidential election.

The contest for control of the national government resulted in the emergence of political parties. As Professor Jeffrey Pasley observed:

> "The issue that led most directly to national electoral competition between parties was the so-called Jay Treaty with Great Britain, ratified by the Senate in 1795. While historians have long debated exactly when and how political parties first emerged, there has never been any question about what the politicians of the Early Republic regarded as the point of no return. While ideological cleavages and some electoral competition had already developed, … it was the Jay Treaty that came to encapsulate them all, deepening the conflict and taking it national."[46]

The Founders' vision of the Electoral College as a deliberative body conflicted with the political goal of winning the presidency.[47]

Thus, the Electoral College was necessarily converted into a body whose members would—regardless of how selected—robotically vote for nominees of their political party.

This overnight conversion in the character of the Electoral College occurred without any change in state laws, federal laws, or the U.S. Constitution.

In the summer of 1796, the Federalist members of Congress met in a caucus and nominated John Adams of Massachusetts (the incumbent Vice President) and Thomas Pinckney of South Carolina as their party's candidates for President and Vice President. Although the party caucus did not specifically designate which nominee was to become President, it was generally understood that Adams was the party's choice for President.

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[44] An act to alter the mode of electing electors to choofe the Prefident and Vice Prefident of the United States. *Laws of Maryland, 1795*. Archives of Maryland Online. Volume 647. Chapter LXXII. Page 66. https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000647/html/am647--66.html

[45] *The Augusta Chronicle and Gazette of the State*. September 24, 1796. Image 3. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82015220/1796-09-24/ed-1/seq-3/#sort=date_asc&index=2&rows=12&proxtext=electors&sequence=0&words=electors&page=

[46] Pasley, Jeffrey L. 2013. *The First Presidential Contest: 1796 and the Founding of American Democracy*. Lawrence, KS: University Press of Kansas. Page 101.

[47] White, Theodore H. 1969. *The Making of the President 1968*. New York, NY: Atheneum Publishers. Page 471.

Meanwhile, the Republican congressional caucus[48] voted to support the candidacies of Thomas Jefferson of Virginia and Aaron Burr of New York.[49,50,51]

The two parties then campaigned throughout the country to elect their nominees.

The necessary consequence of centrally nominated candidates was that presidential electors would be expected to cast their votes in the Electoral College for the party's nominees.

Thus, candidates for presidential elector generally made it known (often through advertisements in newspapers) how they intended to vote in the Electoral College.

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

> "Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive, but experience soon demonstrated that, **whether chosen by the legislatures or by popular suffrage on general ticket[52] or in districts, they [the presidential electors] were so chosen simply to register the will of the appointing power** in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated."[53] [Emphasis added]

The overnight transition from the deliberative Electoral College envisioned by the Founding Fathers to the robotic Electoral College was illustrated by the fact that 138 of the 139 presidential electors in 1796 conformed to the Supreme Court's observation that the electors would simply

> "register the will of the appointing power."

Table 2.5 shows the methods of appointing presidential electors used in 1796 and the number of electoral votes received by John Adams and Thomas Jefferson.[54,55]

In 1796, there was no hint of independent judgment by any of the presidential electors

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[48] The party of Thomas Jefferson subsequently became known as the "Democratic-Republicans" and finally as the "Democrats."

[49] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 63–64.

[50] Grant, George. 2004. *The Importance of the Electoral College*. San Antonio, TX: Vision Forum Ministries. Pages 23–26.

[51] The congressional caucus was replaced by the national nominating convention during the 1820s.

[52] The statewide winner-take-all method of choosing presidential electors was called the "general ticket" system at the time. It was later called the "unit rule" or "winner-take-all rule."

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

[54] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 176.

[55] This table simplifies the results of the 1796 election by presenting only the number of electoral votes received by Adams and Jefferson. Under the original Constitution, each presidential elector cast two undifferentiated votes. Thirteen different people received electoral votes in the 1796 election. Eleven of them were generally understood to be running for Vice President. Adams and Jefferson were generally understood to be running for President. The candidate with the most electoral votes (provided that it was a majority of the electors appointed) became President. The second-ranking candidate (regardless of whether he received a majority of the electors appointed) became Vice President.

Table 2.5 Methods of appointing presidential electors in 1796 and results

State	Adams	Jefferson	Method of choosing presidential electors
Connecticut	9		Legislature (L)
Delaware	3		Legislature (L)
Georgia		4	Popular voting statewide (W)
Kentucky		4	Popular voting in elector districts (DPE)
Maryland	7	4	Popular voting in elector districts (DPE)
Massachusetts	16		Popular voting in congressional districts, with the legislature choosing the two senatorial electors (DCL)
New Hampshire	6		Popular voting statewide (W)
New Jersey	7		Legislature (L)
New York	12		Legislature (L)
North Carolina	1	11	Popular voting in elector districts (DPE)
Pennsylvania	1	14	Popular voting statewide (W)
Rhode Island	4		Legislature (L)
South Carolina		8	Legislature (L)
Tennessee		3	Legislature appointment of members of regional "baby electoral colleges" which, in turn, appointed presidential electors (BEC)
Vermont	4		Grand committee consisting of the Governor, his Council, and the members of the House of Representatives (GCL)
Virginia	1	20	Popular voting in elector districts (DPE)
Total	**71**	**68**	

from the eight states in which presidential electors were chosen by the state legislature.[56] All 62 presidential electors from these eight states voted in lockstep for Jefferson or Adams in accordance with "the will of the appointing power"—that is, in accordance with the will of the legislative majority that effectively appointed the electors.

Similarly, there was no hint of independent judgment by the presidential electors from two of the three states that used the statewide winner-take-all rule. All six of New Hampshire's presidential electors voted for Adams, and all four of Georgia's electors voted for Jefferson—in lockstep with the strong sentiments of each state's voters. That is, when the voters on a statewide basis were "the appointing power," the winning presidential electors did their bidding.

Moreover, all of the district-level presidential electors in the strongly Federalist state of Massachusetts were supporters of their home state candidate (Adams), as were the two presidential electors appointed by the legislature. Again, the presidential electors did the bidding of "the appointing power."

All four of the district-level presidential electors in Kentucky were supporters of Jefferson.

In three states (Virginia, North Carolina, and Maryland), electoral votes were frag-

[56] This count treats Tennessee's "baby Electoral College" and Vermont's Grand Committee as states in which the legislature chose the state's presidential electors. *A New Nation Votes: American Election Returns 1787–1825*. American Antiquarian Society and Tufts University. https://elections.lib.tufts.edu/catalog/kh04dr012

mented because of the use of districts. The splitting of the electoral votes of these states was not, however, a demonstration of independence or detached judgment by presidential electors. The electors were merely voting in accordance with "the will of the appointing power"—which in this case was the will of the voters of each separate district.

Although Pennsylvania chose presidential electors in a statewide popular election in 1796, its electoral votes were divided 14–1 for a different reason. At the time (and well into the 20th century), voters were required to cast separate votes for each individual presidential elector. Thus, in 1796, Pennsylvania voters had to vote for 15 separate candidates for presidential elector.

Moreover, Pennsylvania law (unusual at the time) required that the names of voter's choices for presidential elector be *hand-written*.[57]

As Edward Stanwood reported in *A History of the Presidency from 1788 to 1897*:

> "**In Pennsylvania, the vote was extremely close**. There were … two tickets, each bearing fifteen names. The highest number polled by any candidate for elector was 12,306; the lowest of the thirty had 12,071. Thus 235 votes only represented the greatest difference; and two of the Federalist electors were chosen."[58] [Emphasis added]

The result of this close election was that 13 Jeffersonians and two Federalists were chosen as presidential electors from Pennsylvania in 1796.

The state's electoral votes were split because the election was so close, even though the state was using the statewide winner-take-all method. In fact, similar splits in a state's electoral votes continued to occur until the short presidential ballot came into widespread use in the middle of the 20th century (section 2.14).

When the Electoral College met, 14 of the 15 electors voted, as expected, for their own party's designated nominee for President.

Thus, 138 of the 139 presidential electors in 1796 loyally voted for the nominees of their party.

In short, because of the emergence of competing political parties and the centralized nomination of presidential and vice-presidential candidates in 1796, the Electoral College no longer functioned as the deliberative body envisioned by the Founders.

Nonetheless, one of the two Pennsylvania Federalist electors who was elected due to the close statewide vote did not vote as expected.

Federalist Samuel Miles cast his vote in the Electoral College for Republican Thomas Jefferson—instead of his party's nominee, John Adams.[59]

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[57] The law did not say whose hand had to write the names of the voter's preferred candidates. Thus, the competing parties prepared and distributed sheets of paper with the required hand-written names of their party's nominees for presidential elector. It is not known how many voters used these prepared lists. In any case, some of the variation in vote totals was, almost certainly, caused by individual voters' mistakes in writing out their own lists. *The Statutes at Large of Pennsylvania*. Volume 15. Passed April 1, 1796. Chapter 1893. Page 428. https://palrb.gov/Preservation/Statutes-at-Large/View-Document/17001799/1796/0/act/1893.pdf

[58] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 48.

[59] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 64.

In the December 15, 1796, issue of *United States Gazette*, a Federalist supporter bitterly complained:

> "What, do I chufe Samuel Miles to determine for me whether John Adams or Thomas Jefferfon is the fittest man to be President of the United States? No, **I chufe him to act, not to think**." [Emphasis as per original; spelling as per original].[60]

Of the 24,068 electoral votes cast for President in the 59 presidential elections between 1789 and 2020, the vote of Samuel Miles for Thomas Jefferson in 1796 remains the only instance when an elector might have thought, at the time he voted, that his unexpected vote might affect the national outcome (section 3.7).

The expectation that presidential electors should "act" and not "think" has prevailed ever since 1796. The Electoral College simply became a rubber stamp for affirming "the will of the appointing power." For over two centuries, the Electoral College has thus retained the form—but not the substance—of a deliberative body.

2.6. 1800—THE SECOND CONTESTED PRESIDENTIAL ELECTION

Six states changed their method of appointing presidential electors in anticipation of the 1800 election.

2.6.1. Virginia in 1800

In the nation's first contested election in 1796, Federalist John Adams defeated Republican Thomas Jefferson by a 71–68 vote in the Electoral College (table 2.5).

Nothing focuses the attention of a presidential candidate on electoral machinery more than losing a close election.

In 1796, presidential electors had been elected by district in both Jefferson's home state of Virginia and the neighboring Jeffersonian stronghold of North Carolina.

In 1796 in Virginia, Republican candidates won all but one of the state's 21 presidential-elector districts. However, in the district comprising Loudoun County and Fauquier County, the Federalist candidate for elector (Leven Powell) won 592 votes, while the Republican candidate (Albert Russell) received only 313 votes.[61] Thus, Virginia's use of the district system cost Jefferson one of his home state's 21 electoral votes.

Similarly, North Carolina's use of the district system cost Jefferson one of that state's 12 electoral votes.[62]

If Jefferson had received 100% of the electoral votes from the strongly Republican states of Virginia and North Carolina, he would have won the presidency in 1796 by a 70–69 margin in the Electoral College.

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[60] This piece was signed with the alias "CANDOUR."

[61] Virginia 1796 Electoral College, District 21. *A New Nation Votes: American Election Returns 1787–1825*. American Antiquarian Society and Tufts University. https://elections.lib.tufts.edu/catalog/hx11xg19w

[62] North Carolina 1796 Electoral College. *A New Nation Votes: American Election Returns 1787–1825*. American Antiquarian Society and Tufts University. https://elections.lib.tufts.edu/catalog/k35694952

Then, in the 1798 midterm elections, Virginia Republicans were shocked when the Federalists won eight of Virginia's 19 congressional races.[63,64]

As the 1800 presidential election approached, Virginia Republicans considered two ways to avoid again losing electoral votes to the Federalists:

- eliminate the voters from the process and choose all the state's presidential electors in the state legislature (which was controlled by Jefferson's supporters), or
- continue conducting popular elections, but do so on a statewide winner-take-all basis.

Charles Pinckney, a prominent Jefferson supporter from South Carolina, advocated simply eliminating the voters from the process.

In a 1799 letter marked "Private and in confidence," Charles Pinckney wrote James Madison (then a Virginia Republican Congressman and later President) about

> "the absolute necessity of your State Legislature passing at their next session an act to declare that **the Electors of a President & Vice President shall be elected by joint Ballott by your State Legislature** in the manner it is done in this State [that is, South Carolina]—this act must Be passed at your next session or it will be too late—the Election comes on you recollect in December 1800 & as **the Success of the Republican Interest depends upon this act** I am to intreat you not only to use all your own Influence, but to Write to & speak to all your Friends in the republican interest in the state Legislature to have it done. **The Constitution of the United States fully warrants it—& remember that Every thing Depends upon it—that Mr Adams carried his Election [in 1796] by One Vote from Virginia & from North Carolina**."
>
> "**A single Vote may be of great Consequence.** It is now a proper time to push every measure favourable to the republican interest."
>
> "**This is no time for qualms**."[65] [Emphasis added]

As Noble E. Cunningham wrote in *History of American Presidential Elections 1878–2001*:

> "**In looking for ways to improve their chances for victory in the next presidential election, Republican managers thus turned their attention to state election laws.** No uniform system of selection of presidential electors prevailed. In some states, electors were chosen by the state legislature; in

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[63] Larson, Edward J. 2007. *A Magnificent Catastrophe: The Tumultuous Election of 1800*. New York, NY: Free Press. Page 62. https://books.google.com/books?id=MXcCdlmwwecC&pg=PA62&lpg=PA62&dq=Charles+Pinckney+lived+for+politics&source=bl&ots=eAFaEbIWNd&sig=n4-McTecSzKqitjUddrpsi_hJfg&hl=en&sa=X&ved=0ahUKEwjPw6qw6OvVAhVmxFQKHdzwCJI4ChDoAQ

[64] Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press. Page 156.

[65] Letter from Charles Pinckney to James Madison. September 30, 1799. William T. Hutchinson et al. (editors). *Papers of James Madison*. Volume 17. Pages 272–273. Chicago, IL: University of Chicago Press. Available at https://founders.archives.gov/documents/Madison/01-17-02-0175

> others they were elected on a general ticket throughout the state; in still others they were elected in districts. This meant that **the party that controlled the state legislature was in a position to enact the system of selection that promised the greatest partisan advantage.** Thus, in January 1800 the Republican-controlled legislature of Virginia passed an act providing for the election of presidential electors on a general ticket [that is, winner-take-all] instead of districts as in previous elections. By changing the election law, Republicans in Virginia, confident of carrying a majority of the popular vote throughout the state but fearful of losing one or two districts to the Federalists ensured the entire electoral vote of the Union's largest state for the Republican candidate."[66] [Emphasis added]

Jefferson summed up the reasons for Virginia's switch from the district system to the statewide winner-take-all system in a January 12, 1800, letter to Virginia Governor (and later President) James Monroe:

> "On the subject of an election by a general ticket, or by districts, most persons here seem to have made up their minds. **All agree that an election by districts would be best, if it could be general; but while 10 states chuse either by their legislatures or by a general ticket, it is folly & worse than folly** for the other 6 not to do it. In these 10. states the minority is entirely unrepresented; & their majorities not only have the weight of their whole state in their scale, but have the benefit of so much of our minorities as can succeed at a district election. This is, in fact, ensuring to our minorities the appointment of the government. To state it in another form; it is merely a question whether we will divide the U S into 16. or 137. districts. The latter being more chequered, & representing the people in smaller sections, would be more likely to be an exact representation of their diversified sentiments. But a representation of a part by great, & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the U S, were they assembled together."[67] [Emphasis added; spelling and punctuation as per original]

Six days after Jefferson's letter to the Governor, the Virginia legislature passed a law that ended the "folly" of dividing the state's electoral votes[68] and replaced the district sys-

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[66] Cunningham, Noble E., Jr. 2002. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Pages 104–105. Note that Cunningham's article incorrectly attributes Jefferson's lost electoral vote in Pennsylvania to the state's use of the district system, whereas voting for presidential electors in Pennsylvania was, in fact, statewide. As previously mentioned in this section, it was the extreme closeness of the Pennsylvania *statewide* vote that produced the split statewide result that permitted the Federalists to elect two of their elector candidates. One of the two Federalist electors (Samuel Miles) defected to Jefferson, but one loyally voted for Adams.

[67] Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G.P. Putnam's Sons. 9:90.

[68] In 1892, the U.S. Supreme Court commented on the "folly" of dividing a state's electoral votes by saying, "The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform [that is, winner-take-all] rule was preferable." *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

tem that had been used in the first three presidential elections with the statewide winner-take-all system.

Two days later, Governor Monroe signed the law.[69]

Remarkably, Virginia's new winner-take-all law began with an explanation linking its passage to the absence of a federal constitutional amendment:

> "Whereas, **until some uniform mode for choosing a president and vice president of the United States, shall be prescribed by an amendment to the constitution**, it may happen under the law of this commonwealth for appointing electors for that purpose, that **a choice may take place contrary to the will of a majority of the United States, and also contrary to the will of a majority of the people of this state**, which would be inconsistent with the true intent and meaning of the constitution of the United States; and although this commonwealth is willing to accede to any reasonable and proper amendment of the said constitution to remedy the said evil, yet for as much as it ought in the mean time to be counteracted by every constitution regulation within the power of the legislature, until is shall be so removed." [Emphasis added]

The Federalists campaigned against the new law in the subsequent April 1800 state legislative elections.

The *Virginia Federalist* complained that the general ticket (i.e., winner-take-all law) would:

> "exclude one third at least of the citizens of Virginia from a vote for the president of the United States."[70]

The *Virginia Federalist* later said that the new law violated:

> "the ancient useages of elections and [the voters'] established rights."[71,72]

The Republicans defended the new winner-take-all law in a nine-page broadside entitled "A Vindication of the General Ticket Law":

> "Virginia for instance has 21 electors, who constitute nearly one third of a majority, which is 70. **If all her votes are given in the same way, her consti-**

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[69] An Act to amend an act entitled "An Act for Appointing Electors to choose a President and Vice President of the United States." 1800. *Acts Passed at a General Assembly of the Commonwealth of Virginia*. Chapter One. Passed January20, 1800. Pages 197–200. https://babel.hathitrust.org/cgi/pt?id=mdp.35112104867314&view=1up&seq=203&q1=electors

[70] *Virginia Federalist*. March 19, 1800. Pages 2–3.

[71] *Virginia Federalist*. May 28, 1800. Page 3.

[72] Larson, Edward J. 2007. *A Magnificent Catastrophe: The Tumultuous Election of 1800*. New York, NY: Free Press. Page 64. https://books.google.com/books?id=MXcCdlmwwecC&pg=PA62&lpg=PA62&dq=Charles+Pinckney+lived+for+politics&source=bl&ots=eAFaEbIWNd&sig=n4-McTecSzKqitjUddrpsi_hJfg&hl=en&sa=X&ved=0ahUKEwjPw6qw6OvVAhVmxFQKHdzwCJI4ChDoAQ

> **tutional influence in the election is great**; it is three times greater than that of New Jersey, which has seven votes, and seven times greater than that of Delaware which has three. **But if the state were to vote by districts, ten votes might, under the law, be given for one candidate and eleven for the other**, and thus the state of Virginia, instead of retaining a power in the election, which the constitution allows three times greater than that of New Jersey, and seven times greater than that of Delaware, would have only a seventh part of the influence of the former, and a third part of the influence of the latter; in other words, only one efficient vote."[73] [Emphasis added]

The full text of this document may be found in appendix C.

In any case, the Federalists failed to win control of the state legislature in the April 1800 elections and were thus unable to repeal winner-take-all.

As a result of this timely change in Virginia's election law, Jefferson received 100% of Virginia's electoral votes in the 1800 election.[74]

The remainder of Thomas Jefferson's January 12, 1800, letter to Virginia Governor James Monroe continues with what he learned from Aaron Burr of New York, his 1796 (and 1800) running mate (referred to as "113" in the letter).

The letter is noteworthy in that it records Burr's prediction of victory in New York's upcoming April 1800 state legislative elections based on winning New York City and Burr's political calculation not to permit New York and New Jersey voters to participate in choosing the state's president electors by the "general ticket" (that is, winner-take-all) method.

> "I have today had a conversation with 113 who has taken a flying trip here from NY. He says, they have really now a majority in the H of R, but for want of some skilful person to rally round, they are disjointed, & will lose every question. In the Senate there is a majority of 8. or 9. against us.
>
> "But in the new election which is to come on in April, **three or 4. in the Senate will be changed in our favor**; & **in the H of R** the county elections will still be better than the last; but still **all will depend on the city election, which is of 12. members.** At present there would be no doubt of our carrying our ticket there; nor does there seem to be time for any events arising to change that disposition.

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[73] A Vindication of the General Ticket Law passed by the Legislature of Virginia on the 18th day of January. (Addressed "To the freeholders of Shenandoah County," signed, Shenandoah Committee) Staunton, VA: John M. Thur Printers. 1800. Restored by Barrow, 1961. Page 2 states "Extract from a late publication signed Franklin." Located at the Library of Virginia, Special Collections West Side JK528.V82.

[74] Virginia's switch from the district system to the winner-take-all system, combined with the Republican victory in the spring 1800 state legislative elections in New York (described shortly in this section) allowed Jefferson's party to win a majority in the Electoral College in the 1800 presidential election.

> "There is therefore the best prospect possible of a great & decided majority on a joint vote of the two houses. **They are so confident of this, that the republican party there will not consent to elect either by districts or a general ticket. They chuse to do it by their legislature.** I am told the republicans of N J are equally confident, & equally anxious against an election either by districts or a general ticket. The contest in this State will end in a separation of the present legislature without passing any election law, (& their former one is expired), and in depending on the new one, which will be elected Oct 14. in which the republican majority will be more decided in the Representatives, & instead of a majority of 5. against us in the Senate, will be of 1. for us. They will, from the necessity of the case, chuse the electors themselves. Perhaps it will be thought I ought in delicacy to be silent on this subject. But you, who know me, know that my private gratifications would be most indulged by that issue, which should leave me most at home. If anything supersedes this propensity, it is merely the desire to see this government brought back to it's republican principles.
>
> "Consider this as written to mr. Madison as much as yourself; & communicate it, if you think it will do any good, to those possessing our joint confidence, or any others where it may be useful & safe. Health & affectionate salutations." [Emphasis added] [Spelling and punctuation from original]

2.6.2. Massachusetts in 1800

Meanwhile, the closeness of the electoral vote in the 1796 election and Virginia's "folly" of dividing its electoral votes in 1796 did not go unnoticed by the Federalist Party in Massachusetts.

John Adams had won the support of all 16 of his home state's popularly elected presidential electors in 1796.

However, the Republicans were making inroads in Federalist Massachusetts—just as the Federalists were doing in Virginia.

The Federalists feared that the Jeffersonians might win as many as two districts in the upcoming 1800 presidential election.[75]

Thus, the Federalist-controlled Massachusetts legislature did the same thing that the Republican-controlled Virginia legislature did—it repealed the district method for electing presidential electors.

Then—just to be safe—the Massachusetts legislature decided to eliminate the voters as well as the districts. It passed a law designating itself as the appointing authority for all of the state's presidential electors for the 1800 election.[76,77]

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[75] Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 105.

[76] Resolve respecting the choice of electors of president and Vice President of the United States, and requesting the Governor to transmit a certificate of such choice. *Acts and Resolves of Massachusetts, 1800-1801*. Chapter Six. Passed June 6, 1800. Page 142. https://archive.org/details/actsresolvespass180001mass/page/142/mode/2up?q=electors

[77] Congressional Quarterly. 2010. *Presidential Elections 1789–2008*. Washington, DC: CQ Press. Page 190.

2.6.3. New Hampshire in 1800

The political situation was similar in nearby New Hampshire. In 1789, 1792, and 1796, New Hampshire had conducted popular elections for presidential elector on a statewide winner-take-all basis.

Fearing a possible loss in a statewide popular vote in 1800, the Federalist-controlled New Hampshire legislature passed a law specifying that it would choose all of the state's presidential electors.[78,79]

2.6.4. Georgia in 1800

Similarly, Republicans in Georgia were concerned that the Federalists had won two congressional seats in the 1798 midterm elections in their state.

Consequently, Georgia became the third state to switch from popular voting for presidential electors (which it used in 1796) to legislative appointment for the 1800 election.[80,81]

2.6.5. New York in 1800

The Empire State was not to be outdone by Virginia, Massachusetts, New Hampshire, and Georgia in terms of political shamelessness.

The legislature had appointed all of the state's presidential electors in 1792 and 1796.

The Federalists were in control of the legislature at the beginning of the year.

Recognizing that continuing Federalist control of the legislature would mean that Jefferson would again lose all 12 of New York's electoral votes, Jefferson's supporters advocated use of the district system—the very system that Jefferson had just eliminated in Virginia.

> "In New York, Republicans introduced a measure to move from legislative choice to election by districts, but the proposal was defeated by the Federalists."[82]

After killing the Republican proposal to adopt popular elections and the district

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[78] An act directing the mode of appointing electors of this state for the election of a President and Vice President of the United States. *Laws of New Hampshire*. Volume Six. Second Constitutional Period, 1792-1801. Volume 6. Ninth General Court, First Session. Chapter 6. Passed June 14, 1800. Page 636. https://archive.org/details/lawsofnewhampshi1904newh/page/636/mode/2up?q=electors

[79] Sharp, James Roger. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in Balance*. Lawrence, KS: University Press of Kansas. Pages 116–117.

[80] *Augusta Herald*. November 5, 1800. Image 3. Column 3. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82014178/1800-11-05/ed-1/seq-3/#sort=date_asc&index=5&rows=12&proxtext=electors&sequence=0&words=Electors+electors&page=18. See also *The Augusta Chronicle and Gazette of the State*. November 22, 1800, Image 3. Column 1. https://gahistoricnewspapers.galileo.usg.edu/lccn/sn82015220/1800-11-22/ed-1/seq-3/#sort=date_asc&index=11&rows=12&proxtext=electors&sequence=0&words=electors&page=18

[81] Sharp, James Roger. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in Balance*. Lawrence, KS: University Press of Kansas. Pages 118.

[82] Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 105.

system, the Federalists were horrified when the Republicans won control of the legislature in the spring 1800 legislative elections.[83,84]

The loss of the legislature (largely due to the organizing efforts of Jefferson's 1796 running mate, Aaron Burr) meant that Jefferson would receive all 12 of New York's electoral votes when the new legislature chose presidential electors later in the year.[85]

Given the close 71–68 vote in the Electoral College in the Adams-Jefferson race in 1796, the imminent shift of these 12 electoral votes was poised to decide the national outcome of the 1800 presidential election.

However, the legislature that was elected in the spring would not take office until July 1.

As John Ferling wrote:

> "Jarred by the specter of defeat in the autumn, **Hamilton importuned Governor John Jay to call a special session of the Federalist-dominated New York legislature so that it might act before the newly elected assemblymen took their seats**. Hamilton's plan was for the outgoing assembly to enact legislation providing for the popular election—in districts—of the state's presidential electors, a ploy virtually guaranteed to ensure that the Federalists would capture nine or ten of the twelve electoral college slots."[86] [Emphasis added]

Federalist Alexander Hamilton was blunt in his letter to Federalist Governor John Jay on May 7, 1800, in which he advocated that the Governor convene a lame-duck session of the outgoing legislature before July 1.

> "The moral certainty therefore is, that there will be an anti-federal majority in the ensuing legislature; and the very high probability is, that **this will bring Jefferson into the chief magistracy, unless it be prevented by the measure which I now submit to your consideration, namely, the immediate calling together of the existing legislature**.
>
> "**I am aware that there are weighty objections to the measure**; but the reasons for it appear to me to outweigh the objections. And in times like these in which we live, **it will not do to be over-scrupulous**. It is easy to sacrifice the substantial interests of society by a strict adherence to ordinary rules.
>
> "In observing this, I shall not be supposed to mean that anything ought to be done which integrity will forbid; but merely that the **scruples of delicacy and propriety**, as relative to a common course of things, **ought to yield to the extraordinary nature of the crisis**. They ought not to hinder the taking of a

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[83] Sharp, James Roger. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in Balance*. Lawrence, KS: University Press of Kansas. Pages 118.

[84] Aaron Burr received major credit for this Republican victory in the April 1800 state legislative elections in New York.

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

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

> legal and constitutional step **to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of State**."[87] [Emphasis added]

Governor Jay (formerly Chief Justice of the United States) rejected Hamilton's proposal and wrote this notation on Hamilton's letter:

> "Proposing a measure for party purposes which it would not become me to adopt."[88]

Hamilton was, of course, correct in predicting that the newly elected legislature would give all 12 of New York's electoral votes to Thomas Jefferson. Moreover, those 12 votes accounted for all of Jefferson's 73–65 lead over Adams in the Electoral College in 1800.

2.6.6. Pennsylvania in 1800

The Pennsylvania legislature permitted its voters to elect all of the state's presidential electors in 1789, 1792, and 1796 using the statewide winner-take-all rule.

However, the political situation in Pennsylvania in 1800 was complicated by the fact that the state had not previously enacted its winner-take-all method of picking presidential electors in the form of a permanent statute.

Control of the legislature was divided between the two parties when it came time to appoint presidential electors for the 1800 election.

> "In Pennsylvania, a Republican House of Representatives and a Federalist Senate produced a deadlock over the system to be used to select electors, and the vote of that state was eventually cast by the legislature in a compromise division of the 15 electoral votes, eight Republican and seven Federalist electors being named."[89]

2.6.7. Summary of changes in anticipation of the 1800 election

All three states (Maryland, New Hampshire, and Pennsylvania) that used the winner-take-all method in 1789 had abandoned it by the time of the 1800 election.

Georgia (which had adopted the statewide winner-take-all method in 1796) abandoned it in 1800.

Meanwhile, two states (Rhode Island[90] and Virginia) switched to the statewide winner-take-all method in 1800—making them the only two states to use the system in 1800.

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[87] The complete letter can be found in *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker*. 1892. Pages 30–31. See also Cunningham, Noble E., Jr. 1958. *Jeffersonian Republicans: The Formation of Party Organizations*. Chapel Hill, NC: University of North Carolina Press. Page 185. See also Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow. Page 239.

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

[89] Cunningham, Noble E., Jr. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). 2002. *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Page 71.

[90] Resolution Relative to Election of President. *Acts and Resolves of the Rhode Island General Assembly, 1801-1804*. Passed November 1, 1800.

Despite the decrease in the number of states using the winner-take-all method, 1800 would turn out to be the year when it got its second wind.

2.7. THE 12TH AMENDMENT

Under the original Constitution, each presidential elector cast two votes.

In voting, a presidential elector did not differentiate between his choice for President and his choice for Vice President (as they do today). Instead, the candidate with the most electoral votes became President (provided that the candidate had an absolute majority of the presidential electors appointed), and the second-place candidate became Vice President (regardless of whether that candidate had an absolute majority).

In the nation's first two presidential elections (1789 and 1792), the problems lurking in this arrangement were masked, because George Washington was the unanimous choice of the Electoral College.

That was not to be the case in the nation's first competitive presidential election in 1796.

In that year, the Federalist members of Congress caucused and nominated Vice President John Adams of Massachusetts and Thomas Pinckney of South Carolina.

Meanwhile, their opponents in Congress (initially called the "Republicans," later called the "Democratic Republicans," and eventually called the "Democrats") caucused and nominated Thomas Jefferson of Virginia (who had served as Secretary of State for several years under Washington) and Aaron Burr of New York.

Neither caucus officially designated one of their nominees as the presidential nominee and the other as the vice-presidential nominee. It was, however, generally understood that Adams and Jefferson were the presidential candidates.

As John Ferling wrote:

> "The election was overshadowed by the Constitutional Convention's ill-advised notion that electors were to vote by ballot for two persons for the presidency. The electoral college system was a calamity waiting to happen."[91]

The election was expected to be close in the Electoral College.

The Federalists were strongest in the north, and the Republicans were strongest in the south.

Each party had a nominee from each region in order to maximize its appeal.

Federalist nominee Thomas Pinckney was expected to be able to win all of the electoral votes from his home state of South Carolina (where the legislature appointed the presidential electors). However, Republican nominee Aaron Burr was not expected to be able to win similar support in the New York legislature (where the legislature also appointed the electors).

Given that each presidential elector cast two votes in the Electoral College—not differentiated as to whether for President or Vice President—the Federalist Party faced the excruciating dilemma of whether to give its wholehearted support to both its own nominees.

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[91] Ferling, John. 2004. *Adams vs. Jefferson: The Tumultuous Election of 1800*. Oxford, UK: Oxford University Press. Page 887.

If 100% of the Federalist presidential electors had loyally cast one of their two votes for Adams and their second vote for Thomas Pinckney, and if Pinckney had then won the additional bloc of electoral votes from South Carolina, Thomas Pinckney would likely have ended up with more electoral votes than Adams. However, Adams was the person that the party's congressional caucus and most Federalists wanted to become President.

To avoid that result:

> "No less than eighteen [Federalist] electors in New England resolved that Pinckney's vote should not exceed Adam's and withheld their votes from the [Federalist] candidate for Vice president, and scattered them upon others."[92]

This strategic voting by Federalist presidential electors succeeded in ensuring the presidency to John Adams.

However, it simultaneously enabled Republican Thomas Jefferson to end up with the second-highest number of electoral votes.

Thus, Federalist John Adams was elected President, and his chief critic and opponent (Jefferson) became Vice President.[93,94,95]

The problems inherent with giving each presidential elector two undifferentiated votes surfaced again in the nation's second contested presidential election (1800).

Thomas Jefferson and Aaron Burr again were the nominees of the Republican Party. As in 1796, it was generally understood that Jefferson was the Party's choice for President, and Burr was the party's choice for Vice President.

In 1800, the Republicans won an absolute majority in the Electoral College.

To avoid the scattering of electoral votes that had given the vice-presidency to the opposing party in 1796, 100% of the Republican presidential electors loyally voted for both of their party's nominees in 1800.

However, the result of their lockstep loyalty was that Jefferson and Burr each received an equal number of votes in the Electoral College.

Under the Constitution, ties in the Electoral College were to be resolved by a "contingent election" in which the U.S. House of Representatives picks the President and the U.S. Senate picks the Vice President.

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[92] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 49.

[93] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 63–64.

[94] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Pages 49–53. There is considerable historical controversy concerning Alexander Hamilton's possible motives and role in the "strategic voting" by Federalist presidential electors in the 1796 election. The main point, for the purposes of this chapter, is that the original Constitution's provision for double voting by presidential electors was unworkable in the context of political parties and in the context of a competitive presidential election.

[95] John Adams received 71 electoral votes to Jefferson's 68. Adams received an absolute majority (71 out of 138) of the electoral votes. Jefferson received the second highest number of electoral votes but not an absolute majority.

In the House, each state is entitled to cast one vote for President. Moreover, states with an equally divided House delegation could not cast a vote. Nonetheless, an absolute majority of the House delegations was required in order to elect a President.

In 1800, newly elected members of the House did not take office until March 4—the same day that the newly elected President took office.

Thus, the Congress that was sitting at the time of the contingent election was the lame-duck Federalist Congress elected in 1798.

Neither party controlled an absolute majority of the House delegations at the time.[96]

After a prolonged and bitter dispute involving 36 ballots in the House of Representatives, Thomas Jefferson emerged as President.[97,98,99]

The 1796 and 1800 elections demonstrated that giving presidential electors two undifferentiated votes was incompatible with a system in which political parties competed for power.

Thus, Congress passed the 12th Amendment specifying that each presidential elector would cast separate votes for President and Vice President.

Separate voting for President and Vice President enables the winning political party to elect both of its nominees to national office.

The states quickly ratified the amendment, and the new procedure was in effect in time for the 1804 election.[100]

The 12th Amendment can be viewed as formalizing the central role of political parties in presidential elections and recognizing that the Electoral College was not a deliberative body.

2.8. MASSACHUSETTS CHANGED ITS METHOD OF SELECTING PRESIDENTIAL ELECTORS IN EACH OF THE FIRST 10 ELECTIONS

Massachusetts changed its method of awarding its electoral votes in every one of the first 10 presidential elections.

In addition to the methods previously mentioned (for 1789, 1792, 1796, and 1800), Massachusetts made the following additional changes:

- In 1804, the voters were allowed to elect 17 presidential electors by district and two on a statewide basis. This was thus the first election in which the Massachusetts legislature ceded control to the voters for all of the state's presidential electors.[101]

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[96] As a result of the 20th Amendment (ratified in 1933), the newly elected House takes office on January 3. A contingent election today would be conducted by the newly elected House on January 6.

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

[98] Weisberger, Bernard A. 2001. *America Afire: Jefferson, Adams, and the First Contested Election*. William Morrow.

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

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

[101] *Acts and Resolves of the Massachusetts General Court*, 1804-1895. Boston: Young & Mims, MDCCCIV. Reprinted, Wright & Porter, 1898. Page 296._https://archive.org/details/actsresolvespass180405mass/page/296/mode/2up?q=electors

- In 1808, the legislature decided to pick the electors itself—again excluding the voters entirely.[102]
- In 1812, the voters elected six presidential electors from one district, five electors from another district, four electors from another, three electors from each of two districts, and one elector from a sixth district.[103]
- In 1816, the legislature again decided to pick all the electors itself.[104]
- In 1820, the voters were allowed to elect 13 presidential electors by district and two on a statewide basis.[105]
- Then, in 1824, Massachusetts adopted its 10th method of awarding electoral votes, namely the statewide winner-take-all rule that is in effect today.[106]

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

2.9. MID-DECADE CHANGES IN PRESIDENTIAL-ELECTOR DISTRICTS IN TENNESSEE IN 1807.

The Tennessee legislature abandoned the "baby Electoral College" method that it used in 1796 and 1800 and replaced it in 1803 with a system in which the voters of five presidential-elector districts would each elect one elector.

Specifically, the first presidential-elector district consisted of the counties of Greene, Washington, Carter, and Sullivan for the 1804 presidential election. The second district consisted of Hawkins, Claiborne, Grainger, Jefferson, and Cocke.[107]

Then, in 1807, the legislature rearranged the districts prior to the 1808 presidential election. For example, Hawkins County (which had been in the second district) was added to the first district, and Sevier County and a portion of Campbell County were added to the second district.[108]

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[102] *Resolves of the General Court of the Commonwealth of Massachusetts,* May 1806-Mar. 1810. Boston: Adams & Rhoades. Pages 205-209. https://archive.org/details/actsresolvespass0610mass/page/n341/mode/2up?q=electors

[103] *Resolves of the Commonwealth of Massachusetts Passed at the Several Sessions of the General Court, May 1812–Mar. 1815*. Boston: Russell, Cutler and Co., 1812-15. Chapter LXXI. Passed Oct. 12, 1812. Page 94. https://archive.org/details/actsresolvespass181215mass/page/94/mode/2up?q=electors

[104] *Acts and Resolves passed by the General Court of Massachusetts. May 1815–Feb 1819*. Chapter XIX. Passed June 13, 1816. Page 233. https://archive.org/details/actsresolvespass1519mass/page/232/mode/2up?q=electors

[105] *Acts and Resolves passed by the General Court of Massachusetts. May 1819–Feb 1824*. Chapter 6. Passed June 15, 1820. Page 245. https://archive.org/details/actsresolvespass181924mass/page/244/mode/2up?q=electors

[106] *Acts and Resolves passed by the General Court of Massachusetts. May 1824–Mar 1828*. Chapter IX. Passed June 8, 1924. Page 40. https://archive.org/details/actsresolvespass2428mass/page/40/mode/2up?q=electors

[107] An Act to provide for the election of electors of President and Vice President of the United States. Chapter XXIV. November 3, 1803. Image 67. https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74276806

[108] An Act to provide for the election of electors of President and Vice President of the United States. Chapter LXXIV. December 4, 1807. Image 125. https://llmc.com/OpenAccess/docDisplay5.aspx?textid=74277246

2.10. KENTUCKY'S USE OF MULTI-ELECTOR DISTRICTS 1804–1824

Between 1804 and 1824, Kentucky voters elected presidential electors from multi-elector districts.

> "That this state shall be divided into three districts, for the purpose of electing fourteen electors to choose a President and Vice President of the United States, in the following manner [designating which counties are in each district]."
>
> "Electors [shall] vote for the number of electors for President and Vice President hereby authorized to be elected in said districts."[109]

2.11. FIRST APPEARANCE OF THE PRESENT-DAY CONGRESSIONAL-DISTRICT METHOD

In 1820, Massachusetts adopted a system in which the voters elected one presidential elector from each of the state's congressional districts and two electors statewide.

> "Each of the present districts for the choice of Representatives to Congress, shall form one district, for the choice of one Elector, and the two remaining Electors shall be chosen by the people at large."[110]

Maine was admitted to the Union on March 15, 1820 (under the Missouri Compromise) and adopted this same system to elect its presidential electors.

> "There shall be chosen at large out of the whole State, two Electors of President and Vice President of the United States, and one in each District within this State."[111]

Maine continued to use this system in 1824 and 1828. It then adopted the statewide winner-take-all rule starting in 1832.

In 1969, Maine repealed the winner-take-all system and re-adopted the system it had used in 1820, 1824, and 1828.

Nebraska adopted this same system in 1991.

2.12. SPREAD OF POPULAR VOTING FOR PRESIDENTIAL ELECTORS

In the period between 1804 and 1836, the method of choosing presidential electors varied considerably from state to state, and from election to election (table 2.1).

Chief Justice Melville Fuller of the U.S. Supreme Court recounted the variety of methods used to appoint presidential electors during this period in *McPherson v. Blacker*:

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[109] An act to lay off the State into Electoral Districts. *Acts passed at the First Session of the Thirty-Second General Assembly for the Commonwealth of Kentucky. 1824. First Session.* Chapter DCCXVIII. Approved. January 7, 1824. Page 457.

[110] Resolve regulating the choice of electors of President and Vice President of the United States. *Acts and Resolves passed by the General Court of Massachusetts*. Chapter VI. Passed June 15, 1820. Page 245. https://archive.org/details/actsresolvespass181924mass/page/244/mode/2up?q=electors

[111] Resolve providing for the choice of electors of President and Vice President. *Resolves of the legislature of the state of Maine, 1820*. Chapter XIX. Passed June 22, 1820.

> "[T]he district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts used the general ticket system in 1804, … chose electors by joint ballot of the legislature in 1808 and in 1816, … used the district system again in 1812 and 1820, … and returned to the general ticket system in 1824. … In New York, the electors were elected in 1828 by districts, the district electors choosing the electors at large.… The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont,[112] and New Jersey in 1812."[113]

Nonetheless, there was an unmistakable trend during this period in favor of both

- popular election of presidential electors and
- the winner-take-all method.

The controversial 1824 election focused attention again on the machinery for electing the President.

In that election, Andrew Jackson won the most popular votes and the most electoral votes; however, he did not become President.

By 1824, presidential electors were chosen by popular vote (either by districts or statewide) in 18 of the 24 states. The six states where legislatures still chose presidential electors in 1824 were Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont.

Jackson received 41% of the national popular vote in the 18 states that conducted popular elections for presidential electors—compared to 31% for John Quincy Adams (with the remaining popular votes divided approximately equally between two other candidates).

Jackson led Adams in the Electoral College by a 99–64 margin. However, he failed to receive the required absolute majority of 131 of the 261 electoral votes because of the electoral votes won by the two other candidates. Thus, the election of the President was thrown into the U.S. House (section 1.6.1). A mere 2,586 popular votes in four states kept Jackson from receiving the required majority in the Electoral College.

The controversy over the method of selecting presidential electors was stoked by the fact that Jackson received only 15 of the 71 electoral votes cast by presidential electors picked by state legislatures. Had Jackson received as few as 32 of these 71 electoral votes, he would have had the required absolute majority of 131.

Second, the conduct of the contingent election in the House further enflamed the controversy. House Speaker Henry Clay came in fourth place in the Electoral College. Under the 12th Amendment, only the top three candidates could be considered by the House. Being ineligible, Speaker Clay helped John Quincy Adams (the second-place candidate) to win the presidency in the House election. President Adams then promptly appointed Speaker Clay as his Secretary of State—an action that was widely criticized and became known as "the corrupt bargain."[114]

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[112] Vermont's presidential electors were not selected by the legislature but instead by a "Grand Committee" consisting of the Governor his Council and the members of the House of Representatives (section 2.4).

[113] *McPherson v. Blacker*. 146 U.S. 1 at 32. 1892.

[114] Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas.

Table 2.6 Number of states conducting popular elections of presidential electors 1789–1836

Election	Number of participating states	Number of states conducting popular elections of presidential electors	Percent of states conducting popular elections of presidential electors
1789	10	6	60%
1792	15	6	40%
1796	16	8	50%
1800	16	5	31%
1804	17	10	59%
1808	17	10	53%
1812	18	9	50%
1816	19	10	59%
1820	24	15	63%
1824	24	18	75%
1828	24	22	92%
1832	24	23	96%
1836	26	25	96%

The public reaction to these controversial aspects of the 1824 presidential election gave added impetus for the adoption of state laws allowing the voters to elect presidential electors.

By 1828, voters chose presidential electors in all but two states (Delaware and South Carolina), and Jackson swept that election.[115]

In 1832 and 1836, the voters chose presidential electors in all but one state (South Carolina). The South Carolina legislature continued to select presidential electors up to, and including, the 1860 election.

Table 2.6 shows the number of states conducting popular elections of presidential electors for the first 13 elections.

As can be seen in the table, 1800 was the year with both the smallest number of states and smallest percentage of states allowing the voters to select presidential electors.

Since the Civil War, there have been only two instances when presidential electors have been chosen by a state legislature—rather than the voters.

During Reconstruction, the Florida legislature appointed presidential electors in the 1868 presidential election.

The last occasion when any state legislature appointed presidential electors occurred in 1876.

When Colorado was admitted as a new state in the summer of that year, the Colorado legislature picked the state's presidential electors. However, the principle that the people should elect presidential electors was so well established by that time that the Colorado Constitution specifically acknowledged the exceptional nature of the legislature's appointment of the state's presidential electors on that occasion. The Colorado Constitution's

[115] Cole, Donald B. 2009. *Vindicating Andrew Jackson: The 1828 Election and the Rise of the Two-Party System*. Lawrence, KS: University Press of Kansas.

schedule governing the transition from territorial status to statehood specified that the legislature would appoint presidential electors in 1876, but then required that starting in 1880:

> "the electors of the electoral college shall be chosen by direct vote of the people."

2.13. SPREAD OF WINNER-TAKE-ALL

Only two states used the statewide winner-take-all method in the 1800 election (Virginia and Rhode Island).

The political party that controlled a given state generally preferred the winner-take-all method, because it maximized the party's power in national affairs.

As Missouri Senator Thomas Hart Benton said in a Senate speech in February 1824:

> "The general ticket system, now existing in 10 States was the offspring of policy, and not of any disposition to give fair play to the will of the people. **It was adopted by the leading men of those States, to enable them to consolidate the vote of the State**.…The rights of minorities are violated because a majority of one will carry the vote of the whole State.… This is … a case … of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."[116] [Emphasis added]

Each state's dominant political party was not only the beneficiary of the winner-take-all method, it was also in a position to enact it into law.

Thus, seven states (Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, and Virginia) used winner-take-all for the 1804 election.[117]

The number increased to 12 by 1824.

After the controversial 1824 election, the number jumped to 18 by 1828.

By the time of the 1832 election, there were only two states that did not use the winner-take-all method of awarding electoral votes, namely Maryland (which used a multi-elector district system) and South Carolina (where the legislature appointed the presidential electors).

The preamble to Maryland's 1834 law adopting the winner-take-all method for use in the upcoming 1836 election explained the reason for making the change:

> "Whereas, the manner of appointing electors of president and Vice President, of the United States, by a general ticket, as directed by the legislatures of a large majority of the states, has the effect of giving the whole electoral vote

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[116] 41 *Annals of Congress* 169. February 3, 1824. https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=041/llac041.db&recNum=2

[117] Note that some sources incorrectly say that Massachusetts used a district system in 1804. However, all 19 presidential electors were chosen statewide under the winner-take-all rule in 1804. *Resolve Prescribing the Mode for the Choice of Electors of President and Vice President of the United States*. Acts and Resolves Passed by the General Court—Session Laws. Volume 1804–1805. Boston, MA: Secretary of the Commonwealth. Pages 296–298. https://archive.org/details/actsresolvespass180405mass/page/n7/mode/2up See also *American Election Returns 1787–1825*. https://elections.lib.tufts.edu/catalog/qn59q517m

Table 2.7 Number of states using winner-take-all 1789–1836

Election	Number of participating states	Number of states using winner-take-all	Percent of states using winner-take-all
1789	10	3	30%
1792	15	3	20%
1796	16	3	19%
1800	16	2	13%
1804	17	7	41%
1808	17	6	35%
1812	18	5	28%
1816	19	7	37%
1820	24	9	38%
1824	24	12	50%
1828	24	18	75%
1832	24	22	92%
1836	26	25	96%

> of each of those states, to one person, for each of those important offices; and **the mode adopted and long used in the state of Maryland**, of electing in separate districts of the state, one or at most two electors from [each] district, **results in all cases of contest in giving a divided vote** to the candidates for the highest offices in the government, and the majority of **the citizens of Maryland are thereby deprived of their just weight in the choice of the Chief Magistrate**, as compared with the majority of the citizens of most of the other states."[118] [Emphasis added]

Thus, in 1836, South Carolina remained as the only state that did not conduct a popular election for its presidential electors and the only state that was not using the winner-take-all method.[119]

Table 2.7 shows the number of states using the winner-take-all method for selecting presidential electors for the first 13 elections.

Opposition to the spread of the winner-take-all system was centered in Congress.

Given that the Constitution gave the states exclusive power to choose the method of selecting presidential electors, the tool available to Congress to stop the spread of the winner-take-all system was a federal constitutional amendment.

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[118] A supplement to an act, entitled, an act, to reduce into one, the several acts of assembly, respecting elections, and to regulate such elections. Passed March 13, 1834. Archives of Maryland Online. Volume 210. Page 305. https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000210/html/am210--305.html

[119] Note that, as a practical matter, legislative selection usually meant that all of that state's electors would be supporters of the same presidential candidate. That was indeed the case in South Carolina in every case between 1836 and 1860. It would also be the case when both chambers of the legislature met in joint session. However, the selection of presidential electors by a legislature can result in a split delegation to the Electoral College if there is a political split between the two chambers (e.g., in Pennsylvania in 1800 when the legislature's two chambers were controlled by different parties).

Initiation of an amendment by Congress requires a two-thirds vote of both houses.

In 1813, 1819, 1820, and 1822, the U.S. Senate approved, by a two-thirds vote, a federal constitutional amendment to adopt the district method on a nationwide basis.

However, the amendment never managed to pass the House, although it did garner 63% support in 1819.[120]

As previously noted, the Founding Fathers did not ever debate the winner-take-all method at the 1787 Constitutional Convention. Also, the winner-take-all method is not mentioned in the *Federalist Papers*.

Nonetheless, because the Constitution gave each state legislature the exclusive power to choose the method of appointing presidential electors, the spread of winner-take-all was, in retrospect, almost inevitable.

The Constitution's grant of the power to the states to independently choose the manner of allocating their electoral votes resulted in an irresistible spread of a system that the Founders never envisioned.

This fundamental change in the system for electing the President did not come about from a federal constitutional amendment but instead from the use by the states of a power that Article II of the U.S. Constitution specifically granted to them.

As Stanwood noted in *A History of the Presidency from 1788 to 1897*:

> "[The winner-take-all] method of choosing electors had now become uniform throughout the country, **without the interposition of an amendment to the Constitution**."[121] [Emphasis added]

Since the Civil War, there have been only three states in which voters have selected presidential electors by a method other than the statewide winner-take-all rule.

2.13.1. Michigan's use of districts in 1892

The first exception arose in Michigan as a consequence of the controversial 1888 presidential election. In that election, President Grover Cleveland received 5,539,118 popular votes in his re-election campaign, whereas Republican challenger Benjamin Harrison received only 5,449,825 popular votes.[122]

Despite Cleveland's nationwide margin of 89,293 popular votes, Harrison won a 233–168 majority in the Electoral College and was therefore elected President.

In the 1890 midterm elections, the Democrats won political control of the usually Republican state of Michigan. The Democrats repealed the statewide winner-take-all method

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[120] Keyssar, Alexander. 2020. *Why Do We Still Have the Electoral College?* Cambridge, MA: Harvard University Press. Page 62.

[121] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Page 165. See also Busch, Andrew E. 2001. The development and democratization of the electoral college. In Gregg, Gary L., II (editor). 2001. *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books. Pages 27–42.

[122] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 128.

of electing presidential electors (then prevailing in all the states). The state switched to an arrangement in which:

- one presidential elector would be elected by the voters of each of Michigan's 12 congressional districts;
- one additional presidential elector would be elected by the voters in the eastern half of the state (consisting of the 1st, 2nd, 6th, 7th, 8th, and 10th congressional districts); and
- the state's final presidential elector would be elected by the voters in the western half of the state (consisting of the state's other districts).

Despite the numerous historical examples of states using districts to choose presidential electors between 1789 and 1832, Michigan Republicans contested the constitutionality of the change to the district system.

In October 1892, the U.S. Supreme Court upheld Michigan's right to use the district method in *McPherson v. Blacker*.[123]

The Democrats' district law delivered the desired results. In the 1892 election, Democrat Grover Cleveland received five electoral votes from Michigan, and Republican Benjamin Harrison received nine.

As soon as the Republicans regained overall control of the state government in Michigan, they promptly restored the statewide winner-take-all method. In 1896, the Republican presidential nominee (McKinley) received all of Michigan's electoral votes.

2.13.2. Maine's adoption of the district method in 1969

The second exception arose in 1969 when Maine adopted a system in which the state's two senatorial presidential electors are awarded to the presidential slate winning the statewide vote, and one presidential elector is awarded to the presidential slate carrying each of the state's two congressional districts.

This district system was identical to the system that Maine used in 1820, 1824, and 1828.

Until 2016, the district system did not produce an outcome different from the winner-take-all method of awarding electoral votes. In both 2016 and 2020, Donald Trump won one electoral vote from Maine by virtue of carrying the state's 2nd congressional district.

2.13.3. Nebraska's adoption of the district method in 1991

The third exception arose in 1991 when Nebraska adopted Maine's system of district and statewide electors.[124]

Until 2008, the district system used in Nebraska did not produce an outcome different from the winner-take-all method of awarding electoral votes.

However, in 2008, Barack Obama carried Nebraska's 2nd congressional district (the Omaha area) and thereby won one of Nebraska's five electoral votes. In 2020, Joe Biden also won the 2nd district. Section 9.35 discusses the attempt to repeal Nebraska's district system.

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

[124] Nebraska Revised Statutes. Section 32.1038.

2.14. EMERGENCE OF THE SHORT PRESIDENTIAL BALLOT

The "short presidential ballot" enables a voter to conveniently cast a single vote for a named candidate for President and a named candidate for Vice President—instead of voting separately for numerous individual candidates for presidential elector.

Starting with the nation's first presidential election in 1789, voters in states that conducted popular elections were required to cast votes for individual candidates for presidential elector.

For example, Pennsylvania had 15 electoral votes in the 1796 election. The 15 elector candidates with the most popular votes statewide became the state's presidential electors. That is, the state had a winner-take-all system.

But because the elector candidates ran individually, and because some elector candidates were better-known or better-liked than others, each elector candidate ended up with a slightly different statewide total.

The statewide vote in Pennsylvania was very close in 1796. Even though Pennsylvania was using the winner-take-all method, the state's electoral votes ended up being split between the two parties. Thomas Jefferson's Republican Party won 13 presidential electors, and John Adams' Federalist Party won two.

Split electoral votes recurred in numerous subsequent elections.

For example, in 1880 in California (with six electoral votes), the statewide popular-vote count for the presidential electors of the two major parties ranged between 79,885 for the least popular elector candidate and 80,441 for the most popular candidate—a difference of only 556 votes. The top five vote-getters were Democratic elector candidates supporting their party's nominee, Winfield S. Hancock. However, a Republican elector candidate supporting James A. Garfield managed to come in sixth place—thus splitting California's electoral votes 5–1.[125]

Similarly, the statewide winner came up one electoral vote short in Ohio and Oregon in 1892, in California and Kentucky in 1896, and in Maryland in 1904.

In 1912, Wilson received two of California's electoral votes, with Theodore Roosevelt receiving 11.

In 1916, Democrat Woodrow Wilson received one of West Virginia's electoral votes, while Republican Charles Evans Hughes received seven.[126]

State-printed ballots for President first appeared in 1892.

In filling out a long "bed sheet" paper ballot, it was inevitable that some voters would accidentally vote for more elector candidates than their state's number of electors–thereby invalidating their ballot. Other voters would inevitably vote for fewer electors than their state's number of electors—thereby diminishing their impact on the election. Some voters mistakenly voted for just one elector candidate—thereby drastically diminishing the value of their franchise. In addition, a small number of voters would intentionally split their ticket and vote for presidential electors from opposing parties—perhaps because they liked or disliked a particular individual candidate for presidential elector.

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[125] Congressional Quarterly. 2008. *Presidential Elections 1789–2008*. Washington, D.C.: CQ Press. Page 188.

[126] *Ibid*. Pages 158–159.

For these reasons, the inevitable result of long "bed sheet" ballots was that a state's electoral vote would occasionally be split between presidential candidates.

Some states aided the voter by placing the names of each political party's nominee for President and Vice President at the top of a column containing all of a party's candidates for presidential elector.

For example, on the 1904 Louisiana ballot, the Democratic Party appears in the first column with the name of its presidential nominee (Alton B. Parker), and the Republican Party appears in the second column with the name of its presidential nominee (Theodore Roosevelt). The voter was still required to cast a separate vote for each of the state's nine presidential electors.[127]

The introduction of voting machines (with their limited space) created additional pressure to eliminate the "bed sheet" ballot created by separately listing the names of the numerous individual candidates for presidential elector.

In 1892, Massachusetts passed the nation's first law allowing voters to make a single mark that would serve as a vote for a given party's entire group of elector candidates.[128] Minnesota became the second state to pass such a law in 1901.[129]

A second innovation emerged at approximately the same time. In 1897, Kansas passed a law that placed the names of the party's presidential and vice-presidential nominees on paper ballots. This law acknowledged the political reality that voters were voting for a President and Vice President who would serve four-year terms governing the country—not for presidential electors who would make a brief appearance in their state Capitol to cast their votes in the Electoral College.

In 1918, Maryland passed a law combining Kansas' idea (of presenting the voter with the names of the presidential and vice-presidential nominees) with Massachusetts' idea (of enabling the voter to conveniently vote for a given political party's entire group of elector candidates).[130] The result was what we today call the "short presidential ballot."

By 1940, 15 states had adopted the short presidential ballot. The number increased to 26 states by 1948 and to 36 states by 1966.[131]

Since 1980, all states have used the short presidential ballot.

The increasing use of voting machines led to another change. Starting in Iowa in 1900, Indiana in 1901, New Jersey in 1902, and Illinois in 1903, states passed laws allowing the names of the individual candidates for presidential elector to be omitted from voting ma-

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[127] The 1904 Louisiana ballot is part of the New York Public Library's Election Ballots Collection and Rare Book Division. Image ID 57965442. https://digitalcollections.nypl.org/items/32c1a750-4dcc-0137-d7df-2ff72b3d559c

[128] The "short presidential ballot" should not be confused with "straight ticket" voting (which enables a voter to make a single mark to support all of a party's candidate for *all* offices).

[129] Albright, Spencer D. 1940. The Presidential Short Ballot. *American Political Science Review*. Volume 34. Issue 5. Pages 955–959. page 955. https://econpapers.repec.org/article/cupapsrev/default74.htm#v34:i5

[130] Albright, Spencer D. 1940. The Presidential Short Ballot. *American Political Science Review*. Volume 34. Issue 5. Pages 955–959. Page 956. https://econpapers.repec.org/article/cupapsrev/default74.htm#v34:i5

[131] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 120.

chines. In 1917, Nebraska became the first state to omit the names of elector candidates from paper ballots.[132]

However, the old system lingered in some states.

The presidential ballot in Ohio in 1948 was particularly confusing. Ohio employed the short presidential ballot in 1948 for established political parties that had qualified to be on the ballot in previous years. Thus, Ohio permitted the voter to cast a single vote for all the elector candidates associated with the two major-party candidates—Democrat Harry Truman or Republican Thomas Dewey.

However, the newly formed Progressive Party (supporting Henry Wallace for President) failed to qualify in Ohio as a regular party in time for the 1948 presidential election. Ohio retained the old system for such situations. Thus, in lieu of Henry Wallace's name appearing on the ballot, the ballot provided a way to cast votes for the Progressive Party's 25 individual elector candidates.

In the confusion caused by this hybrid ballot, about 100,000 voters invalidated their ballots by voting for one or more individual Progressive elector candidates, while simultaneously voting for either Democrat Harry Truman or Republican Thomas Dewey. Truman carried Ohio by a mere 7,107 votes.

In the 1960 election, Alabama had not yet adopted the short presidential ballot. This fact led to a controversy as to whether John F. Kennedy won the most popular votes nationwide in 1960. The 1960 Alabama ballot is shown in figures 3.10a and 3.10b, and this controversy is discussed in section 3.13.

As recently as 1980, Vermont used a combination of the short presidential ballot and the traditional long ballot. Figure 2.1 shows a 1964 sample presidential ballot in Vermont where the voter had three options:

- vote for the Johnson-Humphrey slate or the Goldwater-Miller slate and thereby cast a vote for all three of that slate's presidential electors;
- vote for one, two, or three individual presidential-elector candidates of the same or different parties; or
- vote for one, two, or three write-in candidates for presidential elector.

It is still possible in some states today to cast write-in votes for presidential electors (section 3.9), votes for unpledged presidential electors (section 3.13), and separate votes for individual elector candidates (section 3.8).

By 2020, names of the individual presidential-elector candidates appeared on ballots of only three states (Arizona, Idaho, and South Dakota). For example, the 2020 ballot in Idaho (figure 3.3) shows the names of the four presidential-elector candidates associated with each presidential-vice-presidential slate.

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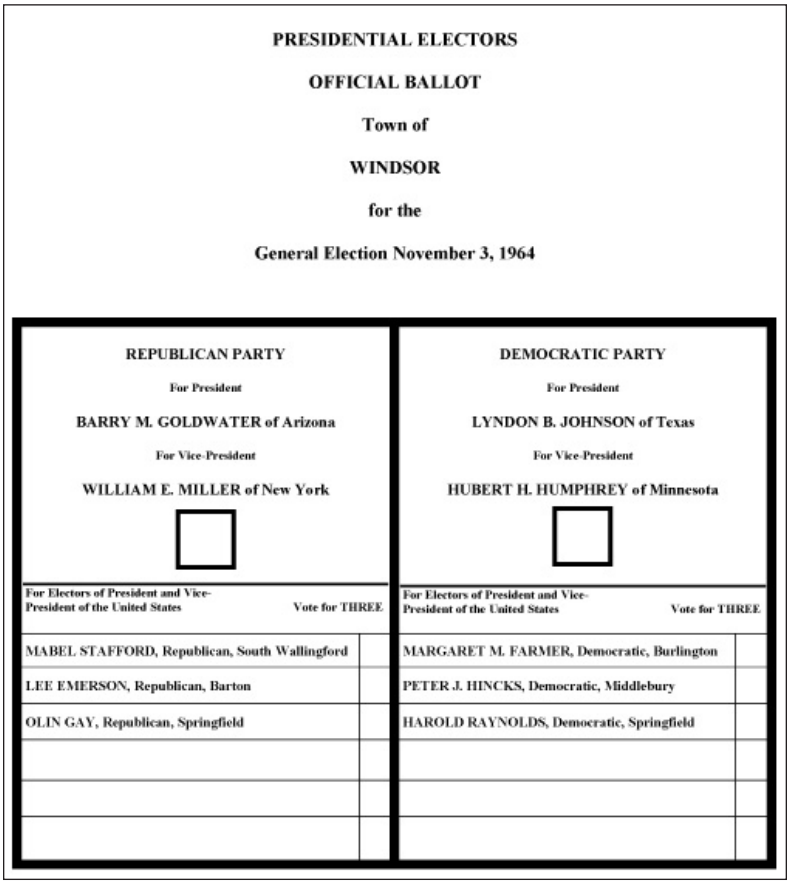
[132] Albright, Spencer D. 1940. The Presidential Short Ballot. *American Political Science Review*. Volume 34. Issue 5. Pages 955–959. Page 956. https://econpapers.repec.org/article/cupapsrev/default74.htm#v34:i5



PRESIDENTIAL ELECTORS

OFFICIAL BALLOT

Town of

WINDSOR

for the

General Election November 3, 1964

REPUBLICAN PARTY For President BARRY M. GOLDWATER of Arizona For Vice-President WILLIAM E. MILLER of New York		DEMOCRATIC PARTY For President LYNDON B. JOHNSON of Texas For Vice-President HUBERT H. HUMPHREY of Minnesota	
For Electors of President and Vice-President of the United States	Vote for THREE	For Electors of President and Vice-President of the United States	Vote for THREE
MABEL STAFFORD, Republican, South Wallingford		MARGARET M. FARMER, Democratic, Burlington	
LEE EMERSON, Republican, Barton		PETER J. HINCKS, Democratic, Middlebury	
OLIN GAY, Republican, Springfield		HAROLD RAYNOLDS, Democratic, Springfield	

Figure 2.1 Presidential ballot in Vermont in 1964

2.15. SEVEN COURT DECISIONS INTERPRETING ARTICLE II, SECTION 1

Seven court cases are particularly relevant to the interpretation of Article II, section 1 of the Constitution and the subject matter of this book.

These seven cases are mentioned briefly below and are discussed in greater detail elsewhere in this book.

2.15.1. *McPherson v. Blacker* in 1892

The U.S. Supreme Court recognized the exclusive power of the states to choose the method of awarding electoral votes in the seminal case of *McPherson v. Blacker* in 1892:

> "[F]rom the formation of the government until now the practical construction of the clause has conceded **plenary** power to the state legislatures in the matter of the appointment of electors."[133,134]

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

[134] In the 2000 case of *Bush v. Gore*, the U.S. Supreme Court wrote, "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [i.e., the winner-take-all rule], nor that the majority of those who exercise the elective franchise can alone choose the electors.… In short, **the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States**."[135] [Emphasis added]

See the index of this book for numerous references to this case.

2.15.2. *State of Delaware v. State of New York* in 1966

In 1966, Delaware led a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) in suing New York in the U.S. Supreme Court.

At the time, New York was not only a closely divided battleground state, but it also possessed the largest number of electoral votes (43).

In *State of Delaware v. State of New York*, Delaware argued that New York's decision to use the winner-take-all rule effectively disenfranchised voters in Delaware and the other 11 plaintiff states.[136] See Delaware's brief,[137] New York's brief,[138] and Delaware's argument in its request for a re-hearing.[139]

The U.S. Supreme Court declined to hear the case—presumably following the Court's 1892 decision in *McPherson v. Blacker* that the choice of method of awarding electoral votes is exclusively a state decision.[140] See additional discussion in section 9.3.5.

2.15.3. *Williams v. Virginia State Board of Elections* in 1968

The plaintiffs in *Williams v. Virginia State Board of Elections* argued that Virginia's winner-take-all statute violated the Equal Protection Clause of the 14th Amendment on the grounds that New York's voters controlled the selection of 43 presidential electors, whereas Virginia voters controlled only 12.

A three-judge federal court in Virginia rejected this "interstate equal protection" claim as well as a claim based on the one-person-one-vote principle concerning the constitutionality of the winner-take-all method of awarding electoral votes. The U.S. Supreme Court

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legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. Id., at 28–33." (531 U.S. 98 at 104. 2000).

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

[136] *Delaware v. New York* (1966). https://www.scribd.com/document/331930037/Delaware-v-New-York-1966

[137] https://www.nationalpopularvote.com/elevenplaintiffs

[138] https://www.nationalpopularvote.com/delawarebrief

[139] https://www.nationalpopularvote.com/newyorkbrief

[140] *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

let the decision of the three-judge panel stand in a *per curiam* decision.[141] See additional discussion in section 9.1.7 and section 9.33.3.

2.15.4. *Williams v. Rhodes* in 1968

In *Williams v. Rhodes* in 1968, the U.S. Supreme Court ruled that Article II, section 1's grant of power to the states is subject to the Equal Protection clause of the 14th Amendment.[142] See additional discussion in section 9.1.13, section 9.1.14, and section 9.25.

2.15.5. *Bush v. Gore* in 2000

In 2000, the U.S. Supreme Court settled the dispute involving Florida's 25 electoral votes in favor of George W. Bush.[143] The Court approvingly cited its 1892 decision in *McPherson v. Blacker*. See additional discussion in section 6.23, section 7.35, section 9.11, and section 9.17.

2.15.6. Equal Citizens' challenge to winner-take-all laws in 2018

In 2018, Equal Citizens, a non-profit organization founded by Harvard Law Professor Lawrence Lessig, spearheaded the formation of the coalition of professors, organizations, plaintiffs, and law firms that filed lawsuits in federal district courts in Massachusetts, Texas, South Carolina, and California.[144]

These (substantially similar) lawsuits argued that the state-by-state winner-take-all method of awarding electoral votes is unconstitutional under both the Equal Protection clause of the 14th Amendment and the First Amendment.[145,146]

Equal Citizens argued against the winner-take-all (WTA) method in California in *Rodriguez et al. v. Brown*:

> "WTA violates the Fourteenth Amendment because it counts votes for a losing presidential candidate in California only to discard them in determining Electors who cast votes directly for the presidency. Put differently, **the WTA system unconstitutionally magnifies the votes of a bare plurality of voters by translating those votes into an entire slate of presidential Electors**,

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[141] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622. Dist. Court, E.D. Virginia (1968). This decision was affirmed by the U.S. Supreme Court at 393 U.S. 320 (1969) (*per curiam*).

[142] *Williams v. Rhodes*. 1968. 393 U.S. 23.

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

[144] Interest in filing such lawsuits was stimulated after the November 2016 presidential election by Atlanta attorney Jerry L. Sims of Davis Gillett Mottern & Sims LLC, who advanced the legal theory behind the lawsuits. See letter to National Popular Vote from Jerry L. Sims on November 20, 2016. https://www.nationalpopularvote.com/sites/default/files/sims-idea-email-2016-11-30.pdf

[145] Weiss, Debra Cassens. 2018. Winner-take-all electoral college system is unconstitutional, say suits led by Boies. *American Bar Association Journal*. February 22, 2018. http://www.abajournal.com/news/article/winner-take-all_electoral_college_system_is_unconstitutional_say_suits_by_b

[146] Press release from law firm of Boies Schiller Flexner LLP entitled "Legal Team Led by David Boies and LULAC Files Lawsuits Challenging Winner-Take-All Approach to Selecting Electors in Presidential Elections." February 21, 2018. http://electionlawblog.org/wp-content/uploads/2018-02-21-WTA_PressRelease_FINAL-12-PM.pdf

> all of whom support the nominee of a single political party—**while, at the same time, the votes cast for all other candidates are given no effect**. Accordingly, in the last five presidential elections, at least 30% of California voters cast a vote for the candidate that did not win the popular vote in California, and those voters thereby effectively had their votes cancelled. Their votes were completely irrelevant to how the Electors representing California voted in the Electoral College. **WTA thus treats California citizens who vote for a losing candidate in an arbitrary and disparate manner in clear violation of the principle of "one person, one vote**."
>
> "In addition, WTA violates the First Amendment because of the burdens that it places on the right of association and on the right to have a voice in presidential elections through casting a vote. There is no state interest that remotely outweighs these burdens. Again, at least 30% of voters in the last five presidential elections—nationwide and in California—have voted for a losing candidate, and none of their votes have counted in the final direct election. This trend will likely continue."[147] [Emphasis added]

The lawsuits filed by Equal Citizens pointed out that a presidential election is a two-stage process to fill a single office.

After counting all the votes for President cast by the voters on Election Day in November in a given state, winner-take-all laws give all of the state's electoral votes to the supporters of the presidential candidate who received a plurality of the votes in the state, while giving no electoral votes to the supporters of other candidates. Thus, in the decisive second stage of the presidential selection process in December, the supporters of other candidates are left unrepresented.

The same Equal Protection argument applies to Maine and Nebraska at the district level.

See additional discussion at the Equal Citizens web site.[148]

Maine's 2016 election returns can be used to illustrate the argument behind the lawsuits filed by Equal Citizens.

Maine awards two of its electoral votes on a statewide winner-take-all basis, and its remaining two electoral votes on a district-wide winner-take-all basis.

Maine adopted its current district method of awarding electoral votes in 1969; however, the 2016 election was the first occasion when Maine awarded one of its electoral votes to a candidate (Trump) who lost the statewide vote.

The statewide vote in Maine in 2016 is shown in table 2.8.

The table shows that the Democratic Clinton-Kaine slate received a 48% plurality of the popular votes in the state in 2016. Consequently, the two candidates for statewide presidential elector nominated by the Maine Democratic Party were elected as the two state-

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[147] *Rodriguez et al. v. Brown.* 2018. Complaint for Declaratory and Injunctive Relief. February 21, 2018. Pages 5–6. https://equalvotes.us/wp-content/uploads/2018/02/complaint-california.pdf

[148] See the Equal Citizens web site at https://equalvotes.us/our-progress/index.html

Table 2.8 Maine 2016 statewide vote for President

Party	Slate	Statewide popular vote	Statewide popular percent	Electoral Votes	Votes reassigned
Democratic	Clinton-Kaine	357,735	47.830%	2	0
Republican	Trump-Pence	335,593	44.870%	0	335,593
Libertarian	Johnson-Weld	38,105	5.095%	0	38,105
Green	Stein-Baraka	14,251	1.905%	0	14,251
Courage, Character, Service	McMullin-Johnson	1,887	0.252%	0	1,887
Constitution	Castle-Bradley	333	0.045%	0	333
It's Our Children	Kotlikoff-Leamer	16	0.002%	0	16
Non-Party	Fox-Kusher	7	0.001%	0	7
Total		**747,927**	**100.000%**	**2**	**390,192**

level members of the Electoral College. When the Electoral College met on December 19, 2016, these two presidential electors dutifully voted for the Clinton-Kaine slate.

Maine's winner-take-all law treated the 45% of the state's voters who supported the Trump-Pence slate (335,593) and the additional 7% of the state's voters who supported the six other candidates who received votes as if they had voted for the Clinton-Kaine slate. Indeed, a majority of the votes cast (390,192 or 52%) were transferred to the Clinton-Kaine slate even though those votes were not cast for the Clinton-Kaine slate. This 52% majority of Maine's voters had no influence on the decisive second stage of the process that occurred when the Electoral College met on December 19, 2016, to actually elect the President. The plaintiffs in the lawsuits argued that this zeroing-out of 52% of Maine's voters violates the Equal Protection clause of the 14th Amendment and the First Amendment rights of these voters to voice their choice.

Maine also awards two of its electoral votes on a winner-take-all basis at the congressional district level.

Maine's 2016 presidential vote in the 1st congressional district is shown in table 2.9.

In the 1st district, the Democratic Clinton-Kaine slate received the most popular votes—a 54% majority. In this district, the 154,384 voters who supported the Trump-Pence slate (39% of the district's voters) and the voters who supported the six other candidates (another 7%) were, in effect, treated as if they had voted for the Clinton-Kaine slate. A total of 181,555 votes cast (46%) were, in effect, transferred to the Clinton-Kaine slate and had no influence on the decisive second stage of the process of electing the President.

The plaintiffs in the lawsuits argued that this zeroing-out of the votes of this 46% minority of voters in the 1st district violates the Equal Protection clause of the 14th Amendment and the First Amendment.

Maine's 2016 presidential vote in the 2nd congressional district is shown in table 2.10.

In Maine's 2nd congressional district, the Republican Trump-Pence slate received the most popular votes in 2016—a 51% majority. In this district, the 144,817 voters who supported the Clinton-Kaine slate (41% of the district's voters) and the voters who supported the six other candidates (another 8%) were, in effect, treated as if they had voted for the Trump-Pence slate. A total of 172,248 votes cast (49%) were, in effect, transferred to the

Table 2.9 Maine's 2016 presidential vote in the 1st district

Party	Slate	1st CD popular vote	1st CD popular percent	Electoral Votes	Votes reassigned
Democratic	Clinton-Kaine	212,774	53.958%	1	0
Republican	Trump-Pence	154,384	39.151%	0	154,384
Libertarian	Johnson-Weld	18,592	4.715%	0	18,592
Green	Stein-Baraka	7,563	1.918%	0	7,563
Courage, Character, Service	McMullin-Johnson	807	0.205%	0	807
Constitution	Castle-Bradley	203	0.051%	0	203
It's Our Children	Kotlikoff-Leamer	6	0.002%	0	6
Non-Party	Fox-Kusher	0	0.000%	0	0
Total		**394,329**	**100.000%**	**1**	**181,555**

Table 2.10 Maine's 2016 presidential vote in the 2nd district

Party	Slate	2nd CD popular vote	2nd CD popular percent	Electoral Votes	Votes reassigned
Democratic	Clinton-Kaine	144,817	40.975%	0	144,817
Republican	Trump-Pence	181,177	51.263%	1	0
Libertarian	Johnson-Weld	19,510	5.520%	0	19,510
Green	Stein-Baraka	6,685	1.891%	0	6,685
Courage, Character, Service	McMullin-Johnson	1,080	0.306%	0	1,080
Constitution	Castle-Bradley	130	0.037%	0	130
It's Our Children	Kotlikoff-Leamer	19	0.005%	0	19
Non-Party	Fox-Kusher	7	0.002%	0	7
Total		**353,425**	**100.000%**	**1**	**172,248**

Trump-Pence slate and had no influence on the decisive second stage of the process of electing the President.

In reaching decisions in the four cases, the federal district courts and appeals courts repeatedly cited the 1968 decision of the three-judge federal court in *Williams v. Virginia State Board of Elections* (which the U.S. Supreme Court let stand in a *per curiam* decision).

Despite the arguments raised in the four lawsuits, the plaintiffs were unsuccessful in all four federal district courts and all four federal appeals courts. In the end, the Supreme Court declined to hear the matter and allowed the lower-court decisions to stand.

2.15.7. *Chiafalo v. Washington* in 2020

When the Electoral College met in December 2016, several presidential electors from both parties cast votes, or indicated that they wanted to cast votes, for a presidential candidate other than their party's candidate.

The Washington State Supreme Court and the U.S. Court of Appeals for the 10th District reached opposite conclusions as to the constitutionality of state laws restricting how presidential electors must vote.

In *Chiafalo v. Washington* in 2020,[149] the U.S. Supreme Court resolved the issue as described in section 3.7.8.

2.16. CHANGING ROLE OF PRESIDENTIAL ELECTORS AND CANDIDATES

The role played by presidential electors in the 19th century was very different from the deliberative role envisioned by the Founders and very different from their invisible role today.

As Russell Holt observed:

> "[Abraham Lincoln] was a Whig presidential elector in 1840 and 1844. … Moreover, he was one of the so-called senatorial electors—a statewide elector. Electors in the 19th century didn't just cast votes in December after the presidential election. **Presidential candidates didn't campaign. The job of campaigning—that's what presidential electors did.** And Lincoln criss-crossed Illinois giving these passionate speeches about the virtues and values of the Whig economic program in both 40 and 44."[150,151] [Emphasis added]

John Tyler (who was President between 1841 and 1845) was a candidate for presidential elector in 1860 and campaigned vigorously for the southern Democratic (Breckenridge-Lane) ticket that year. Tyler won his race to be a presidential elector from Virginia.

Personal campaigning by presidential candidates was rare in the 19th century.

William Henry Harrison is generally recognized as having given the first presidential campaign speech on June 6, 1840. He was elected President later that year.[152]

During the next sixty years, the four presidential candidates who did any significant amount of campaigning were Stephen A. Douglas in 1860, Horace Greeley in 1872, James G. Blaine in 1884, and William Jennings Bryan in 1896. All four lost. Bryan's 1896 campaign was, by far, the most extensive. He traveled over 18,000 miles and gave 570 speeches in 29 states.[153]

To counter Bryan's unprecedented effort, Republican William McKinley conducted a "front porch" campaign in which hundreds of thousands of people visited his home in Canton, Ohio, to hear him speak.[154]

Extensive personal campaigning by presidential candidates throughout the country became the norm in the 20th century.

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

[150] Holt, Michael F. 1999. *The Rise and Fall of the American Whig Party*. Author talk at Barnes and Noble Booksellers in Charlottesville, Virginia. July 15, 1999. *C-SPAN*. Timestamp 43:10. https://www.c-span.org/video/?150474-1/the-rise-fall-american-whig-party

[151] Holt, Michael F. 1999. *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War*. New York, NY: Oxford University Press. Page 108.

[152] Shafer, Ronald G. 2016. *The Carnival Campaign: How the 1840 Campaign of "Tippecanoe and Tyler Too" Changed Presidential Elections Forever*. Chicago, IL: Chicago Review Press. Page 134.

[153] Williams, R. Hal. 2010. *Realigning America: McKinley, Bryan, and the Remarkable Election of 1896*. Lawrence, KS: University Press of Kansas. Page 99.

[154] Williams, R. Hal. 2010. *Realigning America: McKinley, Bryan, and the Remarkable Election of 1896*. Lawrence, KS: University Press of Kansas. Page 131.

2.17. FIVE MAJOR CHANGES IN THE PRESIDENTIAL ELECTION SYSTEM THAT WERE IMPLEMENTED WITHOUT A FEDERAL CONSTITUTIONAL AMENDMENT

Five of the most salient features of the present-day system of electing the President and Vice President of the United States are:

- popular voting for president;
- the statewide winner-take-all method of choosing presidential electors;
- nomination of candidates by nationwide political parties;
- the nondeliberative nature of the Electoral College since 1796; and
- the short presidential ballot.

Although some people today mistakenly believe that the current system of electing the President and Vice President of the United States was designed by the Founding Fathers and embodied in the U.S. Constitution, none of the above features is mentioned in the original U.S. Constitution or reflected a consensus of the Founders. None of these features was implemented by means of a federal constitutional amendment. None was created by federal legislation.

Instead, three of these features came into being by the piecemeal enactment of state laws over a period of years, and two resulted from actions taken by non-government entities—namely the political parties that emerged at the time of the 1796 presidential election.

2.17.1. Popular voting for presidential electors

There was no agreement among the Founding Fathers as to whether the voters should be directly involved in the process of choosing presidential electors. Some favored permitting the voters to vote for presidential electors, while others did not. The Constitution left the manner of choosing presidential electors to the states.

In fact, the voters were allowed to choose presidential electors in only six states in the nation's first presidential election in 1789. However, state laws changed over the years. By 1824, voters were allowed to choose presidential electors in three-quarters of the states. By 1832, voters were able to choose presidential electors in all but one state.[155] Starting with the 1880 election, all presidential electors have been elected by the voters.

In short, direct popular voting for presidential electors became the norm by virtue of the piecemeal enactment of state laws—not because all the Founders favored popular elections, not because the original Constitution required it, and not because of the ratification of any federal constitutional amendment. The states used the built-in flexibility of Article II, section 1 of the Constitution to change the system.

2.17.2. Winner-take-all method of awarding electoral votes

The Founding Fathers certainly did not advocate that presidential electors be chosen by the people on a statewide winner-take-all basis. The winner-take-all method of selecting presidential electors was not even debated at the Constitutional Convention. It is not men-

[155] The South Carolina legislature chose presidential electors up to and including 1860. There were two subsequent isolated instances of the election of presidential electors by the state legislature, namely Florida in 1868 and Colorado in 1876.

tioned anywhere in the *Federalist Papers*. The winner-take-all method was used by only three of the states participating in the nation's first presidential election in 1789. The states that originally elected presidential electors by districts of various types eventually came to realize what Thomas Jefferson called the "folly"[156] of diminishing their influence by fragmenting their electoral votes and thus gravitated toward the winner-take-all method. Still, it was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states. Since 1836, the winner-take-all rule has been used with only occasional exceptions.[157] It emerged because of the piecemeal enactment of state laws—not because the Founders preferred it, not because the original Constitution required it, and not because of the ratification of any federal constitutional amendment.

2.17.3. Nomination of presidential and vice-presidential candidates by political parties

Since the nation's first contested presidential election in 1796, candidates for President and Vice President have been nominated on a nationwide basis by a central body of a political party. This was accomplished by the congressional caucus of each party starting in 1796 and later by national nominating conventions. This feature of the present-day system of electing the President emerged because of the actions taken by non-government entities—namely the political parties. This change did not come about because the Founders wanted it, because the original Constitution mentioned it or required it, or because of the ratification of any federal constitutional amendment.

2.17.4. Nondeliberative nature of the Electoral College Since 1796

The Founding Fathers intended that the Electoral College would act as a deliberative body in which the presidential electors would exercise independent judgment as to the best persons to serve as President and Vice President.

However, once political parties began nominating presidential candidates on a centralized basis and actively campaigning for their nominees, presidential electors necessarily became willing rubber stamps for their party's nominees.

As the U.S. Supreme Court said:

> "Whether chosen by the legislatures or by popular suffrage on general ticket or in districts, [the presidential electors] were so chosen simply to register the will of the appointing power."[158]

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[156] Letter from Thomas Jefferson to James Monroe on January 12, 1800. Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G. P. Putnam's Sons. 9:90.

[157] The three exceptions since 1836 include the one-time use of a district system by Michigan in 1892, the present-day district system in Maine (since 1969), and the present-day district system in Nebraska (since 1992).

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

Thus, starting in 1796, presidential electors have been expected to vote for the candidates nominated by their party—that is, "to act, not to think."[159]

Moreover, this expectation has been achieved with remarkable fidelity. Of the 24,068 electoral votes cast for President in the 59 presidential elections between 1789 and 2020, the vote of Samuel Miles for Thomas Jefferson in 1796 was the only instance when a presidential elector might have thought, at the time he voted, that his vote might affect the national outcome for President (section 3.7).

The change in character of the Electoral College from the deliberative body envisioned by the Founding Fathers to a rubber stamp came about because of the actions taken by non-government entities, namely the political parties. This change did not come into being because the Founders wanted it, because the original Constitution mentioned it or required it, or because of any federal constitutional amendment.

2.17.5. Short presidential ballot

In the version of the winner-take-all rule that was used in 1789, each voter was allowed to cast as many votes as the state's number of presidential electors.

This method of voting was used in most states well into the 20th century and remained in use as late as 1980 in Vermont.

The short presidential ballot enables a voter to conveniently vote for an entire slate of presidential electors merely by casting one vote for a named candidate for President and Vice President. Under the short presidential ballot, a vote for the presidential and vice-presidential candidate whose names appear on the ballot is deemed to be a vote for all of the individual presidential electors nominated in association with the named candidates. For example, when a voter cast a vote for the Trump-Vance slate in California in 2024, the voter is deemed to be casting a vote for each of 54 individual candidates for presidential elector nominated by the California Republican Party.

The universal use of the short presidential ballot in recent decades has almost entirely eliminated presidential electors from the public's consciousness. By 2020, the names of the presidential electors had disappeared from the ballot in all but three states.

The short presidential ballot emerged over a period of years because of the piecemeal enactment of laws by the individual states—not because the Founders ever thought of it, not because the original Constitution mentioned it or required it, and not because of any federal constitutional amendment.

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[159] *United States Gazette.* December 15, 1796. Item signed with the alias of "CANDOUR."

3 How the Electoral College Works

This chapter discusses the:

- federal constitutional and statutory provisions governing presidential elections (section 3.1),
- current state laws for nominating presidential electors (section 3.2),
- current state laws for electing presidential electors (section 3.2),
- certification of the popular vote count (section 3.4),
- certification of votes cast by presidential electors (section 3.5),
- counting of the electoral votes in Congress (section 3.6),
- faithless presidential electors (section 3.7),
- state laws permitting a voter to cast separate votes for individual candidates for presidential elector (section 3.8)
- write-in votes for president (section 3.9),
- voting before the days of government-printed ballots (section 3.10),
- voting with government-printed ballots (section 3.11)
- fusion voting (section 3.12), and
- unpledged electors (section 3.13).

The President and Vice President of the United States are not elected directly by the voters when they go to the polls on Election Day in November.

Instead, the U.S. Constitution provides that the President and Vice President are to be elected by a small group of people (currently 538) who are known individually as "presidential electors" and collectively as the "Electoral College."

These presidential electors meet in their respective state capitals in mid-December to elect the President and Vice President.

One might assume that a national constitution would specify how these 538 members of the Electoral College are to be chosen. However, the U.S. Constitution leaves the choice of method for selecting presidential electors to the individual states.

Article II, section 1 of the Constitution states:

> "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, **be elected, as follows**:
>
> "**Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no

> Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[1] [Emphasis added]

The Constitution does not say whether a state's presidential electors are to be chosen by the voters, the state legislature, the Governor and his cabinet, or some other person or body.

If voters are allowed to choose the presidential electors, the Constitution does not specify whether they are to be chosen from single-elector districts, from multi-elector districts, or statewide. It is silent as to whether they are to be elected on a winner-take-all basis, a proportional basis, or some other basis.

If the state legislature is to appoint the presidential electors, the Constitution does not say whether the members of the legislature's two chambers should vote in a joint meeting (thereby typically diminishing the role of State Senators), or whether the two chambers vote separately (thereby possibly requiring agreement between opposing parties).

Although the states have historically used many different methods for appointing their presidential electors (chapter 2), this chapter discusses how the system operates today.

Under current laws in all 50 states and the District of Columbia, the choice of presidential electors is made by the voters—not state legislatures, Governors, or anybody else. This has been the case since the 1880 election.

Thanks to the "short presidential ballot" (section 2.14), voters are not required to cast separate votes for individual candidates for presidential elector. Instead, voters today choose among presidential-vice-presidential slates. A voter's vote is deemed to be a vote for each of the presidential electors that were nominated in association with that presidential-vice-presidential slate.

Forty-eight states and the District of Columbia use so-called "winner-take-all" laws for selecting all of their presidential electors. Under these laws, the winning presidential electors are those who were nominated in association with the presidential-vice-presidential slate that received the most popular votes (that is, a plurality) in that particular state.

In Maine and Nebraska, two of each state's presidential electors are elected on a statewide winner-take-all basis—just like the other 48 states and the District of Columbia. However, the state's remaining presidential electors are elected by congressional district.

The congressional-district method currently used in Maine and Nebraska is a present-day reminder that individual state law—not the U.S. Constitution or a uniform federal law—determines how presidential electors are selected.

Maine and Nebraska also provide a reminder that states may change their method of selecting their presidential electors simply by changing their state law. For example, Maine switched from the statewide winner-take-all method to the congressional-district method in 1969, and Nebraska did so in 1991.

The U.S. Constitution gave the states considerably more power in choosing the manner of appointing their presidential electors than it does in choosing the manner of electing their members of Congress.

Article I, section 4, clause 1 defines the power of Congress over congressional elections:

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

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

That is, the power of states to conduct congressional elections is subject to congressional intervention, whereas Congress has no comparable power over presidential elections.

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

> "In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States."[2] [Emphasis added]

3.1. FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

The election of the President and Vice President of the United States is governed by a combination of federal and state laws and constitutional provisions.[3]

3.1.1. Number of presidential electors

The Constitution gives each state as many presidential electors as it has members of the U.S. House of Representatives and U.S. Senate.

The number of seats in the House was set at 435 by a 1911 federal statute (Section 1.4.2). Each of the 50 states has two U.S. Senators. The District of Columbia acquired three electoral votes by virtue of the 23rd Amendment to the Constitution (ratified in 1961). Therefore, there are currently 538 presidential electors in the Electoral College.

After each decennial federal census, the 435 seats in the United States House of Representatives are reapportioned among the 50 states. Under an algorithm established by a 1941 federal law, each state is initially assigned one Representative. Then, seats 51 through 435 are assigned using a formula known as the "method of proportions."[4]

This formula is applied to each state's "apportionment population." This number is the sum of the "resident population" plus the number of the U.S. military personnel and federal civilian employees living outside the United States (and their dependents living with them) for whom it is possible to identify a home state.[5] The difference between the resident popu-

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[2] *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892. https://supreme.justia.com/cases/federal/us/146/1/

[3] For the reader's convenience, appendix A contains the provisions of the U.S. Constitution relating to presidential elections. Appendix B of this book contains the Electoral Count Reform Act of 2022, which is the current federal law relating to presidential elections. The Electoral Count Act of 1887 (which was the law in effect during the events of January 6, 2021) may be found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[4] Census Bureau. 2021. Computing Apportionment. March 1, 2021. https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html. The U.S. Supreme Court upheld the constitutionality of the "method of equal proportions" in 1992 in *Department of Commerce v. Montana* (112 S.Ct. 1415) and *Franklin v. Massachusetts* (112 S.Ct. 2767).

[5] U.S. Census Bureau. 2020. 2020 Census Apportionment Results. April 26, 2021. https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html

lation and the apportionment population is only about a tenth of a percent of the country's total population. Concerning the 2020 apportionment of congressional seats and electoral votes, Election Data Services found:

> "The overseas counts had no impact on the apportionment results."[6]

The 2020 census determined the apportionment of House seats (and hence electoral votes) that will apply to the 2024 and 2028 presidential elections.

The 2030 census will determine the apportionment of electoral votes that will apply to the 2032, 2036, and 2040 presidential elections.

Table 3.1 shows the distribution of electoral votes among the 51 jurisdictions that are entitled to appoint presidential electors. Because each state has two Senators and at least one Representative, no state has fewer than three electoral votes.

As can be seen from the table, the average number of electoral votes is about 11.

The median number of electoral votes is seven—that is, half the states have fewer than seven electoral votes, and half have more.

3.1.2. Number of electoral votes required for election

The U.S. Constitution does not require an absolute majority of the electoral votes for election.

Instead, both the original Constitution and the 12th Amendment (ratified in 1804) requires an absolute majority of the presidential electors "appointed."

Specifically, the 12th Amendment provides:

> "The person having the greatest number of votes for President, shall be the President, if such number be a **majority of the whole number of Electors appointed**."[7] [Emphasis added]

If all states appoint their presidential electors, 270 of the 538 electoral votes are required for election.

There have been two occasions when states have failed to appoint presidential electors.

- Most famously, the 11 southern states belonging to the Confederacy failed to appoint presidential electors in the midst of the Civil War in 1864.
- New York failed to appoint any presidential electors for the nation's first presidential election in 1789, because the two houses of the state legislature could not agree on a method (section 2.2).

The word "appointed" played a prominent role in the events of January 6, 2021, when some supporters of outgoing President Donald Trump argued that certain states had failed to validly appoint their presidential electors (as discussed momentarily below).

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[6] Election Data Services. 2021. Final Census Apportionment Counts Surprises Many Observers. April 28, 2021. https://www.electiondataservices.com/wp-content/uploads/2021/04/NR_Appor20wTablesMaps-20210428.pdf

[7] The word "appointed" appeared in the original Constitution as well as the 12th Amendment.

Table 3.1 Distribution of electoral votes

State	1984–1988	1992–1996–2000	2004–2008	2012–2016–2020	2024–2028
Alabama	9	9	9	9	9
Alaska	3	3	3	3	3
Arizona	7	8	10	11	11
Arkansas	6	6	6	6	6
California	47	54	55	55	54
Colorado	8	8	9	9	10
Connecticut	8	8	7	7	7
D.C.	3	3	3	3	3
Delaware	3	3	3	3	3
Florida	21	25	27	29	30
Georgia	12	13	15	16	16
Hawaii	4	4	4	4	4
Idaho	4	4	4	4	4
Illinois	24	22	21	20	19
Indiana	12	12	11	11	11
Iowa	8	7	7	6	6
Kansas	7	6	6	6	6
Kentucky	9	8	8	8	8
Louisiana	10	9	9	8	8
Maine	4	4	4	4	4
Maryland	10	10	10	10	10
Massachusetts	13	12	12	11	11
Michigan	20	18	17	16	15
Minnesota	10	10	10	10	10
Mississippi	7	7	6	6	6
Missouri	11	11	11	10	10
Montana	4	3	3	3	4
Nebraska	5	5	5	5	5
Nevada	4	4	5	6	6
New Hampshire	4	4	4	4	4
New Jersey	16	15	15	14	14
New Mexico	5	5	5	5	5
New York	36	33	31	29	28
North Carolina	13	14	15	15	16
North Dakota	3	3	3	3	3
Ohio	23	21	20	18	17
Oklahoma	8	8	7	7	7
Oregon	7	7	7	7	8
Pennsylvania	25	23	21	20	19
Rhode Island	4	4	4	4	4
South Carolina	8	8	8	9	9
South Dakota	3	3	3	3	3
Tennessee	11	11	11	11	11
Texas	29	32	34	38	40
Utah	5	5	5	6	6
Vermont	3	3	3	3	3
Virginia	12	13	13	13	13
Washington	10	11	11	12	12
West Virginia	6	5	5	5	4
Wisconsin	11	11	10	10	10
Wyoming	3	3	3	3	3
Total	**538**	**538**	**538**	**538**	**538**

3.1.3. Date for appointing presidential electors (Election Day)

While the states have exclusive power to choose the *manner* of appointing presidential electors, Congress has exclusive power to choose the *time* when presidential electors are to be chosen.

The U.S. Constitution provides (Article II, section 1, clause 4):

> "**The Congress may determine the Time of chusing the Electors** …." [Spelling as per original] [Emphasis added]

After the Constitution was ratified, but before the new government came into being, the outgoing Confederation Congress (operating under the Articles of Confederation) passed a resolution on September 13, 1788, specifying that each state would appoint its presidential electors on January 7, 1789.[8]

As the 1792 presidential election approached, Congress decided to give the states some leeway as to the day when they could appoint their presidential electors. A 1792 federal law allowed the electors to be appointed any time during the 34-day period preceding the first Wednesday in December. That same law also specified that the Electoral College would meet on the final day of the 34-day period.

> "Electors shall be appointed in each state for the election of a President and Vice President of the United States, **within thirty-four days preceding the first Wednesday in December**, one thousand seven hundred and ninety-two, and within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election.[9] [Emphasis added]

Because the 1792 law allowed the presidential election to take place on different days in different states, it was possible for the outcome of the voting in one state to influence the result in another. The lack of uniformity raised the question as to whether some states or candidates were gaming the system.[10]

Thus, in 1845, Congress passed a law designating a uniform national day for appointing presidential electors—a choice that remains in effect today.

> "The electors of President and Vice President shall be appointed in each State on the **Tuesday next after the first Monday in the month of November** of the year in which they are to be appointed."[11] [Emphasis added]

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[8] Resolution of 13 September 1788 by the Confederation Congress. https://avalon.law.yale.edu/18th_century/resolu01.asp This resolution also established the first Wednesday in February for the first meeting of the Electoral College and the first Wednesday in March for the inauguration.

[9] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Image 14. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf Many of the provisions of this 1792 law later appeared in the Electoral Count Act of 1887.

[10] The final impetus for congressional action may have been the increase in the speed of communication as a result of the telegraph. On May 24, 1844, Samuel F.B. Morse transmitted the message "What hath God wrought?" from Washington to Baltimore using an electronic telegraph (a project that was financed by a $30,000 appropriation from Congress).

[11] An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 28th Congress. 5 Stat. 721. January 25, 1845. Image 759. https://www.loc.gov/resource/llsalvol.llsal_005/?sp=759&st=image

History of the 1845 "failed to make a choice" provision

While passing the 1845 law, Congress made a seemingly inconsequential accommodation to pre-existing laws in three states.

The resulting vague wording played an important role in the tumultuous events of January 6, 2021 (discussed in the next subsection).

In this subsection, we detail the history of the 1845 law.

In December 1844, Ohio Representative Alexander Duncan introduced a bill in Congress providing:

> "All regular[12] state elections for the choice of electors of President and Vice President of the United States shall be held **on the same day, and on one single day, in all States** of the Union."[13] [Emphasis added]

During the House debate in the Committee on the Whole on Duncan's bill on December 9, 1844, New Jersey Representative Elmer offered an amendment that would recognize that health or travel difficulties might prevent an already selected presidential elector from voting in the Electoral College.

Elmer's proposed amendment was based on the fact that in 1789, 1792, 1808, 1812, 1816, 1820, and 1832, one or more presidential electors was absent from the Electoral College meeting due to health or travel difficulties.[14]

Elmer's proposed amendment said:

> "Nothing herein contained shall prevent the legislatures of the several states for directing the appointment of electors on any subsequent day in the same year, **to take the place of any electors who may be prevented by sickness of any other cause** from fulfilling the duties of their appointment."[15] [Emphasis added]

In response to Representative Elmer, Representative Duncan amended his bill on December 11 to create an exception allowing states to appoint replacement presidential elector(s) that become apparent on the day when the Electoral College meets.

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[12] The term "regular" here is in contrast to a special national election for President. The 1792 statute provided for a special national election in event of the death, removal, or resignation of both the President and Vice President. Duncan's 1844 bill set a date for such special elections. Of course, no such special election ever occurred.

[13] H.R. 432 introduced by Representative Duncan on December 4, 1844. https://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=028/llhb028.db&recNum=994

[14] There was a total of 18 such absences during this period. In 1789, four electors were absent (two from Maryland and two from Virginia). In 1792, three electors were absent (two from Maryland and one from Vermont). In 1808, one elector was absent (from Kentucky). In 1812, one elector was absent (from Ohio). In 1816, four electors were absent (three from Maryland and one from Delaware). In 1820, three electors were absent (one each from Mississippi, Pennsylvania, and Tennessee). In 1832, two electors were absent (from Maryland).

[15] *Congressional Globe*, 28th Congress, 2nd Session. December 9, 1844. Page 14. https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=29

> "That each State may by law provide for the filling of any vacancy or **vacancies which may occur in its college of electors when such college meets** to give its electoral vote.[16] [Emphasis added]

A more significant second deficiency in Representative Duncan's bill was pointed out by New Hampshire Representative John Parker Hale in the Committee of the Whole on December 9, 1844. As reported in the *Congressional Globe*:

> "Mr. Hales desired to make a suggestion to the gentleman from Ohio (Mr. Duncan) and the other friends of this bill. **This bill appeared to him to be framed on the idea that the choice of electors would always be perfected in one day**; now it appeared to him that the bill was deficient, as it made no provision for an election, **if the people should fail to elect on the day designated**. In the State which he had the honor to represent [New Hampshire], a majority of all the votes cast was required to elect the electors of President and Vice President of the United States, and **it might so happen that no choice might be made**."[17] [Emphasis added]

Indeed, starting with the nation's first presidential election in 1789, New Hampshire state law had required candidates for presidential elector to receive an absolute majority of the statewide popular vote in order to be elected.[18] If one or more candidates for presidential elector did not receive an *absolute* majority of the statewide vote on Election Day, the New Hampshire General Court (state legislature) would fill those positions after Election Day, but before the Electoral College meeting.

Specifically, New Hampshire law provided:

> "**That the inhabitants** of the several towns, plantations and places in this State, qualified to vote in the choice of senators for the state legislature, **shall assemble in their respective towns, plantations and places on the first Monday of November next, to vote for eight persons,** inhabitants of this State, who shall not be senators or representatives in Congress, or persons holding offices of profit or trust under the United States, **to be electors of President and Vice President of the United States**; and the selectmen of the towns, plantations and places shall give fifteen days notice of the time, place and design of such meeting; and the meeting shall be governed by a moderator chosen for that purpose, who shall impartially preside, and with the

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[16] An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf

[17] *Congressional Globe*, 28th Congress, 2nd Session. December 9, 1844. Page 14. https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=29

[18] An Act for carrying into effect an ordenenance of Congress of the 14th Sept last relative to the Constitution of the United States. November 12, 1788. Page 333. https://archive.org/details/lawsofnewhampshi05newh/page/331/). In subsequent years, New Hampshire enacted a series of similar laws, each with an absolute majority requirement, with the single exception of the 1800 election (when the New Hampshire legislature appointed presidential electors without involvement of the voters. See https://archive.org/details/lawsofnewhampshi1904newh/page/636/).

> selectmen, whose duty it shall be to attend at such meeting, shall receive from all the inhabitants of such towns, plantations and places respectively, present and qualified as aforesaid, votes for such electors **(each voter giving in on one ballot or ticket the names of the persons he votes for)** and shall in open town meeting sort and count the same; of all which the clerk of each town, plantation or place respectively, shall make a fair record in the presence of the said selectmen of the name of every person voted for, and the number of votes against his name, and a full and fair copy of such record shall be made out and attested by the said selectmen or clerks respectively, and sealed up and directed to the Secretary of State."
>
> "The Secretary shall, on the twenty-third day of November next, lay the same before the Senate and House of Representatives in convention, to be by them examined and counted; and **in case there shall appear to be any or the full number who have a majority of the votes, they shall be declared electors**; provided that not more than eight persons have such majority; but in case more than eight persons shall have a majority of votes, then those eight persons who have the highest number of votes (if any there be) shall be declared electors. And in case the state of the votes will not admit of the designation of eight persons by the highest number of votes, then so many as can be designated, shall be declared electors; and from the remaining number of those who have a majority of the votes, **the Senate and House of Representatives, in convention, shall forthwith elect by ballot, one person at a time, so many persons, as, added to those already declared electors, shall complete the number of eight**."[19,20,21] [Emphasis added]

New Hampshire repealed its requirement for an absolute majority in 1912.

Similarly, starting with the nation's first presidential election in 1789, Massachusetts had a requirement that candidates for presidential elector receive an absolute majority of the votes.[22] The General Court (the legislature) would make the choice in the absence of such majority. Even today, if a candidate for presidential elector fails to receive at least

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[19] An Act directing the mode of balloting for and appointing Electors of this State for the election of a President and Vice President of the United States. June 19, 1820. Pages 893–894. https://archive.org/details/lawsofnewhampshi08newh/page/893/

[20] New Hampshire's absolute majority requirement dates back to the nation's first presidential election in 1789 (see https://archive.org/details/lawsofnewhampshi05newh/page/331/mode/1up). After 1789, New Hampshire enacted a series of similar laws for electing presidential electors containing an absolute majority requirement, with the single exception of the 1800 election (when the New Hampshire legislature appointed presidential electors without direct involvement of the voters). https://archive.org/details/lawsofnewhampshi1904newh/page/636/mode/2up

[21] The New Hampshire law in effect in 1845 was 28 N.H. Rev. Stat. §§ 4, 5 (1843). The Massachusetts law in effect in 1845 was "An Act directing the mode of choosing Electors of President and Vice President of the United States" enacted in 1832.

[22] The Massachusetts law in effect in 1845 was "An Act directing the mode of choosing Electors of President and Vice President of the United States" enacted in 1832.

20% of the popular vote in Massachusetts, the General Court (that is, the state legislature) would choose the state's electors.[23]

Georgia had a similar law in 1845.[24]

Accordingly, on December 11, Representative Duncan amended his bill by creating a carve-out allowing presidential electors to be appointed *after* the uniform national election day in the three states.

> "When any State shall have held an election for the purpose of choosing electors, and shall **fail to make a choice** on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide."[25] [Emphasis added]

Another rejected amendment is noteworthy in indicating the scope of Duncan's bill.

In 1844, South Carolina was the only state where the state legislature selected the state's presidential electors.

On December 13, 1844, South Carolina Representative John Campbell proposed an amendment on the House floor to Duncan's bill that would have exempted states whose legislatures appointed presidential electors from the proposed uniform national election day.

> "That nothing herein contained shall apply to any State where the electors of President and Vice President are now chosen by its legislature, until such time as such State shall give the election of electors directly to the people."[26]

South Carolina Representative John Campbell's amendment was rejected by a 52–141 vote.[27,28] Thus, the South Carolina legislature was required to convene and appoint its presidential electors on the same day as other states conducted statewide popular elections.

In other words, Congress exercised its power to control the schedule for choosing presidential electors so as to require every state to choose its presidential electors on the

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[23] Current Massachusetts law (section 118 of chapter 54) requires preparation of a list of "the names of the persons who have received at least one-fifth of the entire number of votes cast for electors." The elector candidates from this list "who have received the highest number of votes … shall be deemed to be elected." https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section118 However, if an insufficient number of electors are yet to be chosen, section 136 provides "the governor shall … call together the general court; and the senators and representatives assembled in joint convention shall by ballot choose electors to complete the full number." https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section136

[24] The Georgia law in effect in 1845 was "An Act to prescribe the mode of choosing the Electors of President and Vice President of the United States to which this state is entitled by the constitution of the United States" enacted in 1824.

[25] An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf

[26] *Congressional Globe*, 28th Congress, 2nd Session. December 13, 1844. Page 30. https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=45

[27] *Congressional Globe*, 28th Congress, 2nd Session. December 13, 1844. Page 31. https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=015/llcg015.db&recNum=46

[28] *Journal of the House of Representatives of the United States*, *1844-1845*. December 13, 1844. https://memory.loc.gov/cgi-bin/query/D?hlaw:12:./temp/~ammem_LTNv::

Tuesday after the first Monday in November, except that if the state happened to "fail to make a choice," Congress allowed electors to be chosen at a later date.

In summary, the legislative history shows that Duncan's original bill

- originally had no exceptions to a uniform national date for states to appoint their presidential electors,
- was amended to allow states to appoint presidential elector(s) to fill vacancies that become apparent after the uniform national election day and the day when the Electoral College meets, and
- was amended to allow states that held an election for the purpose of choosing electors, but had failed to make a choice on Election Day, to appoint electors on a later day.

In January 1845, after additional minor amendments, Congress completed work and President Tyler signed Duncan's amended bill establishing a uniform national day for appointing presidential electors. The key provision was:

> "That the electors of President and Vice President shall be appointed in each State on the **Tuesday next after the first Monday in the month of November** of the year in which they are to be appointed."[29] [Emphasis added]

The final wording of the two exceptions in the 1845 law requiring states to appoint presidential electors after the uniform national election day was as follows:

> "Provided, That each State may by law provide for the filling of any vacancy or **vacancies which may occur in its college of electors when such college meets** to give its electoral vote:
>
> "And provided, also, when any State shall have held an election for the purpose of choosing electors, and shall **fail to make a choice** on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide."[30] [Emphasis added]

The Tuesday after the first Monday in November remains the uniform national day for appointing presidential electors to this day. This date was incorporated into section 1 of the Electoral Count Act of 1887 and is currently found in section 1 of the Electoral Count Reform Act of 2022.[31]

The New Hampshire–Massachusetts–Georgia exception in the 1845 law became section 2 of the Electoral Count Act of 1887:

> "Whenever any State has held an election for the purpose of choosing electors, and has **failed to make a choice on the day prescribed by law**, the electors

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[29] An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf

[30] *Ibid.*

[31] Section 1 title 3. United States Code.

> may be appointed on a subsequent day in such a manner as the legislature of such State may direct." [Emphasis added]

This provision was repealed by the Electoral Count Reform Act of 2022.[32]

Events of January 6, 2021

The dormant "failed to make a choice" wording from the 1845 law acquired sudden prominence in the 2020 presidential election.

On November 3, 2020, Joe Biden won the national popular vote by a margin of 7,052,711 popular votes and won the electoral vote by a margin of 74 votes (table 1.2.1).

At the time, five of the closely divided states that Biden won (Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin) had Republican-controlled state legislatures. Two of them had Republican Governors.

President Trump and his advocates initiated 64 federal and state judicial and administrative proceedings to dispute the outcome of the election.[33] None of this litigation succeeded in overturning the results in any state.

Eight conservative former judges, lawyers, and Senators examined all 64 judicial and administrative proceedings initiated by Donald Trump and his advocates. Their conclusion was summarized in the title of their report—*Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election.*

> "Our conclusion is unequivocal: Joe Biden was the choice of a majority of the Electors, who themselves were the choice of the majority of voters in their states."[34]

Nonetheless, supporters of outgoing President Donald Trump argued that the "failed to make a choice" wording permitted Republican-controlled state legislatures to meet after Election Day, claim that the voters had "failed to make a choice" because of real or imagined irregularities, and then appoint slates of presidential electors who would vote for Trump when the Electoral College met.

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[32] Today, a plurality of the popular vote is sufficient to choose the state's presidential electors in every state—with one minor exception. Current Massachusetts law states that if a candidate for presidential elector fails to receive at least 20% of the popular vote, the General Court (that is, the state legislature) would fill that position. Specifically, section 118 of chapter 54 requires preparation of a list of "the names of the persons who have received at least one-fifth of the entire number of votes cast for electors." The elector candidates from this list "who have received the highest number of votes … shall be deemed to be elected." https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/Section118 However, if an insufficient number of electors satisfy that requirement, section 136 provides "the governor shall … call together the general court; and the senators and representatives assembled in joint convention shall by ballot choose electors to complete the full number." https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVIII/Chapter54/SThection136

[33] The Brennan Center for Justice has an on-line tracker for this litigation. Brennan Center. 2021. *Voting Rights Litigation Tracker 2020*. July 8, 2021. https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020

[34] Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

Despite considerable pressure from President Trump and his supporters, no state legislature invoked the "failed to make a choice" wording.

Thus, the Electoral College met on December 14, 2020, and Joe Biden received 306 electoral votes to Trump's 232.

Those electoral votes were scheduled to be counted in a joint session of the newly elected Congress on January 6, 2021.

The "failed to make a choice" wording in section 2 of the Electoral Count Act of 1887[35] and the word "majority of the whole number of Electors appointed" provision of the Constitution formed the basis for several scenarios designed to give President Trump a second term.

On January 3, 2021, attorney John Eastman wrote a memo entitled "January 6 Scenarios" saying:

> "**VP Pence determines that the ongoing election challenges must conclude before ballots can be counted, and adjourns the joint session of Congress**,"
>
> "Taking the cue, state legislatures convene, order a comprehensive audit/investigation of the election returns in their states, and then determine whether the slate of electors initially certified is valid, or whether the alternative slate of electors should be certified by the legislature, exercise authority it has directly from Article II and also from 3 U.S.C. §2, which provides:
>
> > 'Whenever any State has held an election for the purpose of choosing electors, and has **failed to make a choice** on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.'[36]
>
> "If, after investigation, proven fraud and illegality is insufficient to alter the results of the election, the original slate of electors would remain valid. BIDEN WINS.
>
> "**If, on the other hand, the investigation proves to the satisfaction of the legislature that there was sufficient fraud and illegality to affect the results of the election, the Legislature certifies the Trump electors. Upon reconvening the Joint Session of Congress, those votes are counted and TRUMP WINS**."[37,38] [Emphasis added]

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[35] The entire Electoral Count Act of 1887 may be found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[36] Congress repealed the "failed to make a choice" language as part of the Electoral Count Reform Act of 2022.

[37] Eastman, John. 2021. January 6 Scenario. CNN. 2021. Trump lawyer's full memo on plan for Pence to overturn the election. January 3, 2021. Pages 4–5. *CNN*. https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html

[38] See also the shorter and earlier memo. Eastman, John. 2020. January 6 Scenario. CNN. Trump lawyer's memo on six-step plan for Pence to overturn the election. *CNN*. https://edition.cnn.com/2021/09/21/politics/read-eastman-memo/index.html

The "number of electors appointed" provision of the Constitution was the basis of another scenario outlined by Eastman. The idea was to declare that no presidential electors had been appointed from certain states that Biden had won.

> "**VP Pence opens the ballots, determines on his own which is valid,** asserting that the authority to make that determination under the 12th Amendment, and the Adams and Jefferson precedents, **is his alone** (anything in the Electoral Count Act to the contrary is therefore unconstitutional).
>
> "(i) If State Legislatures have certified the Trump electors, he counts those, as required by Article II (the provision of the Electoral Count Act giving the default victory to the "executive"-certified slate therefore being unconstitutional). Any combination of states totaling 38 elector votes, and TRUMP WINS.
>
> (ii) **If State Legislatures have not certified their own slates of electors, VP Pence** determines, based on all the evidence and the letters from state legislators calling into question the executive certifications, **decides to count neither slate of electors**. (Note: this could be done when he gets to Arizona in the alphabetical roster, or he could defer Arizona and the other multi-slate states until the end, and then make the determination). At the end of the count, the tally would therefore be 232 for Trump, 222 for Biden. **Because the 12th Amendment says "majority of electors appointed," having determined that no electors from the 7 states were appointed …, TRUMP WINS**.
>
> (iii) **Alternatively,** VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 elector votes, **throwing the election to the House**. IF the Republicans in the State delegations stand firm, the vote there is 26 states for Trump, 23 for Biden, and 1 split vote. TRUMP WINS."[39,40] [Emphasis added]

When the joint session of Congress met on January 6, 2021, to count the electoral votes, Vice President Pence refused to make any of the rulings that Eastman advocated and that President Trump had urged Pence to make.

An unsuccessful effort was made in Congress to postpone its counting of the electoral votes and invite the legislatures of various contested states to "audit" their previously certified results from their states. Presumably, after these audits, the Republican-controlled legislatures would then appoints slates of Trump presidential electors to replace the Biden electors who had already cast their votes in the Electoral College on December 14, 2020.

After order was restored in the Capitol in the evening of January 6, Congress counted

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[39] Eastman, John. 2021. January 6 scenario. CNN. 2021. Trump lawyer's full memo on plan for Pence to overturn the election. January 3, 2021. Pages 4–5. CNN. https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html

[40] See also the shorter and earlier memo. Eastman, John. 2020. January 6 scenario. CNN. 2021. Trump lawyer's memo on six-step plan for Pence to overturn the election. CNN. https://edition.cnn.com/2021/09/21/politics/read-eastman-memo/index.html

the electoral votes cast on December 14, 2020, and declared that Joe Biden had been elected President.

These events have been voluminously described elsewhere.[41,42,43]

Electoral Count Reform Act of 2022

After reviewing the events of January 6, 2021, Congress enacted the Electoral Count Reform Act of 2022 (appendix B).

The 2022 Act contained several changes specifically designed to prevent a state legislature from overriding the choice of its voters after Election Day.

First, the 2022 Act repealed the vague "failed to make a choice" section of the 1845 law and the Electoral Count Act of 1887.

Second, the 2022 Act requires that the appointment of presidential electors be in accordance with laws "enacted prior to election day." Specifically, section 1 of the new law provides:

> "The electors of President and Vice President shall be appointed, in each State, on election day, **in accordance with the laws of the State enacted prior to election day**." [Emphasis added]

This new requirement does not affect the power of state legislatures to change the method of awarding their electoral votes (potentially appointing presidential electors without involvement of the state's voters); however, no post-election changes can be made.

Third, Congress recognized that the wording of the 1845 law concerning vacancies among presidential electors provided a potential avenue for abuse by state legislatures.

In 1789, 1792, 1808, 1812, 1816, 1820, and 1832, between one and three duly appointed presidential electors failed to cast their votes in the Electoral College—often because of health reasons or the difficulties of travel in the pre-railroad world. Luckily, no uncast electoral votes affected the outcome of any presidential election during this period.

In 1845, Congress dealt with the problem of vacancies and absences by specifically designating one specific additional time after Election Day when states could appoint a presidential elector:

> "That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors **when such college meets** to give its electoral vote.[44] [Emphasis added]

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[41] Select Committee to Investigate the January 6th Attack on the United States Capitol. 2022. *The January 6 Report: The Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol*. New York, NY: Celadon Books.

[42] Raskin, Jamie. 2022. *Unthinkable: Trauma, Truth, and the Trials of American Democracy*. New York, NY: Harper.

[43] Bowden, Mark and Teague, Matthew. 2022: *The Steal: The Attempt to Overturn the 2020 Election and the People Who Stopped It*. New York, NY: Atlantic Monthly Press.

[44] An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf This provision of the 1845 law later became section 4 of the Electoral Count Act of 1887.

In 2022, Congress amended the 1845 vacancy-filling procedure to require that any state law for filling a vacancy in the Electoral College must have been "enacted prior" to Election Day.

> "Each State may, by law **enacted prior to election day**, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote." [Emphasis added]

Fourth, the 2022 Act permits a state to extend the "period of voting" in event of a *force majeure* event (such as a natural disaster or terrorist attack). However, the period of voting can only be extended under procedures and standards contained in laws "enacted prior" to Election Day. Specifically, section 21(1) of the 2022 Act re-defined "Election Day" as follows:

> "'Election day' means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, **in the case of a State that appoints electors by popular vote**, if the State modifies the period of voting, as necessitated by **force majeure events that are extraordinary and catastrophic**, as provided **under laws of the State enacted prior to such day**, 'election day' shall include the modified period of voting."[45] [Emphasis added]

As of July 2024, no state had adopted procedures for extending the period of voting.

3.1.4. Date for the Electoral College meeting

The September 13, 1788, resolution of the Confederation Congress established the first Wednesday in February in 1789 as the date for the first meeting of the Electoral College.[46]

The new Constitution (Article II, section 1, clause 4) gave the newly created Congress power to set the date for subsequent Electoral College meetings.

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

As the second presidential election approached in 1792, Congress passed a law setting the date for the Electoral College meeting:

> "That the electors shall meet and give their votes on the said **first Wednesday in December**, at such place in each state as shall be directed, by the legislature thereof."[47] [Emphasis added]

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[45] Note that the 2022 federal law recognizes the fact that the Constitution does not require a state to allow its voters to choose the state's presidential electors. The choice of method of selecting a state's presidential electors is an exclusive state power under Article II, section 1 of the Constitution. The timing restrictions in section 21(1) apply only if a state "appoints electors by popular vote" (as all states have chosen to do since 1880).

[46] Resolution of 13 September 1788 by the Confederation Congress. https://avalon.law.yale.edu/18th_century/resolu01.asp

[47] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd

In 1933, the 20th Amendment changed the date for the presidential inauguration from March 4 to January 20. In 1934, Congress amended the Electoral Count Act of 1887 and set the date for the Electoral College meeting to be the first Monday after the second Wednesday in December.[48]

The Electoral Count Reform Act of 2022 changed the meeting date of the Electoral College by one day, so that section 7 now provides:

> "The electors of President and Vice President of each State shall meet and give their votes on the **first Tuesday after the second Wednesday in December** next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day."[49] [Emphasis added]

Thus, today, there are 42 days between Election Day and the meeting date of the Electoral College.

Depending on the year, Election Day (the Tuesday after the first Monday in November) can be any date from November 2 to November 9. The meeting date of the Electoral College is the Tuesday after the second Wednesday in December and therefore can be any date from December 14 (if Election Day is November 2) to December 20 (if Election Day is November 8).

For example, in 2024, Election Day will be Tuesday November 5, and the meeting date for the Electoral College will be Tuesday December 17.

State law, in turn, specifies the place and time of day for the Electoral College meeting. These meetings are typically held at the state Capitol. For example, Minnesota law provides:

> "The Presidential electors**,** before 12:00 P. M. on the day before that fixed by congress for the electors to vote for president and vice-president of the United States, shall notify the Governor that they are at the state capitol and ready at the proper time to fulfill their duties as electors**.** The Governor shall deliver to the electors present a certificate of the names of all the electors. If any elector named therein fails to appear before 9:00 A. M. on the day, and at the place, fixed for voting for president and vice-president of the United States, the electors present shall, in the presence of the Governor, immediately elect by ballot a person to fill the vacancy."[50]

Figure 3.1 shows the meeting of the Minnesota Electoral College in St. Paul on December 17, 2012.

Congress. 1 Stat. 239. March 1, 1792. Image 14. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf Many of the provisions of the 1792 law later appeared in the Electoral Count Act of 1887.

[48] Section 7 of the Electoral Count Act of 1887.

[49] Section 7 of the Electoral Count Reform Act of 2022.

[50] Minnesota election law. Section 208.06. In this chapter, we will frequently refer to the laws of Minnesota to illustrate the way in which states implement the process of electing the President and Vice President.

Figure 3.1 Meeting of Minnesota Electoral College in St. Paul on December 17, 2012

3.1.5. Procedures for the Electoral College meeting

The Electoral College does not meet in a central place. Instead, the Meeting Clause of the original Constitution and the 12th Amendment specifies:

> "The Electors shall meet in their respective States."

In the pre-railroad and pre-telegraph era, this provision prevented the presidential electors from knowing—with certainty—how electors in other states had voted. The Founders thought that the geographical dispersal of the Electoral College would act to prevent the formation of political parties—what they called "factions."

Of course, geographic dispersal did not prevent presidential electors from making advance arrangements as to how they would vote in their state's meeting.

The meeting of the Electoral College is governed by the 12th Amendment to the U.S. Constitution (ratified in 1804), which provides (in part):

> "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate."

3.2. STATE LAWS FOR NOMINATING PRESIDENTIAL ELECTORS

3.2.1. Nomination of presidential elector candidates

In a majority of states, candidates for the position of presidential elector are nominated by party conventions at the congressional-district level and state level.[51]

Minnesota election law (section 208.03) is typical and provides:

> "Presidential electors for the major political parties of this state shall be nominated by delegate conventions called and held under the supervision of the respective state central committees of the parties of this state."

In many other states and the District of Columbia, the state party committee nominates the party's presidential electors.

Pennsylvania has a unique procedure for nominating presidential electors. A 1937 law gives each party's presidential nominee the power to personally and directly nominate the entire slate of candidates for the position of presidential elector:

> "The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the position of presidential elector as the State is then entitled to."[52]

Some states (e.g., California) permit each political party to choose its own method for nominating presidential electors. For example, the California Democratic Party empowers the party's most current nominee for U.S. Representative to nominate the party's candidate for presidential elector from that congressional district (and each of the party's most recent nominees for U.S. Senate to nominate a senatorial elector).

In some states, a political party's candidates for presidential elector are nominated at a state convention after the party selects its presidential and vice-presidential nominee at its national convention.

However, in other states, the selection of the party's elector candidates is done before the selection of the party's national nominee is known with certainty and, more pertinently, before the party has coalesced behind its national nominee.

For example, in Washington State, the party's candidates for presidential elector are nominated at the same state convention that selects the party's delegates to its national nominating convention. In 2016, Vermont Senator Bernie Sanders swept the Washington State Democratic Party's local caucuses held in March. As a result, supporters of Sanders greatly outnumbered supporters of Hillary Clinton at the party's state convention in June.[53]

Thus, many of the 12 presidential electors nominated by the Washington Democratic Party's state convention in June 2016 were less-than-enthusiastic Clinton supporters.

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[51] National Association of Secretaries of State. 2020. *Summary: State Laws Regarding Presidential Electors—October 2020*. October 2020. https://www.nass.org/sites/default/files/surveys/2020-10/summary-electoral-college-laws-Oct20.pdf

[52] Section 2878 of Pennsylvania election law enacted on June 1, 1937.

[53] Associated Press. 2016. Washington Democrats meet for state convention. *Spokane Spokesman-Review*. June 17, 2016. https://www.spokesman.com/stories/2016/jun/17/state-convention-for-washington-democrats-convenes

After Clinton carried the state in November 2016, four of the state's 12 presidential electors failed to vote for Clinton when the Electoral College met in December (section 3.7).

As a result of the unprecedented number of faithless electors in 2016, the method of nominating candidates for presidential elector was changed prior to the 2020 election:

> "In Washington, where the faithless elector problem was the most acute in 2016—there were four defectors—state Democrats made the process much more centralized for 2020, **moving the selection process from state and congressional district conventions to the party's state central committee**."[54] [Emphasis added]

3.2.2. The link between state governments and the political parties

Minnesota law illustrates the procedure by which the state election officials become officially informed of the names of the persons running for President and Vice President and the names of the persons running for presidential elector. Section 208.03 provides:

> "On or before primary election day the chair of the major political party shall certify to the secretary of state the names of the persons nominated as Presidential electors and the names of the party candidates for president and vice-president."

3.3. STATE LAWS FOR ELECTING PRESIDENTIAL ELECTORS

3.3.1. There is no federal constitutional right to vote for President.

The Constitution explicitly gives the right to vote for U.S. Representatives to everyone who has the qualifications to vote for the more numerous chamber of their state legislature.[55]

Under the original Constitution, U.S. Senators were chosen by state legislatures. However, the 17th Amendment (ratified in 1913) gave the voters the right to directly elect their Senators.

Nonetheless, voters today have no federal constitutional right to vote for President or Vice President or presidential electors.

As the U.S. Supreme Court wrote in *McPherson v. Blacker* in 1892—the leading case on the manner of appointing presidential electors:

> "**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 gen-**

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[54] Putnam, Josh. 2020. If The Supreme Court Lets The Electoral College Vote However It Wants, Will Chaos Ensue? *FiveThirtyEight*. June 16, 2020. https://fivethirtyeight.com/features/if-the-supreme-court-lets-the-electoral-college-vote-however-it-wants-will-chaos-ensue/

[55] At the time of ratification of the Constitution, the qualifications to vote varied considerably from state to state. Many states had highly restrictive property, wealth, and/or income qualifications to vote. The requirements to vote for the lower house of the state legislature were often more lenient than for the state senate. See table A.3 (page 314) in Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York, NY: Basic Books.

> **eral ticket [i.e., the winner-take-all rule], nor that the majority of those who exercise the elective franchise can alone choose the electors**."[56]
>
> "In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States."[57] [Emphasis added]

In 2000, the U.S. Supreme Court in *Bush v. Gore* reiterated that fact that the people have no federal constitutional right to vote for President.

> "**The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power** to appoint members of the Electoral College. U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that **the State legislature's power to select the manner for appointing electors is plenary**; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution."[58] [Emphasis added]

Voters can vote for President today because there is a law in their state allowing them to do so. For example, Minnesota allows provides:

> "Presidential electors shall be chosen **at the state general election** held in the year preceding the expiration of the term of the president of the United States."[59] [Emphasis added]

The link between the voter's vote for President and the presidential electors. Figure 3.2 shows a 2004 ballot for President and Vice President in Hennepin County, Minnesota. It includes the Democratic-Farmer-Labor Party slate consisting of John F. Kerry for President and John Edwards for Vice President, the Republican Party slate consisting of George W. Bush and Dick Cheney, and seven other presidential-vice-presidential slates.

The ballot simply reads:

> "U.S. President and Vice President—Vote for one team."

It is silent as to:

- the existence of the Electoral College,
- the fact that the state has 10 electoral votes, and
- the fact that the voter is, in fact, voting for 10 individual candidates for presidential elector whose names do not appear anywhere on the ballot.

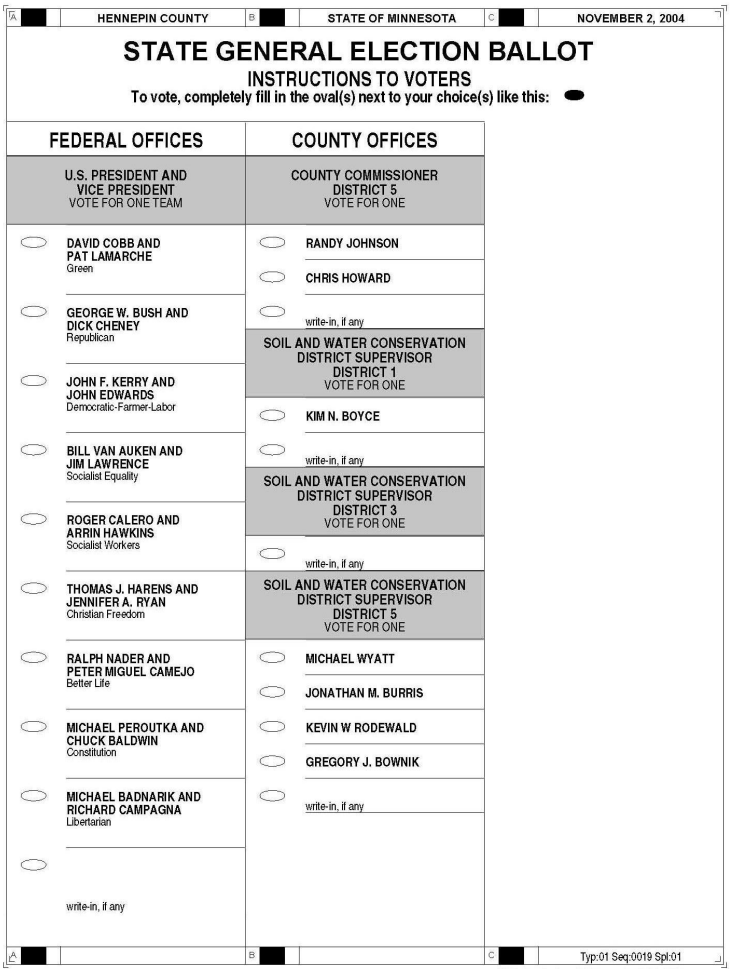
---

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

[57] *Ibid*. Page 35.

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

[59] Minnesota Election law. Section 208.02.



HENNEPIN COUNTY | STATE OF MINNESOTA | NOVEMBER 2, 2004

STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS

To vote, completely fill in the oval(s) next to your choice(s) like this:

FEDERAL OFFICES

U.S. PRESIDENT AND VICE PRESIDENT
VOTE FOR ONE TEAM

- DAVID COBB AND PAT LAMARCHE — Green
- GEORGE W. BUSH AND DICK CHENEY — Republican
- JOHN F. KERRY AND JOHN EDWARDS — Democratic-Farmer-Labor
- BILL VAN AUKEN AND JIM LAWRENCE — Socialist Equality
- ROGER CALERO AND ARRIN HAWKINS — Socialist Workers
- THOMAS J. HARENS AND JENNIFER A. RYAN — Christian Freedom
- RALPH NADER AND PETER MIGUEL CAMEJO — Better Life
- MICHAEL PEROUTKA AND CHUCK BALDWIN — Constitution
- MICHAEL BADNARIK AND RICHARD CAMPAGNA — Libertarian
- write-in, if any

COUNTY OFFICES

COUNTY COMMISSIONER DISTRICT 5
VOTE FOR ONE

- RANDY JOHNSON
- CHRIS HOWARD
- write-in, if any

SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR DISTRICT 1
VOTE FOR ONE

- KIM N. BOYCE
- write-in, if any

SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR DISTRICT 3
VOTE FOR ONE

- write-in, if any

SOIL AND WATER CONSERVATION DISTRICT SUPERVISOR DISTRICT 5
VOTE FOR ONE

- MICHAEL WYATT
- JONATHAN M. BURRIS
- KEVIN W RODEWALD
- GREGORY J. BOWNIK
- write-in, if any

Typ:01 Seq:0019 Spl:01

Figure 3.2 Presidential ballot in Minnesota in 2004

The linkage between a vote cast for a presidential slate and the state's 10 presidential electors is established by state law. Minnesota's law is typical and provides:

> "When Presidential electors are to be voted for, a vote cast for the party candidates for president and vice-president **shall be deemed** a vote for that party's electors as filed with the secretary of state."[60] [Emphasis added]

Thus, a voter who filled in the oval next to the names of John Kerry and John Edwards, was "deemed" to be casting a vote for each of the 10 candidates for the position of presidential elector who had been nominated by the Minnesota Democratic Farmer-Labor Party.

Because the Kerry–Edwards slate received the most popular votes in Minnesota in 2004, the 10 Democratic candidates for presidential elector were elected on November 2,

[60] Minnesota election law. Section 208.04, subdivision 1.

2004. Then, on December 13, 2004, they met in St. Paul, Minnesota, and cast their votes in the Electoral College.

In 2020, the names of the individual presidential-elector candidates appeared on ballots of only three states (Arizona, Idaho, and South Dakota).

For example, figure 3.3 showing Idaho's 2020 ballot indicates that a vote for Donald Trump and Michael Pence was a vote for the four presidential-elector candidates nominated by the Idaho Republican Party, namely Rod Beck, Raúl Labrador, Janice McGreachin, and Melinda Smyser.

In states such as Idaho that show the names of candidates for presidential elector on the ballot, the presidential electors are often well-known political figures. For example, Raúl Labrador was a former Congressman and Chair of the Idaho Republican Party. Janice McGreachin was Idaho's Lieutenant Governor at the time. Melinda Smyser was a former State Senator and Lieutenant Governor.

Ballots in some states mention that the voter is voting for presidential electors without identifying them. For example, Oregon's presidential ballot informs the voter:

> "Your vote for the candidates for United States President and Vice President shall be a vote for the electors supporting those candidates."

3.4. CERTIFICATION OF THE PRESIDENTIAL VOTE COUNT BY THE STATES

After the popular voting for presidential electors takes place on Election Day, the votes are counted at the precinct level.

The official vote counts from precincts are then reported to some intermediate level of government (e.g., city, town, village, township, county, or parish).[61]

Shortly thereafter, the official vote counts from the lower levels are reported to the state level.

Most states have "rapid transmission" requirements that require the certified vote counts from lower levels to be promptly reported to the next-higher level.

Meanwhile, candidates, political parties, civic groups, and media independently gather unofficial vote counts from every precinct and county on Election Night or shortly thereafter. The media often pool their efforts and operate a joint reporting system.

3.4.1. The process of declaring the winning presidential electors

State laws provide that a state canvassing board (or other designated board or official) will ascertain the number of popular votes cast for each presidential slate in the state. Minnesota law is typical and provides.

> "The state canvassing board at its meeting on the second Tuesday after each state general election shall open and canvass the returns made to the secretary of state for Presidential electors**,** prepare a statement of the number of votes cast for the persons receiving votes for these offices, and **declare the person or persons receiving the highest number of votes for each office duly elected**."[62] [Emphasis added]

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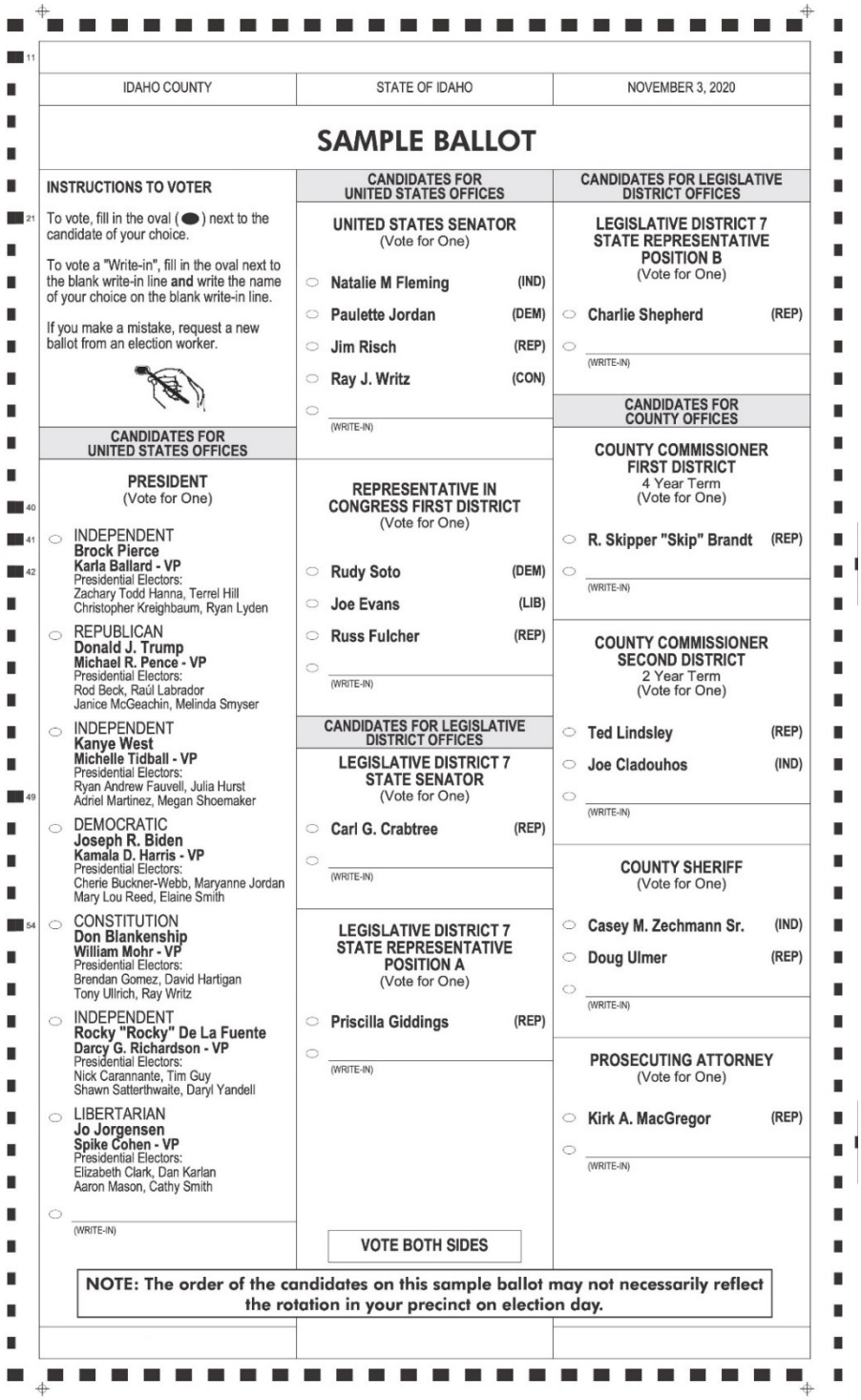
[61] In Alaska, votes are aggregated by state Senate districts.

[62] Minnesota election law. Section 208.05.



IDAHO COUNTY | STATE OF IDAHO | NOVEMBER 3, 2020

SAMPLE BALLOT

INSTRUCTIONS TO VOTER

To vote, fill in the oval (●) next to the candidate of your choice.

To vote a "Write-in", fill in the oval next to the blank write-in line **and** write the name of your choice on the blank write-in line.

If you make a mistake, request a new ballot from an election worker.

CANDIDATES FOR UNITED STATES OFFICES

PRESIDENT
(Vote for One)

- INDEPENDENT
  Brock Pierce
  Karla Ballard - VP
  Presidential Electors:
  Zachary Todd Hanna, Terrel Hill
  Christopher Kreighbaum, Ryan Lyden
- REPUBLICAN
  Donald J. Trump
  Michael R. Pence - VP
  Presidential Electors:
  Rod Beck, Raúl Labrador
  Janice McGeachin, Melinda Smyser
- INDEPENDENT
  Kanye West
  Michelle Tidball - VP
  Presidential Electors:
  Ryan Andrew Fauvell, Julia Hurst
  Adriel Martinez, Megan Shoemaker
- DEMOCRATIC
  Joseph R. Biden
  Kamala D. Harris - VP
  Presidential Electors:
  Cherie Buckner-Webb, Maryanne Jordan
  Mary Lou Reed, Elaine Smith
- CONSTITUTION
  Don Blankenship
  William Mohr - VP
  Presidential Electors:
  Brendan Gomez, David Hartigan
  Tony Ullrich, Ray Writz
- INDEPENDENT
  Rocky "Rocky" De La Fuente
  Darcy G. Richardson - VP
  Presidential Electors:
  Nick Carannante, Tim Guy
  Shawn Satterthwaite, Daryl Yandell
- LIBERTARIAN
  Jo Jorgensen
  Spike Cohen - VP
  Presidential Electors:
  Elizabeth Clark, Dan Karlan
  Aaron Mason, Cathy Smith
- (WRITE-IN)

CANDIDATES FOR UNITED STATES OFFICES

UNITED STATES SENATOR
(Vote for One)

- Natalie M Fleming (IND)
- Paulette Jordan (DEM)
- Jim Risch (REP)
- Ray J. Writz (CON)
- (WRITE-IN)

REPRESENTATIVE IN CONGRESS FIRST DISTRICT
(Vote for One)

- Rudy Soto (DEM)
- Joe Evans (LIB)
- Russ Fulcher (REP)
- (WRITE-IN)

CANDIDATES FOR LEGISLATIVE DISTRICT OFFICES

LEGISLATIVE DISTRICT 7 STATE SENATOR
(Vote for One)

- Carl G. Crabtree (REP)
- (WRITE-IN)

LEGISLATIVE DISTRICT 7 STATE REPRESENTATIVE POSITION A
(Vote for One)

- Priscilla Giddings (REP)
- (WRITE-IN)

VOTE BOTH SIDES

CANDIDATES FOR LEGISLATIVE DISTRICT OFFICES

LEGISLATIVE DISTRICT 7 STATE REPRESENTATIVE POSITION B
(Vote for One)

- Charlie Shepherd (REP)
- (WRITE-IN)

CANDIDATES FOR COUNTY OFFICES

COUNTY COMMISSIONER FIRST DISTRICT
4 Year Term
(Vote for One)

- R. Skipper "Skip" Brandt (REP)
- (WRITE-IN)

COUNTY COMMISSIONER SECOND DISTRICT
2 Year Term
(Vote for One)

- Ted Lindsley (REP)
- Joe Cladouhos (IND)
- (WRITE-IN)

COUNTY SHERIFF
(Vote for One)

- Casey M. Zechmann Sr. (IND)
- Doug Ulmer (REP)
- (WRITE-IN)

PROSECUTING ATTORNEY
(Vote for One)

- Kirk A. MacGregor (REP)
- (WRITE-IN)

NOTE: The order of the candidates on this sample ballot may not necessarily reflect the rotation in your precinct on election day.

Figure 3.3 Presidential ballot in Idaho in 2020

The highlighted words "declare the person or persons receiving the highest number of votes for each office duly elected" are what establish the statewide winner-take-all rule for presidential electors in Minnesota.

3.4.2. Ties in the popular vote

In the event of a statewide tie vote for presidential electors, many state laws call for the use of a lottery to break the tie. Minnesota law is typical and provides:

> "When it appears that more than the number of persons to be elected as Presidential electors have the highest and an equal number of votes, the secretary of state, in the presence of the board shall **decide by lot** which of the persons shall be declared elected."[63] [Emphasis added]

In some states, the state legislature is empowered to break a tie among presidential electors. For example, Maine law provides:

> "If there is a tie vote for presidential electors, the Governor shall convene the Legislature by proclamation. The Legislature by joint ballot of the members assembled in convention shall determine which are elected."[64]

3.4.3. Certificates of Ascertainment

Since 1792, federal law has required each state to issue certificates reporting the official results of the presidential election to the federal government.[65]

Current federal law (the Electoral Count Reform Act of 2022) requires each state to create seven Certificates of Ascertainment reporting the number of votes cast for each presidential slate and the names of the state's presidential electors. One of these certificates is sent to the Archivist of the United States in Washington, D.C., and six are supplied to the presidential electors for their use during the meeting of the Electoral College in mid-December.

Figure 3.4 shows Vermont's 2008 Certificate of Ascertainment. It contains the number of popular votes received by eight presidential-vice-presidential slates and scattered write-ins.

Vermont's Certificate of Ascertainment shows that 219,262 popular votes were cast for each of the three presidential electors associated with the Democratic presidential-vice-presidential slate consisting of Barack Obama for President and Joe Biden for Vice President. All three Democratic elector candidates received the identical number of popular votes, because Vermont law (like those of other states) provides that a vote for a presidential-vice-presidential slate shall be "deemed" to be a vote for each of the presidential electors nominated in association with that slate.

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[63] *Ibid.*

[64] Maine 21–A M.R.S, section 732.

[65] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Page 240. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf

CERTIFICATE OF ASCERTAINMENT OF ELECTORS FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

State of Vermont)
Executive Department, ss.)

Pursuant to the laws of the United States, I, James H. Douglas, Governor of the State of Vermont, certify that the following named persons, residing in the towns indicated, received the number of votes indicated for the offices of ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES. These votes were cast at the election held on Tuesday, November 4, 2008.

For President and Vice-President of the United States	Electors of President and Vice-President of the United States	
Barack Obama and Joe Biden, **Democratic**	Claire Ayer, Weybridge Euan Bear, Bakersfield Kevin B. Christie, Hartford	219,262
John McCain and Sarah Palin, **Republican**	Mike Hebert, Vernon Linda Kirker, Georgia Kay Trudell, Grand Isle	98,974
Ralph Nader and Matt Gonzalez, **Independent**	Sonja Maria Golonka-Seese, Rupert James Marc Leas, South Burlington John Nirenberg, Brattleboro	3,339
Bob Barr and Wayne A. Root, **Libertarian**	David A. Baker, Bakersfield Steven J. Howard, Mount Holly Ben Mayer, Burlington	1,067
Chuck Baldwin and Darrell L. Castle, **Constitution**	John F. Bassette, Hartland Gregory C. Moore, Jr., Leicester Katie E. Smith, Charlotte	500
Roger Calero and Alyson Kennedy, **Socialist Workers**	Ralph Iovino, Wallingford Peter Voorhees, Middlebury Maja Zimmermann, Middlebury	150
Gloria LaRiva and Eugene Puryear, **Socialism and Liberation**	Kenneth Brace, Townshend Debra Forrett, Dummerston Pete Schor, Dummerston	149
Brian Moore and Stewart Alexander, **Liberty Union**	Mary Alice Herbert, Putney Doris Lake, Brattleboro Boots Wardinski, Newbury	141
Scattering (write-in) votes:		1,464

I further certify that Claire Ayer, Euan Bear and Kevin B. Christie are the Electors of President and Vice President of the United States for the State of Vermont.

Witness my hand and the Great Seal
of the State of Vermont, hereunto affixed.
Done in the Executive Chamber at Montpelier,
this 3rd day of December, 2008.

James H. Douglas
Governor

Figure 3.4 Vermont's 2008 Certificate of Ascertainment

Because the Obama–Biden slate received the most popular votes in Vermont in 2008, the Governor states:

> "I certify that Claire Ayer, Euen Bear, and Kevin B. Christie are the Electors of President and Vice President of the United States for the State of Vermont."

In the two states that use the congressional-district method of awarding electoral votes (Maine and Nebraska), their Certificates of Ascertainment show the statewide popular vote count (which decides the state's two senatorial electors) as well as the district-level popular vote count (which decides the presidential elector for each district).[66]

3.5. CERTIFICATE OF VOTE

When the Electoral College meets in each state in mid-December, federal law requires that the presidential electors sign six separate Certificates of Vote reporting the outcome of their voting for President and Vice President. One Certificate of Ascertainment is then attached to each of the Certificates of Vote.[67]

In addition, federal law specifies that one of these sets of documents be sent to the President of the U.S. Senate in Washington; two be sent to the chief elections officer of the state; two be sent to the Archivist of the United States in Washington; and one be sent to the federal district court in the judicial district in which the electors assemble.[68]

In the event that no certificates are received from a particular state by the fourth Wednesday in December, federal law establishes procedures for sending a special messenger to the local federal district court in order to obtain the missing certificates.[69]

In Minnesota in 2004, the Kerry–Edwards presidential slate received the most votes in the statewide popular election, and the 10 Democratic-Farmer-Labor Party presidential electors were thus elected. Figure 3.5 shows Minnesota's 2004 Certificate of Vote.

In Minnesota in 2004, the presidential electors voted by secret ballot when they met. In accordance with the 12th Amendment, each presidential elector cast one vote for President and a separate vote for Vice President.

As can be seen in the figure, all 10 of Minnesota's Democratic presidential electors voted, as expected, for John Edwards for Vice President.

However, unexpectedly, one of the 10 electors also voted for John Edwards for President. That vote was apparently accidental because, after the votes were counted, all 10 electors said that they had intended to vote for John Kerry for President. The result of this error was that John Kerry officially received only 251 electoral votes for President in 2004 (and John Edwards received one accidental electoral vote for President).

The vote for Edwards for President in Minnesota in 2004 was, as far as is known, the only electoral vote ever cast by accident.

Minnesota subsequently amended its state law to eliminate use of the secret ballot in the Electoral College.

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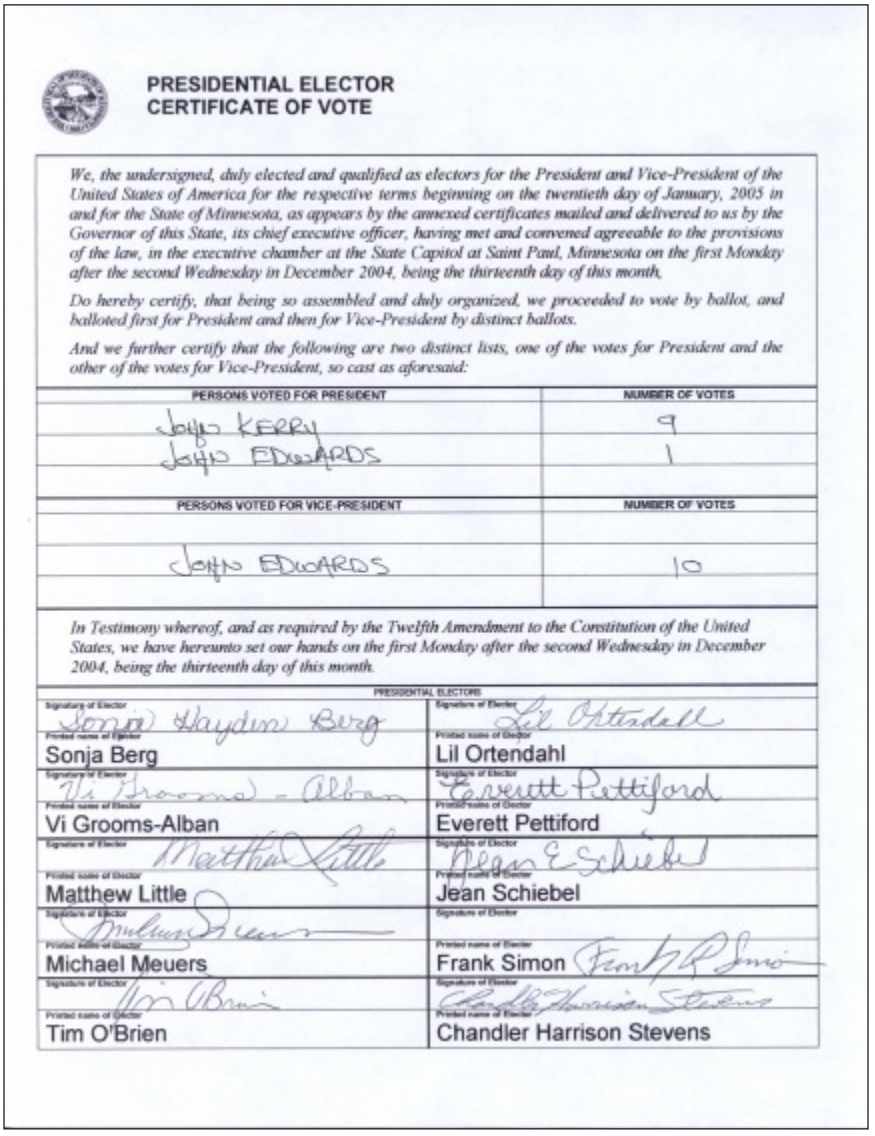
[66] The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

[67] United States Code. Title 3, chapter 1, section 9.

[68] United States Code. Title 3, chapter 1, section 11.

[69] United States Code. Title 3, chapter 1, sections 12 and 13.



PRESIDENTIAL ELECTOR
CERTIFICATE OF VOTE

We, the undersigned, duly elected and qualified as electors for the President and Vice-President of the United States of America for the respective terms beginning on the twentieth day of January, 2005 in and for the State of Minnesota, as appears by the annexed certificates mailed and delivered to us by the Governor of this State, its chief executive officer, having met and convened agreeable to the provisions of the law, in the executive chamber at the State Capitol at Saint Paul, Minnesota on the first Monday after the second Wednesday in December 2004, being the thirteenth day of this month,

Do hereby certify, that being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice-President by distinct ballots.

And we further certify that the following are two distinct lists, one of the votes for President and the other of the votes for Vice-President, so cast as aforesaid:

PERSONS VOTED FOR PRESIDENT	NUMBER OF VOTES
John KERRY	9
John EDWARDS	1

PERSONS VOTED FOR VICE-PRESIDENT	NUMBER OF VOTES
John EDWARDS	10

In Testimony whereof, and as required by the Twelfth Amendment to the Constitution of the United States, we have hereunto set our hands on the first Monday after the second Wednesday in December 2004, being the thirteenth day of this month.

PRESIDENTIAL ELECTORS

Signature of Elector: Sonja Haydin Berg Printed name of Elector: Sonja Berg	Signature of Elector: Lil Ortendahl Printed name of Elector: Lil Ortendahl
Signature of Elector: Vi Grooms-Alban Printed name of Elector: Vi Grooms-Alban	Signature of Elector: Everett Pettiford Printed name of Elector: Everett Pettiford
Signature of Elector: Matthew Little Printed name of Elector: Matthew Little	Signature of Elector: Jean E Schiebel Printed name of Elector: Jean Schiebel
Signature of Elector: Michael Meuers Printed name of Elector: Michael Meuers	Signature of Elector: Frank Simon Printed name of Elector: Frank Simon
Signature of Elector: Tim O'Brien Printed name of Elector: Tim O'Brien	Signature of Elector: Chandler Harrison Stevens Printed name of Elector: Chandler Harrison Stevens

Figure 3.5 Minnesota 2004 Certificate of Vote

3.6. COUNTING OF THE ELECTORAL VOTES IN CONGRESS

The constitutional requirement that the presidential electors meet in their respective states necessitates that the electoral votes be counted in a central place.

Under the terms of the 20th Amendment (ratified in 1933), the newly elected Congress takes office and convenes on January 3 in each odd-numbered year.

Current federal law, in turn, specifies that Congress shall meet in a joint session on January 6 after each presidential election for the purpose of counting the electoral votes. The 12th Amendment states:

> "[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed."

In the event that no candidate for President receives the votes of an absolute majority of the presidential electors "appointed" to the Electoral College, the 12th Amendment specifies that the House of Representatives chooses the President (section 1.6.1). If no candidate receives the required majority for Vice President, the Senate fills that office.[70]

Between 1789 and 1861, Congress adopted a separate *ad hoc* resolution governing the counting of electoral votes for each election.[71]

In 1865, Congress adopted Joint Rule 22, which governed the counting of the electoral votes in 1865, 1869, and 1873.[72]

In order to settle the disputed 1876 Tilden-Hayes presidential election, Congress established a special Electoral Commission in January 1877.[73]

A decade later, Congress passed the Electoral Count Act of 1887, which governed the counting of electoral votes until it was replaced by the Electoral Count Reform Act of 2022 (appendix B).

3.7. FAITHLESS PRESIDENTIAL ELECTORS

A total of 24,068 presidential electors have been appointed to serve in the Electoral College in the nation's 59 presidential elections between 1789 and 2020.

The term "faithless" is often loosely applied to any electoral vote that was cast in some exceptional way; however, as will be seen in this section, these exceptional cases fall into numerous distinctly different categories.

In any event, none of these exceptional votes ever changed the outcome of any presidential election.

U.S. Supreme Court Justice Robert H. Jackson summarized the history of presidential electors in *Ray v. Blair* in 1952:

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

---

[70] Article I, section 3, clause 4 appears to allow the sitting Vice President (who is frequently a candidate for President or re-election as Vice President) to vote in the case of a tie in the Senate. It says, "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."

[71] The proceedings for the electoral counts between 1789 and 1873 can be seen in Hind's Precedents. Volume 3. https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-8.htm

[72] Wallner, James. 2024. Congress' Role in Presidential Elections: Part V. February 12, 2024. https://www.rstreet.org/commentary/congresss-role-in-presidential-elections-part-v/

[73] An act to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, for the term commencing March fourth, anno Domini 1877. January 29, 1877. Page 227. https://tile.loc.gov/storage-services/service/ll/llsl/llsl-c44/llsl-c44.pdf

> "This arrangement miscarried. Electors, although often personally eminent, independent, and respectable, officially become **voluntary party lackeys and intellectual nonentities** to whose memory we might justly paraphrase a tuneful satire:
>
> 'They always voted at their party's call
> 'And never thought of thinking for themselves at all.'"[74] [Emphasis added]

Despite the Founders' vision that the Electoral College would be a deliberative body, candidates for presidential elector started giving pledges as to how they would vote in the Electoral College as early as 1789.[75]

As a U.S. Senate report in 1826 stated:

> "**In the first election** held under the constitution, **the people** looked beyond these agents (electors), fixed upon their own candidates for President and Vice President, and **took pledges from the electoral candidates to obey their will**.
>
> "In every subsequent election, the same thing has been done. Electors, therefore, have not answered the design of their institution.
>
> "**They are not the independent body and superior characters which they were intended to be.** They are not left to the exercise of their own judgment: on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. **They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not**."[76] [Emphasis added]

The exceptional votes that have been cast in the Electoral College over the years fall into several categories:

- **Absence of electors due to health or travel difficulties**: In the early years of the Republic, 18 electors failed to vote for President and Vice President, because they were absent from the Electoral College meeting (and could not be replaced under applicable law at the time).
- **Death of presidential nominee**: 63 electoral votes were not cast for the presidential nominee of the elector's political party, because the nominee had died before the Electoral College meeting.
- **Death of vice-presidential nominee**: Eight electoral votes were not cast for the vice-presidential nominee of the elector's political party, because the nominee had died before the Electoral College meeting.
- **Deviating votes for Vice President in five 19th-century elections**: 67

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[74] *Ray v. Blair*. 343 U.S. 214 at 232. 1952. https://www.law.cornell.edu/supremecourt/text/343/214

[75] Although George Washington received a vote from every presidential elector in 1789, there was a spirited contest for Vice President in that election (section 2.2).

[76] Senate Report No. 22, 19th Congress, 1st Session (1826). Page 4. The report is quoted in footnote 15 of *Ray v. Blair* 343 U.S. 214. 1952. https://www.law.cornell.edu/supremecourt/text/343/214

electors chose not to vote for their party's vice-presidential nominee either to honor or snub a candidate they knew, at the time they cast their vote, was going to win or lose the office.

- **Accidentally cast electoral vote**: In 2004 in Minnesota, an elector accidentally wrote an unintended name on his ballot.
- **Grand-standing votes for President**: 22 electors cast a deviating vote for President knowing, at the time they voted, that their vote would not possibly affect the outcome of the election in the Electoral College. Seven of these 22 deviating votes were cast in the 2016 Trump–Clinton race.
- **Samuel Miles in 1796—the only true faithless elector**: Federalist Samuel Miles' vote in the Electoral College for Republican Thomas Jefferson in 1796 was the only instance when an elector might have thought—at the time that he cast his vote—that his vote might affect the national outcome for President.

Table 3.2 shows the exceptional electoral votes for President (but not Vice President).[77,78,79,80]

3.7.1. The 18 absences due to health or travel difficulties

In 1789, 1792, 1808, 1812, 1816, 1820, and 1832, between one and four presidential electors were absent from the Electoral College meeting due to health or travel difficulties.[81]

In 1845, Congress passed a law allowing the states to pass laws for filling vacancies that occur in the Electoral College after Election Day.[82] These state laws typically empower the electors present at the Electoral College meeting to replace an elector who is absent due to illness, death, resignation, disqualification, travel difficulties, or other reason. These laws have eliminated this particular problem.

---

[77] Note that in the four presidential elections prior to ratification of the 12th Amendment in 1804, each elector cast two undifferentiated votes.

[78] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 159.

[79] There were arguably three additional faithless electors in the 1796 presidential election, although this argument does not have widespread support among historians. As *Congressional Quarterly* notes, "Some historians and political scientists claim that three Democratic-Republican electors voted for Adams. However, the fluidity of political party lines at that early date, and the well-known personal friendship between Adams and at least one of the electors, makes the claim of their being 'faithless electors' one of continuing controversy." See *Congressional Quarterly*. 1979. *Presidential Elections Since 1789*. Second edition. Washington, DC: CQ Press. Page 7.

[80] FairVote. Faithless Electors. http://archive.fairvote.org/?page=973

[81] In 1789, four electors were absent (two from Maryland and two from Virginia). In 1792, three electors were absent (two from Maryland and one from Vermont). In 1808, one elector was absent (from Kentucky). In 1812, one elector was absent (from Ohio). In 1816, four electors were absent (three from Maryland and one from Delaware). In 1820, three electors were absent (one each from Mississippi, Pennsylvania, and Tennessee). In 1832, two electors were absent (from Maryland).

[82] An act to establish a uniform time for holding elections for electors of President and Vice President of the United States in all States of the Union. 5 Stat. 721. January 25, 1845. Page 721. https://www.loc.gov/law/help/statutes-at-large/28th-congress/session-2/c28s2ch1.pdf

Table 3.2 Categories of exceptional electoral votes for President

Election	Electors voting	Cast as expected for President	Absent electors	Death of nominee for President	Accidental vote in 2004	Grand-standing vote	Samuel Miles in 1796
1789	69	65	4				
1792	132	129	3				
1796	139	138					1
1800	138	138					
1804	176	176					
1808	175	168	1			6	
1812	218	217	1				
1816	221	217	4				
1820	232	228	3			1	
1824	261	261					
1828	261	261					
1832	288	286	2				
1836	294	294					
1840	294	294					
1844	275	275					
1848	290	290					
1852	296	296					
1856	296	296					
1860	303	303					
1864	234	234					
1868	294	294					
1872	366	303		63			
1876	369	369					
1880	369	369					
1884	401	401					
1888	401	401					
1892	444	444					
1896	447	447					
1900	447	447					
1904	476	476					
1908	483	483					
1912	531	531					
1916	531	531					
1920	531	531					
1924	531	531					
1928	531	531					
1932	531	531					
1936	531	531					
1940	531	531					
1944	531	531					
1948	531	530				1	
1952	531	531					
1956	531	530				1	
1960	537	536				1	
1964	538	538					
1968	538	537				1	
1972	538	537				1	
1976	538	537				1	
1980	538	538					
1984	538	538					
1988	538	537				1	
1992	538	538					
1996	538	538					
2000	538	537				1	
2004	538	537			1		
2008	538	538					
2012	538	538					
2016	538	531				7	
2020	538	538					
Total	**24,068**	**23,963**	**18**	**63**	**1**	**22**	**1**

3.7.2. The 63 deviating votes cast after the death of a presidential nominee in 1872

The largest single bloc of exceptional electoral votes was cast as a result of the death of the 1872 Democratic presidential nominee between Election Day and the Electoral College meeting.

In the November election, Horace Greeley had won 63 electoral votes to Republican Ulysses S. Grant's 286. After Greeley's death, his 63 electors scattered their votes among Benjamin Gratz Brown (Greeley's vice-presidential running mate) and three others.

3.7.3. The eight deviating votes cast after the death of a vice-presidential nominee in 1912

In 1912, incumbent Republican President William H. Taft and incumbent Vice President James S. Sherman won eight electoral votes, while Woodrow Wilson won 435 and former President Theodore Roosevelt won 88. After Sherman died before the Electoral College meeting, the eight Republican presidential electors voted for Nicholas Murray Butler.

3.7.4. The 67 deviating votes for Vice President in five 19th-century elections

1812 election

In 1812, three Federalist electors refused to support Jared Ingersoll, their party's vice-presidential nominee. Instead, they voted for Elbridge Gerry, the vice-presidential candidate for the Democratic-Republican Party. The Democratic-Republican ticket headed by James Madison was the known runaway winner of the Electoral College (winning in the Electoral College by a 128–89 margin). That is, the three Federalist electors who snubbed Ingersoll knew, at the time they voted, that their votes would merely decrease the number of electoral votes for a candidate who had already lost.

1828 election

In 1828, seven Democratic electors from Georgia refused to support John Calhoun, the party's vice-presidential nominee, and instead voted for William Smith. The Democratic ticket headed by Andrew Jackson was the known runaway winner of the Electoral College (with 178 of the 261 electoral votes). Thus, Calhoun easily won the vice-presidency despite the loss of these seven electoral votes. These seven electors knew, at the time they voted, that their votes snubbing Calhoun would not prevent Calhoun from becoming Vice President.

1832 election

In 1832, all 30 Democratic electors from Pennsylvania refused to support Martin Van Buren, the party's vice-presidential nominee and instead voted for William Wilkins. The Democratic ticket headed by incumbent President Andrew Jackson was the known runaway winner of the Electoral College (with 219 of the 288 electoral votes). Van Buren easily won the vice-presidency in the Electoral College despite the loss of these 30 electoral votes from Pennsylvania. These electors knew, at the time they voted, that their votes snubbing Van Buren were not going to prevent Van Buren from becoming Vice President.

1836 election

In the 1836 election, 23 Democratic presidential electors from Virginia did not vote for their party's vice-presidential nominee, Richard M. Johnson of Kentucky.

Because Johnson was living with an African-American woman at the time, the Virginia delegation at the Democratic Party's national convention in Baltimore in 1835 announced that they were adamantly opposed to Johnson's nomination for Vice President.

Nonetheless, Johnson was nominated by more than a two-to-one margin at the convention.

Opposition to Johnson persisted after the convention. The 23 Democrats nominated to be electors from Virginia announced that they would not support Johnson in the Electoral College.

In the election, Martin Van Buren, the Democratic presidential nominee won both Virginia and a comfortable margin in the Electoral College.

All 23 of Virginia's Democratic electors dutifully voted for Van Buren, their party's nominee for President. They then voted for William Smith, instead of Johnson, for Vice President.

As a result, Johnson did not receive an absolute majority of the electoral votes, and the election of the Vice President was thrown into the U.S. Senate.[83]

However, the Democrats controlled the Senate by a large margin, and Johnson won the vice-presidency by an overwhelming 33–16 party-line vote.[84]

Given the fact that the Virginia delegation to the nominating convention announced their vigorous opposition to Johnson, and that the Virginia Democratic Party's 23 nominees for elector announced their opposition to Johnson prior to Election Day, it would be inaccurate to characterize these 23 deviating electoral votes as being "unexpected"—much less "faithless." That is, the Virginia electors did exactly what they said they would do.

Given the Democratic Party's overwhelming strength in the U.S. Senate, the 23 deviating Virginia electors knew, at the time they voted, that their snubbing Johnson in the Electoral College was not going to prevent Johnson from becoming Vice President.

1896 election

In 1896, two political parties nominated William Jennings Bryan as their presidential candidate—something that was very common in the 19th century.

The Democratic Party nominated Arthur Sewall for Vice President, but the People's Party nominated Thomas Watson for Vice President.

The People's Party won 31 electoral votes for their Bryan-Watson ticket; however, four of their presidential electors voted for the Democratic Party's nominee for Vice President (namely Arthur Sewall).

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[83] Stanwood, Edward. 1924. *A History of the Presidency from 1788 to 1897*. Boston, MA: Houghton Mifflin Company. Pages 182–188.

[84] Sibley, Joel H. 2002. Election of 1836. In Schlesinger, Arthur M., Jr. and Israel, Fred L. (editors). *History of American Presidential Elections 1878–2001*. Philadelphia, PA: Chelsea House Publishers. Volume 2. Page 600.

In any case, the Republican ticket headed by William McKinley was the known runaway winner of the Electoral College (with a 271–176 win). In other words, the four electors from the People's Party switched their votes between two vice-presidential nominees already known to be losers.

3.7.5. Accidental electoral vote in 2004

In 2004, one of Minnesota's 10 Democratic presidential electors accidentally voted for John Edwards for both President and Vice President (figure 3.5). Afterwards, all 10 of the Democratic presidential electors said that they had intended to vote for John Kerry for President and John Edwards for Vice President. This accidentally cast electoral vote had no effect on the national outcome, and incumbent President George W. Bush won the Electoral College with 286 of 538 electoral votes.

3.7.6. The 22 grand-standing votes for President

Now let's consider various cases when an elector cast a grand-standing vote for President.[85,86,87]

1808 election

In 1808, six of New York's 19 presidential electors voted for George Clinton instead of James Madison. These six votes were cast in an apparent gesture of respect to Clinton, who was the sitting Vice President at the time and who had previously served as New York's first Governor (between 1777 and 1795). Vice President Clinton had not been nominated for President by either major party in 1808. Thus, he was poised to become the first Vice President not to advance to the presidency. Madison was the runaway favorite when the Electoral College met (with 122 of the 176 electoral votes). That is, these six New York electors knew, at the time they cast their unexpected electoral votes for Clinton, that their courtesy gesture was not going to affect the national outcome.

1820 election

In 1820, James Monroe was uncontested in the presidential election. William Plummer, Sr., a New Hampshire Democratic-Republican presidential elector (who had been expected to vote for Monroe), voted instead for John Quincy Adams. Plummer's vote prevented Monroe from receiving a unanimous vote in the Electoral College (as George Washington had in 1789 and 1792). Plummer knew that his single unexpected vote was not going to affect the national outcome. Indeed, he stated that he had cast his unexpected vote out of respect for Washington.

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[85] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 159.

[86] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Pages 122–127.

[87] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 53–60.

1948 election

In 1948, the Democratic National Convention adopted a civil-rights provision as part of its national platform—thus splitting the Party.

Segregationist Strom Thurmond ran for President as the Dixiecrat presidential nominee and won 38 electoral votes by carrying four states in the November election (Alabama, Louisiana, Mississippi, and South Carolina).

Thurmond received 73,815 popular votes in Tennessee, but incumbent Democratic President Harry Truman carried the state with 270,402 votes. Republican nominee Thomas E. Dewey received 202,914 votes.

Although Preston Parks had been nominated to be a presidential elector by the Tennessee Democratic Party, he voted for Thurmond instead of Truman.

Truman was known to be the winner in the Electoral College (with 303 of the 531 electoral votes). That is, Parks knew, at the time that he voted, that his deviating vote was not going to affect the national outcome.

Faithless presidential electors continued to play a role in presidential politics in southern states during the period before and after passage of the civil rights legislation of the mid-1960s.

1956 election

In 1956, W.F. Turner, a Democratic elector in Alabama, voted for Walter B. Jones, a local judge, instead of his party's national nominee, Adlai Stevenson. Incumbent President Dwight D. Eisenhower was the known overwhelming winner of the Electoral College at the time when it met (with 457 of the 531 electoral votes). That is, Turner knew, at the time that he voted, that his deviating vote was not going to affect the national outcome.

1960 election

In 1960, Henry D. Irwin, an Oklahoma Republican elector, voted for segregationist Senator Harry F. Byrd (a Democrat) instead of his party's nominee, Richard Nixon. John F. Kennedy was the known winner of the Electoral College at the time when it met (with a comfortable 303 of the 537 electoral votes).

1968 election

In 1968, Lloyd W. Bailey, a North Carolina Republican elector, voted for Governor George Wallace (that year's nominee of the American Independent Party) instead of Richard Nixon. Nixon was the known winner of the Electoral College at the time when it met (with a comfortable 301 of the 537 electoral votes).

1972 election

In 1972, Roger L. MacBride, a Virginia Republican elector, voted for John Hospers (a Libertarian who ran for President in 1976) instead of incumbent President Richard M. Nixon. Nixon was the runaway winner of the Electoral College at the time when it met (and ended up with 520 of the 538 electoral votes).

Nixon had the unenviable distinction of losing one electoral vote on each of the three

occasions when he ran for President (1960, 1968, and 1972). In 1969, he sent a message to Congress saying that one of the conditions for his support for changing the method of electing the President was "abolition of individual electors" (section 4.7.3).

1976 election

In 1976, Mike Padden, a Republican presidential elector from Washington State, voted for Ronald Reagan (who had lost the presidential nomination to President Gerald Ford at the closely divided Republican nominating convention earlier in the year). Padden's switch between these two Republicans had no effect on the national outcome, because Democrat Jimmy Carter won the Electoral College with 297 of the 538 electoral votes.

1988 election

In 1988, Margaret Leach, a Democratic elector from West Virginia, voted for Lloyd Bentsen for President and Michael Dukakis for Vice President, saying that she thought that the Democratic ticket would have been better in the opposite order. Leach's switch had no effect on the Electoral College winner, because Vice President George H.W. Bush had won an overwhelming 426 of the 538 electoral votes.

2000 election

In 2000, Barbara Lett-Simmons, a Democratic presidential elector from the District of Columbia, did not vote for Al Gore. Instead, she abstained as a protest against the District's lack of representation in Congress. Lett-Simmons' abstention had no effect on the nationwide outcome, because Texas Governor George W. Bush had secured Florida's 25 electoral votes and thus won the Electoral College with 271 electoral votes.

2016 election

In 2016, Hillary Clinton won the national popular vote by 2,868,518 votes; however, 306 Republican presidential electors and 232 Democratic electors were elected on Election Day.

Between Election Day and the Electoral College meeting on December 19, 2016, various politically implausible scenarios were bandied about in a futile attempt to prevent Donald Trump from becoming President.

In an op-ed in the *Washington Post* on November 24, Harvard Law Professor Lawrence Lessig advocated that the Electoral College should choose Hillary Clinton because she had won the national popular vote—a suggestion that would have required at least 38 Republican electors to abandon their own party's national nominee and vote for Clinton.[88]

Another unlikely scenario involved 37 of the 306 Republican electors voting for a Republican other than Donald Trump (perhaps Republican Governor John Kasich of Ohio). In that case, Trump would have received only 269 electoral votes. The choice of President would then have been thrown to the newly elected U.S. House of Representatives (with

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[88] Lessig, Lawrence. 2016. Op-Ed: The Constitution lets the electoral college choose the winner. They should choose Clinton. *Washington Post*. November 24, 2016. https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college-choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0_story.html?utm_term=.401e78c0662f

each state having one vote). The Republicans had an absolute majority of the 50 state delegations—thus creating the possibility of installing a Republican other than Trump.

An even less likely scenario involved all 232 Democratic electors abandoning Clinton and 38 Republican electors abandoning Trump—leaving Trump with only 268 electoral votes. Then, the resulting bipartisan coalition of 270 electors would presumably have elected a Republican other than Trump.

During this period, Peter Chiafalo (a Democratic presidential elector from Washington State) and Michael Baca (a Democratic elector from Colorado) co-founded a group called "Hamilton Electors" to advocate various scenarios by which the Electoral College could choose someone other than Donald Trump when it met on December 19.[89,90,91]

Of course, it was never likely that the precondition for these speculative scenarios (namely defection by 37 or 38 Republican electors) would materialize.

What actually happened in 2016 was considerably tamer—although still unprecedented.

On November 28, *Politi*co reported:

> "Art Sisneros, a Texas Republican elector … confirmed Monday that he would quit the position.… He argued that Trump is unqualified to be president—but also wrote that he knows he can't prevent it from happening."[92]

When the remaining Texas Republican electors met in Austin on December 19, they replaced Sisneros with someone who was willing to vote for Donald Trump.

However, two Texas electors did not resign and, instead, voted for someone other than Donald Trump at the Electoral College meeting.

One of the Republican electors, Christopher Suprun, explained his position on December 5 in an op-ed in the *New York Times*:

> "Alexander Hamilton provided a blueprint…. *Federalist* 68 argued that an Electoral College should determine if candidates are qualified, not engaged in demagogy, and independent from foreign influence. Mr. Trump shows us again and again that he does not meet these standards."[93,]

When the Electoral College met, Suprun voted for Republican Ohio Governor John Kasich.[94]

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[89] Charles, Guy-Uriel and Fuentes-Rohwer, Luis E. 2020. Chiafalo: Constitutionalizing Historical Gloss in Law & Democratic Politics. *Harvard Law & Policy Review*. Volume 15. Number 1. Winter 2020. Pages 16–17. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP107.pdf

[90] O'Donnell, Lilly. 2016. Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt. *Atlantic*. November 21, 2016. https://www.theatlantic.com/politics/archive/2016/11/meet-thehamilton-electors-hoping-for-an-electoral-college-revolt/508433/

[91] Wegman, Jesse. 2020. *Let the People Pick the President: The Case for Abolishing the Electoral College*. New York, NY: St. Martin's Press. Pages 1–10.

[92] Cheney, Kyle. 2016. Texas elector who criticized Trump says he's resigning. *Politico*. November 28, 2016. https://www.politico.com/story/2016/11/art-sisneros-texas-electoral-college-resigns-231874

[93] Suprun, Christopher. 2016. Op-Ed: Why I Will Not Cast My Electoral Vote for Donald Trump. *New York Times*. December 5, 2016. https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html?_r=0

[94] Messerr, Olivia. 2016. Gov. Greg Abbott Goes After Texas Elector. *The Daily Beast*. December 20, 2016. https://www.thedailybeast.com/cheats/2016/12/20/greg-abbott-goes-after-texas-elector

A second Texas Republican elector, Bill Greene, voted for former Texas Republican Congressman Ron Paul instead of Trump.

As a result of these two deviating Republican votes for President, Donald Trump received only 304 electoral votes when the Electoral College met—even though 306 Republican presidential electors had been elected on Election Day.[95]

As to the Democratic side, the political reality was that—in the absence of 37 or 38 Republican defections—the national outcome was not going to be affected by anything that the 232 Democratic electors did.

Nonetheless, there were five Democratic electors whose votes for President were cast and counted for someone other than Clinton when the Electoral College met on December 19.

- **Four Democratic electors from Washington State**: Bret Chiafalo, Levi Guerra, and Esther John voted for Republican Colin Powell. Robert Satiacum voted for Faith Spotted Eagle, a Native American political activist who had been prominent in attempting to block the Keystone XL and the Dakota Access Pipelines.[96]
- **One Democratic elector from Hawaii**: David Mulinix of Hawaii voted for Vermont U.S. Senator Bernie Sanders (who had lost the Democratic nomination fight to Hillary Clinton earlier in the year).[97]

As a result of these five deviating votes for President, Hillary Clinton received only 227 electoral votes when the Electoral College met on December 19—even though 232 Democratic presidential electors had been elected on Election Day.[98]

Overall, seven electoral votes for President (two Republican and five Democratic) were cast and counted for persons other than Trump and Clinton.

In addition, there were five Democratic electors (three in Colorado, one in Minnesota, and one in Maine) who attempted to cast their electoral votes for someone other than Clinton.

In Colorado, three Democratic electors publicly stated, after Election Day, that they wanted to cast their electoral votes for someone other than Hillary Clinton—despite having signed a pledge, prior to Election Day, to vote for their party's nominee.

On December 6, two of these Colorado Democratic electors (Polly Baca and Robert Nemanich) sought a temporary restraining order and preliminary injunction against enforcement of Colorado's 1959 "Faithful Elector" law.[99] That law required presidential electors to vote in accordance with the pledge that they had previously signed prior to Election Day.[100]

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[95] National Archives. *2016 Electoral College Results*. https://www.archives.gov/electoral-college/2016

[96] Washington State's 2016 Certificate of Election shows the four deviating electoral votes for President along with eight electoral votes for Clinton at https://www.archives.gov/files/electoral-college/2016/vote-washington.pdf

[97] Hawaii's 2016 Certificate of Election shows the one deviating electoral vote for President at https://www.archives.gov/files/electoral-college/2016/vote-hawaii.pdf

[98] National Archives. *2016 Electoral College Results*. https://www.archives.gov/electoral-college/2016

[99] Colo. Rev. Stat. § 1-4-304(5).

[100] *Polly Baca and Robert Nemanich v. Hickenlooper*. Complaint. December 6, 2016. http://ia902801.us.archive.org/21/items/gov.uscourts.cod.167359/gov.uscourts.cod.167359.1.0.pdf

Polly Baca and Robert Nemanich both argued in their complaint that they had a right to vote for whomever they wanted and that Colorado's law was therefore unconstitutional.

U.S. District Court Judge Wiley Daniel wrote a detailed opinion denying the request,[101] finding that the plaintiffs were unlikely to prevail if a full hearing were to be conducted on the issue.[102] He ruled from the bench that the plaintiffs were engaging in a "political stunt."[103]

The plaintiffs then appealed to the Tenth Circuit, which denied their request.[104]

At that point, Polly Baca and Robert Nemanich "felt intimidated and pressured to vote against their determined judgment," and they cast votes for Hillary Clinton.[105]

When the Electoral College met in Denver on December 19, Democratic elector Michael Baca (no relation to Polly Baca) proceeded to cast his electoral vote for President for Ohio Republican Governor John Kasich.

Acting under authority of Colorado's 1959 Faithful Elector law, the Colorado Secretary of State promptly cancelled Michael Baca's deviating vote and declared his office vacant.

The choice of a replacement elector then fell to the eight remaining Colorado electors present at the meeting. A majority of the remaining electors (six of the eight) selected a replacement—with electors Polly Baca and Robert Nemanich not agreeing to the replacement. The replacement elector (Celeste Landry) then duly cast her vote for Clinton.[106]

Thus, in the end, Clinton received all nine of Colorado's electoral votes—that is, Colorado's Faithful Elector law delivered its intended result.

Something similar happened in Minnesota. As mentioned earlier in this section, an "accidental" electoral vote had been cast in that state in 2004 by an absent-minded elector. As a result, the legislature in 2010 enacted a version of the Uniform Faithful Presidential Electors Act.[107]

In 2016, Democratic elector Muhammad Abdurrahman voted for Bernie Sanders for President. His deviating vote was promptly replaced under authority of the 2010 Minnesota law. Thus, Hillary Clinton received all 10 of Minnesota's electoral votes—that is, Minnesota's law delivered its intended result.[108]

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[101] *Polly Baca and Robert Nemanich v. Hickenlooper*. 2016. Opinion. https://casetext.com/case/baca-v-hickenlooper

[102] Frank, John. 2016. Judge rejects injunction request in Colorado elector suit seeking to block Donald Trump. *Denver Post*. December 12, 2016. https://www.denverpost.com/2016/12/12/trump-lawyers-intervene-colorado-lawsuit-free-electors/

[103] *Ballot Access News*. January 1, 2017. Page 1. www.ballot-access.org

[104] *Polly Baca and Robert Nemanich v. Hickenlooper*. 2016. Opinion. https://casetext.com/case/baca-v-hickenlooper

[105] *Baca v. Colorado Dep't of State*. 935 F.3d 887, 945 (10th Cir. 2019). August 20, 2019. Page 6. https://scholar.google.com/scholar_case?case=7418016276739753369&q=Baca+v.+Colorado+Dep%E2%80%99t+of+State,+935+F.3d+887&hl=en&as_sdt=2006&as_vis=1

[106] Colorado's 2016 Certificate of Election shows Michael Baca's removal from office, the choice of his replacement, and the certification of nine electoral votes for Clinton for President. See https://www.archives.gov/files/electoral-college/2016/vote-colorado.pdf

[107] Information about the Uniform Faithful Presidential Electors Act advocated by the Uniform Law Commission and its status in various states is at https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d

[108] Minnesota's 2016 Certificate of Election is at https://www.archives.gov/files/electoral-college/2016/vote-minnesota.pdf

Maine has a law that requires that presidential electors support the nominee of the political party that nominated them. However, its law lacks the specific enforcement mechanism found in the laws of some other states. The *Portland Press Herald* reported:

> "The initial vote by David Bright, a Democratic elector from Dixmont, was ruled out of order because he cast his ballot for [Vermont Senator Bernie Sanders]."
>
> "When the electors cast ballots a second time, Bright switched his vote and supported Clinton."[109]

Thus, Hillary Clinton received all of the electoral votes to which she was entitled under Maine law—that is, Maine's law delivered its intended result.[110]

In summary, although seven electoral votes were cast and counted for persons other than Clinton or Trump, all of these seven presidential electors knew, at the time they cast their votes in the Electoral College, that their action would not affect the national outcome.

3.7.7. Samuel Miles' faithless electoral vote in 1796

The 1796 presidential election was the first presidential election

- that was contested (George Washington having been the unanimous choice of the presidential electors in 1789 and 1792);
- that occurred after the emergence of competing national political parties;
- in which each of the competing political parties nominated candidates for President and Vice President at a central national meeting (specifically, their party's congressional caucus).

The existence of competing national parties, each running a national campaign aimed at putting their nominees in control of the Executive Branch, made it imperative that the candidates competing for the position of presidential elector support their party's national nominee.

In 1796, Samuel Miles was one of the two Federalist presidential electors chosen in Pennsylvania.

However, Miles unexpectedly voted for Thomas Jefferson (the Republican nominee) instead of John Adams (the Federalist nominee).

As the meeting of the Electoral College in 1796 approached, it was well known that the overall vote for President in the Electoral College between the Federalist Party and the Republican Party would be close—close enough, and uncertain enough, that one electoral vote might possibly affect the national outcome.

In fact, John Adams ended up receiving 71 electoral votes to Jefferson's 68, so that a switch by only two presidential electors would have changed the national outcome (section 2.5).

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[109] Thistle, Scott. 2016. Maine electors cast votes for Clinton, Trump – after protests inside and outside State House. *Portland Press Herald*. December 19, 2016. https://www.pressherald.com/2016/12/19/maine-electoral-college-elector-says-he-will-cast-his-ballot-for-sanders/

[110] Because Maine chooses two of its four presidential electors by congressional district, and because Trump carried the state's 2nd congressional district, Clinton received a total of three electoral votes from Maine (one from the 1st congressional district and two statewide).

The Constitution requires that the presidential electors meet on the same day throughout the United States in their separate states—not at a central location.

Given the slow communications of the day (the first railroads did not appear in America until the late 1820s, and the telegraph did not appear in America until 1844), no one could be confident about exactly how many votes Adams and Jefferson would actually receive on the day of the Electoral College meeting. Thus, Samuel Miles would have had reason to believe, at the time he voted, that his single electoral vote very well might determine the overall national outcome. Thus, he qualifies as the nation's only true faithless elector.

3.7.8. *Chiafalo v. Washington* faithless elector case

The Electoral College meetings in 2016 in both Washington State and Colorado led to litigation about the constitutionality of state laws restricting how presidential electors must vote.

Washington State law imposed a $1,000 fine on any presidential elector who violated the pledge to vote for the nominees of the political party that nominated the elector.

Three of the Washington electors who did not vote for Clinton (Levi Guerra, Esther John, and Peter Chiafalo) appealed their fines.

In 2019, the Washington State Supreme Court upheld the constitutionality of the state's Faithful Elector law, saying:

> "The Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors."
>
> "The Constitution does not limit a state's authority in adding requirements to presidential electors, indeed, **it gives to the states absolute authority in the manner of appointing electors**. Thus, it is within a state's authority under article II, section 1 to impose a fine on electors for failing to uphold their pledge."[111] [Emphasis added]

Meanwhile, the U.S. Court of Appeals for the Tenth Circuit reached the opposite conclusion in a case involving Michael Baca, the Colorado Democratic elector who had been removed from the Electoral College in 2016 because he had not voted for Clinton. The Tenth Circuit concluded:

> "The text of the Constitution makes clear that **states do not have the constitutional authority to interfere with presidential electors** who exercise their constitutional right to vote for the President and Vice President candidates of their choice."[112] [Emphasis added]

Given the disagreement between a federal appeals court and a state supreme court,

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[111] *Guerra v. Washington State*. In re Guerra, 193 Wash. 2d 380, 441 P. 3d 807. May 23, 2019. Pages 16–17. https://law.justia.com/cases/washington/supreme-court/2019/95347-3.html

[112] *Baca v. Colorado Dep't of State*. 935 F.3d 887, 945 (10th Cir. 2019). August 20, 2019. Page 93. https://scholar.google.com/scholar_case?case=7418016276739753369&q=Baca+v.+Colorado+Dep%E2%80%99t+of+State,+935+F.3d+887&hl=en&as_sdt=2006&as_vis=1

the unprecedented number of deviating electoral votes in 2016, and the approach of the 2020 election, the U.S. Supreme Court agreed to hear the issue.

On July 6, 2020, the U.S. Supreme Court upheld the judgment of the Washington State Supreme Court (and rejected the position of the Tenth Circuit).

The U.S. Supreme Court was unanimous in ruling that states could require presidential electors to vote faithfully.

Eight of the nine justices signed Justice Elena Kagan's majority opinion in *Chiafalo v. Washington*.[113]

Justice Thomas wrote a concurring opinion saying that the 10th Amendment was the appropriate basis for deciding the case, and Justice Gorsuch concurred with part of Thomas' concurring opinion.

See section 9.1.1. section 9.1.13, section 9.1.14, section 9.14.4, and section 9.37.2 for additional discussion and quotations from these opinions.

3.7.9. Faithful Elector laws and the Uniform Faithful Presidential Electors Act

Thirty-three states and the District of Columbia have laws that regulate the way that a presidential elector should vote.

Many of these state laws simply assert that a presidential elector is obligated to vote for the nominee of the political party that nominated the elector, while containing no specific enforcement mechanism.[114]

Nonetheless, even in the absence of a specific enforcement mechanism in Maine's state law, a deviating electoral vote was declared "out of order" in 2016 in that it was contrary to state law. That electoral vote was then recorded in favor of the presidential candidate whose name appeared on the state's ballot (section 3.7.6).

North Carolina led the way in passing an especially effective faithful elector law. It provides:

- if a presidential elector casts a deviating vote, that action constitutes resignation from the office of elector;
- a deviating vote cast is cancelled, and
- a replacement will be appointed by the remaining electors present at the Electoral College meeting.[115]

Specifically, North Carolina law (section 163-212) provides:

> "Any presidential elector having previously signified his consent to serve as such, who fails to attend and vote for the candidate of the political party which nominated such elector, for President and Vice-President of the United States at the time and place directed in G.S. 163-210 (except in case of sickness or other unavoidable accident) shall forfeit and pay to the State five hundred dollars ($500.00), to be recovered by the Attorney General in the Superior Court

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

[114] Berns, Walter (editor). 1992. *After the People Vote: A Guide to the Electoral College*. Washington, DC: The AEI Press. Pages 10–13 and 86–88.

[115] *Ibid*. Pages 12 and 87–88.

> of Wake County. In addition to such forfeiture, refusal or failure to vote for the candidates of the political party which nominated such elector shall constitute a resignation from the office of elector, his vote shall not be recorded, and the remaining electors shall forthwith fill such vacancy as hereinbefore provided."

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws or NCCUSL) is a nongovernmental body, formed in 1892, that has produced more than 200 recommended uniform state laws over the years, including the widely used Uniform Commercial Code.

In 2010, the Commission used the North Carolina law as a starting point and promulgated its "Uniform Faithful Presidential Electors Act." The Commission urged state legislatures to adopt its recommended law.

The Uniform Faithful Presidential Electors Act:

- requires candidates for the position of presidential elector to sign a pledge of faithfulness;
- calls for the election of both electors and alternate electors by each party;
- specifies that any attempt by an elector to vote in violation of his or her pledge constitutes resignation from the office of elector; and
- provides a mechanism for immediately filling the vacancy with a pre-designated alternate or other replacement.

As of July 2024, the Act has been enacted by 14 states:

- California
- Delaware
- Idaho
- Illinois
- Indiana
- Hawaii
- Minnesota
- Montana
- Nebraska
- Nevada
- North Dakota
- Tennessee
- Virginia
- Washington State.[116,117]

The National Popular Vote organization has endorsed the Uniform Faithful Presidential Electors Act.

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[116] Information about the Uniform Law Commission's proposed law and its status in various states is at https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d The text of the proposed law is at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c98d06fd-0be3-aff9-a9ab-af16d701c771

[117] Washington State passed a version of the Uniform Faithful Presidential Electors Act in 2019—that is, after the 2016 election, but before the U.S. Supreme Court case decided in July 2020.

3.8. VOTING FOR INDIVIDUAL PRESIDENTIAL ELECTORS

Notwithstanding the now-universal use of the short presidential ballot, it is still theoretically possible for voters in some states to cast separate votes for individual presidential-elector candidates.

For example, section 23–15–431 of Mississippi election law provides:

> "Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office, are herein referred to as irregular ballots. In voting for presidential electors**,** a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially of persons not in nomination, or wholly of persons not in nomination by any party."[118]

In addition, Mississippi election law provides:

> "No electronic voting system … shall be … used … unless it shall … permit each voter … to vote individually for the electors of his choice."[119]

An examination of the 2020 Certificates of Ascertainment from Mississippi, the other 49 states, and the District of Columbia uncovered no instances of any votes cast for individual presidential-elector candidates.

3.9. WRITE-IN VOTES FOR PRESIDENT

Write-in votes for the offices of President and Vice President are inherently more complex than those for other offices, because voters are electing a slate of presidential-elector candidates.

Many states allow such write-in votes.

For example, Minnesota law provides two ways by which write-in votes may be cast for presidential electors:

- **Advance filing of write-ins**: Under this approach, supporters of a write-in presidential slate may file a slate of presidential electors prior to Election Day with the Secretary of State. Such advance filing makes write-in voting more convenient, because it enables the voter to write in just two names, instead of writing in the names of numerous individual candidates for presidential elector.
- **Election-Day write-ins**: Under this approach, there is no advance filing, and the voter must write in the names of the individual presidential electors.

Minnesota law implements the method of advance filing of write-ins as follows:

> "(a) A candidate for state or federal office who wants write-in votes for the candidate to be counted must file a written request with the filing office for the office sought no later than the fifth day before the general election. The filing officer shall provide copies of the form to make the request.

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[118] Mississippi election law. Section 23–15–431.

[119] Mississippi election law. Section 23–15–465. Similar statutory provisions are applicable to other voting systems that may be used in Mississippi (e.g., optical mark-reading equipment).

> "(b) A candidate for president of the United States who files a request under this subdivision must include the name of a candidate for vice-president of the United States. The request must also include the name of at least one candidate for Presidential elector. The total number of names of candidates for Presidential elector on the request may not exceed the total number of electoral votes to be cast by Minnesota in the presidential election."[120]

Many other states have similar procedures for advance filing of write-ins.

Minnesota is one of the few states that permit Election-Day write-ins without advance filing. This option is allowed as the consequence of a 1968 opinion of the state's Attorney General.[121] That ruling declared that a presidential write-in vote may be cast by writing between one and 10 names of persons for presidential elector. The Attorney General also ruled that a pre-printed sticker containing the names of between one and 10 presidential electors could be employed. Given the exceedingly small amount of space available for a write-in on Minnesota's ballot (figure 3.2), a pre-printed sticker would appear to be the only practical way to cast such a vote.

In summary, it is possible for an individual candidate for presidential elector in Minnesota to receive votes in three separate ways:

- by appearing as one of the electors nominated by a political party on the ballot under section 208.03;
- by appearing on a list of electors filed in advance under subdivision 3 of section 204B.09; or
- by receiving a write-in vote for presidential elector (say, by means of a pre-printed sticker) as permitted by the Attorney General's opinion in 1968.

When the Minnesota State Canvassing Board meets, all votes cast for a particular individual candidate for presidential elector, from the three sources mentioned above, are added together. The 10 elector candidates receiving the most votes are elected. Minnesota's Certificate of Ascertainment for 2020 illustrates the reporting of write-in votes for President.[122]

3.10. VOTING BEFORE THE DAYS OF GOVERNMENT-PRINTED BALLOTS

There were no government-printed ballots in the United States until 1888, and there were no government-printed ballots for President anywhere until 1892.

Prior to that, votes in most states were cast by means of printed or hand-written pieces of paper that the voter brought to the polling place. These printed pieces of paper (called "tickets") were typically printed by political parties.[123]

For example, the Republican "ticket" in 1860 in Worcester, Massachusetts (figure 3.6) shows the party's 13 candidates for presidential elector (two state-level and 11 district-

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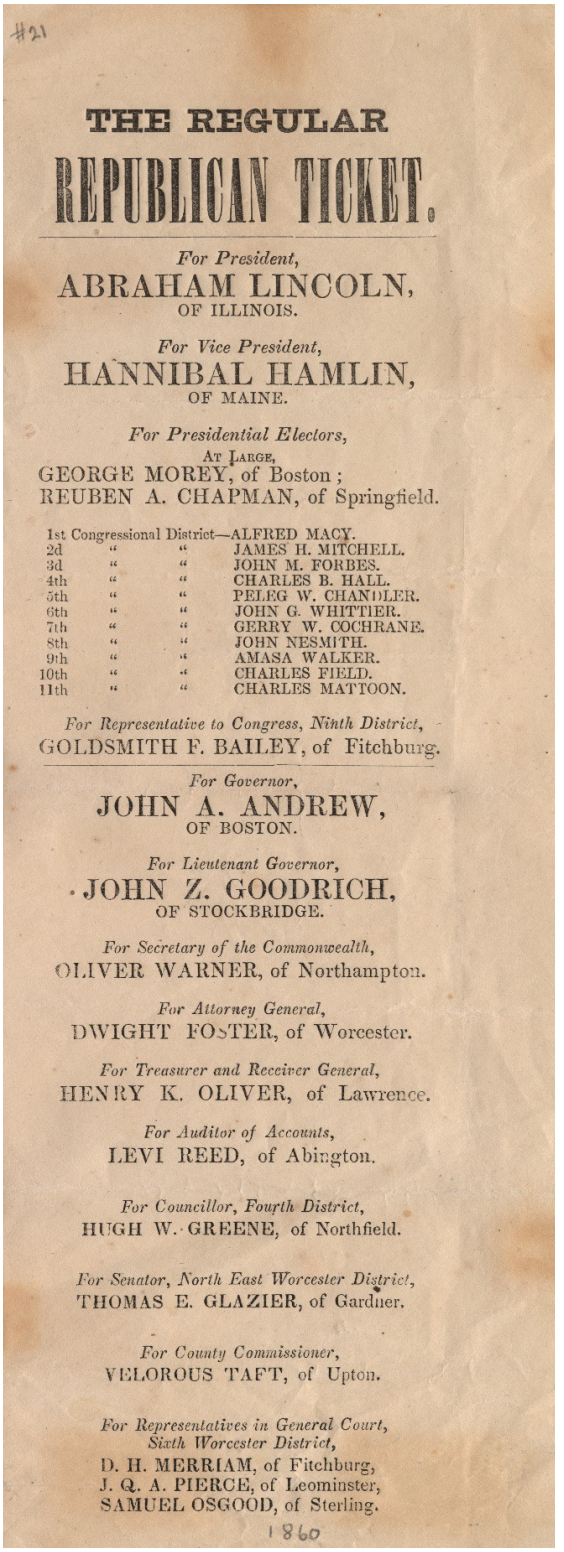
[120] Minnesota election law. Section 204B.09, subdivision 3.

[121] Op. Atty. Gen., 28c–5. October 5, 1968. The question of Election-Day write-ins arose from those desiring to vote for Eugene McCarthy instead of Hubert Humphrey.

[122] Minnesota's 2020 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2020/ascertainment-minnesota.pdf

[123] For example, see the 1788 Delaware law quoted in section 2.1.4.



#21

THE REGULAR
REPUBLICAN TICKET.

For President,
ABRAHAM LINCOLN,
OF ILLINOIS.

For Vice President,
HANNIBAL HAMLIN,
OF MAINE.

For Presidential Electors,
AT LARGE,
GEORGE MOREY, of Boston;
REUBEN A. CHAPMAN, of Springfield.

1st	Congressional	District—	ALFRED MACY.
2d	"	"	JAMES H. MITCHELL.
3d	"	"	JOHN M. FORBES.
4th	"	"	CHARLES B. HALL.
5th	"	"	PELEG W. CHANDLER.
6th	"	"	JOHN G. WHITTIER.
7th	"	"	GERRY W. COCHRANE.
8th	"	"	JOHN NESMITH.
9th	"	"	AMASA WALKER.
10th	"	"	CHARLES FIELD.
11th	"	"	CHARLES MATTOON.

For Representative to Congress, Ninth District,
GOLDSMITH F. BAILEY, of Fitchburg.

For Governor,
JOHN A. ANDREW,
OF BOSTON.

For Lieutenant Governor,
JOHN Z. GOODRICH,
OF STOCKBRIDGE.

For Secretary of the Commonwealth,
OLIVER WARNER, of Northampton.

For Attorney General,
DWIGHT FOSTER, of Worcester.

For Treasurer and Receiver General,
HENRY K. OLIVER, of Lawrence.

For Auditor of Accounts,
LEVI REED, of Abington.

For Councillor, Fourth District,
HUGH W. GREENE, of Northfield.

For Senator, North East Worcester District,
THOMAS E. GLAZIER, of Gardner.

For County Commissioner,
VELOROUS TAFT, of Upton.

For Representatives in General Court,
Sixth Worcester District,
D. H. MERRIAM, of Fitchburg,
J. Q. A. PIERCE, of Leominster,
SAMUEL OSGOOD, of Sterling.

1860

Figure 3.6 Republican Party ticket for Worcester, Massachusetts in 1860 election

level) that were supporters of Abraham Lincoln for President and Hannibal Hamlin for Vice President. The ticket also lists the party's candidates for U.S. Representative, Governor, five other statewide offices, two local offices, State Senator, and State Representative.

Figure 3.7 shows the Republican ticket in 1872 for Ward 10 in Boston, Massachusetts, including the party's 13 candidates for presidential elector (two state-level and 11 district-level) that were supporters of Ulysses S. Grant for President and Henry Wilson for Vice President. The ticket also shows numerous other candidates.

In some states, voting was *viva voce*.

3.11. VOTING ON GOVERNMENT-PRINTED BALLOTS

Government-printed ballots were first used in 1888 in a Louisville, Kentucky, city election.

The first state to use government-printed ballots for state and federal offices was Massachusetts in 1889 (followed by Indiana in 1890).

This approach spread quickly, and a majority of the states had government-printed ballots for President by 1892. However, Georgia did not have government-printed ballots until 1922, and South Carolina not until 1950. North Carolina permitted privately printed ballots until 1929, even though there were also government ballots in the state starting in 1901.

3.12. FUSION VOTING

Before the era of government-printed ballots, "fusion voting" was the natural way of voting.

Most voting in the United States was by means of a printed piece of paper (typically produced by a political party) brought to the polls by the individual voter. These tickets typically contained the names of all of the party's nominees for the various offices being filled at a given election.

It was common for a candidate to be nominated by more than one political party or organization. Therefore, a candidate's name would appear on the "ticket" of more than one party. When the votes were counted, a candidate would be credited with a vote for each voter-supplied ballot paper on which his name appeared. That is, all votes in favor of a given candidate were "fused" together.

The transition to government-printed ballots necessitated the creation of detailed legal procedures for gaining access to the ballot.

That transition was often accompanied by restrictions on the ability of a candidate to be nominated by more than one political party.

In "full fusion" voting, the names of a candidate would appear on a government-printed ballot multiple times—one time for each political party that nominated the candidate.

However, during the transition to government-printed ballots that occurred in the late 19th century and early 20th century, more and more states decided to prohibit a candidate from running as the nominee of more than one political party.

Today, full fusion voting exists only in New York State and Connecticut.[124]

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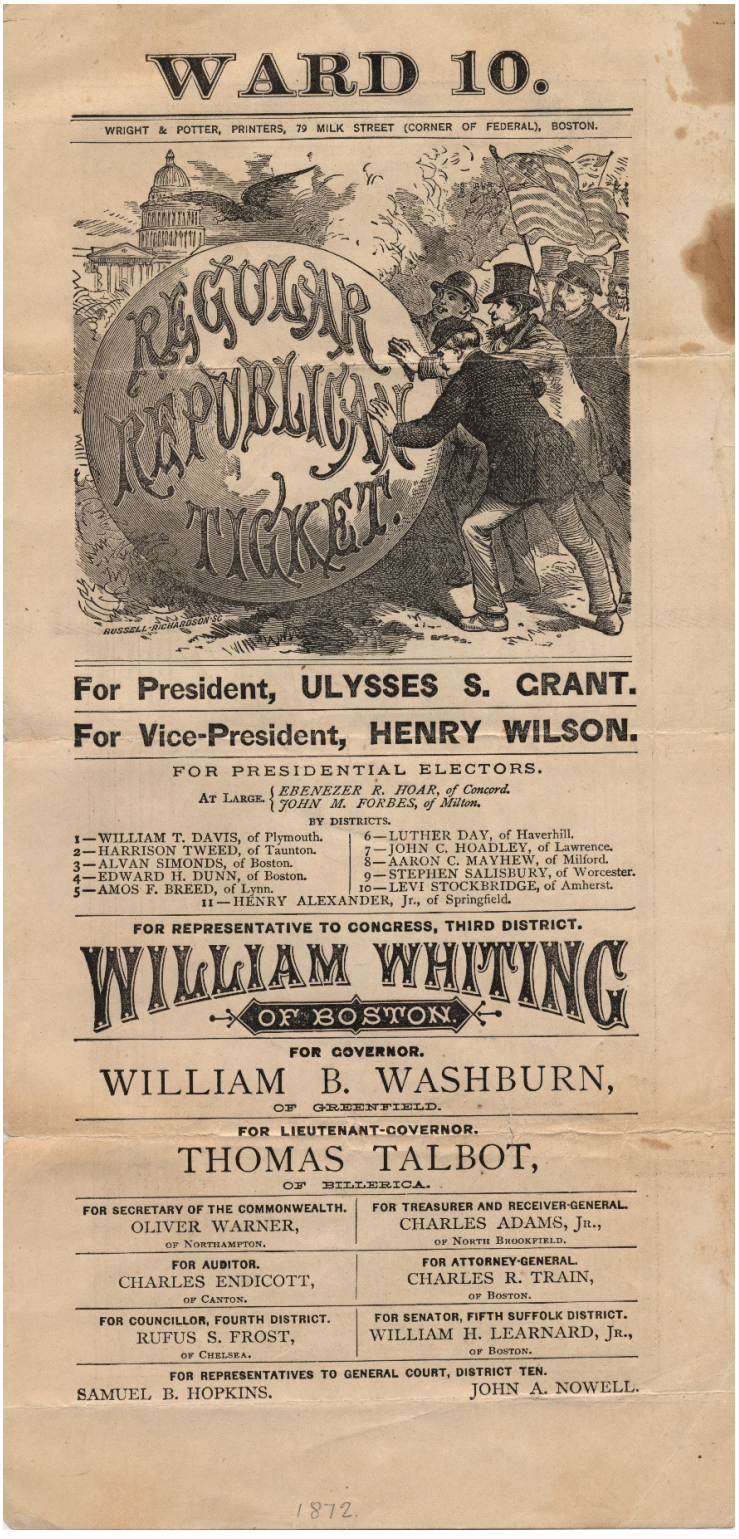
[124] A vestigial form of fusion voting, called "partial fusion" voting, continues to exist in Vermont and Oregon (and is authorized, but not used, in Mississippi). In "partial fusion" voting, a candidate's name appears only once on the ballot, along with a notation listing the various political parties that nominated the candidate. See *Ballotpedia* article on fusion voting at https://ballotpedia.org/Fusion_voting



WARD 10.

WRIGHT & POTTER, PRINTERS, 79 MILK STREET (CORNER OF FEDERAL), BOSTON.

For President, ULYSSES S. GRANT.

For Vice-President, HENRY WILSON.

FOR PRESIDENTIAL ELECTORS.

AT LARGE. { *EBENEZER R. HOAR, of Concord.* / *JOHN M. FORBES, of Milton.*

BY DISTRICTS.

1—WILLIAM T. DAVIS, of Plymouth.
2—HARRISON TWEED, of Taunton.
3—ALVAN SIMONDS, of Boston.
4—EDWARD H. DUNN, of Boston.
5—AMOS F. BREED, of Lynn.
6—LUTHER DAY, of Haverhill.
7—JOHN C. HOADLEY, of Lawrence.
8—AARON C. MAYHEW, of Milford.
9—STEPHEN SALISBURY, of Worcester.
10—LEVI STOCKBRIDGE, of Amherst.
11—HENRY ALEXANDER, Jr., of Springfield.

FOR REPRESENTATIVE TO CONGRESS, THIRD DISTRICT.

WILLIAM WHITING
OF BOSTON.

FOR GOVERNOR.

WILLIAM B. WASHBURN,
OF GREENFIELD.

FOR LIEUTENANT-GOVERNOR.

THOMAS TALBOT,
OF BILLERICA.

FOR SECRETARY OF THE COMMONWEALTH.
OLIVER WARNER,
OF NORTHAMPTON.

FOR TREASURER AND RECEIVER-GENERAL.
CHARLES ADAMS, Jr.,
OF NORTH BROOKFIELD.

FOR AUDITOR.
CHARLES ENDICOTT,
OF CANTON.

FOR ATTORNEY-GENERAL.
CHARLES R. TRAIN,
OF BOSTON.

FOR COUNCILLOR, FOURTH DISTRICT.
RUFUS S. FROST,
OF CHELSEA.

FOR SENATOR, FIFTH SUFFOLK DISTRICT.
WILLIAM H. LEARNARD, Jr.,
OF BOSTON.

FOR REPRESENTATIVES TO GENERAL COURT, DISTRICT TEN.

SAMUEL B. HOPKINS. JOHN A. NOWELL.

1872.

Figure 3.7 Republican Party ticket for Ward 10 of Boston, Massachusetts, in 1872 election

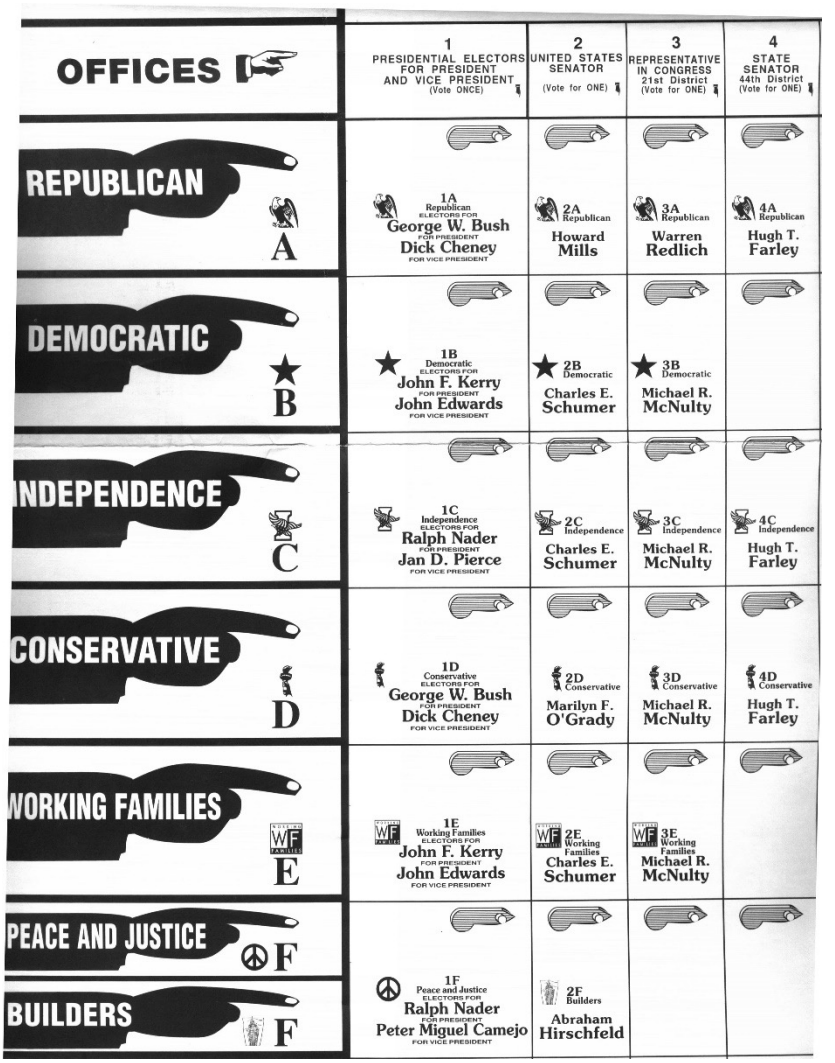


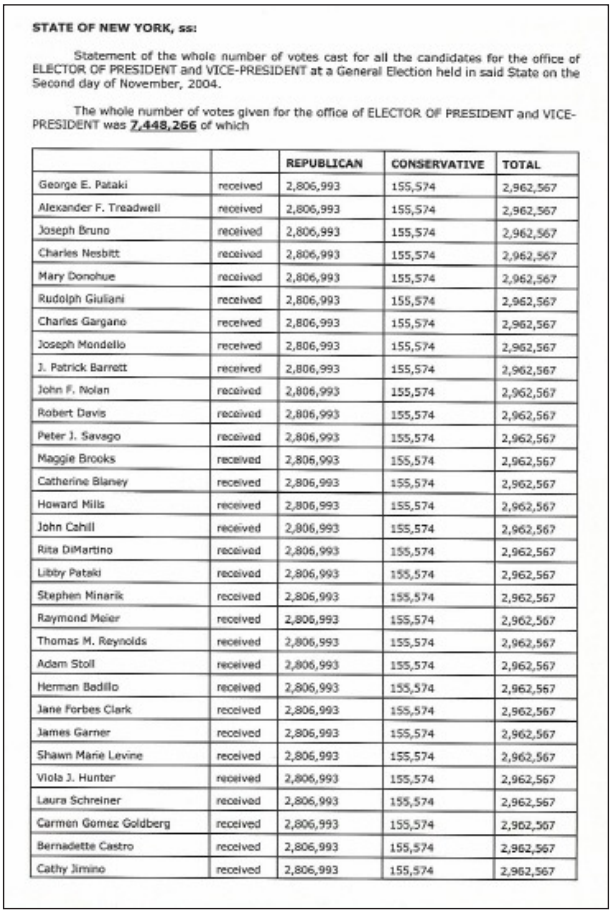
Figure 3.8 2004 New York presidential ballot

In New York, where fusion voting has historically played a uniquely important role, right-of-center candidates usually appear on the ballot as the nominee of both the Republican Party and the Conservative Party. Similarly, left-of-center candidates often appear on both the Democratic Party's line on the ballot and the Working Families Party's line.

Under full fusion voting, the votes that a candidate receives from the lines of each party that nominated the candidate are added together.

Fusion enables a minor party to nominate a major party's candidate for a particular office and thereby make the major-party nominee aware that he or she would not have won without the minor party's support.

Conversely, fusion allows a minor party to nominate a separate candidate for a given office and thereby make the major party aware of the number of votes it could have received if its nominee had been acceptable to the minor party.



STATE OF NEW YORK, ss:

Statement of the whole number of votes cast for all the candidates for the office of ELECTOR OF PRESIDENT and VICE-PRESIDENT at a General Election held in said State on the Second day of November, 2004.

The whole number of votes given for the office of ELECTOR OF PRESIDENT and VICE-PRESIDENT was **7,448,266** of which

		REPUBLICAN	CONSERVATIVE	TOTAL
George E. Pataki	received	2,806,993	155,574	2,962,567
Alexander F. Treadwell	received	2,806,993	155,574	2,962,567
Joseph Bruno	received	2,806,993	155,574	2,962,567
Charles Nesbitt	received	2,806,993	155,574	2,962,567
Mary Donohue	received	2,806,993	155,574	2,962,567
Rudolph Giuliani	received	2,806,993	155,574	2,962,567
Charles Gargano	received	2,806,993	155,574	2,962,567
Joseph Mondello	received	2,806,993	155,574	2,962,567
J. Patrick Barrett	received	2,806,993	155,574	2,962,567
John F. Nolan	received	2,806,993	155,574	2,962,567
Robert Davis	received	2,806,993	155,574	2,962,567
Peter J. Savago	received	2,806,993	155,574	2,962,567
Maggie Brooks	received	2,806,993	155,574	2,962,567
Catherine Blaney	received	2,806,993	155,574	2,962,567
Howard Mills	received	2,806,993	155,574	2,962,567
John Cahill	received	2,806,993	155,574	2,962,567
Rita DiMartino	received	2,806,993	155,574	2,962,567
Libby Pataki	received	2,806,993	155,574	2,962,567
Stephen Minarik	received	2,806,993	155,574	2,962,567
Raymond Meier	received	2,806,993	155,574	2,962,567
Thomas M. Reynolds	received	2,806,993	155,574	2,962,567
Adam Stoll	received	2,806,993	155,574	2,962,567
Herman Badillo	received	2,806,993	155,574	2,962,567
Jane Forbes Clark	received	2,806,993	155,574	2,962,567
James Garner	received	2,806,993	155,574	2,962,567
Shawn Marie Levine	received	2,806,993	155,574	2,962,567
Viola J. Hunter	received	2,806,993	155,574	2,962,567
Laura Schreiner	received	2,806,993	155,574	2,962,567
Carmen Gomez Goldberg	received	2,806,993	155,574	2,962,567
Bernadette Castro	received	2,806,993	155,574	2,962,567
Cathy Jimino	received	2,806,993	155,574	2,962,567

Figure 3.9 Third page of New York's 2004 Certificate of Ascertainment

Figure 3.8 shows the 2004 New York presidential ballot. As can be seen, the Bush–Cheney presidential slate ran with the support of both the Republican Party and the Conservative Party, and the Kerry–Edwards slate ran with the support of both the Democratic Party and the Working Families Party.

Complications can arise when fusion voting is applied to presidential races.

New York law permits two parties to nominate a common slate of presidential electors. For example, the Republican and Conservative parties nominated a joint slate of presidential electors for the 2004 presidential election. Similarly, the Democratic Party and Working Families Party nominated a joint slate of presidential electors.

Figure 3.9 shows the third page of New York's 2004 Certificate of Ascertainment indicating that the Bush–Cheney presidential slate received 2,806,993 votes on the Republican Party line and an additional 155,574 votes on the Conservative Party line, for a grand total of 2,962,567 votes.

Similarly, the fourth page of New York's 2004 Certificate of Ascertainment shows that the Kerry–Edwards slate received 4,180,755 votes on the Democratic Party line and an

additional 133,525 votes on the Working Families Party line, for a grand total of 4,314,280 votes.[125]

New York's 2004 Certificate of Ascertainment states (on its second page) that the 31 presidential electors shared by the Democratic Party and the Working Families Party (i.e., the Kerry–Edwards electors)

> "were, by the greatest number of votes given at said election, duly elected elector of President and Vice-President of the United States."

Similarly, in New York in 2004, Ralph Nader appeared on the ballot as the presidential nominee of both the Independence Party and the Peace and Justice Party.

Oddly, Nader also ran with Jan D. Pierce for Vice President on the Independence Party line, but with Peter Miguel Camejo as his running mate on the Peace and Justice Party line. Thus, there were two different Nader presidential slates in New York in 2004, and each had a different slate of presidential electors.

The Nader–Pierce presidential slate received 84,247 votes on the Independence Party line (shown on the fifth page of New York's 2004 Certificate of Ascertainment). The Nader–Camejo presidential slate received 15,626 votes on the Peace and Justice Party line (shown on the sixth page of New York's 2004 Certificate of Ascertainment).

In the unlikely event that Nader had gotten more support in New York than the major-party presidential candidates, he probably would not have received any electoral votes from New York, because the self-destructive decision to run with two different vice-presidential candidates would have divided his support between two dueling slates of presidential electors.

In California, fusion voting is allowed only for President, and it is rarely used (section 9.30.5).

3.13. UNPLEDGED PRESIDENTIAL ELECTORS

Unpledged electors were a prominent feature of presidential voting in various southern states immediately before and after passage of the civil rights legislation of the mid-1960s.

During that period, the Democratic Party's national platform favored civil rights. In many southern states, the Democratic Party was divided between segregationists and supporters of civil rights.

In Mississippi in 1960, segregationists captured all eight Democratic nominations for the position of presidential elector. These eight candidates presented themselves to the public in November as unpledged electors.

If the Electoral College had been closely divided between the two major parties in 1960, these eight unpledged electors might have held the balance of power between the two major parties. In that event, Mississippi's eight electors might have been able to negotiate concessions on civil rights from one or the other major-party presidential nominees before casting their votes in the Electoral College.

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[125] New York's entire 2004 Certificate of Ascertainment is shown in appendix H (on page 809) of the 4th edition of this book available at https://www.every-vote-equal.com/4th-edition

One alternative scenario was that Mississippi's eight unpledged electors in 1960 would vote in the Electoral College for a segregationist (presumably Virginia Senator Harry F. Byrd), thereby throwing the presidential election into the U.S. House of Representatives. In an election in the House, each state would have had one vote, and 26 out of 50 votes would be required for election. Thus, the 11 southern states almost certainly would have held the balance of power between the two major parties in the House—thus enabling them to negotiate concessions on civil rights from one of the major parties.

On Election Day in November, all eight unpledged candidates won in Mississippi. When the Electoral College met, all eight voted for Senator Byrd.

Mississippi's election law continues to allow for unpledged presidential electors.[126]

Segregationists in Alabama (which had 11 electoral votes) had a similar plan. However, they were unable to capture all 11 Democratic nominations for presidential elector because of a lack of discipline within their ranks.

In the 1960 Democratic primary in Alabama, there were 24 unpledged (segregationist) candidates seeking the 11 Democratic nominations for presidential elector.

In contrast, there were exactly 11 "loyalist" candidates—that is, candidates who were committed to the national party's nominee for President (John F. Kennedy).

With support for the unpledged electors dispersed over 24 candidates, the Democratic primary produced a mixed result—six unpledged nominees and five loyalists.[127]

In the November 1960 election in Alabama, the short presidential ballot (section 2.14) was not in use in all states (as it is today in every state).

Figure 3.10a and figure 3.10b show Alabama's 1960 presidential ballot. The ballot contained 11 separate lines—one for each of the state's 11 presidential electors. Each line contained the names of one elector candidate for each of the five political parties on the ballot. That is, there were 55 separate levers on the voting machine for presidential elector.[128]

John F. Kennedy's name appeared nowhere on the ballot. Instead, the 11 electors of the Alabama Democratic Party appeared under the party's rooster logo and the slogan:

> "White Supremacy—For the Right."

Similarly, there were 11 elector candidates for the Alabama Republican Party, but Richard Nixon's name did not appear anywhere on the ballot.

All 11 Democratic candidates were elected on Election Day in November 1960.

When the Electoral College met in December, John F. Kennedy received the votes of the five loyalist Democratic electors, and Harry F. Byrd of Virginia received the votes of the six unpledged (segregationist) Democratic electors.

The Alabama 1960 presidential ballot is discussed further in section 6.2.3 and section 9.30.12.

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[126] Mississippi election law. Section 23–15–785.

[127] Trende, Sean. 2012. Did JFK lose the popular vote? *Real Clear Politics*. October 19, 2012. https://www.realclearpolitics.com/articles/2012/10/19/did_jfk_lose_the_popular_vote_115833.html

[128] The 1960 Alabama presidential ballot is shown in appendix K of Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. The 1960 Alabama presidential ballot is reprinted as figure 3.10a and figure 3.10b in this book with the permission of Yale University Press.

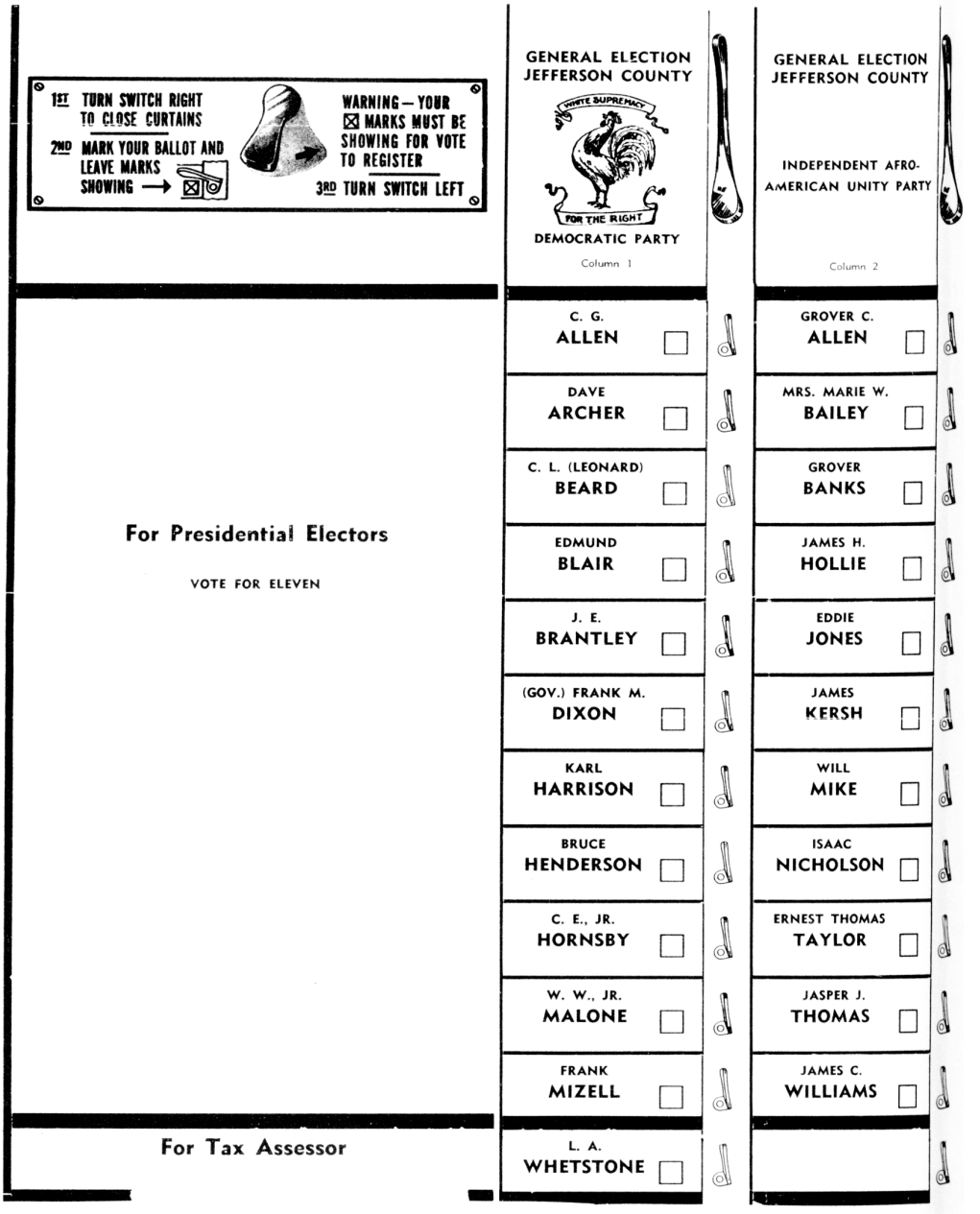

Figure 3.10a First part of 1960 Alabama presidential ballot

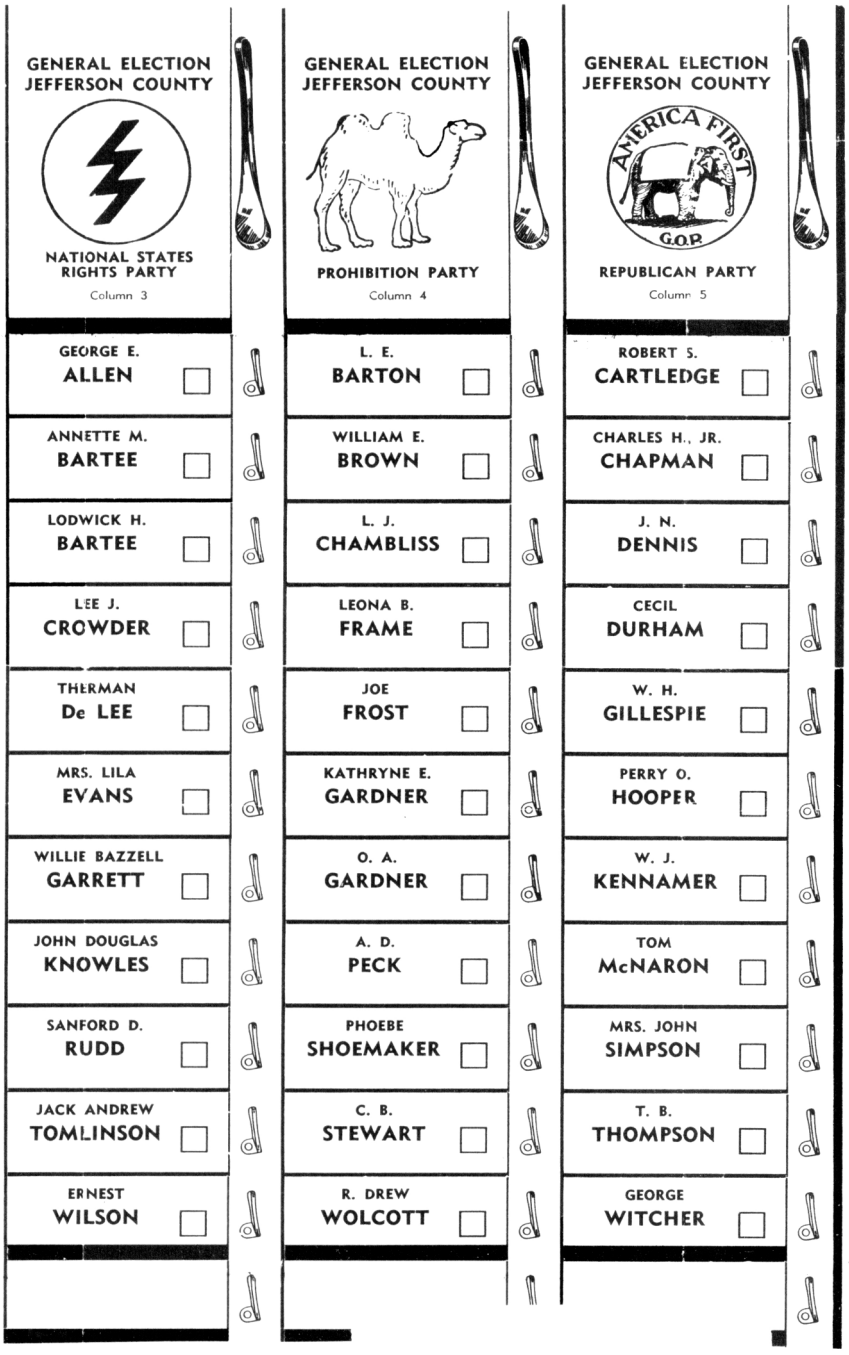

Figure 3.10b Second part of 1960 Alabama presidential ballot

4 Analysis of Seven Proposals for Presidential Election Reform

This chapter analyzes seven proposals for changing the way the President is elected (other than the National Popular Vote Compact discussed elsewhere in this book).

- **Fractional-proportional (Lodge-Gossett) method of allocating electoral votes**: A federal constitutional amendment would be adopted to divide each state's electoral votes proportionally according to the percentage of popular votes received by each presidential candidate in the state—with the calculation *carried out to three decimal places* (section 4.1).
- **Whole-number proportional method of allocating electoral votes**: Laws would be enacted at the state level to divide the state's electoral votes proportionally according to the percentage of popular votes received by each presidential candidate in the state—*in whole-number increments* (section 4.2).
- **Congressional-district method of allocating electoral votes**: The voters would elect one presidential elector in each congressional district and two presidential electors statewide. This method could be implemented either by a federal constitutional amendment or enacted at the state level as Maine and Nebraska have done (section 4.3).
- **Elimination of senatorial electors**: A federal constitutional amendment would be adopted to eliminate the two presidential electors that each state currently receives above and beyond the number warranted by its population (section 4.4).
- **Adding 102 at-large presidential electors**: Under the "National Bonus Plan," a federal constitutional amendment would be adopted to create 102 additional at-large presidential electors and award them to the candidate receiving the most popular votes nationwide (section 4.5).
- **Increasing the number of electoral votes**: Under this approach, Congress would amend existing federal law to increase the number of seats in the U.S. House of Representatives from 435 to, say, 573, thereby increasing the number of electoral votes from 538 to 676 (section 4.6).
- **Direct election constitutional amendment**: A federal constitutional amendment would be adopted to abolish the Electoral College and directly elect the President on the basis of a nationwide popular vote (section 4.7).

Table 4.1 Comparison of seven proposals for presidential election reform

	Guaranteeing the presidency to the national popular vote winner	Making every vote equal	Giving presidential candidates a compelling reason to campaign in every state
Fractional-proportional method	No	No	Yes
Whole-number proportional method	No	No	No
Congressional-district method	No	No	No
Elimination of senatorial electors	No	No	No
Adding 102 at-large bonus electors	No	No	No
Increasing number of electoral votes	No	No	No
Direct election constitutional amendment	Yes	Yes	Yes

We discuss each of these proposed methods in terms of the following three criteria:

- **Guaranteeing the presidency to the national popular vote winner**: Would the method guarantee the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia?
- **Making every vote equal**: Would the method make every voter equal throughout the United States?
- **Giving presidential candidates a compelling reason to campaign in every state**: Would the method improve upon the current situation in which three out of four states and about 70% of voters in the United States are ignored in the general-election campaign for President?

Table 4.1 compares the seven proposals.

4.1. FRACTIONAL-PROPORTIONAL METHOD OF AWARDING ELECTORAL VOTES

4.1.1. Summary

- Under the fractional-proportional method of awarding electoral votes, a federal constitutional amendment would be adopted to divide each state's electoral votes proportionally according to the percentage of popular votes received in that state by each presidential candidate—with the *calculation carried out to three decimal places.*[1]
- The fractional-proportional method would not accurately reflect the national popular vote. For example, if this method is applied to the 2000 election returns, George W. Bush would have received *more* electoral votes than Al Gore—even though Gore received 543,816 more popular votes nationwide. Second-place Presidents are the consequence of this method's four significant built-in inequalities in the value of a vote. This shortcoming applies to all five

[1] Note that carrying this fractional calculation out to several decimal places is what distinguishes the fractional-proportional method from the *whole-number* proportional method (section 4.2).

proposed versions of the fractional-proportional method discussed in this chapter, including:

- the original 1950 Lodge-Gossett amendment,
- the 1969 Cannon amendment,
- the 2001 Engel amendment that would give electoral votes only to candidates receiving 5% or more of the popular vote,
- the version that would give electoral votes only to the top-two candidates *nationally*, and
- the version that would give electoral votes only to *each state's* top-two candidates.

- The fractional-proportional method would not make every voter equal throughout the United States. There are four substantial sources of inequality built into this method.
  - **Senatorial electors**: A 3.81-to-1 inequality in the value of a vote is created by the two senatorial electoral votes that each state receives in addition to the number of electoral votes warranted by its population. The vote of the 261 million people living in 22 states (79% of the U.S. population) would be worth *less than a third* of a vote in Wyoming under the fractional-proportional method.
  - **Imprecision in apportionment**: A 1.72-to-1 inequality in the value of a vote is created by imprecision in apportioning U.S. House seats (and hence electoral votes) among the states.
  - **Voter turnout**: A vote in a high-turnout state is worth less than a vote elsewhere. A 1.67-to-1 disparity in the value of a vote is created by differences in voter turnout at the state level.
  - **Intra-decade population changes**: A vote in a fast-growing state is worth less than a vote elsewhere. Intra-decade population changes after each census produce a 1.39-to-1 disparity in the value of a vote.
- The fractional-proportional method would address one of the major shortcomings of the current state-by-state winner-take-all method of awarding electoral votes. It would make every voter in every state relevant (to some degree) in the general-election campaign for President. It would therefore give presidential candidates a compelling need to campaign in every state.

4.1.2. History of the fractional-proportional method

On February 1, 1950, the U.S. Senate voted 64–27 to approve a federal constitutional amendment to implement this method of electing the President.

The amendment was sponsored by Senator Henry Cabot Lodge, Jr. (R–Massachusetts) and Representative Ed Gossett (D–Texas).

A few weeks later, the House defeated the Lodge-Gossett amendment by almost a two-thirds margin.[2,3,4,5,6]

Professor Alexander Keyssar recounted the history of the Senate passage and the subsequent House defeat of the Lodge-Gossett Amendment in discussing his 2020 book *Why Do We Still Have the Electoral College?*[7] at a lecture in Cambridge, Massachusetts.[8]

> "[Senator Lodge] really believed in the national popular vote. … And he also wanted to help the Republican party maybe make some inroads in the South.…
>
> "His cosponsor was a guy named Ed Lee Gossett, who was a very right-wing congressman from Texas. … Gossett's argument was very different. He wanted to have a proportional system. And he gave speeches on the floor of Congress about this. Because he **wanted to limit the power of Jews, Blacks, and Italians in New York state, who he thought were in effect determining American presidential elections**. Basically, he wanted to break up the power of large cities. And he gave these extraordinary speeches about the Communists, the New York Labor Party, and then these Jews, and then the Italians, and Black people.
>
> "Remarkably, this Amendment gets passed by the Senate in 1950. … **The liberals were asleep at the switch** about what was going on here. And then after it gets passed, they start paying attention."
>
> "**And then the liberal members of Congress, coupled with some important outside African American advisors, recognized that what this is really aimed at, from Gossett's point of view, is killing the civil rights movement**, in killing Northern support for the civil rights movement, by diminishing the power of key Northern states, and in effect making the South the strongest wing of the Democratic Party.
>
> "So, in the period of 6 weeks, this whole thing turns around. It's a remarkable political moment, where you go from a constitutional amendment which is passed by a two-thirds vote in the Senate, and six weeks later, or seven

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[2] U.S. Senate Committee on the Judiciary. 1949. Election of President and Vice President: Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 81st Congress, 1st Session, on S.J. Res. 2. https://babel.hathitrust.org/cgi/pt?id=uiug.30112119853536&view=1up&seq=5

[3] Bennett, Emmett L. 1950. The reform of presidential elections: The Lodge amendment. *American Bar Association Journal*. Volume 37. February 1951. Page 89ff.

[4] Morley, Felix. 1961. Democracy and the Electoral College. *Modern Age*. Fall 1961. Pages 373–388.

[5] Editorial: Giving the minority vote a voice. *St. Petersburg Times*. August 6, 1951.

[6] Silva, Ruth C. 1950. The Lodge-Gossett resolution: A critical review. *The American Political Science Review*. Volume 44. Number 1. March 1950. Pages 86–99.

[7] Keyssar, Alexander. 2020. *Why Do We Still Have the Electoral College?* Cambridge, MA: Harvard University Press.

[8] Keyssar, Alexander. 2020. Lecture at Harvard Book Store. July 31, 2020. *C-SPAN*. https://www.c-span.org/video/?473814-1/why-electoral-college

> weeks later maybe, it is voted down by about a two-thirds vote in the House of Representatives."
>
> "But the anti-Communism, the racism, all that feeding into this says something about the anxiety attached to our politics in our discussions of political institutions."[9] [Emphasis added]

When the Lodge-Gossett amendment was debated in 1950, New York occupied a dominant role in deciding the presidency that has not been equaled by any state since.

First, New York had the largest number of electoral votes of any state at the time—a whopping 47 electoral votes (out of 531).

Second, New York was a closely divided battleground state at the time.

Third, in addition to being a battleground state, New York was a "swing" state, having voted:

- Republican (for Thomas Dewey) in 1948 by a 46%–45% margin, and
- Democratic (for Franklin D. Roosevelt) in 1944 by a 52%–47% margin.

If there had been a proportional division of New York's electoral votes in 1944 and 1948, New York would have given its chosen candidate a lead of only about two electoral votes in 1944 and one electoral vote in 1948.

Representative Gossett frequently highlighted the fact that several other large closely divided northern industrial states such as Pennsylvania, Illinois, and Michigan played outsized roles in electing the President at the time.

- Pennsylvania had 35 electoral votes and voted 51%–48% Democratic in 1944 and 47%–51% Republican in 1948.
- Illinois had 28 electoral votes and voted 52%–48% Democratic in 1944 and 50%–49% Democratic in 1948.
- Michigan had 19 electoral votes and voted 50%–49% Democratic in 1944 and 49%–48% Republican in 1948.

Under the fractional-proportional method of awarding electoral votes, these three states would have delivered leads of *only about one electoral vote each* to the candidate who won in 1944 and 1948.

In contrast, under the winner-take-all method of awarding electoral votes:

- New York delivered a 47–0 lead in electoral votes to the state's winner;
- Pennsylvania delivered a 35–0 lead;
- Illinois delivered a 28–0 lead; and
- Michigan delivered a 19–0 lead.

Together, New York, Pennsylvania, Illinois, and Michigan could deliver a 129–0 lead under the winner-take-all system.

However, they would have been able to deliver a lead of only about four or five electoral votes under the fractional-proportional method.

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[9] Keyssar, Alexander. 2020. Author talk at Harvard Book Store in Cambridge, Massachusetts on the book *Why Do We Still Have the Electoral College? C-SPAN*. July 21, 2020. Timestamp 52:58–55:12 https://www.c-span.org/video/?473814-1/why-electoral-college

Meanwhile, the 11 states of the former Confederacy had almost the same combined total number of electoral votes (127) as those four northern industrial states.

The "solid south" was a one-party region at the time. As shown in table 4.2, the 11 southern states delivered 76% of their popular votes in support of the region's then-dominant party (the Democrats) and in support of the region's hallmark governmental policy—racial segregation.

This 76% landslide was made possible, in large part, by the fact that virtually no blacks voted in the south under Jim Crow laws that were in place at the time.

If the south's 127 electoral votes were divided proportionately (that is, 97–30), the south would have delivered a lead of 67 electoral votes to its favored candidate under the fractional-proportional amendment.

A lead of 67 electoral votes would have been far greater than the paltry four-vote or five-vote lead that the four northern industrial states (New York, Pennsylvania, Illinois, and Michigan) could generate together.

In short, the Lodge-Gossett amendment would have dramatically shifted political power in the country, given the political situation at the time.

Representative Gossett was candid about this.

He described the role of Negroes, Jews, Italians, Irish, Poles, organized labor, and Communists in the closely divided northern industrial states in his testimony to a House committee in 1949:

> "The Electoral College permits and invites irresponsible control and domination by **small organized minority groups, within the large pivotal States**. It aggravates and accentuates the building up and solidification within these States of **religious, economic, and racial blocs**. Small, definable, minority groups, organized along religious or economic or racial lines, by voting together, can and do hold a balance of power within these pivotal States. As a result, the political strategists in both parties make special appeals to these various groups as such. **These groups have become more and more politically conscious. They know their power.** In many instances, they have no political alignments or philosophy as such, but are simply up for sale to the highest bidder. To encourage economic, racial, and religious group consciousness and group action, is a dangerously undemocratic practice, aside from its other evil consequences.
>
> "**At the danger of stepping on some toes, let's get down to specific cases. Let's take a look at the political platforms of both major parties in the presidential campaigns of 1944 and 1948 and see how they were built and designed to appeal to minority groups and blocs in the large pivotal States**. First, both parties wrote the FEPC[10] [Federal Employment Practices Committee] into their platforms. **The platform makers of both parties will tell you frankly, off the record of course, that this was done as a bid**

[10] In 1941, the Fair Employment Practices Committee (FEPC), was established by President Franklin D. Roosevelt to help prevent discrimination against African Americans in defense and government jobs. https://www.britannica.com/topic/Fair-Employment-Practices-Committee

Table 4.2 Vote for President in 1944 in 11 southern states

State	Democratic percent	Electoral votes
Alabama	81%	11
Arkansas	70%	9
Florida	70%	8
Georgia	82%	12
Louisiana	81%	10
Mississippi	94%	9
North Carolina	67%	14
South Carolina	88%	8
Tennessee	71%	12
Texas	71%	23
Virginia	62%	11
Total	**76%**	**127**

> **for the Negro vote. There are enough Negroes in New York City, when voting in bloc, to determine often how the entire electoral vote of the State of New York is cast; enough in Philadelphia if cast in bloc to probably determine the result of an election in the State of Pennsylvania; enough in Detroit to perhaps decide the vote of the State of Michigan; enough in Chicago to carry the State of Illinois**."[11][Emphasis added]

Referring to the civil-rights planks of the 1948 platforms of both major parties, Representative Gossett continued:

> "Hence, **a dangerous and radical proposal in which a majority of neither party believes was written into both platforms as political bait for a minority vote within the large pivotal States**.
>
> "A second minority group that was wooed by the platform makers of both parties was **the radical wing of organized labor**. In the large pivotal States above mentioned, the votes controlled by the political action committee of the CIO was a tremendous, potential, political threat. The votes allegedly controlled by this organization in the large pivotal States, if cast in bloc, would be sufficient to swing the votes of such States and perhaps elect a President. Hence, both parties generally speaking wrote platitudinous provisions into their platforms concerning industrial-management relations. Both parties pussyfooted on the labor question because of organized labor's power through the Electoral College.
>
> "**Now, with all due deference to our many fine Jewish citizens**, they constitute a third group, to whom a specific overt appeal was made in the platforms of both major parties. There are 2 million Jews in the city of New

[11] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, United States House of Representatives, 81st Congress, 1949. Pages 16–18. https://babel.hathitrust.org/cgi/pt?id=pst.000045412301&view=1up&seq=21

> York alone. When they vote even substantially in bloc, it means the balance of power in our largest State. The candidate for whom they vote carries New York State and probably the presidency. What did the platform makers of 1944 do? Both of them wrote into their platforms specifically and without equivocation the so-called Palestine resolution, calling upon Great Britain to immediately open Palestine to unrestricted Jewish immigration. Regardless of the merits of the Zionists' cause in Palestine, this was political demagoguery and dangerous meddling with British foreign policy in the Holy Land. As a result of platform endorsements by both major parties, we passed a resolution through the Seventy-Ninth Congress calling upon England to open up Palestine to unrestricted Jewish immigration. Within a few weeks after this resolution was passed, England asked us if we were ready and willing to back up our request with the Army and the Navy if she got into war. We stuck our noses into British foreign policy for purely political reasons and to the detriment of all of our citizens, Jewish and otherwise.
>
> "Then **there are numerous other minority pressure groups** within these large pivotal States to whom continuous political overtures are made by the strategists of both parties. There are more than **1,000,000 Italians in New York City. There are 2,000,000 Irish**, many of whom are still politically conscious where Ireland is concerned. **There are 500,000 Poles** and other large racial groups. Because of the electoral college, **the American Labor Party and the Communist Party in the State of New York** have power and trading position out of all proportion to their numbers, to say nothing of their merit. It is entirely possible that because of this political straitjacket, the electoral college system, that said American Labor Party or the Communist Party will determine someday soon who will be the President of the United States. Of late, we have become rightly alarmed over the activities of the Communist Party in the United States. Strange to say, this party has its greatest following and influence in the aforesaid large pivotal States. This party and its fellow-travelers are shrewd political manipulators. What grim irony it would be if they should swing the balance of power and be responsible for the election of a President of the United States. Again, mention might be made of the undue power and influence given to the big city political machines through the Electoral College. Through, and because of the Electoral College, a few big cities have elected and will probably continue to elect Presidents of the United States. It is largely within these big cities that the racial, religious, and economic blocs are found and in which they operate."[12] [Emphasis added]

African Americans played a unique role in the national debate over the fractional-proportional (Lodge-Gossett) plan because, at the time, Jim Crow laws in the southern states denied them the right to vote.

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[12] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, United States House of Representatives, 81st Congress, 1949. Pages 16–18. https://babel.hathitrust.org/cgi/pt?id=pst.000045412301&view=1up&seq=21

Representative Gossett obliquely acknowledged the relatively small total number of voters who went to the polls in southern states:

> "Under our proposal, **it's of no concern** to Texas how many vote in New York and of no concern **to New York how many vote in Texas**. New York would still have 47 electoral votes, divided, however, in the exact ratio in which they were cast. Texas would still have 23 electoral votes, divided, however, in the exact ratio in which they were cast."[13] [Emphasis added]

Thus, African Americans were especially concerned with preserving their political clout in the closely divided northern industrial states where they were able to vote.

If there was any doubt as to whether the concern of African Americans was well placed, Representative Gossett made it very clear why he objected to the winner-take-all method of awarding electoral votes at a congressional hearing in 1949:

> "Now, please understand, **I have no objection to the Negro in Harlem voting**, and to his vote being counted, but I do resent that fact that **both parties will spend a hundred times as much money to get his vote, and that his vote is worth a hundred times as much in the scale of national politics as is the vote of a white man in Texas**. I have no objection to a million folks who cannot speak English voting, or to their votes being counted, but I do resent the fact that because they happen to live in Chicago, or Detroit, or New York, that **their vote is worth a hundred times as much as mine because I happen to live in Texas**. Is it fair, is it honest, is it democratic, is it to the best interest of anyone in fact, to place **such a premium on a few thousand labor votes, or Italian votes, or Irish votes, or Negro votes, or Jewish votes, or Polish votes, or Communist votes, or big-city-machine votes**, simply because they happen to be located in two or three large, industrial pivotal States? Can anything but evil come from placing such temptation and such power in the hands of political parties and political bosses? They, of course, will never resist the temptation of making undue appeals to these minority groups whose votes mean the balance of power and the election of Presidents. Thus, both said groups and said politicians are corrupted and the Nation suffers."[14] [Emphasis added]

Professor Alexander Keyssar's book *Why Do We Still Have the Electoral College?* provides additional detail on Representative Gossett's vigorous—and overtly racist—campaign for his amendment.[15]

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[13] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, United States House of Representatives, 81st Congress, 1949. Pages 19. https://babel.hathitrust.org/cgi/pt?id=pst.000045412301&view=1up&seq=21

[14] *Ibid.*

[15] Keyssar, Alexander. 2020. *Why Do We Still Have the Electoral College?* Cambridge, MA: Harvard University Press.

4.1.3. The fractional-proportional method would require a constitutional amendment.

Because the fractional-proportional method involves the creation of fractional electoral votes, a federal constitutional amendment would be required to implement it.

The position of presidential elector is established by the U.S. Constitution:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, **a Number of Electors equal to the whole Number** of Senators and Representatives to which the State may be entitled in the Congress…."[16] [Emphasis added]

That is, each state has the power to choose the manner of selecting the specified whole number of persons to serve as presidential electors in the Electoral College.

Under the original Constitution, presidential electors did not differentiate their vote for President from their vote for Vice President.

Under Article II, section 1, clause 3 of the original Constitution, each presidential elector voted for two persons:

> "The Electors shall meet in their respective States, and **vote by Ballot for two Persons, of whom one** at least shall not be an Inhabitant of the same State with themselves."
>
> "The Person having the greatest Number of Votes shall be the President."
>
> "After the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President." [Emphasis added]

The problems associated with giving each presidential elector two undifferentiated votes become apparent in the 1796 and 1800 elections (section 2.5 and 2.6).

The 12th Amendment (ratified in 1804) required presidential electors to cast separate ballots for President and Vice President:

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

The requirement that each presidential elector cast a ballot for "the person" precludes fractional electoral votes.

Thus, a federal constitutional amendment would be necessary to implement the fractional-proportional method.[17]

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

[17] In contrast, the whole-number proportional method (section 4.2) would divide each state's electoral votes proportionally in whole-number increments. Therefore it would not require a federal constitutional amendment and could be implemented by state law on a state-by-state basis.

4.1.4. Description of the fractional-proportional method

Under this method of awarding electoral votes, a state's electoral votes would be divided proportionally according to the percentage of popular votes received in the state by each presidential candidate—with this fractional calculation *carried out to three decimal places.*

Five versions of the fractional-proportional amendment have been proposed at various times:

- 1950 Lodge-Gossett amendment,
- 1969 Cannon amendment,
- 2001 Engel amendment,
- nationwide top-two fractional-proportional proposal, and
- state-level top-two fractional-proportional proposal.

Lodge-Gossett amendment of 1950

The Lodge-Gossett amendment to implement the fractional-proportional method passed the U.S. Senate in 1950 (but was defeated in the House). It would have

- retained the existing distribution of electoral votes among the states—that is, each state would have a number of electoral votes equal to its number of U.S. Representatives and Senators,
- awarded each state's electoral votes in proportion to each candidate's share of the state's electoral votes—carried out to three decimal places, and
- made a plurality of electoral votes sufficient for election—thereby eliminating the current procedure wherein the choice of the President and Vice President would be made by Congress.

The 1950 Lodge-Gossett amendment (Senate Joint Resolution 2 of the 81st Congress) reads:

> "Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as herein provided.
>
> "**The Electoral College system for electing the President and Vice President of the United States is hereby abolished.** The President and Vice President shall be elected by the people of the several States. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of the President is to begin. **Each State shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress.**
>
> "Within forty-five days after such election, or at such time as the Congress shall direct, the official custodian of the election returns of each State shall

make distinct lists of all persons for whom votes were cast for President and the number of votes for each, and the total vote of the electors of the State for all persons for President, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall in the presence of the Senate and House of Representatives open all certificates and the votes shall then be counted. **Each person for whom votes were cast for President in each State shall be credited with such proportion of the electoral votes thereof as he received of the total vote of the electors therein for President.** In making the computations, fractional numbers less than one one-thousandth shall be disregarded. **The person having the greatest number of electoral votes for President shall be President.** If two or more persons shall have an equal and the highest number of such votes, then the one for whom the greatest number of popular votes were cast shall be President.

"The Vice-President shall be likewise elected, at the same time and in the same manner and subject to the same provisions, as the President, but no person constitutionally ineligible for the office of President shall be eligible to that of Vice-President of the United States.

"Section 2. Paragraphs 1, 2, and 3 of section 1, article II, of the Constitution and the twelfth article of amendment to the Constitution, are hereby repealed.

"Section 3. This article shall take effect on the tenth day of February following its ratification.

"Section 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of the submission hereof to the States by the Congress." [Emphasis added]

Cannon amendment of 1969

While Congress was intensively debating various constitutional amendments for electing the president in 1969, Senator Howard Cannon (D–Nevada) introduced a constitutional amendment that would have:

- retained the existing distribution of electoral votes among the states;
- awarded each state's electoral votes in proportion to each candidate's share of the state's electoral votes—carried out to three decimal places;
- required that a candidate receive at least 40% of the electoral votes in order to win. If this requirement is not satisfied, there would be a contingent election for President and Vice President in a joint session of Congress in which each member of the House and Senate cast one vote.

The proposed 1969 Cannon amendment (Senate Joint Resolution 33 in the 91st Congress) reads:

"Section 1. The Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as provided in this article. No person constitutionally ineligible for the office of President shall be eligible for the office of Vice President.

"Section 2. The President and Vice President shall be elected by the people of the several States and the District of Columbia. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that the legislature of any State may prescribe lesser qualifications with respect to residence therein. The electors of the District of Columbia shall have such qualifications as the Congress may prescribe. **The places and manner of holding such election in each State shall be prescribed by the legislature thereof, but the Congress may at any time by law make or alter such regulations.** The place and manner of holding such election in the District of Columbia shall be prescribed by the Congress. The Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of the President is to begin.

"Section 3. Each state shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives to which each State may be entitled in the Congress. **The District of Columbia shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives in Congress to which such District would be entitled if it were a State, but in no event more than the least populous State.**

"Section 4. Within forty-five days after such election, or at such time as Congress shall direct, the official custodian of the election returns of each State and the District of Columbia shall make distinct lists of all persons for whom votes were cast for President and the number of votes cast for each person, and the total vote cast by the electors of the State or the District for all persons for President, which lists he shall sign and certify and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all certificates and the votes shall then be counted. **Each person for whom votes were cast shall be credited with such proportion of the electoral votes thereof as he received of the total vote cast by the electors therein for President.** In making the computation, fractional numbers less than one one-thousandth shall be disregarded. **The person having the greatest aggregate number of electoral**

> **votes of the States and the District of Columbia for President shall be President, if such number be at least 40 per centum of the whole number of such electoral votes**, or if two persons have received an identical number of such electoral votes which is at least 40 per centum of the whole number of electoral votes, then from the persons having the two greatest number of such electoral votes for President, the Senate and the House of Representatives sitting in joint session shall choose immediately, by ballot, the President. A majority of the votes of the combined membership of the Senate and House of Representatives shall be necessary for a choice.
>
> "Section 5. The Vice President shall be likewise elected, at the same time, in the same manner, and subject to the same provisions as the President.
>
> "Section 6. The Congress may by law provide for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of death of any of the persons from whom the Senate and the House of Representatives may choose a Vice President whenever the right of choice shall have devolved upon them. The Congress shall have power to enforce this article by appropriate legislation.
>
> "Section 7. The following provisions of the Constitution are hereby repealed: paragraphs 1, 2, 3, and 4 of section 1, Article II; the twelfth article of amendment; section 4 of the twentieth article of amendment; and the twenty-third article of amendment.
>
> "Section 8. This article shall take effect on the 1st day of February following its ratification, except that this article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress." [Emphasis added]

Engel amendment with 5% threshold of 2001

The Congressional Research Service observed:

> "Many, though not all, proportional plan amendments would also require that candidates gain a minimum of 5% of the popular vote in a state in order to win any share of its electoral votes."[18]

For example, in 2001, Representative Eliot Engel (D–New York) proposed a version of the fractional-proportional method requiring that a candidate receive at least 5% of the popular vote in a state in order to receive any electoral votes.

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[18] Neale, Thomas H. 2003. *The Electoral College: Reform Proposals in the 107th Congress*. Congressional Research Service. February 7, 2003. Page 9.

The Engel amendment would have:

- retained the existing distribution of electoral votes among the states;
- required that a candidate receive at least 5% of a state's popular vote in order to get a proportionate share (calculated to three decimal places) of that state's electoral votes;
- contained no minimum number of electoral votes in order to win election (that is, it was like the original 1950 Lodge-Gossett amendment, but unlike the 1969 Cannon amendment, which had a 40% requirement); and
- provided for a contingent election in Congress only in the remote possibility of a 269.000-to-269.000 tie in the nationwide electoral vote.

The Engel amendment (Senate Joint Resolution 17 of the 107th Congress)[19] is as follows:

> "Section 1. In an election for President and Vice President, each State shall appoint a number of Electors to vote for each candidate for President or Vice President that bears the same ratio to the total number of Electors of that State as the number of votes received by that candidate bears to the total number of votes cast in that State.
>
> "Each State shall make computations for purposes of carrying out this section in accordance with such laws as it may adopt, including laws providing for the allocation of Electors among more than two **candidates receiving 5 percent or more of the total number of votes cast in the State** under such criteria as the State may by law establish, except that fractional numbers less than one one-thousandth shall be disregarded. The candidate having the greatest number of electoral votes for President shall be the President. The candidate having the greatest number of electoral votes for Vice President shall be the Vice President.
>
> "Section 2. If two or more candidates receive an equal number of electoral votes for President and such number is greater than the number of such votes received by any other candidate, then from the candidates who receive such equal number of votes the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice.
>
> "Section 3. If two or more candidates receive an equal number of electoral votes for Vice President and such number is greater than the number of such votes received by any other candidate, then from the candidates who receive such equal number of votes the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

[19] House Joint Resolution 17. 107th Congress. February 13, 2001. https://www.congress.gov/bill/107th-congress/house-joint-resolution/17

> "Section 4. For purposes of this article other than sections 2 and 3, the District constituting the seat of Government of the United States shall be treated as if it were a State, except that the District may not appoint a number of Electors greater than the number of Electors appointed by the least populous State.
>
> "Section 5. The Congress shall have the power to enforce this article by appropriate legislation.
>
> "Section 6. This article shall apply with regard to any election for President and Vice President that is held more than one year after the date of the ratification of this article." [Emphasis added]

Nationwide top-two version of the fractional-proportional method

In 2020, Kevin Johnson of the Election Reformers Network described a version of the fractional-proportional method with a nationwide top-two rule:

> "Seventy years ago, senators voted 64-27 to amend the Constitution with exactly the features discussed here: replacing human electors with electoral votes, replacing winner-take-all with proportional allocation, and retaining the advantage for small states.
>
> "The version electoral reformers are pushing now is an improvement, because it would **limit the proportional allocation to the top-two vote-getters nationwide**."[20] [Emphasis added]

Thus, this constitutional amendment would:

- retain the existing distribution of electoral votes among the states;
- split each state's electoral votes between the top-two *nationwide* candidates in proportion to their share of the state's popular vote—with the fractional calculation carried out to three decimal places.
- apparently (by its silence) leave unchanged the current power of state legislatures to control the manner of conducting presidential elections (that is, it would be like the original 1950 Lodge-Gossett amendment and 2001 Engel amendment, but unlike the 1969 Cannon amendment and various other proposals that would increase the power of Congress over presidential elections).

State-level top-two version of the fractional-proportional method

The *nationwide* top-two approach described above appeals to staunch enthusiasts of the two existing major political parties.

However, it is correspondingly less appealing to those who would like to see more independent or third-party candidates.

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[20] Johnson, Kevin. 2020. Bloc voting is a bigger problem than electors going rogue. Here's a fix. *The Fulcrum*. July 10, 2020. https://thefulcrum.us/electoral-college-votes

Thus, the Election Reformers Network web site (as of March 2024) proposes a state-level variation of the top-two fractional-proportional method:

> "All of a state's electoral votes are divided proportionally between the two candidates receiving the most votes **in that state**."[21] [Emphasis added]

This change allows independent and third-party candidates to accumulate fractional electoral votes from state to state.

However, this change raises the question as to what happens if no presidential candidate wins an absolute majority of 269.001 electoral votes.

This is no small matter, because no candidate received a majority of the national popular vote in four of the eight presidential elections between 1992 and 2020.

Moreover, given the declining number of voters who identify themselves with one of the two established political parties, this outcome could become even more frequent in the future.

If the constitutional amendment is silent on this question, the existing constitutional provision for a contingent election would continue to operate—that is, the choice of the President and Vice President would be thrown into Congress.

4.1.5. The fractional-proportional method would not accurately reflect the national popular vote.

From the point-of-view of the general public, the most conspicuous shortcoming of the current system is that the second-place candidate can become President.

The country is currently in an era of relatively close presidential elections. Indeed, in the eight presidential elections between 1992 and 2020, the average margin of victory for the national popular vote winner has been only 4.3%.[22]

In 2000, Al Gore received 543,816 more popular votes nationwide than George W. Bush.

However, Bush would have received *more* electoral votes than Gore under all five versions of the fractional-proportional method and, therefore, would have been elected.

Lodge-Gossett amendment of 1950

In 2000, the national popular vote for President was:

- Al Gore—51,003,926
- George W. Bush—50,460,110
- Ralph Nader—2,883,105
- Pat Buchanan—449,225
- Harry Browne—384,516
- 11 other candidates—236,593[23]

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[21] See slide 8. Election Reformers Network. *The Top-two Proportional Approach to Fixing the Electoral College*. Accessed March 10, 2024. https://assets-global.website-files.com/642dcbc53f522476efc85893/64e5177348271c04f0660665_The%20proportional%20allocation%20approach%20to%20fixing%20the%20electoral%20college.pdf

[22] The margin of victory for the national popular vote winner was 5.6% in 1992, 8.5% in 1996, 0.5% in 2000, 2.4% in 2004, 7.2% in 2008, 3.9% in 2012, 2.0% in 2016, and 4.0% in 2020.

[23] These 236,593 popular votes were scattered among 11 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." The total national popular vote for President in 2000 was 105,417,475.

Table 4.3 2000 election results

State	Gore	Bush	Nader	Buchanan	Browne	Others	Total
AL	695,602	944,409	18,349	6,364	5,902	1,925	1,672,551
AK	79,004	167,398	28,747	5,192	2,636	2,583	285,560
AZ	685,341	781,652	45,645	12,373	0	9,102	1,534,113
AR	422,768	472,940	13,421	7,358	2,781	2,513	921,781
CA	5,861,203	4,567,429	418,707	44,987	45,520	28,010	10,965,856
CO	738,227	883,745	91,434	10,465	12,799	4,695	1,741,365
CT	816,015	561,094	64,452	4,731	3,484	9,749	1,459,525
DE	180,068	137,288	8,307	777	774	408	327,622
DC	171,923	18,073	10,576	0	669	653	201,894
FL	2,912,253	2,912,790	97,488	17,484	16,415	6,680	5,963,110
GA	1,116,230	1,419,720	13,432	10,926	36,332	164	2,596,804
HI	205,286	137,845	21,623	1,071	1,477	649	367,951
ID	138,637	336,937	12,292	7,615	3,488	2,652	501,621
IL	2,589,026	2,019,421	103,759	16,106	11,623	2,188	4,742,123
IN	901,980	1,245,836	18,531	16,959	15,530	466	2,199,302
IA	638,517	634,373	29,374	5,731	3,209	4,359	1,315,563
KS	399,276	622,332	36,086	7,370	4,525	2,627	1,072,216
KY	638,898	872,492	23,192	4,173	2,896	2,536	1,544,187
LA	792,344	927,871	20,473	14,356	2,951	7,661	1,765,656
ME	319,951	286,616	37,127	4,443	3,074	606	651,817
MD	1,145,782	813,797	53,768	4,248	5,310	2,575	2,025,480
MA	1,616,487	878,502	173,564	11,149	16,366	6,916	2,702,984
MI	2,170,418	1,953,139	84,165	2,061	16,711	6,217	4,232,711
MN	1,168,266	1,109,659	126,696	22,166	5,282	6,616	2,438,685
MS	404,964	573,230	8,126	2,267	2,009	4,330	994,926
MO	1,111,138	1,189,924	38,515	9,818	7,436	3,061	2,359,892
MT	137,126	240,178	24,437	5,697	1,718	1,841	410,997
NE	231,780	433,862	24,540	3,646	2,245	946	697,019
NV	279,978	301,575	15,008	4,747	3,311	4,351	608,970
NH	266,348	273,559	22,198	2,615	2,757	1,604	569,081
NJ	1,788,850	1,284,173	94,554	6,989	6,312	6,348	3,187,226
NM	286,783	286,417	21,251	1,392	2,058	704	598,605
NY	4,107,907	2,403,374	244,060	31,703	7,702	27,922	6,822,668
NC	1,257,692	1,631,163	0	8,874	12,307	1,226	2,911,262
ND	95,284	174,852	9,497	7,288	671	675	288,267
OH	2,186,190	2,351,209	117,857	26,724	13,475	10,002	4,705,457
OK	474,276	744,337	0	9,014	6,602	0	1,234,229
OR	720,342	713,577	77,357	7,063	7,447	8,182	1,533,968
PA	2,485,967	2,281,127	103,392	16,023	11,248	15,362	4,913,119
RI	249,508	130,555	25,052	2,273	742	982	409,112
SC	566,039	786,426	20,279	3,520	4,888	2,625	1,383,777
SD	118,804	190,700	0	3,322	1,662	1,781	316,269
TN	981,720	1,061,949	19,781	4,250	4,284	4,197	2,076,181
TX	2,433,746	3,799,639	137,994	12,394	23,160	704	6,407,637
UT	203,053	515,096	35,850	9,319	3,616	3,820	770,754
VT	149,022	119,775	20,374	2,192	784	2,161	294,308
VA	1,217,290	1,437,490	59,398	5,455	15,198	4,616	2,739,447
WA	1,247,652	1,108,864	103,002	7,171	13,135	8,921	2,488,745
WV	295,497	336,475	10,680	3,169	1,912	391	648,124
WI	1,242,987	1,237,279	94,070	11,471	6,640	6,160	2,598,607
WY	60,481	147,947	4,625	2,724	1,443	1,131	218,351
Total	**51,003,926**	**50,460,110**	**2,883,105**	**449,225**	**384,516**	**236,593**	**105,417,475**

Table 4.4 2000 election under the Lodge-Gossett fractional-proportional method

State	Gore	Bush	Nader	Buchanan	Browne	All others	EV
AL	3.743	5.082	0.099	0.034	0.032	0.010	9
AK	0.830	1.759	0.302	0.055	0.028	0.027	3
AZ	3.574	4.076	0.238	0.065	0.000	0.047	8
AR	2.752	3.078	0.087	0.048	0.018	0.016	6
CA	28.863	22.492	2.062	0.222	0.224	0.138	54
CO	3.391	4.060	0.420	0.048	0.059	0.022	8
CT	4.473	3.075	0.353	0.026	0.019	0.053	8
DE	1.649	1.257	0.076	0.007	0.007	0.004	3
DC	2.555	0.269	0.157	0.000	0.010	0.010	3
FL	12.209	12.212	0.409	0.073	0.069	0.028	25
GA	5.588	7.107	0.067	0.055	0.182	0.001	13
HI	2.232	1.499	0.235	0.012	0.016	0.007	4
ID	1.106	2.687	0.098	0.061	0.028	0.021	4
IL	12.011	9.369	0.481	0.075	0.054	0.010	22
IN	4.921	6.798	0.101	0.093	0.085	0.003	12
IA	3.397	3.375	0.156	0.030	0.017	0.023	7
KS	2.234	3.482	0.202	0.041	0.025	0.015	6
KY	3.310	4.520	0.120	0.022	0.015	0.013	8
LA	4.039	4.730	0.104	0.073	0.015	0.039	9
ME	1.963	1.759	0.228	0.027	0.019	0.004	4
MD	5.657	4.018	0.265	0.021	0.026	0.013	10
MA	7.176	3.900	0.771	0.049	0.073	0.031	12
MI	9.230	8.306	0.358	0.009	0.071	0.026	18
MN	4.791	4.550	0.520	0.091	0.022	0.027	10
MS	2.849	4.033	0.057	0.016	0.014	0.030	7
MO	5.179	5.547	0.180	0.046	0.035	0.014	11
MT	1.001	1.753	0.178	0.042	0.013	0.013	3
NE	1.663	3.112	0.176	0.026	0.016	0.007	5
NV	1.839	1.981	0.099	0.031	0.022	0.029	4
NH	1.872	1.923	0.156	0.018	0.019	0.011	4
NJ	8.419	6.044	0.445	0.033	0.030	0.030	15
NM	2.395	2.392	0.178	0.012	0.017	0.006	5
NY	19.869	11.625	1.180	0.153	0.037	0.135	33
NC	6.048	7.844	0.000	0.043	0.059	0.006	14
ND	0.992	1.820	0.099	0.076	0.007	0.007	3
OH	9.757	10.493	0.526	0.119	0.060	0.045	21
OK	3.074	4.825	0.000	0.058	0.043	0.000	8
OR	3.287	3.256	0.353	0.032	0.034	0.037	7
PA	11.638	10.679	0.484	0.075	0.053	0.072	23
RI	2.440	1.276	0.245	0.022	0.007	0.010	4
SC	3.272	4.547	0.117	0.020	0.028	0.015	8
SD	1.127	1.809	0.000	0.032	0.016	0.017	3
TN	5.201	5.626	0.105	0.023	0.023	0.022	11
TX	12.154	18.976	0.689	0.062	0.116	0.004	32
UT	1.317	3.342	0.233	0.060	0.023	0.025	5
VT	1.519	1.221	0.208	0.022	0.008	0.022	3
VA	5.777	6.822	0.282	0.026	0.072	0.022	13
WA	5.514	4.901	0.455	0.032	0.058	0.039	11
WV	2.280	2.596	0.082	0.024	0.015	0.003	5
WI	5.262	5.237	0.398	0.049	0.028	0.026	11
WY	0.831	2.033	0.064	0.037	0.020	0.016	3
Total	**258.271**	**259.170**	**14.898**	**2.425**	**1.985**	**1.251**	**538**

Table 4.3 shows, by state, the results of the 2000 presidential election.

Table 4.4 shows the result of applying the Lodge-Gossett fractional-proportional method to the 2000 election returns.[24]

Columns 2 through 7 of the table show, by state, the number of electoral votes that Gore, Bush, Nader, Buchanan, Browne, and "all others" would have received, respectively. Each candidate's number of electoral votes is obtained by:

- dividing the candidate's popular vote in the state by the total popular vote for President in that state,
- multiplying this quotient by the state's number of electoral votes (found in column 8 of the table), and
- rounding the result off to three decimal places.

The bottom line of the table shows that Al Gore would have received 258.271 electoral votes, while George W. Bush would have received 259.170 electoral votes under the fractional-proportional method in 2000.

That is, the Lodge-Gossett version of the fractional-proportional system would have produced the same second-place President in 2000 as the current state-by-state winner-take-all method of awarding electoral votes.

Cannon amendment of 1969

Similarly, the Cannon version of the fractional-proportional method would have produced the same second-place President in 2000.

Engel amendment with 5% threshold in 2001

The Engel version of the fractional-proportional system would have required that a candidate receive at least 5% of a state's votes in order to share in the state's electoral votes.[25]

In 2000, third-party candidates received the following percentages of the national popular vote for President:

- Ralph Nader—2.73%
- Pat Buchanan—0.43%
- Harry Browne—0.36%
- 11 other candidates—0.22%

Moreover, none of these minor-party candidates received 5% of the popular vote in any state. Therefore, all of their votes would have been extinguished, and none of them would have received any electoral votes under the Engel amendment.

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[24] In this book, all hypothetical analyses of an alternative electoral system being applied to a past election are necessarily based on the election returns from the actual election conducted under the then-existing electoral system. The authors, of course, recognize that the campaigns would have been conducted differently if a different electoral system had been in effect. For example, George W. Bush led in the vast majority of national polls during most of 2000. That, in turn, suggests that Bush might well have won the national popular vote if the candidates had campaigned nationwide, instead of just in the battleground states.

[25] House Joint Resolution 17. 107th Congress. February 13, 2001. https://www.congress.gov/bill/107th-congress/house-joint-resolution/17

In particular, Ralph Nader, the minor-party candidate with the greatest support in 2000, would have received no electoral votes as a result of the 5% threshold, whereas he would have received 14.898 electoral votes under the original 1950 Lodge-Gossett proposal (table 4.4).

Table 4.5 shows, by state, the results of the fractional-proportional method with Engel's 5% threshold.

- Columns 2 and 3 show, by state, the number of popular votes received by Gore and Bush, respectively.
- Columns 4 and 5 show the electoral votes that Gore and Bush would have received under the fractional-proportional method with a 5% threshold. This number is obtained by:
  - dividing each candidate's popular vote in a state by the combined Bush–Gore vote in that state,
  - multiplying this quotient by the state's number of electoral votes (column 6), and
  - rounding the result off to three decimal places.

As can be seen in the table, even if all minor-party candidates had been excluded, George W. Bush would have received 269.231 electoral votes, while Gore would have received 268.769.

That is, the Engel version of the fractional-proportional system would have produced the same second-place President in 2000 as the current state-by-state winner-take-all method of awarding electoral votes.

Nationwide top-two version of the fractional-proportional plan

In describing the nationwide top-two version of the fractional-proportional plan, Kevin Johnson of the Election Reformers Network inaccurately asserted in *Governing* magazine that this approach would:

> "make a second-place president extremely unlikely."[26]

Both versions of the top-two fractional-proportional method would have operated in the same way in 2000 as the Engel amendment (table 4.5), because Bush and Gore were the top-two candidates in every state as well as nationally.

Under both versions, George W. Bush would have received *more* electoral votes than Al Gore with either of the top-two variations. Thus, 2000 would have been a divergent election in which the candidate who became President did not win the most popular votes nationwide.

The Election Reformers Network attempts to dismiss this inconvenient outcome by arguing that their proposal might be further modified so as to give individual states the option to use ranked-choice voting (RCV).

Having given states this option, the Election Reformers Network then hypothesizes

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[26] Johnson, Kevin. 2020. To Fix the Electoral College, Change the Way Its Votes Are Awarded. *Governing*. December 11, 2020. https://www.governing.com/now/to-fix-the-electoral-college-change-the-way-its-votes-are-awarded.html

Table 4.5 2000 election under the fractional-proportional method after exclusion of all minor-party candidates

State	Gore	Bush	Gore-EV	Bush-EV	EV
Alabama	695,602	944,409	3.817	5.183	9
Alaska	79,004	167,398	0.962	2.038	3
Arizona	685,341	781,652	3.737	4.263	8
Arkansas	422,768	472,940	2.832	3.168	6
California	5,861,203	4,567,429	30.350	23.650	54
Colorado	738,227	883,745	3.641	4.359	8
Connecticut	816,015	561,094	4.740	3.260	8
Delaware	180,068	137,288	1.702	1.298	3
D.C.	171,923	18,073	2.715	0.285	3
Florida	2,912,253	2,912,790	12.499	12.501	25
Georgia	1,116,230	1,419,720	5.722	7.278	13
Hawaii	205,286	137,845	2.393	1.607	4
Idaho	138,637	336,937	1.166	2.834	4
Illinois	2,589,026	2,019,421	12.360	9.640	22
Indiana	901,980	1,245,836	5.039	6.961	12
Iowa	638,517	634,373	3.511	3.489	7
Kansas	399,276	622,332	2.345	3.655	6
Kentucky	638,898	872,492	3.382	4.618	8
Louisiana	792,344	927,871	4.145	4.855	9
Maine	319,951	286,616	2.110	1.890	4
Maryland	1,145,782	813,797	5.847	4.153	10
Massachusetts	1,616,487	878,502	7.775	4.225	12
Michigan	2,170,418	1,953,139	9.474	8.526	18
Minnesota	1,168,266	1,109,659	5.129	4.871	10
Mississippi	404,964	573,230	2.898	4.102	7
Missouri	1,111,138	1,189,924	5.312	5.688	11
Montana	137,126	240,178	1.090	1.910	3
Nebraska	231,780	433,862	1.741	3.259	5
Nevada	279,978	301,575	1.926	2.074	4
New Hampshire	266,348	273,559	1.973	2.027	4
New Jersey	1,788,850	1,284,173	8.732	6.268	15
New Mexico	286,783	286,417	2.502	2.498	5
New York	4,107,907	2,403,374	20.819	12.181	33
North Carolina	1,257,692	1,631,163	6.095	7.905	14
North Dakota	95,284	174,852	1.058	1.942	3
Ohio	2,186,190	2,351,209	10.118	10.882	21
Oklahoma	474,276	744,337	3.114	4.886	8
Oregon	720,342	713,577	3.517	3.483	7
Pennsylvania	2,485,967	2,281,127	11.994	11.006	23
Rhode Island	249,508	130,555	2.626	1.374	4
South Carolina	566,039	786,426	3.348	4.652	8
South Dakota	118,804	190,700	1.152	1.848	3
Tennessee	981,720	1,061,949	5.284	5.716	11
Texas	2,433,746	3,799,639	12.494	19.506	32
Utah	203,053	515,096	1.414	3.586	5
Vermont	149,022	119,775	1.663	1.337	3
Virginia	1,217,290	1,437,490	5.961	7.039	13
Washington	1,247,652	1,108,864	5.824	5.176	11
West Virginia	295,497	336,475	2.338	2.662	5
Wisconsin	1,242,987	1,237,279	5.513	5.487	11
Wyoming	60,481	147,947	0.871	2.129	3
Total	**51,003,926**	**50,460,110**	**268.769**	**269.231**	**538**

that Nader's two best states (California and New York) enacted RCV in 2000. The use of RCV in those two particular states would have extinguished Nader's fractional electoral votes from those two states. As a result, Nader's fractional electoral votes would have then ended up with Gore and Bush in the final round of RCV tabulation. After Nader's electoral votes are zeroed out, Gore would just barely overtake Bush. Election Reformers Network then proclaims:

> "Gore wins in a 2000 scenario with RCV incorporated in only 2 states."[27]

However, after-the-fact adjusting of the voting laws of *two selected states* cannot be used to dismiss inconvenient historical data.

If it were, apologists for the current winner-take-all system would be entitled to dismiss the outcome of the 2000 election by saying that Gore would have become President if RCV had been in use in just *one selected state*—Florida.[28]

State-level top-two version of the fractional-proportional method

The state-level top-two version of the fractional-proportional system would have produced the same second-place President in 2000 as the nationwide top-two version, because Bush and Gore were the top-two candidates in every state.

4.1.6. The fractional-proportional method would not make every vote equal.

The aim of democracy reformers since the Constitution was written in 1787 has been to achieve the goal stated in the Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal."

It is thus appropriate to evaluate a proposed electoral reform in terms of whether it makes every vote equal.

Every vote would *not* be equal under any of the five proposed versions of the fractional-proportional method.

There are four significant sources of inequality built into this method, including a:

- 3.81-to-1 inequality in the value of a vote created by the two senatorial electoral votes that each state receives in addition to the number of electoral votes warranted by its population;
- 1.72-to-1 inequality in the value of a vote because of the imprecision of the process of apportioning U.S. House seats (and hence electoral votes) among the states;
- 1.68-to-1 inequality in the value of a vote in favor of voters in low-turnout states; and

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[27] See slide 10 of undated presentation that was accessed March 10, 2024. Election Reformers Network. *The Top-two Proportional Approach to Fixing the Electoral College*. https://assets-global.website-files.com/642dcbc53f522476efc85893/64e5177348271c04f0660665_The%20proportional%20allocation%20approach%20to%20fixing%20the%20electoral%20college.pdf

[28] Ralph Nader received 97,488 popular votes in Florida in 2000, while George W. Bush's margin of victory in the state was a mere 537 votes. If RCV had been the law in Florida in 2000, it is a certainty that Gore would have overcome Bush's 537-vote lead after these 97,488 ballots were redistributed according to the second choices of Nader supporters.

- 1.39-to-1 inequality in the value of a vote caused by the intra-decade population changes after each census.

The magnitude of the inequalities built into the fractional-proportional method can be appreciated by comparing them with the considerably smaller inequalities that courts tolerate when reviewing the constitutionality of congressional, state, and local legislative districts.

The largest allowed deviation in population between congressional districts in the same state after the 2010 census was 0.76%—that is an inequality of 1.0076-to-1.[29] Deviations of up to 10% (that is, 1.1-to-1) are generally allowed in state legislative redistricting.[30]

Moreover, because the fractional-proportional method must necessarily be enacted in the form of a federal constitutional amendment, these four inequalities would be constitutionally enshrined.

Inequality because of the two senatorial electoral votes

First, each state receives two senatorial electoral votes above and beyond the number of electoral votes warranted by its population.

As a result, a vote cast in a large state has less weight than a vote cast in a small state under the fractional-proportional method of awarding electoral votes.

For example, Wyoming (with a population of 576,851 according to the 2020 census) has three electoral votes in the 2024 and 2028 presidential elections, whereas California (population 39,538,223) has 54 electoral votes.

Thus, there is one presidential elector for every 192,283 people in Wyoming, compared to one for every 732,189 people in California.

That is, the ratio of the number of persons per electoral vote for California to that of Wyoming is 3.81-to-1 (table 1.34).

Inequality because of imprecision of the process of apportioning U.S. House seats

Second, the imprecision of the process of apportioning U.S. House seats (and hence electoral votes) introduces significant inequalities in the value of a vote under the fractional-proportional method.

The Constitution specifies that seats in the U.S. House of Representatives are to be apportioned among the states on the basis of population. That process is governed by a mathematical formula known as the "method of equal proportions" specified by a 1941 federal law.[31]

However, because so few seats (435) must be distributed over so many states (50), the process of apportioning House seats—and hence electoral votes—introduces significant differences among the states in the number of people per congressional district.

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[29] National Conference of State Legislatures. 2012. 2010 Redistricting Table. https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx

[30] Spencer, Doug. 2022. Equal Population. *Prof. ~~Justin Levitt's~~ Doug Spencer's Guide to Drawing Electoral Lines*. Accessed September 4, 2022. https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn

[31] U.S. Census Bureau. 2021. *Computing Apportionment*. March 1, 2021. https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html.

As a result, even among states possessing the *same* number of House seats (and therefore the *same* number of electoral votes), a vote in some states will have considerably less weight than a vote cast in another state.

The impact of these rough approximations is illustrated by the seven jurisdictions with three electoral votes.

For example, one electoral vote corresponds to 329,983 people in Delaware, but only 192,284 in Wyoming—a 1.72-to-1 variation in the value of a vote (table 1.35).

Similar disparities exist among states in every other cohort of states with the same number of electoral votes (section 1.4.2).

Inequality because of voter-turnout differences

Third, a voter in a low-turnout state has greater voting power under the fractional-proportional method than a voter in a high-turnout state.

Differences in voter turnout at the state level create variations of up to 1.67-to-1 in the value of a vote under the fractional-proportional method (table 1.41).

Inequalities because of population changes occurring during the decade after each census

Fourth, the value of a voter's vote in a fast-growing state declines from year to year, because a state's number of electoral votes is only adjusted every 10 years.

This inequality is relatively small for a presidential election held in the second year of a decade. However, it typically grows as the decade progresses. It is especially large when a presidential election occurs at the end of a decade—such as 2000 and 2020. In such end-of-decade elections, the allocation of electoral votes among the states is based on 10-year-old population data.

These differences create variations of up to 1.39-to-1 in the value of a vote under the fractional-proportional method (table 1.40).

4.1.7. The fractional-proportional method would make every voter in every state politically relevant.

All five versions of the fractional-proportional method would remedy one of the major shortcomings of the current system, namely that three out of four states and 70% of the voters in the United States are ignored in the general-election campaign for President.

In 1949 testimony, Texas Representative Ed Gossett, noted the distorting effects of the current state-by-state winner-take-all method of awarding electoral votes:

> "**The Electoral College confines and largely restricts national campaigns to a half-dozen pivotal States**. The national campaign committees and the political strategists of both parties sit down with a map of the Nation and decide where to do their work and where to spend their money."[32] [Emphasis added]

[32] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, United States House of Representatives, 81st Congress, 1949. Page 11. https://babel.hathitrust.org/cgi/pt?id=pst.000045412301&view=1up&seq=21

He added:

> "**Most of our citizens outside of the great pivotal states never see a presidential candidate** or a campaign speaker, and never hear a campaign speech except by radio. **Neither the platforms nor the speeches are designed to appeal to them**.
>
> "Furthermore, **millions in these areas refrain from voting** in general elections, knowing that to do so is futile, since their votes will have no bearing on results."[33] [Emphasis added]

Because electoral votes would be calculated to three decimal places, candidates would have something to gain or lose everywhere in the country and therefore have a compelling reason to campaign in every state.

For example, 324 popular votes would have corresponded to 0.001 of an electoral vote in the nation's largest state (California) in 2020 under the fractional-proportional method.

In the nation's smallest state (Wyoming), a candidate could earn an additional 0.001 electoral vote by winning 92 additional popular votes.[34]

Under the current winner-take-all method of awarding electoral votes, votes for President in California and Wyoming are politically equal—both are irrelevant in presidential elections.

Although the value of a vote would vary significantly between California and Wyoming under the fractional-proportional method, candidates would nonetheless have reason to campaign in both states.

4.1.8. None of the five versions of the fractional-proportional method eliminates the partisan political advantage created by the inclusion of non-citizens in the census.

Professor George C. Edwards III pointed out in his seminal book *Why the Electoral College Is Bad for America*:

> "Representation in the House is based on the decennial census, which counts all residents—whether citizens or not. States such as California, Florida, and New York where non-citizens compose a larger percentage of the population receive more electoral votes than they would if electoral votes were allocated on the basis of the number of a state's citizens."[35]

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[33] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, United States House of Representatives, 81st Congress, 1949. Page 18. https://babel.hathitrust.org/cgi/pt?id=pst.000045412301&view=1up&seq=21

[34] Note that if the fractional calculation to a fourth decimal place, a candidate could earn an additional 0.0001 electoral vote by winning 32 additional popular votes in California and 9 additional popular votes in Wyoming.

[35] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Page 46.

It is true that non-citizens (whether legal residents or undocumented persons) cannot vote in presidential elections under federal law.

Nonetheless, non-citizens significantly impact presidential elections, because they amplify the vote of citizens in the states where they reside.

In an interview with Elon Musk on March 18, 2024, Don Lemon said:

> "[Concerning] President Biden's immigration plan to open up the border … you said that the President … and the Democrats are doing it to get more votes."[36]

Elon Musk responded:

> "The more that come into the country, the more that are likely to vote in that direction. It is, in my view, a simple incentive to increase Democratic voters."
>
> "The census is based on all people in an area, whether they are citizens or not. So, if there is a concentration of people who came here illegally in a particular state, that state will actually then get an increased number of House seats. So, the House seat apportionment is proportionate to the number of people, not the number of citizens. … The illegals overwhelmingly go to places like California or New York. And, if you just look at the math, if you look at the apportionment with, and without illegals, I believe … there would be a net loss of blue states of approximately 20 seats in the House. This also applies to the Electoral College. This also applies to electing the President, because the electoral votes are also done by apportionment the same way that House seats are done."
>
> "If, as is the case, a disproportionate number of illegal immigrants go to blue states, they amplify the effect of a blue state vote. … The Democrats would lose approximately 20 seats in the House if illegals were not counted in the census, and that's also 20 less electoral votes for President. So, illegals absolutely affect who controls the House and who controls the presidency."[37]

The U.S. Constitution requires that the census be used to determine each state's number of seats in the U.S. House of Representatives. Each state receives a number of electoral votes equal to the state's number of Representatives plus two (representing the state's two U.S. Senators).

The Constitution specifies that the census count all "persons," thereby including non-citizens living in the United States in the count:

> "Representatives … shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free **Persons**, including

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[36] Don Lemon Interview of Elon Musk. *YouTube*. March 18, 2024. Timestamp: 23:20 https://www.youtube.com/watch?v=hhsfjBpKiTw&t=1399s

[37] *Ibid*. Timestamp: 24:00. https://www.youtube.com/watch?v=hhsfjBpKiTw&t=1399s

> those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[38,39] [Emphasis added]

The Census Bureau uses a mathematical formula (specified by a federal statute adopted in 1941) known as the "method of equal proportions" to apportion seats in the U.S. House of Representatives automatically among the states.[40]

A state with a disproportionally large number of non-citizens (relative to other states) acquires additional U.S. House seats and, hence, additional electoral votes.

Because of the winner-take-all rule, *legal* voters in a state that acquired additional electoral votes by virtue of the disproportionate presence of non-citizens control the disposition of an enlarged bloc of electoral votes to the candidate receiving the most popular votes in their state.

That is, the voting power of the *legal* voters is increased because of the presence of non-citizens in their state.

Professor Leonard Steinhorn of American University has computed the effect of non-citizens on presidential elections. He applied the statutory formula to apportion U.S. House seats among the states to data on the number of citizens and non-citizens in each state from the American Community Survey.[41]

In a 2012 article entitled "Without Voting, Noncitizens Could Swing the Election for Obama," Steinhorn found that non-citizens affected the number of electoral votes possessed by 15 states.

Five states gained between one and five electoral votes, and 10 states each lost one electoral vote because of non-citizens.

Overall, the Democrats had a built-in net advantage of 10 electoral votes in the 2012, 2016, and 2020 presidential elections from the 15 states whose representation was affected by the counting of non-citizens in allocating electoral votes among the states.

Specifically, Democratic non-battleground states gained seven electoral votes from the following states:

- +5 for California
- +1 for New York
- +1 for Washington.

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[38] U.S. Constitution. Article I, section 2, clause 3. The provisions concerning indentured servants, "Indians not taxed," and slaves ("other persons") are not applicable today.

[39] No doubt, the reason why the Constitution specified that the census would count "persons," instead of trying to count eligible voters, was that the states had complicated and widely varying criteria for voter eligibility in 1787. In most states, eligibility depended on property, wealth, and/or income. Moreover, the requirements for voting were often more stringent for the upper house of the state legislature, as compared to the lower house.

[40] U.S. Census Bureau. 2021. Computing Apportionment. March 1, 2021. https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html. The U.S. Supreme Court upheld the constitutionality of the "method of equal proportions" in 1992 in *Department of Commerce v. Montana* (112 S.Ct. 1415) and *Franklin v. Massachusetts* (112 S.Ct. 2767).

[41] Steinhorn, Leonard. Without voting, noncitizens could swing the election for Obama. *Washington Post*. October 5, 2012.

Republican non-battleground states lost a net of three electoral votes from the following states:

- +2 for Texas
- –1 for Indiana
- –1 for Missouri
- –1 for Louisiana
- –1 for Montana
- –1 for Oklahoma.

Six states that were presidential battlegrounds in the 2012, 2016, and 2020 elections were also affected. However, battleground states can, by definition, go either way in a presidential election. Thus, the following states did not constitute a systemic advantage to either party at the time:

- +1 Florida
- –1 for Iowa
- –1 for Michigan
- –1 for North Carolina
- –1 for Ohio
- –1 for Pennsylvania.

In December 2019, the Center for Immigration Studies issued a projection of the likely effect of non-citizens on the allocation of electoral votes in the 2024 and 2028 presidential elections.

Excluding U.S.-born minor children (who are U.S. citizens under provisions of the 14th Amendment), the study projected:

> "Counting only immigrants themselves (naturalized citizens, legal permanent residents, guest workers, foreign students and illegal aliens), but not their U.S.-born minor children, will redistribute 18 seats in the House in 2020."[42,43]

The National Popular Vote Compact and the direct election constitutional amendment (section 4.7) would eliminate the distortion in presidential elections caused by the disproportionate presence of non-citizens in certain states. These proposals would equalize the vote of every legal voter in the country by guaranteeing the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

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[42] Camarota, Steven A. and Zeigler, Karen. 2019. The Impact of Legal and Illegal Immigration on the Apportionment of Seats in the U.S. House of Representatives in 2020. Center for Immigration Studies. December 2019. https://cis.org/Report/Impact-Legal-and-Illegal-Immigration-Apportionment-Seats-US-House-Representatives-2020.

[43] Dorman, Sam. 2019. LBJ-era immigration changes skewed political power toward Dems, away from GOP: study. Fox News. December 24, 2019. https://www.foxnews.com/politics/study-immigration-electoral-college-house-2020

4.1.9. The spoiler effect would not be eliminated by the top-two fractional-proportional method.

Kevin Johnson of the Election Reformers Network has claimed:

> "This [top-two fractional-proportional] approach would also drastically reduce the 'spoiler' problem: A few percentage points to a Libertarian or Green Party candidate would no longer potentially swing [the outcome]."[44,]

Advocates of the top-two fractional-proportional method specifically cite the 1992 election involving Bill Clinton, George H.W. Bush, and Ross Perot as demonstrating:

> "Proportional allocation significantly reduces the impact of a 'spoiler candidate.'"[45]

In fact, the fractional-proportional (Lodge-Gossett) approach alone, the top-two method alone, and the top-two fractional-proportional method would do nothing at all to ameliorate the spoiler effect.

The spoiler effect can, however, be ameliorated with ranked choice voting (RCV). Indeed, RCV would also ameliorate the spoiler effect if it were included in the direct election amendment (section 4.7) and the current state-by-state winner-take all method of awarding electoral votes. However, it would be RCV—not the fractional-proportional method—that would be doing the ameliorating.

To disentangle the role played by the top-two fractional-proportional method versus the role played by RCV, let's examine the 1992 Clinton-Bush-Perot race.

The 1992 election returns were as follows:

- Bill Clinton—44,909,806
- George H.W. Bush—39,104,550
- Ross Perot—19,743,821
- All others—665,816[46]

The state-by-state returns for the 1992 election are shown in table 4.32 later in this chapter.

Table 4.6 shows the number of electoral votes under the fractional-proportional method for Bill Clinton, George H.W. Bush, Ross Perot and all other candidates—before considering the effect of either RCV or top-two.

Ross Perot was a highly successful Republican Texas businessman known for his hawkish views on foreign policy and fiscal conservatism. When he ran for President in 1992 as an independent candidate, budget deficits and foreign-trade imbalances were prominent

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[44] Johnson, Kevin. 2020. To Fix the Electoral College, Change the Way Its Votes Are Awarded. *Governing*. December 11, 2020. https://www.governing.com/now/to-fix-the-electoral-college-change-the-way-its-votes-are-awarded.html

[45] See slide 10 in Election Reformers Network. 2021. *The Top-two Proportional Approach to Fixing the Electoral College*. January 2021. https://electionreformers.org/wp-content/uploads/2022/01/The-proportional-allocation-approach-to-fixing-the-electoral-college-Jan-2021.pdf Accessed October 18, 2022.

[46] The total national popular vote for President in 1992 was 104,423,993. This total included 665,816 popular votes scattered among 20 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above."

Table 4.6 Fractional-proportional method in 1992

State	Clinton	Bush	Perot	Others	EV
AL	3.679	4.288	0.976	0.056	9
AK	0.909	1.184	0.853	0.055	3
AZ	2.922	3.078	1.903	0.098	8
AR	3.192	2.129	0.626	0.053	6
CA	24.844	17.612	11.138	0.407	54
CO	3.210	2.870	1.866	0.054	8
CT	3.377	2.862	1.726	0.034	8
DE	1.306	1.060	0.613	0.021	3
DC	2.539	0.273	0.128	0.060	3
FL	9.750	10.224	4.954	0.072	25
GA	5.651	5.574	1.734	0.041	13
HI	1.924	1.468	0.569	0.040	4
ID	1.137	1.681	1.082	0.100	4
IL	10.688	7.554	3.662	0.097	22
IN	4.415	5.149	2.373	0.063	12
IA	3.030	2.609	1.310	0.051	7
KS	2.024	2.333	1.619	0.023	6
KY	3.564	3.307	1.093	0.036	8
LA	4.103	3.687	1.063	0.147	9
ME	1.551	1.216	1.217	0.016	4
MD	4.980	3.562	1.418	0.040	10
MA	5.705	3.483	2.736	0.076	12
MI	7.879	6.548	3.473	0.100	18
MN	4.348	3.185	2.396	0.071	10
MS	2.854	3.478	0.610	0.058	7
MO	4.848	3.731	2.386	0.034	11
MT	1.129	1.054	0.783	0.034	3
NE	1.470	2.329	1.181	0.020	5
NV	1.494	1.389	1.047	0.069	4
NH	1.556	1.508	0.903	0.032	4
NJ	6.443	6.087	2.341	0.129	15
NM	2.295	1.867	0.806	0.032	5
NY	16.409	11.179	5.196	0.215	33
NC	5.971	6.082	1.918	0.028	14
ND	0.966	1.326	0.692	0.016	3
OH	8.438	8.053	4.406	0.103	21
OK	2.722	3.412	1.841	0.026	8
OR	2.974	2.277	1.695	0.055	7
PA	10.384	8.309	4.186	0.121	23
RI	1.881	1.161	0.927	0.031	4
SC	3.190	3.842	0.924	0.044	8
SD	1.114	1.220	0.654	0.012	3
TN	5.179	4.668	1.109	0.044	11
TX	11.865	12.979	7.045	0.111	32
UT	1.233	2.168	1.367	0.233	5
VT	1.383	0.913	0.683	0.021	3
VA	5.277	5.846	1.771	0.106	13
WA	4.775	3.516	2.605	0.103	11
WV	2.421	1.770	0.796	0.014	5
WI	4.524	4.045	2.366	0.064	11
WY	1.023	1.191	0.769	0.017	3
Total	**230.547**	**202.334**	**101.537**	**3.582**	**538**

components of his platform. That is, the most prominent elements of Perot's persona were Republican.

Most (albeit not all) political observers have concluded that Perot took far more votes from the Republican incumbent President George H.W. Bush than from Clinton—that is, Perot acted as a spoiler who helped Clinton win.

For the sake of argument here, let's accept that prevailing view so that we can disentangle the role played by the top-two fractional-proportional method versus the role played by RCV.

Because Perot came in third nationally, he would have received no electoral votes under the *nationwide* top-two fractional-proportional method.

Thus, the nationwide version of the top-two fractional-proportional method would not have protected Bush from the spoiler—because Perot's 19,743,821 voters had *already given* their votes to him. Therefore, this huge Republican-tilted bloc of voters would not have been available to help Bush in his match-up with Clinton.

In other words, the top-two rule would have eliminated the spoiler (Perot)—but not the damaging and decisive impact that the spoiler had on Bush.

The results would have been almost the same under the *state-level* top-two fractional-proportional method. Because Perot came in second in two states, he would have received 1.217 electoral votes from Maine and 1.367 electoral votes from Utah. Nonetheless, the overall result would have been the same—very few of Perot's huge bloc of votes would have been available to help Bush in his final match-up with Clinton.

It is definitely true that RCV is an excellent way to ameliorate the spoiler problem. If every state were constitutionally required to use RCV in conjunction with the top-two fractional-proportional system, Bush would have received the lion's share of the second choices made by Perot's voters (under either the nationwide or state level version), and thus Bush would have emerged as the national winner. However, as will be discussed in the next section, any attempt to incorporate universal use of RCV in a federal constitutional amendment would almost certainly prevent its ratification by three-quarters of the states.

4.1.10. Prospects of adoption for the fractional-proportional method

The fractional-proportional method:

- *would not* accurately reflect the nationwide popular vote,
- *would not* make every vote equal, but
- *would* improve upon the current state-by-state winner-take-all method of awarding electoral votes in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President.

The fractional-proportional method has the very desirable feature of giving candidates a need to solicit the votes of every voter, in every state, in every presidential election.

However, the fractional-proportional method does not eliminate the most conspicuous shortcoming of the current system from the point-of-view of the general public, namely that the second-place candidate can become President.

If the fractional-proportional method is applied to the 2000 election returns, it would

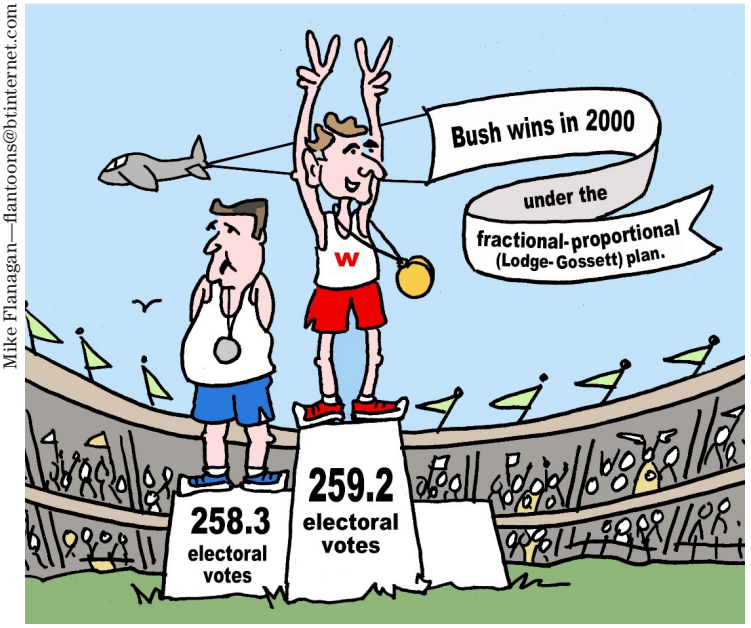

Figure 4.1 George W. Bush would have won under the fractional-proportional method in 2000.

have elected George W. Bush, despite the fact that his opponent received 543,816 more popular votes nationwide, as shown in figure 4.1.

In fact, all five proposed versions of the fractional-proportional method discussed in this chapter would have elected George W. Bush in 2000, including:

- the original 1950 Lodge-Gossett amendment,
- the 1969 Cannon amendment,
- the 2001 Engel amendment that would give electoral votes only to candidates receiving 5% or more of the popular vote,
- the version that would give electoral votes only to the top-two candidates *nationally*, and
- the version that would give electoral votes only to *each state's* top-two candidates.

Moreover, the fractional-proportional method would fail to eliminate any of the four sources of inequality in the value of a vote caused by senatorial electors, imprecision in apportionment of electoral votes among the states, uneven voter turnout, and intra-decade population changes.

In fact, the fractional-proportional method would make these inequalities dramatically worse, because it would convert the *theoretical* advantage conferred by the senatorial electors onto the small states into an *actual* political advantage.

Under the current winner-take-all method of awarding electoral votes, presidential candidates have nothing to gain or lose by campaigning in a state whose outcome is a fore-

gone conclusion. Thus, the theoretically greater value of a vote in smaller states is negated, because almost all of the small states are one-party states in presidential elections. Specifically, only two of the 28 smallest states (Nevada and New Hampshire) are places where the 2024 presidential candidates will campaign.[47]

Thus, the 3.81-to-1 theoretical advantage of a Wyoming voter over a California voter does not currently translate into any real-world clout in favor of Wyoming under the current winner-take-all system, because presidential candidates pay no attention to voters in either state. In a practical political sense, a Wyoming voter is currently equal to a California voter—both are politically irrelevant in the general election campaign for President under the winner-take-all system.

In fact, a voter in 26 of the 28 smallest states is currently as politically irrelevant as a California voter, because the winner-take-all rule causes presidential candidates to ignore all of them.

However, the fractional-proportional method would dramatically change that. Fractional electoral votes would be added together on a nationwide basis, thus converting a Wyoming voter's *theoretical* 3.81-to-1 advantage into an *actual* 3.81-to-1 advantage. Voters in all of the 28 smallest states would instantly become the most avidly courted voters in the country in every presidential election. They would suddenly matter.

In fact, under the fractional-proportional method, the value of vote of 261 million people in 22 states (79% of the U.S. population) would be less than a third of the value of a vote in Wyoming (as shown in figure 4.2).

Table 4.7 shows the value of a vote under the fractional-proportional method, compared to the value of a vote in the smallest state (Wyoming). The combined population of the 28 smallest states (at the top of the table) is 70,022,053 (21% of the U.S. population of 331,449,281). The combined population of the 22 states at the bottom of the table (in bold) is 261,427,228 (79% of the population).[48]

The political effect of the fractional-proportional method would be to substantially enhance the influence of the 28 smallest states (which already enjoy outsized influence in the federal government because of their constitutionally entrenched position in the U.S. Senate and in ratifying constitutional amendments).

The 261 million people in the 22 states whose votes would be worth less than a third of a vote in Wyoming may have something to say about that. They are represented by 341 of the 435 members of the U.S. House (that is, 78%).

A constitutional amendment that devalues voters represented by three-quarters of the House is hardly likely to ever be approved by two-thirds of the House.

That fact alone means that none of the five versions of the fractional-proportional method is ever likely to become part of the U.S. Constitution.

Indeed, several weeks after the U.S. Senate passed the Lodge-Gossett amendment by a 64–27 vote in 1950, more than two-thirds of the House voted against it.

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[47] One of the 14 smallest states (New Hampshire) has been a battleground state in earlier elections, although it ended up in the Democratic column in seven of the eight elections between 1992 and 2020. That is, New Hampshire was a "battleground" state, but not a "swing" state.

[48] Table 1.34 is similar to this table, except that the comparison is made in terms of persons per electoral votes.

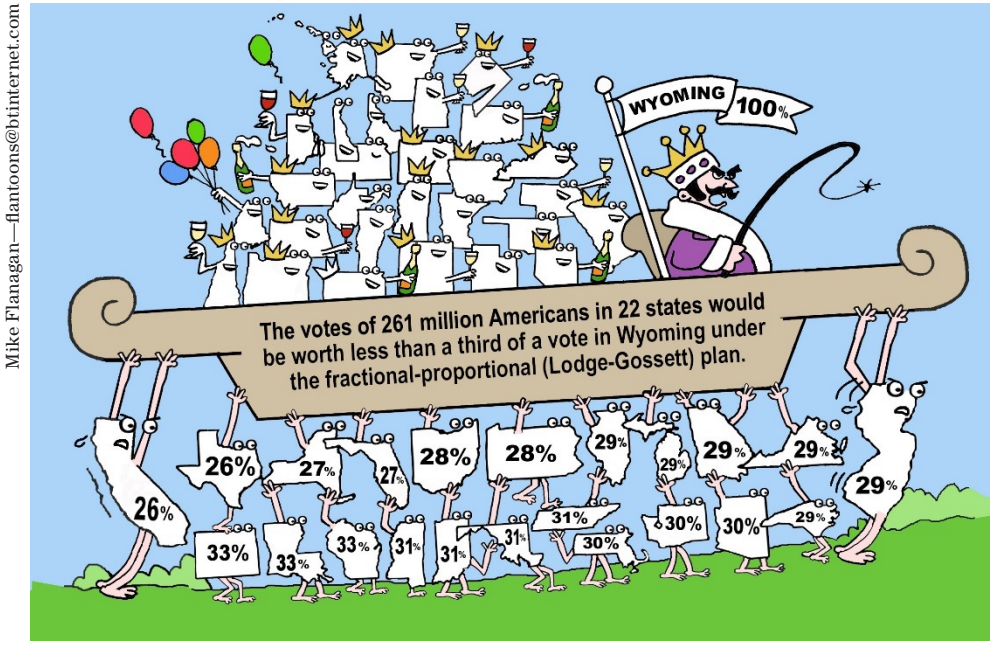

Figure 4.2 The value of the vote of 79% of Americans would be less than a third of that of Wyoming.

The fractional-proportional method does not appeal to two of the natural constituencies for electoral reform.

Much of the political energy behind efforts to reform presidential elections comes from democracy advocates who want every voter to have an equal voice.

The fractional-proportional method fails to deliver this.

As the Making Every Vote Count Foundation observes in its 2023 report *Improving Our Electoral College System*, the fractional-proportional method:

> "would retain … the greater weight given to smaller states under the Electoral College. As a result, [it] **could also be criticized by progressives for failing to adhere fully to the principle of all votes counting equally**."[49] [Emphasis added]

The Election Reformers Network dismisses the fact that every vote would not be equal under the top-two fractional-proportional method, saying:

> "Top-two proportional has something for everyone to like."

[49] Making Every Vote Count Foundation. 2023. *Improving Our Electoral College System*. November 2023. Page 7. https://static1.squarespace.com/static/5a7b7d95b7411c2b69bd666f/t/65b979baf7e8e411b2864a40/1706654139098/MEVC+Report.pdf

Table 4.7 Value of a vote under the fractional-proportional method, compared to the value of a vote in the smallest state

State	2020 population	Electoral votes 2024–2028	Persons per electoral vote	Value of vote compared to smallest state
Wyoming	576,851	3	192,284	100%
Vermont	643,077	3	214,359	90%
D.C.	689,545	3	229,848	84%
Alaska	733,391	3	244,464	79%
North Dakota	779,094	3	259,698	74%
Montana	1,084,225	4	271,056	71%
Rhode Island	1,097,379	4	274,345	70%
South Dakota	886,667	3	295,556	65%
Delaware	989,948	3	329,983	58%
Maine	1,362,359	4	340,590	56%
New Hampshire	1,377,529	4	344,382	56%
Hawaii	1,455,271	4	363,818	53%
Nebraska	1,961,504	5	392,301	49%
New Mexico	2,117,522	5	423,504	45%
West Virginia	1,793,716	4	448,429	43%
Idaho	1,839,106	4	459,777	42%
Kansas	2,937,880	6	489,647	39%
Mississippi	2,961,279	6	493,547	39%
Arkansas	3,011,524	6	501,921	38%
Connecticut	3,605,944	7	515,135	37%
Nevada	3,104,614	6	517,436	37%
Oregon	4,237,256	8	529,657	36%
Iowa	3,190,369	6	531,728	36%
Utah	3,271,616	6	545,269	35%
Alabama	5,024,279	9	558,253	34%
Kentucky	4,505,836	8	563,230	34%
Oklahoma	3,959,353	7	565,622	34%
South Carolina	5,118,425	9	568,714	34%
Minnesota	5,706,494	10	570,649	34%
Colorado	5,773,714	10	577,371	33%
Louisiana	4,657,757	8	582,220	33%
Wisconsin	5,893,718	10	589,372	33%
Missouri	6,154,913	10	615,491	31%
Indiana	6,785,528	11	616,866	31%
Maryland	6,177,224	10	617,722	31%
Tennessee	6,910,840	11	628,258	31%
Massachusetts	7,029,917	11	639,083	30%
Washington	7,705,281	12	642,107	30%
Arizona	7,151,502	11	650,137	30%
North Carolina	10,439,388	16	652,462	29%
New Jersey	9,288,994	14	663,500	29%
Virginia	8,631,393	13	663,953	29%
Georgia	10,711,908	16	669,494	29%
Michigan	10,077,331	15	671,822	29%
Illinois	12,812,508	19	674,343	29%
Pennsylvania	13,002,700	19	684,353	28%
Ohio	11,799,448	17	694,085	28%
Florida	21,538,187	30	717,940	27%
New York	20,201,249	28	721,473	27%
Texas	29,145,505	40	728,638	26%
California	39,538,223	54	732,189	26%
Total	**331,449,281**	**538**	**616,077**	

"Democracy advocates:

- Fix all problems with the system **except making every vote equal**."[50] [Emphasis added]

One wonders what it means to be a "democracy advocate," but not want to see "every vote equal."

How can a proposal that would have elected the candidate who lost the nationwide popular vote by 543,816 votes in 2000 be said to "fix all problems"?

Another significant constituency for election reform comes from the growing number of independent voters and third-party supporters seeking more choice than is currently offered by the two dominant political parties.

However, the top-two rule as well as Engel's 5% threshold further entrench the two currently existing major parties.

A proposal that fails to appeal to the natural constituencies for political reform seems unlikely to ever pass two-thirds of both houses of Congress and 38 state legislatures.

The claim that the Republican Party will support the fractional-proportional method because small states give them a political advantage is not based on political reality.

In his 2024 book, Nick Troiano claims that the over-representation of small states would generate Republican support for the top-two fractional-proportional method:

> "**As Republicans desire**, it maintains the Electoral College as an institution that ensures national elections are still state-based and ensures that **smaller states can still wield influence** by continuing to award at least three electoral votes per states, regardless of population."[51] [Emphasis added]

However, this claim is based on a widespread misconception, namely that the small states deliver a partisan political advantage to the Republican Party in presidential elections.

Table 4.8 shows the political facts—namely that the 14 smallest states (those with three or four electoral votes) were divided 7–7 in the five presidential elections between 2004 and 2020.[52,53]

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[50] Slide 14 of a presentation with no date that was accessed March 10, 2024. Election Reformers Network. *The Top-Two Proportional Approach to Fixing the Electoral College*. https://assets-global.website-files.com/642dcbc53f522476efc85893/64e5177348271c04f0660665_The%20proportional%20allocation%20approach%20to%20fixing%20the%20electoral%20college.pdf

[51] Troiano, Nick. 2024. *The Primary Solution: Rescuing Our Democracy from the Fringes*. Page 200. New York, NY: Simon & Shuster.

[52] Note that there are 14 states that currently have three or four electoral votes, but that one of them (West Virginia) had five electoral votes before the 2020 census.

[53] The table shows which party's presidential candidate won statewide. Note, however, that Maine awards two of its four electoral votes by congressional district. In 2016 and 2020, Donald Trump won one of Maine's district-level electoral votes by carrying the state's 2nd congressional district, while the Democratic nominee won the state as a whole as well as the 1st district.

Table 4.8 Statewide winner of 14 smallest states 2004–2020

State	2004	2008	2012	2016	2020	Total
Delaware	D	D	D	D	D	
District of Columbia	D	D	D	D	D	
Hawaii	D	D	D	D	D	
Maine	D	D	D	D	D	
Rhode Island	D	D	D	D	D	
Vermont	D	D	D	D	D	
New Hampshire	D	D	D	D	D	
Montana	R	R	R	R	R	
Alaska	R	R	R	R	R	
Idaho	R	R	R	R	R	
North Dakota	R	R	R	R	R	
South Dakota	R	R	R	R	R	
West Virginia	R	R	R	R	R	
Wyoming	R	R	R	R	R	
Democratic states	**7**	**7**	**7**	**7**	**7**	
Republican states	**7**	**7**	**7**	**7**	**7**	
Democratic electoral votes	**24**	**24**	**24**	**23**	**23**	**118**
Republican electoral votes	**20**	**20**	**20**	**21**	**21**	**102**

In fact, the Democrats won slightly more electoral votes than the Republicans from the 14 smallest states in five presidential elections between 2004 and 2020 (for a cumulative 118-to-102 margin for the period).[54]

Kevin Johnson of the Election Reformers Network makes a similar point, namely that divergent elections such as 2016 are the consequence of the state-by-state winner-take-all method of awarding electoral votes—not from the non-existent partisan tilt of the smallest states.

> "Donald Trump did not become president because of small states: The 16 least populous split, eight to eight. Instead, Trump won from second place because he carried states with smaller margins of victory than Hillary Clinton did."[55,56]

It may not be politically possible to incorporate RCV in a constitutional amendment. When contemplating a federal constitutional amendment, the relevant political question is whether there is one state legislative chamber in 13 or more states that would oppose the amendment because of the inclusion of ranked choice voting (RCV).

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[54] A similar table covering the eight presidential elections between 1992 and 2020 shows that the Democratic presidential nominee won the 13 smallest states 56 times, compared to 48 times for the Republican, and that the Democratic nominee won 189 electoral votes, compared to 153 for the Republican (table 9.4).

[55] Johnson, Kevin. 2020. Bloc voting is a bigger problem than electors going rogue. Here's a fix. *The Fulcrum*. July 10, 2020. https://thefulcrum.us/electoral-college-votes

[56] See slide 4. Election Reformers Network. The Top-two Proportional Approach to Fixing the Electoral College. Accessed March 10, 2024. https://assets-global.website-files.com/642dcbc53f522476efc85893/64e5177348271c04f0660665_The%20proportional%20allocation%20approach%20to%20fixing%20the%20electoral%20college.pdf

Advocates of the top-two variation of the fractional-proportional method may not be in a position to incorporate RCV as part of their proposed constitutional amendment.

It is certainly true that RCV has been adopted by an impressive number of state and local jurisdictions in recent years. It is already used statewide by Maine and Alaska. Proposals to adopt RCV will be on the ballot in Oregon and Nevada in November 2024. In addition, proposals to adopt RCV on a statewide basis are expected to be on the statewide ballot in November 2024 in Arizona, Colorado, District of Columbia, and Idaho.

Meanwhile, organized opposition to RCV has grown dramatically since Sarah Palin's loss in the 2022 Alaska congressional election conducted under RCV.

As of July 2024, there are 14 states where at least one house of the state legislature has recently taken a position in opposition to RCV.

Specifically, 10 states have enacted laws prohibiting the use of RCV in their elections:

- Alabama
- Florida
- Idaho
- Kentucky
- Louisiana
- Montana
- Mississippi
- Oklahoma
- South Dakota
- Tennessee.

Similar bills banning RCV have recently passed at least one chamber of the legislatures of four additional states:

- Arizona
- North Dakota
- Texas
- Utah.

The existence of this bloc of 14 states strongly suggests that it may not be politically possible to ratify any federal constitutional amendment that involves the use of RCV.

Moreover, well-funded conservative leader Leonard Leo[57] has launched a major nationwide effort—centered on Republican-controlled states—to stop the spread of RCV. This development suggests that there will soon be a number of additional states where one or more legislative chambers will go on record as being strongly opposed to RCV as a matter of policy.

Also, a state constitutional prohibition against RCV will be on the statewide ballot in Missouri in November 2024.

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[57] Perez, Andrew. GOP Puppetmaster Expands His Dark-Money Operation. 2024. *Rolling Stone*. February 20, 2024. https://www.rollingstone.com/politics/politics-features/leonard-leo-dark-money-supreme-court-trump-1234972151/

4.2. WHOLE-NUMBER PROPORTIONAL METHOD OF AWARDING ELECTORAL VOTES

4.2.1. Summary

- Under the whole-number proportional method for awarding electoral votes, a state's electoral votes would be divided proportionally according to the percentage of popular votes received in the state by each presidential candidate—*in whole-number increments*.[58]
- Because it would not abolish the position of presidential elector or the Electoral College and does not require the creation of fractional electoral votes, the whole-number proportional method can be enacted as state legislation on a state-by-state basis.
- The whole-number proportional method *would not* accurately reflect the nationwide popular vote—even if enacted by every state. In fact, the national popular vote winner would not have become President in three of the eight presidential elections between 1992 and 2020 under this method.
  - In two of these eight presidential elections (2000 and 2016), the winner of the national popular vote would not have won the most electoral votes.
  - In four of these eight elections (1992, 1996, 2000, and 2016), the choice of President would have been thrown into the U.S. House. Based on the composition of the House at the time, the national popular vote winner would not have been chosen by the House in three of those four cases (1996, 2000, and 2016).
- In practice, the whole-number proportional method would be a "winner-take-one" system in almost every state—with perhaps two electoral votes being in play in Texas, and three in California.
- Although it might appear that the whole-number proportional method would give candidates a reason to campaign in all 50 states, it would not do so. Candidates would only campaign in states where their level of support was a few percentage points away from a breakpoint that might possibly gain or lose them an electoral vote. In practice, only about 29 electoral votes from about 26 states would typically be in play. Candidates would not have any reason to campaign in the 24 remaining states, because their level of support would be too far away from a breakpoint that would change an electoral vote. That is, almost half of the states would be politically irrelevant spectator states.
- The whole-number proportional method *would not* make every vote equal. There are five sources of significant inequality built into this method, including a
  - 3.81-to-1 inequality because of senatorial electors;
  - 1.72-to-1 inequality because of imprecision in apportioning U.S. House seats (and hence electoral votes);

[58] Note that the allocation of electoral votes in *whole-number* increments is what distinguishes this method from the *fractional-proportional* (Lodge-Gossett) method (section 4.1).

  - 1.67-to-1 inequality in favor of voters in low-turnout states;
  - 1.39-to-1 inequality because of intra-decade population changes; and
  - 50.2-to-1 inequality, because one electoral vote could be won with a few thousand popular votes in a low-population state, while requiring tens of thousands of popular votes in a bigger state.
- Minor-party and independent candidates would almost always be zeroed-out in small- and medium-sized states. The reason is that their level of support would be far less than the fraction of the state's popular vote required to win one electoral vote in such states. One electoral vote would correspond to 33% of the popular vote in a state with three electoral votes. One electoral vote would correspond to 14% of the popular vote of a median-sized state (that is, a state with seven electoral votes).
- The whole-number proportional method would transfer the choice of President from the people to Congress in about half of all elections. The reason is that this method would be adopted without amending the U.S. Constitution, thereby leaving the U.S. House in a position to pick the President if no candidate were to receive an absolute majority of the electoral votes. If the whole-number proportional method had been used by all states, the U.S. House would have picked the President in four of the eight presidential elections between 1992 and 2020 (1992, 1996, 2000, and 2016).
- A state reduces its own influence if it divides its electoral votes while other states continue to use winner-take-all. The whole-number proportional method would penalize first movers and early adopters. Moreover, a piecemeal state-by-state adoption process would quickly become self-arresting, because each new adherent would increase the influence of the remaining winner-take-all states—thereby reducing their incentive to make the change.
- In November 2004, Colorado voters defeated an initiative petition to enact the whole-number proportional method.

4.2.2. Description of the whole-number proportional method

Under the whole-number proportional method, each state's electoral votes are awarded—*in whole-number increments*—according to each presidential candidate's percentage share of the state's popular vote.

The procedure for determining the number of electoral votes that each presidential candidate would receive under the whole-number proportional method is as follows:

- First, each candidate's percentage share of the popular vote in a state is computed by dividing the candidate's popular vote in the state by the total number of popular votes cast there.
- Second, each candidate's percentage share is multiplied by the number of electoral votes possessed by the state. In the unlikely event that only two candidates receive popular votes for President in a given state, the result of this

multiplication is simply rounded off, and each candidate receives that number of electoral votes.[59]

- Third, if more than two candidates receive popular votes in a given state (as would almost always be the case in a presidential race), at least one of the state's electoral votes will remain unallocated by the previous step. In this case, each candidate is initially given the whole number of electoral votes obtained by the multiplication in the second step.
- Fourth, each state's unallocated electoral vote(s) are then allocated to the candidate(s) with the largest fractional remainder(s) resulting from the multiplication in the second step.

4.2.3. History of the whole-number proportional method

We now discuss the history of the debate about this method in the two places where it was recently considered—Pennsylvania in 2012–2013 and Colorado in 2004.

Debate in Pennsylvania in 2012–2013

There were three reasons why the Republican-controlled legislature and Republican Governor in Pennsylvania were interested in examining alternatives to the winner-take-all method of awarding electoral votes in the aftermath of the 2012 presidential election.

First, Pennsylvania proved to be a "jilted battleground" in 2012. As *PoliticsPA* said:

> "Once a reliable battleground state, Pennsylvania spent most of the 2012 presidential campaign on the sidelines."[60]

Indeed, Pennsylvania received only five general-election campaign events in 2012—out of a nationwide total of 253. In contrast, there were 40 visits to the state in 2008.

Particularly galling to Pennsylvanians was the fact that neither incumbent President Obama nor Vice President Biden bothered to visit the state during the 2012 general-election campaign.

Even more galling was the fact that neighboring Ohio (with two fewer electoral votes than Pennsylvania) received 73 general-election campaign events—almost one-third of the nationwide total of 253.

Pennsylvania received so little attention because both presidential campaigns correctly predicted that the state would go Democratic in 2012.

Second, even though Pennsylvania was not overwhelmingly Democratic, the Republican presidential nominee had not won any electoral votes from the state in the six previous presidential elections.

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[59] Note that if more than two candidates were to receive popular votes for President in a state, simple "rounding off" would result in numerous anomalies. For example, if simple "rounding off" were applied to the results of the 2016 election (as discussed in detail below), it would allocate only 54 of the 55 electoral votes that California had at the time, and it would allocate 17 electoral votes in Michigan (which had only 16 electoral votes at the time).

[60] Gibson, Keegan. House Republicans resurrect congressional-based Electoral College plan. *PoliticsPA*. December 20, 2012. http://www.politicspa.com/house-rs-resurrect-congressional-based-electoral-college-plan/44960/

Third, there were six states that President Obama carried in both 2008 and 2012 and where the Republican party controlled both houses of the legislature and the Governor's office (namely Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida). That is, these six Republican-controlled state governments (with a combined total of 106 electoral votes) had the potential to make a dramatic change in the presidential election system.

Thus, in December 2012, Pennsylvania Senate Majority Leader Dominic Pileggi (R)[61] announced that he planned to introduce a bill in 2013 to award 18 of Pennsylvania's 20 electoral votes using the whole-number proportional method, while continuing to award the state's two senatorial electoral votes to the candidate receiving the most popular votes statewide.[62]

In a state allocating 18 electoral votes proportionally, each electoral vote would represent 5.56% of the statewide vote.

Table 4.9 shows how Pennsylvania's 20 electoral votes would be divided under Pileggi's proportional proposal in a race with two major-party candidates.[63]

Note that a candidate receiving between 47.22% and 49.99% of the statewide vote would win nine electoral votes. However, because of the state's two senatorial electoral votes, a candidate receiving between 50.01% and 52.78% of the statewide vote would receive 11 electoral votes.

In a December 2012 article entitled "Electoral College Chaos: How Republicans Could Put a Lock on the presidency," Rob Richie from FairVote discussed the political effect if the six Republican-controlled states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida) were to adopt Senator Pileggi's proposal.[64]

As Richie observed, President Obama won the electoral votes of these six states by a 106–0 margin in November 2012.

Meanwhile, Obama won the Electoral College by a 332–206 margin over Governor Mitt Romney—that is, with only 62 more electoral votes than the 270 required for election.

Table 4.10 shows the effect (using data from Richie's article) of applying Senator Pileggi's 2012 proportional proposal to the 2012 election returns from the six states being discussed.

The table shows that, under Pileggi's 2012 proposal (with each state's two senatorial electoral votes awarded to the statewide popular vote winner), President Obama would have received 61 electoral votes to Governor Romney's 45 electoral votes in the six states.

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[61] As discussed in section 4.3.3, Senator Pileggi had previously proposed (in September 2011) the congressional-district method for awarding Pennsylvania's electoral votes.

[62] Varghese, Romy. Pennsylvania proposal may help Republicans win electoral votes. *Bloomberg*. December 3, 2012. http://www.bloomberg.com/news/2012-12-03/pennsylvania-proposal-may-help-republicans-win-electoral-votes.html

[63] The whole-number proportional method can be implemented in several slightly different ways, depending how third parties, fractions, and round-offs are treated. Senator Pileggi did not release legislative language at the time of announcing his proposal in December 2012. The calculation here assumes use of the whole-number proportional method as described in section 4.1 of this book and also assumes only two major-party candidates.

[64] Richie, Rob. 2012. Electoral College chaos: How Republicans could put a lock on the presidency. December 13, 2012. http://www.fairvote.org/electoral-college-chaos-how-republicans-could-put-a-lock-on-the-presidency

Table 4.9 Division of Pennsylvania's 20 electoral votes under Senator Pileggi's proportional proposal

Candidate receiving statewide popular vote of	Wins this number of "proportional" electoral votes	Wins this number of senatorial electoral votes	Wins this total number of electoral votes
Between 0% and 2.78%	0	0	0
Between 2.78% and 8.33%	1	0	1
Between 8.33% and 13.89%	2	0	2
Between 13.89% and 19.44%	3	0	3
Between 19.44% and 25.00%	4	0	4
Between 25.00% and 30.56%	5	0	5
Between 30.56% and 36.11%	6	0	6
Between 36.11% and 41.67%	7	0	7
Between 41.67% and 47.22%	8	0	8
Between 47.22% and 49.99%	9	0	9
Between 50.01% and 52.78%	9	2	11
Between 52.78% and 58.33%	10	2	12
Between 58.33% and 63.89%	11	2	13
Between 63.89% and 69.44%	12	2	14
Between 69.44% and 75.00%	13	2	15
Between 75.00% and 80.56%	14	2	16
Between 80.56% and 86.11%	15	2	17
Between 86.11% and 91.67%	16	2	18
Between 91.67% and 97.22%	17	2	19
Between 97.22% and 100%	18	2	20

Table 4.10 Political effect of Pileggi's 2012 proportional proposal in six states that Obama carried in 2012

State	D	R	D proportional	R proportional	D at-large	R at-large	D total	R total
FL	50%	49%	14	13	2	0	16	13
MI	54%	45%	8	6	2	0	10	6
OH	51%	48%	8	8	2	0	10	8
PA	52%	47%	9	9	2	0	11	9
VA	51%	47%	6	5	2	0	8	5
WI	53%	46%	4	4	2	0	6	4
Total			**49**	**45**	**12**	**0**	**61**	**45**

That is, President Obama would have ended up with a narrow 287–251 win in the Electoral College, instead of his actual 332–206 win.

These six Republican-controlled states could potentially narrow the margin even more by awarding all of their electoral votes (instead of all but two) on a proportional basis.

For comparison, table 4.11 shows the effect of applying the whole-number proportional method to all 106 electoral votes possessed by the six states.

As can be seen in the table, if this method is applied to the election returns of these six states, President Obama would have received only 56 electoral votes to Governor

Table 4.11 Political effect of the whole-number proportional method in six states that Obama carried in 2012

State	D	R	D total	R total
FL	50%	49%	15	14
MI	54%	45%	9	7
OH	51%	48%	9	9
PA	52%	47%	11	9
VA	51%	47%	7	6
WI	53%	46%	5	5
Total			**56**	**50**

Romney's 50 electoral votes. That is, Obama would have ended up with a 282–256 win in the Electoral College.

Not surprisingly, the Democrats did not like Pileggi's proposal.

Clifford B. Levine, a prominent Democrat in Pennsylvania, said the following in a speech to the Electoral College meeting in Harrisburg, Pennsylvania, on December 17, 2012:

> "**If Pennsylvania became the third state to split its electors**—lightly populated Maine and Nebraska are the only states that do so now—**it would have little influence in future presidential elections, diminishing the voice of Pennsylvania on the national stage**.
>
> "Worse, seems a more nefarious nationwide scheme is being orchestrated by far-right strategists.
>
> "In 2010, Republicans took control of state legislatures in many battleground states, including Pennsylvania, Ohio, Michigan, Wisconsin, Virginia and Florida, which have voted Democratic in recent presidential elections. Instead of listening to voters, Republican leaders in those states have recently proposed similar drastic changes to the elector-selection process, seeking a pro rata allocation of electors in their states.
>
> "These partisans assert this allocation is fair because the winner-take-all approach deprives the losing party of a voice. What these partisan Republicans do not address—and what every voter and journalist in America should ask—is whether the pro rata systems are being proposed in red states, where Republicans control the state government and which vote Republican in presidential elections. Texas, Georgia, Mississippi, North Carolina and Missouri apparently will retain the winner-take-all selection method. Only in blue states are proposals being made to dilute Democratic strength. **The result would be a country of red states and irrelevant states, with preordained election results**."[65] [Emphasis added]

[65] Levine, Clifford B. Hands off the Electoral College! *Pittsburgh Post-Gazette*. December 30, 2012. http://www.post-gazette.com/stories/opinion/perspectives/hands-off-the-electoral-college-668327/

When the Pennsylvania legislature met in 2013 and 2014, it took no action on Pileggi's proposal.

Initiative petition in Colorado in 2004 for the whole-number proportional method (Amendment 36)

The practical political difficulties of enacting this method in a single state were illustrated in Colorado in 2004.

An initiative petition was filed in Colorado calling for a statewide vote on November 2, 2004, on a proposed amendment to the state constitution to install the whole-number proportional method.[66,67,68]

There were three main reasons why the voters defeated Amendment 36 in Colorado in 2004.

First, if Amendment 36 had been adopted, Colorado would have been the only state in the country to divide its electoral votes in this manner. Everyone agreed that the practical political effect of Amendment 36 would be to convert Colorado from a "winner-take-nine" state into a "winner-take-one" state. In his campaign against Amendment 36, Colorado Governor Bill Owens (R) argued that it did not make sense for just one state to adopt this method. Many voters agreed that Colorado's national influence would be reduced if Colorado were the only state in the country to divide its presidential electors proportionally. The Governor's argument was, in essence, the same that Thomas Jefferson had made in his January 12, 1800, letter to James Monroe (section 2.6.1) concerning the "folly" of dividing the electoral votes of states (Virginia and North Carolina) that supported Jefferson in the 1796 presidential election.

Second, Amendment 36 was presented to the voters by its proponents using the argument that it would take effect immediately and apply to the November 2004 presidential election. That is, the initiative would have applied to the very election in which the voters were deciding its fate. Many voters said that they would have approved the change for a subsequent election, but that they were troubled by changing the rules of the game in the midst of the presidential campaign.[69]

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[66] The text of Amendment 36 is found on pages 32–38 of Colorado's 2004 voter pamphlet, and the arguments for and against the proposition are found on pages 10–12. Legislative Council of the Colorado General Assembly. 2004. *Analysis of the 2004 Ballot Proposals*. Research Publication No. 527-8. http://hermes.cde.state.co.us/drupal/islandora/object/co:2995/datastream/OBJ/view

[67] Johnson, Kirk. 2004. Coloradans to Consider Splitting Electoral College Votes. *New York Times*. September 19, 2004. https://www.nytimes.com/2004/09/19/politics/campaign/coloradans-to-consider-splitting-electoral-college-votes.html

[68] The Colorado effort was inspired and supported by the late Professor John Sperling, who authored an analysis of the problems of the current political system. See Sperling, John; Helburn, Suzanne; George, Sam; Morris, John; and Hunt Carl. 2004. *The Great Divide: Retro vs. Metro America*. Polipoint Press.

[69] Amendment 36 would almost certainly not have applied to the 2004 presidential election in Colorado even if it had been approved by the voters on Election Day in 2004. Section 5 of the Electoral Count Act of 1887 states that a state's appointment of presidential elector is conclusive as to the counting of the electoral votes by Congress only if the electors were appointed under laws "enacted *prior* to the day fixed for the appointment of the electors." Note that if current federal law (section 5 of the Electoral Count Reform Act of 2022) had been in effect in 2004, there is no question that no change in the law on or after Election Day can be applied to the presidential election at hand.

Third, the changing fortunes of the candidates during the campaign interacted with the claim (whether legally correct or not) that Amendment 36 would govern Colorado's awarding of its electoral votes in the 2004 presidential election. During the summer of 2004, it was taken for granted that President George W. Bush, would easily carry Colorado. Indeed, Colorado had voted Republican in most recent presidential elections. Given that political expectation, the political effect of Amendment 36 would have been to transfer four of Colorado's nine electoral votes from Bush to the candidate who was almost universally expected to lose the state, namely Democratic presidential nominee John Kerry.

The historical context of the 2004 campaign was that Bush received only 271 votes in the Electoral College in 2000—that is, only one more electoral vote than is necessary to win. Based on the closeness of the 2000 election and closeness of the 2004 race, it was widely predicted that the vote in the Electoral College was likely to be very close again in 2004.[70] Thus, there was little Republican support for Amendment 36 because it was perceived, from the beginning, to be a partisan effort to take four electoral votes from Bush.

Colorado's Republican Governor Bill Owens led a campaign that spent over a million dollars in opposition to Amendment 36.

Then, as Election Day approached, some polls unexpectedly showed Kerry virtually tied with Bush in Colorado. At that point, Democrats started believing that Kerry might win all nine of Colorado's electoral votes under the winner-take-all system, and Democratic support evaporated. Amendment 36 ended up with only 35% statewide support on Election Day.

4.2.4. The whole-number proportional method would not accurately reflect the nationwide popular vote.

At first blush, it might appear that this method would accurately reflect the nationwide popular vote.

However, the national popular vote winner would not have become President in three of the eight presidential elections between 1992 and 2020 if this method had been used in every state.

In two of these eight elections—namely 2000 and 2016—the winner of the national popular vote would not have won the most electoral votes under this method.

- In 2016, this method would have produced a *tie* between Clinton and Trump in the Electoral College (with 261 each)—even though Clinton received 2,868,518 more popular votes nationwide.
- In 2000, this method would have given Bush *more* electoral votes than Gore in 2000—even though Gore received 543,816 more popular votes nationwide.

In four of these eight elections—namely 1992, 1996, 2000, and 2016—no candidate would have received the constitutionally required absolute majority (270 of 538) in the Electoral College.

Consequently, the election for President would have been thrown into the U.S. House of Representatives (with each state having one vote).

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[70] In fact, this prediction turned out to be correct—Bush eventually received only 286 electoral votes in 2004.

- In three of these four elections (1996, 2000, and 2016), the composition of the newly elected U.S. House was such that the candidate who received the most popular votes nationwide would *not* have been chosen as President by the House.
- In one of these four elections (1992), the national popular vote winner (Bill Clinton) would have been chosen by the House.

To see how the whole-number proportional method operates, we now apply it to the results of the eight presidential elections between 1992 and 2020.

We start with the 2016 election, because it illustrates several of the method's most unexpected features.

2016 election

The total national popular vote for President in 2016 was 137,125,484.

The results of the 2016 election were:

- Hillary Clinton—65,853,652
- Donald Trump—62,985,134
- Gary Johnson—4,489,235
- Jill Stein—1,457,226
- Evan McMullin—732,273
- 26 other candidates—1,607,964.[71]

Table 4.12 shows, by state, the results of the 2016 presidential election.

- Columns 2 through 6 show the number of popular votes for each candidate.
- Column 7 shows the combined total vote for candidates other than the top five.
- Column 8 shows the total number of popular votes cast for President in each state.

Now let's illustrate the four steps of the whole-number proportional process by applying it to California (highlighted in the fifth row of this table).

First, Hillary Clinton received 8,753,792 of the 14,237,893 popular votes cast in California. Her percentage share of California's popular vote was 61.48%.

Second, Clinton's percentage share in California (61.48%) is multiplied by 55 (the state's number of electoral votes at the time) yielding 33.815.[72] That is, the result of this step is a whole number (33) and a fractional remainder (0.815). This is shown in table 4.13.

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[71] A combined total of 1,607,964 votes were scattered among 26 additional candidates (most of whom were on the ballot in only one state, or just a few states), various write-in candidates (notably Ron Paul), and votes cast in the state of Nevada for "none of the above." None of these 26 additional candidates received enough popular votes in any state to come close to winning any electoral votes under the whole-number proportional method. These 1,607,964 votes have been consolidated as "others" in this table.

[72] An alternative way to think of this second step is that one electoral vote represented 258,871 popular votes cast in California in 2016. If you divide Clinton's statewide popular vote total in California (8,753,792) by 258,871, the result is 33 (the whole number portion of the quotient) plus a remainder of 211,056 (that is, a fractional remainder of 0.815).

Table 4.12 2016 election results

State	Clinton	Trump	Johnson	Stein	McMullin	Others	Total
AL	729,547	1,318,255	44,467	9,391		21,712	2,123,372
AK	116,454	163,387	18,725	5,735		14,307	318,608
AZ	1,161,167	1,252,401	106,327	34,345	17,449	32,968	2,604,657
AR	380,494	684,872	29,829	9,473	13,255	12,712	1,130,635
CA	**8,753,792**	**4,483,814**	**478,500**	**278,658**	**39,596**	**203,533**	**14,237,893**
CO	1,338,870	1,202,484	144,121	38,437	28,917	27,418	2,780,247
CT	897,572	673,215	48,676	22,841	2,108	508	1,644,920
DE	235,603	185,127	14,757	6,103	706	1,518	443,814
DC	282,830	12,723	4,906	4,258		6,551	311,268
FL	4,504,975	4,617,886	207,043	64,399		108,444	9,502,747
GA	1,877,963	2,089,104	125,306	7,674	13,017	28,383	4,141,447
HI	266,891	128,847	15,954	12,737		4,508	428,937
ID	189,765	409,055	28,331	8,496	46,476	8,310	690,433
IL	3,090,729	2,146,015	209,596	76,802	11,915	59,768	5,594,825
IN	1,033,126	1,557,286	133,993	7,841		25,719	2,757,965
IA	653,669	800,983	59,186	11,479	12,366	28,348	1,566,031
KS	427,005	671,018	55,406	23,506	6,520	11,300	1,194,755
KY	628,854	1,202,971	53,752	13,913	22,780	1,880	1,924,150
LA	780,154	1,178,638	37,978	14,031	8,547	9,684	2,029,032
ME	357,735	335,593	38,105	14,251	1,887	356	747,927
MD	1,677,928	943,169	79,605	35,945	9,630	35,169	2,781,446
MA	1,995,196	1,090,893	138,018	47,661	2,719	50,559	3,325,046
MI	2,268,839	2,279,543	172,136	51,463	8,183	44,378	4,824,542
MN	1,367,825	1,323,232	112,984	36,991	53,083	51,118	2,945,233
MS	485,131	700,714	14,435	3,731		7,077	1,211,088
MO	1,071,068	1,594,511	97,359	25,419	7,072	32,837	2,828,266
MT	177,709	279,240	28,037	7,970	2,297	6,569	501,822
NE	284,494	495,961	38,946	8,775		16,051	844,227
NV	539,260	512,058	37,384			36,683	1,125,385
NH	348,526	345,790	30,777	6,496	1,064	11,643	744,296
NJ	2,148,278	1,601,933	72,477	37,772		46,263	3,906,723
NM	385,234	319,667	74,541	9,879	5,825	3,173	798,319
NY	4,556,142	2,819,557	176,600	107,937	10,413	51,146	7,721,795
NC	2,189,316	2,362,631	130,126	12,105		47,386	4,741,564
ND	93,758	216,794	21,434	3,780		8,594	344,360
OH	2,394,169	2,841,006	174,498	46,271	12,574	68,029	5,536,547
OK	420,375	949,136	83,481			0	1,452,992
OR	1,002,106	782,403	94,231	50,002		72,594	2,001,336
PA	2,926,441	2,970,733	146,715	49,941	4,304	68,595	6,166,729
RI	252,525	180,543	14,746	6,220	759	9,351	464,144
SC	855,373	1,155,389	49,204	13,034	21,016	9,011	2,103,027
SD	117,458	227,721	20,850			4,064	370,093
TN	870,695	1,522,925	70,397	15,993	11,991	16,026	2,508,027
TX	3,877,868	4,685,047	283,492	71,558	42,366	32,835	8,993,166
UT	310,676	515,231	39,608	9,438	243,690	24,958	1,143,601
VT	178,573	95,369	10,078	6,758	631	23,658	315,067
VA	1,981,473	1,769,443	118,274	27,638	54,054	31,870	3,982,752
WA	1,742,718	1,221,747	160,879	58,417	2,104	131,131	3,316,996
WV	188,794	489,371	23,004	8,075	1,104	10,885	721,233
WI	1,382,536	1,405,284	106,674	31,072	11,855	38,729	2,976,150
WY	55,973	174,419	13,287	2,515		9,655	255,849
Total	**65,853,652**	**62,985,134**	**4,489,235**	**1,457,226**	**732,273**	**1,607,964**	**137,125,484**

The result of these first two steps for the top five candidates in California are:

- 33.815 for Hillary Clinton
- 17.321 for Trump
- 1.848 for Johnson
- 1.076 for Stein
- 0.153 for McMullin

Table 4.13 shows this same calculation for all 50 states and the District of Columbia for 2016. Specifically, the table shows, for each state and each candidate, the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Note that these intermediate calculations for the whole-number proportional method are the very same calculations needed to implement the fractional-proportional method (section 4.1). That is, the totals on the bottom line of this table are the number of electoral votes that each candidate would receive under the fractional-proportional method.

Third, each candidate in California *initially* receives the *whole number* of electoral votes resulting from the second step above:

- 33 electoral votes for Hillary Clinton
- 17 electoral votes for Trump
- 1 electoral vote for Johnson
- 1 electoral vote for Stein
- 0 electoral votes for McMullin

Note that only 52 of California's 55 electoral votes have been allocated after this third step. That is, three of California's 55 electoral votes remain to be allocated at this point in the process.[73]

Fourth, in order to allocate California's three remaining electoral votes, we now examine the fractional remainders for each candidate resulting from the second step above.

- 0.815 for Hillary Clinton
- 0.321 for Trump
- 0.848 for Johnson
- 0.076 for Stein
- 0.153 for McMullin
- insignificant small fractions for each of the 26 other candidates

Johnson has the largest fraction (0.848), Clinton has the second largest fraction (0.815), and Trump has the third largest fraction (0.321).

Therefore, these three candidates each receive one additional electoral vote—thereby completing the allocation of all 55 of California's electoral votes.

Stein and McMullin would not have received any additional electoral votes in this final step, because of their smaller fractional remainders (0.076 and 0.153, respectively).

Note that this step is *not* a simple rounding-off of the numbers produced in the second step. Indeed, rounding-off would not produce a complete allocation of California's electoral votes.

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[73] On a nationwide basis, 82 of the 538 electoral votes remain unallocated after this third step.

Table 4.13 Intermediate calculation for 2016 election

State	Clinton	Trump	Johnson	Stein	McMullin	Others	EV
AL	3.092	5.587	0.188	0.040	0.000	0.092	9
AK	1.097	1.538	0.176	0.054	0.000	0.135	3
AZ	4.904	5.289	0.449	0.145	0.074	0.139	11
AR	2.019	3.634	0.158	0.050	0.070	0.067	6
CA	**33.815**	**17.321**	**1.848**	**1.076**	**0.153**	**0.786**	**55**
CO	4.334	3.893	0.467	0.124	0.094	0.089	9
CT	3.820	2.865	0.207	0.097	0.009	0.002	7
DE	1.593	1.251	0.100	0.041	0.005	0.010	3
DC	2.726	0.123	0.047	0.041	0.000	0.063	3
FL	13.748	14.093	0.632	0.197	0.000	0.331	29
GA	7.255	8.071	0.484	0.030	0.050	0.110	16
HI	2.489	1.202	0.149	0.119	0.000	0.042	4
ID	1.099	2.370	0.164	0.049	0.269	0.048	4
IL	11.049	7.671	0.749	0.275	0.043	0.214	20
IN	4.121	6.211	0.534	0.031	0.000	0.103	11
IA	2.504	3.069	0.227	0.044	0.047	0.109	6
KS	2.144	3.370	0.278	0.118	0.033	0.057	6
KY	2.615	5.002	0.223	0.058	0.095	0.008	8
LA	3.076	4.647	0.150	0.055	0.034	0.038	8
ME	1.913	1.795	0.204	0.076	0.010	0.002	4
MD	6.033	3.391	0.286	0.129	0.035	0.126	10
MA	6.601	3.609	0.457	0.158	0.009	0.167	11
MI	7.524	7.560	0.571	0.171	0.027	0.147	16
MN	4.644	4.493	0.384	0.126	0.180	0.174	10
MS	2.403	3.471	0.072	0.018	0.000	0.035	6
MO	3.787	5.638	0.344	0.090	0.025	0.116	10
MT	1.062	1.669	0.168	0.048	0.014	0.039	3
NE	1.685	2.937	0.231	0.052	0.000	0.095	5
NV	2.875	2.730	0.199	0.000	0.000	0.196	6
NH	1.873	1.858	0.165	0.035	0.006	0.063	4
NJ	7.698	5.741	0.260	0.135	0.000	0.166	14
NM	2.413	2.002	0.467	0.062	0.036	0.020	5
NY	17.111	10.589	0.663	0.405	0.039	0.192	29
NC	6.926	7.474	0.412	0.038	0.000	0.150	15
ND	0.817	1.889	0.187	0.033	0.000	0.075	3
OH	7.784	9.236	0.567	0.150	0.041	0.221	18
OK	2.025	4.573	0.402	0.000	0.000	0.000	7
OR	3.505	2.737	0.330	0.175	0.000	0.254	7
PA	9.491	9.635	0.476	0.162	0.014	0.222	20
RI	2.176	1.556	0.127	0.054	0.007	0.081	4
SC	3.661	4.945	0.211	0.056	0.090	0.039	9
SD	0.952	1.846	0.169	0.000	0.000	0.033	3
TN	3.819	6.679	0.309	0.070	0.053	0.070	11
TX	16.386	19.796	1.198	0.302	0.179	0.139	38
UT	1.630	2.703	0.208	0.050	1.279	0.131	6
VT	1.700	0.908	0.096	0.064	0.006	0.225	3
VA	6.468	5.776	0.386	0.090	0.176	0.104	13
WA	6.305	4.420	0.582	0.211	0.008	0.474	12
WV	1.309	3.393	0.159	0.056	0.008	0.075	5
WI	4.645	4.722	0.358	0.104	0.040	0.130	10
WY	0.656	2.045	0.156	0.029	0.000	0.113	3
Total	**255.377**	**249.022**	**18.034**	**5.795**	**3.255**	**6.517**	**538**

Overall, the final allocation of California's 55 electoral votes would have been:

- 34 electoral votes for Hillary Clinton
- 18 electoral votes for Trump
- 2 electoral votes for Johnson
- 1 electoral vote for Stein
- 0 electoral votes for McMullin
- 0 electoral votes for each of the 26 other candidates.

Table 4.14 carries out this process for all 50 states and the District of Columbia. It shows the number of electoral votes each candidate would have received from each state if the whole-number proportional method is applied to the 2016 election returns.

As can be seen from the bottom line in the table, the overall national results of applying the whole-number proportional method to the results of the 2016 election would have been as follows:

- 261 electoral votes for Hillary Clinton
- 261 electoral votes for Donald Trump
- 14 electoral votes for Johnson (two from California and one each from Arizona, Colorado, Florida, Georgia, Illinois, Indiana, Michigan, New Mexico, New York, Ohio, Texas, and Washington)
- 1 electoral vote for Jill Stein (from California)
- 1 electoral vote for McMullin (from Utah)
- 0 electoral votes for each of the 26 other candidates

In other words, the whole-number proportional method would have produced a 261–261 tie in electoral votes for Hillary Clinton and Donald Trump—even though Clinton received 2,868,518 more popular votes nationwide than Trump.

The reason for this 261–261 tie is that this method of allocating electoral votes yields only a very crude approximation of each state's popular vote. Indeed, in half of the states, one electoral vote corresponds to between 14% and 33% of a state's popular vote.

The most important consequence of this 261–261 tie is that no candidate in 2016 would have received the constitutionally required absolute majority of the electoral votes (270 of 538). Consequently, the presidential election would have been thrown into the newly elected U.S. House of Representatives.

In a so-called "contingent" election for President, each state would have one vote, and the House would be constitutionally limited to choosing among the three candidates receiving the most electoral votes, namely Clinton, Trump, and Johnson in 2016.

If all the members of the 50 delegations in the newly elected U.S. House of Representatives had voted in accordance with their party affiliations on January 6, 2017, Donald Trump would have been chosen President.

In summary, the whole-number proportional method would have initially produced a 261–261 tie in the Electoral College in 2016, and the resulting contingent election in the House would not have selected the candidate (Hillary Clinton) who received the most popular votes nationwide.

The contingent election for Vice President in the Senate is limited to choosing between the two candidates receiving the most electoral votes (Pence and Kaine in 2016). If each

Table 4.14 2016 election under the whole-number proportional method

State	Clinton	Trump	Johnson	Stein	McMullin	Others	EV
AL	3	6					9
AK	1	2					3
AZ	5	5	1				11
AR	2	4					6
CA	**34**	**18**	**2**	**1**			**55**
CO	4	4	1				9
CT	4	3					7
DE	2	1					3
DC	3						3
FL	14	14	1				29
GA	7	8	1				16
HI	3	1					4
ID	1	3					4
IL	11	8	1				20
IN	4	6	1				11
IA	3	3					6
KS	2	4					6
KY	3	5					8
LA	3	5					8
ME	2	2					4
MD	6	4					10
MA	7	4					11
MI	7	8	1				16
MN	5	5					10
MS	2	4					6
MO	4	6					10
MT	1	2					3
NE	2	3					5
NV	3	3					6
NH	2	2					4
NJ	8	6					14
NM	2	2	1				5
NY	17	11	1				29
NC	7	8					15
ND	1	2					3
OH	8	9	1				18
OK	2	5					7
OR	4	3					7
PA	10	10					20
RI	2	2					4
SC	4	5					9
SD	1	2					3
TN	4	7					11
TX	17	20	1				38
UT	2	3			1		6
VT	2	1					3
VA	7	6					13
WA	6	5	1				12
WV	1	4					5
WI	5	5					10
WY	1	2					3
Total	**261**	**261**	**14**	**1**	**1**	**0**	**538**

Table 4.15 2016 election under the whole-number proportional method and fractional-proportional (Lodge-Gossett) method

Method	Clinton	Trump	Johnson	Stein	McMullin	Others	EV
FP	255.377	249.022	18.034	5.795	3.255	6.517	538
WNP	261	261	14	1	1	0	538

Senator had voted in accordance with party affiliations on January 6, 2017, Mike Pence would have been elected Vice President.

The conclusion is that the whole-number proportional method, if applied to the 2016 election returns, would not have accurately reflected the nationwide popular vote for President or Vice President.

Table 4.15 compares the results produced by the whole-number proportional method (WNP) to the fractional-proportional method (FP) to 2016 election returns.

The table shows that the three minor-party candidates would have received considerably fewer electoral votes under the whole-number proportional method than under the fractional-proportional method.

2020 election

The results of the 2020 election were:

- Joe Biden (Democrat)—81,268,586
- Donald Trump (Republican)—74,215,875
- Jo Jorgensen (Libertarian)—1,865,526
- Howie Hawkins (Green)—404,980
- 32 other candidates—470,032.[74]

The total national popular vote for President in 2020 was 158,224,999.

Table 4.16 shows, by state, the results for the 2020 presidential election.[75]

Table 4.17 shows the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote in 2020 by each state's number of electoral votes.

Table 4.18 shows, by state, the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the results of the 2020 election.

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[74] A combined total of 470,032 popular votes were scattered among 32 additional candidates (most of whom were on the ballot in only one state, or just a few states), various write-in candidates, and votes cast in the state of Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

[75] The data in this table comes from the 51 Certificates of Ascertainment on file at the National Archives and found at https://www.archives.gov/electoral-college/2020?_ga=2.79064146.774453085.1607395607-1857190428.1606759205

Table 4.16 2020 election results

State	Biden	Trump	Jorgensen	Hawkins	Others	Total
AL	849,624	1,441,170	25,176		7,312	2,323,282
AK	153,778	189,951	8,897	2,673	2,270	357,569
AZ	1,672,143	1,661,686	51,465	1,557	475	3,387,326
AR	423,932	760,647	13,133	2,980	18,377	1,219,069
CA	11,110,250	6,006,429	187,895	81,029	115,268	17,500,871
CO	1,804,352	1,364,607	52,460	8,986	26,575	3,256,980
CT	1,080,831	714,717	20,230	7,538	541	1,823,857
DE	295,933	200,327	4,993	2,138	290	503,681
DC	317,323	18,586	2,036	1,726	4,685	344,356
FL	5,297,045	5,668,731	70,324	14,721	16,635	11,067,456
GA	2,473,633	2,461,854	62,138		91	4,997,716
HI	366,130	196,864	5,539	3,822	2,114	574,469
ID	287,021	554,119	16,304		9,787	867,231
IL	3,471,915	2,446,891	66,544	30,494	17,594	6,033,438
IN	1,242,413	1,729,516	59,232	988	963	3,033,112
IA	759,061	897,672	19,637	3,075	7,089	1,686,534
KS	570,323	771,406	30,574			1,372,303
KY	772,474	1,326,646	26,234	716	10,658	2,136,728
LA	856,034	1,255,776	21,645		14,607	2,148,062
ME	435,072	360,737	14,152	8,230	1,183	819,374
MD	1,985,023	976,414	33,488	15,799	7,195	3,017,919
MA	2,382,202	1,167,202	47,013	18,658		3,615,075
MI	2,804,040	2,649,852	60,381	13,718	11,293	5,539,284
MN	1,717,077	1,484,065	34,976	10,033	22,299	3,268,450
MS	539,398	756,764	8,026	1,498	8,073	1,313,759
MO	1,253,014	1,718,736	41,205	8,283	4,724	3,025,962
MT	244,786	343,602	15,252			603,640
NE	374,583	556,846	20,283			951,712
NV	703,486	669,890	14,783		3,138	1,391,297
NH	424,937	365,660	13,236			803,833
NJ	2,608,335	1,883,274	31,677	14,202	11,865	4,549,353
NM	501,614	401,894	12,585	4,426	3,446	923,965
NY	5,230,985	3,244,798	60,234	32,753	22,587	8,591,357
NC	2,684,292	2,758,775	48,678	12,195	7,549	5,511,489
ND	114,902	235,595	9,393		1,929	361,819
OH	2,679,165	3,154,834	67,569	18,812	1,822	5,922,202
OK	503,890	1,020,280	24,731		11,798	1,560,699
OR	1,340,383	958,448	41,582	11,831	4,988	2,357,232
PA	3,458,229	3,377,674	79,380			6,915,283
RI	307,486	199,922	5,053		5,296	517,757
SC	1,091,541	1,385,103	27,916	6,907	1,862	2,513,329
SD	150,471	261,043	11,095			422,609
TN	1,143,711	1,852,475	29,877	4,545	23,243	3,053,851
TX	5,259,126	5,890,347	126,243	33,396	5,944	11,315,056
UT	560,282	865,140	38,447	5,053	19,367	1,488,289
VT	242,820	112,704	3,608	1,310	6,986	367,428
VA	2,413,568	1,962,430	64,761			4,440,759
WA	2,369,612	1,584,651	80,500	18,289	7,327	4,060,379
WV	235,984	545,382	10,687	2,599	79	794,731
WI	1,630,866	1,610,184	38,491		18,500	3,298,041
WY	73,491	193,559	5,768		2,208	275,026
Total	**81,268,586**	**74,215,875**	**1,865,526**	**404,980**	**470,032**	**158,224,999**

Table 4.17 Intermediate calculation for 2020 election

State	Biden	Trump	Jorgensen	Hawkins	Others	EV
AL	3.291	5.583	0.098	0.000	0.028	9
AK	1.290	1.594	0.075	0.022	0.019	3
AZ	5.430	5.396	0.167	0.005	0.002	11
AR	2.087	3.744	0.065	0.015	0.090	6
CA	34.916	18.876	0.590	0.255	0.362	55
CO	4.986	3.771	0.145	0.025	0.073	9
CT	4.148	2.743	0.078	0.029	0.002	7
DE	1.763	1.193	0.030	0.013	0.002	3
DC	2.764	0.162	0.018	0.015	0.041	3
FL	13.880	14.854	0.184	0.039	0.044	29
GA	7.919	7.882	0.199	0.000	0.000	16
HI	2.549	1.371	0.039	0.027	0.015	4
ID	1.324	2.556	0.075	0.000	0.045	4
IL	11.509	8.111	0.221	0.101	0.058	20
IN	4.506	6.272	0.215	0.004	0.003	11
IA	2.700	3.194	0.070	0.011	0.025	6
KS	2.494	3.373	0.134	0.000	0.000	6
KY	2.892	4.967	0.098	0.003	0.040	8
LA	3.188	4.677	0.081	0.000	0.054	8
ME	2.124	1.761	0.069	0.040	0.006	4
MD	6.577	3.235	0.111	0.052	0.024	10
MA	7.249	3.552	0.143	0.057	0.000	11
MI	8.099	7.654	0.174	0.040	0.033	16
MN	5.253	4.541	0.107	0.031	0.068	10
MS	2.463	3.456	0.037	0.007	0.037	6
MO	4.141	5.680	0.136	0.027	0.016	10
MT	1.217	1.708	0.076	0.000	0.000	3
NE	1.968	2.925	0.107	0.000	0.000	5
NV	3.034	2.889	0.064	0.000	0.014	6
NH	2.115	1.820	0.066	0.000	0.000	4
NJ	8.027	5.796	0.097	0.044	0.037	14
NM	2.714	2.175	0.068	0.024	0.019	5
NY	17.657	10.953	0.203	0.111	0.076	29
NC	7.306	7.508	0.132	0.033	0.021	15
ND	0.953	1.953	0.078	0.000	0.016	3
OH	8.143	9.589	0.205	0.057	0.006	18
OK	2.260	4.576	0.111	0.000	0.053	7
OR	3.980	2.846	0.123	0.035	0.015	7
PA	10.002	9.769	0.230	0.000	0.000	20
RI	2.376	1.545	0.039	0.000	0.041	4
SC	3.909	4.960	0.100	0.025	0.007	9
SD	1.068	1.853	0.079	0.000	0.000	3
TN	4.120	6.673	0.108	0.016	0.084	11
TX	17.662	19.782	0.424	0.112	0.020	38
UT	2.259	3.488	0.155	0.020	0.078	6
VT	1.983	0.920	0.029	0.011	0.057	3
VA	7.066	5.745	0.190	0.000	0.000	13
WA	7.003	4.683	0.238	0.054	0.022	12
WV	1.485	3.431	0.067	0.016	0.000	5
WI	4.945	4.882	0.117	0.000	0.056	10
WY	0.802	2.111	0.063	0.000	0.024	3
Total	**273.594**	**254.775**	**6.525**	**1.374**	**1.731**	**538**

Table 4.18 2020 election under the whole-number proportional method

State	Biden	Trump	Jorgensen	Hawkins	Others	EV
AL	3	6				9
AK	1	2				3
AZ	6	5				11
AR	2	4				6
CA	35	19	1			55
CO	5	4				9
CT	4	3				7
DE	2	1				3
DC	3					3
FL	14	15				29
GA	8	8				16
HI	3	1				4
ID	1	3				4
IL	12	8				20
IN	5	6				11
IA	3	3				6
KS	3	3				6
KY	3	5				8
LA	3	5				8
ME	2	2				4
MD	7	3				10
MA	7	4				11
MI	8	8				16
MN	5	5				10
MS	3	3				6
MO	4	6				10
MT	1	2				3
NE	2	3				5
NV	3	3				6
NH	2	2				4
NJ	8	6				14
NM	3	2				5
NY	18	11				29
NC	7	8				15
ND	1	2				3
OH	8	10				18
OK	2	5				7
OR	4	3				7
PA	10	10				20
RI	2	2				4
SC	4	5				9
SD	1	2				3
TN	4	7				11
TX	18	20				38
UT	2	4				6
VT	2	1				3
VA	7	6				13
WA	7	5				12
WV	2	3				5
WI	5	5				10
WY	1	2				3
Total	**276**	**261**	**1**	**0**	**0**	**538**

This table shows the overall national results of applying this method to the results of the 2020 election:

- 276 electoral votes for Joe Biden
- 261 electoral votes for Donald Trump
- 1 electoral vote for Jo Jorgensen (from California)
- 0 electoral votes for Hawkins
- 0 electoral votes for the 32 additional candidates

Thus, the national popular vote winner (Biden) would have received an absolute majority of the electoral votes if this method had been applied to the 2020 election returns.

The very small separation between the winner's number of electoral votes (276) and loser's number (261) reflects the fact that very few electoral votes are actually in play under this method.

2012 election

The results of the 2012 election were:

- Barack Obama—65,918,036
- Mitt Romney—60,934,261
- Gary Johnson—1,275,912
- Jill Stein—469,643
- 23 other candidates—486,668

The total national popular vote for President was 129,084,520.[76]

Table 4.19 shows, by state, the results for the 2012 presidential election.

Table 4.20 shows, for each state and each candidate, the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Table 4.21 shows the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the 2012 election returns.

The bottom line of this table shows the overall national results of applying this method to the 2012 election returns:

- 276 electoral votes for Obama
- 261 electoral votes for Romney
- 1 electoral vote for Johnson (from California)
- 0 electoral votes for Stein
- 0 electoral votes for the 23 additional candidates

Thus, the national popular vote winner (Obama) would have received an absolute majority of the electoral votes if this method had been applied to the 2012 election returns.

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[76] A combined total of 486,668 popular votes were scattered among 23 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

Table 4.19 2012 election results

State	Obama	Romney	Johnson	Stein	Others	Total
AL	795,696	1,255,925	12,328	3,397	6,992	2,074,338
AK	122,640	164,676	7,392	2,917	2,870	300,495
AZ	1,025,232	1,233,654	32,100	7,816	7,757	2,306,559
AR	394,409	647,744	16,276	9,305	1,734	1,069,468
CA	7,854,285	4,839,958	143,221	85,638	115,445	13,038,547
CO	1,323,102	1,185,243	35,545	7,508	18,124	2,569,522
CT	905,109	634,899	12,580	863	5,542	1,558,993
DE	242,584	165,484	3,882	1,940	31	413,921
DC	267,070	21,381	2,083	2,458	772	293,764
FL	4,237,756	4,163,447	44,726	8,947	19,303	8,474,179
GA	1,773,827	2,078,688	45,324	1,516	695	3,900,050
HI	306,658	121,015	3,840	3,184		434,697
ID	212,787	420,911	9,453	4,402	4,793	652,346
IL	3,019,512	2,135,216	56,229	30,222	835	5,242,014
IN	1,154,275	1,422,872	50,148	625	368	2,628,288
IA	822,544	730,617	12,926	3,769	12,324	1,582,180
KS	439,908	689,809	20,409	714	5,414	1,156,254
KY	679,370	1,087,190	17,063	6,337	7,252	1,797,212
LA	809,141	1,152,262	18,157	6,978	7,527	1,994,065
ME	401,306	292,276	9,352	8,119	2,127	713,180
MD	1,677,844	971,869	30,195	17,110	10,309	2,707,327
MA	1,921,290	1,188,314	30,920	20,691	6,552	3,167,767
MI	2,564,569	2,115,256	7,797	21,897	21,465	4,730,984
MN	1,546,167	1,320,225	35,098	13,023	22,048	2,936,561
MS	562,949	710,746	6,676	1,588	3,625	1,285,584
MO	1,223,796	1,482,440	43,151		7,936	2,757,323
MT	201,839	267,928	14,165		116	484,048
NE	302,081	475,064	11,109		6,125	794,379
NV	531,373	463,567	10,968		9,010	1,014,918
NH	369,561	329,918	8,212	324	2,957	710,972
NJ	2,126,610	1,478,749	20,974	9,902	6,699	3,642,934
NM	415,335	335,788	27,787	2,691	2,156	783,757
NY	4,485,877	2,490,496	47,256	39,984	17,923	7,081,536
NC	2,178,391	2,270,395	44,515		12,071	4,505,372
ND	124,827	188,163	5,231	1,361	3,045	322,627
OH	2,827,709	2,661,437	49,493	18,573	23,658	5,580,870
OK	443,547	891,325				1,334,872
OR	970,488	754,175	24,089	19,427	21,091	1,789,270
PA	2,990,274	2,680,434	49,991	21,341		5,742,040
RI	279,677	157,204	4,388	2,421	2,359	446,049
SC	865,941	1,071,645	16,321	5,446	4,765	1,964,118
SD	145,039	210,610	5,795		2,371	363,815
TN	960,709	1,462,330	18,623	6,515	10,400	2,458,577
TX	3,308,124	4,569,843	88,580	24,657	2,647	7,993,851
UT	251,813	740,600	12,572	3,817	8,638	1,017,440
VT	199,239	92,698	3,487	594	3,272	299,290
VA	1,971,820	1,822,522	31,216	8,627	20,304	3,854,489
WA	1,755,396	1,290,670	42,202	20,928	16,320	3,125,516
WV	238,269	417,655	6,302	4,406	4,035	670,667
WI	1,620,985	1,407,966	20,439	7,665	11,379	3,068,434
WY	69,286	170,962	5,326		3,487	249,061
Total	**65,918,036**	**60,934,261**	**1,275,912**	**469,643**	**486,668**	**129,084,520**

Table 4.20 Intermediate calculation for 2012 election

State	Obama	Romney	Johnson	Stein	Others	EV
AL	3.452	5.449	0.053	0.015	0.030	9
AK	1.224	1.644	0.074	0.029	0.029	3
AZ	4.889	5.883	0.153	0.037	0.037	11
AR	2.213	3.634	0.091	0.052	0.010	6
CA	33.131	20.416	0.604	0.361	0.487	55
CO	4.634	4.151	0.124	0.026	0.063	9
CT	4.064	2.851	0.056	0.004	0.025	7
DE	1.758	1.199	0.028	0.014	0.000	3
DC	2.727	0.218	0.021	0.025	0.008	3
FL	14.502	14.248	0.153	0.031	0.066	29
GA	7.277	8.528	0.186	0.006	0.003	16
HI	2.822	1.114	0.035	0.029	0.000	4
ID	1.305	2.581	0.058	0.027	0.029	4
IL	11.520	8.147	0.215	0.115	0.003	20
IN	4.831	5.955	0.210	0.003	0.002	11
IA	3.119	2.771	0.049	0.014	0.047	6
KS	2.283	3.580	0.106	0.004	0.028	6
KY	3.024	4.839	0.076	0.028	0.032	8
LA	3.246	4.623	0.073	0.028	0.030	8
ME	2.251	1.639	0.052	0.046	0.012	4
MD	6.197	3.590	0.112	0.063	0.038	10
MA	6.672	4.126	0.107	0.072	0.023	11
MI	8.673	7.154	0.026	0.074	0.073	16
MN	5.265	4.496	0.120	0.044	0.075	10
MS	2.627	3.317	0.031	0.007	0.017	6
MO	4.438	5.376	0.156	0.000	0.029	10
MT	1.251	1.661	0.088	0.000	0.001	3
NE	1.901	2.990	0.070	0.000	0.039	5
NV	3.141	2.741	0.065	0.000	0.053	6
NH	2.079	1.856	0.046	0.002	0.017	4
NJ	8.173	5.683	0.081	0.038	0.026	14
NM	2.650	2.142	0.177	0.017	0.014	5
NY	18.370	10.199	0.194	0.164	0.073	29
NC	7.253	7.559	0.148	0.000	0.040	15
ND	1.161	1.750	0.049	0.013	0.028	3
OH	9.120	8.584	0.160	0.060	0.076	18
OK	2.326	4.674	0.000	0.000	0.000	7
OR	3.797	2.950	0.094	0.076	0.083	7
PA	10.415	9.336	0.174	0.074	0.000	20
RI	2.508	1.410	0.039	0.022	0.021	4
SC	3.968	4.911	0.075	0.025	0.022	9
SD	1.196	1.737	0.048	0.000	0.020	3
TN	4.298	6.543	0.083	0.029	0.047	11
TX	15.726	21.723	0.421	0.117	0.013	38
UT	1.485	4.367	0.074	0.023	0.051	6
VT	1.997	0.929	0.035	0.006	0.033	3
VA	6.650	6.147	0.105	0.029	0.068	13
WA	6.740	4.955	0.162	0.080	0.063	12
WV	1.776	3.114	0.047	0.033	0.030	5
WI	5.283	4.589	0.067	0.025	0.037	10
WY	0.835	2.059	0.064	0.000	0.042	3
Total	**272.247**	**256.138**	**5.537**	**1.988**	**2.091**	**538**

Table 4.21 2012 election under the whole-number proportional method

State	Obama	Romney	Johnson	Stein	Others	EV
AL	4	5				9
AK	1	2				3
AZ	5	6				11
AR	2	4				6
CA	33	21	1			55
CO	5	4				9
CT	4	3				7
DE	2	1				3
DC	3					3
FL	15	14				29
GA	7	9				16
HI	3	1				4
ID	1	3				4
IL	12	8				20
IN	5	6				11
IA	3	3				6
KS	2	4				6
KY	3	5				8
LA	3	5				8
ME	2	2				4
MD	6	4				10
MA	7	4				11
MI	9	7				16
MN	5	5				10
MS	3	3				6
MO	5	5				10
MT	1	2				3
NE	2	3				5
NV	3	3				6
NH	2	2				4
NJ	8	6				14
NM	3	2				5
NY	19	10				29
NC	7	8				15
ND	1	2				3
OH	9	9				18
OK	2	5				7
OR	4	3				7
PA	11	9				20
RI	3	1				4
SC	4	5				9
SD	1	2				3
TN	4	7				11
TX	16	22				38
UT	2	4				6
VT	2	1				3
VA	7	6				13
WA	7	5				12
WV	2	3				5
WI	5	5				10
WY	1	2				3
Total	**276**	**261**	**1**	**0**	**0**	**538**

2008 election

The results of the 2008 election were:

- Barack Obama—69,499,428
- John McCain—59,950,323
- Ralph Nader—739,278
- Bob Barr—523,433
- 19 other candidates—749,119.[77]

The total national popular vote for President in 2008 was 131,461,581.

Table 4.22 shows the results by state for the 2008 presidential election.

Table 4.23 shows, for each state and each candidate, the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Table 4.24 shows, for each state, the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the 2008 election returns.

The bottom line of this table shows that the overall national results of applying this method to the results of the 2008 election would have been:

- 289 electoral votes for Obama
- 248 electoral votes for McCain
- 1 electoral vote for Nader (from California)
- 0 electoral votes for Barr
- 0 electoral votes for 19 additional candidates.

Thus, the national popular vote winner (Obama) would have received an absolute majority of the electoral votes if the whole-number proportional method had been applied to the 2008 election returns.

2004 election

The results of the 2004 election were:

- John Kerry—59,028,432
- George W. Bush—62,040,611
- Ralph Nader—465,650
- Michael Badnarik (Libertarian)—397,266
- 12 other candidates—371,577.[78]

The total national popular vote for President in 2004 was 122,303,536.

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[77] A combined total of 749,119 popular votes were scattered among 19 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

[78] A combined total of 371,577 popular votes were scattered among 12 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

Table 4.22 2008 election results

State	Obama	McCain	Nader	Barr	Others	Total
AL	813,479	1,266,546	6,788	4,991	8,015	2,099,819
AK	123,594	193,841	3,783	1,589	3,390	326,197
AZ	1,034,707	1,230,111	11,301	12,555	15,164	2,303,838
AR	422,310	638,017	12,882	4,776	8,632	1,086,617
CA	8,274,473	5,011,781	108,381	67,582	115,048	13,577,265
CO	1,288,633	1,073,629	13,352	10,898	14,950	2,401,462
CT	997,773	629,428	19,162		430	1,646,793
DE	255,459	152,374	2,401	1,109	1,273	412,616
DC	245,800	17,367	958		1,728	265,853
FL	4,282,367	4,046,219	28,128	17,220	37,927	8,411,861
GA	1,844,123	2,048,759	1,165	28,731	9,380	3,932,158
HI	325,871	120,566	3,825	1,314	1,992	453,568
ID	236,440	403,012	7,175	3,658	8,169	658,454
IL	3,419,348	2,031,179	31,152	19,642	27,034	5,528,355
IN	1,374,039	1,345,648	909	29,257	5,737	2,755,590
IA	828,940	682,379	8,014	4,590	13,200	1,537,123
KS	514,765	699,655	10,527	6,706	7,220	1,238,873
KY	751,985	1,048,462	15,378	5,989	5,773	1,827,587
LA	782,989	1,148,275	6,997		22,500	1,960,761
ME	421,923	295,273	10,636	251	3,080	731,163
MD	1,629,467	959,862	14,713	9,842	17,712	2,631,596
MA	1,904,098	1,108,854	28,841	13,189	26,087	3,081,069
MI	2,872,579	2,048,639	33,085	23,716	32,175	5,010,194
MN	1,573,354	1,275,409	30,152	9,174	22,280	2,910,369
MS	554,662	724,597	4,011	2,529	4,066	1,289,865
MO	1,441,911	1,445,814	17,813	11,386	12,025	2,928,949
MT	232,159	243,882	3,699	1,358	11,652	492,750
NE	333,319	452,979	5,406	2,740	6,837	801,281
NV	533,736	412,827	6,150	4,263	10,872	967,848
NH	384,826	316,534	3,503	2,217	3,890	710,970
NJ	2,215,422	1,613,207	21,298	8,441	19,039	3,877,407
NM	472,422	346,832	5,327	2,428	3,149	830,158
NY	4,804,945	2,752,771	41,249	19,596	22,387	7,640,948
NC	2,142,651	2,128,474	1,454	25,722	12,488	4,310,789
ND	141,403	168,887	4,199	1,067	2,182	317,738
OH	2,940,044	2,677,820	42,337	19,917	41,697	5,721,815
OK	502,496	960,165				1,462,661
OR	1,037,291	738,475	18,614	7,635	25,849	1,827,864
PA	3,276,363	2,655,885	42,977	19,912	20,339	6,015,476
RI	296,571	165,391	4,829	1,382	3,593	471,766
SC	862,449	1,034,896	5,053	7,283	11,288	1,920,969
SD	170,924	203,054	4,267	1,835	1,895	381,975
TN	1,087,437	1,479,178	11,560	8,547	15,260	2,601,982
TX	3,528,633	4,479,328	5,751	56,116	17,380	8,087,208
UT	327,670	596,030	8,416	6,966	18,399	957,481
VT	219,262	98,974	3,339	1,067	2,404	325,046
VA	1,959,532	1,725,005	11,483	11,067	16,173	3,723,260
WA	1,750,848	1,229,216	29,489	12,728	30,970	3,053,251
WV	303,857	397,466	7,219		6,326	714,868
WI	1,677,211	1,262,393	17,605	8,858	17,350	2,983,417
WY	82,868	164,958	2,525	1,594	2,713	254,658
Total	**69,499,428**	**59,950,323**	**739,278**	**523,433**	**749,119**	**131,461,581**

Table 4.23 Intermediate calculation for 2008 election

State	Obama	McCain	Nader	Barr	Others	EV
AL	3.487	5.429	0.029	0.021	0.034	9
AK	1.137	1.783	0.035	0.015	0.031	3
AZ	4.491	5.339	0.049	0.054	0.066	10
AR	2.332	3.523	0.071	0.026	0.048	6
CA	33.519	20.302	0.439	0.274	0.466	55
CO	4.829	4.024	0.050	0.041	0.056	9
CT	4.241	2.676	0.081	0.000	0.002	7
DE	1.857	1.108	0.017	0.008	0.009	3
DC	2.774	0.196	0.011	0.000	0.019	3
FL	13.745	12.987	0.090	0.055	0.122	27
GA	7.035	7.815	0.004	0.110	0.036	15
HI	2.874	1.063	0.034	0.012	0.018	4
ID	1.436	2.448	0.044	0.022	0.050	4
IL	12.989	7.716	0.118	0.075	0.103	21
IN	5.485	5.372	0.004	0.117	0.023	11
IA	3.775	3.108	0.036	0.021	0.060	7
KS	2.493	3.389	0.051	0.032	0.035	6
KY	3.292	4.589	0.067	0.026	0.025	8
LA	3.594	5.271	0.032	0.000	0.103	9
ME	2.308	1.615	0.058	0.001	0.017	4
MD	6.192	3.647	0.056	0.037	0.067	10
MA	7.416	4.319	0.112	0.051	0.102	12
MI	9.747	6.951	0.112	0.080	0.109	17
MN	5.406	4.382	0.104	0.032	0.077	10
MS	2.580	3.371	0.019	0.012	0.019	6
MO	5.415	5.430	0.067	0.043	0.045	11
MT	1.413	1.485	0.023	0.008	0.071	3
NE	2.080	2.827	0.034	0.017	0.043	5
NV	2.757	2.133	0.032	0.022	0.056	5
NH	2.165	1.781	0.020	0.012	0.022	4
NJ	8.571	6.241	0.082	0.033	0.074	15
NM	2.845	2.089	0.032	0.015	0.019	5
NY	19.494	11.168	0.167	0.080	0.091	31
NC	7.456	7.406	0.005	0.090	0.043	15
ND	1.335	1.595	0.040	0.010	0.021	3
OH	10.277	9.360	0.148	0.070	0.146	20
OK	2.405	4.595	0.000	0.000	0.000	7
OR	3.972	2.828	0.071	0.029	0.099	7
PA	11.438	9.272	0.150	0.070	0.071	21
RI	2.515	1.402	0.041	0.012	0.030	4
SC	3.592	4.310	0.021	0.030	0.047	8
SD	1.342	1.595	0.034	0.014	0.015	3
TN	4.597	6.253	0.049	0.036	0.065	11
TX	14.835	18.832	0.024	0.236	0.073	34
UT	1.711	3.112	0.044	0.036	0.096	5
VT	2.024	0.913	0.031	0.010	0.022	3
VA	6.842	6.023	0.040	0.039	0.056	13
WA	6.308	4.429	0.106	0.046	0.112	11
WV	2.125	2.780	0.050	0.000	0.044	5
WI	5.622	4.231	0.059	0.030	0.058	10
WY	0.976	1.943	0.030	0.019	0.032	3
Total	**283.146**	**246.455**	**3.124**	**2.128**	**3.147**	**538**

Table 4.24 2008 election under the whole-number proportional method

State	Obama	McCain	Nader	Barr	Other	EV
AL	4	5				9
AK	1	2				3
AZ	5	5				10
AR	2	4				6
CA	34	20	1			55
CO	5	4				9
CT	4	3				7
DE	2	1				3
DC	3					3
FL	14	13				27
GA	7	8				15
HI	3	1				4
ID	1	3				4
IL	13	8				21
IN	6	5				11
IA	4	3				7
KS	3	3				6
KY	3	5				8
LA	4	5				9
ME	2	2				4
MD	6	4				10
MA	8	4				12
MI	10	7				17
MN	6	4				10
MS	3	3				6
MO	5	6				11
MT	1	2				3
NE	2	3				5
NV	3	2				5
NH	2	2				4
NJ	9	6				15
NM	3	2				5
NY	20	11				31
NC	8	7				15
ND	1	2				3
OH	10	10				20
OK	2	5				7
OR	4	3				7
PA	12	9				21
RI	3	1				4
SC	4	4				8
SD	1	2				3
TN	5	6				11
TX	15	19				34
UT	2	3				5
VT	2	1				3
VA	7	6				13
WA	6	5				11
WV	2	3				5
WI	6	4				10
WY	1	2				3
Total	**289**	**248**	**1**	**0**	**0**	**538**

Table 4.25 shows, for each state, the results for the 2004 presidential election.

Table 4.26 shows, for each state and each candidate, the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Table 4.27 shows, for each state, the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the results of the 2004 election.

The bottom line of this table shows the overall national results of applying this method to the 2004 election returns:

- 258 electoral votes for Kerry
- 280 electoral votes for George W. Bush
- 0 electoral votes for Nader and Badnarik
- 0 electoral votes for 12 additional candidates

Thus, the national popular vote winner (George W. Bush) would have received an absolute majority of the electoral votes if the whole-number proportional method had been applied to the 2004 election returns.

2000 election

The results of the 2000 election were:

- Al Gore—51,003,926
- George W. Bush—50,460,110
- Ralph Nader—2,883,105
- Pat Buchanan—449,225
- Harry Browne—384,516
- 11 other candidates—236,593.[79]

The total national popular vote for President in 2000 was 105,417,475.

Table 4.3 (located earlier in this chapter) shows the results of the 2000 presidential election by state.

Table 4.4 shows the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Table 4.28 shows, for each state, the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the 2000 election returns.

[79] A combined total of 236,593 popular votes were scattered among 11 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

Table 4.25 2004 election results

State	Kerry	Bush	Nader	Badnarik	Other	Total
AL	693,933	1,176,394	6,701	3,529	2,892	1,883,449
AK	111,025	190,889	5,069	1,675	3,940	312,598
AZ	893,524	1,104,294	2,773	11,856	1,446	2,013,893
AR	469,953	572,898	6,171	2,352	3,571	1,054,945
CA	6,745,485	5,509,826	21,213	50,165	95,168	12,421,857
CO	1,001,725	1,101,256	12,718	7,665	6,961	2,130,325
CT	857,488	693,826	12,969	3,367	11,119	1,578,769
DE	200,152	171,660	2,153	586	719	375,270
DC	202,970	21,256	1,485	502	1,373	227,586
FL	3,583,544	3,964,522	32,971	11,996	16,777	7,609,810
GA	1,366,149	1,914,254	2,231	18,387	3,460	3,304,481
HI	231,708	194,191		1,377	1,737	429,013
ID	181,098	409,235	1,115	3,844	3,155	598,447
IL	2,891,550	2,345,946	3,571	32,442	813	5,274,322
IN	969,011	1,479,438	1,328	18,058	167	2,468,002
IA	741,898	751,957	5,973	2,992	4,088	1,506,908
KS	434,993	736,456	9,348	4,013	2,946	1,187,756
KY	712,733	1,069,439	8,856	2,619	2,432	1,796,079
LA	820,299	1,102,169	7,032	2,781	10,825	1,943,106
ME	396,842	330,201	8,069	1,965	3,675	740,752
MD	1,334,493	1,024,703	11,854	6,094	9,534	2,386,678
MA	1,803,800	1,071,109	4,806	15,022	17,651	2,912,388
MI	2,479,183	2,313,746	24,035	10,552	11,736	4,839,252
MN	1,445,014	1,346,695	18,683	4,639	13,356	2,828,387
MS	458,094	684,981	3,177	1,793	4,320	1,152,365
MO	1,259,171	1,455,713	1,294	9,831	5,355	2,731,364
MT	173,710	266,063	6,168	1,733	2,771	450,445
NE	254,328	512,814	5,698	2,041	3,305	778,186
NV	397,190	418,690	4,838	3,176	5,693	829,587
NH	340,511	331,237	4,479	372	1,139	677,738
NJ	1,911,430	1,670,003	19,418	4,514	6,772	3,612,137
NM	370,942	376,930	4,053	2,382	1,997	756,304
NY	4,314,280	2,962,567	99,873	11,607	3,414	7,391,741
NC	1,525,849	1,961,166	1,805	11,731	456	3,501,007
ND	111,052	196,651	3,756	851	523	312,833
OH	2,741,167	2,859,768		14,676	12,297	5,627,908
OK	503,966	959,792				1,463,758
OR	943,163	866,831		7,260	19,528	1,836,782
PA	2,938,095	2,793,847	2,656	21,185	13,807	5,769,590
RI	259,760	169,046	4,651	907	2,770	437,134
SC	661,699	937,974	5,520	3,608	8,929	1,617,730
SD	149,244	232,584	4,320	964	1,103	388,215
TN	1,036,477	1,384,375	8,992	4,866	2,609	2,437,319
TX	2,832,704	4,526,917	9,159	38,787	3,198	7,410,765
UT	241,199	663,742	11,305	3,375	8,223	927,844
VT	184,067	121,180	4,494	1,102	1,466	312,309
VA	1,454,742	1,716,959	2,393	11,032	13,241	3,198,367
WA	1,510,201	1,304,894	23,283	11,955	11,380	2,861,713
WV	326,541	423,778	4,063	1,405	100	755,887
WI	1,489,504	1,478,120	16,390	6,464	6,529	2,997,007
WY	70,776	167,629	2,741	1,171	1,111	243,428
Total	**59,028,432**	**62,040,611**	**465,650**	**397,266**	**371,577**	**122,303,536**

Table 4.26 Intermediate calculation for 2004 election

State	Kerry	Bush	Nader	Badnarik	Others	EV
AL	3.316	5.621	0.032	0.017	0.014	9
AK	1.066	1.832	0.049	0.016	0.038	3
AZ	4.437	5.483	0.014	0.059	0.007	10
AR	2.673	3.258	0.035	0.013	0.020	6
CA	29.867	24.396	0.094	0.222	0.421	55
CO	4.232	4.652	0.054	0.032	0.029	9
CT	3.802	3.076	0.058	0.015	0.049	7
DE	1.600	1.372	0.017	0.005	0.006	3
DC	2.676	0.280	0.020	0.007	0.018	3
FL	12.715	14.066	0.117	0.043	0.060	27
GA	6.201	8.689	0.010	0.083	0.016	15
HI	2.160	1.811	0.000	0.013	0.016	4
ID	1.210	2.735	0.007	0.026	0.021	4
IL	11.513	9.341	0.014	0.129	0.003	21
IN	4.319	6.594	0.006	0.080	0.001	11
IA	3.446	3.493	0.028	0.014	0.019	7
KS	2.197	3.720	0.047	0.020	0.015	6
KY	3.175	4.763	0.039	0.012	0.011	8
LA	3.799	5.105	0.033	0.013	0.050	9
ME	2.143	1.783	0.044	0.011	0.020	4
MD	5.591	4.293	0.050	0.026	0.040	10
MA	7.432	4.413	0.020	0.062	0.073	12
MI	8.709	8.128	0.084	0.037	0.041	17
MN	5.109	4.761	0.066	0.016	0.047	10
MS	2.385	3.566	0.017	0.009	0.022	6
MO	5.071	5.863	0.005	0.040	0.022	11
MT	1.157	1.772	0.041	0.012	0.018	3
NE	1.634	3.295	0.037	0.013	0.021	5
NV	2.394	2.523	0.029	0.019	0.034	5
NH	2.010	1.955	0.026	0.002	0.007	4
NJ	7.938	6.935	0.081	0.019	0.028	15
NM	2.452	2.492	0.027	0.016	0.013	5
NY	18.094	12.425	0.419	0.049	0.014	31
NC	6.537	8.403	0.008	0.050	0.002	15
ND	1.065	1.886	0.036	0.008	0.005	3
OH	9.741	10.163	0.000	0.052	0.044	20
OK	2.410	4.590	0.000	0.000	0.000	7
OR	3.594	3.304	0.000	0.028	0.074	7
PA	10.694	10.169	0.010	0.077	0.050	21
RI	2.377	1.547	0.043	0.008	0.025	4
SC	3.272	4.638	0.027	0.018	0.044	8
SD	1.153	1.797	0.033	0.007	0.009	3
TN	4.678	6.248	0.041	0.022	0.012	11
TX	12.996	20.769	0.042	0.178	0.015	34
UT	1.300	3.577	0.061	0.018	0.044	5
VT	1.768	1.164	0.043	0.011	0.014	3
VA	5.913	6.979	0.010	0.045	0.054	13
WA	5.805	5.016	0.089	0.046	0.044	11
WV	2.160	2.803	0.027	0.009	0.001	5
WI	4.970	4.932	0.055	0.022	0.022	10
WY	0.872	2.066	0.034	0.014	0.014	3
Total	**257.830**	**274.545**	**2.176**	**1.762**	**1.688**	**538**

Table 4.27 2004 election under the whole-number proportional method

State	Kerry	Bush	Nader	Badnarik	Others	EV
AL	3	6				9
AK	1	2				3
AZ	4	6				10
AR	3	3				6
CA	30	25				55
CO	4	5				9
CT	4	3				7
DE	2	1				3
DC	3					3
FL	13	14				27
GA	6	9				15
HI	2	2				4
ID	1	3				4
IL	12	9				21
IN	4	7				11
IA	3	4				7
KS	2	4				6
KY	3	5				8
LA	4	5				9
ME	2	2				4
MD	6	4				10
MA	8	4				12
MI	9	8				17
MN	5	5				10
MS	2	4				6
MO	5	6				11
MT	1	2				3
NE	2	3				5
NV	2	3				5
NH	2	2				4
NJ	8	7				15
NM	2	3				5
NY	18	13				31
NC	7	8				15
ND	1	2				3
OH	10	10				20
OK	2	5				7
OR	4	3				7
PA	11	10				21
RI	2	2				4
SC	3	5				8
SD	1	2				3
TN	5	6				11
TX	13	21				34
UT	1	4				5
VT	2	1				3
VA	6	7				13
WA	6	5				11
WV	2	3				5
WI	5	5				10
WY	1	2				3
Total	**258**	**280**	**0**	**0**	**0**	**538**

Table 4.28 2000 election under the whole-number proportional method

State	Gore	Bush	Nader	Buchanan	Browne	All others	EV
AL	4	5					9
AK	1	2					3
AZ	4	4					8
AR	3	3					6
CA	29	23	2				54
CO	3	4	1				8
CT	5	3					8
DE	2	1					3
DC	3	0					3
FL	12	12	1				25
GA	6	7					13
HI	2	2					4
ID	1	3					4
IL	12	9	1				22
IN	5	7					12
IA	4	3					7
KS	2	4					6
KY	3	5					8
LA	4	5					9
ME	2	2					4
MD	6	4					10
MA	7	4	1				12
MI	9	8	1				18
MN	5	5					10
MS	3	4					7
MO	5	6					11
MT	1	2					3
NE	2	3					5
NV	2	2					4
NH	2	2					4
NJ	8	6	1				15
NM	3	2					5
NY	20	12	1				33
NC	6	8					14
ND	1	2					3
OH	10	10	1				21
OK	3	5					8
OR	3	3	1				7
PA	12	11					23
RI	3	1					4
SC	3	5					8
SD	1	2					3
TN	5	6					11
TX	12	19	1				32
UT	1	4					5
VT	2	1					3
VA	6	7					13
WA	6	5					11
WV	2	3					5
WI	5	5	1				11
WY	1	2					3
Total	**262**	**263**	**13**	**0**	**0**		**538**

The bottom line of this table shows the overall national results of applying the whole-number proportional method to the 2000 election returns:

- 262 electoral votes for Gore
- 263 electoral votes for George W. Bush
- 13 electoral votes for Ralph Nader, including two electoral votes in California and one electoral vote in each of 11 other states (Colorado, Florida, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Texas, and Wisconsin)
- 0 electoral votes for Buchanan
- 0 electoral votes for Brown
- 0 electoral votes for 11 additional candidates

Note that Gore received *fewer* electoral votes than Bush under the whole-number proportional method—despite the fact that Gore received over a half million more popular votes than Bush.

The reason that the second-place candidate (Bush) would have had a 263–262 lead in electoral votes is that this method produces only a very rough approximation to the national popular vote.

In any case, no candidate would have received "a majority of the whole number of Electors appointed" as required by the Constitution if this method is applied to the 2000 election returns. Consequently, the election for President would have been thrown into the newly elected U.S. House of Representatives on January 6, 2001.

If the members of the 50 delegations in the U.S. House of Representatives had voted in accordance with their party affiliations in the contingent election on January 6, 2001, George W. Bush would have been elected President.

In summary, the whole-number proportional method would have initially produced a 263–262 lead for the second-place candidate (Bush), and the contingent election in the House would have resulted in the election of the second-place candidate as President.

The newly elected Senate was equally divided on January 6, 2001. The U.S. Constitution is not entirely clear as to whether, in the event of a tie in the Senate in a contingent election for Vice President, the sitting Vice President (namely Al Gore, whose term of office ran until January 20, 2001) would have been entitled to vote to break the tie.

If Gore had voted, and all the Senators had voted in accordance with their party affiliation, the Democratic nominee for Vice President (Senator Joseph Lieberman) would have been elected Vice President by the Senate. If Gore had not voted, and all the Senators had voted in accordance with their party affiliations, the office of Vice President would have remained unfilled.

Then, the President whom the House would have elected (George W. Bush) would have filled the vacant office of Vice President under terms of the 25th Amendment after he was inaugurated on January 20, 2001.

1996 election

The results of the 1996 election were:

- Bill Clinton—47,400,125
- Bob Dole—39,198,755
- Ross Perot—8,085,402
- Ralph Nader—685,435
- Harry Browne—485,798
- 17 additional candidates—420,125.[80]

The total national popular vote for President in 1996 was 96,275,640.

Table 4.29 shows, for each state, the results for the 1996 presidential election.

Table 4.30 shows, for each state and each candidate, the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Table 4.31 shows, for each state, the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the 1996 election returns.

The bottom line of this table shows the overall national results of applying this method to the results of the 1996 election:

- 267 electoral votes for Bill Clinton
- 224 electoral votes for Dole
- 46 electoral votes for Perot (coming from a total of 35 states)
- 1 electoral vote for Nader (from California)
- 0 electoral votes for Browne
- 0 electoral votes for 17 additional candidates

No candidate would have received "a majority of the whole number of Electors appointed" as required by the Constitution if this method had been applied to the results of the 1996 election. Consequently, the election for President would have been thrown into the newly elected U.S. House of Representatives on January 6, 1997, and the election for Vice President would have been thrown into the newly elected U.S. Senate.

If the members of the 50 delegations in the U.S. House of Representatives had voted in accordance with their party affiliations in the contingent election on January 6, 1996, Bob Dole would have been elected President.

Thus, after the contingent election in the House, the whole-number proportional method would not have resulted in the election of the candidate who received the most popular votes nationwide in 1996, namely Bill Clinton.

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[80] This total of 96,275,640 includes 420,125 popular votes scattered among 17 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

Table 4.29 1996 election results

State	Clinton	Dole	Perot	Nader	Browne	Others	Total
AL	662,165	769,044	92,149		5,290	5,701	1,534,349
AK	80,380	122,746	26,333	7,597	2,276	2,288	241,620
AZ	653,288	622,073	112,072	2,062	14,358	552	1,404,405
AR	475,171	325,416	69,884	3,649	3,076	7,066	884,262
CA	5,119,835	3,828,380	697,847	237,016	73,600	62,806	10,019,484
CO	671,152	691,848	99,629	25,070	12,392	10,613	1,510,704
CT	735,740	483,109	139,523	24,321	5,788	4,133	1,392,614
DE	140,355	99,062	28,719	156	2,052	740	271,084
DC	158,220	17,339	3,611	4,780	588	1,188	185,726
FL	2,546,870	2,244,536	483,870	4,101	23,965	452	5,303,794
GA	1,053,849	1,080,843	146,337		17,870	172	2,299,071
HI	205,012	113,943	27,358	10,386	2,493	928	360,120
ID	165,443	256,595	62,518		3,325	3,838	491,719
IL	2,341,744	1,587,021	346,408	1,447	22,548	12,223	4,311,391
IN	887,424	1,006,693	224,299	1,121	15,632	673	2,135,842
IA	620,258	492,644	105,159	6,550	2,315	7,149	1,234,075
KS	387,659	583,245	92,639	914	4,557	5,286	1,074,300
KY	636,614	623,283	120,396	701	4,009	3,705	1,388,708
LA	927,837	712,586	123,293	4,719	7,499	8,025	1,783,959
ME	312,788	186,378	85,970	15,279	2,996	2,486	605,897
MD	966,207	681,530	115,812	2,606	8,765	5,950	1,780,870
MA	1,571,763	718,107	227,217	4,734	20,426	14,538	2,556,785
MI	1,989,653	1,481,212	336,670	2,322	27,670	11,317	3,848,844
MN	1,120,438	766,476	257,704	24,908	8,271	14,843	2,192,640
MS	394,022	439,838	52,222		2,809	4,966	893,857
MO	1,025,935	890,016	217,188	534	10,522	13,870	2,158,065
MT	167,922	179,652	55,229		2,526	1,932	407,261
NE	236,761	363,467	71,278		2,792	3,117	677,415
NV	203,974	199,244	43,986	4,730	4,460	7,885	464,279
NH	246,214	196,532	48,390		4,237	3,802	499,175
NJ	1,652,329	1,103,078	262,134	32,465	14,763	11,038	3,075,807
NM	273,495	232,751	32,257	13,218	2,996	1,357	556,074
NY	3,756,177	1,933,492	503,458	75,956	12,220	34,826	6,316,129
NC	1,107,849	1,225,938	168,059	2,108	8,740	3,113	2,515,807
ND	106,905	125,050	32,515		847	1,094	266,411
OH	2,148,222	1,859,883	483,207	2,962	12,851	27,309	4,534,434
OK	488,105	582,315	130,788		5,505		1,206,713
OR	649,641	538,152	121,221	49,415	8,903	10,428	1,377,760
PA	2,215,819	1,801,169	430,984	3,086	28,000	27,060	4,506,118
RI	233,050	104,683	43,723	6,040	1,109	1,679	390,284
SC	504,051	573,458	64,386		4,271	3,291	1,149,457
SD	139,333	150,543	31,250		1,472	1,228	323,826
TN	909,146	863,530	105,918	6,427	5,020	4,064	1,894,105
TX	2,459,683	2,736,167	378,537	4,810	20,256	12,191	5,611,644
UT	221,633	361,911	66,461	4,615	4,129	6,880	665,629
VT	137,894	80,352	31,024	5,585	1,183	2,411	258,449
VA	1,091,060	1,138,350	159,861		9,174	18,197	2,416,642
WA	1,123,323	840,712	201,003	60,322	12,522	15,955	2,253,837
WV	327,812	233,946	71,639		3,062		636,459
WI	1,071,971	845,029	227,339	28,723	7,929	15,178	2,196,169
WY	77,934	105,388	25,928		1,739	582	211,571
Total	**47,400,125**	**39,198,755**	**8,085,402**	**685,435**	**485,798**	**420,125**	**96,275,640**

Table 4.30 Intermediate calculation for 1996 election

State	Clinton	Dole	Perot	Nader	Browne	Others	EV
AL	3.884	4.511	0.541	0.000	0.031	0.033	9
AK	0.998	1.524	0.327	0.094	0.028	0.028	3
AZ	3.721	3.544	0.638	0.012	0.082	0.003	8
AR	3.224	2.208	0.474	0.025	0.021	0.048	6
CA	27.593	20.633	3.761	1.277	0.397	0.338	54
CO	3.554	3.664	0.528	0.133	0.066	0.056	8
CT	4.227	2.775	0.802	0.140	0.033	0.024	8
DE	1.553	1.096	0.318	0.002	0.023	0.008	3
DC	2.556	0.280	0.058	0.077	0.009	0.019	3
FL	12.005	10.580	2.281	0.019	0.113	0.002	25
GA	5.959	6.112	0.827	0.000	0.101	0.001	13
HI	2.277	1.266	0.304	0.115	0.028	0.010	4
ID	1.346	2.087	0.509	0.000	0.027	0.031	4
IL	11.949	8.098	1.768	0.007	0.115	0.062	22
IN	4.986	5.656	1.260	0.006	0.088	0.004	12
IA	3.518	2.794	0.596	0.037	0.013	0.041	7
KS	2.165	3.257	0.517	0.005	0.025	0.030	6
KY	3.667	3.591	0.694	0.004	0.023	0.021	8
LA	4.681	3.595	0.622	0.024	0.038	0.040	9
ME	2.065	1.230	0.568	0.101	0.020	0.016	4
MD	5.425	3.827	0.650	0.015	0.049	0.033	10
MA	7.377	3.370	1.066	0.022	0.096	0.068	12
MI	9.305	6.927	1.575	0.011	0.129	0.053	18
MN	5.110	3.496	1.175	0.114	0.038	0.068	10
MS	3.086	3.444	0.409	0.000	0.022	0.039	7
MO	5.229	4.537	1.107	0.003	0.054	0.071	11
MT	1.237	1.323	0.407	0.000	0.019	0.014	3
NE	1.748	2.683	0.526	0.000	0.021	0.023	5
NV	1.757	1.717	0.379	0.041	0.038	0.068	4
NH	1.973	1.575	0.388	0.000	0.034	0.030	4
NJ	8.058	5.379	1.278	0.158	0.072	0.054	15
NM	2.459	2.093	0.290	0.119	0.027	0.012	5
NY	19.625	10.102	2.630	0.397	0.064	0.182	33
NC	6.165	6.822	0.935	0.012	0.049	0.017	14
ND	1.204	1.408	0.366	0.000	0.010	0.012	3
OH	9.949	8.614	2.238	0.014	0.060	0.126	21
OK	3.236	3.861	0.867	0.000	0.036	0.000	8
OR	3.301	2.734	0.616	0.251	0.045	0.053	7
PA	11.310	9.193	2.200	0.016	0.143	0.138	23
RI	2.389	1.073	0.448	0.062	0.011	0.017	4
SC	3.508	3.991	0.448	0.000	0.030	0.023	8
SD	1.291	1.395	0.290	0.000	0.014	0.011	3
TN	5.280	5.015	0.615	0.037	0.029	0.024	11
TX	14.026	15.603	2.159	0.027	0.116	0.070	32
UT	1.665	2.719	0.499	0.035	0.031	0.052	5
VT	1.601	0.933	0.360	0.065	0.014	0.028	3
VA	5.869	6.124	0.860	0.000	0.049	0.098	13
WA	5.482	4.103	0.981	0.294	0.061	0.078	11
WV	2.575	1.838	0.563	0.000	0.024	0.000	5
WI	5.369	4.233	1.139	0.144	0.040	0.076	11
WY	1.105	1.494	0.368	0.000	0.025	0.008	3
Total	**264.878**	**219.047**	**45.182**	**3.830**	**2.715**	**2.348**	**538**

Table 4.31 1996 election under the whole-number proportional method

State	Clinton	Dole	Perot	Nader	Browne	Others	EV
AL	4	4	1				9
AK	1	2					3
AZ	4	3	1				8
AR	3	2	1				6
CA	28	21	4	1			54
CO	4	4					8
CT	4	3	1				8
DE	2	1					3
DC	3						3
FL	12	11	2				25
GA	6	6	1				13
HI	2	1	1				4
ID	1	2	1				4
IL	12	8	2				22
IN	5	6	1				12
IA	3	3	1				7
KS	2	3	1				6
KY	4	3	1				8
LA	5	3	1				9
ME	2	1	1				4
MD	5	4	1				10
MA	8	3	1				12
MI	9	7	2				18
MN	5	4	1				10
MS	3	4					7
MO	5	5	1				11
MT	1	1	1				3
NE	2	3					5
NV	2	2					4
NH	2	2					4
NJ	8	6	1				15
NM	3	2					5
NY	20	10	3				33
NC	6	7	1				14
ND	1	2					3
OH	10	9	2				21
OK	3	4	1				8
OR	3	3	1				7
PA	12	9	2				23
RI	2	1	1				4
SC	4	4					8
SD	1	2					3
TN	5	5	1				11
TX	14	16	2				32
UT	2	3					5
VT	2	1					3
VA	6	6	1				13
WA	6	4	1				11
WV	3	2					5
WI	6	4	1				11
WY	1	2					3
Total	**267**	**224**	**46**	**1**	**0**	**0**	**538**

1992 election

The results of the 1992 election were:

- Bill Clinton—44,909,806
- George H.W. Bush—39,104,550
- Ross Perot—19,743,821
- Andre Marrou—290,087
- 19 additional candidates—375,729.[81]

The total national popular vote for President in 1992 was 104,423,993.

Table 4.32 shows, by state, the results of the 1992 presidential election.

Table 4.33 shows, for each state and each candidate, the *whole number* and *fraction* resulting from multiplying each candidate's percentage share of the state's popular vote by each state's number of electoral votes.

Table 4.34 shows, for each state, the number of electoral votes each candidate would have received if the whole-number proportional method is applied to the 1992 election returns.

The bottom line of this table shows the overall national results of applying this method to the results of the 1992 election:

- 236 electoral votes for Bill Clinton
- 197 electoral votes for George H.W. Bush
- 105 electoral votes for Ross Perot (with at least one electoral vote coming from each of the 50 states, but none from the District of Columbia)
- 0 electoral votes for Andre Marrou
- 0 electoral votes for 20 additional candidates

No candidate would have received "a majority of the whole number of Electors appointed" as required by the Constitution. Consequently, the election for President would have been thrown into the newly elected U.S. House of Representatives on January 6, 1993, and the election for Vice President would have been thrown into the newly elected U.S. Senate.

If the members of the 50 delegations in the U.S. House of Representatives had voted in accordance with their party affiliations in the contingent election on January 6, 1993, Bill Clinton would have been elected President.[82]

Thus, the whole-number proportional method would, after the contingent election in the House, have resulted in the election of the candidate who received the most popular votes nationwide in 1992, namely Bill Clinton.

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[81] This total of 104,423,993 includes a total of 375,729 popular votes scattered among 19 additional candidates (most of whom were on the ballot in only one state or just a few states), various write-in candidates, and votes cast in Nevada for "none of the above." None of these other candidates received enough popular votes in any state to win any electoral votes under the whole-number proportional method.

[82] The newly elected House in 1993 had 30 Democratic-controlled delegations, ten tied delegations, nine Republican delegations, and Independent Congressman Bernie Sanders as the sole member of the Vermont delegation.

Table 4.32 1992 election results

State	Clinton	Bush	Perot	Marrou	Others	Total
AL	690,080	804,283	183,109	5,737	4,851	1,688,060
AK	78,294	102,000	73,481	1,378	3,353	258,506
AZ	543,050	572,086	353,741	6,781	11,348	1,487,006
AR	505,823	337,324	99,132	1,261	7,113	950,653
CA	5,121,325	3,630,574	2,296,006	48,139	35,677	11,131,721
CO	629,681	562,850	366,010	8,669	1,970	1,569,180
CT	682,318	578,313	348,771	5,391	1,539	1,616,332
DE	126,054	102,313	59,213	935	1,105	289,620
DC	192,619	20,698	9,681	467	4,107	227,572
FL	2,072,698	2,173,310	1,053,067	15,079	238	5,314,392
GA	1,008,966	995,252	309,657	7,110	148	2,321,133
HI	179,310	136,822	53,003	1,119	2,588	372,842
ID	137,013	202,645	130,395	1,167	10,894	482,114
IL	2,453,350	1,734,096	840,515	9,218	12,978	5,050,157
IN	848,420	989,375	455,934	7,936	4,206	2,305,871
IA	586,353	504,891	253,468	1,076	8,819	1,354,607
KS	390,434	449,951	312,358	4,314	199	1,157,256
KY	665,104	617,178	203,944	4,513	2,161	1,492,900
LA	815,971	733,386	211,478	3,155	26,027	1,790,017
ME	263,420	206,504	206,820	1,681	1,074	679,499
MD	988,571	707,094	281,414	4,715	3,252	1,985,046
MA	1,318,662	805,049	632,312	7,458	10,093	2,773,574
MI	1,871,182	1,554,940	824,813	10,175	13,563	4,274,673
MN	1,020,997	747,841	562,506	3,374	13,230	2,347,948
MS	400,258	487,793	85,626	2,154	5,962	981,793
MO	1,053,873	811,159	518,741	7,497		2,391,270
MT	154,507	144,207	107,225	986	3,658	410,583
NE	217,344	344,346	174,687	1,344	1,562	739,283
NV	189,148	175,828	132,580	1,835	6,927	506,318
NH	209,040	202,484	121,337	3,548	806	537,215
NJ	1,436,206	1,356,865	521,829	6,822	21,872	3,343,594
NM	261,617	212,824	91,895	1,615	2,035	569,986
NY	3,444,450	2,346,649	1,090,721	13,451	31,654	6,926,925
NC	1,114,042	1,134,661	357,864	5,171	112	2,611,850
ND	99,168	136,244	71,084	416	1,221	308,133
OH	1,984,942	1,894,310	1,036,426	7,252	17,034	4,939,964
OK	473,066	592,929	319,878	4,486		1,390,359
OR	621,314	475,757	354,091	4,277	7,204	1,462,643
PA	2,239,164	1,791,841	902,667	21,477	4,661	4,959,810
RI	213,299	131,601	105,045	571	2,961	453,477
SC	479,514	577,507	138,872	2,719	3,915	1,202,527
SD	124,888	136,718	73,295	814	539	336,254
TN	933,521	841,300	199,968	1,847	6,002	1,982,638
TX	2,281,815	2,496,071	1,354,781	19,699	1,652	6,154,018
UT	183,429	322,632	203,400	1,900	32,707	744,068
VT	133,592	88,122	65,991	501	1,495	289,701
VA	1,038,650	1,150,517	348,639	5,730	15,129	2,558,665
WA	993,037	731,234	541,780	7,533	13,981	2,287,565
WV	331,001	241,974	108,829	1,873		683,677
WI	1,041,066	930,855	544,479	2,877	11,837	2,531,114
WY	68,160	79,347	51,263	844	270	199,884
Total	**44,909,806**	**39,104,550**	**19,743,821**	**290,087**	**375,729**	**104,423,993**

Table 4.33 Intermediate calculation for 1992 election

State	Clinton	Bush	Perot	Marrou	Others	EV
AL	3.679	4.288	0.976	0.031	0.026	9
AK	0.909	1.184	0.853	0.016	0.039	3
AZ	2.922	3.078	1.903	0.036	0.061	8
AR	3.192	2.129	0.626	0.008	0.045	6
CA	24.844	17.612	11.138	0.234	0.173	54
CO	3.210	2.870	1.866	0.044	0.010	8
CT	3.377	2.862	1.726	0.027	0.008	8
DE	1.306	1.060	0.613	0.010	0.011	3
DC	2.539	0.273	0.128	0.006	0.054	3
FL	9.750	10.224	4.954	0.071	0.001	25
GA	5.651	5.574	1.734	0.040	0.001	13
HI	1.924	1.468	0.569	0.012	0.028	4
ID	1.137	1.681	1.082	0.010	0.090	4
IL	10.688	7.554	3.662	0.040	0.057	22
IN	4.415	5.149	2.373	0.041	0.022	12
IA	3.030	2.609	1.310	0.006	0.046	7
KS	2.024	2.333	1.619	0.022	0.001	6
KY	3.564	3.307	1.093	0.024	0.012	8
LA	4.103	3.687	1.063	0.016	0.131	9
ME	1.551	1.216	1.217	0.010	0.006	4
MD	4.980	3.562	1.418	0.024	0.016	10
MA	5.705	3.483	2.736	0.032	0.044	12
MI	7.879	6.548	3.473	0.043	0.057	18
MN	4.348	3.185	2.396	0.014	0.056	10
MS	2.854	3.478	0.610	0.015	0.043	7
MO	4.848	3.731	2.386	0.034	0.000	11
MT	1.129	1.054	0.783	0.007	0.027	3
NE	1.470	2.329	1.181	0.009	0.011	5
NV	1.494	1.389	1.047	0.014	0.055	4
NH	1.556	1.508	0.903	0.026	0.006	4
NJ	6.443	6.087	2.341	0.031	0.098	15
NM	2.295	1.867	0.806	0.014	0.018	5
NY	16.409	11.179	5.196	0.064	0.151	33
NC	5.971	6.082	1.918	0.028	0.001	14
ND	0.966	1.326	0.692	0.004	0.012	3
OH	8.438	8.053	4.406	0.031	0.072	21
OK	2.722	3.412	1.841	0.026	0.000	8
OR	2.974	2.277	1.695	0.020	0.034	7
PA	10.384	8.309	4.186	0.100	0.022	23
RI	1.881	1.161	0.927	0.005	0.026	4
SC	3.190	3.842	0.924	0.018	0.026	8
SD	1.114	1.220	0.654	0.007	0.005	3
TN	5.179	4.668	1.109	0.010	0.033	11
TX	11.865	12.979	7.045	0.102	0.009	32
UT	1.233	2.168	1.367	0.013	0.220	5
VT	1.383	0.913	0.683	0.005	0.015	3
VA	5.277	5.846	1.771	0.029	0.077	13
WA	4.775	3.516	2.605	0.036	0.067	11
WV	2.421	1.770	0.796	0.014	0.000	5
WI	4.524	4.045	2.366	0.013	0.051	11
WY	1.023	1.191	0.769	0.013	0.004	3
Total	**231.379**	**201.469**	**101.722**	**1.495**	**1.936**	**538**

Table 4.34 1992 election under the whole-number proportional method

State	Clinton	Bush	Perot	Marrou	Other	EV
AL	4	4	1			9
AK	1	1	1			3
AZ	3	3	2			8
AR	3	2	1			6
CA	25	18	11			54
CO	3	3	2			8
CT	3	3	2			8
DE	1	1	1			3
DC	3					3
FL	10	10	5			25
GA	6	5	2			13
HI	2	1	1			4
ID	1	2	1			4
IL	11	7	4			22
IN	5	5	2			12
IA	3	3	1			7
KS	2	2	2			6
KY	4	3	1			8
LA	4	4	1			9
ME	2	1	1			4
MD	5	4	1			10
MA	6	3	3			12
MI	8	7	3			18
MN	4	3	3			10
MS	3	3	1			7
MO	5	4	2			11
MT	1	1	1			3
NE	2	2	1			5
NV	2	1	1			4
NH	2	1	1			4
NJ	7	6	2			15
NM	2	2	1			5
NY	17	11	5			33
NC	6	6	2			14
ND	1	1	1			3
OH	9	8	4			21
OK	3	3	2			8
OR	3	2	2			7
PA	11	8	4			23
RI	2	1	1			4
SC	3	4	1			8
SD	1	1	1			3
TN	5	5	1			11
TX	12	13	7			32
UT	1	2	2			5
VT	1	1	1			3
VA	5	6	2			13
WA	5	3	3			11
WV	2	2	1			5
WI	5	4	2			11
WY	1	1	1			3
Total	**236**	**197**	**105**	**0**	**0**	**538**

4.2.5. The whole-number proportional method would not make every voter in every state politically relevant.

At first blush, it would appear that this method would give presidential candidates reason to campaign in all 50 states and the District of Columbia.

However, proper analysis of the whole-number proportional method cannot be accomplished qualitatively. Instead, a quantitative analysis of actual data is required to see how the system would work in practice.

As previously mentioned in this book, presidential candidates only campaign in places where they have something to gain or lose—that is, where they are within striking distance of gaining or losing one or more electoral votes.

For example, 100% of the general-election campaign events in 2012 occurred in the 12 particular states where the Republican percentage of the two-party vote was in the narrow six-percentage-point range between 45% and 51%—that is, where the separation between the major-party candidates was six percentage points or less.[83]

Another way of saying that is that the candidates are within three percentage points of the national outcome, which was 48% Republican in 2012.

Table 4.35 shows the 12 closely divided battleground states that received 100% of the nation's 253 general-election campaign events in 2012. The table is sorted according to the Republican percentage of the two-party vote.

Although all the general-election campaigning occurred in states where the candidates were within six percentage points, very little campaigning actually took place in states where the candidates were separated by the full six points. In fact:

- 98% of the 2012 general-election campaign events (249 of 253) were concentrated in the states where the Republican percentage of the two-party vote was in the narrow *four-percentage-point* range between 46% and 50%.
- 82% of the campaign events (208 of 253) were concentrated in the states where the Republican percentage of the two-party vote was in the narrow *two-percentage-point* range between 47% and 49%.

Now let's discuss what would happen when a presidential candidate formulates a plan to campaign under the whole-number proportional method.

The first thing to realize is that the share of a state's popular vote represented by one electoral vote varies enormously from state to state under this method.

Table 4.36 shows the percentage share of a state's popular vote corresponding to one electoral vote under the whole-number proportional method.

As can be seen from the table, one electoral vote corresponds to anywhere from 33.33% down to 1.82% of a state's popular vote under this method.

Half of the states (25) are median-sized or smaller. In the *median-sized* state (i.e., a state with seven electoral votes), one electoral vote corresponds to a 14.29% share of the state's popular vote.

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[83] In 2012, there were no general-election campaign events whatsoever (and virtually no advertising expenditures) in the 38 states outside this narrow six-percentage-point range. See table 1.10.

Table 4.35 The only states that received any attention in 2012 were those within three percentage points of the national outcome

Romney percent	2012 general-election campaign events (out of 253)	State	Ad spending	2010 population
51%	3	North Carolina	$80,000,000	9,565,781
50%	40	Florida	$175,776,780	18,900,773
48%	73	Ohio	$148,000,000	11,568,495
48%	36	Virginia	$127,000,000	8,037,736
47%	23	Colorado	$71,000,000	5,044,930
47%	27	Iowa	$52,194,330	3,053,787
47%	13	Nevada	$55,000,000	2,709,432
47%	13	New Hampshire	$34,000,000	1,321,445
47%	5	Pennsylvania	$31,000,000	12,734,905
47%	18	Wisconsin	$40,000,000	5,698,230
46%	1	Minnesota	$0	5,314,879
45%	1	Michigan	$15,186,750	9,911,626
Total	**253**		**$829,157,860**	**93,862,019**

Table 4.36 Share of a state's popular vote corresponding to one electoral vote

Number of electoral votes	Share of a state's popular vote corresponding to one electoral vote	Number of states of this size	States
3	33.33%	8	Alaska, District of Columbia, Delaware, Montana, North Dakota, South Dakota, Vermont, Wyoming
4	25.00%	5	Hawaii, Idaho, Maine, New Hampshire, Rhode Island
5	20.00%	3	Nebraska, New Mexico, West Virginia
6	16.67%	6	Arkansas, Iowa, Kansas, Mississippi, Nevada, Utah
7	14.29%	3	Connecticut, Oklahoma, Oregon
8	12.50%	2	Kentucky, Louisiana
9	11.11%	3	Alabama, Colorado, South Carolina
10	10.00%	4	Maryland, Minnesota, Missouri, Wisconsin
11	9.09%	4	Arizona, Indiana, Massachusetts, Tennessee
12	8.33%	1	Washington
13	7.69%	1	Virginia
14	7.14%	1	New Jersey
15	6.67%	1	North Carolina
16	6.25%	2	Georgia, Michigan
18	5.56%	1	Ohio
20	5.00%	2	Illinois, Pennsylvania
29	3.45%	2	Florida, New York
38	2.63%	1	Texas
55	1.82%	1	California
538		**51**	**Total**

In the *average-sized* state (i.e., a state with 10 electoral votes), one electoral vote corresponds to a 10% share of the state's popular vote. Two-thirds of the states (34) are average-sized or smaller.

We now use the 2012 race to demonstrate how the whole-number proportional method would actually operate. Specifically, we ask whether a candidate would bother to campaign in each state.

States with three electoral votes

Eight states are entitled to three presidential electors—Alaska, Delaware, the District of Columbia, Montana, North Dakota, South Dakota, Vermont, and Wyoming.

As we will see in this subsection, neither Obama nor Romney would have campaigned in any of these eight states if the whole-number proportional method had been in effect in 2012.

Under this method, one electoral vote corresponds to a 33.3% share of the state's popular vote in a state with three electoral votes.

In a state with three electoral votes:

- If a candidate receives less than 16.66% (half of the 33.3%) of the state's popular vote, then the candidate gets no electoral votes.
- If a candidate receives between 16.67% and 50% of the popular vote, then the candidate gets one electoral vote.
- If a candidate receives between 50.01% and 83.33% of the popular vote, then the candidate gets two electoral votes.
- Finally, if a candidate receives more than 83.33% of the popular vote, then the candidate gets all three of the state's electoral votes.

The *breakpoints*—where a candidate's number of electoral votes changes—are shown in table 4.37.

Table 4.37 Breakpoints for states with three electoral votes

Percent of popular vote	Number of electoral votes	Breakpoint
0.00% to 16.66%	0	16.67%
16.67% to 50.00%	1	50.00%
50.01% to 83.33%	2	83.33%
83.33% to 100.00%	3	NA

Figure 4.3 graphically presents these breakpoints for states with three electoral votes.

- The horizontal line represents a candidate's percentage share of the popular vote—from 0% to 100%.
- The vertical tick marks show the breakpoints at 16.67%, 50%, and 83.33%.
- The small numbers (0, 1, 2, or 3) immediately under the horizontal line show the number of electoral votes that a candidate would receive by winning a particular share of the state's popular vote.

Candidates will decide whether to campaign in a state by comparing their level of support in the state with the breakpoints (16.67%, 50%, and 83.33%).

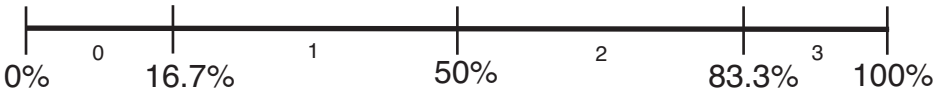

Figure 4.3 Scale showing the number of electoral votes that a candidate would win by receiving a particular share of the popular vote in a state with three electoral votes

Presidential candidates only campaign in places where they have something to gain or lose.

In a two-person race such as we are discussing here, the two candidates will campaign in a state only if they are within three percentage points of the same breakpoint (and hence six percentage points or less from one another).

We start in Wyoming, where President Obama had a 29% share of the two-party popular vote in 2012.

Figure 4.4 is the same as the previous figure, except that a marker has been added at the 29% point along the scale to mark Obama's level of support in Wyoming. A candidate with 29% support on Election Day would win one electoral vote under the whole-number proportional method, because 29% lies between the breakpoint of 16.7% and the breakpoint of 50%.

When Obama considers the question of whether he is within shooting distance of gaining or losing anything in Wyoming in 2012, it is immediately apparent that getting more than one electoral vote in Wyoming would have required him to perform the monumental task of increasing his level of support in the state by 21 percentage points during the course of the general-election campaign. If he could have increased his support up to the breakpoint at 50%, he would have won two electoral votes, instead of just one.

Meanwhile, Governor Mitt Romney would have considered the question of whether he could possibly win all three of Wyoming's electoral votes, instead of two. To accomplish that, Romney would have had to perform the daunting task of depressing Obama's support by 12.3 percentage points—that is, pushing Obama below the breakpoint at 16.7%.

Because Obama's level of support of 29% in Wyoming was so distant from the two nearest breakpoints in Wyoming (50% on the upside, and 16.67% on the downside), both Obama and Romney would have quickly reached the conclusion that they had nothing to gain or lose by bothering to campaign in Wyoming.

No amount of campaigning by either of them could possibly change the way Wyoming's three electoral votes would be divided under the whole-number proportional method.

Serious presidential candidates—advised by the nation's most astute political strategists—simply do not spend time and money in states where they have nothing to lose and nothing to gain.

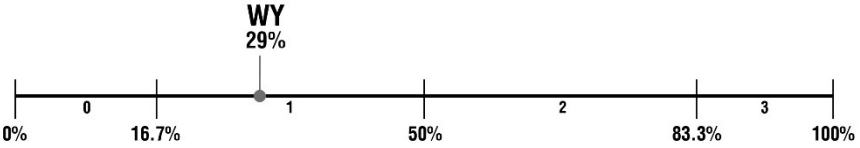

Figure 4.4 Obama's popular vote in 2012 in Wyoming (three electoral votes)

Hence, Wyoming would have been ignored in 2012 under this method.

Note that the above analysis is essentially the same that the candidates make today under the current winner-take-all method of awarding electoral votes.

Under the winner-take-all system, the breakpoint is always at 50% in a two-candidate race, and the payoff to the winner is all three of Wyoming's electoral votes, rather than just one.

Wyoming would have been ignored by both political parties under the whole-number proportional method for the very same reason that it was ignored under the current winner-take-all system. Obama could not possibly increase his level of support by the 21 percentage points needed to reach the 50% breakpoint, and he therefore wrote off Wyoming. Similarly, Romney could not possibly lose 21 percentage points, and he took the state for granted.

We now modify the previous figure by adding markers for the other states with three electoral votes.

Figure 4.5 is the same as the previous figure, except that it shows Obama's level of support in all eight states with three electoral votes.

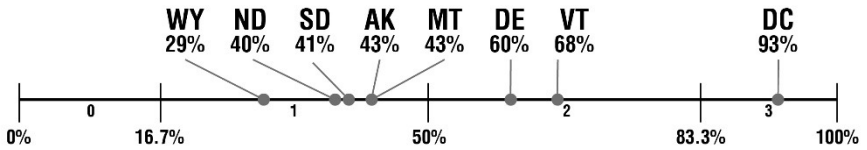

Figure 4.5 Obama's popular vote in 2012 in the eight states with three electoral votes

As can be seen, Obama was not within three percentage points of any breakpoint (16.67%, 50%, and 83.33%) in any of these eight states.

Table 4.38 provides the details as to how Obama and Romney would have analyzed their prospects in the eight states with three electoral votes under the whole-number proportional method.

- Column 2 of the table shows President Obama's percentage share of the two-party 2012 vote for the eight states with three electoral votes.
- Columns 3 and 4 show the respective number of electoral votes that President Obama and Governor Romney would have received if this method had been used to award electoral votes in 2012.
- Column 5 shows the breakpoint (taken from table 4.37) just below Obama's level of support in 2012, while column 6 shows the breakpoint just above Obama's level of support.
- Column 7 shows the smallest change that could have shifted one electoral vote. It shows the difference between Obama's level of support in a state (column 2) and the *nearer* of the two breakpoints (columns 5 and 6) for that state.

For example, Obama's vote in Alaska was 42.68%. This percentage is nearer to the 50% breakpoint (column 6) than the 33.33% breakpoint (column 5). Therefore, a change of 7.32 percentage points is the smallest change that could shift one electoral vote in Alaska in 2012. If Obama could have increased his level of support from 42.68% to 50.01%, he could have won two electoral votes (instead of one) in Alaska.

Table 4.38 Whole-number proportional method in states with three electoral votes for 2012 election

State	Obama vote	Obama EV	Romney EV	Breakpoint just below Obama percent	Breakpoint just above Obama percent	Change needed to gain or lose 1 EV
AK	42.68%	1	2	16.67%	50.00%	7.32%
DC	92.59%	3	0	83.33%	100.00%	7.41%
DE	59.45%	2	1	50.00%	83.33%	9.45%
MT	42.97%	1	2	16.67%	50.00%	7.03%
ND	39.89%	1	2	16.67%	50.00%	10.11%
SD	40.78%	1	2	16.67%	50.00%	9.22%
VT	68.25%	2	1	50.00%	83.33%	15.09%
WY	28.84%	1	2	16.67%	50.00%	12.17%

The percentage in column 7 is the most important number in understanding how the whole-number proportional method works in practice. It indicates whether it is likely for a candidate to gain or lose one electoral vote in a particular state. That, in turn, indicates whether a candidate will campaign in the state.

Unless the percentage in column 7 is "small" for a given state, it would be very difficult for a candidate to gain or lose one electoral vote in that state.

Now let's discuss precisely how small is "small."

For the sake of argument, suppose that Obama's level of support in Alaska in column 2 of table 4.5 was a hair above 47% (instead of its actual level of 42.68%). That would mean that Romney's level of support was a tad below 53%. That is, Obama and Romney would be *within six percentage points of one another*.

Under that assumption, the percentage in column 7 for Obama would be 3%.

If Obama could increase his standing with the voters by three percentage points (which would mean *simultaneously* decreasing Romney's standing by three percentage points), Obama would then be a hair above 50% and therefore would win one additional electoral vote. In that case, Obama would likely decide to campaign in Alaska.

In other words, if column 7 is 3% or less, the candidates are within six percentage points of one another.

We know—from the actual behavior of the real-world presidential candidates over many elections—that the two major-party candidates campaign only in places where they are within six percentage points, more or less, of one another.

Of course, Alaska did not meet that criterion in 2012.

Moreover, a glance at table 4.5 shows that *none* of the numbers in column 7 is less than three percentage points. In fact, all the numbers are rather large—they range from seven to 15 percentage points. They are so large that no candidate would have any reasonable expectation of gaining or losing even a single electoral vote by campaigning in any of the eight states with three electoral votes.

Thus, all eight states would have been ignored under the whole-number proportional method.

The 2012 election was (like most presidential races) essentially a two-party competition. However, the above analysis is equally applicable in a race with a strong third-party

candidate, such as George Wallace in 1968 or Ross Perot in 1992. Each of the candidates would carefully consider whether their level of support in a particular state is close enough to a breakpoint to offer them the chance of gaining or losing an electoral vote.

The division of electoral votes (columns 3 and 4) for the eight states with three electoral votes in 2012 would have been 12–12 under the whole-number proportional method, compared to nine for Obama and 15 for Romney under the existing statewide winner-take-all system.

States with four electoral votes

There were five states with four electoral votes in 2012—Hawaii, Idaho, Maine, New Hampshire, and Rhode Island.

As we will see in this subsection, Rhode Island would have been the *only* state with four electoral votes where Obama and Romney would have had any chance of winning or losing an electoral vote if the whole-number proportional system had been in effect in 2012.

In states with four electoral votes, one electoral vote corresponds to a 25% share of the state's popular vote under this method.

Table 4.39 shows the number of electoral votes that a candidate would win as a result of receiving various percentages of the popular vote in the states with four electoral votes.[84] Column 3 shows the breakpoints (12.5%, 37.5%, 62.5%, and 87.5%).

Note that there is no breakpoint at 50% for the states with four electoral votes (or any

Table 4.39 Breakpoints for states with four electoral votes

Percent of popular vote	Number of electoral votes	Breakpoint
0.00% to 12.50%	0	12.50%
12.51% to 37.50%	1	37.50%
37.51 to 62.50%	2	62.50%
62.51% to 87.50%	3	87.50%
87.51% to 100.00%	4	NA

other state with an even number of electoral votes). In other words, the 50% mark has no special political relevance to the candidates in states with an even number of electoral votes. The issue is always whether a candidate is close enough to a breakpoint (wherever it is) to warrant campaigning in a particular state.

Figure 4.6 shows Obama's level of support in 2012 in the five states with four electoral votes. The figure contains tick marks along the horizontal line at the breakpoints of 12.5%,

[84] The general rule for constructing this table (and other similar tables in this section) is that if x is the number of electoral votes, $1/2x$ is the breakpoint between zero and one electoral vote; $1/2x+1/x$ is the breakpoint between one and two electoral votes; $1/2x+2/x$ is the breakpoint between two and three electoral votes; $1/2x+3/x$ is the breakpoint between three and four electoral votes; and so forth.

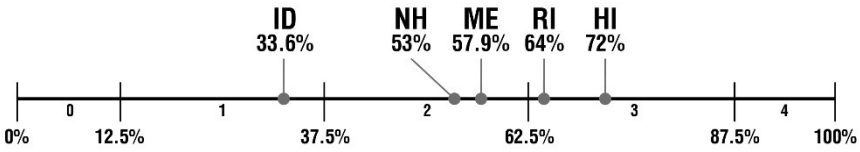

Figure 4.6 Obama's popular vote in 2012 in the five states with four electoral votes

37.5%, 62.5%, and 87.5%. The small numbers immediately under the horizontal line show the number of electoral votes (0, 1, 2, 3, or 4) that a candidate would win under the whole-number proportional method as a result of receiving a particular share of the popular vote.

Table 4.40 shows how the candidates would have analyzed their prospects in the five states with four electoral votes under the whole-number proportional method.

Hawaii, Idaho, Maine, and New Hampshire would have been ignored by candidates, because the change needed to gain or lose one electoral vote (column 7) was simply too large (9.20%, 3.92%, 4.64%, and 9.67%, respectively).

On the other hand, Obama's level of support in Rhode Island (64.02%) was very close to the breakpoint (62.5%). Therefore, Rhode Island would have been a battleground state (with one electoral vote at stake) under this method, because only a modest change (1.52%) would have been needed to change one electoral vote. In this case, Obama would have campaigned vigorously in Rhode Island so as to keep his support above the breakpoint of 62.5%, while Romney would have worked diligently to drive Obama below 62.5%.

In fact, among the 13 states with three or four electoral votes, Rhode Island would be the only place where a candidate would have had a reasonable expectation of winning or losing anything.

In fact, the whole-number proportional method would have performed very much like the current winner-take-all system among the 13 smallest states.

There was only one state (New Hampshire) that received any general-election campaign events under the current winner-take-all system. The reason was that Obama's level of support in New Hampshire (52.83%) was within three percentage points of the relevant breakpoint (that is, 50%).

Under the whole-number proportional method, the battle would have been for only one electoral vote in Rhode Island in 2012, whereas it was for four electoral votes in New Hampshire under the current winner-take-all system.

Table 4.40 Whole-number proportional method in states with four electoral votes for 2012 election

State	Obama vote	Obama EV	Romney EV	Breakpoint just below Obama percent	Breakpoint just above Obama percent	Change needed to gain or lose 1 EV
HI	71.70%	3	1	62.50%	87.50%	9.20%
ID	33.58%	1	3	12.50%	37.50%	3.92%
ME	57.86%	2	2	37.50%	62.50%	4.64%
NH	52.83%	2	2	37.50%	62.50%	9.67%
RI	64.02%	3	1	62.50%	87.50%	1.52%

The next few sections present a similar analysis for each of the larger states. Some readers may want to skip ahead to table 4.47, which summarizes all of the results.

States with five electoral votes

There were three states with five electoral votes in 2012—Nebraska, New Mexico, and West Virginia.

In states with five electoral votes, one electoral vote corresponds to a 20% share of the state's popular vote.

Table 4.41 shows the breakpoints for states with five electoral votes under the whole-number proportional method.

Table 4.41 Breakpoints for states with five electoral votes

Percent of popular vote	Number of electoral votes	Breakpoint
0.00% to 10.00%	0	10.00%
10.01 to 30.00%	1	30.00%
30.01% to 50.00%	2	50.00%
50.01% to 70.00%	3	70.00%
70.01% to 90.00%	4	90.00%
90.01% to 100.00%	5	NA

Figure 4.7 shows Obama's level of support in 2012 in the three states with five electoral votes.

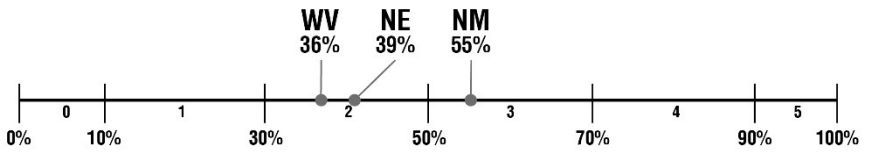

Figure 4.7 Obama's popular vote in 2012 in the three states with five electoral votes

Table 4.42 shows how candidates would have analyzed their prospects in the three states with five electoral votes under the whole-number proportional method.

All three states with five electoral votes would have been ignored by candidates, because the change (column 7) needed to gain or lose one electoral vote would have been too large (8.87%, 5.30%, and 6.33%, respectively).

Table 4.42 Whole-number proportional method in states with five electoral votes for 2012 election

State	Obama vote	Obama EV	Romney EV	Breakpoint just below Obama percent	Breakpoint just above Obama percent	Change needed to gain or lose 1 EV
NE	38.87%	2	3	30.00%	50.00%	8.87%
NM	55.30%	3	2	50.00%	70.00%	5.30%
WV	36.33%	2	3	30.00%	50.00%	6.33%

States with six electoral votes

There were six states with six electoral votes in 2012—Arkansas, Iowa, Kansas, Mississippi, Nevada, and Utah.

In states with six electoral votes, one electoral vote corresponds to a 16.67% share of the state's popular vote.

Table 4.43 shows the breakpoints for states with six electoral votes under the whole-number proportional method.

Table 4.43 Breakpoints for states with six electoral votes

Percent of popular vote	Number of electoral votes	Breakpoint
0.00% to 8.33%	0	8.33%
8.34% to 25.00%	1	25.00%
25.01% to 41.66%	2	41.66%
41.67% to 58.33%	3	58.33%
58.34% to 75.00%	4	75.00%
75.00% to 91.66%	5	91.66%
91.67% to 100.00%	6	NA

Figure 4.8 shows Obama's level of support in 2012 in the six states with six electoral votes.

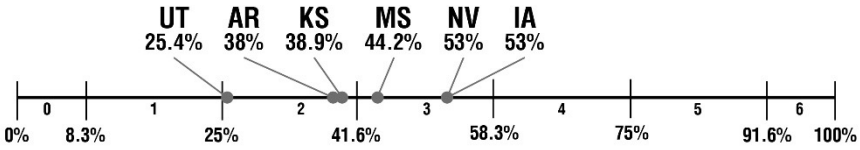

Figure 4.8 Obama's popular vote in 2012 in the six states with six electoral votes

Table 4.44 shows how candidates would have analyzed their prospects in the six states with six electoral votes under the whole-number proportional method.

Utah would have been a battleground state (for one electoral vote) under this method, because only a very small change (0.37%) would have been needed to gain or lose one

Table 4.44 Whole-number proportional method in states with six electoral votes for 2012 election

State	Obama vote	Obama EV	Romney EV	Breakpoint just below Obama percent	Breakpoint just above Obama percent	Change needed to gain or lose 1 EV
AR	37.85%	2	4	25.00%	41.67%	3.82%
IA	52.96%	3	3	41.67%	58.33%	5.37%
KS	38.89%	2	4	25.00%	41.67%	2.78%
MS	44.20%	3	3	41.67%	58.33%	2.53%
NV	53.41%	3	3	41.67%	58.33%	4.93%
UT	25.37%	2	4	25.00%	41.67%	0.37%

electoral vote. The battle in Utah would have been about whether Obama's level of support would remain above the breakpoint of 25%.

Kansas also would have been a battleground state (for one electoral vote), because a change of 2.78% of the popular vote would have affected one electoral vote. The battle in Kansas would have been about whether Obama could increase his level of support above the breakpoint at 41.67%.

Mississippi also would have been a battleground state (for one electoral vote), because a change of 2.53% of the popular vote would have affected one electoral vote. The battle in Mississippi would have been about whether Obama's level of support would remain above the breakpoint of 41.67%.

On the other hand, Arkansas, Iowa, and Nevada would have been ignored, because the change (column 7) needed to gain or lose one electoral vote was too large (3.82%, 5.37%, and 4.93%, respectively).

States with seven electoral votes

There were three states with seven electoral votes in 2012—Connecticut, Oklahoma, and Oregon.

In states with seven electoral votes, one electoral vote corresponds to a 14.29% share of the state's popular vote.

Table 4.45 shows the breakpoints for states with seven electoral votes under the whole-number proportional method.

Table 4.45 Breakpoints for states with seven electoral votes

Percent of popular vote	Number of electoral votes	Breakpoint
0.00% to 7.14%	0	7.14%
7.15% to 21.43%	1	21.43%
21.44% to 35.71%	2	35.71%
35.72% to 50.00%	3	50.00%
50.01% to 64.28%	4	64.28%
64.29% to 78.57%	5	78.57%
78.58% to 92.86%	6	92.86%
92.87% to 100.00%	7	NA

Figure 4.9 shows Obama's level of support in 2012 in the three states with seven electoral votes.

Table 4.46 shows how candidates would have analyzed their prospects in the three states with seven electoral votes under the whole-number proportional method.

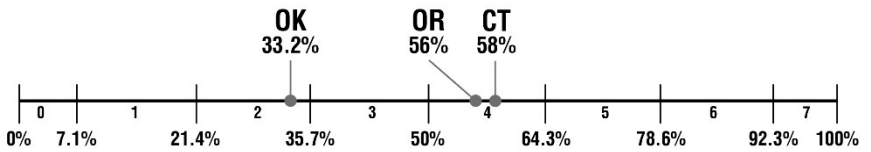

Figure 4.9 Obama's popular vote in 2012 in the three states with seven electoral votes

Table 4.46 Whole-number proportional method in states with seven electoral votes for 2012 election

State	Obama vote	Obama EV	Romney EV	Breakpoint just below Obama percent	Breakpoint just above Obama percent	Change needed to gain or lose 1 EV
CT	58.77%	4	3	50.00%	64.29%	5.51%
OK	33.23%	2	5	21.43%	35.71%	2.49%
OR	56.27%	4	3	50.00%	64.29%	6.27%

Oklahoma would have been a battleground state (for one electoral vote) under the whole-number proportional method, because only a modest change (2.49%) would have been needed to affect one electoral vote.

On the other hand, Connecticut and Oregon would have been ignored, because by the candidates, because the change needed to gain or lose one electoral vote was too large (5.51% and 6.27%, respectively).

Summary for states with between three and seven electoral votes

In only four of the 25 smallest states would the candidates have had any expectation of winning or losing anything (namely one electoral vote) under the whole-number proportional method:

- Rhode Island (where a change of 1.52% could have caused a candidate to gain or lose one electoral vote),
- Utah (with a change of 0.37%),
- Kansas (with a change of 2.78%), and
- Mississippi (with a change of 2.53%).

The other 21 smallest states would have been ignored.

In other words, the whole-number proportional method would have operated almost exactly like the current winner-take-all method in the 25 smallest states.

Indeed, under the current winner-take-all system, only three of these 25 states (Iowa, Nevada, and New Hampshire) received any general-election campaign events in 2012.

States with eight electoral votes

Figure 4.10 shows Obama's level of support in 2012 in the two states with eight electoral votes.

Among states with eight electoral votes, Louisiana would have been a battleground state (for one electoral vote) under the whole-number proportional method, because Obama's level of support (41.2%) was close to the breakpoint (43.75%); however, Kentucky would have been ignored, because 38% was not close enough to the breakpoint of 43.75%.

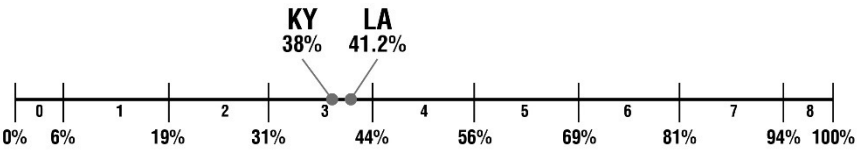

Figure 4.10 Obama's popular vote in 2012 in the two states with eight electoral votes

States with nine electoral votes

Figure 4.11 shows Obama's level of support in 2012 in the three states with nine electoral votes.

Among states with nine electoral votes, Alabama and Colorado would have been battleground states (for one electoral vote) under this method; however, South Carolina would have been ignored.

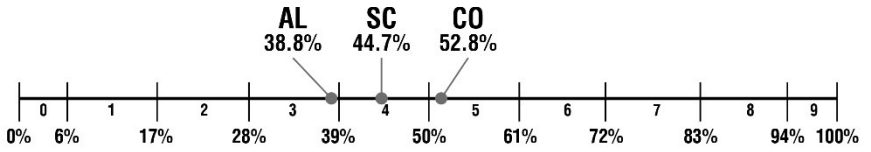

Figure 4.11 Obama's popular vote in 2012 in the three states with nine electoral votes

States with 10 electoral votes

Figure 4.12 shows Obama's level of support in 2012 in the four states with 10 electoral votes.

All four states with 10 electoral votes (Missouri, Minnesota, Wisconsin, and Maryland) would have been battleground states (for one electoral vote) under the whole-number proportional method.

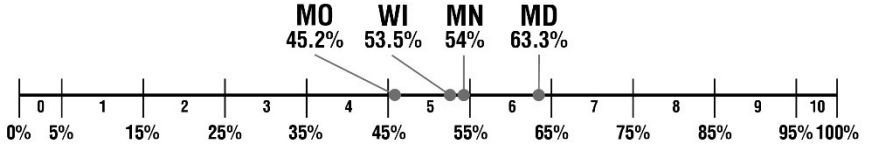

Figure 4.12 Obama's popular vote in 2012 in the four states with 10 electoral votes

States with 11 electoral votes

Figure 4.13 shows Obama's level of support in 2012 in the four states with 11 electoral votes.

Among states with 11 electoral votes, Tennessee and Massachusetts would have been battleground states (for one electoral vote) under the whole-number proportional method; however, Indiana and Arizona would have been ignored.

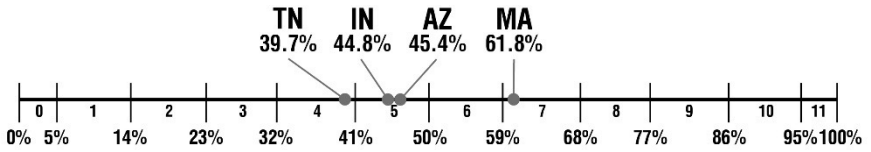

Figure 4.13 Obama's popular vote in 2012 in the four states with 11 electoral votes

States with 12 or more electoral votes

Figure 4.14 shows Obama's level of support in 2012 in Washington State (the only state with 12 electoral votes).

Washington State would have been ignored by the candidates under the whole-number proportional method, because Obama's level of support (57.6%) was too distant from the nearest breakpoints (54% and 62%).

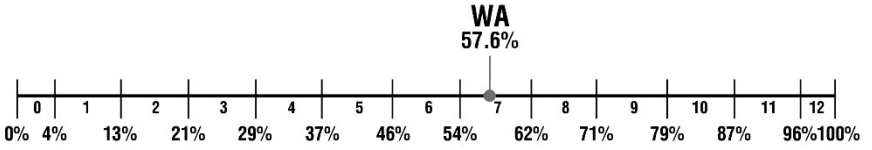

Figure 4.14 Obama's popular vote in 2012 in the one state (Washington) with 12 electoral votes

Figure 4.15 shows Obama's level of support in 2012 in Virginia (the only state with 13 electoral votes).

Virginia would have been a battleground state (for one electoral vote) under the whole-number proportional method, because Obama's level of support (52%) was sufficiently close to a breakpoint (50%).

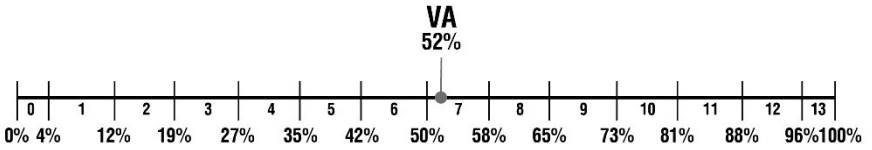

Figure 4.15 Obama's popular vote in 2012 in the one state (Virginia) with 13 electoral votes

Obama's level of support in New Jersey (14 electoral votes), North Carolina (15), Georgia (16), and Michigan (16) was such that they all would have been battleground states in 2012 (with one electoral vote at stake) under this method.

Things change at 18 electoral votes. Because 5.6% of the popular vote corresponds to one electoral vote in a state with 18 electoral votes, *every* state with 18 or more electoral votes would be a battleground (for at least one electoral vote) under the whole-number proportional method. The reason is that a six percentage-point range always occupies all the space between breakpoints that are 5.6% apart or closer.

Thus, Ohio (18 electoral votes), Illinois (20), Pennsylvania (20), Florida (29), New York (29), Texas (38), and California (55) would have been battleground states under this method.

In fact, the very largest states (California, Texas, and New York) can be battlegrounds for more than one electoral vote.

In California, the nation's largest state (with 55 electoral votes), one electoral vote corresponded to a slender 1.82% share of the state's popular vote.

Obama's level of support was 61.87% in California in 2012. Obama could have gained one electoral vote if his support had risen by 0.86% (so that it would have ended up above

the next breakpoint on the upside at 62.73%). In fact, he could have gained two electoral votes if his support had risen by 2.68% (so that it would have ended up above the next-higher breakpoint at 64.55%). Also, Obama could have lost one electoral vote if his support had dropped by 0.96% (so that it would have ended up below the next breakpoint on the downside at 60.91%). Thus, three electoral votes would have been in play in California in 2012.

Note that only three additional electoral votes would have been in play in California in 2012, because the next breakpoint on the downside would have been at 58.09% (a little too far away from 61.87%), and the next breakpoint on the upside would have been at 66.37% (a little too far away from 61.87%).[85]

In Texas, the nation's second largest state (with 38 electoral votes), one electoral vote corresponds to a 2.63% share of the state's popular vote. Obama's level of support was 41.99% in Texas in 2012. He could have gained one electoral vote in Texas if his support had risen by 1.43% (so that it would have ended up above the next breakpoint on the upside at 43.42%). Also, he could have lost one electoral vote in Texas if his support had dropped by 1.20% (so that it would have ended up below the next breakpoint on the downside at 40.79%). Thus, two electoral votes would have been in play in Texas in 2012.

However, no additional electoral votes would have been in play in Texas in 2012, because the next breakpoint on the downside would have been at 38.17%, and the next breakpoint on the upside would have been at 46.05%.[86]

Summary of the whole-number proportional method for all states

Table 4.47 shows the result of applying the whole-number proportional method to the 2012 election. The table is sorted in ascending order of the percentage change (column 8) that would have been needed in each state to change one electoral vote.

As can be seen from the top half of the table, there are 26 states where the number in column 8 is less than 3%. Among these 26 battleground states:

- only one electoral vote would be in play in 24 states (that is, the whole-number proportional method would be a one-state-one-vote system for these states);
- two electoral votes would be in play in Texas;
- three electoral votes would be in play in California;
- a total of only 29 electoral votes from 26 states would have been in play.

To say it another way, under the whole-number proportional method:

- The entire presidential election would have been about trying to change one electoral vote in each of 24 states, two in Texas, and three in California.
- Meanwhile, 509 of 538 electoral votes (95%) would have been preordained.

In this extremely narrow playing field of 29 electoral votes in 26 states, Obama would have won the 2012 election by a 276–262 margin in the Electoral College under the whole-number proportional method.

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[85] If a candidate were to have a particular (very unlikely) level of support in California, as many as four electoral votes could be in play in the state.

[86] If a candidate were to have a particular (very unlikely) level of support in Texas, as many as three electoral votes could might be potentially in play there.

Table 4.47 2012 election under the whole-number proportional method

State	EV	Obama vote	Obama EV	Romney EV	Breakpoint just below D-percent	Breakpoint just above D-percent	Percent change to gain or lose 1 EV
AL	9	38.78%	3	6	27.78%	38.89%	0.11%
MO	10	45.22%	5	5	45.00%	55.00%	0.22%
PA	20	52.73%	11	9	52.50%	57.50%	0.23%
UT	6	25.37%	2	4	25.00%	41.67%	0.37%
FL	29	50.44%	15	14	50.00%	53.45%	0.44%
NY	29	64.28%	19	10	63.79%	67.24%	0.48%
GA	16	46.04%	7	9	40.63%	46.88%	0.83%
CA	55	61.87%	34	21	60.91%	62.73%	0.85%
NC	15	48.97%	7	8	43.33%	50.00%	1.03%
MN	10	53.94%	5	5	45.00%	55.00%	1.06%
IL	20	58.58%	12	8	57.50%	62.50%	1.08%
TX	38	41.99%	16	22	40.79%	43.42%	1.20%
TN	11	39.65%	4	7	31.82%	40.91%	1.26%
OH	18	51.51%	9	9	47.22%	52.78%	1.26%
RI	4	64.02%	3	1	62.50%	87.50%	1.52%
WI	10	53.46%	5	5	45.00%	55.00%	1.54%
MI	16	54.80%	9	7	53.13%	59.38%	1.68%
MD	10	63.32%	6	4	55.00%	65.00%	1.68%
NJ	14	58.95%	8	6	53.57%	60.71%	1.76%
VA	13	51.97%	7	6	50.00%	57.69%	1.97%
OK	7	33.23%	2	5	21.43%	35.71%	2.49%
LA	8	41.25%	3	5	31.25%	43.75%	2.50%
MS	6	44.20%	3	3	41.67%	58.33%	2.53%
MA	11	61.79%	7	4	59.09%	68.18%	2.69%
CO	9	52.75%	5	4	50.00%	61.11%	2.75%
KS	6	38.89%	2	4	25.00%	41.67%	2.78%
WA	12	57.63%	7	5	54.17%	62.50%	3.46%
AR	6	37.85%	2	4	25.00%	41.67%	3.82%
IN	11	44.80%	5	6	40.91%	50.00%	3.89%
ID	4	33.58%	1	3	12.50%	37.50%	3.92%
AZ	11	45.39%	5	6	40.91%	50.00%	4.48%
ME	4	57.86%	2	2	37.50%	62.50%	4.64%
NV	6	53.41%	3	3	41.67%	58.33%	4.93%
KY	8	38.46%	3	5	31.25%	43.75%	5.29%
NM	5	55.30%	3	2	50.00%	70.00%	5.30%
SC	9	44.69%	4	5	38.89%	50.00%	5.31%
IA	6	52.96%	3	3	41.67%	58.33%	5.37%
CT	7	58.77%	4	3	50.00%	64.29%	5.51%
OR	7	56.27%	4	3	50.00%	64.29%	6.27%
WV	5	36.33%	2	3	30.00%	50.00%	6.33%
MT	3	42.97%	1	2	16.67%	50.00%	7.03%
AK	3	42.68%	1	2	16.67%	50.00%	7.32%
DC	3	92.59%	3	0	83.33%	100.00%	7.41%
NE	5	38.87%	2	3	30.00%	50.00%	8.87%
HI	4	71.70%	3	1	62.50%	87.50%	9.20%
SD	3	40.78%	1	2	16.67%	50.00%	9.22%
DE	3	59.45%	2	1	50.00%	83.33%	9.45%
NH	4	52.83%	2	2	37.50%	62.50%	9.67%
ND	3	39.89%	1	2	16.67%	50.00%	10.11%
WY	3	28.84%	1	2	16.67%	50.00%	12.17%
VT	3	68.25%	2	1	50.00%	83.33%	15.09%
Total	**538**	**51.96%**	**276**	**262**			

There would be about 27 battleground states in every election.

Recall that table 4.47 showed that there would have been the 26 battleground states if the 2012 Obama-Romney election had been conducted under the whole-number proportional method.

If we were to construct a similar table for a different election, the candidates would, of course, be different. Those candidates would, in turn, have different levels of support in each state than Obama and Romney did in 2012.

As will be seen momentarily, even though the candidates would be different, and even though each candidate's level of support in each state would be different, *there will always be about 27 states in play* under the whole-number proportional method.

The reason for this counter-intuitive conclusion is that a state is a battleground under this method if a candidate is within three percentage points of a breakpoint in a state. The distance between a state's breakpoints is the percentage of the popular vote that corresponds to one electoral vote in that state. This percentage is simply the reciprocal of the state's number of electoral votes (table 4.36).

The ratio of six percentage points to the total distance between breakpoints for a state is the probability that the state has a candidate within three percentage points of one of its breakpoints.

That ratio is, in turn, the *probability* that the state is a battleground state under the whole-number proportional method.

The sum of those probabilities is the expected number of battleground states under the whole-number proportional method.

Notably, these distances, these probabilities, and these ratios do *not* depend on the candidates.

Table 4.48 shows the probability that a state will be a battleground state under the whole-number proportional method.

- Column 2 shows the state's number of electoral votes.
- Column 3 is the percentage of the popular vote corresponding to one electoral vote in the state.
- Column 4 is the ratio of six percentage points to the number in column 3. This ratio is the probability that the state is a battleground state under this method.

The sum of all the probabilities in column 7 of table 4.48 is the expected number of battleground states under the whole-number proportional method.

This sum (26.74) depends on two things, namely the distribution of electoral votes among the states and the six-percentage point gap.

Thus, we can say that about 27 states would be battleground states in *any* future election conducted under the whole-number proportional method.

Note that the states that would be battlegrounds in a particular campaign would vary depending on each candidate's level of support in each state. However, the statistical expectation is that there would always be approximately 27 battleground states under the whole-number proportional method.

Table 4.48 Probability that a state is a battleground state under the whole-number proportional method

State	Electoral Votes	Percent of popular vote for one EV	Probability of being a battleground
Alabama	9	11.11%	0.54
Alaska	3	33.33%	0.18
Arizona	11	9.09%	0.66
Arkansas	6	16.67%	0.36
California	55	1.82%	1.00
Colorado	9	11.11%	0.54
Connecticut	7	14.29%	0.42
D.C.	3	33.33%	0.18
Delaware	3	33.33%	0.18
Florida	29	3.45%	1.00
Georgia	16	6.25%	0.96
Hawaii	4	25.00%	0.24
Idaho	4	25.00%	0.24
Illinois	20	5.00%	1.00
Indiana	11	9.09%	0.66
Iowa	6	16.67%	0.36
Kansas	6	16.67%	0.36
Kentucky	8	12.50%	0.48
Louisiana	8	12.50%	0.48
Maine	4	25.00%	0.24
Maryland	10	10.00%	0.60
Massachusetts	11	9.09%	0.66
Michigan	16	6.25%	0.96
Minnesota	10	10.00%	0.60
Mississippi	6	16.67%	0.36
Missouri	10	10.00%	0.60
Montana	3	33.33%	0.18
Nebraska	5	20.00%	0.30
Nevada	6	16.67%	0.36
New Hampshire	4	25.00%	0.24
New Jersey	14	7.14%	0.84
New Mexico	5	20.00%	0.30
New York	29	3.45%	1.00
North Carolina	15	6.67%	0.90
North Dakota	3	33.33%	0.18
Ohio	18	5.56%	1.00
Oklahoma	7	14.29%	0.42
Oregon	7	14.29%	0.42
Pennsylvania	20	5.00%	1.00
Rhode Island	4	25.00%	0.24
South Carolina	9	11.11%	0.54
South Dakota	3	33.33%	0.18
Tennessee	11	9.09%	0.66
Texas	38	2.63%	1.00
Utah	6	16.67%	0.36
Vermont	3	33.33%	0.18
Virginia	13	7.69%	0.78
Washington	12	8.33%	0.72
West Virginia	5	20.00%	0.30
Wisconsin	10	10.00%	0.60
Wyoming	3	33.33%	0.18
Total	**538**		**26.74**

4.2.6. The whole-number proportional method would not make every vote equal.

There are five sources of inequality in the whole-number proportional method, and each is substantial, including the:

- 3.81-to-1 inequality in the value of a vote because of the two senatorial electoral votes that each state receives in addition to the number of electoral votes warranted by its population;
- 1.72-to-1 inequality in the value of a vote because of the imprecision of the process of apportioning U.S. House seats (and hence electoral votes) among the states;
- 1.67-to-1 inequality in the value of a vote created by voter-turnout differences at the state level;
- 1.39-to-1 inequality in the value of a vote caused by the intra-decade population changes after each census; and
- 50.2-to-1 inequality because the one winnable electoral vote could be won with a few thousand popular votes in a low-population state while requiring tens of thousands of popular votes in a bigger state.

Inequality because of the two senatorial electoral votes

First, under the whole-number proportional method, a vote cast in a large state has less weight than a vote cast in a small state because of the two senatorial electoral votes that each state receives above and beyond the number warranted by the state's population.

Table 1.34 shows, for each state, the ratio of the number of people per electoral vote, compared to the number of people per electoral vote in the nation's smallest state (Wyoming). For example, the ratio of California's population per electoral vote to that of Wyoming is 3.81-to-1.

Inequality because of the imprecision of the process of apportioning U.S. House seats

Second, a vote cast in certain states has less weight than a vote cast in certain other states because of inequalities created by imprecision in apportioning U.S. House seats.

There is a 1.72-to-1 variation in the weight of a vote because of the imprecision of the process of apportioning U.S. House seats (table 1.35).

Inequalities because of voter-turnout differences at the state level

Third, a voter in a low-turnout state has greater voting power than a voter in a high-turnout state.

Differences in voter turnout at the state level create variations of up to 1.67-to-1 in the value of a vote under this method (table 1.41).

Inequalities because of population changes occurring during the decade after each census

Fourth, another source of variation in the value of a vote from state to state arises from the fact that state populations change at different rates during the decade after each census.

These differences create variations of up to 1.39-to-1 in the value of a vote under this method (table 1.40).

Inequalities due to differences in the number of votes that enable a candidate to win an electoral vote

Fifth, recall that table 4.47 showed that, under the whole-number proportional method applied to the 2012 election:

- only one electoral vote would be in play in 24 states;
- two electoral votes would be in play in Texas; and
- three electoral votes would be in play in California.

Winning the single electoral vote available in 24 states would require only a few thousand popular votes in a low-population state, while requiring tens of thousands of popular votes in a bigger state.

This inequality becomes apparent by focusing on the *number* of popular votes—rather than the percentages presented in the earlier table.

Table 4.49 shows the 26 states that would have been in play if the 2012 election had been conducted under the whole-number proportional method.

- Column 3 shows the number of popular votes that Obama received in each state.
- Column 4 shows the number of popular votes that Romney received in each state.
- Column 5 shows Obama's level of support in the state.
- Column 6 shows the percentage change needed to gain or lose one electoral vote in the state. Note that this change is measured to the nearest breakpoint (up or down).
- Column 7 shows the number of popular votes needed to gain or lose one electoral vote in the state (measured to the nearest breakpoint).

This table is sorted in ascending order of the percentage change needed to gain or lose one electoral vote (column 6) in 2012 under the whole-number proportional method.

A glance at rows 4 through 6 of the table (highlighted in bold) shows that changing 3,710 popular votes in Utah would have yielded one electoral vote, while the same one-electoral-vote reward would have taken 36,812 popular votes in Florida and 33,591 popular votes in New York.

Table 4.50 presents the same information as the previous table, except that this table is sorted in ascending order of the number of popular votes (column 7) needed to affect one electoral vote in 2012 under the whole-number proportional method.

Table 4.49 The 26 battleground states of 2012 sorted by the percentage change needed to affect one electoral vote (column 6)

State	EV	Obama (D)	Romney (R)	D-Percent	Percent change to affect one EV	Popular-vote change to affect one EV
AL	9	795,696	1,255,925	38.78%	0.11%	2,157
MO	10	1,223,796	1,482,440	45.22%	0.22%	5,990
PA	20	2,990,274	2,680,434	52.73%	0.23%	13,152
UT	6	251,813	740,600	25.37%	0.37%	3,710
FL	29	4,235,965	4,162,341	50.44%	0.44%	36,812
NY	29	4,471,871	2,485,432	64.28%	0.48%	33,591
GA	16	1,773,827	2,078,688	46.04%	0.83%	32,039
CA	55	7,854,285	4,839,958	61.87%	0.85%	108,467
NC	15	2,178,391	2,270,395	48.97%	1.03%	46,002
MN	10	1,546,167	1,320,225	53.94%	1.06%	30,349
IL	20	3,019,512	2,135,216	58.58%	1.08%	55,543
TX	38	3,308,124	4,569,843	41.99%	1.20%	94,743
TN	11	960,709	1,462,330	39.65%	1.26%	30,534
OH	18	2,827,621	2,661,407	51.51%	1.26%	69,366
RI	4	279,677	157,204	64.02%	1.52%	6,626
WI	10	1,620,985	1,410,966	53.46%	1.54%	46,588
MI	16	2,564,569	2,115,256	54.80%	1.68%	78,412
MD	10	1,677,844	971,869	63.32%	1.68%	44,469
NJ	14	2,122,786	1,478,088	58.95%	1.76%	63,459
VA	13	1,971,820	1,822,522	51.97%	1.97%	74,649
OK	7	443,547	891,325	33.23%	2.49%	33,193
LA	8	809,141	1,152,262	41.25%	2.50%	48,973
MS	6	562,949	710,746	44.20%	2.53%	32,243
MA	11	1,921,290	1,188,314	61.79%	2.69%	83,797
CO	9	1,322,998	1,185,050	52.75%	2.75%	68,974
KS	6	440,726	692,634	38.89%	2.78%	31,507

As can be seen from the table, there is considerable variation in the number of popular votes required to change one electoral vote.

Among the 24 states in table 4.50 where one electoral vote is in play, Alabama is the state requiring the fewest popular votes (2,157) to change one electoral vote. California is the state requiring the most popular votes (108,467) to change one electoral vote.

That is, the ratio of the number of popular votes required to change one electoral vote in California, compared to Alabama is 50.2-to-1.

We mentioned above that the very largest states (California, Texas, and New York) could potentially be battlegrounds for two or three electoral votes. However, another counter-intuitive feature of the whole-number proportional method is that the candidates would probably choose to ignore that opportunity. The reason would be that statewide campaigns in a large state are very expensive. The cost of campaigning for two or three electoral votes in California or Texas would be similar to that required to run a campaign for Governor or U.S. Senator in those states. There would be many smaller states where it would be far more cost-effective to campaign for an extra electoral vote.

Table 4.50 The 26 battleground states of 2012 sorted by the number of popular votes needed to affect one electoral vote (column 7)

State	EV	Obama (D)	Romney (R)	D-Percent	Percent change needed to gain or lose one EV	Popular-vote change needed to gain or lose one EV
AL	9	795,696	1,255,925	38.78%	0.11%	2,157
UT	6	251,813	740,600	25.37%	0.37%	3,710
MO	10	1,223,796	1,482,440	45.22%	0.22%	5,990
RI	4	279,677	157,204	64.02%	1.52%	6,626
PA	20	2,990,274	2,680,434	52.73%	0.23%	13,152
MN	10	1,546,167	1,320,225	53.94%	1.06%	30,349
TN	11	960,709	1,462,330	39.65%	1.26%	30,534
KS	6	440,726	692,634	38.89%	2.78%	31,507
GA	16	1,773,827	2,078,688	46.04%	0.83%	32,039
MS	6	562,949	710,746	44.20%	2.53%	32,243
OK	7	443,547	891,325	33.23%	2.49%	33,193
NY	29	4,471,871	2,485,432	64.28%	0.48%	33,591
FL	29	4,235,965	4,162,341	50.44%	0.44%	36,812
MD	10	1,677,844	971,869	63.32%	1.68%	44,469
NC	15	2,178,391	2,270,395	48.97%	1.03%	46,002
WI	10	1,620,985	1,410,966	53.46%	1.54%	46,588
LA	8	809,141	1,152,262	41.25%	2.50%	48,973
IL	20	3,019,512	2,135,216	58.58%	1.08%	55,543
NJ	14	2,122,786	1,478,088	58.95%	1.76%	63,459
CO	9	1,322,998	1,185,050	52.75%	2.75%	68,974
OH	18	2,827,621	2,661,407	51.51%	1.26%	69,366
VA	13	1,971,820	1,822,522	51.97%	1.97%	74,649
MI	16	2,564,569	2,115,256	54.80%	1.68%	78,412
MA	11	1,921,290	1,188,314	61.79%	2.69%	83,797
TX	38	3,308,124	4,569,843	41.99%	1.20%	94,743
CA	55	7,854,285	4,839,958	61.87%	0.85%	108,467

4.2.7. Minor-party candidates would be zeroed-out in small- and medium-sized states under the whole-number proportional method.

Jerry Spriggs, an advocate of the whole-number proportional method of allocating electoral votes, describes the effect of this method of allocating electoral votes on minor-party candidates as follows:

> "Third (or more) party candidate electoral votes are counted and remain in the system."[87]

[87] Spriggs, Jerry. 2012. *Equal Voice Voting: Making Our Votes Count in the Electoral College*. Page 70. https://equalvoicevoting.com. See also Spriggs, Jerry. 2021. *All Votes Matter!* Bloomington, IN: iUniverse.

The facts show otherwise. Minor-party candidates would:

- rarely win any electoral votes from small-and medium-sized states, and
- receive a significantly smaller percentage of electoral votes than warranted by their share of the national popular vote.

The reason is that the percentage of the popular vote needed to win one electoral vote—particularly in small- and medium-sized states—is typically far greater than a third party's level of support in the state.

Under the whole-number proportional method, it takes:

- 33.33% of the state's popular vote to win one electoral vote in the eight states with three electoral votes
- 25% of the state's popular vote to win one electoral vote in the five states with four electoral votes
- 14.3% of the state's popular vote to win one electoral vote in the three states with the *median* number of electoral votes (that is, seven electoral votes)
- 10% of the state's popular vote to win one electoral vote in the four states with the *average* number of electoral votes (that is, 10 electoral votes).

For example, consider the 2016 presidential election. In that election:

- Libertarian candidate Gary Johnson received 3.3% of the national popular vote
- Green candidate Jill Stein received 1.1% of the national popular vote.

Johnson would have received 14 electoral votes under the whole-number proportional method. As shown in table 4.14, two of those 14 electoral votes would have come from California, and one each would have come from Arizona, Colorado, Florida, Georgia, Illinois, Indiana, Michigan, New Mexico, New York, Ohio, Texas, and Washington. Except for former Governor Johnson's home state of New Mexico (with five electoral votes), all of these states have nine or more electoral votes (and most have considerably more than nine).

Similarly, Jill Stein would have received one electoral vote under this method in 2016 (table 4.14). California would have been the source of her electoral vote.

In 2012, Johnson received 1.1% of the national popular vote and would have received one electoral vote under this method. California would have been the source of Johnson's one electoral vote (table 4.21).

In 2008, Ralph Nader received 0.6% of the national popular vote and would have received one electoral vote under this method. Again, California would have been the source of Nader's one electoral vote (table 4.24).

In 2000, Ralph Nader received 2.7% of the national popular vote and would have received 13 electoral votes under the whole-number proportional method. As shown in table 4.28, two of those 14 electoral votes would have come from California, and one each would have come from Colorado, Florida, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Texas, and Wisconsin. All of these states except Oregon have nine or more electoral votes (and most have considerably more than nine).

In 1996, Perot's support was 8% nationally and distributed fairly evenly across the country. He would have received 46 electoral votes from 35 states under the whole-number proportional method (table 4.31). However, he would not have received any electoral votes from 15 states or the District of Columbia. Thirteen of these 16 jurisdictions had only

three, four, or five electoral votes each (namely Alaska, Delaware, District of Columbia, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, Vermont, West Virginia, and Wyoming). Perot would not have won any electoral votes from these 13 jurisdictions, because one electoral vote corresponds to 33% of the popular vote in a three-electoral-vote jurisdiction, 25% in a four-electoral-vote state, or 20% in a five-electoral-vote state.

Moreover, Perot would have just barely missed winning one electoral vote in the remaining three of these 16 states, namely Colorado (8), Mississippi (7), and South Carolina (8). He would not have won any electoral votes from these three states, because one electoral vote corresponds to 14% of the popular vote in a seven-electoral-vote state and 12.5% in an eight-electoral-vote state.

4.2.8. Prospects of adoption for the whole-number proportional method

The whole-number proportional method

- *would not* accurately reflect the nationwide popular vote;
- *would not* make every vote equal; and
- *would not* significantly improve upon the current state-by-state winner-take-all method of awarding electoral votes in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President.

That is, the whole-number proportional method would not satisfy any of the three criteria necessary for improving the current system.

In particular, the whole-number proportional method does not address the most conspicuous shortcoming of the current system from the point of view of the general public, namely that the second-place candidate can become President.

Moreover, the whole-number proportional method would fail to address any of the four sources of inequality in the value of a vote.

As the Making Every Vote Count Foundation correctly noted in their 2023 report *Improving Our Electoral College System*, the whole-number proportional method:

> "would retain … the greater weight given to smaller states under the Electoral College. As a result, [it] could also be criticized by progressives for **failing to adhere fully to the principle of all votes counting equally**."[88] [Emphasis added]

Furthermore, there are two prohibitive practical impediments to adoption of the whole-number proportional method.

First, a state reduces its own influence if it divides its electoral votes while other states continue to use winner-take-all. Thus, this method would penalize first movers and early adopters—leaving them with only minimal influence.

Thomas Jefferson summed up this objection in his January 12, 1800, letter to Virginia

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[88] Making Every Vote Count Foundation. 2023. *Improving Our Electoral College System*. November 2023. Page 7. https://static1.squarespace.com/static/5a7b7d95b7411c2b69bd666f/t/65b979baf7e8e411b2864a40/1706654139098/MEVC+Report.pdf

Governor (and later President) James Monroe arguing that the state should switch from its existing district system[89] to the statewide winner-take-all system.

> "All agree that an election by districts would be best, if it could be general; but while 10. states chuse either by their legislatures or by a general ticket, **it is folly & worse than folly** for the other 6 not to do it."[90] [Emphasis added; spelling and punctuation as per original]

The now-prevailing statewide winner-take-all system became entrenched in the political landscape between 1800 and 1830 precisely because each state's dominant political party came to realize that fragmentation of its electoral votes diminished its influence in comparison to states employing winner-take-all. Once a few states adopted the winner-take-all method, it became increasingly disadvantageous for other states not to follow. Once entrenched, winner-take-all is difficult to unwind.

If states were to ever start unilaterally adopting the whole-number proportional method on a state-by-state basis, each additional adherent would increase the influence of the remaining winner-take-all states—thereby decreasing the incentive of other states to adopt the method. That is, the adoption process would quickly become self-arresting.[91]

For the sake of argument, suppose that as many as 49 states adopted the whole-number proportional method.

Recall that table 4.47 showed that only about 29 electoral votes would be in play nationally under this method.

Then, if just one closely divided state with a substantial number of electoral votes (e.g., perhaps Texas or Florida) were to retain its winner-take-all law, then that state would immediately become, for all practical purposes, the only state that would matter in presidential politics.

The second prohibitive impediment to adoption of the whole-number proportional method stems from the fact that it is state legislation that may be enacted on a state-by-state basis without a federal constitutional amendment. That is, these state-level enactments would leave intact the existing federal constitutional provision that specifies that the President be chosen by the U.S. House of Representatives (on a one-state-one-vote basis) if no candidate receives an absolute majority of the electoral votes.

If the whole-number proportional method is applied to the results of the eight presidential elections between 1992 and 2020, the presidential election would have been thrown into the House in four of those elections.

In fact, the most salient feature of the whole-number proportional method would be that it would frequently throw presidential elections into the U.S. House.[92]

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[89] At the time, Virginia chose its 14 presidential electors from 14 special presidential elector districts.

[90] The entire letter and citations appear in the text and footnotes of section 2.2.3 of this book.

[91] The above problems associated with piecemeal adoption by the states of the whole-number proportional method would not apply if it were adopted on a uniform national basis in the form of a federal constitutional amendment. A federal constitutional amendment would, if ratified, take effect simultaneously in all 50 states and the District of Columbia. However, if there ever were support for a proportional amendment, the fractional-proportional (Lodge-Gossett) approach would be the more attractive approach.

[92] Note that the National Popular Vote Compact guarantees the national popular winner a majority of the electoral votes, and hence avoids the possibility of a contingent election in the House.

Conceivably, this method could be adopted in the form of a federal constitutional amendment. In that case, the amendment could simply eliminate the contingent election in the House (as the 1950 Lodge-Gossett fractional-proportional amendment would have done).

However, if amending the Constitution were being considered, the whole-number proportional method would be manifestly inferior to the fractional-proportional method in several ways. Specifically, the fractional-proportional method (section 4.1) would:

- make every voter in every state politically relevant in every president election, and
- less frequently give the presidency to a candidate who did not win the national popular vote. Specifically, the fractional-proportional method would not have elected Trump in 2016, although it would have elected George W. Bush in 2000.

4.3. CONGRESSIONAL-DISTRICT METHOD OF AWARDING ELECTORAL VOTES

4.3.1. Summary

- Under the congressional-district method of awarding electoral votes, one electoral vote is awarded to the presidential candidate who receives the most popular votes in each of a state's congressional districts. The state's two senatorial electoral votes are awarded on the basis of the statewide vote.
- The congressional-district method could be implemented in two ways, namely by means of a federal constitutional amendment or by state-level legislation enacted by individual states (as Maine did in 1969, Nebraska did in 1992, and many states did in the late 1700s and early 1800s).
- The congressional-district method *would not* accurately reflect the nationwide popular vote even if used nationwide. In three of the six presidential elections between 2000 and 2020, the winner of the most votes nationwide would not have won the presidency if this method had been applied to past election returns.
- The congressional-district method *would not* make every voter in every state politically relevant. It would worsen the current situation in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President. Campaigns would be focused only on the small number of congressional districts that are closely divided in the presidential race. In 2020, 31% of the U.S. population lived in the dozen closely divided battleground states where the major-party presidential candidates were within eight percentage points of each other. In contrast, only 17% of the nation's congressional districts (72 of 435) were within eight percentage points of each other in 2020.
- The congressional-district method *would not* make every vote equal. There are six substantial sources of inequality built into this method, namely:
  - 3.81-to-1 inequality because of senatorial electors;
  - 1.72-to-1 inequality because of imprecision in apportioning U.S. House seats (and hence electoral votes);

  - 3.76-to-1 inequality in the value of a vote because of voter-turnout differences among congressional districts across the country;
  - 1.67-to-1 inequality in favor of voters in low-turnout states;
  - 1.39-to-1 inequality because of intra-decade population changes; and
  - 7.1-to-1 differences, from district to district within a state, in the number of votes that enable a candidate to win an electoral vote; and
  - 210-to-1 inequality in the value of a vote based on its ability to decide the national outcome.
- District allocation of electoral votes would magnify the effects of gerrymandering of congressional districts and increase the incentive to gerrymander.
- Presidential campaigns would not be attracted *to a state* by the congressional-district method but, instead, only to whatever closely divided districts, if any, happen to exist in a given state. For example, recent presidential campaigns paid attention to Nebraska's closely divided 2nd congressional district (the Omaha area) while totally ignoring the heavily Republican rural 1st and 3rd districts. Similarly, recent campaigns paid attention to Maine's closely divided 2nd congressional district (the northern part of the state), while ignoring the heavily Democratic 1st district (the Portland area).
- The congressional-district method would be difficult to install on a state-by-state basis, because it imposes a substantial disadvantage on first movers and early adopters. A state reduces its own influence if it divides its electoral votes while other states continue to use winner-take-all. Moreover, each additional state that adopts this method increases the influence of the states that cling to the winner-take-all method.
- The congressional-district method of awarding electoral votes would make a bad system worse, because it would not accurately reflect the nationwide popular vote, would not make every voter in every state politically relevant, and would not make every vote equal.

4.3.2. Description of the congressional-district method

Under this method of awarding electoral votes, one electoral vote is awarded to the presidential candidate who receives the most popular votes in each of a state's congressional districts. Typically, the state's two senatorial electoral votes are awarded on the basis of the statewide vote.

4.3.3. History of the congressional-district method

This method could be implemented in two ways.

First, a federal constitutional amendment could implement it on a nationwide basis.

Second, an individual state could enact a law to allocate its electoral votes by district (as Maine did in 1969, as Nebraska did in 1992, and numerous other states have done as far back as the nation's first presidential election in 1789).

Using a constitutional amendment to implement the congressional-district method

The U.S. Senate approved, by a two-thirds vote, a constitutional amendment to implement the district method in 1813, 1819, 1820, and 1822. However, in each case, the amendment failed to pass the House.[93]

The congressional-district method received considerable attention in 1969, when Congress intensively debated various alternative constitutional amendments concerning election of the President, including direct popular election (section 4.7) and the fractional-proportional method (section 4.1).

In 1969, Senator Karl Mundt (R–South Dakota) sponsored a federal constitutional amendment to implement the district method. Senate Joint Resolution 12 of the 91st Congress read:

> "Section 1. Each State shall choose a number of electors of President and Vice President equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States shall be chosen elector.
>
> "The electors assigned to each State with its Senators shall be elected by the people thereof. Each of the electors apportioned with its Representatives shall be elected by the people of a single-member electoral district formed by the legislature of the State.[94] Electoral districts within each State shall be of compact and contiguous territory containing substantially equal numbers of inhabitants, and shall not be altered until another census of the United States has been taken. Each candidate for the office of elector of President and Vice President shall file in writing under oath a declaration of the identity of the persons for whom he will vote for President and Vice President, which declaration shall be binding on any successor to his office. In choosing electors the voters in each State have the qualifications requisite for electors of the most numerous branch of the State legislature.
>
> "The electors shall meet in their respective States, fill any vacancies in their number as directed by the State legislature, and vote by signed ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the State with themselves.…
>
> "Any vote cast by an elector contrary to the declaration made by him shall be counted as a vote cast in accordance with his declaration."

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[93] Keyssar, Alexander. 2020. *Why Do We Still Have the Electoral College?* Cambridge, MA: Harvard University Press. Page 62.

[94] Although the 1969 Mundt amendment is generally viewed as being based on congressional districts, it did not specifically require that the presidential-elector districts be the same as the state's congressional districts. Instead, the amendment merely said that the districts would be "single-member electoral district[s] formed by the legislature of the State."

The 1969 Mundt amendment was sponsored by 18 Senators including:

- Mundt (R–South Dakota)
- Boggs (R–Delaware)
- Byrd (D–West Virginia)
- Cotton (R–New Hampshire)
- Curtis (R–Nebraska)
- Dominick (R–Colorado)
- Fong (R–Hawaii)
- Goldwater (R–Arizona)
- Hansen (R–Wyoming)
- Hruska (R–Nebraska)
- Jordan (R–Idaho)
- Miller (R–Iowa)
- Sparkman (D–Alabama)
- Stennis (D–Mississippi)
- Thurmond (R–South Carolina)
- Tower (R–Texas)
- Williams (R–Delaware)
- Young (R–North Dakota).

A secondary feature of the 1969 Mundt amendment was that it eliminated the possibility of faithless presidential electors, while retaining the position of presidential elector. The Mundt amendment provided that each person nominated for presidential elector must take an oath promising to vote in the Electoral College for a particular candidate for President and Vice President. Then, regardless of how the presidential elector actually voted when the Electoral College met, the elector's vote would "be counted as a vote cast in accordance with his declaration."

Passing a constitutional amendment requires an enormous head of steam at the front-end of the process—specifically, getting a two-thirds vote in both houses of Congress. A constitutional amendment then requires ratification by three-fourths of the states. There have been only 17 amendments ratified since the Bill of Rights.[95]

However, the district method of awarding electoral votes could be implemented without a constitutional amendment—that is, it could be implemented unilaterally by individual states, as discussed in the next section.

Using state legislation to implement the congressional-district method

Before we discuss the history of use of the congressional-district method at the state level, note that states have employed districts other than congressional districts to award their electoral votes in the past.

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[95] The most recently approved constitutional amendment was the 27th Amendment (congressional salaries), which became part of the Constitution in 1992; however, that amendment had been submitted to the states by the First Congress on September 25, 1789—203 years earlier.

- In the first three presidential elections (1789, 1792, and 1796), Virginia voters chose presidential electors from single-elector districts. Presidential-elector districts were also used in North Carolina in 1796, 1800, 1804, and 1808.
- In the nation's first presidential election in 1789, Delaware had three counties and three electoral votes (as it still does today). In 1789, one presidential elector was elected from each of Delaware's three counties.[96]
- In 1792, Massachusetts voters chose presidential electors from four multi-elector regional districts (with the legislature choosing the state's remaining two electors).

Between 1789 and 1832, presidential electors were elected by congressional district in numerous states in various years.

In the nation's first presidential election in 1789, Massachusetts voters voted on candidates for presidential elector on a congressional-district basis.

Chief Justice Melville Fuller recounted the history of the congressional-district method between 1804 and 1828 in his opinion in *McPherson v. Blacker*:

> "The district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824, and 1828. Massachusetts … used the district system again in 1812 and 1820.… In New York, the electors were elected in 1828 by districts, the district electors choosing the electors at large."[97]

1892 enactment of the congressional-district method in Michigan

Michigan had given all of its electoral votes to the Republican presidential nominee between the formation of the modern Republican Party in 1856 and the 1888 election.

In 1888, Democrats were outraged when incumbent President Grover Cleveland won the national popular vote while losing the Electoral College to Republican Benjamin Harrison.

> "In the off-year election of 1890, Republicans suffered epic landslide losses, nationally and in Michigan. Democrats picked up 75 seats and won control of the U.S. House of Representatives.… Democrats had won eight … Congressional districts in Michigan."[98]

Moreover, the Democrats also won control of both houses of the Michigan legislature and the governorship.

In 1891, they repealed Michigan's winner-take-all law for awarding electoral votes. The

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[96] The U.S. Supreme Court decision in the 1892 case of *McPherson v. Blacker* contains an error concerning Delaware. In its historical review of the election laws of 1789, the Court (incorrectly) stated, "At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina." 146 U.S. 1 at 29. This source of this incorrect statement appears to be page 19 of the plaintiff's brief in the 1892 case. *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892. In fact, Delaware's presidential electors in 1789 were elected on a county basis. See section 2.2.

[97] *McPherson v. Blacker*. 146 U.S. 1 at 32. 1892.

[98] Ballenger, William S. 2012. Electoral College reform: Return of the Miner Law. *Inside Michigan Politics*. June 3, 2013. Page 1.

new law provided that one presidential elector would be chosen from each of the state's 12 congressional districts. In addition, the Miner Act created an eastern and western super-district—each consisting of six congressional districts. One electoral vote was awarded to the candidate who received the most popular votes in each super-district.

> "Enactment of Miner's bill meant that Democrats would not be shut out in 1892, and might even be assured of winning six or seven votes, instead of zero electoral votes, from Michigan in the impending presidential election.
>
> "Miner predicted that a system for district elections, if adopted elsewhere, would prevent the election of minority presidents like Harrison."[99]

This new law in Michigan aroused intense opposition.

In his 1891 State of the Union address to Congress, President Benjamin Harrison—the beneficiary of the winner-take-all system in the 1888 election—criticized Michigan's adoption of the district system:

> "The method of appointment by the States of electors of President and Vice-President has recently attracted renewed interest by reason of **a departure by the State of Michigan from the method which had become uniform in all the States**."
>
> **"For nearly sixty years all the States save one have appointed their electors by a popular vote upon a general ticket, and for nearly thirty years this method was universal."**[100] [Emphasis added]

President Harrison then spent 10% of his 16,000-word address to Congress arguing that the use of districts to elect presidential electors would subject the presidency to "the baneful influence of the gerrymander."

In 1892, the Michigan Republicans challenged the constitutionality of the Miner Act in state courts.

> "On June 17, 1892, the Michigan Supreme Court stunned the GOP by unanimously denying the writ of mandamus and upholding the Miner Law. This action came from a Supreme Court that had been elected on a partisan ballot and where Republican justices constituted a majority on the court."[101]

On appeal, the U.S. Supreme Court unanimously upheld Michigan's use of the congressional-district method in *McPherson v. Blacker*—the seminal case on the power of state legislatures to choose the method of awarding the state's electoral votes.

In November 1892, Michigan voters elected seven Republican and five Demo-

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[99] Ballenger, William S. 2012. Electoral College reform: Return of the Miner Law. *Inside Michigan Politics*. June 3, 2013. Page 2.

[100] Harrison, Benjamin. 1891. Third Annual Message. *The American Presidency Project*. https://www.presidency.ucsb.edu/node/205168

[101] Ballenger, William S. 2012. Electoral College reform: Return of the Miner Law. *Inside Michigan Politics*. June 3, 2013. Page 2.

cratic presidential electors at the district level. The Republicans won both of the state's super-districts.

Michigan voters also elected a Republican Governor and legislature in 1892.

> "The very first bill introduced in the state Senate in January of 1893 was a bill to repeal the Miner Law.… On straight party line votes, first in the state Senate and later in the state House, the Miner Law was wiped out of Michigan's statute books."[102]

Under the restored winner-take-all law, Republican presidential nominee William McKinley won all of Michigan's electoral votes in 1896.

1969 enactment of the congressional-district method in Maine

This method is in use today in Maine as a result of a 1969 state law. Maine awards its two senatorial electoral votes to the candidate who receives the most popular votes statewide.

In the 13 presidential elections between 1972 and 2020 in which Maine used this method, there were only two occasions when the state's electoral votes were divided. In 2016 and 2020, Donald Trump carried Maine's 2nd congressional district (the northern part of the state), while the Democratic nominee carried the 1st district (the Portland area) and the state as a whole.

1992 congressional-district proposal in Florida and seven other states

The congressional-district method was actively considered by the states of Arizona, Connecticut, Florida, Georgia, Louisiana, Nebraska, New Jersey, North Carolina, and Virginia in 1992.

In 1992, Nebraska enacted a congressional-district law similar to Maine's 1969 law. In the eight presidential elections between 1992 and 2020 in which Nebraska used this method, there were only two occasions when the state's electoral votes were divided. Barack Obama carried Nebraska's 2nd congressional district (the Omaha area) in 2008, and Joe Biden carried the 2nd district in 2020.

A congressional-district system came close to enactment in Florida in 1992, when the proposal had the support of Governor Lawton Chiles (D) and passed the state House. However, the bill failed to pass the Senate.

2011 congressional-district proposal in Pennsylvania

Just before and after the 2012 presidential election, this method was the subject of considerable debate in various states—notably in Pennsylvania in 2011.

In November 2010, the Republicans won control of both houses of the Pennsylvania legislature and the Governor's office.

The political context of this debate was that the Democratic presidential nominee had won Pennsylvania in the five previous elections. Moreover, it was generally expected that President Obama would win Pennsylvania again in 2012—as indeed he did.

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[102] Ballenger, William S. 2012. Electoral College reform: Return of the Miner Law. *Inside Michigan Politics*. June 3, 2013. Page 2.

Also, it was widely anticipated that the Republican legislature and Republican Governor would enact a congressional redistricting plan that would be highly favorable to their party—as they, in fact, did.

Thus, in September 2011, Pennsylvania Senate Majority Leader Dominic Pileggi (R) introduced a bill that would have replaced Pennsylvania's existing winner-take-all law with a law similar to the 1969 Maine and 1992 Nebraska laws. Under Pileggi's proposal, the candidate winning each of Pennsylvania's congressional districts would receive one electoral vote, and the candidate winning the state would receive the state's two senatorial electoral votes.

Although Senator Pileggi's 2011 proposal was not enacted in time for the 2012 election, the issue remained active and resurfaced in 2013.

2013 Congressional-district proposals in Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida

There were six closely divided battleground states in which the Republicans won control of both houses of the legislature and the Governor's office in the November 2010 midterm elections—Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida.

In 2012, President Obama carried all six states (as he had in 2008), thus giving him a 106–0 margin over Governor Romney in these six states. This 106-vote margin was considerably larger than the 62-vote margin by which President Obama won the Electoral College in 2012.

Thus, the congressional-district method attracted increased attention among Republican state legislators in these six states after the 2012 election.

A *National Journal* article entitled "The GOP's Electoral College Scheme" in December 2012 reported:

> "Republicans alarmed at the apparent challenges they face in winning the White House are preparing an all-out assault on the Electoral College system in critical states, an initiative that would significantly ease the party's path to the Oval Office.
>
> "**Senior Republicans say they will try to leverage their party's majorities in Democratic-leaning states in an effort to end the winner-take-all system of awarding electoral votes. Instead, bills that will be introduced in several Democratic states would award electoral** votes on a proportional basis."
>
> "If more reliably blue states like Michigan, Pennsylvania, and Wisconsin were to award their electoral votes proportionally, Republicans would be able to eat into what has become a deep Democratic advantage.
>
> "All three states have given the Democratic nominee their electoral votes in each of the last six presidential elections. Now, senior Republicans in Washington are overseeing legislation in all three states to end the winner-take-all system."
>
> "The proposals, the senior GOP official said, are likely to come up in each

Table 4.51 Political effect of the congressional-district method in six states in 2012

State	D	R	D districts	R districts	D-EV under CD	R-EV under CD
FL	50%	49%	11	16	13	16
MI	54%	45%	5	9	7	9
OH	51%	48%	4	12	6	12
PA	52%	47%	5	13	7	13
VA	51%	47%	4	7	6	7
WI	53%	46%	3	5	5	5
Total			**32**	**62**	**44**	**62**

state's legislative session in 2013. Bills have been drafted, and legislators are talking to party bosses to craft strategy."

"In the long run, Republican operatives say they would like to pursue similar Electoral College reform in Florida, Ohio, and Virginia. Obama won all three states, but Romney won a majority of the congressional districts in each state.

"**Rewriting the rules would dramatically shrink or eliminate the Democratic advantage, because of the way House districts are drawn**."

"If Republicans go ahead with their plan, Democrats don't have the option of pushing back.… **Some consistently blue presidential states have Republican legislatures; the reverse is not true**."[103] [Emphasis added]

Table 4.51 shows the effect of applying the congressional-district method to the actual 2012 election returns from these six states (Pennsylvania, Wisconsin, Michigan, Ohio, Virginia, and Florida).[104] Columns 2 and 3 of the table show the statewide popular-vote results in each of the six states. Columns 4 and 5 show the number of congressional districts won by President Barack Obama and Governor Mitt Romney in each state. Columns 6 and 7 show the total number of electoral votes (including the two senatorial electoral votes) for Obama and Romney if this method had been applied to the results of the 2012 election.[105]

Under this method, President Obama would have received only 44 electoral votes to Governor Romney's 62 electoral votes from the six states—even though Obama carried all six states.

If this method had been in place in 2012 in the six states, President Obama would have ended up nationally with a razor-thin 270–268 win in the Electoral College (instead of the actual 332–206 margin).[106]

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[103] Wilson, Reid. The GOP's Electoral College scheme. *National Journal.* December 17, 2012. http://www.nationaljournal.com/columns/on-the-trail/the-gop-s-electoral-college-scheme-20121217

[104] Richie, Rob. 2012. Electoral College chaos: How Republicans could put a lock on the presidency. December 13, 2012. http://www.fairvote.org/electoral-college-chaos-how-republicans-could-put-a-lock-on-the-presidency

[105] *Ibid.*

[106] In 2012, if the congressional-district method is applied to the election returns in every state, Mitt Romney would have received a total of 274 electoral votes, and Obama would have received 264 electoral votes, despite the fact that Barack Obama received 4,966,945 more popular votes nationwide.

2013 Congressional-district proposal in Pennsylvania

The debate was particularly intense in Pennsylvania because Pennsylvania lost its battleground status in 2012. As *PoliticsPA* said:

> "Once a reliable battleground state, **Pennsylvania spent most of the 2012 presidential campaign on the sidelines**."[107] [Emphasis added]

Indeed, Pennsylvania received only five general-election campaign events in 2012 (out of 253 nationally)—compared to 40 that it had received in 2008.

Particularly galling to Pennsylvanians was the fact that neither President Obama nor Vice President Biden bothered to visit the state at all during the 2012 general-election campaign.

Moreover, neighboring Ohio (with two fewer electoral votes than Pennsylvania) received 73 general-election campaign events—almost one-third of the national total of 253.

In short, Pennsylvania was a "jilted battleground" state in the 2012 election.

Shortly after the 2012 election, Pennsylvania state Representatives Robert Godshall (R) and Seth Grove (R) announced that they intended to introduce a bill in 2013 to implement the congressional-district method in Pennsylvania.

The memo soliciting Pennsylvania legislators to co-sponsor the congressional-district bill said:

> "I believe that the Congressional District Method will increase voter turnout and **encourage candidates t**o **campaign in all states rather than just those that are competitive**.… Most importantly, this method of selecting presidential electors will give a stronger voice to voters in **all regions** of our great Commonwealth." [Emphasis added]

2013 congressional-district proposal in Michigan

Michigan was another "jilted battleground" in the 2012 election.

In fact, Michigan was ignored in the 2012 general-election campaign for President to an even greater degree than Pennsylvania.

Michigan's only general-election campaign visit in 2012 was an appearance by Republican vice-presidential nominee Paul Ryan in Rochester, Michigan.

President Obama, Governor Romney, and Vice President Biden never bothered to visit the state during the general-election campaign.

Thus, Representative Pete Lund (R), Chair of the House Redistricting and Elections Committee, announced his intention to introduce a bill[108] in the 2013 legislative session to enact the congressional-district method, saying:

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[107] Gibson, Keegan. House Republicans resurrect congressional-based Electoral College plan. *PoliticsPA*. December 20, 2012. http://www.politicspa.com/house-rs-resurrect-congressional-based-electoral-college-plan/44960/

[108] Oosting, Jonathan. Shake up the Electoral College? GOP proposal would have helped Mitt Romney win Michigan. *MLive*. December 18, 2012. http://www.mlive.com/politics/index.ssf/2012/12/shake_up_the_electoral_college.html

> "It's more representative of the people.… A person doesn't win a state by 100 percent of the vote, so this is a better, more accurate way.… People would feel voting actually matters. It's an idea I've had for several years."[109]

An Associated Press story reported:

> "Pete Lund, Michigan's House Republican whip, said next year is an opportune time to renew the push for his bill to award two electoral votes to the statewide winner and allocate the rest based on results in each congressional district—the method used by Nebraska and Maine.
>
> "The 2016 election 'is still a few years away and no one knows who the candidates are going to be,' said Lund."[110]

A *Christian Post* article entitled "GOP Operatives Eye Reversal of Democrats' Electoral College Edge" in December 2012 reported:

> "**The current method of calculating electoral college votes in most states gives Democrats an edge in presidential races.** Republican operatives are working to undo that edge, not by supporting a popular vote, though, as most Americans would prefer, but by supporting changes that would give Republicans an edge.
>
> "In all but two states, Maine and Nebraska, the candidate who wins the majority of votes in the state receives all the electors for that state. In Maine and Nebraska, electors are assigned by congressional district. A candidate gets one elector for each congressional district they win and two more electors if they win the popular vote in the state.
>
> "**Republican operatives are working to cherry pick a few select states to change the system to one like Maine and Nebraska in order to pick up a few more electors in the next presidential election**.
>
> "The states they are looking at are Michigan, Pennsylvania and Wisconsin. Obama won all three of those states in 2008 and 2012. Combined, those states netted 46 electors for President Barack Obama. If those states had assigned electors by congressional district, though, at least 26 electors would have likely gone to Republican presidential candidate Mitt Romney instead of Obama, according to calculations by Reid Wilson for *National Journal*. It would not have been enough for Romney to win, but would at least put future Republican candidates in a better position to win in future elections.

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[109] Lund: Divide Electoral College votes by congressional district. *Michigan Information and Research Service*. December 17, 2012. www.mirsnews.com/alert.php?alert_id=1352

[110] Associated Press. Changes advocated in Pennsylvania electoral vote counting. *PennLive*. December 22, 2012. http://www.pennlive.com/midstate/index.ssf/2012/12/changes_advocated_in_pennsylva.html

> "One aspect that all three of those states have in common is their state governments are controlled by Republicans, making the change possible. It also means that the 2010 redistricting in those states was controlled by the Republicans, thus giving them an advantage in drawing congressional district lines favorable to their party.…
>
> "**The current plan pursued by some Republicans is not aimed at fixing perceived flaws in the system, though. Rather, it is aimed at simply helping Republicans win**. (Notice they are not proposing the same system for states like Texas, which would help Democrats gain a few more electors.)"[111] [Emphasis added]

2013 congressional-district proposal in Virginia

In December 2012, Virginia state Senator Charles Carrico (R) proposed that his state adopt a variation of the congressional-district method.[112]

Under Carrico's proposal, Virginia's two senatorial electoral votes would not go to the statewide winner (namely Obama in 2008 and 2012).

Instead, the candidate winning a majority of Virginia's 11 districts (which were gerrymandered in 2011 to favor the Republican Party) would receive a bonus of two senatorial electoral votes. That is, Carrico's bill would layer a winner-take-all rule on top of the winner-take-all rule applied at the district level.

Because the Republican legislature and Governor had created congressional districts highly favorable to their own party, President Obama won only four of Virginia's 11 districts while carrying the state in November 2012. Meanwhile, Governor Romney won seven.

If the congressional-district law used in Maine and Nebraska is applied to the 2012 election returns in Virginia, the state's electoral votes would have been split 7–6 in favor of Romney.

If Senator Carrico's variation had been used, Romney would have won Virginia's two senatorial electoral votes, and the state's electoral votes would have been split 9–4 in favor of Romney. Note that President Obama won Virginia's two-party vote by a 52%–48% margin in 2012.

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[111] Nazworth, Napp. GOP operatives eye reversal of Democrats' Electoral College edge. *Christian Post*. December 20, 2012. http://www.christianpost.com/news/gop-operatives-eye-reversal-of-democrats-electoral-college-edge-87014/

[112] Lee, Tony. OH, VA Republicans Consider Changes to Electoral Vote System. *Breitbart*. December 10, 2012. http://www.breitbart.com/Big-Government/2012/12/10/OH-VA-Republicans-Float-Idea-Of-Getting-Rid-Of-Winner-Take-All-System-Of-Awarding-Electoral-Votes

2013 congressional-district proposal in Wisconsin

A December 27, 2012, *Milwaukee Journal Sentinel* article reported that incoming Assembly Speaker Robin Vos (R) had sponsored a bill (Assembly Bill 589) to divide Wisconsin's electoral votes by congressional district in 2008.[113]

A *Milwaukee Journal Sentinel* article entitled "Walker Open to Changing state's Electoral College Allocations" reported on December 22, 2012:

> "Gov. Scott Walker is open to having Wisconsin allocate its Electoral College votes based on results from each congressional district—a move that would offer Republicans a chance to score at least a partial victory in a state that has gone Democratic in the last seven presidential elections.
>
> "The idea is being considered in other battleground states that have tipped toward Democrats as Republicans try to develop a national plan to capture the presidency in future years.…
>
> "In the weeks since Obama won reelection, Republicans are now eyeing splitting up electoral votes in other key battleground states, according to the *National Journal*. **If Wisconsin, Michigan and Pennsylvania went to such a system, Republicans would have a chance to edge into the national Electoral College advantage that Democrats now enjoy.**
>
> "While those states lend an advantage to Democrats in presidential years, Republicans control all of state government in those three states after the GOP sweep of 2010."
>
> "Republicans last year bolstered their chances in congressional races by redrawing district lines. Those boundaries have to be redrawn every decade to account for population changes, and Republicans were able to use that opportunity to their advantage since they controlled state government."[114] [Emphasis added]

2021 congressional-district proposals in various state legislatures

Interest in the district method of awarding electoral votes has decreased considerably since the flurry of activity between 2011 and 2013.

Nonetheless, such bills are introduced regularly in state legislatures.

Table 4.52 shows the 28 bills to implement the district method of awarding electoral votes that were introduced in state legislatures in 2021 and 2022. District bills were introduced in 14 states, with a total of 87 sponsors.

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[113] Marley, Patrick. Vos previously backed changing electoral vote rules. *Milwaukee Journal Sentinel*. December 27, 2012. http://www.jsonline.com/news/statepolitics/vos-previously-backed-changing-electoral-vote-rules-jb865ct-184975431.html

[114] Marley, Patrick. Walker open to changing state's Electoral College allocations. *Milwaukee Journal Sentinel*. December 22, 2012. http://www.jsonline.com/news/statepolitics/walker-open-to-changing-states-electoral-college-allocations-8884ck6-184566961.html

Table 4.52 2021–2022 state legislative bills for district allocation of electoral votes

State	Bill	Year	Party that won state in 2020	Sponsors
Arizona	HB2426[a]	2021	Democrat	3 Republicans
Arizona	HB2476[b]	2022	Democrat	5 Republicans
Connecticut	HB5012[c]	2021	Democrat	2 Republicans
Connecticut	HB5322[d]	2021	Democrat	1 Republican
Connecticut	HB5324[e]	2021	Democrat	1 Democrat
Iowa	HF519[f]	2021	Republican	2 Democrats and 1 Republican
Illinois	HB2611[g]	2021	Democrat	2 Republicans
Illinois	HB2821[h]	2021	Democrat	1 Republican
Illinois	SB1762[i]	2021	Democrat	1 Republican
Illinois	SB54[j]	2021	Democrat	1 Republican
Massachusetts	HB785[k]	2021	Democrat	1 Republican
Massachusetts	HB799[l]	2021	Democrat	5 Republicans
Michigan	HB4319[m]	2021	Democrat	5 Republicans
Michigan	HB4320[n]	2021	Democrat	5 Republicans
Minnesota	HF453[o]	2021	Democrat	1 Republican
Minnesota	HF2608[p]	2021	Democrat	5 Republicans
Minnesota	SF429[q]	2021	Democrat	3 Republicans
Mississippi	HB176[r]	2022	Republican	1 Democrat
New Hampshire	HB370[s]	2021	Democrat	4 Republicans
New York	AB4895[t]	2021	Democrat	2 Republicans
New York	AB5437[u]	2021	Democrat	8 Republicans
New York	SB1804[v]	2021	Democrat	1 Republican
New York	SB2552[w]	2021	Democrat	1 Republican
Texas	HB1375[x]	2021	Republican	1 Democrat
Texas	HB3868[y]		Republican	5 Republicans and 2 Democrats
Virginia	SB1432[z]		Democrat	1 Republican
Wisconsin	AB35[aa]		Democrat	8 Republicans
Wisconsin	SB61[ab]		Democrat	8 Republicans

a https://apps.azleg.gov/BillStatus/BillOverview/74978
b https://apps.azleg.gov/BillStatus/BillOverview/76974
c https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05012&which_year=2021
d https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05322&which_year=2021
e https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05324&which_year=2021
f https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF519
g https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2611&GAID=16&DocTypeID=HB&SessionID=110&GA=102
h https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2821&GAID=16&DocTypeID=HB&SessionID=110&GA=102
i https://www.ilga.gov/legislation/BillStatus.asp?DocNum=1762&GAID=16&DocTypeID=SB&SessionID=110&GA=102
j https://www.ilga.gov/legislation/BillStatus.asp?DocNum=54&GAID=16&DocTypeID=SB&SessionID=110&GA=102
k https://malegislature.gov/Bills/192/H785
l https://malegislature.gov/Bills/192/H799
m http://www.legislature.mi.gov/(S(asihliut5srpqo34h2qj4aem))/mileg.aspx?page=GetObject&objectname=2021-HB-4319
n http://www.legislature.mi.gov/(S(asihliut5srpqo34h2qj4aem))/mileg.aspx?page=GetObject&objectname=2021-HB-4320
o https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF453&ssn=0&y=2021
p https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF2608&ssn=0&y=2021
q https://www.revisor.mn.gov/bills/bill.php?f=SF429&y=2021&ssn=0&b=senate
r http://billstatus.ls.state.ms.us/2022/pdf/history/HB/HB0176.xml
s http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=318&sy=2021&sortoption=&txtsessionyear=2021&txtbillnumber=HB370
t https://www.nysenate.gov/legislation/bills/2021/A4895
u https://www.nysenate.gov/legislation/bills/2021/A5437
v https://www.nysenate.gov/legislation/bills/2021/s1804
w https://www.nysenate.gov/legislation/bills/2021/s2552
x https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB1375
y https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB3868
z https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1432
aa https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/ab35
ab https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/sb61

As can be seen from the table, 92% of sponsors (80 of the 87) belonged to the political party that did not carry their state in the 2020 presidential election. The seven exceptions included:

- a Democratic Connecticut state legislator who sponsored a district bill in 2021, even though Biden won the state in 2020;
- an Iowa Republican state legislator who sponsored a district bill in 2021, even though Trump won the state in 2020; and
- five Texas Republican state legislators who sponsored a district bill in 2021 even though Trump won the state in 2020.[115]

All of the bills in the table called for the allocation of electoral votes based on congressional districts, except for the New Hampshire bill.

The New Hampshire bill (HB370) was based on the five districts used to elect the Governor's Executive Council—a body with considerable power that harks back to Pre-Independence America.

Under the New Hampshire bill, all four of the state's electoral votes would be awarded to the presidential candidate who receives the most votes in a majority of the five Executive Council districts. That is, like the 2012 Carrico bill in Virginia, this bill would layer a winner-take-all rule on top of a winner-take-all rule. For example, if a candidate were to carry three of the five Executive-Council districts, that candidate would receive all four of New Hampshire's electoral votes.

By way of background, the current five districts for electing the New Hampshire Executive Council are significantly gerrymandered. Four of the five districts will usually elect a Republican, even when more total Democratic votes are cast for Council members statewide.[116,117] That is, the practical political effect of the New Hampshire bill (HB370) would be to award all four of New Hampshire's electoral votes to the Republican presidential candidate.

4.3.4. The congressional-district method would not accurately reflect the national popular vote.

The late Curtis Gans and Leslie Francis (opponents of a national popular vote for President) advocated the use of this method of awarding electoral votes by saying:

> "**The lack of competition and campaigning in a majority of states owes itself not to the existence of the Electoral College's indirect method of choosing presidents, but rather to the winner-take-all method of choosing electors** in all but two states. If a party knows either that it can't win a single elector in a state or has an easy road to winning all of them, it sends its resources to where it has a competitive chance.

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[115] Note that Texas voted 62% Republican in 2004, 58% in 2012, 55% in 2016, and 53% in 2020.

[116] Rayno, Gerry. 2022. Gerrymandering Makes the Majority the Minority in the NH State House. *InDepthNH*. November 12, 2022. https://indepthnh.org/2022/11/12/gerrymandering-makes-the-majority-the-minority-in-the-nh-state-house/

[117] New Hampshire Election Results. *New York Times*. December 13, 2022. https://www.nytimes.com/interactive/2022/11/08/us/elections/results-new-hampshire.html?action=click&pgtype=Article&state=default&module=election-results&context=election_recirc&region=StateResultsFooter

> "There are alternatives to winner-take-all that do not involve abandoning the positive aspects of the Electoral College. **All states could adopt the system that now exists in Maine and Nebraska**, where all but two electors are chosen by congressional district, and the other two go to the statewide winner.
>
> "Or states might explore what was recently proposed in Colorado [in a statewide vote in November 2004]—that electors be allocated in proportion to each candidate's share of the popular vote above a certain threshold.
>
> "Either would provide a reason for both parties to compete in most states because there would be electors to win. Either **would likely produce an electoral vote count closer to the popular vote.**"[118] [Emphasis added]

The claim by Gans and Francis that the congressional-district system would "likely produce an electoral vote count closer to the popular vote" is demonstrably false.[119]

In three of the first six presidential elections of the 2000s (namely 2000, 2012, and 2016), the winner of the most votes nationwide would *not* have won the presidency if the district system had been in use in all states.

In 2016, if the congressional-district method is applied to election returns, Donald Trump would have received a majority in the Electoral College despite the fact that Hillary Clinton received 2,868,518 more popular votes nationwide. Overall, Trump would have received 290 electoral votes in 2016, and Clinton would have received 248 electoral votes. Specifically:

- Trump carried 230 of the nation's 435 congressional districts, whereas Clinton carried only 205 districts.
- Trump carried 30 states (having 60 senatorial electors), whereas Clinton carried only 20 states (having 40 senatorial electors).
- Clinton carried the District of Columbia with three electoral votes.

In 2012, if this method is applied to the election returns, Mitt Romney would have received a majority in the Electoral College despite the fact that Barack Obama received 4,966,945 more popular votes nationwide. Romney would have received a total of 274 electoral votes, and Obama would have received 264 electoral votes.[120]

In 2000, if this method is applied to the election returns,[121] George W. Bush would have

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[118] Gans, Curtis and Francis, Leslie. Why National Popular Vote is a bad idea. *Huffington Post*. January 6, 2012.

[119] The claim by Curtis Gans and Leslie Francis that the whole-number proportional method of awarding electoral votes "would likely produce an electoral vote count closer to the popular vote" is also demonstrably false, as discussed in 4.2.4.

[120] Daviss, Claire and Richie, Rob. 2015. *Fuzzy Math: Wrong Way Reforms for Allocating Electoral Votes (Problems with the Whole Number proportional and Congressional District Systems)*. FairVote report. https://fairvote.app.box.com/v/fuzzy-math-wrong-way-reforms

[121] In this book, all hypothetical analyses of an alternative electoral system being applied to a past election are necessarily based on the election returns from the actual election conducted under the then-existing electoral system. The authors, of course, recognize that the campaigns would have been conducted differently if a different electoral system had been in effect. For example, George W. Bush led in the vast majority of national polls during most of 2000. That, in turn, suggests that Bush might well have won the national popular vote if the candidates had campaigned nationwide, instead of just in the battleground states.

received a majority in the Electoral College despite the fact that Al Gore received 543,816 more popular votes nationwide. Overall, in 2000, Bush would have received a total of 288 electoral votes, and Gore would have received 250 electoral votes.[122] Specifically:

- George W. Bush carried 228 of the 435 congressional districts, whereas Al Gore carried only 207 districts.
- Bush carried 30 states (having 60 senatorial electors), whereas Gore carried only 20 states (having 40 senatorial electors).
- Gore carried the District of Columbia, which has three electoral votes.

The congressional-district method would have given Bush a 6.8% lead in electoral votes over Gore in 2000. However, Gore received 51,003,926 popular votes (50.2% of the two-party popular vote), whereas Bush received 50,460,110 (49.7% of the two-party popular vote). Under the existing statewide winner-take-all 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 three of the first six elections of the 2000s (namely 2004, 2008, and 2020), the congressional-district method would have yielded the same winner as the current state-by-state winner-take-all method of awarding electoral votes; however, the winner's percentage of the electoral votes would have differed considerably from his popular-vote percentage.

In 2004, George W. Bush carried 255 of the 435 congressional districts, whereas John Kerry carried 180. Bush carried 30 of the 50 states, and Kerry won the District of Columbia.[123] Bush would have won 59% of the electoral votes (315 of 538) under the congressional-district method in an election in which he received only 51% of the two-party national popular vote. Bush would have won 29 more electoral votes under this method than the 286 electoral votes that he actually won under the current system.

In 2008, Obama would have won 64 fewer electoral votes under the congressional-district method than he won under the current state-by-state winner-take-all method of awarding electoral votes. Instead of winning by 365–173 electoral votes, Obama would have won by the much narrower margin of 301–237.

In 2020, Biden won 224 of the 435 congressional districts, while Trump won 211. Biden and Trump each won 25 states—that is, each won 50 senatorial electoral votes. Biden won the District of Columbia's three electoral votes. If the congressional-district method had been applied to the 2020 election returns, Biden would have won the Electoral College by a slender margin of 277–261 electoral votes, instead of the 306–232 margin produced by the current winner-take-all system.

Table 4.53 shows the closest eight congressional districts that Biden won in 2020.

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[122] Daviss, Claire and Richie, Rob. 2015. *Fuzzy Math: Wrong Way Reforms for Allocating Electoral Votes (Problems with the Whole Number proportional and Congressional District Systems)*. FairVote report. https://fairvote.app.box.com/v/fuzzy-math-wrong-way-reforms

[123] America's choice in 2004: Votes by congressional district. *Cook Political Report*. 2005.

Table 4.53 The nine closest congressional districts that Biden won in 2020

Percent margin	District	Biden	Trump	Total	Winner	Margin (D–R)
0.2%	NV-3	214,184	213,299	435,796	Biden	885
1.1%	VA-7	228,335	223,268	460,031	Biden	5,067
1.5%	NY-19	182,965	177,569	368,128	Biden	5,396
1.5%	CA-48	199,791	193,832	401,845	Biden	5,959
1.8%	AZ-1	187,182	180,673	374,808	Biden	6,509
1.9%	TX-15	119,784	115,315	237,719	Biden	4,469
2.5%	IL-14	203,741	193,889	407,226	Biden	9,852
2.8%	PA-17	221,555	209,683	438,251	Biden	11,872
3.0%	CA-10	154,990	146,084	309,075	Biden	8,906
	Total	**1,712,527**	**1,653,612**	**3,432,879**		**58,915**

If 29,458 voters across these nine congressional districts had changed their votes from Biden to Trump, Biden would have lost the Electoral College by a 268–270 margin, despite leading in the national popular vote by 7,052,711 votes.[124]

Overall, Thomas, Gelman, King, and Katz concluded that:

> "The current electoral college and direct popular vote are both substantially fairer compared to those alternatives where states would have divided their electoral votes by congressional district."[125]

In summary, the congressional-district method would have been even less accurate than the current state-by-state winner-take-all method of awarding electoral votes in terms of reflecting the national popular vote.

One reason why the congressional-district method would not accurately reflect the nationwide popular vote is the widespread gerrymandering of congressional districts.

A more fundamental reason is that the congressional-district method is a combination of a "winner-takes-one" system at the district level and a "winner-takes-two" system at the statewide level.

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[124] In fact, Biden would have lost the presidency if only eight districts had switched, because there would have been a 269–269 tie in the Electoral College. In that event, the presidential election would have been thrown into the U.S. House of Representatives. In the contingent election in the House, each state casts one vote. The newly elected House takes office on January 3. The Republicans had a majority of the state delegations in the House on January 6, 2021 (although not a majority of the 435 House members). However, since the Republicans did not have a majority of the House, it is not clear that the Democrats would have allowed the House to conduct the contingent election. If the House had been given a chance to vote and if the House Republicans supported their party's presidential nominee, incumbent President Donald Trump would have been selected by the House on January 6, 2021. Two Democrats from Georgia were elected to the Senate on January 5, 2021. However, they had not yet taken their seats as of January 6, so the Senate still had a Republican majority in the Senate on January 6. Thus, if Senate Republicans supported their party's vice-presidential nominee on January 6, incumbent Vice President Mike Pence would have been selected by the U.S. Senate.

[125] Thomas, A. C.; Gelman, Andrew; King, Gary; and Katz, Jonathan N. 2012. Estimating partisan bias of the Electoral College under proposed changes in elector apportionment. SSRN-id2136804. August 27, 2012. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134776

Whenever a single office is filled by an electoral process in which the winner-take-all rule is applied to districts that are smaller than the entire jurisdiction served by the office, the candidate who received the most popular votes in the jurisdiction as a whole will frequently be different from the candidate who received the most popular votes in a majority of the districts. That is, the application of the winner-take-all rule to sub-jurisdictions will often lead to the defeat of the candidate receiving the most votes in the entire jurisdiction.

4.3.5. The congressional-district method would not make every vote equal.

Every vote would not be equal throughout the country if this method of awarding electoral votes were used in all states.

There are six different sources of inequality inherent in this method.

Each of these inequalities is substantial.

As will be detailed below, these inequalities include a

- 3.81-to-1 inequality in the value of a vote because of the two senatorial electoral votes that each state receives in addition to the number of electoral votes warranted by its population;
- 1.72-to-1 inequality in the value of a vote because of the imprecision of the process of apportioning U.S. House seats (and hence electoral votes) among the states;
- 3.76-to-1 inequality in the value of a vote because of voter-turnout differences at the district level;
- 1.67-to-1 inequality in the value of a vote created by voter-turnout differences at the state level;
- 1.39-to-1 inequality in the value of a vote caused by the intra-decade population changes after each census;
- 7.1-to-1 differences, from district to district within a state, in the number of votes that enable a candidate to win an electoral vote; and
- 210-to-1 inequality in the value of a vote based on its ability to decide the national outcome.

Inequality because of the two senatorial electoral votes

First, a vote cast in a large state has less weight than a vote cast in a small state because of the two senatorial electoral votes that each state receives above and beyond the number of electoral votes warranted by the state's population.

Table 1.3 shows, for each state, the ratio of the number of people per electoral vote, compared to the number of people per electoral vote in the nation's smallest state (Wyoming). For example, the ratio of California's population per electoral vote to that of Wyoming is 3.81-to-1.

Inequality because of the imprecision of the process of apportioning U.S. House seats

Second, a vote cast in many states has less weight than a vote cast in other states because of inequalities created by imprecision in apportioning U.S. House seats.

There is a 1.72-to-1 variation in the weight of a vote (table 1.35).

Inequalities because of differences in voter turnout at the district level

Third, voter turnout varies considerably from district to district for a variety of reasons. Under the congressional-district system, a voter in a low-turnout district has greater voting power in choosing the President than a voter in a high-turnout district.

Texas' 33rd congressional district[126] had the nation's lowest total vote for President in both the 2020 and 2016 elections—only 160,828 votes in 2020.

In contrast, Montana's single congressional district had the nation's highest total vote for President—603,674 votes in 2020.

That is, there was a 3.76-to-1 variation in the value of a vote between these two districts.

The example of Montana is hardly unique.[127]

In fact, under the congressional-district method of awarding electoral votes, the value of a vote in 328 of the nation's 435 congressional districts would have been less than half of that of Texas' 33rd congressional district.

Table 4.54 shows the 10 districts where the value of a vote would be less than a third of that of TX-33 under the congressional-district method. The table is sorted according to the district's 2020 total vote for President in column 1.

There are many reasons for this wide variation in turnout from district to district.

Consider, for example, Florida's 11th congressional district, which had the nation's ninth highest presidential vote (486,702) in the table.

Turnout is generally higher among older voters, and lower among younger voters. According to U.S. Census Bureau data, turnout in 2020 was:

- 78% among those 65 or over,
- 75% for those 50–64,
- 68% for those 40–49,
- 63% for those 30–39, and
- 53% for those 18–29.[128]

Florida's 11th congressional district contains, among other things, The Villages, a vast retirement community. Overall, a third of the population of FL-11 was 65 or older, while only 14% was age 18 to 34.[129] In contrast, only 8% of the people in TX-33 were 65 or over, and 27% were between 18 and 34 in 2020.

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[126] Note that the district numbers in this section were those in use for the 2020 election (that is, before the redistricting that occurred after the 2020 census).

[127] Cook, Rhodes, 2023. Where People Voted in 2022—and Where They Didn't: The vast differences in congressional district turnout. *Sabato's Crystal Ball*. July 20, 2023. https://centerforpolitics.org/crystalball/articles/where-people-voted-in-2022-and-where-they-didnt/

[128] Clement, Scott and Santamariña, Daniela. 2021. What we know about the high, broad turnout in the 2020 election. *Washington Post*. May 13, 2021. https://www.washingtonpost.com/politics/2021/05/13/what-we-know-about-high-broad-turnout-2020-election/

[129] Cohen, Richard and Cook, Charlie. 2019. *The Almanac of American Politics*. Columbia Books and Information Services. Pages 448 and 1752.

Table 4.54 Congressional districts where a vote's value is less than a third of that of a vote in the 33rd congressional district of Texas

Total	District	Biden	Trump	Winner	Margin (D–R)	Percent margin
603,674	MT-at-Large	244,786	343,602	Trump	–98,816	16.8%
530,867	CO-2	338,261	178,561	Biden	159,700	30.9%
512,062	FL-4	198,414	305,934	Trump	–107,520	21.3%
504,346	DE-at-Large	296,268	200,603	Biden	95,665	19.3%
504,172	NC-2	323,249	171,017	Biden	152,232	30.8%
501,293	NC-4	332,604	160,812	Biden	171,792	34.8%
491,810	FL-16	223,366	262,840	Trump	–39,474	8.1%
487,935	CO-4	198,971	276,309	Trump	–77,338	16.3%
486,702	FL-11	164,285	318,054	Trump	–153,769	31.9%
483,462	OR-3	356,714	112,509	Biden	244,205	52.0%

Hispanic turnout is considerably less than average. According to Census Bureau data, turnout in 2020 was:

- 73% among whites
- 66% among blacks
- 62% among Asians
- 53% among Hispanics
- 49% among American Indians.[130]

TX-33 was 66% Latino, whereas FL-11 was only 10% Latino.

Turnout is generally higher among those with advanced education. According to Census Bureau data, turnout in 2020 was:

- 90% for those with a post-graduate degree,
- 84% for those with a four-year college degree,
- 72% for those with some college,
- 54% for high-school graduates, and
- 36% for those with less than a high-school diploma.[131]

North Carolina's 4th congressional district is home to the Research Triangle. In that district, 22% have a post-graduate degree, and an additional 31% have a four-year college degree. That is, 53% of the population have college degrees. In contrast, only 3% of TX-33 have a post-graduate degree, and only 7% have a four-year college degree.[132]

Turnout is generally higher among those with higher income.

Consider Colorado's 2nd congressional district, another district in table 4.54. The median income in CO-2 is $75,021, whereas it is only $39,089 in TX-33.[133]

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[130] Clement, Scott and Santamariña, Daniela. 2021. What we know about the high, broad turnout in the 2020 election. *Washington Post*. May 13, 2021. https://www.washingtonpost.com/politics/2021/05/13/what-we-know-about-high-broad-turnout-2020-election/

[131] *Ibid*.

[132] Cohen, Richard and Cook, Charlie. 2019. *The Almanac of American Politics*. Columbia Books and Information Services. Pages 448 and 1752.

[133] *Ibid*.

Inequality because of voter-turnout differences

Fourth, a voter in a low-turnout state has greater voting power than a voter in a high-turnout state.

Differences in voter turnout at the state level create variations of up to 1.67-to-1 in the value of a vote in electing a state's two senatorial electors under the congressional-district method (table 1.41).

There are additional turnout differences among districts.

Inequalities because of population changes occurring during the decade after each census

Fifth, another source of variation in the value of a vote from state to state arises from the fact that state populations change during the decade after each census.

These differences create variations of up to 1.39-to-1 in the value of a vote under the congressional-district method (table 1.40).

Inequalities because of differences in the number of votes needed to win an electoral vote from district to district in the same state

Sixth, the number of votes required to win one electoral vote varies widely from district to district in the same state.

For example, in Nebraska in 2020, a margin of 22,091 in the 2nd congressional district gave Joe Biden one electoral vote, while a margin of 156,325 in the 3rd district gave Donald Trump one electoral vote—a 7.1-to-1 difference in the value of a vote within Nebraska.[134]

In Maine in 2020, a margin of 102,331 in the 1st congressional district gave Joe Biden one electoral vote, while a margin of 27,996 in the 2nd congressional district gave Donald Trump one electoral vote—a 3.6-to-1 difference within Maine.[135]

If the congressional-district method were used across the country, there would be similar differences in almost every state with more than one congressional district.

4.3.6. The congressional-district method would not make every voter in every state politically relevant.

Gans and Francis say that this method:

> "would provide a reason for both parties to compete **in most states** because there would be electors to win."[136] [emphasis added]

This prediction ignores the political reality that candidates would have no more reason to campaign in unwinnable and unlosable congressional districts any more than they currently campaign in unwinnable and unlosable states.

In their pursuit of electoral votes, presidential candidates do not spend their time and

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[134] State of Nebraska. 2020 Electoral College Certificate of Ascertainment. November 30, 2020. https://www.archives.gov/files/electoral-college/2020/ascertainment-nebraska.pdf

[135] State of Maine. Certificate of Ascertainment of Electors. November 23, 2020. https://www.archives.gov/files/electoral-college/2020/ascertainment-maine.pdf

[136] Gans, Curtis and Francis, Leslie. Why National Popular Vote is a bad idea. *Huffington Post*. January 6, 2012.

money soliciting votes in places where they are safely ahead or hopelessly behind. They do not campaign in places where they have nothing to gain or nothing to lose. Here are the facts about the current state-by-state winner-take-all method of awarding electoral votes:

- In 2020, almost all (96%) of the general-election campaign events (204 of 212) occurred in the 12 states where the Republican percentage of the final two-party vote was in the narrow **eight-point range** between 46% and 54%.
- In 2016, almost all (94%) of the general-election campaign events (375 of 399) occurred in the 12 states where the Republican percentage of the final two-party vote was in the narrow **eight-point range** between 47% and 55%.
- In 2012, 100% of the 253 general-election campaign events occurred in the 12 states where the Republican percentage of the final two-party vote was in the narrow **six-point range** between 45% and 51%.
- In 2008, almost all (98%) of the general-election campaign events (293 of 300) occurred in the 14 states where the Republican percentage of the final two-party vote was in the narrow **eight-point range** between 42% and 50%.

In other words, under the current winner-take-all method of awarding electoral votes, virtually all campaigning occurs in states where the two leading candidates are within six to eight percentage points of each other.

In the discussion below, we will generously use a margin of eight percentage points.

If electoral votes were awarded by congressional district, virtually all campaigning would necessarily occur in districts where the two leading candidates are within eight (or fewer) percentage points of one another.

The fact is that the presidential results were within eight percentage points in only one sixth (17%) of the congressional districts (72 of 435) in 2020.

Column 1 of table 4.55 shows the percentage margin by which Biden or Trump won the district (that is, the absolute value of the percentage). Column 7 shows the vote margin by which the Democratic vote exceeded the Republican vote in that district. For example, the closest congressional district in the country in the 2020 presidential race was Missouri's 2nd district, which Trump won by 0.03% or 115 votes.[137] Column 5 shows the total presidential vote in the district (including votes for minor-party candidates).

Similarly, in 2016, only about one seventh (14.4%) of the congressional districts (63 of 435) were within eight percentage points, as shown in table 4.56.

Likewise, in 2012, the presidential race was within eight percentage points in only 17% of the districts (75 out of 435).

In other words, the presidential race is competitive in only a small fraction of the nation's 435 congressional districts.[138]

Moreover, the fraction of Americans living in presidentially close congressional districts is an even smaller percentage of the population than those living in presidentially close states.

In 2020, almost all (96%) of the general-election campaign events (204 of 212) occurred

[137] Note that the district numbers in this table were those in use for the 2020 election (that is, before the redistricting that occurred after the 2020 census).

[138] Of course, the vast majority of congressional districts are also noncompetitive in congressional elections.

Table 4.55 The 72 congressional districts where the 2020 presidential race was within 8%

Percent margin	District	Biden	Trump	Total	Winner	Margin (D–R)
0.03%	MO-2	222,349	222,464	452,483	Trump	–115
0.1%	IA-3	224,159	224,726	458,496	Trump	–567
0.2%	NJ-3	217,223	218,016	443,175	Trump	–793
0.2%	NV-3	214,184	213,299	435,796	Biden	885
0.8%	MI-8	212,085	215,649	435,141	Trump	–3,564
0.9%	TX-22	206,114	210,011	421,647	Trump	–3,897
1.1%	TX-3	209,859	214,359	430,821	Trump	–4,500
1.1%	VA-7	228,335	223,268	460,031	Biden	5,067
1.3%	TX-2	170,430	174,980	350,554	Trump	–4,550
1.5%	NY-19	182,965	177,569	368,128	Biden	5,396
1.5%	CA-48	199,791	193,832	401,845	Biden	5,959
1.6%	IL-17	145,987	150,764	303,947	Trump	–4,777
1.6%	TX-10	203,975	210,770	421,398	Trump	–6,795
1.8%	AZ-1	187,182	180,673	374,808	Biden	6,509
1.8%	TX-23	146,559	151,964	302,498	Trump	–5,405
1.9%	TX-15	119,784	115,315	237,719	Biden	4,469
2.3%	IN-5	200,376	209,669	420,107	Trump	–9,293
2.5%	IL-14	203,741	193,889	407,226	Biden	9,852
2.7%	TX-21	220,572	232,949	460,886	Trump	–12,377
2.8%	PA-17	221,555	209,683	438,251	Biden	11,872
2.9%	TX-31	192,599	204,096	405,541	Trump	–11,497
2.9%	NJ-2	183,250	194,366	383,596	Trump	–11,116
3.0%	PA-10	189,804	201,367	398,383	Trump	–11,563
3.0%	CA-10	154,990	146,084	309,075	Biden	8,906
3.0%	TX-6	164,746	175,101	344,906	Trump	–10,355
3.2%	FL-27	178,643	167,420	348,765	Biden	11,223
3.2%	OH-1	185,947	198,433	390,655	Trump	–12,486
3.3%	MI-3	194,585	207,752	411,223	Trump	–13,167
3.4%	OH-13	171,221	159,955	336,690	Biden	11,266
3.5%	IA-1	199,259	213,601	421,596	Trump	–14,342
3.5%	IL-13	158,905	170,490	338,909	Trump	–11,585
3.9%	WA-3	198,429	214,391	426,189	Trump	–15,962
4.0%	NV-4	174,851	161,363	343,613	Biden	13,488
4.0%	TX-34	106,771	98,462	207,395	Biden	8,309
4.1%	IA-2	193,437	209,858	411,705	Trump	–16,421
4.1%	OR-4	238,619	219,851	474,234	Biden	18,768
4.1%	NY-2	168,779	183,204	356,856	Trump	–14,425
4.1%	FL-13	211,530	194,721	411,893	Biden	16,809
4.2%	AZ-6	204,365	222,166	433,904	Trump	–17,801
4.2%	NY-1	182,793	198,826	387,224	Trump	–16,033
4.4%	TX-28	125,755	115,160	243,915	Biden	10,595
4.4%	MI-5	189,245	173,179	368,480	Biden	16,066
4.4%	VA-1	213,535	233,398	455,418	Trump	–19,863
4.4%	PA-8	169,148	184,892	358,252	Trump	–15,744
4.5%	OH-10	172,479	188,657	368,121	Trump	–16,178
4.6%	MI-11	237,696	216,799	461,648	Biden	20,897
4.6%	MI-6	180,139	197,508	385,582	Trump	–17,369
4.7%	WI-3	184,306	202,659	394,654	Trump	–18,353
4.8%	VA-2	186,427	169,365	363,766	Biden	17,062
4.9%	PA-7	199,520	180,936	386,112	Biden	18,584
5.1%	NY-18	184,181	166,448	356,255	Biden	17,733

(Continued)

Table 4.55 (Continued)

Percent margin	District	Biden	Trump	Total	Winner	Margin (D–R)
5.3%	NJ-5	224,937	202,421	435,160	Biden	22,516
5.5%	OK-5	140,370	156,645	305,082	Trump	–16,275
5.5%	CA-22	146,467	163,584	316,836	Trump	–17,117
5.5%	TX-24	180,609	161,671	347,875	Biden	18,938
5.6%	FL-26	164,356	184,019	351,018	Trump	–19,663
5.7%	CO-3	200,886	224,996	436,225	Trump	–24,110
5.9%	PA-1	233,462	207,442	446,826	Biden	26,020
6.1%	OH-12	206,168	232,995	447,243	Trump	–26,827
6.1%	NH-1	213,662	188,999	410,379	Biden	24,663
6.1%	SC-1	197,130	222,867	427,597	Trump	–25,737
6.5%	NC-8	177,876	202,785	386,816	Trump	–24,909
6.6%	GA-7	199,533	174,869	380,036	Biden	24,664
6.7%	NE-2	176,468	154,377	339,666	Biden	22,091
6.7%	WA-8	218,274	190,801	422,538	Biden	27,473
6.7%	NJ-11	237,986	208,018	454,000	Biden	29,968
7.0%	MN-2	226,589	197,005	434,216	Biden	29,584
7.0%	FL-9	232,318	201,924	439,502	Biden	30,394
7.5%	CA-42	170,481	198,259	376,001	Trump	–27,778
7.7%	ME-2	168,696	196,725	376,349	Trump	–28,029
7.9%	CA-50	166,841	195,430	370,905	Trump	–28,589
7.9%	NC-9	187,012	219,265	411,994	Trump	–32,253
	Total	**13,703,300**	**13,799,454**	**28,025,776**		**–96,154**

in 12 states where the Republican percentage of the two-party presidential vote was in the narrow eight-point range between 46% and 54%, as shown in table 1.6.

Similarly, in 2016, almost all (94%) of the general-election campaign events (384 of 399) occurred in 12 states where the Republican percentage of the two-party presidential vote was in the narrow range between 47% and 55%, as shown in table 1.8.

If the congressional-district method were used in presidential elections, the promises made by candidates and the actions made by sitting presidents would tend to emphasize decisions of interest to a handful of very localized areas, namely the presidentially close districts. These policies might include federal support for specific local infrastructure projects (e.g., bridges, roads, harbors, airports, waterways, levees), the awarding of job-generating government contracts to specific local employers, and placement of job-generating government facilities (e.g., regional offices of agencies, military bases) employing large numbers of local people.

Note that, under the district system, presidential candidates would probably de-emphasize efforts to win the senatorial electors who would be available in larger closely divided battleground states.

The average state has about 10 electoral votes, but the average closely divided battleground state has about 13 electoral votes.[139] Thus, winning a battleground state's two

[139] Note that the closely divided battleground states are, on average, bigger than the average-sized state, because very few small states are competitive in presidential elections. Only three of the battleground states in 2020, 2016, and 2012 (New Hampshire, Nevada, and Iowa) had fewer than 10 electoral votes.

Table 4.56 The 63 congressional districts where the 2016 presidential race was within 8%

Percent margin	District	Clinton	Trump	Total	Winner	Margin (D–R)
0.1%	OR-4	180,872	180,318	406,334	Clinton	554
0.2%	PA-8	185,685	186,607	388,182	Trump	–922
0.6%	PA-6	177,639	175,340	372,927	Clinton	2,299
0.7%	IL-17	133,999	136,017	290,469	Trump	–2,018
0.9%	NJ-11	182,334	185,696	384,811	Trump	–3,362
1.0%	NV-3	151,552	154,814	325,602	Trump	–3,262
1.0%	AZ-1	132,874	135,928	291,816	Trump	–3,054
1.1%	NJ-7	180,525	176,386	374,404	Clinton	4,139
1.1%	NJ-5	173,969	178,058	367,796	Trump	–4,089
1.2%	KS-3	161,479	157,304	349,308	Clinton	4,175
1.2%	MN-2	171,396	176,088	382,067	Trump	–4,692
1.4%	TX-7	124,722	121,204	258,953	Clinton	3,518
1.5%	GA-6	155,087	160,029	338,532	Trump	–4,942
1.6%	NH-1	173,344	179,259	377,574	Trump	–5,915
1.7%	CA-48	152,035	146,595	320,355	Clinton	5,440
1.7%	FL-25	126,668	131,320	266,103	Trump	–4,652
1.8%	TX-32	134,895	129,701	283,843	Clinton	5,194
1.9%	NY-18	146,188	152,142	313,121	Trump	–5,954
2.2%	NE-2	131,030	137,564	291,680	Trump	–6,534
2.3%	PA-7	190,599	181,455	389,508	Clinton	9,144
2.4%	NH-2	175,182	166,531	366,722	Clinton	8,651
2.9%	CT-2	165,799	155,975	341,409	Clinton	9,824
2.9%	CA-10	116,335	109,145	245,251	Clinton	7,190
2.9%	WA-8	153,167	143,403	332,795	Clinton	9,764
3.2%	FL-13	178,892	167,348	364,512	Clinton	11,544
3.3%	VA-2	147,217	158,067	326,515	Trump	–10,850
3.4%	TX-23	115,157	107,273	233,235	Clinton	7,884
3.5%	IA-3	178,937	192,960	402,164	Trump	–14,023
3.5%	IA-1	176,535	190,410	395,633	Trump	–13,875
3.6%	NY-24	151,021	139,763	310,431	Clinton	11,258
3.8%	IL-14	154,058	167,327	347,995	Trump	–13,269
4.1%	IA-2	170,796	186,384	384,495	Trump	–15,588
4.1%	OR-5	180,404	164,548	389,157	Clinton	15,856
4.1%	CT-5	161,142	147,901	323,202	Clinton	13,241
4.3%	MI-5	162,982	148,953	329,869	Clinton	14,029
4.3%	MI-11	177,143	194,245	394,639	Trump	–17,102
4.5%	WI-3	160,999	177,172	363,271	Trump	–16,173
4.6%	NJ-2	147,656	162,486	323,778	Trump	–14,830
4.8%	AZ-2	156,676	141,196	322,180	Clinton	15,480
4.9%	NV-4	137,070	123,380	276,932	Clinton	13,690
5.4%	IL-13	141,540	159,013	324,629	Trump	–17,473
5.4%	CA-45	162,449	144,713	329,076	Clinton	17,736
6.1%	NY-3	178,288	156,942	348,016	Clinton	21,346
6.1%	NJ-3	165,090	187,703	368,671	Trump	–22,613
6.2%	TX-24	122,872	140,128	279,514	Trump	–17,256
6.3%	GA-7	132,012	150,845	299,946	Trump	–18,833
6.5%	VA-7	172,544	198,032	394,604	Trump	–25,488
6.5%	OH-13	163,600	142,738	322,976	Clinton	20,862
6.6%	OH-1	160,988	185,025	363,580	Trump	–24,037
6.6%	CA-25	137,491	119,249	275,282	Clinton	18,242

(Continued)

Table 4.56 (Continued)

Percent margin	District	Clinton	Trump	Total	Winner	Margin (D–R)
6.6%	UT-4	89,796	108,421	280,350	Trump	–18,625
6.7%	PA-16	140,186	161,763	321,358	Trump	–21,577
6.7%	MI-8	164,436	189,891	378,440	Trump	–25,455
6.7%	NY-19	140,517	162,266	323,115	Trump	–21,749
6.8%	IL-6	177,549	152,935	360,943	Clinton	24,614
6.9%	RI-2	121,843	105,033	243,824	Clinton	16,810
7.1%	WA-3	134,009	157,359	327,002	Trump	–23,350
7.2%	OH-10	153,346	178,674	351,828	Trump	–25,328
7.2%	FL-7	186,658	160,178	367,614	Clinton	26,480
7.4%	CA-49	159,081	135,576	317,552	Clinton	23,505
7.5%	PA-15	148,078	173,596	338,011	Trump	–25,518
7.7%	MI-9	183,085	155,597	357,076	Clinton	27,488
7.8%	TX-22	135,525	159,717	308,653	Trump	–24,192
	Total	**9,805,043**	**9,911,686**	**21,129,630**		**–106,643**

senatorial electoral votes requires campaigning among about 5½ times more people than winning a congressional district's single electoral vote.[140]

Because a candidate would have to run a statewide campaign in order to win the two senatorial electoral votes, the pursuit of these particular electoral votes would not be cost-effective when compared to the cost of winning at the district level.

One reason why so few congressional districts are competitive in presidential races is that the dominant political party in a state's government usually tries to draft districts to its advantage. This gerrymandering typically involves creating numerous noncompetitive districts where the dominant party is safe, but not too safe (perhaps giving the dominant party a comfortable 55%–45% advantage), while simultaneously creating a significantly smaller number of noncompetitive districts that are excessively safe for the opposing party (say, giving the minority party an advantage of 70%–30% or even more).[141]

If the presidential election were based on congressional districts, the incentive for, and the impact of, gerrymandering would be even greater than it is today.

Moreover, the perverse effect of many efforts to reform the redistricting process is to create even more noncompetitive districts. The reason is that many reform measures require districts to be geometrically compact, to disrupt as few local government boundaries as possible, and to create "communities with common interests." Districts drawn in compliance with criteria such as these will frequently contain like-minded people—which is another way of saying that they will be politically one-sided and noncompetitive.[142] In many cases, the only way to achieve competitiveness (in the context of the single-member

[140] Note that a state with 13 electoral votes has about 11 times more people than an average congressional district.

[141] In states with divided government, gerrymandering is sometimes done to protect the congressional incumbents of both parties, thereby creating a great many noncompetitive districts.

[142] Gimpel, James G. and Harbridge-Yong, Laurel. 2020, Conflicting Goals of Redistricting: Do Districts That Maximize Competition Reckon with Communities of Interest? *Election Law Journal: Rules, Politics, and Policy*. Volume 19, number 4. https://www.liebertpub.com/doi/10.1089/elj.2019.0576

districts) is to allow the creation of irregularly shaped districts so that competitiveness can be the top priority (after, of course, population equality).[143]

In summary, the congressional-district method:

- *would not* accurately reflect the nationwide popular vote;
- *would worsen* the current situation in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President; and
- *would not* make every vote equal.

4.3.7. Prospects of adoption for the congressional-district method

This method could be adopted either on a state-by-state basis (as Maine and Nebraska have done) or as a federal constitutional amendment.

Adoption on a state-by-state basis

There are two prohibitive practical impediments to the adoption of the congressional-district method on a state-by-state basis.

First, a state reduces its own influence if it divides its electoral votes while other states continue to use winner-take-all.

In his January 12, 1800, letter to Virginia Governor (and later President) James Monroe, Thomas Jefferson argued that Virginia should switch from its then-existing district system to a statewide winner-take-all system because of the political disadvantage suffered by states (such as Virgina) that divided their electoral votes by districts in a political environment in which other states used the winner-take-all method:

> "All agree that an election by districts would be best, if it could be general; but while 10. states chuse either by their legislatures or by a general ticket, **it is folly & worse than folly** for the other 6. not to do it."[144] [Emphasis added; spelling and punctuation as per original]

Indeed, the now-prevailing winner-take-all method of awarding electoral votes was adopted by Virginia in 1800 and became widespread in the period between 1800 and 1830 precisely because dividing a state's electoral votes diminishes the state's political influence relative to states employing the winner-take-all method.

Once the winner-take-all method became established, state-by-state adoption of this method of awarding electoral votes would penalize first movers and early adopters.

This point was made during a debate in Florida in 1992 on adopting the congressional-district method.

> "[Opponents of the bill] say they are also worried that the proposal would weaken the state's growing political clout. If Florida is the only large state to

[143] A federal law, not the U.S. Constitution, requires the use of single-member congressional districts. The use of multi-member congressional districts in conjunction with ranked-choice voting (RCV) has been proposed as one possible way to make congressional races more competitive.

[144] See section 2.6.1 for more extensive quotations from this letter.

> abolish the winner-take-all system, they argue, candidates will be less inclined to campaign here and take the state's needs into account."[145]

The proposal passed the state House and had the Governor's support, but ultimately failed because of concern that it would reduce the state's political importance in presidential elections.[146]

A second practical impediment to state-by-state adoption of this method of awarding electoral votes is that if a significant number of states ever were to start adopting this method, each additional adherent would increase the influence of the remaining winner-take-all states. That, in turn, would decrease the incentive of the remaining states to adopt the congressional-district method. Thus, a state-by-state adoption process would become a self-arresting process, because each new adherent would increase the influence of the remaining winner-take-all states.

Adoption as a federal constitutional amendment

Both of the above obstacles to adoption of the congressional-district method would, of course, be eliminated if it were adopted in the form of a federal constitutional amendment.

4.4. ELIMINATING SENATORIAL ELECTORS

4.4.1. Summary

- A federal constitutional amendment would be adopted to eliminate the two senatorial electors, thereby aligning each state's number of presidential electors more closely to its population.
- The elimination of each state's senatorial electors would not have changed the outcome in three of the five presidential elections in which the Electoral College winner did not receive the most popular votes nationwide. For example, the candidate who lost the national popular vote in 2016 (i.e., Donald Trump) would still have won the Electoral College by a comfortable margin even if there had been no senatorial electors. The two elections in which elimination of senatorial electors would have mattered were exceptional—namely, those in which the winner's margin was either zero or one electoral vote. In 2020, the elimination of senatorial electoral votes would have reduced Biden's margin by a mere two electoral votes.
- Eliminating each state's two senatorial electors would not make every voter in every state relevant in presidential elections. Given that the state-by-state winner-take-all method of awarding electoral votes would still be in place, the

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[145] Rohter, Larry. 1992. Florida is rethinking the way presidents are elected. *New York Times*. June 7, 1992. https://www.nytimes.com/1992/06/07/us/1992-campaign-electoral-college-florida-rethinking-way-presidents-are-elected.html

[146] As it happened, George W. Bush carried 13 of Florida's 23 congressional districts in the 2000 presidential election, and Gore carried 10. If the congressional-district method had been used in Florida in 2000, Gore would have received 10 of Florida's 25 electoral votes (instead of zero) and would therefore have won a majority of the Electoral College, and would therefore have become President.

general-election campaign would continue to be concentrated on the dozen-or-so closely divided battleground states. The removal of two electoral votes from each state would not alter the list of states that are closely divided—nor their pivotal importance in winning the presidency. Thus, this proposal would not improve upon the current situation in which three out of four states and about 70% of voters in the United States are ignored by the presidential campaigns.

- Eliminating each state's two senatorial electors would not make every vote equal. Four of the current system's sources of inequality—ranging from 1.39-to-1 to 210-to-1—would remain, including those caused by imprecision in apportioning U.S. House seats (and hence electoral votes), voter-turnout differences at the state level, intra-decade population changes, and the power of a vote in deciding the national outcome.

4.4.2. Description of constitutional amendment to eliminate senatorial electors

Currently, the U.S. Constitution gives each state a number of presidential electors equal to its number of U.S. Representatives plus two additional electors (corresponding to the state's U.S. Senators).

Elimination of each state's two senatorial electors would require a constitutional amendment, because the original Constitution specifies the number of electoral votes to which each state is entitled.

The 23rd Amendment (ratified in 1961) specifies the number of electoral votes to which the District of Columbia is entitled.

4.4.3. History of suggestions to eliminate each state's two senatorial electors

In his 2023 book on the Electoral College, Thomas E. Weaver said that one

> "proposed reform is to reduce the number of electors to be equal to the number of Representatives, plus one for the District of Columbia. Currently, all states receive electors based roughly on its population plus two. This 'plus two,' as we have seen, has a distorting impact, giving disproportionate representation to small-population states like Wyoming and North Dakota, while minimizing the influence of large-population states like California."[147]

4.4.4. Eliminating senatorial electors would not create a system that accurately reflects the national popular vote.

The elimination of each state's senatorial electors would not have changed the outcome in three of the five presidential elections in which the winner of the Electoral College did not receive the most popular votes nationwide (2016, 2000, 1888, 1876, and 1824).

We discuss them in detail below.

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[147] Weaver, Thomas E. 2023. *The Electoral College: A Biography of America's Peculiar Creation Through the Eyes of the People Who Shaped It*. New York, NY: Post Hill Press. Page 219.

2016 election

In 2016, if there had been no senatorial electors, Donald Trump, the candidate who lost the national popular vote, would still have won the Electoral College by a comfortable 246–190 majority.

Trump's actual 306–232 margin in the Electoral College in 2016 had nothing to do with senatorial electors. Like almost all presidential victories, it happened because the winning candidate swept the closely divided battleground states—and, in 2016 in particular, the bigger battleground states.

Trump swept eight of the 12 closely divided battleground states by a 125–32 electoral-vote margin. He won Florida (29 electoral votes), Pennsylvania (20), Ohio (18), Michigan (16), North Carolina (15), Arizona (11), Wisconsin (10), and Iowa (6).

In contrast, Clinton won only four of the 12 closely divided battlegrounds states. Moreover, Clinton's states were of modest size, namely Virginia (13 electoral votes), Colorado (9), Nevada (6), and New Hampshire (4).

In 2016, there were three decisive states. Trump won Michigan by 10,704 votes, Wisconsin by 22,748 votes, and Pennsylvania by 44,292 votes—a total of 77,744 votes out of a total of more than 13 million votes cast in these three states.

Trump's electoral-vote margin was 306–232 (with 270 electoral votes being required for election).

Trump won 30 states, while Hillary Clinton won 20 states and the District of Columbia.

If the two senatorial electors were eliminated, there would be only 436 electoral votes (instead of 538), and 219 electoral votes would have constituted a majority of the Electoral College.

Table 4.57 compares the result of the 2016 election—with and without senatorial electors.

- Column 1 shows Trump's percentage of the two-party vote in each state. The table is arranged in descending order of Trump's percentage.
- Column 2 shows the number of general-election campaign events in each state.
- Columns 4 and 5, respectively, show Trump's and Clinton's electoral votes under the actual allocation of electoral votes among the states in 2016.[148]
- Column 6 and 7, respectively, show Trump's and Clinton's electoral votes if each state and the District of Columbia had two fewer electoral votes.[149]

As can be seen from the bottom line of the table, Trump would still have won a comfortable 246–190 majority in the Electoral College in the absence of senatorial electors.

In short, it was the state-by-state winner-take-all method of awarding electoral votes—not the impact of senatorial electors—that elected Trump in 2016.

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[148] See table 1.8 for the 2016 two-party popular-vote counts.

[149] Maine's electoral vote in the last two columns of the table is divided 1–1, because Maine divides its electoral votes by congressional district, and Trump carried the state's 2nd congressional district. The electoral votes in this table do not reflect the electoral votes cast by "grandstanding" faithless electors in 2016 (section 3.7.6).

Table 4.57 2016 Election with—and without—senatorial electoral votes

R %	Events	State	Actual R-EV	Actual D-EV	R-EV without senatorial electors	D-EV without senatorial electors
76%	0	Wyoming	3		1	
72%	0	West Virginia	5		3	
70%	0	North Dakota	3		1	
69%	0	Oklahoma	7		5	
68%	0	Idaho	4		2	
66%	0	South Dakota	3		1	
66%	0	Kentucky	8		6	
64%	0	Alabama	9		7	
64%	0	Arkansas	6		4	
64%	0	Tennessee	11		9	
64%	2	Nebraska	5		3	
62%	1	Utah	6		4	
61%	0	Kansas	6		4	
61%	0	Montana	3		1	
60%	0	Louisiana	8		6	
60%	2	Indiana	11		9	
60%	2	Missouri	10		8	
59%	1	Mississippi	6		4	
58%	0	Alaska	3		1	
57%	0	South Carolina	9		7	
55%	21	Iowa	6		4	
55%	1	Texas	38		36	
54%	48	Ohio	18		16	
53%	3	Georgia	16		14	
52%	55	North Carolina	15		13	
52%	10	Arizona	11		9	
51%	71	Florida	29		27	
50%	14	Wisconsin	10		8	
50%	54	Pennsylvania	20		18	
50%	22	Michigan	16		14	
49.8%	21	New Hampshire		4		2
49%	2	Minnesota		10		8
49%	17	Nevada		6		4
48%	3	Maine	1	3	1	1
47%	19	Colorado		9		7
47%	23	Virginia		13		11
45%	3	New Mexico		5		3
44%	0	Delaware		3		1
44%	0	Oregon		7		5
43%	1	Connecticut		7		5
43%	0	New Jersey		14		12
42%	0	Rhode Island		4		2
41%	1	Washington		12		10
41%	1	Illinois		20		18
38%	0	New York		29		27
36%	0	Maryland		10		8
35%	0	Massachusetts		11		9
35%	0	Vermont		3		1
34%	1	California		55		53
33%	0	Hawaii		4		2
4%	0	D.C.		3		1
49%	**399**	**Total**	**306**	**232**	**246**	**190**

1888 election

Similarly, if there had been no senatorial electors in 1888, the candidate who lost the national popular vote (Benjamin Harrison) would still have won the Electoral College by a comfortable margin.

In 1888, Harrison won the Electoral College by a margin of 233–168, even though incumbent President Grover Cleveland won the national popular vote.

Harrison won 20 states, while Cleveland won 18.

If the two senatorial electors had been eliminated, Harrison would still have won the Electoral College by the comfortable margin of 193–132.

Harrison's margin in the Electoral College in 1888 did not come from senatorial electors. It was based on winning one state, namely the closely divided battleground state of New York (which had 36 electoral votes at the time). Harrison received 650,338 popular votes (49.2%) in New York, while Cleveland received 635,965 votes (48.1%)—a difference of 14,373 popular votes out of a total of 1,321,270 votes cast in New York.

It was the state-by-state winner-take-all method of awarding electoral votes—not the impact of senatorial electors—that elected Benjamin Harrison in 1888.

1824 election

In 1824, Andrew Jackson received more popular votes nationwide than any of his opponents.

Jackson also led in electoral votes (although he did not win a majority of the electoral votes). Specifically, Jackson received 99 electoral votes, while Adams received 84 and two other candidates received 78.

If there had been no senatorial electors, Jackson still would have led Adams in electoral votes, but still would have not won the required absolute majority of electoral votes. Specifically, Jackson carried eight of the 18 states that permitted their voters to vote for presidential electors, while Adams carried seven. Jackson won one of the six states where the legislature chose the state's presidential electors (South Carolina), and Adams won three such states (Delaware, Vermont, and New York). Jackson and Adams split Louisiana, and William Crawford won Georgia.

The situation in 1824 was admittedly complicated, because there were four major candidates who received electoral votes, because six of the 24 states did not hold popular elections for President, and because the presidential election was eventually thrown into the U.S. House of Representatives (from which John Quincy Adams emerged as President).[150]

Despite this atypical situation, senatorial electors were not the reason that Jackson failed to become President in 1824.

Thus, in three divergent elections (2016, 1888, and 1824), senatorial electors were not even arguably relevant to the fact that the winner of the national popular vote did not win the presidency.

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[150] Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas. Page 21.

1876 election

Senatorial electors arguably mattered in two presidential elections in which the winner won with only *one or zero* more electoral votes than the minimum required for election.

In 1876, Rutherford B. Hayes won the Electoral College by a margin of 185–184 electoral votes—with 185 being the minimum required for election. That is, Hayes won the Electoral College with no margin to spare. Specifically, Hayes won 21 states, while Samuel J. Tilden won 17. Thus, Hayes won eight more electoral votes than Tilden because of senatorial electors.

Although senatorial electors were the proximate cause of the national outcome in 1876, they were realistically not the cause-in-fact.

In a practical political sense, the cause-in-fact was the fact that Hayes carried three states (with a combined total of 19 electoral votes) by miniscule popular-vote margins:

- 889 popular votes in South Carolina (7 electoral votes);
- 922 popular votes in Florida (4 electoral votes); and
- 4,807 popular votes in Louisiana (8 electoral votes).[151]

Hayes had a margin of 7,668 popular votes in the three disputed states. Tilden won the national popular vote by a margin of 254,694. Each of these 7,668 votes for Hayes was 33 times more important than the 254,694 votes that Tilden received from voters in other states.

As discussed in Michael Holt's book *By One Vote: The Disputed Presidential Election of 1876*,[152] Hayes won his one-vote lead in the Electoral College after a specially constituted Electoral Commission awarded him all of the disputed states.[153]

Had the Commission sided with Tilden in even one of the disputed states, he would have prevailed.[154]

2000 election

George W. Bush won the Electoral College with 271 electoral votes in 2000—with 270 being required for election.

Bush won 30 states, while Al Gore won 20 states and the District of Columbia—thus giving Bush the advantage of 18 senatorial electors.

Although senatorial electors were the proximate cause of Bush's victory in the Electoral College in 2000, no one views the controversy as revolving around senatorial electors.

The cause-in-fact of the outcome in the Electoral College in 2000, was the extremely

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[151] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 125.

[152] Holt, Michael F. 2008. *By One Vote: The Disputed Presidential Election of 1876*. Lawrence, KS: University Press of Kansas.

[153] Morris, Roy B. 2003. *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*. Waterville, ME: Thorndike Press.

[154] The eligibility of an Oregon presidential elector and a Vermont presidential elector (both postmasters) was also disputed in 1876. The Commission sided with Hayes on the eligibility issues on both cases. Holt, Michael F. 2008. *By One Vote: The Disputed Presidential Election of 1876*. Lawrence, KS: University Press of Kansas.

close vote in Florida (with 25 electoral votes) and the state-by-state winner-take-all method of awarding electoral votes.

Al Gore won the national popular vote by 543,816 votes. However, Bush won the presidency because he carried Florida by 537 popular votes. Each of those 537 popular votes in Florida was 1,013 times more important than the 543,816 votes cast in other states.

In summary, in three of the five elections in which the national popular vote winner did not win the presidency, senatorial electors played no role. In the two elections in which the winner won with only *one or zero* more electoral votes than the minimum required for election, senatorial electors were the proximate cause, but not the cause-in-fact, of the final outcome.

The University of Texas Electoral College Study has conducted extensive computer simulations of presidential elections. Its study entitled "Inversions in US Presidential Elections: 1836–2016" concluded:

> "Although the '+2' Electors feature has received much attention, reversing it leaves the chance of an inversion almost unchanged in a close election."[155]
>
> "**The probability of an inversion**, within a 1 percentage point [national popular vote] margin **changes negligibly from 42.4 percent to 41.6 percent with the removal of the two senator-linked electors**."[156] [Emphasis added]
>
> "No change to the Electoral College other than a national popular vote would eliminate the risk of electoral inversions [including] removing the two Electors corresponding to Senators."[157] [Emphasis added]

4.4.5. Eliminating senatorial electors would not make every voter in every state politically relevant.

Given that the current state-by-state winner-take-all method of awarding electoral votes would remain in place after eliminating the senatorial electors, the general-election campaign for President would continue to concentrate on the closely divided battleground states. The removal of two electoral votes from each state would not change the list of closely divided states—nor their critical role in winning the presidency.

As can be seen in column 2 of table 4.57, almost all the general-election campaign events were concentrated in states where the two-party vote for President was close. Specifically, the campaign was concentrated on the states in the middle of the table where the two-party vote (column 1 of the table) was in the eight percentage-point range between

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[155] Geruso, Michael; Spears, Dean; and Talesara, Ishaana. 2019. *Inversions in US Presidential Elections: 1836-2016.* University of Texas Electoral College Study Brief No. 2. September 6, 2019. http://utecs.org/wp-content/uploads/Brief2.pdf

[156] Geruso, Michael; Spears, Dean; and Talesara, Ishaana. 2022. Inversions in US Presidential Elections: 1836–2016. *American Economic Journal: Applied Economics*. Volume 14. Number 1. January 2022. Pages 327–357. Page 349. https://www.aeaweb.org/articles?id=10.1257/app.20200210

[157] Geruso, Michael; Spears, Dean; and Talesara, Ishaana. 2019. *Inversions in US Presidential Elections: 1836-2016.* University of Texas Electoral College Study Brief No. 2. September 6, 2019. http://utecs.org/wp-content/uploads/Brief2.pdf

47% and 55%. The popular vote in those states would, of course, have been close even if there were no senatorial electors. Therefore, a 2016 presidential campaign without senatorial electors would have continued to concentrate on these same closely divided battleground states in the middle of the table. Meanwhile, the remaining three-quarters of the states would have continued to be politically irrelevant in the general-election campaign for President.

In summary, the proposal to eliminate senatorial electors would do nothing to improve upon the current situation in which three out of four states and about 70% of voters in the United States are ignored by the presidential campaigns.

4.4.6. Eliminating senatorial electors would not make every vote equal.

Eliminating each state's two senatorial electors would indeed align a state's electoral votes much more closely to its population.

However, every vote still would not be equal because four of the current system's five sources of inequality would remain, namely the

- 1.72-to-1 inequality in the value of a vote because of the imprecision of the process of apportioning U.S. House seats (and hence electoral votes) among the states;
- 1.67-to-1 inequality in the value of a vote created by voter-turnout differences at the state level;
- 1.39-to-1 inequality in the value of a vote caused by the intra-decade population changes after each census; and
- 210-to-1 inequality in the value of a vote based on its ability to decide the national outcome.

Inequality because of the imprecision of the process of apportioning U.S. House seats

First, a vote cast in certain states has less weight than a vote cast in certain other states, because of inequalities created by imprecision in apportioning U.S. House seats (and hence electoral votes). The 1.72-to-1 variation in the weight of a vote would remain (table 1.35).

Inequalities because of differences in voter turnout among states

Second, a voter in a low-turnout state has greater voting power than a voter in a high-turnout state.

Differences in voter turnout at the state level create variations of up to 1.67-to-1 in the value of a vote in electing the state's senatorial electors (table 1.41).

Inequalities because of population changes occurring during the decade after each census

Third, another source of variation in the value of a vote from state to state arises from the fact that state populations change during the decade after each census.

These differences create variations of up to 1.39-to-1 in the value of a vote (table 1.40).

Inequalities due to differences in the number of popular votes that enable a candidate to win an electoral vote

Fourth, the elimination of each state's two senatorial electors would not change the current state-by-state winner-take-all method of awarding electoral votes. Therefore, it would do nothing to change the 210-to-1 inequality due to differences in the number of popular votes that enable a candidate to win an electoral vote (section 1.4.5).

4.4.7. Prospects of adoption of a constitutional amendment to eliminate senatorial electors

The system resulting from the elimination of each state's two senatorial electors:

- *would not* accurately reflect the nationwide popular vote;
- *would not* make every vote equal; and
- *would not* improve upon the current state-by-state winner-take-all method of awarding electoral votes in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President.

That is, elimination of senatorial electors would not satisfy any of these three criteria.

As to the first criterion, elimination of senatorial electors would have prevented a divergent election in only two of the five elections where it occurred. Moreover, those two cases (1876 and 2000) were elections in which the eventual winner received only zero or one electoral vote above the minimum required.

The partial delivery of this single benefit seems unlikely to generate sufficient political energy to pass a federal constitutional amendment.

Thirteen states can prevent ratification of a federal constitutional amendment. There are 14 states that have three or four electoral votes after the 2020 census. These 14 states would end up with two fewer electoral votes if the senatorial electors were eliminated. That is, they would end up with one or two electoral votes instead of their current three or four. Thirteen of these 14 states are one-party states in presidential elections (and hence receive no attention from presidential candidates under the current system). The elimination of senatorial electors would, of course, not change the political makeup of these states—that is, it would not make these states politically competitive and therefore politically relevant in presidential elections. As a result, these 14 low-population states would realize no particular benefit from the elimination of senatorial electors.

4.5. THE NATIONAL BONUS PLAN

4.5.1. SUMMARY

- A federal constitutional amendment could be adopted to award 102 at-large (bonus) presidential electors to the candidate receiving the most popular votes in all 50 states and the District of Columbia. All of the other elements of the current system would remain.
- A bonus of 102 at-large electoral votes would not be sufficient to accurately reflect the nationwide popular vote in many plausible election scenarios.

- Because 84% of the electoral votes under the National Bonus Plan (that is, 538 of 640) would still be awarded on a state-by-state winner-take-all basis, presidential candidates would continue to pay significantly more attention to voters in closely divided states, and correspondingly less attention to voters in safe states.
- Because the National Bonus Plan retains all existing features of the current Electoral College, all five of the current system's sources of inequality would remain.

4.5.2. Description of the National Bonus Plan

A federal constitutional amendment would be adopted to award 102 at-large presidential electors to the candidate receiving the most popular votes in all 50 states and the District of Columbia. All the other elements of the current Electoral College would be retained.

4.5.3. History of the National Bonus Plan

On several occasions over several decades, historian Arthur Schlesinger, Jr. and others have advocated a constitutional amendment that would give a bonus of 102 electoral votes to the candidate winning the national popular vote—while retaining all the other elements of the current Electoral College.[158]

The Twentieth Century Fund published several analyses of the National Bonus Plan in the 1970s.[159,160]

In 1978, Senator Birch Bayh (D–Indiana) introduced a constitutional amendment with this 102-electoral-vote bonus feature,[161] and Representative Jonathan Bingham (D–New York) did so in 1979.[162]

In 2001, Representative James A. Leach (R–Iowa) introduced a constitutional amendment with the 102-electoral-vote bonus and some other changes (House Joint Resolution 25).[163]

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[158] See Schlesinger, Arthur Jr. 2000. It's a mess, but we've been through it before. *CNN*. November 13, 2000. http://www.cnn.com/ALLPOLITICS/time/2000/11/20/mess.html

[159] Twentieth Century Fund Task Force. 1977. *The National Bonus Plan*. See also Twentieth Century Fund. 1978. *Winner-take-all*. New York, NY: Holmes & Meier.

[160] For additional comments on the National Bonus Plan, see Jacobson, Arthur J. and Rosenfeld, Michel (editors). 2002. *The Longest Night: Polemics and Perspectives on Election 2000*. Berkeley, CA: University of California Press. Pages 553–554.

[161] Senate Joint Resolution 123. 95th Congress. March 17, 1978. https://www.congress.gov/bill/95th-congress/senate-joint-resolution/123

[162] House Joint Resolution 223. 96th Congress. February 26, 1979. https://www.congress.gov/bill/96th-congress/house-joint-resolution/223

[163] House Joint Resolution 25. 107th Congress. March 1, 2001. https://www.congress.gov/bill/107th-congress/house-joint-resolution/25

4.5.4. The National Bonus Plan may, or may not, accurately reflect the national popular vote.

In evaluating the Leach proposal in 2003:

> "Awarding the 102 national bonus electoral votes to the popular vote winners would eliminate [a divergent election] in almost **every conceivable election scenario**."[164] [Emphasis added]

However, Neale's paper did not actually analyze any specific election scenario—much less a wide-ranging collection of scenarios.

In 2016, Hillary Clinton won 232 presidential electoral votes, and Donald Trump won 306 electoral votes on Election Day.[165]

If the National Bonus Plan had been in place in 2016, there would have been 640 electoral votes (instead of the current 538), and the majority required to win would have been 321 (instead of the current 270).

If Clinton had been given a 102 electoral-vote bonus for winning the national popular vote, the result would have been 334 electoral votes for Clinton—28 more than Trump's 306. That is, the National Bonus Plan would have managed to deliver the presidency to the candidate who received the most popular votes nationwide—but just barely.

Now let's consider a hypothetical scenario that is very close to what actually happened in 2016.

In 2016, the race for President was exceedingly close in New Hampshire (with four electoral votes) and Minnesota (with 10 electoral votes).

- Trump lost New Hampshire by a 49.8%–50.2% margin in the two-party vote.
- Trump lost Minnesota by a 49.2%–50.8% margin in the two-party vote.

If Trump had won those two states with their combined total of 14 electoral votes, the electoral-vote count would have been a 320-320 tie in the Electoral College.

In short, the addition of a 102 electoral-vote bonus would not have prevented a tie in the Electoral College.

If the only change in the Constitution had been the addition of the 102 electoral-vote bonus, the 2016 election would then have been thrown into the U.S. House of Representatives (with each state having one vote). If all the members of the 50 delegations in the newly elected House had voted for their party's nominee in the contingent election on January 6, 2017, Donald Trump would have been elected President.

In short, the addition of a 102 electoral-vote bonus would not have prevented the second-place candidate from becoming President in a scenario based on a very small change in two states (Minnesota and New Hampshire).

The above hypothetical scenario suggests that a more wide-ranging analysis would be necessary to determine whether a bonus of 102 electoral votes is large enough to make the National Bonus Plan reliable.

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[164] Neale, Thomas H. 2003. *The Electoral College: Reform Proposals in the 107th Congress*. Congressional Research Service. February 7, 2003. Page 10.

[165] The 306–332 split in electoral votes does not reflect the votes cast on December 19, 2016, in the Electoral College by "grand-standing" faithless electors from Colorado, Washington State, and Texas.

4.5.5. The National Bonus Plan may, or may not, make every vote equal.

Because the National Bonus Plan retains all existing features of the current Electoral College system, all five of the current system's sources of inequality (section 1.4) would remain with respect to the core 538 electoral votes.

However, if the number of at-large presidential electors were large enough to result in the election of the national popular vote winner in "every conceivable election scenario," every vote throughout the country would, in fact, become equal.

4.5.6. The National Bonus Plan may, or may not, make every voter in every state politically relevant.

Because 84% of the electoral votes under the National Bonus Plan (that is, 538 of 640) would still be awarded on a state-by-state winner-take-all basis, presidential candidates would continue to pay significant attention to voters in closely divided states (and hence and correspondingly less attention to voters in safe states).

However, if the number of bonus presidential electors were large enough to result in the election of the national popular vote winner in "every conceivable election scenario," then every voter in every state would be politically relevant.

4.5.7. Variations in the National Bonus Plan

In 2023, Congressman Sean Casten (D–Illinois) and Congressman Earl Blumenauer (D–Oregon) proposed a constitutional amendment that would add 12 at-large Senators and 12 at-large presidential electors—both to be elected on a nationwide basis.[166]

Given that the addition of 102 presidential electors would be insufficient to eliminate the possibility of a second-place President, the addition of a mere 12 additional electors would be clearly insufficient.

4.5.8. Prospects of the National Bonus Plan

The National Bonus Plan can be described best as an attempt to create something approximating the operation of a national popular vote for President—while retaining the appearance of the current system.

It is clear that 102 at-large presidential electors would not be sufficient to guarantee delivery of the benefits of a national popular vote.

4.6. INCREASING THE NUMBER OF ELECTORAL VOTES

4.6.1. SUMMARY

- Congressman Sean Casten (D–Illinois) has introduced a bill to amend the existing federal law to increase the number of seats in the U.S. House of Representatives from 435 to 573—thereby increasing the number of electoral votes from 538 to 676.

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[166] House Joint Resolution 23. 118th Congress. January 31, 2023. https://www.congress.gov/bill/118th-congress/house-joint-resolution/23/all-info

- Increasing the number of electoral votes would not necessarily result in the Electoral College accurately reflecting the national popular vote. Both Donald Trump in 2016 and George W. Bush in 2000 still would have won a majority in a 676-member Electoral College.
- The creation of additional electoral votes would not alter the list of closely divided states—nor their all-important role in winning the presidency. Thus, the general-election campaign for President would continue to be concentrated on a handful of closely divided battleground states.
- All five of the current system's sources of inequality would remain after the size of the Electoral College was increased to 676.

4.6.2. Description of proposals to increase the number of electoral votes

The number of seats in the U.S. House of Representatives was set at 435 by a 1911 federal law (re-adopted in 1929).[167]

In 2023, Congressman Sean Casten (D–Illinois) introduced a bill (H.R. 643) in Congress to enlarge the House.[168]

Under the Casten bill, the number of seats in the House would be determined by dividing the country's total population by the population of the smallest state (Wyoming).

If this proposal had been in effect after the 2020 census, there would have been 573 members in the House.

Increasing the size of the House from 435 to 573 would increase the number of electoral votes from 538 to 676.

Representative Casten argued that these changes would make it less likely that the results of the electoral vote for president would differ from the popular vote.[169]

4.6.3. History of proposals to increase the number of electoral votes

Over the years, numerous other possible sizes of the House have been bandied about.

In 2023, the Making Every Vote Count Foundation suggested increasing the size of the House by 150 from 435 to 585.[170]

Spokane, Washington, attorney Will Schroeder has filed a lawsuit (dismissed by a U.S. District Court due to lack of standing) to force a change in the size of the U.S. House based on the size of the smallest state.[171]

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[167] An Act to provide for the fifteenth and subsequent decennial census and to provide for apportionment of Representatives in Congress. Approved June 18, 1929. 2 U.S.C. 2a(a). https://uscode.house.gov/view.xhtml?req=(title:2%20section:2a%20edition:prelim)

[168] Casten, Sean. 2023. H.R. 643. *Equal Voice Act*. https://www.congress.gov/bill/118th-congress/house-bill/643?q=%7B%22search%22%3A%22size+of+House+representatives%22%7D&s=1&r=1

[169] Saksa, Jim. 2023. Majority rules? This Democrat wants to talk about anti-majoritarian bias. *Roll Call*. January 31, 2023. https://rollcall.com/2023/01/31/majority-rules-this-democrat-wants-to-talk-about-anti-majoritarian-bias/

[170] Making Every Vote Count Foundation. 2023. *Improving Our Electoral College System*. November 2023. Page 15. https://static1.squarespace.com/static/5a7b7d95b7411c2b69bd666f/t/65b979baf7e8e411b2864a40/1706654139098/MEVC+Report.pdf

[171] Wohlfeil, Samantha. 2024. The U.S. House once had a representative for about every 30,000 people, but now lawmakers serve between 543,000 and 991,000 constituents — what happened? *Inlander*. February

4.6.4. Increasing the number of electoral votes to 676 would not create a system that accurately reflects the national popular vote.

Increasing the size of the U.S. House (and therefore the number of electoral votes) would not necessarily result in the Electoral College accurately reflecting the national popular vote.

Both Donald Trump in 2016 and George W. Bush in 2000 would have won a majority in the Electoral College if the House size had been 573.

In 2016, Donald Trump won the Electoral College by 306–232—36 more than the 270 electoral votes required for election.[172]

In 2000, George W. Bush received 271 electoral votes—only one more than that required for election. If the statutory algorithm for distributing House seats to the states is applied to House sizes between 492 and 598, Al Gore would have won the Electoral College if the House had been any of 73 of these 107 possible sizes, but lost the Electoral College in 34 cases, including a House size of 573 (section 1.3.3).

If the House size had been increased to 585, as suggested by the Making Every Vote Count Foundation, Al Gore would not have won the Electoral College in 2000.

Thus, even when the electoral vote is extremely close (as in 2000), increasing the size of the Electoral College cannot be relied upon to elect the national popular vote winner.

4.6.5. Increasing the number of electoral votes would not make every vote equal.

All five of the current system's sources of inequality (section 1.4) would remain after the size of the House were increased.

4.6.6. Increasing the number of electoral votes would not make every voter in every state politically relevant.

Given that the state-by-state winner-take-all method of awarding electoral votes would remain in place after increasing the number of electoral votes, the general-election campaign for President would continue to concentrate on a handful of closely divided battleground states. The creation of additional electoral votes would not alter the very short list of closely divided states—nor their critical role in winning the presidency.

4.6.7. Prospects for increasing the size of the U.S. House

There may, or may not, be a case for increasing the size of the U.S. House; however, such action has next to nothing to do with improving presidential elections.

15, 2024 https://www.inlander.com/news/the-us-house-once-had-a-representative-for-about-every-30000-people-but-now-lawmakers-serve-between-543000-and-991000-constituents-wha-27462209

[172] In 2016, Trump and Clinton did not actually receive all the electoral votes to which they were entitled, due to the unprecedented number of faithless presidential electors that year. Because of two Republican faithless electors from Texas, Trump actual received only 304 electoral votes when the Electoral College met on December 19, 2016. Because of five Democratic faithless electors (four from Washington State and one from Hawaii), Clinton actually received only 227 votes in the Electoral College. See section 3.7.6 for a discussion of faithless electors.

4.7. DIRECT ELECTION CONSTITUTIONAL AMENDMENT

4.7.1. Summary

- Under the federal constitutional amendment for direct popular election of the President proposed by Senator Birch Bayh (D–Indiana) and Representative Emmanuel Celler (D–New York), the Electoral College would be abolished, and the President would be elected directly by the voters in a nationwide vote.
- In 1969, the U.S. House of Representatives approved the Bayh-Celler constitutional amendment by a bipartisan 338–70 vote. The House-passed Amendment was filibustered in the Senate and never came to a vote. In 1979, a nearly identical amendment failed to receive the required two-thirds vote in the Senate.
- The direct-election amendment would accurately reflect the national popular vote.
- It would make every vote equal.
- It would improve upon the current situation in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President. Every voter in every state would be politically relevant in every presidential election, and candidates would therefore have reason to campaign in every state.

4.7.2. Description of the direct election amendment

The Bayh-Celler amendment had the following features:

- direct popular election of the President and
- a run-off if no candidate receives 40% of the national popular vote.

The constitutional amendment (House Joint Resolution 681 of the 91st Congress)[173] introduced into the House by Representative Emanual Celler (D–New York) provided:

> "Section 1: **The people of the several States and the District constituting the seat of government of the United States shall elect the President and Vice President.** Each elector shall cast a single vote for two persons who shall have consented to the joining of their names as candidates for the offices of President and Vice President. No candidate shall consent to the joinder of his name with that of more than one other person.
>
> "Section 2: The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice President, the legislature of any State may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications.

[173] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

"Section 3: The pair of persons having the greatest number of votes for President and Vice President shall be elected, **if such number be at least 40 per centum of the whole number of votes cast for such offices. If no pair of persons has such number, a runoff election** shall be held in which the choice of President and Vice President shall be made from the two pairs of persons who received the highest number of votes.

"Section 4: The times, places, and manner of holding such elections and **entitlement to inclusion on the ballot** shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations. The days for such elections shall be determined by Congress and shall be uniform throughout the United States. The Congress shall prescribe by law the time, place, and manner in which the results of such elections shall be ascertained and declared.

"Section 5: The Congress may by law provide for the case of the death or withdrawal of any candidate for President or Vice President before a President and Vice President have been elected, and for the case of the death of both the President-elect and Vice-President-elect.

"Section 6: The Congress shall have power to enforce this article by appropriate legislation.

"Section 7: This article shall take effect one year after the 21st day of January following ratification." [Emphasis added]

4.7.3. History of the Bayh-Celler direct election amendment

The issue of electing the President by a direct nationwide popular vote acquired considerable momentum following the 1968 presidential election.

The 1968 election occurred in the midst of controversies over civil rights and the Vietnam War as well as urban rioting.

Segregationist Governor George Wallace of Alabama ran against then-Vice President Hubert Humphrey and former Vice President Richard Nixon.[174]

Wallace hoped to win enough electoral votes to prevent the major-party nominees from winning an absolute majority of the electoral votes. He would then have been in a position to extract policy concessions on civil rights from the major-party candidates either:

- by promising to deliver his electoral votes to his chosen candidate when the Electoral College met in December, or
- by negotiating with members of Congress after throwing the choice of President into the U.S. House (with each state casting one vote).

To maximize Wallace's leverage in the anticipated negotiations with the major-party candidates prior to the Electoral College meeting, Wallace obtained signed agreements

[174] Longley, Lawrence D., and Braun, Alan G. 1972. *The Politics of Electoral College Reform*. New Haven, CT: Yale University Press. Pages 7–21.

(secret at the time) from his presidential-elector candidates committing them to vote for Wallace in the Electoral College or "for whomsoever he may direct."[175]

On the other hand, if Wallace had denied the required Electoral College majority to both major-party candidates, he might have directed his presidential electors to vote for him in the Electoral College. In the context of a one-state-one-vote election in the House, Wallace would have expected to be in a position to extract policy concessions on civil rights from one major-party candidate or the other.

The 1968 election was extremely close. Nixon led Humphrey by 510,645 votes nationwide—a 43.4% to 42.7% margin.

Governor Wallace won 45 electoral votes by carrying five southern states (Alabama, Arkansas, Georgia, Louisiana, and Mississippi)—even more than the 39 electoral votes that segregationist Strom Thurmond won in the Truman-Dewey election of 1948.

The prospect of a deadlock in the Electoral College was avoided in 1968, because Nixon won an absolute majority of the electoral votes.

In the absence of Nixon's lead of 20,488 popular votes in Missouri and 134,960 in Illinois, Humphrey would have won in the Electoral College (but with Nixon leading Humphrey in the national popular vote).[176]

The memory of the close call in the 1968 election was fresh in the minds of Congress and the White House in early 1969.

Meanwhile, faithless presidential electors in southern states had been an ongoing irritant during the period immediately before and after passage of the civil rights legislation of the mid-1960s.

In the 1968 presidential election, George Wallace received one electoral vote from a faithless Republican presidential elector from North Carolina.

Moreover, the newly elected President, Richard Nixon, suffered the loss of one electoral vote due to a faithless elector on all three occasions when he ran for President—1960, 1968, and 1972.

Thus, on February 20, 1969, Nixon sent a message to Congress offering to support any reform in the presidential election system that satisfied three conditions:

> "I have in the past supported the proportional plan."[177]
>
> "But I am not wedded to the details of this plan or any other specific plan. I will support any plan that moves toward … the **abolition of individual electors** … allocation of presidential candidates of the electoral vote of each state and the District of Columbia in a manner that may **more closely approximate the**

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[175] Congressional Quarterly. 1979. *Presidential Elections Since 1789*. Second edition. Washington, DC: CQ Press. Page 8.

[176] Note that our table 1.4 is based on the popular-vote change in the *smallest* number of states needed to reverse the national outcome. For example, if three states are considered (instead of two), the 1968 election was decided by 106,063 votes (not 155,448). Specifically, the national outcome would have been reversed in the absence of Nixon's margin of 20,488 votes in Missouri, 24,314 in New Hampshire, and 61,261 in New Jersey.

[177] Nixon was referring to the Lodge-Gossett fractional-proportional constitution amendment that passed the U.S. Senate in 1950 (section 4.1).

> **popular vote** than does the present system … making a **40 percent electoral vote plurality** sufficient to choose a President." [Emphasis added]

President Nixon's message ignited a flurry of activity as members of Congress introduced and debated constitutional amendments to implement the fractional-proportional method (section 4.1), the congressional-district method (section 4.3), and nationwide direct popular election of the President.

Extensive hearings were held in the U.S. House and Senate.[178,179,180]

When it was first introduced in 1969, the Celler amendment for direct popular election was co-sponsored by the following 24 Representatives:

- Biester (R–Pennsylvania)
- Cahill (R–New Jersey)
- Conyers (D–Michigan)
- Donohue (D–Massachusetts)
- Edwards (D–California)
- Eilberg (D–Pennsylvania)
- Feighan (D–Ohio)
- Fish (R–New York)
- Hungate (D–Missouri)
- Jacobs (D–Indiana)
- Kastenmeier (D–Wisconsin)
- MacGregor (R–Minnesota)
- McClory (R–Illinois)
- McCulloch (R–Ohio)
- Meskill (R–Connecticut)
- Mikva (D–Illinois)
- St. Onge (D–Connecticut)
- Railsback (R–Illinois)
- Rodino (D–New Jersey)
- Rogers (D–Colorado)
- Ryan (D–New York)

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[178] U.S. House of Representatives Committee on the Judiciary. 1969. *Electoral College Reform: Hearings on H.J. Res. 179, H.J. Res. 181, and Similar Proposals to Amend the Constitution Relating to Electoral College Reform*. 91st Congress, 1st Session. February 5, 6, 19, 20, 26, and 27; March 5, 6, 12, and 13, 1969. Washington, DC: U.S. Government Printing Office.

[179] U.S. Senate Committee on the Judiciary. 1969. *Electing the President: Hearings on S.J. Res. 1, S.J. Res. 2, S.J. Res. 4, S.J. Res. 12, S.J. Res. 18, S.J. Res. 20, S.J. Res. 25, S.J. Res. 30, S.J. Res. 31, S.J. Res. 33, S.J. Res. 71, and S.J. Res. 72 to Amend the Constitution Relating to Electoral College Reform*. 91st Congress, 1st Session. January 23–24, March 10, 11, 12, 13, 20, 21, April 30, May 1–2, 1969. Washington, DC: U.S. Government Printing Office.

[180] U.S. Senate Committee on the Judiciary. 1969. *Direct Popular Election of the President: Report, with Additional Minority, Individual, and Separate Views on H.J. Res. 681, Proposing an Amendment to the Constitution of the United States Relating to the Election of the President and Vice President*. 91st Congress, 1st Session. Washington, DC: U.S. Government Printing Office.

- Sandman (R–New Jersey)
- Smith (R–New York)
- Waldie (D–California).

George H.W. Bush (then a Republican congressman from Texas) spoke in favor of the Celler amendment for nationwide direct popular election of the President on September 18, 1969, saying:

> "Frankly I think this legislation has a great deal to commend it. It will correct the wrongs of the present mechanism because by calling for direct election of the President and Vice President it will eliminate the formality of the Electoral College and by providing for a runoff in case no candidate receives 40 percent of the vote it eliminates the unrealistic ballot casting in the House of Representatives. **Yet, in spite of these drastic reforms, the bill is not, when viewed in the light of current practice, one that will be detrimental to our federal system or one that will change the departmentalized and local nature of voting in this country.**
>
> "In electing the President and Vice President, the Constitution establishes the principle that votes are cast by States. This legislation does not tamper with that principle. It only changes the manner in which the States vote. Instead of voting by intermediaries, the States will certify their popular vote count to the Congress. The states will maintain primary responsibility for the ballot and for the qualifications of voters. In other words, they will still designate the time, place, and manner in which elections will be held. **Thus, there is a very good argument to be made that the basic nature of our federal system has not been disturbed.**
>
> "On the walls of the Jefferson Memorial are written these words that we might well consider today:
>
> > 'I am not an advocate for frequent changes in laws and constitutions, but laws and constitutions must go hand in hand with the progress of the human mind as that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change. With the change of circumstances institutions must advance also to keep pace with the times.'
>
> "The world has changed a great deal since the 12th amendment was approved, and the system it perpetuates is one fraught with a history of fraud, leaves our country open to constitutional crisis, and is clearly unresponsive to the desires of the American people. I do support the proposal before us today because I believe it combines the best features of our current practice with the desirable goal of a simpler, more direct voting system."[181] [Emphasis added]

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

After lengthy hearings and considerable debate in 1969, the House of Representatives approved—by a bipartisan 338–70 vote—a federal constitutional amendment sponsored by Representative Emmanuel Celler (D–New York) for direct nationwide popular election of the President.

Celler's constitutional amendment satisfied all three of Nixon's criteria. Thus, after the 338–70 vote in the House, President Nixon urged the Senate to adopt the Celler amendment.

Celler's proposal (identical to Senator Bayh's) died in the Senate after a filibuster led by southern segregationists.[182,183]

Senator Birch Bayh (D–Indiana) was the lead sponsor of the direct election amendment in the Senate. He introduced Senate Joint Resolution 1 in the 91st Congress in 1969 (with substantially the same provisions as the Celler amendment) with 39 co-sponsors:

- George D. Aiken (R–Vermont)
- Henry Bellmon (R–Oklahoma)
- Alan Bible (D–Nevada)
- Quentin Burdick (D–North Dakota)
- Robert C. Byrd (D–West Virginia)
- Clifford P. Case (R–New Jersey)
- Frank Church (D–Idaho)
- Marlow Cook (R–Kentucky)
- Alan Cranston (D–California)
- Thomas F. Eagleton (D–Missouri)
- Charles E. Goodell (R–New York)
- Mike Gravel (D–Alaska)
- Fred R. Harris (D–Oklahoma)
- Mark O. Hatfield (R–Oregon)
- Vance Hartke (D–Indiana)
- Daniel K. Inouye (D–Hawaii)
- Henry M. Jackson (D–Washington)
- Jacob K. Javits (R–New York)
- Warren G. Magnuson (D–Washington)
- Mike Mansfield (D–Montana)
- Charles McC. Mathias, Jr. (R–Maryland)
- George McGovern (D–South Dakota)
- Thomas J. McIntyre (D–New Hampshire)
- Lee Metcalf (D–Montana)
- Walter F. Mondale (D–Minnesota)
- Joseph M. Montoya (D–New Mexico)
- Edmund S. Muskie (D–Maine)

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[182] Congressional Quarterly. 2002. *Presidential Elections 1789–2000*. Washington, DC: CQ Press. Page 169.

[183] Wegman, Jesse. 2021. The filibuster that saved the electoral college. *New York Times*. February 8, 2021. https://www.nytimes.com/2021/02/08/opinion/filibuster-electoral-college.html?action=click&module=Opinion&pgtype=Homepage

- Gaylord Nelson (D–Wisconsin)
- Robert W. Packwood (R–Oregon)
- John O. Pastore (D–Rhode Island)
- James B. Pearson (R–Kansas)
- Claiborne Pell (D–Rhode Island)
- William Proxmire (D–Wisconsin)
- Jennings Randolph (D–West Virginia)
- Abraham Ribicoff (D–Connecticut)
- Richard S. Schweiker (R–Pennsylvania)
- Joseph D. Tydings (D–Maryland)
- Harrison A. Williams, Jr. (D–New Jersey)
- Stephen M. Young (D–Ohio).

Throughout the 1970s, Senator Bayh repeatedly introduced constitutional amendments for nationwide popular election of the President with substantially the same terms as the amendment that had been supported by a bipartisan 338–70 vote in the House in 1969.

Extensive hearings were held in 1975,[184] 1977,[185] and 1979.[186]

Interest in electoral reform was rekindled after the 1976 presidential election. A shift of 3,687 popular votes in Hawaii and 5,559 popular votes in Ohio would have elected Gerald Ford, even though Jimmy Carter led Ford by 1,682,970 popular votes nationwide.

President Jimmy Carter, President Gerald Ford (the losing presidential candidate in 1976), and Senator Robert Dole (the losing vice-presidential candidate in 1976 and later the Republican presidential nominee in 1996), and Vice President Walter Mondale publicly supported nationwide popular election of the President.

In 1977, the sponsors of Bayh's Senate Joint Resolution 1 in the 95th Congress in 1977 included 43 Senators.

In 1979, there was considerable debate in Congress on Senator Bayh's amendment. The sponsors of Senate Joint Resolution 28[187] in the 96th Congress in 1979 included the following 37 Senators:

- Baker (R–Tennessee)
- Bayh (D–Indiana)
- Bellmon (R–Oklahoma)

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[184] U.S. Senate Committee on the Judiciary. 1975. *Direct Popular Election of the President: Report (to Accompany S.J. Res. 1)*. 94th Congress, 1st Session. Washington, DC: U.S. Government Printing Office.

[185] U.S. Senate Committee on the Judiciary. 1977. *The Electoral College and Direct Election: Hearings on the Electoral College and Direct Election of the President and Vice President (S.J. Res. 1, 8, and 18): Supplement*. 95th Congress, 1st Session. July 20, 22, and 28, and August 2, 1977. Washington, DC: U.S. Government Printing Office.

[186] U.S. Senate Committee on the Judiciary. 1979. *Direct Popular Election of the President and Vice President of the United States: Hearings on S.J. Res. 28, Joint Resolution Proposing an Amendment to the Constitution to Provide for the Direct Popular Election of the President and Vice President of the United States*. 96th Congress, 1st Session. March 27 and 30, April 3 and 9, 1979. Washington, DC: U.S. Government Printing Office.

[187] Senate Joint Resolution 28. 96th Congress. January 25, 1979. https://www.congress.gov/bill/96th-congress/senate-joint-resolution/28

- Burdick (D–North Dakota)
- Chafee (R–Rhode Island)
- Cranston (D–California)
- Danforth (R–Missouri)
- DeConcini (D–Arizona)
- Dole (R–Kansas)
- Durenberger (R–Minnesota)
- Ford (D–Kentucky)
- Garn (R–Utah)
- Gravel (D–Alaska)
- Hatfield (R–Oregon)
- Huddleston (D–Kentucky)
- Inouye (D–Hawaii)
- Jackson (D–Washington)
- Javits (R–New York)
- Johnston (D–Louisiana)
- Kennedy (D–Massachusetts)
- Leahy (D–Vermont)
- Levin (D–Michigan)
- Magnuson (D–Washington)
- Mathias (R–Maryland)
- Matsunaga (D–Hawaii)
- Packwood (R–Oregon)
- Pell (D–Rhode Island)
- Proxmire (D–Wisconsin)
- Pryor (D–Arkansas)
- Randolph (D–West Virginia)
- Ribicoff (D–Connecticut)
- Riegle (D–Michigan)
- Stafford (R–Vermont)
- Stevenson (D–Illinois)
- Tsongas (D–Massachusetts)
- Williams (D–New Jersey)
- Zorinsky (D–Nebraska).

Senator Robert E. Dole of Kansas spoke in the Senate on January 15, 1979, in favor of a nationwide popular election of the President, saying:

> "That candidates for these two positions should be selected by direct election is an idea which I have long supported.…
>
> "The Electoral College system was provided for in the Constitution because, at one time, it seemed the most fair way to select the President and Vice President.

> Alexander Hamilton apparently expressed the prevailing view when he wrote that a small number of persons selected from the general population would most likely have the ability and intelligence to select the best persons for the job. I have no doubt but that in the 18th century, the Electoral College was well suited for our country. However, already by the early 19th century, misgivings were being voiced about the College.
>
> "The skepticism seems to be related to the formation of political party candidates and the difference they made in the selection of the President and Vice President. In the years since then, the Electoral College has remained in use. It has served us fairly well—except for three times when it allowed a candidate to gain the presidency who did not have the most popular votes.
>
> "There have been numerous other elections in which a shift of a few thousand votes would have changed the outcome of the Electoral College vote, despite the fact that the would-be winner came in second place in popular votes. Mr. President, I think we are leaving a little too much to chance, and to hope, that we will not witness yet another unrepresentative election."[188]

Senator Dole then specifically addressed the question of the effect of the bonus of two electoral votes that each state receives regardless of its population.

> "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. For no longer will minority votes be lost. Their accumulated total will be important, and in some instances perhaps even decisive.
>
> "The objections raised to direct election are varied. When they are analyzed, I think many objections reflect not so much satisfaction with the Electoral College, but rather a reluctance to change an established political system.

[188] *Congressional Record.* January 15, 1979. Page 309. https://www.congress.gov/bound-congressional-record/1979/01/15/senate-section

> While I could never advocate change simply for the sake of changing, neither should we defer action because we fear change.
>
> "In this situation, I think the weaknesses in the current system have been demonstrated, and that the prudent move is to provide for direct election of the President and Vice President.
>
> "I hope that the Senate will be able to move ahead on this resolution. As long as we continue with the Electoral College system, we will be placing our trust in an institution which usually works according to design, but which sometimes does not. There are remedies available to us, and I trust the Senate will act to correct this weakness in our political system."[189] [Emphasis added]

In a 1979 Senate speech, Senator Henry Bellmon (R–Oklahoma) described how his views on the Electoral College had changed while he had served as Governor, Senator, national campaign director for Richard Nixon's presidential campaign, 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, and that it was to the advantage of the small States for the Electoral College concept be preserved.
>
> "I think if any Member of the State has that concept, he would be greatly enlightened by the fact that the Members of the Senate from New York are now actively supporting the retention of the electoral college system."
>
> "Mr. President, 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.
>
> "It is true that the smaller States which are allowed an elector for each U.S. Senator and for each Congressman do, on the surface, appear to be favored; but, in fact, the system gives the advantage to the voters in the populous States. The reason is simple as I think our friends from New York understand: A small State voter is, in effect, the means whereby a Presidential candidate may receive a half-dozen-or-so electoral votes. On the other hand, a vote in a large State is the means to 20 or 30 or 40 or more electoral votes. Therefore, Presidential candidates structure their campaigns to appeal to the States with large blocs of electors. This gives special and disproportionate importance

[189] *Congressional Record*. January 15, 1979. Page 309. https://www.congress.gov/bound-congressional-record/1979/01/15/senate-section

to the special interest groups which may determine the electoral outcome in those few large States.

"Here, Mr. President, let me say parenthetically that during 1967 and part of 1968 I served as the national campaign director for Richard Nixon, and I know very well as we structured that campaign we did not worry about Alaska, about Wyoming, or about Nevada or about New Mexico or about Oklahoma or Kansas. We worried about New York, California, Pennsylvania, Texas, Michigan, Illinois, all of the populous States, where there are these big blocs of electors that we could appeal to, provided we chose our issues properly and provided we presented the candidates in an attractive way.

"The result, Mr. President, is that the executive branch of our National Government has grown and is continuing to become increasingly oriented toward populous States, to the disadvantage of the smaller, less populous areas. An examination of past campaign platforms and campaign schedules of the major party candidates will bear out this position. Therefore, it is obvious that any political party or any candidate for President or Vice President will spend his efforts primarily in the populous States. The parties draft their platforms with the view in mind of attracting the voters of the populous States and generally relegate the needs of the smaller States to secondary positions.

"This whole situation would change if we go for a direct election and, therefore, **make the voters of one State equally important with the voters of any other State."**[190] [Emphasis added]

Senator Carl Levin (D–Michigan) spoke in the Senate on June 21, 1979, and said:

"Mr. President, the direct election of the President and the Vice President of the United States is an electoral reform which is long overdue. It is long overdue because of its basic fairness, democratic nature, and its inherent simplicity. There is no principle which is more basic to our concept of democracy than equal treatment under the law. And yet when this Nation goes to the polls every 4 years in the only truly national election that we have, that principle is abrogated. The effect of the Electoral College system on our Presidential election is often drastically unequal treatment of individual voters and their votes. The discrepancies are real and widespread, and they defy our basic sense of fairness.…

"Mr. President, we ask the wrong question when we ask who gains and who loses under the Electoral College, and how will this group lose its advantage under direct election? The function of the President is to serve the interests of all persons, all citizens of this country, and, therefore, all citizens should have an equal say as to who the President will be. In the debate over who will gain

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[190] *Congressional Record*. July 10, 1979. Page 17748. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

> and who will lose, there is only one real winner in implementing direct election, and that is the American people who will finally be able to participate in a democratic and fair national election where **each vote counts for as much as every other vote**.
>
> "The American people will also win because we have eliminated the threat which the Electoral College has always posed—that is the possibility that a candidate who has not won the popular vote will, through the mechanisms of the Electoral College, be elevated to the presidency."[191] [Emphasis added]

In a Senate speech on July 10, 1979, Senator Charles McCurdy Mathias, Jr. (R–Maryland) listed the faults of the existing system, including the "state-by-state winner-take-all" system and the possibility of electing the second-place candidate, saying:

> "Direct election is the most effective method to remedy these faults. As the late Senator Hubert Humphrey noted, only direct election ensures that
>
> > 'the votes of the American people wherever cast [are] counted directly and equally in determining who shall be President of the United States.'
>
> "Only by direct election can the fundamental principle of equal treatment under the law for all Americans be incorporated into our Presidential selection process."[192]

After discussing the ever-present possibility that the presidential candidate receiving the most popular votes nationwide might not win the presidency, Senator David Durenberger (R–Minnesota) said:

> "The most damaging effect of the electoral system has already occurred, in **every** State and in **every** Presidential election. For with its 'winner-take-all' requirement, the electoral college effectively disenfranchises every man and woman supporting the candidate who fails to carry their State. Under that system, votes for the losing candidate have no significance whatsoever in the overall outcome of the election. And for this reason, candidates who either pull far ahead or fall far behind in a State have the incentive to 'write it off'—simply ignore it—in planning their campaign appearances. In contrast, **the proposed amendment would grant every vote the same degree of significance in determining the final outcome**. Candidates would be forced to consider their margins in every State, and the tendency to ignore a 'safe' or 'lost' State would be sharply diminished. By restoring the significance of every vote, Senate Joint Resolution 28 increases the incentive to vote, which in itself is a significant argument for passage."

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[191] *Congressional Record*. June 21, 1979. Page 15095. https://www.congress.gov/bound-congressional-record/1979/06/21/senate-section

[192] *Congressional Record*. July 10, 1979. Page 17751. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

> "Had the Founding Fathers adopted a direct election system, it is inconceivable that anyone would be rising after 200 years to propose replacing that system with the Electoral College."[193] [Emphasis added]

Appendix E contains the March 14, 1979, speech of Senator Birch Bayh on his proposed constitutional amendment.

On July 20, 1979, 51 senators voted in favor of Senate Joint Resolution 28 (with one additional senator being announced in favor). This total was 16 votes short of the required two-thirds majority.

On February 23, 2006, retired Senator Birch Bayh joined the press conference at the National Press Club formally launching the National Popular Vote Compact. He remained on the Board of Advisors for National Popular Vote until his death in 2019.

Exon amendment in 1992

In 1992, there was a flurry of proposals for reforming the method of electing the President as a result of the candidacy of independent presidential candidate Ross Perot.

The *New York Times* reported that a nationwide poll taken on June 4–8, 1992, showed:

- Ross Perot—39%
- Incumbent President George H.W. Bush—31%
- Bill Clinton—25%.[194]

Such a division of the national popular vote in 1992, if it had persisted until Election Day, would probably have either elected Perot outright or thrown the presidential election into the House of Representatives.

In 1992, Senator J. James Exon of Nebraska introduced a constitutional amendment that was co-sponsored by 13 other Senators:

- Murkowski (R–Alaska)
- Burdick (D–North Dakota)
- Boren (D–Oklahoma)
- Adams (D–Washington)
- D'Amato (R–New York)
- Kennedy (D–Massachusetts)
- Coats (R–Indiana)
- Reid (D–Nevada)
- Dixon (D–Illinois)
- Durenberger (R–Minnesota)
- Glenn (D–Ohio)
- Lieberman (D–Connecticut)
- Hollings (D–South Carolina).

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[193] *Congressional Record*. July 10, 1979. Pages 17706–17707. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

[194] On the Trail: Poll gives Perot a clear lead. *New York Times*. June 11, 1992. https://www.nytimes.com/1992/06/11/us/the-1992-campaign-on-the-trail-poll-gives-perot-a-clear-lead.html The same article reported that, in a previous Gallup poll in late May, Bush and Perot were tied at 35 percent each, with Clinton at 25 percent.

The Exon amendment (Senate Joint Resolution 302) required that a candidate receive a majority of the votes cast in order to be elected. It read:

> "Section 1. The people of the several States and the District constituting the seat of government of the United States shall elect the President and Vice President. Each elector shall cast a single vote for two persons who shall have consented to the joining of their names as candidates for the offices of President and Vice President.
>
> "Section 2. The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for the electors of President and Vice President, any State may prescribe by law less restrictive residence qualifications and for electors of President and Vice President the Congress may by law establish uniform residence qualification.
>
> "Section 3. The persons joined as candidates for President and Vice President having the greatest number of votes shall be elected President and Vice President, if such number be at least 50 per centum of the whole number of votes cast and such number be derived from a majority of the number of votes cast in each State comprising at least one-third of the several States. If, after any such election, none of the persons joined as candidates for President and Vice President is elected pursuant to the preceding paragraph, a runoff election shall be held within sixty days in which the choice of President and Vice President shall be made from the two pairs of persons joined as candidates for President and Vice President receiving the greatest number of votes in such runoff election shall be elected President and Vice President.
>
> "Section 4. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed by law in each State; but the Congress may by law make or alter such regulations. The days for such elections shall be determined by Congress and shall be uniform throughout the United States. The Congress shall prescribe by law the times, places, and manner in which the results of such elections shall be ascertained and declared. No such election, other than a runoff election, shall be held later than the first Tuesday after the first Monday in November, and the results thereof shall be declared no later than thirty days after the date on which the election occurs.
>
> "Section 5. The Congress may by law provide for the case of the death, inability, or withdrawal of any candidate for President or Vice President before a President and Vice President have been elected, and for the case of the death of either the President-elect or the Vice President-elect.
>
> "Section 6. Sections 1 through 4 of this article shall take effect two years after ratification of this article.

> "Section 7. The Congress shall have power to enforce this article by appropriate legislation."[195]

Congressional hearings on the topic of reforming the Electoral College were held in 1993[196] and again in 1999.[197]

The 2000 election resulted in the election of a President who had not received the most popular votes nationwide.

After the 2000 election, former Presidents Jimmy Carter and Gerald Ford created a bipartisan commission to make recommendations for improving the nation's electoral system. Many of the reforms proposed by the Carter-Ford Commission became part of the Help America Vote Act (HAVA) of 2002.

In 2004, if 59,152 Ohio voters had voted for John Kerry instead of George W. Bush, Kerry would have been elected President despite Bush's lead of over 3,000,000 votes in the nationwide popular vote. After the 2004 election, former President Jimmy Carter and former Secretary of State James Baker formed another bipartisan commission to make additional recommendations concerning election administration and to review the implementation of HAVA in light of the nation's experience in the 2004 election.

Jackson-Frank amendment in 2005

In 2005, Representatives Jesse Jackson, Jr. (D–Illinois) and Barney Frank (D–Massachusetts) introduced a constitutional amendment for nationwide popular election of the President (House Joint Resolution 36).[198] Like the Exon proposal of 1992, this proposal would have required that a candidate receive a majority of the votes cast in order to be elected.

Feinstein amendment in 2005

Senator Dianne Feinstein (D–California) introduced Senate Joint Resolution 11 in 2005 as follows:

> "Section 1. The President and Vice President shall be elected by the people of the several States and the district constituting the seat of government of the United States. The persons having the greatest number of votes for President and Vice President shall be elected.

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[195] Senate Joint Resolution 302. 102nd Congress. May 13, 1992. https://www.congress.gov/bill/102nd-congress/senate-joint-resolution/302

[196] U.S. Senate Committee on the Judiciary. 1993. *The Electoral College and Direct Election of the President: Hearing on S.J. Res. 297, S.J. Res. 302, and S.J. Res. 312, Measures Proposing Amendments to the Constitution Relating to the Direct Election of the President and Vice President of the United States*. 102nd Congress, 2nd Session. July 22, 1992. Washington, DC: U.S. Government Printing Office.

[197] U.S. House Committee on the Judiciary. 1999. *Proposals for Electoral College Reform: Hearing on H.J. Res. 28 and H.J. Res. 43*. 105th Congress, 1st Session. September 4, 1997. Washington, DC: U.S. Government Printing Office.

[198] House Joint Resolution 36. 109th Congress. March 2, 2005. https://www.congress.gov/bill/109th-congress/house-joint-resolution/36

> "Section 2. The voters in each State shall have the qualifications requisite for electors of Representatives in Congress from that State, except that the legislature of any State may prescribe less restrictive qualifications with respect to residence and Congress may establish uniform residence and age qualifications. Congress may establish qualifications for voters in the district constituting the seat of government of the United States.
>
> "Section 3. Congress may determine the time, place, and manner of holding the election, and the entitlement to inclusion on the ballot. Congress shall prescribe by law the time, place, and manner in which the results of the election shall be ascertained and declared.
>
> "Section 4. Each voter shall cast a single vote jointly applicable to President and Vice President in any such election. Names of candidates shall not be joined unless both candidates have consented thereto, and no candidate shall consent to being joined with more than one other person.
>
> "Section 5. Congress may by law provide for the case of the death of any candidate for President or Vice President before the day on which the President-elect or the Vice President-elect has been chosen, and for the case of a tie in any such election.
>
> "Section 6. This article shall take effect one year after the twenty-first day of January following ratification."[199]

In contrast to the Exon proposal of 1992 (which called for a run-off election if no presidential candidate received at least 50% of the national popular vote), Feinstein's 2005 proposal required only a plurality of the popular votes.

The 2005 Feinstein proposal also differed from the 1992 Exon proposal concerning the power of the states over the manner of awarding electoral votes. Article II, section 1, clause 2 of the U.S. Constitution currently gives the states exclusive control over the manner of awarding electoral votes.

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[200]

This power contrasts with the power of the states in section 4 of Article I over congressional elections.

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

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[199] Senate Joint Resolution 11. 109th Congress. March 16, 2005. https://www.congress.gov/bill/109th-congress/senate-joint-resolution/11

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

As can be seen, Article I currently gives states *primary*—but not *exclusive*—control over congressional elections, whereas Article II gives the states *exclusive* control over the manner of appointing presidential electors.

The Exon proposal in 1992 would have applied Article I's approach to presidential elections:

> "The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed by law in each State; but the Congress may by law make or alter such regulations."

In contrast, the 2005 Feinstein proposal gave Congress exclusive control over the manner of conducting presidential elections.

> "Congress may determine the time, place, and manner of holding the election, and the entitlement to inclusion on the ballot."

Jackson Amendment of 2011 with 24 co-sponsors from the Congressional Black Caucus

In 2011, Representative Jesse Jackson, Jr. (D–Illinois) introduced a constitutional amendment (House Joint Resolution 36)[201] for direct election of the President with 29 co-sponsors, including 24 members of the Congressional Black Caucus:

- Conyers, John, Jr. (D–MI)
- Grijalva, Raúl M. (D–AZ)
- Brown, Corrine (D–FL)
- Davis, Danny K. (D–IL)
- Clay, Wm. Lacy (D–MO)
- Butterfield, G. K. (D–NC)
- Carson, Andre (D–IN)
- Cleaver, Emanuel (D–MO)
- Clyburn, James E. (D–SC)
- Cummings, Elijah E. (D–MD)
- Fattah, Chaka (D–PA)
- Filner, Bob (D–CA)
- Johnson, Henry C. "Hank," Jr. (D–GA)
- Kaptur, Marcy (D–OH)
- Kucinich, Dennis J. (D–OH)
- Lewis, John (D–GA)
- Payne, Donald M. (D–NJ)
- Rangel, Charles B. (D–NY)
- Rush, Bobby L. (D–IL)

[201] https://www.congress.gov/bill/112th-congress/house-joint-resolution/36/all-info?s=1&r=4#cosponsors-content

- Scott, David (D–GA)
- Thompson, Bennie G. (D–MS)
- Towns, Edolphus (D–NY)
- Watt, Melvin L. (D–NC)
- Bass, Karen (D–CA)
- Fudge, Marcia L. (D–OH)
- Jackson Lee, Sheila (D–TX)
- Lee, Barbara (D–CA)
- Green, Gene (D–TX)
- Ellison, Keith (D–MN)

Constitutional amendments introduced in 2019–2020

In the 116th Congress (2019–2020), three amendments for a nationwide popular election of the President were introduced.

Representative Steve Cohen (D–Tennessee) introduced a constitutional amendment for a direct popular election of the President (House Joint Resolution 7) with 11 co-sponsors that was identical to his 2021 proposal.[202]

Senator Jeff Merkley (D–Oregon) introduced a constitutional amendment that was co-sponsored by:

- Sen. Edward Markey (D–Massachusetts)
- Sen. Mazie Hirono (D–Hawaii)

This proposed amendment[203] was identical to the one these same senators introduced in 2022.

Senator Brian Schatz (D–Hawaii) introduced a constitutional amendment for a direct popular election of the President co-sponsored by three Senate Democrats:

- Sen. Richard Durbin (D–Illinois)
- Sen. Dianne Feinstein (D–California)
- Sen. Kirsten Gillibrand (D–New York).

Senator Schatz's Senate Joint Resolution 17[204] of 2019 was identical to Representative Cohen's 2019 proposal.

Constitutional amendments introduced in 2021–2022

Two constitutional amendments were introduced relating to the method of electing the President during the 117th Congress (2021–2022).

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[202] House Joint Resolution 7. 116th Congress. January 3, 2019. https://www.congress.gov/bill/116th-congress/house-joint-resolution/7/

[203] Senate Joint Resolution 16. 116th Congress. March 28, 2019. https://www.congress.gov/bill/116th-congress/senate-joint-resolution/16/

[204] Senate Joint Resolution 17. 116th Congress. April 2, 2019. https://www.congress.gov/bill/116th-congress/senate-joint-resolution/17/

In 2021, Representative Steve Cohen (D–Tennessee) introduced a constitutional amendment for a direct popular election of the President. House Joint Resolution 14[205] of 2021 was co-sponsored by the following eight Democrats:

- Rep. Zoe Lofgren (D–California)
- Rep. Anna Eshoo (D–California)
- Rep. Janice Schakowsky (D–Illinois)
- Rep. Julia Brownley (D–California)
- Rep. Peter DeFazio (D–Oregon)
- Rep. Adriano Espaillat (D–New York)
- Rep. John Garamendi (D–California)
- Rep. Jim Cooper (D–Tennessee)

Representative Cohen's proposed amendment (House Joint Resolution 14 of 2021) read:

> "Section 1. The President and Vice President shall be elected by the people of the several States and the district constituting the seat of government of the United States.
>
> "Section 2. The electors in each State shall have the qualifications requisite for electors of the most populous branch of the legislature of the State; although Congress may establish uniform age qualifications.
>
> "Section 3. Each elector shall cast a single vote for two persons who have consented to the joining of their names as candidates for President and Vice President. No elector shall be prohibited from casting a vote for a candidate for President or Vice President because either candidate, or both, are inhabitants of the same State as the elector.
>
> "Section 4. The pair of candidates having the greatest number of votes for President and Vice President shall be elected.
>
> "Section 5. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be determined by Congress.
>
> "Section 6. The Congress may by law provide for the case of the death or any other disqualification of any candidate for President or Vice President before the day on which the President-elect or Vice President-elect has been chosen; and for the case of a tie in any election.
>
> "Section 7. This article shall take effect one year after the first day of January following ratification.

[205] House Joint Resolution 14. 117th Congress. March 4, 2021. https://www.congress.gov/bill/117th-congress/house-joint-resolution/14

In 2022, Senator Jeff Merkley (D–Oregon) introduced a constitutional amendment for a direct popular election of the President that was co-sponsored by two Democratic Senators:

- Sen. Edward Markey (D–Massachusetts)
- Sen. Mazie Hirono (D–Hawaii)

Senate Joint Resolution 69 of 2022 read:

> "Section 1. The President and Vice President shall be jointly elected by the direct popular vote of the people of the several States and the District constituting the seat of Government of the United States who are over the age of 18.
>
> "Section 2. Congress shall determine the time, place, and manner of holding the election, and the manner in which the results of the election shall be ascertained and declared, and shall establish one day throughout the United States by which any period of voting shall be complete and during which any eligible voter may cast a vote.
>
> "Section 3. Congress shall have the power to enforce this article by appropriate legislation."[206]

No constitutional amendments introduced in 2023 or in early 2024

No constitutional amendments relating to establishing a nationwide popular vote for President were introduced during the first year of the 118th Congress (2023) or up to the end of May 2024.

Additional history

There has been at least one U.S. Senator or U.S. Representative in each of the 50 states who has either sponsored a bill for nationwide popular election or voted for nationwide popular election of the President in a roll call vote in Congress at various times. A list of the members of Congress who have sponsored various proposed constitutional amendments for nationwide popular election of the President in recent years or who voted in favor of the Bayh-Celler constitutional amendment in the House in 1969 or the 1979 roll call in the Senate may be found in appendix S of the 4th edition of this book.[207]

4.7.4. The direct election amendment would accurately reflect the national popular vote.

The direct election amendment would accurately reflect the national popular vote.

4.7.5. The direct election amendment would make every vote equal.

The direct election amendment would make every vote equal throughout the country.

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[206] Senate Joint Resolution 69. 117th Congress. December 15, 2022. https://www.congress.gov/bill/117th-congress/senate-joint-resolution/69

[207] Appendix S of the 4th edition of this book is available on-line at https://www.every-vote-equal.com/4th-edition

4.7.6. The direct election amendment would make every voter in every state politically relevant.

The direct election amendment would improve upon the current situation in which three out of four states and about 70% of the voters in the United States are ignored in the general-election campaign for President. It would make every voter in every state politically relevant in every presidential election. It would give candidates a compelling reason to campaign in every state.

4.7.7. Prospects of adoption of a constitutional amendment for direct election of the President

Description of the federal constitutional amendment process

Adoption of a federal constitutional amendment is a two-step process in which the amendment must first be "proposed" at the federal level and then "ratified" by three-quarters of the states (38 of 50).

There are two ways of proposing an amendment and two ways of ratifying an amendment.

Article V of the U.S. Constitution provides:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall **propose** Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when **ratified** by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress … " [Emphasis added]

History of the amendment process

The difficulty of amending the Constitution is demonstrated by the fact that there have been only 17 amendments ratified since the Bill of Rights in 1791.

The last time Congress proposed a constitutional amendment that was ratified by the states was 1971—when Congress passed the 26th Amendment (voting by 18-year-olds).

The most recently ratified constitutional amendment was the 27th Amendment (dealing with the time when increases in compensation to members of Congress may take effect). That amendment was submitted to the states by the 1st Congress on September 25, 1789. It languished in the state legislatures for 203 years and was finally ratified in 1992.

Only two constitutional amendments specifically relating to the process of electing the President have ever been adopted:

- The 12th Amendment (ratified in 1804) required presidential electors to cast separate ballots for President and Vice President.
- The 23rd Amendment (ratified in 1961) gave the District of Columbia votes in the Electoral College.

In addition, there have been only seven occasions when one house of Congress approved an amendment related specifically to the method of electing the President:

- In 1813, 1819, 1820, and 1822, the U.S. Senate approved a version of the district method for electing presidential electors; however, the amendment failed each time in the House.[208] This flurry of activity was a reaction to the increasing number of states that were adopting the winner-take-all method at the time (section 2.13).
- In 1868, the Senate approved an amendment requiring that "the people" choose each state's presidential electors.[209] However, the proposal died in the House.
- In 1950, the Senate approved the fractional-proportional (Lodge-Gossett) amendment (section 4.1). However, the proposal died in the House.
- In 1969, the House approved the Bayh-Celler amendment for direct nationwide popular election of the President. However, the proposal died in the Senate.

Vexatious issues that inevitably arise when constitutional amendments are considered

Whenever a constitutional amendment to establish a nationwide vote for President is discussed, advocates for various related causes inevitably seek to embed their favored policy in the amendment.

Two issues inevitably surface in conjunction with a constitutional amendment to establish a nationwide presidential election:

- the power of states versus Congress in setting the rules governing presidential elections (e.g., the state-based approach currently contained in Article II, approaches that give Congress increased or complete control);
- the inter-related questions about:
  - the voting method (e.g., ranked choice voting);
  - the percentage of the popular vote required for election (e.g., a plurality, an absolute majority, or a minimum percentage such as 40% or 45%); and
  - the procedure to be used in the absence of the required percentage (e.g., a national run-off election, selection by Congress).

The current U.S. Constitution gives the states exclusive power over the choice of method of appointing their presidential electors.

There are, of course, passionate advocates for greater uniformity and federal control over presidential elections, and there are reasonable arguments supporting that position.

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[208] Keyssar, Alexander. 2020. *Why Do We Still Have the Electoral College?* Cambridge, MA: Harvard University Press.

[209] The amendment provided, "Each state shall appoint, by a vote of the people thereof qualified to vote for Representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress … and the Congress shall have the power to prescribe the manner in which electors shall be chosen by the people." *Congressional Globe*. U.S. Senate. 40th Congress. 3rd Session. February 9, 1868. Page 1042–1044. https://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor40

There are also equally passionate advocates for a continuation of the current federalist arrangement that disperses power to the states.

Advocates for greater uniformity point out that the current state-based approach allows state legislatures and Governors in one-party states to suppress or enhance voter turnout for partisan reasons.

Defenders of the current state-based approach to regulation of presidential elections argue that the current federalist arrangement prevents an incumbent President—in conjunction with a compliant Congress—from manipulating the rules governing the President's re-election.

Broadly speaking, there are three distinct approaches to this difficult issue:

- **Make no change in the power of Congress** over the manner of conducting presidential elections—that is, preserve the *status quo* expressed in Article II, section 1, clause 2. The 1969 Mundt amendment (section 4.3.3) followed this approach.
- **Give Congress the same power over presidential elections that it currently has over congressional elections**. The 1969 Bayh-Celler Amendment illustrates this approach. Many find this approach appealing because Congress has historically exercised a "light touch" in overseeing state election laws governing congressional elections. Of course, past performance is no guarantee of future performance. The all-encompassing wording of Article I, section 4, clause 1 gives Congress complete control over every aspect of congressional elections (including, as an extreme example, drawing the congressional districts for every state in the country). It provides:

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

- **Explicitly give Congress complete control over the control of presidential elections.** This approach is illustrated by, for example, Representative Cohen's House Joint Resolution 14 of 2021, which provides:

  > "The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be determined by Congress."

Those wishing to enhance the authority of Congress over the conduct of elections would inevitably see any constitutional amendment about presidential elections as an opportunity to incorporate their desired changes into the amendment.

On the other hand, those favoring a constitutionally conservative approach would resist allowing any amendment to negate the current federalist arrangement.

Second, a constitutional amendment inevitably opens the door to a discussion of interrelated questions about the voting method and the percentage of the popular vote required for election.

The current system, of course, does not require a presidential candidate to receive any particular minimum percentage of the popular vote—at either the state or national level.

However, it does require that a candidate receive an absolute majority of the elec-

toral votes appointed. Over the years, numerous different suggestions have been made to change, or eliminate, the contingent election of the President by the House.

In fact, support for the Bayh-Celler amendment during the 1979 congressional debate was substantially reduced because of the inter-related questions of third parties, whether to include a minimum percentage of the popular vote in the amendment, what that percentage should be, and what procedure would be used in the absence of the required percentage.

When the Bayh-Celler amendment was seriously debated in Congress between 1969 and 1979, the debate was colored by the fresh memory of the 1968 campaign in which segregationist Alabama Governor George Wallace received 13.5% of the national popular vote, while the major-party nominees were almost tied (Nixon with 43.4% and Humphrey with 42.7%).

With the 1968 election at top-of-mind (and the expectation that George Wallace would run again in 1972), the 1969 Bayh-Celler amendment specified that there would be a nationwide run-off election if no candidate were to receive at least 40% of the national popular vote.

The vexatious nature of questions about the threshold required for election is illustrated by numerous variations contained in proposals in this chapter.

Today, the debate about a constitutional amendment would inevitably include a discussion of voting procedures other than the familiar plurality voting system.

The effect of using, or not using, a different election system (e.g., ranked choice voting) in a given election can, of course, profoundly affect the conduct of the campaign and the outcome of the election. Thus, in discussing a constitutional amendment for a nationwide election of the President, the question arises as to whether an election system such as RCV should be:

- included in the constitutional amendment,
- permitted as an option at the state level, or
- prohibited.

As previously mentioned, when contemplating a federal constitutional amendment, the relevant political question is whether there is one state legislative chamber in 13 or more states that would oppose the amendment.

As of July 2024, there is a bloc of 10 states that have enacted laws prohibiting the use of RCV in their elections as a matter of policy and four additional states where such a prohibition has passed at least one house of the legislature. See section 4.1.10 for additional details as to why it may not be politically possible to incorporate RCV in a federal constitutional amendment.

Given the requirements for a two-thirds vote in both houses of Congress and ratification by 38 of the 50 states, there appears to be little current appetite in Congress for passing a constitutional amendment for direct popular election of the President.

5 Interstate Compacts

An interstate compact is a legally binding contractual agreement involving two or more states.

This chapter covers the

- constitutional basis for interstate compacts (section 5.1)
- legal standing of compacts (section 5.2)
- history of compacts (section 5.3)
- subjects covered by compacts (section 5.4)
- parties to compacts (section 5.5)
- origination of compacts (section 5.6)
- methods for enacting compacts (section 5.7)
- contingent nature of compacts (section 5.8)
- compacts that are contingent on enactment of federal legislation (section 5.9)
- question of whether compacts should be interpreted under state or federal law (section 5.10)
- adjudication and enforcement of compacts (section 5.11)
- amendments to compacts (section 5.12)
- duration, termination, and withdrawals from compacts (section 5.13)
- administration of compacts (section 5.14)
- legal style of compacts (section 5.15)
- comparison of treaties and compacts (section 5.16)
- comparison of uniform state laws and compacts (section 5.17)
- comparison of federal multi-state commissions and compacts (section 5.18)
- congressional involvement in compacts (section 5.19)
- future of interstate compacts (section 5.20).

5.1. CONSTITUTIONAL BASIS FOR INTERSTATE COMPACTS

Interstate compacts predate the U.S. Constitution.

The Articles of Confederation (proposed by the Continental Congress in 1777 and ratified by the states in 1781) provided for interstate compacts:

> "No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the united states, in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."[1]

[1] Articles of Confederation. Article VI. Clause 2. https://www.ourdocuments.gov/doc.php?flash=false&doc=3&page=transcript

The current U.S. Constitution was proposed by the Constitutional Convention in 1787 and ratified in 1788, and it went into effect in 1789.

Article I, section 10, clause 3 of the U.S. Constitution provides:

> "No state shall, without the consent of Congress, … enter into any agreement or compact with another state."[2]

The terms "compact" and "agreement" are interchangeable. In 1893, the U.S. Supreme Court stated in *Virginia v. Tennessee*:

> "Compacts or agreements … we do not perceive any difference in the meaning…."[3]

5.2. LEGAL STANDING OF INTERSTATE COMPACTS

An interstate compact is, first and foremost, a contract.

Once a state enters into an interstate compact, the state—like an individual, corporation, or any other legal entity that enters into a contract—is bound by the compact's terms.

All contracts—whether they be between or among individuals, corporations, or state governments—are protected by the Impairments Clause of the U.S. Constitution (also called the Contracts Clause).

Article I, section 10, clause 1 of the Constitution provides:

> "No State shall … pass any … Law impairing the Obligation of Contracts…."[4]

Thus, the Impairments Clause prevents a state from passing any law impairing its obligations under an interstate compact to which it is currently a party.

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

> "Compacts are agreements between two or more states that bind them to the compact's 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

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[2] The full wording of the clause 3 is "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

[3] *Virginia v. Tennessee*. 148 U.S. 503 at 520. 1893.

[4] The full wording of clause 1 is: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

> nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and **they take precedence over conflicting state laws, regardless of when those laws are enacted.**
>
> "However, unlike treaties, compacts are not dependent solely upon the good will of the parties. **Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves.** Moreover, Congress and the courts can compel compliance with the terms of interstate compacts. That's why **compacts are considered the most effective means of ensuring interstate cooperation**."[5] [Emphasis added]

The contractual obligations undertaken by a state in an interstate compact bind all state officials.

In addition, an interstate compact binds the state legislature itself—*including future legislatures*—because no state legislature may enact a law impairing a contract.

Thus, after a state enters into an interstate compact, and the compact takes effect, state officials and the state legislature are bound by all of the terms of the compact until

- the state withdraws from the compact in accordance with the compact's terms for withdrawal, or
- the compact is terminated under its terms.[6]

States generally enter into interstate compacts in order to obtain some benefit that can only be obtained by cooperative and coordinated action with one or more sister states.

In most cases, it would make no sense for a state to agree to the terms of any interstate compact unless the other state(s) in the compact agreed to abide by its obligations under the compact.

For example, a state would ordinarily not want to agree to any limitation on its use of water in a river basin located in the state. However, a state might find it advantageous to agree to a limitation if another state were to simultaneously agree to limit its water usage.

When a state enters into an interstate compact (other than a purely advisory compact), it is typically agreeing to a constraint—to one degree or another—on its ability to exercise some power that the state otherwise might freely exercise.

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

> "Upon entering into an interstate compact, **a state effectively surrenders a portion of its sovereignty**; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties."[7] [Emphasis added]

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

[6] Theoretically, an interstate compact could be terminated by a court, although we know of no case in which any interstate compact has been declared unconstitutional.

[7] *C.T. Hellmuth v. Washington Metro. Area Trans*. (D.Md. 1976) 414 F.Supp. 408, 409.

Although one might debate the exact extent of what is included in the concept of state sovereignty, no one would dispute that it includes the power to legislate over an area within a state's jurisdiction.

The Columbia River Compact[8] provides a clear example of the surrender of sovereignty inherent in interstate compacts.

This compact concerns fish in the Columbia River. It was enacted by the states of Washington[9] and Oregon[10] in 1915. It received congressional consent in 1918.[11]

The entire compact—the shortest of all—reads:

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

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

5.3. HISTORY OF INTERSTATE COMPACTS

Four interstate compacts were approved under the Articles of Confederation.

Three of them were settlements of boundary disputes.

The first regulatory compact was an agreement between Maryland and Virginia concerning fishing and navigation on the Chesapeake Bay and the Patowmack (Potomac) and Pocomoke rivers.[12] This compact received the consent of the Confederation Congress under the Articles of Confederation in 1785. Because it was a contractual obligation between the two states, the compact continued in force despite the demise of the Articles of Confederation in 1789. In fact, it remained in force until 1958 (when it was replaced by the current Potomac River Compact).[13]

Prior to 1921, about three-quarters of all interstate compacts were for the purpose

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

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

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

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

[12] Compact of 1785. 1786 Md. Laws c. 1. http://www.virginiaplaces.org/pdf/mdvaapp1.pdf

[13] Potomac River Compact. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

of resolving boundary disputes.[14] Moreover, prior to 1921, all interstate compacts were administered by pre-existing agencies of the compacting states.

The modern era of interstate compacts began in 1921 with the New York–New Jersey Port Authority Compact.[15]

The pressures of World War I dramatized the inadequacies of the port of New York and New Jersey. The two states decided that efficient operation and development of their port required closer cooperation and coordination between them.

The resulting 1921 interstate compact broke new ground by establishing a new governmental entity that was separate from the administration of each state and that was administered by its own governing body.

The compact's intended purposes are summarized in its preamble:

> "Whereas, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson River; and
>
> "Whereas, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and
>
> "Whereas, It is confidently believed that a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and
>
> "Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and
>
> "Whereas, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency."[16]

After 1921, the number, scope, and variety of interstate compacts increased dramatically.

Today, about half of all interstate compacts establish a commission to administer their

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[14] Frankfurter, Felix, and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal* 692–693 and 730–732. May 1925.

[15] New York–New Jersey Port Authority Compact of 1921. https://compacts.csg.org/compact/new-york-new-jersey-port-authority-compact-of-1921 The web site of the Port Authority is at https://www.panynj.gov/port-authority/en/index.html.

[16] Agreement of New York and New Jersey establishing Port of New York Authority. 1921. *Laws of 1921*. Chapter 154. http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:

subject matter.[17] Compact commissions are generally composed of a specified number of representatives from each state—typically appointed by their Governors.

Many compacts with commissions and separate staff receive annual funding from each member state.

If a compact is administered solely by existing state agencies, they each typically receive appropriations from their own state to cover the cost of administering the compact.

Other compacts—particularly those that operate transportation facilities (such as bridges, tunnels, airports, seaports, railroads, or ferries) or other facilities (such as industrial development projects, office buildings, or facilities for storing radioactive waste) have independent revenue streams to finance their operations.

5.4. TOPICS COVERED BY INTERSTATE COMPACTS

There are no constitutional restrictions on the subject matter of interstate compacts other than the implicit limitation that the subject matter must be among the powers that the states are permitted to exercise.

The 10th Amendment reserves considerable power for the states.

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

Accordingly, interstate compacts have been employed for a wide variety of purposes over the years.

The National Center for Interstate Compacts of the Council of State Governments lists 270 compacts in their database.[18]

Interstate compacts deal with numerous topics, including those listed below.

An *advisory compact* establishes a commission that is authorized only to conduct studies and to develop recommendations to solve interstate problems. Advisory compacts are the weakest and least important form of interstate compacts.

Agricultural compacts include the Compact on Agricultural Grain Marketing[19] and the now-inactive Northeast Interstate Dairy Compact.[20]

Boundary compacts allow states to settle disputes involving their official boundaries. Boundary disputes were especially common in the 18th and 19th centuries. States often found negotiated boundary compacts preferable to a protracted trial in the U.S. Supreme Court (which has original jurisdiction over disputes among states). One 20th-century example of a boundary compact is the 1989 Nebraska–South Dakota Boundary Compact,[21]

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

[18] Council of State Governments. *NCIC Database*. Accessed May 28, 2024. https://compacts.csg.org/database/

[19] Compact on Agricultural Grain Marketing. https://ballotpedia.org/Interstate_Compact_on_Agricultural_Grain_Marketing

[20] Northeast Interstate Dairy Compact. https://www.dairycompact.org/ Also see https://en.wikipedia.org/wiki/Northeast_Interstate_Dairy_Compact

[21] South Dakota–Nebraska Boundary Compact. https://compacts.csg.org/compact/south-dakota-nebraska-boundary-compact/

which settled a dispute arising from the fact that the Missouri River had changed course with the passage of time.

Civil defense compacts were adopted by many states during the Cold War. Examples include the Interstate Civil Defense and Disaster Compact[22] of the 1950s, which was replaced in the 1990s by the Emergency Management Assistance Compact.[23]

Crime-control and *corrections compacts* are traceable to 1910, when Congress gave its advance consent to 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.[24]

In 1934, Congress enacted the Crime Control Consent Act[25] authorizing states, in advance, to enter into crime-control compacts.

The Interstate Compact for Supervision of Parolees and Probationers of 1937 was based on this 1934 statute and was the first interstate compact to be joined by all states. The compact provides for the supervision of parolees and probationers who live in states other than the one in which they originally committed their crime. After almost 70 years of use, the Council of State Governments (CSG), the National Institute of Corrections, and a drafting team of state officials updated the 1937 compact and created the Interstate Compact for Adult Offender Supervision.[26] Currently, all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands are members. The compact handles over 100,000 cases per year.

The Interstate Agreement on Detainers[27] facilitates speedy and proper disposition of detainers based on indictments, information, or complaints from the jurisdictions that are parties to the compact. The parties include 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and the federal government itself.

The Interstate Compact for Juveniles[28] and the Interstate Corrections Compact[29] authorize the return of delinquents and convicts, respectively, to their states of domicile to serve their sentences. Supporters of these compacts believe that rehabilitation of delinquents and convicts will be promoted if they are incarcerated in close proximity to their families.

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[22] Interstate Civil Defense and Disaster Compact https://ballotpedia.org/Interstate_Civil_Defense_and_Disaster_Compact#:~:text=The%20Interstate%20Civil%20Defense%20and,disaster%20response%20and%20defense%20aid

[23] Emergency Management Assistance Compact. P.L. 104-321. https://compacts.csg.org/compact/emergency-management-assistance-compact/

[24] 36 Stat. 882.

[25] Crime Control Consent Act of 1934. 48 Stat. 909. 4 U.S.C. §112.

[26] Interstate Compact for Adult Offender Supervision https://compacts.csg.org/compact/interstate-compact-for-adult-offender-supervision/ The compact's extensive web site is at https://www.interstatecompact.org/ Its 2020 annual report is at https://www.interstatecompact.org/sites/default/files/2020-08/2020%20Annual%20Report%20WEB.pdf

[27] Interstate Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

[28] Interstate Compact for Juveniles. https://compacts.csg.org/compact/interstate-compact-for-juveniles/

[29] Interstate Corrections Compact. https://compacts.csg.org/compact/interstate-corrections-compact/

Kansas and Missouri created the nation's first *cultural compact* by establishing a metropolitan cultural district governed by a commission in 2000.[30]

The first *education compact* pooled the resources of southern states by means of the Southern Regional Education Compact.[31] The aim of the compact was to reduce each state's need to maintain separate expensive post-graduate and professional schools. There are two additional compacts of this nature, namely the New England Higher Education Compact[32] and the Western Regional Education Compact.[33]

The New Hampshire–Vermont Interstate School Compact[34] has been used to establish two interstate school districts, each involving New Hampshire and Vermont towns. The Maine-New Hampshire School District Compact[35] similarly establishes interstate school districts for those states.

Election compacts have been suggested at various times over the years. For example, the 1970 U.S. Supreme Court case of *Oregon v. Mitchell*[36] was concerned with congressional legislation to bring about uniformity among state durational residency requirements for voters in presidential elections. In his opinion (partially concurring and partially dissenting), Justice Potter Stewart observed that if Congress had not acted to address this issue, the states could have adopted an interstate compact to accomplish the same objective. Justice Stewart observed that a compact involving all of the states would, in effect, establish a nationwide policy on residency for election purposes.

In the 1990s, New York Congressman (and later Senator) Charles Schumer proposed a bi-state interstate compact in which New York and Texas would pool their electoral votes in presidential elections. At the time, both states were spectator states in presidential elections; they had approximately the same population; and they regularly produced majorities of approximately the same magnitude in favor of each state's respective dominant political party. In particular, the Democrats typically carried New York by about 60% in presidential elections, and the Republicans typically carried Texas by about 60%. The purpose of the proposed compact was to create a new electoral district (slightly larger than California) that would attract the attention of the presidential candidates during campaigns.

The National Popular Vote Compact concerning presidential elections (the subject of this book) is an example of a currently pending compact involving elections.

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[30] Kansas and Missouri Metropolitan Culture District Compact. https://compacts.csg.org/compact/kansas-and-missouri-metropolitan-culture-district-compact/

[31] Southern Regional Education Compact. https://compacts.csg.org/compact/southern-regional-education-compact/

[32] New England Higher Education Compact. https://compacts.csg.org/compact/new-england-higher-education-compact/

[33] Western Regional Education Compact. https://compacts.csg.org/compact/western-regional-education-compact/

[34] New Hampshire–Vermont Interstate School Compact. https://compacts.csg.org/compact/new-hampshire-vermont-interstate-school-compact/

[35] Maine-New Hampshire School District Compact. https://compacts.csg.org/compact/maine-new-hampshire-school-district-compact/

[36] *Oregon v. Mitchell*. 400 U.S. 112. 1970. https://supreme.justia.com/cases/federal/us/400/112/

Energy compacts include the Interstate Compact to Conserve Oil and Gas.[37]

Facilities compacts provide for the construction and operation of physical facilities such as bridges, tunnels, airports, seaports, railroads, and ferries.

The annual revenues of the Port Authority of New York and New Jersey[38] exceed those of 10 states.[39] The Port Authority operates:

- the George Washington Bridge,
- the Holland and Lincoln Tunnels,
- three airports (Kennedy, LaGuardia, and Newark Liberty),
- the PATH rail system,
- ferries, marine facilities, industrial development projects, office buildings including One World Trade Center (which replaced the original World Trade Center destroyed on September 11, 2001).

The Port Authority's police force alone numbers over 1,600.

The Washington Metropolitan Area Transit Authority was created by an interstate compact in 1967 to plan, develop, build, finance, and operate a regional transportation system in the national capital area, including subways and above-ground rail lines. Its members include Maryland, the District of Columbia, Virginia, and the federal government.[40]

On the other hand, some facility compacts operate just one facility, such as the Portsmouth-Kittery Bridge Compact, which administers a bridge over the Piscataqua River between Maine and New Hampshire.

Fish are the topic of numerous compacts, including the previously mentioned 1915 Columbia River Compact[41] between Oregon and Washington and the previously mentioned Compact of 1785[42] between Maryland and Virginia regulating fishing and navigation on the Chesapeake Bay and the Patowmack (Potomac) and Pocomoke rivers. The Atlantic States Marine Fisheries Compact of 1942 is one of the many regional fishery compacts.[43]

Flood-control compacts relate to the construction of projects to prevent flooding. A 1957 compact between Massachusetts and New Hampshire established the Merrimack River Flood Control Compact.[44] In this compact, New Hampshire agreed to the construction by the federal government of certain dams and reservoirs in its territory for regional flood-control purposes. Massachusetts, in turn, agreed to compensate New Hampshire for the loss of tax revenue resulting from the construction of the projects.

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[37] Interstate Compact to Conserve Oil and Gas. https://compacts.csg.org/compact/interstate-compact-to-conserve-oil-and-gas/

[38] The Port Authority's budget (approximately $8.5 billion) is at https://www.panynj.gov/corporate/en/financial-information/budget.html

[39] State budgets may be found at https://en.wikipedia.org/wiki/List_of_U.S._state_budgets

[40] Washington Metropolitan Area Transit Authority. https://www.wmata.com/about/history.cfm The compact is at https://www.wmata.com/about/board/upload/Compact_Annotated_2009_final.pdf

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

[42] Compact of 1785. 1786 Md. Laws c. 1. http://www.virginiaplaces.org/pdf/mdvaapp1.pdf

[43] Atlantic States Marine Fisheries Compact. https://compacts.csg.org/compact/atlantic-states-marine-fisheries-compact/

[44] Merrimack River Flood Control Compact. https://compacts.csg.org/compact/merrimack-river-flood-control-compact/

Health compacts include the Compact on Mental Health[45] and the New England Radiological Health Protection Compact.[46]

Lottery compacts include the Tri-State Lotto Commission that was created in 1985 by the state legislatures of Maine, New Hampshire, and Vermont and the Multistate Lottery Agreement[47] that administers the Powerball game sold in 39 states.

Low-level radioactive waste compacts were encouraged by Congress in the federal Low-Level Radioactive Waste Policy Act of 1980.[48] This federal legislation made each state responsible for the disposal of low-level nuclear waste created within its own boundaries (except for waste created by the activities of the federal government). The act then encouraged the use of interstate compacts to operate regional facilities for management of low-level radioactive waste as an alternative to individual storage sites in each state.

A total of 42 states have entered into one of 10 such compacts, namely the Appalachian, Central Midwest, Central States, Midwest, Northeast, Northwest, Rocky Mountain, Southeast, Southwest, and Texas.[49]

One example is the Southwestern Low-Level Radioactive Waste Disposal Compact,[50] in which California agreed to serve, for 35 years, as the host state for the storage of radioactive waste for the states of Arizona, North Dakota, South Dakota, and California (and such other states that the compact commission might later decide to admit).[51]

Because of their politically sensitive subject matter, radioactive-waste compacts have generated fierce public debate.

Voters have directly participated in these controversies by means of the citizen-initiative process (in Nebraska) and the legislative referral process (in Maine). In addition, there has been considerable litigation concerning these compacts. Controversy over Nebraska's role in storing other states' radioactive waste spanned a 20-year period (as discussed in sections 5.7 and 5.11).

Marketing and development compacts address a variety of subjects and include the Agricultural Grain Marketing Compact and the Mississippi River Parkway Compact.

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[45] Compact on Mental Health. https://compacts.csg.org/compact/compact-on-mental-health/

[46] New England Radiological Health Protection Compact. https://compacts.csg.org/compact/new-england-radiological-health-protection-compact/

[47] Multistate Lottery Agreement. https://compacts.csg.org/compact/multistate-lottery-agreement/ See also https://www.musl.com/

[48] An Act to set forth a federal policy for the disposal of low-level radioactive wastes, and for other purposes. 94 Stat. 3347. https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg3347.pdf

[49] As of 2021, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New York, North Carolina, and Rhode Island are not members of any low-level radioactive waste compact.

[50] Southwestern Low-Level Radioactive Waste Disposal Compact. https://compacts.csg.org/compact/southwestern-low-level-radioactive-waste-disposal-compact/

[51] As can be seen, the states involved in each of these "regional" compacts are not necessarily adjacent or even nearby. For example, Vermont is a member of the Texas Low-Level Radioactive Waste Disposal Compact (https://compacts.csg.org/compact/texas-low-level-radioactive-waste-disposal-compact/), and South Carolina is a member of the Northeast Interstate Low-Level Radioactive Waste Management Compact (https://compacts.csg.org/compact/northeast-interstate-low-level-radioactive-waste-management-compact-atlantic-compact/).

Metropolitan problem compacts include the Washington Metropolitan Area Transit Regulation Compact,[52] which regulates private-sector buses, vans, and motor carriers transporting passengers for hire in the District of Columbia, Maryland, and Virginia.

Military compacts include the National Guard Mutual Assistance Compact,[53] which provides for the sharing of military personnel and equipment among its member states.

Motor vehicles are the topic of a dozen interstate compacts dealing with such matters as driver's licenses, nonresident violators, equipment safety, and vehicle registration. The Driver License Compact[54] is discussed later in section 5.14.

Natural resources compacts are designed to settle disputes and to promote the conservation and development of resources. The Connecticut River Atlantic Salmon Compact[55] involves the return of salmon to the river.

Parks and recreation compacts include the Palisades Interstate Park Compact.[56] This 1900 compact is noteworthy because New York and New Jersey, relying on the U.S. Supreme Court's 1893 decision in *Virginia v. Tennessee*, did not submit it to Congress for its consent (section 5.19 and section 9.23.3).

Regulatory compacts are used to regulate a given economic sector.

Sometimes economic interest groups encourage the establishment of regulatory compacts in order to avoid federal regulation. The Interstate Insurance Product Regulation Compact[57] and the Interstate Compact to Conserve Oil and Gas[58] are examples of industry-sponsored regulatory compacts.

The Atlantic States Marine Fisheries Compact[59] is an example of a compact that lacked direct regulatory enforcement powers when it was first created in the 1940s. However, in 1986, Congress passed the Atlantic Striped Bass Conservation Act.[60] This federal legislation offered the states the choice of complying with a management plan developed by the compact's commission or being subject to a fishing moratorium on striped bass in coastal waters imposed by the U.S. Fish and Wildlife Service. This pre-existing commission thereby acquired actual regulatory authority from a subsequent congressional act.

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[52] Washington Metropolitan Area Transit Regulation Compact. https://compacts.csg.org/compact/washington-metropolitan-area-transity-authority-compact/ The Authority's web site is https://www.wmatc.gov/ Congressional consent was granted by 74 Stat. 1031.

[53] National Guard Mutual Assistance Compact. https://compacts.csg.org/compact/national-guard-mutual-assistance-compact/

[54] Driver License Compact. https://compacts.csg.org/compact/driver-license-agreement/

[55] Connecticut River Atlantic Salmon Compact. https://compacts.csg.org/compact/connecticut-river-atlantic-salmon-compact/

[56] Palisades Interstate Park Compact. https://compacts.csg.org/compact/palisades-interstate-park-compact/

[57] Interstate Insurance Product Regulation Compact. https://compacts.csg.org/compact/interstate-insurance-product-regulation-compact/ The Commission's web site is https://www.insurancecompact.org/

[58] Interstate Compact to Conserve Oil and Gas. https://compacts.csg.org/compact/interstate-compact-to-conserve-oil-and-gas/

[59] Atlantic States Marine Fisheries Compact. https://compacts.csg.org/compact/atlantic-states-marine-fisheries-compact/ The commission's web site is at http://www.asmfc.org/

[60] Atlantic Striped Bass Conservation Act. 100 Stat. 989. 16 U.S.C. §1857. http://www.asmfc.org/uploads/file/Striped_Bass_Act.pdf

The Tri-State Sanitation Compact,[61] entered into by New Jersey and New York in 1935 and by Connecticut in 1941, created a commission with the power to abate and prevent pollution in tidal waters of the New York City metropolitan area. Subsequently, the compact was amended to allow the commission to monitor—but not to regulate—air quality. The commission (renamed the Interstate Environmental Commission) shares concurrent regulatory authority with the environmental protection departments of the member states.

River basin compacts provide an alternative to litigation to solve one of the greatest problems in southwestern states, namely the shortage of water. Water disputes have historically led to the filing of numerous lawsuits between states in the U.S. Supreme Court (which has original jurisdiction over lawsuits between states).

The first river basin compact was the Colorado River Compact[62] apportioning water among seven western states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming). More recently, various mid-Atlantic states have entered into river basin compacts.

Service compacts seek to address social problems by committing each member state to provide services to residents of other member states. The Interstate Compact on the Placement of Children,[63] for example, facilitates the adoption of children by qualified foster parents in other compact states if there are too few families willing to adopt children in the home state.

Tax compacts reflect the growth of interstate commerce and the levying of state income and sales taxes. All 50 states participate in the Multistate Tax Compact[64] to one extent or another. Fifteen states and the District of Columbia have enacted the compact into law and are full members of its commission. Eight additional states help support the commission financially, and an additional 26 states participate in various specific programs of the commission, notably including auditing and promoting uniformity.

The impetus for the Multistate Tax Compact was the 1966 decision of the U.S. Supreme Court in *Northwestern States Portland Cement Company v. Minnesota*.[65] The Court ruled that a state may tax the net income of a foreign corporation (i.e., one chartered by another

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[61] Tri-State Sanitation Compact. https://ballotpedia.org/Tri-State_Sanitation_Compact See also https://compacts.csg.org/compact/tri-state-sanitation-compact/

[62] Colorado River Compact. https://compacts.csg.org/compact/colorado-river-compact/ The 1922 version of the compact is at https://apps.csg.org/ncic/PDF/Colorado%20River%20Compact.pdf The 1928 Boulder Canyon Project Act (https://www.usbr.gov/lc/region/pao/pdfiles/bcpact.pdf) reduced the number of states required to bring the provisions of the compact into effect. The Colorado River Compact came into effect in 1929. In 1948, five states (Arizona, Colorado, New Mexico, Utah, and Wyoming) formed the 1948 Upper Colorado River Basin Compact (https://compacts.csg.org/compact/upper-colorado-river-basin-compact/). The 1948 compact is at http://www.ucrcommission.com/wp-content/uploads/2021/02/1948-Upper-Colorado-River-Basin-Compact.pdf. The web site of the Upper Colorado Commission is at http://www.ucrcommission.com. Various additional laws, compacts, and decrees dictate how the waters of the Colorado River will be apportioned (sometimes collectively referred to as the "The Law of the River") are found at http://www.ucrcommission.com/governing-laws-decrees

[63] Interstate Compact on the Placement of Children. https://compacts.csg.org/compact/interstate-compact-on-the-placement-of-children/

[64] Multistate Tax Compact. https://compacts.csg.org/compact/multistate-tax-compact/ The compact is at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf The web site of the Multistate Tax Commission is at https://www.mtc.gov

[65] *Northwestern States Portland Cement Company v. Minnesota*. 358 U.S. 450. 1966.

state) if the tax is nondiscriminatory and is apportioned equitably on the basis of the corporation's activities with a nexus to the taxing state.

The Multistate Tax Compact has been subject of considerable litigation, notably including the 1978 case that established the current jurisprudence as to whether congressional consent is necessary for a given interstate compact to take effect (section 9.23.2 and section 9.23.3).

New Jersey and New York belong to an agreement providing for a mutual exchange of information relative to purchases by residents of the other state from in-state vendors. The states have also entered into numerous administrative agreements concerning taxation.

Most states belong to dozens of interstate compacts that have been enacted by their legislature.[66] The National Center for Interstate Compacts of the Council of State Governments[67] and *Ballotpedia*[68] each maintain helpful web sites listing the compacts to which each state belongs and providing information about individual compacts.

5.5. PARTIES TO INTERSTATE COMPACTS

Most early interstate compacts involved only two states.

Today, there are interstate compacts that include all 50 states—for example, the Interstate Compact for Adult Offender Supervision.[69]

The parties to an interstate compact are often determined simply by geography (e.g., the Colorado River Compact and the Great Lakes Basin Compact).

In other cases, the presence of a certain industry or activity in a state determines the compact's membership. For example, the Interstate Compact to Conserve Oil and Gas encompasses 38 petroleum-producing states.

In many cases, compacts are open to all states, and actual membership is determined simply by whichever states decide to join the compact.

Many interstate compacts include entities other than states. For example, the Agreement on Detainers[70] includes 49 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Even provinces of Canada are members of some interstate compacts. In 1949, the Northeastern Interstate Forest Fire Compact[71] became the first interstate compact to include a Canadian province. The provinces of New Brunswick, Newfoundland and Labrador, Nova Scotia, and Quebec are currently parties to this compact.

The federal government may also be a party to an interstate compact. For example, the membership of the Agreement on Detainers[72] includes the federal government.

In their seminal 1925 article entitled "The compact clause of the constitution—A study

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[66] Bowman, Ann O'M. 2004. Trends and issues in interstate cooperation. In *The Book of the States 2004 Edition*. Chicago, IL: The Council of State Governments. Page 36.

[67] Council of State Governments. https://apps.csg.org/ncic/

[68] *Ballotpedia*. https://ballotpedia.org/Interstate_compacts_by_topic

[69] Interstate Compact for Adult Offender Supervision. https://compacts.csg.org/compact/interstate-compact-for-adult-offender-supervision/

[70] Interstate Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

[71] Northeastern Interstate Forest Fire Compact. https://compacts.csg.org/compact/northeastern-interstate-forest-fire-protection-compact/

[72] Interstate Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

in interstate adjustments," Felix Frankfurter (later a Justice of the U.S. Supreme Court) and James Landis anticipated the possibility of federal-interstate compacts by writing:

> "[T]he combined legislative powers of Congress and of the several states permit a wide range of permutations and combinations for governmental action. Until very recently these potentialities have been left largely unexplored…. Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests."[73]

The first federal-interstate compact was formed in 1961. After a prolonged drought in the 1950s made the careful management of Delaware River waters essential, four states and the federal government entered into the Delaware River Basin Compact.[74] Congress enacted the compact into federal law with a provision that the United States be a member. That law created a commission with a national co-chairman and a state co-chairman and additional state and federal members.

The federal government, Maryland, New York, and Pennsylvania entered into the Susquehanna River Basin Compact,[75] which became effective in 1971.

Federal-interstate compacts have also been employed to promote economic development in large regions of the nation. The Appalachian Regional Compact was the first such agreement. It was enacted by Congress and 13 states in 1965. This compact has a commission with a state co-chairman appointed by the Governors involved and a federal co-chairman appointed by the President with the Senate's advice and consent.[76]

A unique federal-interstate agreement resulted from a 1980 congressional statute granting consent to an agreement entered into by the Bonneville Power Administration, a federal entity, with Idaho, Montana, Oregon, and Washington.[77] If the states had not enacted the proposed compact, a federal council would have been appointed by the U.S. Secretary of the Interior to perform the functions of the proposed federal-interstate council, namely preparing a conservation and electric power plan and implementing a program to protect fish and wildlife. One unique feature of this legislation was the provision for membership by a federal agency rather than the federal government.[78] The term "interstate compact" does not appear in this legislation. This agreement was not negotiated by the member states. Instead, the proposed compact was drafted by the Pacific Northwest Electric Power and Conservation Planning Council, which then submitted its proposal to the states.

In 1990, Congress created a similar body. The Northern Forest Lands Council Act[79] authorized each of the Governors of Maine, New Hampshire, New York, and Vermont to

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[73] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal* 692–693 and 730–732. May 1925.

[74] Delaware River Basin Compact. https://compacts.csg.org/compact/delaware-river-basin-compact/

[75] Susquehanna River Basin Compact. https://compacts.csg.org/compact/susquehanna-river-basin-compact/

[76] Appalachian Regional Development Act of 1966, 79 Stat. 5, 40 U.S.C. app. §1.

[77] Pacific Northwest Electric Power and Conservation Planning Act of 1980. 94 Stat. 2697. 16 U.S.C. §839b.

[78] Olsen, Darryll and Butcher, Walter R. The Regional Power Act: A model for the nation? *Washington State Policy Notes 35*. Winter 1984. Pages 1–6.

[79] Northern Forest Lands Council Act of 1990, 104 Stat. 3359, 16 U.S.C. §2101.

appoint four council members charged with developing plans to maintain the "traditional patterns of land ownership and use" of the northern forest. The Council was disbanded in 1994.

The National Criminal Prevention and Privacy Compact Act, enacted by Congress in 1998, established what may be termed a federal-interstate compact that:

> "organizes an electronic information sharing system among the Federal Government and the States to exchange criminal history records for non-criminal justice purposes authorized by Federal or State law, such as background checks for governmental licensing and employment."[80]

Federal and state law enforcement officers were not involved in the negotiations leading to this compact. The compact is activated when entered into by two or more states. Article VI of the compact established a Compact Council with authority to promulgate rules and procedures pertaining to the use of the Interstate Identification Index System for non-criminal justice purposes. The council is composed of fifteen members appointed by the Attorney General of the United States, including nine members selected from among the law enforcement officers of member states, two at-large members nominated by the Chairman of the Compact Council, two other at-large members, a member of the FBI's advisory policy board, and an FBI employee appointed by the FBI director. The Director of the FBI designates the federal "Compact Officer."

Indian gaming compacts are a new type of compact. The origin of such compacts is the U.S. Supreme Court's 1987 decision in *Cabazon Band of Mission Indians v. California*, which held that a state may not unduly restrict gaming on Indian lands.[81] This decision led to a sharp increase in gaming on Indian lands. Congress became concerned that tribal governments and their members were not actually profiting from the gaming and that organized crime might acquire a stake in such activity. The Indian Gaming Regulatory Act of 1988[82] therefore authorized tribe–state gaming compacts. The 1988 act established three classes of Indian gaming. Class I gaming—primarily social gaming for small prizes—is regulated totally by Indian tribes. Class II gaming—bingo and bingo-type games and non-banking card games—is regulated by tribes but is subject to limited oversight by the National Indian Gaming Commission. Class III contains all other types of gaming and is prohibited in the absence of a tribe-state compact approved by the U.S. Secretary of the Interior. The compact device permits states to exercise their reserved powers without the need for direct congressional action.

5.6. ORIGINATION OF INTERSTATE COMPACTS

Prior to 1930, interstate compacts were typically negotiated by commissioners appointed by the Governors of the states involved. The commissioners would meet and negotiate and eventually submit their proposed compact to their respective state legislatures and Governors.

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[80] National Crime Prevention and Privacy Compact Act of 1998. 112 Stat. 1874. 42 U.S.C. §14611.

[81] *Cabazon Band of Mission Indians v. California*. 480 U.S. 202. 1987.

[82] Indian Gaming Regulatory Act of 1988. 108 Stat. 2467. 25 U.S.C. §2701.

This method was especially appropriate when the contemplated compact required lengthy negotiations among the prospective parties and frequent consultation with the Governors and legislative leaders of the states involved. The 1958 Potomac River Compact is an example of a compact created through negotiation by commissioners representing Maryland and Virginia.[83]

In practice, interstate compacts often originate in state legislatures. A single legislature might initiate the process by unilaterally enacting a statute containing a prospective interstate compact. The passage of such a statute by the initiating state then serves as an open invitation (an "offer" in the legal sense) to other states to join the compact. Other states can then "accept" the "offer" by enacting identical statutes. The U.S. Supreme Court referred to the first state's enactment of an interstate compact as a "continuing offer" in *Wedding v. Meyer*.[84]

Since the 1930s, many interstate compacts have been formulated by non-governmental entities.

For example, non-profit organizations such as the National Conference of State Legislatures (NCSL) and the Council of State Governments (CSG) have drafted numerous interstate compacts and then presented their proposals to the states for their consideration.[85]

Sometimes industry groups have promoted interstate regulatory compacts in attempts to discourage Congress from exercising its preemption powers over the subject matter involved. These groups argue that the states can adequately address the problem at hand by cooperative action and that a compact obviates the need for federal regulation. The Interstate Insurance Product Regulation Compact[86] and the Interstate Compact to Conserve Oil and Gas are examples of industry-sponsored compacts.

Compacts are sometimes initiated by private citizens. For example, former Governor Terry Sanford of North Carolina wrote the book *The Compact for Education*.[87] As Marian E. Ridgeway noted in her book *Interstate Compacts*:

> "The Compact on Education is largely the product of the zeal and energy of former Governor Terry Sanford of North Carolina, acting on a suggestion of James B. Conant in his [1964 book] *Shaping Education Policy*."[88]

Political advocacy organizations, such as the Goldwater Institute in Arizona, have drafted numerous interstate compacts for consideration by state legislatures.[89] One of its

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[83] Potomac River Compact. Page 1. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

[84] *Wedding v. Meyer*. 192 U.S. 573, 583. 1904.

[85] Hardy, Paul T. 1982. *Interstate Compacts: The Ties That Bind*. Athens, GA: Institute of Government, University of Georgia.

[86] Interstate Insurance Product Regulation Compact. https://compacts.csg.org/compact/interstate-insurance-product-regulation-compact/ The Commission's web site is https://www.insurancecompact.org/

[87] Sanford, Terry. 1965. *The Compact for Education*. December 1965. https://www.ecs.org/wp-content/uploads/Compact-for-Education-Dec1965.pdf

[88] Ridgeway, Marian E. 1971. *Interstate Compacts: A Question of Federalism*. Carbondale, IL: Southern Illinois University Press. Page 41.

[89] http://goldwaterinstitute.org.

proposed compacts provides procedures for a federal Constitutional Convention to consider a constitutional amendment for a balanced budget.[90]

The National Popular Vote Compact (the topic of this book) is another example of a compact drafted by a political advocacy organization.

Representatives of the federal government occasionally participate in the negotiation of interstate compacts. Such federal participation is usually at the invitation of the states themselves.

Federal participation is sometimes necessary, given the nature of the compact. For example, federal representatives participated from the beginning in the negotiation of the Potomac River Compact of 1958.[91] Both the federal government and the District of Columbia were eventually represented on the commission established by the compact.

In the case of the Colorado River Compact, the impetus came from Congress rather than the states. The aim was to resolve a long-standing water dispute involving seven western states in the Colorado River basin (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming). Congress passed legislation[92] in 1921 calling on the seven states to enter negotiations to provide for the use of the water for agriculture and power generation and to resolve their dispute. Under the terms of the federal legislation, the U.S. Secretary of Commerce (then Herbert Hoover) was designated to head the negotiations. These negotiations led to the Colorado River Compact of 1922.[93,94] See section 5.8.

5.7. METHODS FOR ENACTING INTERSTATE COMPACTS

A state may enter an interstate compact in several ways.

The focus of this book is on compacts that require explicit state legislative action in order to come into effect.

In rare circumstances, the Governor, the head of an administrative department, or a commission may have sufficient statutory or constitutional authority to enter into a particular compact on behalf of its state. For example, the Multistate Lottery Agreement was adopted by some of its member states merely by the action of the state's lottery commission (rather than action by the legislature).

Enactment of an interstate compact by a state legislature is accomplished in the same way that ordinary state laws are enacted. Enactment of a state statute typically requires a majority vote[95] of each house of the state legislature and presenting the legislative bill to the state's Governor for approval or disapproval. If the Governor approves a bill that has

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[90] https://goldwaterinstitute.org/article/compact-for-a-balanced-budget/

[91] Potomac River Compact. Page 1. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

[92] 42 Stat. 171.

[93] Barton, Weldon V. 1967. *Interstate Compacts in the Political Process*. Chapel Hill, NC: University of North Carolina Press. Pages 94–95.

[94] Zimmerman, Joseph F. 2012. *Interstate Cooperation: Compacts and Administrative Agreements*. Second edition.Westport, CT: Praeger.

[95] The definition of the required "majority" vote varies from state to state. Assuming a quorum is present, it can mean a majority of those present and voting, an absolute majority of those serving (i.e., not counting vacancies), or an absolute majority of the seats. A quorum can range from a majority to two-thirds of the legislature.

been passed by the legislature, then the bill becomes law. All Governors have the power to veto legislation passed by their state legislatures.[96] If a Governor vetoes a bill, it may nonetheless become law if the legislature overrides the veto in the manner provided by the state's constitution. Overriding a gubernatorial veto typically requires a legislative super-majority (e.g., two-thirds or three-fifths) but can be accomplished in some states by a majority vote.[97]

The citizen-initiative process, if available in a given state, provides a way by which a proposed law (including a law enacting an interstate compact) may be enacted by means of a petition and a statewide vote. In some states, the petition is first submitted to the legislature, thereby giving the legislature the opportunity to enact the legislation proposed by the petition. Then, if the legislature fails to enact the legislation proposed in the petition, the question of enacting the proposal is submitted to the voters in a statewide election. The citizen-initiative process is described in the book *The Initiative: Citizen Law-Making*[98] by Professor Joseph F. Zimmerman (co-author of this book) and in section 7.3 of this book.

The citizen-initiative process may also be used preemptively to oppose enactment of a compact. In 2021, a petition drive was launched in Massachusetts by 2022 Republican gubernatorial candidate Geoff Diehl, State Representative David DeCoste (R), and other legislators concerning the Transportation Climate Initiative (TCI). The TCI is a multi-state compact in the northeast that would establish a cap-and-trade system to reduce carbon emissions from the transportation sector. The sponsors of the petition say that their proposed initiative, if approved by voters, would effectively make it impossible for Massachusetts to participate in the compact.[99,100,] This proposed initiative did not qualify for the November 2022 ballot in Massachusetts.[101]

The citizen-initiative process may be used to repeal an existing state law (including an existing law enacting an interstate compact). For example, an initiative petition was used in Nebraska in 1988 to force a statewide vote on the question of Nebraska's participation in the controversial Central Interstate Low-Level Radioactive Waste Compact.[102] The

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[96] The veto by the Vermont Governor of the bill enacting the New England Interstate Water Pollution Control Compact is an example of a gubernatorial veto of an interstate compact. As it happened, Vermont later joined the compact. https://compacts.csg.org/compact/new-england-interstate-water-pollution-control-compact/

[97] Council of State Governments. 2005. *The Book of the States*. Lexington, KY: The Council of State Governments. 2005 Edition. Volume 37. Pages 161–162.

[98] Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger. See pages 24–25 for citations to the constitutional and statutory provisions governing the initiative processes in various states.

[99] Murphy, Matt. 2021. Ballot proposal targets participation in transpo emissions pact. *WWLP 22 News*. August 4, 2021. https://www.wwlp.com/news/state-politics/ballot-proposal-targets-participation-in-transpo-emissions-pact/

[100] Revello, Katherine. 2021. Massachusetts eyes ballot initiative to halt participation in the Transportation Climate Initiative. Maine Wire. August 9, 2021. https://www.themainewire.com/2021/08/massachusetts-eyes-ballot-initiative-to-halt-participation-in-the-transportation-climate-initiative/

[101] Massachusetts 2022 ballot measures. *Ballotpedia*. https://ballotpedia.org/Massachusetts_2022_ballot_measures

[102] Central Interstate Low-Level Radioactive Waste Compact. https://compacts.csg.org/compact/central-interstate-low-level-radioactive-waste-compact/

compact (which had been passed several years earlier by the legislature) provided for the building of a nuclear waste site in Nebraska to store other states' nuclear waste. In the statewide vote on Proposition 402 in 1988, Nebraska voters rejected the opportunity to repeal the state's participation in the compact. Nonetheless, the compact continued to be politically controversial in Nebraska, and, 11 years later, the legislature enacted a law withdrawing the state from the compact.[103]

The protest-referendum process, if available in a given state, provides a way by which voters may review a law enacted by the legislature. The protest-referendum process usually must be invoked within a very short and limited time after the law was passed by the legislature.[104] The protest-referendum process is described in the book *The Referendum: The People Decide Public Policy*[105] by Professor Joseph F. Zimmerman (who is also co-author of this book).

For example, in 2019, the Colorado legislature passed the National Popular Vote Compact (Senate Bill 42).[106] On March 15, 2019, Governor Jared Polis signed the bill. Shortly thereafter, the Protect Colorado's Vote organization[107] started circulation of a protest-referendum petition opposing the enactment of the Compact. As a result of the validation of the petition by the Colorado Secretary of State in August 2019, the Compact's enactment was temporarily suspended until a statewide referendum could be held on the issue.[108] The Compact was defended by the Yes on National Popular Vote organization,[109] Coloradans for National Popular Vote, and Conservatives for Yes on National Popular Vote. A statewide referendum was held on the question in November 2020. In the statewide vote on Proposition 113, Colorado voters supported the Compact.[110] Ballotpedia[111] and the National Popular Vote web site[112] provide historical information about the campaign.

The referral process, if available in a given state, provides another way by which the voters may get the opportunity to vote on the question of adopting an interstate compact.

For example, in 1993, the Maine legislature referred the question of Maine's participa-

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[103] See section 5.13 for additional discussion of the controversies surrounding this compact in Nebraska.

[104] Note that an initiative petition, as opposed to the protest-referendum process, was used in Nebraska in 1988 to force a statewide vote on the question of Nebraska's participation in the controversial Central Interstate Low-Level Radioactive Waste Compact because the legislature had enacted the compact several years earlier.

[105] Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

[106] Colorado Senate Bill 42 of 2019. https://leg.colorado.gov/bills/sb19-042

[107] https://www.protectcoloradosvote.org/

[108] Davies, Emily. 2019. Colorado approved a national popular vote law. Now it might be repealed. August 2, 2019. *Washington Post*. https://www.washingtonpost.com/politics/colorado-approved-a-national-popular-vote-law-now-it-might-be-repealed/2019/08/02/a305b1de-b468-11e9-8e94-71a35969e4d8_story.html

[109] https://www.YesOnNationalPopularVote.com

[110] The official election returns for Proposition 113 are at https://results.enr.clarityelections.com/CO/105975/web.264614/#/detail/1126

[111] Ballotpedia. Colorado Proposition 113, National Popular Vote Interstate Compact Referendum (2020). https://ballotpedia.org/Colorado_Proposition_113,_National_Popular_Vote_Interstate_Compact_Referendum_(2020)

[112] See the Colorado page at the National Popular Vote web site at https://www.nationalpopularvote.com/state/co

tion in the Texas Low-Level Radioactive Waste Disposal Compact[113] to the state's voters. The question on the ballot was:

> "Do you approve of the interstate compact to be made with Texas, Maine and Vermont for the disposal of the State's low-level radioactive waste at a proposed facility in the State of Texas?"

The proposition received 170,411 "yes" votes and 63,672 "no" votes.

There are no constitutional restrictions on the length of time that potential parties to an interstate compact may take in deciding whether to join the compact.

For example, approval of the Colorado River Compact was spread out over the 22-year period between 1922 and 1944,[114] and approval of the California–Nevada Water Apportionment Interstate Compact was spread out over 46 years.

The Multistate Tax Compact is open to all states and provided that it would initially go into effect when seven states approved it.[115] The compact acquired its first seven adherents in 1967 and acquired additional adherents over the years, including Oregon in 2013 and Utah in 2014.[116]

The Great Lakes Basin Compact[117] was enacted in 1955 by the state legislatures in Illinois, Indiana, Michigan, Minnesota, and Wisconsin. Pennsylvania approved it in 1956, and New York did so in 1960. The Ohio General Assembly did not act until 1963.

An interstate compact typically functions as both:

- a state law (controlling the actions of state officials in the same manner as any other state law) and
- a legally binding contract between the state and the other parties to the compact.

Ohio's legislation for approving the Great Lakes Basin Compact[118] in 1963 illustrates the dual roles of a typical interstate compact.

Ohio's legislation began with an enacting clause that stated that the compact was both being "enacted into law" in Ohio and that the State of Ohio was entering into a contractual obligation.

> "The 'great lakes basin compact' is hereby ratified, **enacted into law**, and **entered into by this state as a party** thereto with any other state or province which, pursuant to Article II of said compact, has legally joined in the compact as follows:" [Emphasis added]

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[113] Texas Low-Level Radioactive Waste Disposal Compact. https://compacts.csg.org/compact/texas-low-level-radioactive-waste-disposal-compact/

[114] Colorado River Compact. https://compacts.csg.org/compact/colorado-river-compact/

[115] Multistate Tax Compact. https://compacts.csg.org/compact/multistate-tax-compact/ The compact is at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf The web site of the Multistate Tax Commission is at https://www.mtc.gov

[116] At approximately the same time, California repealed its enactment of the Multistate Tax Compact in 2012 because of dissatisfaction with the compact's limited choice of methods for computing tax liability of multistate businesses.

[117] Great Lakes Basin Compact. https://compacts.csg.org/compact/great-lakes-basin-compact/

[118] Ohio Revised Code 6161.01–6161.03.

Similar or identical words are used by many states when they approve interstate compacts to recognize the dual roles of the ratifying legislation.

The remainder of Ohio's 1963 activating legislation simply consisted of the exact text of the compact.

Statutory language for enacting an interstate compact at the state level may or may not be self-executing. The above Ohio legislation is an example of self-executing legislation—that is, no further action is required by any Ohio official or body.

On the other hand, the statutory language enacting an interstate compact may require that the compact be subsequently executed by the state's Governor, Attorney General, or other official—perhaps at the discretion of the official involved or perhaps after some specified condition is satisfied.

The Interstate Compact for the Supervision of Parolees and Probationers is an example of a non-self-executing compact. That particular compact was enacted in 1936 by the New York Legislature but required execution by the Governor. However, Governor Herbert H. Lehman opposed the compact, and it consequently languished unexecuted for many years.

When the party adopting an interstate compact is the District of Columbia, two different procedures have been used.

Prior to 1973, it was customary for Congress to enact interstate compacts on behalf of the District of Columbia.

However, in 1973, Congress delegated its authority to pass laws concerning the District to the elected Council of the District of Columbia in all except 10 specifically identified areas listed in section 602(a) of the District of Columbia Home Rule Act.[119]

None of the 10 specific restrictions in the Home Rule Act precluded the District from entering into interstate compacts.

Accordingly, the Council of the District of Columbia has exercised the power to enter into numerous compacts since 1973.

For example, the Council entered into the Interstate Parole and Probation Compact[120] in 1976 (three years after enactment of the Home Rule Act). In 2000, the Council entered into the Interstate Compact on Adoption and Medical Assistance.[121] In 2002, it entered into the Emergency Management Assistance Compact.[122] In 2010, the District of Columbia Council entered into the National Popular Vote Compact.

The Council of State Governments (CSG) lists 22 interstate compacts to which the District of Columbia is a party.[123]

A District of Columbia law passed by the Council (including those adopting an interstate compact) is, in accordance with section 602(c)(1) of the Home Rule Act, usually subject to congressional review for 30 days and potential disapproval by Congress during that period (as discussed in detail in 9.24.5).

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[119] D.C. Code § 1-233.

[120] D.C. Code § 24-452.

[121] Title 4, Chapter 3, D.C. St § 4-326, June 27, 2000, D.C. Law 13-136, § 406, 47 DCR 2850.

[122] Emergency Management Assistance Compact. https://compacts.csg.org/compact/emergency-management-assistance-compact/

[123] Council of State Governments. https://apps.csg.org/ncic/State.aspx?search=1&id=51

However, the Council has an additional option under the Home Rule Act. After the terrorist attacks on September 11, 2001, the Council entered into the Emergency Management Assistance Compact on an emergency 90-day temporary basis (by D.C. Council Act 14-0081) under the special authority granted to the Council by section 412(a) of the Home Rule Act. Shortly thereafter, the Council entered into this same compact (by D.C. Council Act A14-0317) under the authority of section 602(c)(1) of the Home Rule Act (providing for the usual 30-day congressional review period).

Occasionally, an interstate compact may be adopted on a temporary basis by executive or administrative action. For example, the Compact for Education permitted its adoption:

> "either by enactment thereof, or by adherence thereto by the Governor; provided that in the absence of enactment, adherence by the Governor shall be sufficient to make his state a party only until December 31, 1967."

The Governor of Kansas authorized participation in the Interstate Compact for Supervision of Parolees and Probationers for a period of limited time prior to enactment of the compact by the legislature.

5.8. CONTINGENT NATURE OF COMPACTS

Interstate compacts are contracts.

The process of entering into an interstate compact follows standard principles of contract law. The offer is the first state's enactment of its law. The acceptance is the second state's enactment of a law committing the second state to do what the first state wants. The consideration is the promise of each state to do something it would not otherwise do, absent compensating action by the other state.

As a general rule, a state enters into an interstate compact in order to obtain some benefit that can only be obtained by mutually agreed coordinated action with its sister state(s). In most cases, it would make no sense for a state to agree to the terms of a compact unless other states also agreed to it. Thus, an interstate compact generally does not come into effect until it is approved by a specified combination of prospective parties and possibly until other conditions (e.g., timing) are satisfied.

For example, the Tri-State Lotto Compact is an example of a compact that did not come into effect until it was enacted by all three of its explicitly named parties (Maine, New Hampshire, and Vermont).

The Gulf States Marine Fisheries Compact contemplated participation by five states but required enactment by only two states to bring it into effect.

> "This compact shall become operative immediately as to those states ratifying it whenever any two or more of the States of Florida, Alabama, Mississippi, Louisiana and Texas have ratified it."

The Great Lakes Basin Compact was intended to include eight states but came into effect when four states enacted it.

> "This compact shall enter into force and become effective and binding when it has been enacted by the legislatures of any four of the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin and

> thereafter shall enter into force and become effective and binding as to any other of said states when enacted by the legislature thereof."

The Great Lakes Basin Compact is noteworthy because it permitted two Canadian provinces to join the compact. The Canadian provinces did not, however, count toward the threshold of four states necessary to bring the compact into effect.

> "The province of Ontario and the province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the government of Canada may prescribe for adherence thereto. For the purpose of this compact the word 'state' shall be construed to include a province of Canada."[124]

The Midwest Interstate Passenger Rail Compact came into effect when it was enacted by three states out of a pool of 12 named prospective members. The membership of this compact may be expanded by action of the commission established by the compact.[125]

The Central Interstate Low-Level Radioactive Waste Compact[126] named 10 states as eligible for membership. It specified that it would become effective when enacted by any three of the 10 prospective parties. The compact enabled its commission to admit additional states by a unanimous vote.

Sometimes the specific requirements for bringing a compact into effect are of paramount political importance.

For example, the original version of the Colorado River Compact was negotiated in 1922 by commissioners appointed by the Governors of the seven western states involved (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming). The negotiations were headed by Secretary of Commerce (and later President) Herbert Hoover. Amid considerable fanfare, the compact was signed in Santa Fe, New Mexico on November 24, 1922. The 1922 version of the compact provided:

> "This compact shall become binding and obligatory when it shall have been approved by the legislatures of each of the signatory states."[127]

The Arizona legislature, however, never agreed to the 1922 compact.

In reaction to Arizona's intransigence, Congress initiated a revised version of the compact—the Boulder Canyon Project Act of 1928. The 1928 version of the compact specified that it would come into effect when enacted by six of the seven western states involved, provided that California was one of the six.[128] As expected, Arizona, the seventh prospective member, held out. In fact, Arizona did not approve of the 1928 compact until 1944.

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[124] Great Lakes Basin Compact. https://compacts.csg.org/compact/great-lakes-basin-compact/

[125] Midwest Interstate Passenger Rail Compact. Section 1 of Article X. https://compacts.csg.org/compact/midwest-interstate-passenger-rail-compact/

[126] Central Interstate Low-Level Radioactive Waste Compact. https://compacts.csg.org/compact/central-interstate-low-level-radioactive-waste-compact/

[127] See http://ssl.csg.org/compactlaws/coloradoriver.html.

[128] 45 Stat.1057.

5.9. COMPACTS CONTINGENT ON ENACTMENT OF FEDERAL LEGISLATION

An interstate compact may contain terms specifying that it is contingent on the enactment of federal legislation at the time Congress grants its consent to the compact.

For example, the Belle Fourche River Compact[129] between South Dakota and Wyoming stipulated that it would not become effective unless congressional consent were accompanied by congressional legislation satisfactorily addressing three enumerated points that the compacting states desired.[130]

Congress agreed to the legislation requested by the states when it granted consent to the compact.

Similarly, the Republican River Compact contained a description of congressional legislation desired by the compact's parties. Again, Congress agreed to the legislation requested by the states at the time of granting its consent to the compact.

5.10. WHETHER COMPACTS SHOULD BE INTERPRETED UNDER STATE OR FEDERAL LAW

In 1874, the U.S. Supreme Court laid the groundwork for the general principle that the interpretation of state law is the province of the state's highest state court, in *Murdock v. City of Memphis*.[131]

This case had nothing to do with interstate compacts, which, in the 19th century, were used primarily to permanently settle boundary disputes between states.

As the years progressed, compacts started to deal with more complex issues. In particular, they started to address ongoing issues rather than one-time issues, such as the settlement of a boundary dispute.

As compacts became more complex, the question arose as to whether the courts should interpret interstate compacts under state or federal law.

In particular, if a compact requires congressional consent, and Congress grants its consent, the question arose as to whether the compact is "converted" into federal law—and therefore should be interpreted as such.

The Supreme Court's answer to this question has varied over the years.

In 1938, the Supreme Court considered a case involving the La Plata River Compact between Colorado and New Mexico—an interstate compact that had received congressional consent. In *Hinderlider v. La Plata River & Cherry Creek Ditch Company*, the Court ruled that congressional consent does *not* make a compact the equivalent of a "statute of the United States."[132]

However, the Court modified this decision shortly thereafter in *Delaware River Joint Toll Bridge Commission v. Colburn*. In 1940, it ruled:

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[129] Belle Fourche River Compact. https://compacts.csg.org/compact/belle-fourche-river-compact/

[130] The three specific points are found on pages 6–7 of the Belle Fourche River Compact at https://apps.csg.org/ncic/PDF/Belle%20Fourche%20River%20Compact.pdf

[131] *Murdock v. City of Memphis*. 87 U.S. 590. 1874. https://supreme.justia.com/cases/federal/us/87/590/

[132] *Hinderlider v. La Plata River & Cherry Creek Ditch Company*. 304 U.S. 92. 1938. https://supreme.justia.com/cases/federal/us/304/92/

> "The construction of a compact made between two States and sanctioned by an Act of Congress involves a federal 'title, right, privilege or immunity.' "[133]

In 1951, the Supreme Court held in *Dyer v. Sims*:

> "**This Court has final power to pass upon the meaning** and validity of compacts between states.
>
> "**An agreement** entered into between states by those who alone have political authority to speak for a state **cannot be** nullified unilaterally, or **given final meaning by any organ of one of the contracting states**.
>
> "**This Court is free to examine determinations of law by state courts** where an interstate compact brings in issue the rights of other states and the United States."[134] [Emphasis added]

In 1959, the Supreme Court held in *Petty v. Tennessee-Missouri Bridge Commission:*

> "By entering into the compact and acting under it after Congressional approval, the States waived whatever immunity from a suit such as this in a federal court respondent, as their agency, might have enjoyed under the Eleventh Amendment. 359 U.S. 276-282."[135]
>
> "**The construction of a compact sanctioned by Congress** under Art. I, § 10, cl. 3, of the Constitution **presents a federal question over which this Court has the final say**."[136] [Emphasis added]

In *Cuyler v. Adams* in 1981, the Court summarized its rulings in previous cases and wrote:

> "Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that **the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question**. See *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940)."[137] [Emphasis added]

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[133] *Delaware River Joint Toll Bridge Commission v. Colburn*. 320 U.S. 419. 1940. https://supreme.justia.com/cases/federal/us/310/419/

[134] *Dyer v. Sims*. 341 U.S. 22 at 28. 1951. https://supreme.justia.com/cases/federal/us/341/22/

[135] *Petty v. Tennessee-Missouri Bridge Comm'n*. 359 U.S. 275 at 278. 1959. https://supreme.justia.com/cases/federal/us/359/275/

[136] *Ibid.*

[137] *Cuyler v. Adams*. 449 U.S. 433, 439. 1981. https://supreme.justia.com/cases/federal/us/449/433/

Specifically, the Court concluded in *Cuyler v. Adams:*

> "[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, **Congress' consent transforms the States' agreement into federal law** under the Compact Clause, and construction of that agreement presents a federal question."[138] [Emphasis added]

The Court then applied this principle to the congressional act consenting to the Interstate Agreement on Detainers:

> "Because this Act was intended to be a grant of consent under the Compact Clause, and **because the subject matter of the Act is an appropriate subject for congressional legislation,** we conclude that the Detainer Agreement is a congressionally sanctioned interstate compact **the interpretation of which presents a question of federal law**."[139] [Emphasis added]

The Court thus overturned the 1874 *Murdock* principle in connection with interstate compacts. This action enabled it to ignore the Pennsylvania Supreme Court's interpretation of the Interstate Agreement on Detainers and interpret that compact on its own.[140,141] See section 9.23.5.

5.11. ADJUDICATION AND ENFORCEMENT OF INTERSTATE COMPACTS

Article III, section 2, clause 2 of the U.S. Constitution states:

> "**In all Cases** affecting Ambassadors, other public Ministers and Consuls, and those **in which a State shall be Party, the Supreme Court shall have original Jurisdiction**."[142] [Emphasis added]

Joseph F. Zimmerman summarized the implementation of this provision in his book *Interstate Disputes: The Supreme Court's Original Jurisdiction*:

> "The court decided to exercise its original jurisdiction over interstate controversies on a discretionary basis and promulgated Rule 17 governing the procedures to be followed when a state desires to sue a sister state. The court employs three criteria to determine whether it should invoke its original jurisdiction to resolve an interstate dispute:
>
> "(1) whether the complainant state is a genuine or nominal party,
> "(2) a judiciable controversy exists, and
> "(3) the dispute is an appropriate one for the court to adjudicate.

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[138] *Ibid.* at Page 434.

[139] *Ibid.* at Page 441.

[140] Hardy, Paul T. 1982. *Interstate Compacts: The Ties That Bind*. Athens, GA: Institute of Government, University of Georgia.

[141] Zimmerman, Joseph F. 2012. *Interstate Cooperation: Compacts and Administrative Agreements*. Westport, CT: Praeger. Second edition.

[142] U.S. Constitution. Article III, section 2, clause 2.

> "The Supreme Court, when it invokes its original jurisdiction, appoints a special master to collect evidence, determine the facts in the dispute, and prepare a report for the Court. The special master performs a role similar to the role of a U.S. District Court judge with the master's recommendations subject to appeal by the party state to the Supreme Court."[143]

A recent example of a suit in the U.S. Supreme Court concerning the interpretation of an interstate compact occurred in 2001 when the Court granted a request by Kansas to file a bill of complaint in equity against Colorado under the Arkansas River Basin Compact.[144]

After the special master issued his report, Colorado raised four objections, and Kansas raised one objection to the report. One of Colorado's objections to the special master's report was based on the 11th Amendment, which provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In its decision in *Kansas v. Colorado*, the Supreme Court rejected Colorado's argument that the 11th Amendment barred a damages award for Colorado's violation of the compact because the damages were losses suffered by individual farmers in Kansas and not by the State of Kansas.[145]

Nebraska's participation in the Central Interstate Low-Level Radioactive Waste Compact[146] created controversy over a 20-year period starting in the 1980s. As discussed in section 5.7, an initiative petition was used in Nebraska in 1988 in an unsuccessful attempt to repeal the law authorizing Nebraska's participation in the compact. Then, after 11 additional years of controversy, the legislature decided to withdraw from the compact. Nebraska's change of heart proved costly. The Central Interstate Low-Level Radioactive Waste Commission filed a federal lawsuit resulting from Nebraska's withdrawal from the compact and its alleged refusal to meet its contractual obligations to store the radioactive waste. Waste generators and the compact commission's contractor filed a suit in the U.S. District Court for the District of Nebraska, alleging that the state of Nebraska had deliberately delayed review of their license application for eight years and that it had always intended to deny it. The federal court ruled in 1999 that Nebraska had waived its 11th Amendment immunity when it joined the compact.[147] In 2001, the U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's decision.[148] In 2004, Nebraska agreed to settle the lawsuit for $141,000,000.[149]

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[143] Zimmerman, Joseph F. 2006. *Interstate Disputes: The Supreme Court's Original Jurisdiction.* Albany, NY: State University of New York Press. Page 42.

[144] Arkansas River Basin Compact of 1965. https://compacts.csg.org/compact/arkansas-river-compact-of-1965/

[145] *Kansas v. Colorado*. 533 U.S. 1. 2001. https://supreme.justia.com/cases/federal/us/533/1/

[146] Central Interstate Low-Level Radioactive Waste Compact. https://compacts.csg.org/compact/central-interstate-low-level-radioactive-waste-compact/

[147] *Entergy, Arkansas, Incorporated v. Nebraska*, 68 F.Supp.2d 1093 at 1100 (D.Neb.1999).

[148] *Entergy, Arkansas, Incorporated v. Nebraska*, 241 F.3d 979 at 991–992 (8th Cir. 2001).

[149] *Lincoln Journal Star*. July 15, 2005.

An individual or a state may challenge the validity of a compact in state or federal court. Similarly, an individual or a state may bring suit to have provisions of a compact enforced. In general, the 11th Amendment forbids a federal court from considering a suit in law or equity against a state, brought by a citizen of a sister state or a foreign nation. Notwithstanding the 11th Amendment, a citizen can challenge a compact or its execution in a state or federal court in a proceeding to prevent a public officer from enforcing it.

If brought in a state court, the suit can potentially be removed to a United States district court under provisions of the Removal of Causes Act of 1920 on the grounds that the state court "might conceivably be interested in the outcome of the case."[150]

The granting of consent suggests that Congress may enforce compact provisions; however, in practice, enforcement of interstate compacts is usually left to the courts.

5.12. AMENDMENTS TO INTERSTATE COMPACTS

States may amend an interstate compact to which they are a party. Proposed amendments to an interstate compact typically follow the same process employed in the enactment of the original compact (e.g., approval of a bill by the legislature and Governor). For example, the Tri-States Lotto Compact provides:

> "Amendments and supplements to this compact may be adopted by concurrent legislation of the party states."

In addition, if the original compact received congressional consent, then the consent of Congress is necessary for an amendment to it.

As a matter of practical politics, an objection by a member of Congress who represents an area affected by a compact will often be able to halt congressional consideration of consent. This fact is illustrated by the experience of the New Jersey Legislature and the New York Legislature, which each enacted an amendment to the Port Authority of New York and New Jersey Compact (signed by the two Governors) allowing the Port Authority to initiate industrial development projects.

Representative Elizabeth Holtzman of New York delayed the consent bill on the grounds that the Port Authority had failed to solve the port's transportation problems. Holtzman argued that the Port Authority should construct a railroad freight tunnel under the Hudson River to obviate the need of trains to travel 125 miles to the north to a rail bridge over the river. She removed the hold upon reaching a negotiated agreement with the Authority. The Port Authority agreed that it would finance an independent study of the economic feasibility of constructing such a tunnel. The study ultimately reached the conclusion that a rail freight tunnel would not be economically viable.

The Constitution (section 10 of Article I) authorizes Congress to revise state statutes levying import and export duties; however, it does not grant similar authority to revise interstate compacts. Congress withdrew its consent to a Kentucky–Pennsylvania Interstate Compact that stipulated that the Ohio River should be kept free of obstructions. In 1855, the U.S. Supreme Court ruled in *Pennsylvania v. Wheeling and Belmont Bridge Company* that the compact was constitutional under the Constitution's Supremacy Clause

[150] 41 Stat. 554.

(Article VI) and that a compact approved by Congress did not restrict Congress' power to regulate an interstate compact.[151] In *Louisville Bridge Company v. United States* in 1917, the Court ruled that Congress may amend a compact even in the absence of a specific provision reserving to Congress the authority to alter, amend, or repeal the compact.[152] A federal statute terminating a compact is not subject to the due process guarantee of the Fifth Amendment to the Constitution on the grounds that this constitutional protection extends only to persons.

5.13. DURATION, TERMINATION, AND WITHDRAWAL

The duration of an interstate compact, the method of terminating a compact, and the method by which a party may withdraw from a compact are generally specified by the compact itself.

5.13.1. Duration of interstate compacts

The U.S. Constitution does not address the question of the permissible duration of interstate compacts.

The duration of some compacts has been considerable. For example, the Compact of 1785 between Maryland and Virginia[153] regulating fishing and navigation on the Chesapeake Bay and the Patowmack (Potomac) and the Pocomoke rivers was ratified by the Confederation Congress under the Articles of Confederation. Without any further action by the new Congress created by the ratification of the U.S. Constitution in 1788, this 1785 compact remained in effect until 1958, when it was replaced by the Potomac River Compact.[154]

Some compacts contain a sunset provision. For example, in the Southwestern Low-Level Radioactive Waste Disposal Compact, California agreed to serve for 35 years as the host state for the storage of radioactive waste for the states of Arizona, North Dakota, South Dakota, and California.

5.13.2. Termination of an interstate compact

Many compacts contain a termination provision.

The Colorado River Compact stipulates that termination may be authorized only by a unanimous vote of all party states.

The Central Interstate Low-Level Radioactive Waste Compact permits states to withdraw, but it specifies that the compact is not terminated until all parties leave the compact. Article VII provides:

> "The withdrawal of a party state from this compact under section d. of this Article or the revocation of a state's membership in this compact under section e.

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[151] *Pennsylvania v. Wheeling and Belmont Bridge Company*. 50 U.S. 647. 1855.

[152] *Louisville Bridge Company v. United States*. 242 U.S. 409. 1917.

[153] Compact of 1785. 1786 Md. Laws c. 1. http://www.virginiaplaces.org/pdf/mdvaapp1.pdf

[154] Potomac River Compact. Page 1. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

> of this Article shall not affect the applicability of this compact to the remaining party states.
>
> "This compact shall be terminated when all party states have withdrawn pursuant to section d. of this Article."[155]

5.13.3. Withdrawal from an interstate compact

An interstate compact is, first of all, a contract.

States enter into interstate compacts voluntarily. When a state enters into a compact, it becomes a party to that contract. Thereafter, the general principles of contract law apply to states that have entered into interstate compacts.

In particular, unless a contract provides otherwise, a party may not amend, terminate, or withdraw from a contract without the unanimous consent of all parties.

With the exception of compacts that are presumed to be permanent (e.g., boundary settlement compacts), almost all interstate compacts permit a state to withdraw. Accordingly, compacts generally specify the procedure that a party state must follow in order to withdraw.

If a state originally joined a compact by enacting a statute, withdrawal is usually accomplished by repealing that statute.

A small number of interstate compacts permit any party to withdraw instantaneously—without any advance notice to the compact's other parties and without any delay. For example, the Boating Offense Compact provides:

> "Any party state may withdraw from this compact by enacting a statute repealing the same."[156]

The Interstate Compact on Licensure of Participants in Horse Racing with Parimutuel Wagering is similar.

Many compacts specify that a state's withdrawal will not affect any "liability already incurred" or interrupt any legal process that started while the withdrawing party was a member of the compact.

For example, while the Multistate Tax Compact allows instantaneous withdrawal, it also provides:

> "Any party state may withdraw from this compact by enacting a statute repealing the same. **No withdrawal shall affect any liability already incurred by or chargeable to a party state** prior to the time of such withdrawal.
>
> "**No proceeding** commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party **shall be discontinued or terminated by the withdrawal**, nor

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[155] Central Interstate Low-Level Radioactive Waste Compact. https://compacts.csg.org/compact/central-interstate-low-level-radioactive-waste-compact/

[156] Boating Offense Compact. https://compacts.csg.org/compact/boating-offense-compact/

> shall the board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein."[157] [Emphasis added]

The Interstate Agreement on Detainers provides:

> "This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof."[158]

In contrast, the majority of interstate compacts impose both a notification requirement for withdrawal and a delay before a withdrawal becomes effective. The length of the delay is typically calibrated based on the nature of the compact.

For example, the compact on the Interstate Taxation of Motor Fuels Consumed by Interstate Buses permits withdrawal after one year's notice.

> "This compact shall enter into force when enacted into law by any 2 states. Thereafter it shall enter into force and become binding upon any state subsequently joining when such state has enacted the compact into law. Withdrawal from the compact shall be by act of the legislature of a party state, but shall not take effect until one year after the Governor of the withdrawing state has notified the Governor of each other party state, in writing, of the withdrawal."

The delay is generally based on the subject matter of the compact. It is typically lengthy in situations where the compact's remaining parties need time to make alternative arrangements or to adjust economically to a withdrawal.

For example, the Rhode Island–Massachusetts Interstate Low-Level Radioactive Waste Management Compact requires that a withdrawing state give notice five years in advance.

Some compacts impose different delays, depending on the withdrawing party's particular obligations.

For example, the Southwestern Low-Level Radioactive Waste Disposal Compact imposes a five-year delay for withdrawal on the "host" state that receives and stores the radioactive waste (California in the case of this compact), but only a two-year delay on the non-host states (Arizona, North Dakota, and South Dakota) that merely make use of California's hosting services. The host state's withdrawal would require that all of the non-host states scramble to find an alternative place to store their radioactive waste, whereas a withdrawal by a non-host state would merely necessitate that the host state adjust economically to handling a somewhat lower volume of waste."[159]

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[157] Multistate Tax Compact. https://compacts.csg.org/compact/multistate-tax-compact/ The compact is at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf The web site of the Multistate Tax Commission is at https://www.mtc.gov

[158] Interstate Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

[159] Southwestern Low-Level Radioactive Waste Disposal Compact. https://compacts.csg.org/compact/southwestern-low-level-radioactive-waste-disposal-compact/

The Texas Low-Level Radioactive Waste Disposal Compact similarly imposes a longer time delay for withdrawal by the host state.[160]

The Delaware River Basin Compact requires advance notice of at least 20 years for withdrawal, with such notice being allowed only during a five-year window every 100 years:

> "The duration of this compact shall be for an initial period of 100 years from its effective date, and it shall be continued for additional periods of 100 years if not later than 20 years nor sooner than 25 years prior to the termination of the initial period or any succeeding period none of the signatory States, by authority of an act of its Legislature, notifies the commission of intention to terminate the compact at the end of the then current 100-year period."[161]

The Interstate Compact on the Placement of Children provides:

> "Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal."[162]

The Multistate Lottery Agreement delays return of the departing lottery's share of the prize reserve fund until the expiration of the period for winners to claim their lotto prizes.

> "That [Agreement] shall continue in existence until this agreement is revoked by all of the party lotteries. The withdrawal of one or more party lotteries shall not terminate this agreement among the remaining lotteries."
>
> "A party lottery wishing to withdraw from this agreement shall give the board a six months notice of its intention to withdraw."
>
> "In the event that a party lottery terminates, voluntarily or involuntarily, or MUSL is terminated by agreement of the parties, the prize reserve fund share of the party lottery or lotteries shall not be returned to the party lottery or lotteries until the later of one year from and after the date of termination or final resolution of any pending unresolved liabilities arising from transactions processed during the tenure of the departing lottery or lotteries. The voluntary or involuntary termination of a party lottery or lotteries does not cancel any obligation to MUSL which the party lottery or lotteries incurred before the withdrawal date."[163]

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[160] Texas Low-Level Radioactive Waste Disposal Compact. https://compacts.csg.org/compact/texas-low-level-radioactive-waste-disposal-compact/

[161] Delaware River Basin Compact. https://compacts.csg.org/compact/delaware-river-basin-compact/

[162] Interstate Compact for the Placement of Children https://compacts.csg.org/compact/interstate-compact-for-the-placement-of-children/

[163] Multistate Lottery Agreement. https://compacts.csg.org/compact/multistate-lottery-agreement/ The web site of the Multistate Lottery Association (MUSL) is at https://www.musl.com/

Occasionally, a compact permits a member state to withdraw selectively from its obligations under the compact—that is, to withdraw from the compact with respect to some states, but to remain in the compact with respect to other states.

For example, the Interpleader Compact provides:

> "This compact shall continue in force and remain binding on a party state until such state shall withdraw therefrom. To be valid and effective, any withdrawal must be preceded by a formal notice in writing of one year from the appropriate authority of that state. Such notice shall be communicated to the same officer or agency in each party state with which the notice of adoption was deposited pursuant to Article VI. In the event that a state wishes to withdraw with respect to one or more states, but wishes to remain a party to this compact with other states party thereto, its notice of withdrawal shall be communicated only to those states with respect to which withdrawal is contemplated."

Although withdrawals from interstate compacts are relatively rare, they do occur.

In 1995, the Virginia General Assembly enacted a statute withdrawing from the Atlantic States Marine Fisheries Compact, complaining that Virginia's fishing quotas were too low.

Maryland withdrew from the Interstate Bus Motor Fuel Tax Compact in 1967 and from the National Guard Mutual Assistance Compact in 1981.

California withdrew from the Multistate Tax Compact[164] in 2012 because of dissatisfaction with the limited choice of methods for computing tax liability of multistate businesses. The legislature and Governor enacted a law explicitly withdrawing from the compact after a California state court declared it was unconstitutional for the state to override the limited choices provided by the compact merely by passing a law contradicting the compact.

There are examples of a state withdrawing from a compact and later rejoining it. For example, Florida withdrew from the Atlantic States Marine Fisheries Compact[165] and then subsequently rejoined.

The New York–New Jersey Waterfront Commission Compact (created in 1953) was unusual in that it had no provision for withdrawal or termination of the agreement.

Instead, the compact only provided for amendments:

> "Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other."[166]

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[164] Multistate Tax Compact. https://compacts.csg.org/compact/multistate-tax-compact/ The compact is at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf The web site of the Multistate Tax Commission is at https://www.mtc.gov

[165] Atlantic States Marine Fisheries Compact. See https://compacts.csg.org/compact/atlantic-states-marine-fisheries-compact/ and https://www.wcnyh.gov/docs/wcnyh_act.pdf

[166] Waterfront Commission Compact. Article XVI, section 3. Page 48. https://www.wcnyh.gov/docs/wcnyh_act.pdf

In recent years, New Jersey and New York have disagreed on whether to continue operation of the compact.[167,168]

In 2018, New Jersey enacted a law withdrawing from the compact and asserting that it would be "dissolved" 90 days after the New Jersey Governor issued certain notifications.[169]

New York did not concur.

A day after the New Jersey law was enacted, the Waterfront Commission sued New Jersey in federal district court, seeking an order enjoining enforcement of New Jersey's law. The district court ruled in favor of New York,[170] saying:

> "Because this concurrency requirement applies to alterations to the Compact, it applies a fortiori to New Jersey's withdrawal from and termination of the Compact, **the most substantial types of change**.…
>
> "Because [New Jersey's] unilateral directives unambiguously conflict with the Compact's concurrency requirement, [New York's] motion for summary judgment is granted."[171] [Emphasis added].

New Jersey appealed to the U.S. Court of Appeals for the Third Circuit. However, the appeals court focused on a technical issue, namely the 11th Amendment's limitation on lawsuits against states in federal courts.[172]

Because the *state* of New Jersey had been sued by the Waterfront Commission—rather than by the *state* of New York—the appeals court set aside the district court's ruling in favor of New York. The U.S. Supreme Court declined to review the appeals court's interpretation of the 11th Amendment.[173]

New Jersey then renewed its threat to withdraw from the compact.

Then, the *state* of New York (rather than the Waterfront Commission) sued the *state* of

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[167] McGeehan, Patrick. 2018. On the Waterfront, a Mob Watchdog Is Fighting to Survive. *New York Times*. January 17, 2018. https://www.nytimes.com/2018/01/17/nyregion/waterfront-commission-new-york-new-jersey-mob.html

[168] McGeehan, Patrick. 2018. Mob Watchdog Fights Trenton to Say on the Waterfront. *New York Times*. January 18, 2018.

[169] Chaffin, Joshua. 2022. Trouble on the waterfront. *Financial Times*. May 26, 2022.

[170] McGeehan, Patrick. 2018. Judge Blocks New Jersey From Backing Out of Waterfront Commission. *New York Times*. June 4, 2018. https://www.nytimes.com/2018/06/04/nyregion/new-jersey-waterfront-commission.html

McGeehan, Patrick. 2018. Mob Watchdog Fights Trenton to Stay on the Waterfront. *New York Times*. January 18, 2018.

[171] *Waterfront Comm'n of N.Y. Harbor v. Murphy*, 429 F. Supp. 3d 1, 12 (D.N.J. 2019). https://casetext.com/case/waterfront-commn-of-ny-harbor-v-murphy-1

[172] The 11th Amendment (ratified in 1795) states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[173] *Waterfront Commission of New York Harbor v. Phil Murphy, Governor of New Jersey*. https://www.supremecourt.gov/docket/docketfiles/html/public/20-772.html

New Jersey in the U.S. Supreme Court. In 2022, the U.S. Supreme Court temporarily barred New Jersey from exiting the compact until it decided the case.[174,175,176]

In 2023, the U.S. Supreme Court ruled that, given the Compact's silence on withdrawal, New Jersey could withdraw unilaterally.[177]

> "**Because the Compact is silent as to unilateral withdrawal**, the Court looks to background principles of law that would have informed the parties' understanding when they entered the Compact. As relevant here, **interstate compacts 'are construed as contracts under the principles of contract law.'** [*Tarrant Regional Water Dist. v. Herrmann*, 569 U. S. 614, 628]. **Under the default contract-law rule at the time of the Compact's formation**, a contract that contemplates "continuing performance for an indefinite time is to be interpreted as stipulating only for performance terminable at the will of either party." 1 R. Lord, *Williston on Contracts* §4:23, p. 570. Here, the States delegated their sovereign authority to the Commission on an ongoing and indefinite basis. **The default contract-law rule therefore 'speaks in the silence of the Compact' and indicates that either State may unilaterally withdraw**."[178] [Emphasis added]

The Court made it clear that New Jersey's ability to unilaterally withdraw from the Waterfront Compact depended on the silence of this particular compact on the question of withdrawal.

> "New York maintains that the Court's decision will have sweeping consequences for interstate compacts generally. But the Court's decision does not address all compacts, and States may propose language to compacts expressly allowing or prohibiting unilateral withdrawal."[179]

5.14. ADMINISTRATION OF INTERSTATE COMPACTS

About three-quarters of interstate compacts before the 1921 New York–New Jersey Port Authority Compact of 1921 were boundary-settlement compacts (where no further action of any kind was contemplated by the parties).

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[174] NBC. 2022. NY Asks SCOTUS to Stop NJ From Leaving Waterfront Commission Compact. March 14, 2022. https://www.nbcnewyork.com/news/local/ny-asks-scotus-to-stop-nj-from-leaving-waterfront-commission-compact/3598865/

[175] Biryukov, Nikita. 2022. U.S. Supreme Court blocks New Jersey's exit from Waterfront Commission. *New Jersey Monitor*. March 24, 2022. https://newjerseymonitor.com/briefs/u-s-supreme-court-blocks-new-jerseys-exit-from-waterfront-commission/

[176] *New York v. New Jersey*. U.S. Supreme Court order. March 24, 2022. https://www.supremecourt.gov/orders/courtorders/032422zr_aplc.pdf

[177] McGeehan, Patrick. 2023. Supreme Court Says New Jersey Can Break 70-Year Anti-Crime Pact With New York. *New York Times*. April 18, 2023. https://www.nytimes.com/2023/04/18/nyregion/waterfront-organized-crime-nyc-nj.html

[178] *New York v. New Jersey*. 2023. Page 1. https://www.supremecourt.gov/opinions/22pdf/156orig_k5fl.pdf

[179] *Ibid.* Page 3.

The Port Authority Compact was the first interstate compact to establish a commission to administer the subject matter of the compact.[180]

Today, about half of all interstate compacts establish commissions. The remaining compacts are simply administered by pre-existing state officials and agencies.

Joseph F. Zimmerman, in his book *Interstate Cooperation: Compacts and Administrative Agreements*,[181] points out that the compacts with commissions are typically those that are:

- facility-management compacts—that is, they are involved in running complex business operations (e.g., bridges, tunnels, airports, seaports, railroads, ferries, marine facilities, office buildings, radioactive waste storage facilities, and industrial development projects), or
- regulatory compacts—that is, they make and update regulations.

In contrast, what Zimmerman calls "compacts *sans* commissions" are typically those that are intended to implement one, or a small number of, specified policies.

For example, the Boating Offense Compact does not create a commission. This compact implements a specific policy that is expressed in one sentence, namely it gives adjoining states concurrent jurisdiction to arrest, prosecute, and try offenders of boating offenses. Article III, which is the operative section of the compact, provides:

> "If conduct is prohibited by two adjoining party states, **courts and law enforcement officers in either state** who have jurisdiction over boating offenses committed where waters form a common interstate boundary **have concurrent jurisdiction to arrest, prosecute, and try offenders** for the prohibited conduct committed anywhere on the boundary water between the two states."[182] [Emphasis added]

The rest of the compact consists of definitions, findings, and clauses concerned with joining the compact, withdrawal, severability, and other housekeeping matters.

Similarly, the Compact for Pension Portability for Educators allows educators employed by a public school, college, or university to transfer money and credits for pensionable service from one state's pension plan to that of another state. Article III provides:

> "Each state that is a party to this compact shall establish and maintain procedures adequate to **effectuate the transfer of money and pensionable service** from an exporting plan to an importing plan."[183] [Emphasis added]

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[180] New York–New Jersey Port Authority Compact of 1921. https://compacts.csg.org/compact/new-york-new-jersey-port-authority-compact-of-1921/ See also https://www.panynj.gov/port-authority/en/index.html

[181] Zimmerman, Joseph F. 2002. Interstate Cooperation: Compacts and Administrative Agreements. Westport, CT: Praeger Publishers. Chapters 4 and 5.

[182] Boating Offense Compact. Page 2. https://apps.csg.org/ncic/PDF/Boating%20Offense%20Compact.pdf See also https://compacts.csg.org/compact/boating-offense-compact/

[183] Compact for Pension Portability for Educators. Page 2. https://apps.csg.org/ncic/PDF/Compact%20for%20Pension%20Portability%20for%20Educators.pdf See also https://compacts.csg.org/compact/compact-for-pension-portability-for-educators/

The compact then provides a specific formula under which money and credits can be transferred from the educator's former pension plan to the new one.

Similarly, the Driver License Compact requires the motor vehicle department of each member state to perform the ministerial function of implementing three specific policies.

First, Article III of the compact requires each member state to report a motor-vehicle violation to the driver's home state:

> "The licensing authority of a party state **shall report** each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee."[184] [Emphasis added]

Second, Article IV of the compact specifies the action that the driver's home state must take:

> "The licensing authority in the home state … **shall give the same effect to the conduct reported** … as it would if such conduct had occurred in the home state."[185] [Emphasis added]

Third, Article V of the compact requires a member state to investigate each applicant for a new driver's license and not issue a new one under certain circumstances (but it may do so under certain other circumstances).

The Compact of 1785 is another example of a compact that simply lists the specific policies to which the parties agreed. This compact[186] regulated fishing and navigation on the Chesapeake Bay and the Patowmack (Potomac) and the Pocomoke rivers and contained 12 specific statutory provisions. This compact remained in effect until 1958, when it was replaced by the Potomac River Compact. [187]

Finally, boundary settlement compacts do not require commissions, because no further action of any kind is contemplated.

5.15. STYLE OF INTERSTATE COMPACTS

As a matter of convention, modern interstate compacts are typically organized into articles, with un-numbered sections. After each member state enacts a compact, the various articles of the compact are given numbers and letters in the state's compiled code in accordance with the state's style. Similarly, after Congress consents to a compact, its various articles may be assigned different numbers and letters. To accommodate such minor stylistic differences, compacts and congressional legislation consenting to compacts typically refer to enactment of "substantially" the same agreement by other member states.

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[184] Driver License Compact. Page 2. https://apps.csg.org/ncic/PDF/Driver%20License%20Compact.pdf See also https://compacts.csg.org/compact/driver-license-compact/

[185] *Ibid.*

[186] Compact of 1785. 1786 Md. Laws c. 1. http://www.virginiaplaces.org/pdf/mdvaapp1.pdf

[187] Potomac River Compact. Page 1. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

5.16. COMPARISON OF TREATIES AND COMPACTS

Although interstate compacts bear many similarities to international treaties, they differ in three important respects.

First, Congress may enact a statute that conflicts with an international treaty, whereas a state legislature lacks the authority to enact a statute conflicting with any provision of an interstate compact.

Second, an interstate compact is a legally binding contract that is enforceable in court. In contrast, the procedure for the enforcement of an international treaty is specified within the treaty itself. In practice, many treaties contain no specific provision for enforcement but, instead, merely rely on the goodwill of the parties.

Third, the President has sole authority to negotiate a treaty with another nation. In contrast, no provision in the Constitution stipulates the manner of negotiation of interstate compacts. Moreover, Congress has never enacted any general statute specifying procedures to be followed by a state that is contemplating entry into an interstate compact.

There is no provision of international law authorizing citizens of a signatory to a treaty to be involved in its termination. In 1838, the U.S. Supreme Court applied this principle of international law to interstate compacts. The Court ruled, in the case of *Georgetown v. Alexander Canal Company*, that citizens whose rights would be affected adversely by a compact are not parties to a compact and that they consequently can have no direct involvement in a compact's termination.[188]

5.17. COMPARISON OF UNIFORM STATE LAWS AND COMPACTS

The term "uniform state law" usually refers to a law drafted and recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL), although the term is occasionally used to refer to laws originating elsewhere.

NCCUSL is a non-governmental body formed in 1892 upon the recommendation of the American Bar Association. The Conference is most widely known for its work on the Uniform Commercial Code. Since 1892, it has produced more than 200 recommended laws in areas such as commercial law, family and domestic relations law, estates, probate and trusts, real estate, implementation of full faith and credit, interstate enforcement of judgments, and alternative dispute resolution.

Many of the Conference's recommended uniform laws have been adopted by large numbers of states, including the Uniform Anatomical Gift Act, the Uniform Fraudulent Transfer Act, the Uniform Interstate Family Support Act, the Uniform Enforcement of Foreign Judgments Act, and the Uniform Transfers to Minors Act.

There is some resemblance between an interstate compact and a uniform state law. Both, for example, entail enactment of identical statutes by a group of states.

Both an interstate compact encompassing all 50 states and the District of Columbia and a uniform state law enacted by the same 51 jurisdictions have the practical effect of establishing a uniform national policy. There are, however, a number of important differences.

First, the goal of the Conference in recommending a uniform state law is, almost al-

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[188] *Georgetown v. Alexander Canal Company*. 37 U.S. 91 at 95–96. 1838.

ways, enactment of the identical statute by *all* states. Many interstate compacts are inherently limited to a particular geographic area (e.g., the Port of New York and New Jersey Authority Compact, the Arkansas River Compact, and the Great Lakes Basin Compact) or to scattered states that are engaged in a particular activity (e.g., the Interstate Oil Compact and the Multistate Lottery Agreement).

Second, the effective date of a uniform state law is typically not contingent on identical legislation being passed in any other state. A uniform state law generally takes effect in each state as soon as each state enacts it. That is, a uniform state law stands alone, and is not tightly coordinated with the identical laws that other states may, or may not, pass.

If it happens that all 50 states enact a particular uniform state law, then the Conference's goal of establishing a uniform policy for the entire country is achieved. If a substantial fraction of the states enact a uniform state law, then the goal of uniformity is partially achieved. If only one state enacts a uniform state law, that particular statute nonetheless serves as the law of that state on the subject matter involved.

In contrast, the effective date of an interstate compact is almost always contingent on the enactment by some specified number or combination of states. The reason for this is that states typically enter into interstate compacts in order to obtain some benefit that can be obtained only by cooperative and coordinated action with one or more sister states.

Third, although the goal of the National Conference of Commissioners on Uniform State Laws is that identical laws be adopted in all states, it is very common for individual states to amend the Conference's recommended statute in response to local pressures. If the changes are not major, the Conference's goal of uniformity may nonetheless be substantially (albeit not perfectly) achieved. In contrast, adoption of an interstate compact requires a meeting of minds. Variations in substance are not allowed. Because an interstate compact is a contract, each party must accept identical wording (except for insubstantial differences such as numbering and punctuation).

Fourth, and most importantly, a uniform state law does not establish a contractual relationship among the states involved. When a state enacts a uniform state law, it undertakes no obligation to any other state. The enacting state merely seeks the benefits associated with uniform treatment of the subject matter at hand. Each state's legislature may repeal or amend a uniform state law at any time, at its own pleasure and convenience. There is no procedure for withdrawal (or advance notice required prior to withdrawal) in a uniform state law. Indeed, there is no legal entity from which to withdraw, because a uniform state law does not create any new legal entity or create any obligation to any other state. In contrast, an interstate compact establishes a contractual relationship among its member states. Once a state enters into a compact, it is legally bound to the compact's terms, including the compact's procedures for withdrawal and termination.

5.18. COMPARISON OF FEDERAL MULTI-STATE COMMISSIONS AND COMPACTS

Federal multi-state commissions bear some resemblance to the commissions that are established by some interstate compacts. There are, however, a number of important differences between federally created multi-state commissions and interstate compacts.

In 1879, Congress first recognized the need for a governmental body in a multi-state region by establishing the Mississippi River Commission. The enabling statute directed the

Commission to deepen channels; improve navigation safety; prevent destructive floods; and promote commerce, the postal system, and trade. The Commission's original members were three officers of the U.S. Army Corps of Engineers, one member of the U.S. Coast and Geodetic Survey, and three citizen members, including two civil engineers. Commission members are nominated by the President, subject to the Senate's advice and consent.

In a similar vein, the Water Resources Planning Act of 1965 authorizes the President, at the request of the concerned Governors, to establish other river basin commissions. Such commissions have been created for the Ohio River and Upper Mississippi River basins.

The best-known multi-state commission—the Tennessee Valley Authority—was created by Congress in 1933. The TVA operates in an area encompassing parts of seven states. Its purposes are to promote agricultural and industrial development, control floods, and improve navigation on the Tennessee River. The President appoints three TVA commissioners for nine-year terms, with the Senate's advice and consent. The creation of the TVA is credited to populist Senator George Norris of Nebraska, who conducted a crusade for many years against the high rates charged by electric utility companies. Aside from the benefits to the states in the Tennessee Valley, Norris and his supporters argued that the cost of TVA-generated electricity would serve as a yardstick for evaluating the rates charged by private power companies elsewhere in the country.

Although the TVA possesses broad powers to develop the river basin, the authority has largely concentrated its efforts on dams and channels, fertilizer research, and production of electricity. The TVA is generally credited with achieving considerable success in its flood control, land and forest conservation, and river-management activities. At the same time, the TVA has engendered considerable controversy over the years.

There are several differences between federal multi-state commissions and the commissions that are established by interstate compacts.

First, federal multi-state commissions are entirely creatures of the federal government. The states play no official role in enacting the enabling legislation establishing such bodies. In contrast, the states are the primary actors in interstate compacts, and each state makes its own decision as to whether to participate in a given compact.

Second, although state officials typically provide advice on appointments to federal multi-state commissions, the appointing authority for members is entirely federal—that is, the President. In contrast, the governments of the participating states generally appoint the members of commissions established by an interstate compact. Such appointments are typically made by each state's Governor.

5.19. CONGRESSIONAL INVOLVEMENT IN INTERSTATE COMPACTS

Congress may become involved with an interstate compact in any of several ways:

- explicitly consenting to a compact,
- making the federal government a party to a compact,
- consenting to a compact involving the District of Columbia,
- providing implied consent to a compact,
- consenting in advance to a particular compact,
- consenting in advance to a broad category of compacts, and
- conditionally consenting in advance to a broad category of compacts.

The Constitution does not detail the specific form or manner by which congressional consent is to be granted.

There is no constitutional limitation on the amount of time that Congress may take in considering a compact.

For example, Maryland, New York, and Pennsylvania enacted the Susquehanna River Basin Compact in 1967 and 1968, but Congress did not grant its consent until 1970. The Washington Metropolitan Area Transit Regulation Compact was approved by Maryland, Virginia, and the District of Columbia in 1958; however, the compact did not receive the consent of Congress until 1960.

Moreover, congressional consent to an interstate compact may be given at any time during the compacting process.

5.19.1. Explicit consent to a compact

Congress typically uses a joint resolution to grant consent to a compact in cases where it is not simultaneously enacting additional statutory provisions.

For example, House Joint Resolution 193 (Public Law 104–321)[189] of the 104th Congress entitled "Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact" was used to grant consent to the Emergency Management Assistance Compact in 1996.[190]

A joint resolution of Congress to consent to an interstate compact generally consists of three major parts. In the first part, Congress grants its consent:

> "Resolved by the Senate and House of Representatives of the United States in Congress assembled,
>
> "Section 1: CONGRESSIONAL CONSENT.
>
> "The Congress consents to the Emergency Management Assistance Compact entered into by Delaware, Florida, Georgia, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia and West Virginia. The compact reads substantially as follows …"

The second part of the joint resolution consists of the entire wording of the compact.

The third part of a joint resolution typically contains sections that qualify the grant of consent. Congress may include a severability clause. Congress usually includes a savings clause relating to "insubstantial difference in its form or language as adopted by the States." For example, the joint resolution concerning the Emergency Management Assistance Compact provided:

> "Section 2. RIGHT TO ALTER, AMEND, OR REPEAL.

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[189] Congressional consent was granted in Public Law 104–321 of 1996 entitled "Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact." https://www.congress.gov/104/plaws/publ321/PLAW-104publ321.pdf

[190] Emergency Management Assistance Compact. https://compacts.csg.org/compact/emergency-management-assistance-compact/

"The right to alter, amend, or repeal this joint resolution is hereby expressly reserved. The consent granted by this joint resolution shall

(1) not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the subject of the compact;
(2) not be construed as consent to the National Guard Mutual Assistance Compact;
(3) be construed as understanding that the first paragraph of Article II of the compact provides that emergencies will require procedures to provide immediate access to existing resources to make a prompt and effective response;
(4) not be construed as providing authority in Article IIIA.7 that does not otherwise exist for the suspension of statutes or ordinances;
(5) be construed as understanding that Article IIIC does not impose any affirmative obligation to exchange information, plans, and resource records on the United States or any party which has not entered into the compact; and
(6) be construed as understanding that Article XIII does not affect the authority of the President over the National Guard provided by article I of the Constitution and title 10 of the United States Code.

"Section 3. CONSTRUCTION AND SEVERABILITY.

"It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. If any part or application of this compact, or legislation enabling the compact, is held invalid, the remainder of the compact or its application to other situations or persons shall not be affected.

"Section 4. INCONSISTENCY OF LANGUAGE.

"The validity of this compact shall not be affected by any insubstantial difference in its form or language as adopted by the States."

5.19.2. Explicit consent when the federal government is party to a compact

When the federal government is a party to a compact, Congress:

- enters into the compact on behalf of the United States and
- enacts the compact as a federal law.

For example, Congress acted on the Interstate Agreement on Detainers in 1970. On that occasion, Congress performed three functions:

- entered into the compact on behalf of the United States,
- entered into the compact on behalf of the District of Columbia, and
- enacted the compact as a federal law.

In addition, Congress enacted some additional permanent statutory language (sections 5 and 6).

This 1970 law begins:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*,
>
> "[Sec. 1.] That this Act may be cited as the 'Interstate Agreement on Detainers Act.'
>
> "Sec. 2. The Interstate Agreement on Detainers is hereby **enacted into law** and **entered into by the United States on its own behalf** and **on behalf of the District of Columbia** with all jurisdictions legally joining in substantially the following form: …"[191] [Emphasis added]

At this point, Public Law 91–538 incorporated the entire Interstate Agreement on Detainers.[192] The joint resolution then concluded with several definitions and additional sections.

5.19.3. Explicit consent to a compact on behalf of the District of Columbia

Prior to enactment of the District of Columbia Home Rule Act of 1973, Congress provided explicit consent to the interstate compact involving the District.

The 1973 Home Rule Act gave the Council of the District of Columbia the power to approve interstate compacts. However, the Council's approval of a compact is, like other Council legislation, subject to a potential veto by Congress during a 30-day review period.

5.19.4. Implied consent to a compact

Congressional consent to an interstate compact need not be explicit.

The U.S. Supreme Court ruled in 1893 in *Virginia v. Tennessee*:

> "**The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied.** In many cases the consent will usually precede the compact or agreement…. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. [Justice] Story says that **the consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them**."[193] [Emphasis added]

For example, in 1823, the U.S. Supreme Court in *Green v. Biddle* noted this fact in a case involving a congressional statute that admitted Kentucky to the Union. That statute referred to the Virginia–Kentucky Interstate Compact of 1789.[194] Kentucky challenged the

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[191] Appendix L contains Public Law 91–538 of 1970 entitled "An Act to enact the Interstate Agreement on Detainers into law." https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg1397.pdf

[192] Interstate Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

[193] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

[194] *Green v. Biddle*. 21 U.S. 1. 1823.

compact on the grounds that Congress had not explicitly consented to the compact. Kentucky's challenge proved unsuccessful, because the Supreme Court ruled that a reference by Congress to the compact in the statute was sufficient to establish implied consent.

In deciding *Virginia v. Tennessee*, the Court also noted that Congress had relied, over the years, upon the compact's terms for judicial and revenue purposes, thereby implying consent.

> "**The approval by congress of the compact** entered into between the states upon their ratification of the action of their commissioners **is fairly implied** from its subsequent legislation and proceedings."[195] [Emphasis added]

Another example involves the congressional act (quoted earlier in this section) in which Congress entered the federal government and the District of Columbia into the Interstate Agreement on Detainers. The congressional act did not explicitly mention that Congress was consenting to the compact. Instead, congressional consent was implied by its action making the District of Columbia and the federal government parties to the compact.

5.19.5. Advance consent to a particular compact

Congress has occasionally granted advance permission for states to enter into certain compacts.

For example, in 1921, Congress granted its consent to a Minnesota–South Dakota compact relating to criminal jurisdiction over boundary waters. Simultaneously, Congress granted its consent in advance if Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin were to adopt a similar compact.[196]

The Boulder Canyon Project Act of 1928[197] granted congressional consent to the Colorado River Compact subject to several stipulated conditions, including approval of the modified compact by California and five of the other six states involved (it being understood, at the time, that Arizona was unlikely to join immediately).[198]

5.19.6. Advance consent to a broad category of compacts

Congress sometimes grants its consent in advance for all compacts pertaining to a particular subject without seeing—much less approving—any specific compact.

For example, Congress consented in advance to interstate crime-control compacts in the Crime Control Consent Act of 1934, which stated:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled*,

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195 *Virginia v. Tennessee*. 148 U.S. 503 at 522. 1893.

196 41 Stat. 1447.

197 45 Stat. 1057.

198 The original version of the Colorado River Compact was negotiated in 1922 by commissioners appointed by the Governors of the seven western states involved (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming). However, Arizona failed to approve that compact.

> "[Sec. 1.] That the consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they deem desirable for making effective such agreement and compacts.
>
> "Sec. 2. The right to alter, amend, or repeal this Act is hereby expressly reserved."[199]

In the Weeks Act of 1911, Congress granted unrestricted consent in advance to interstate compacts formed "for the purpose of conserving the forests and water supply."[200]

In the Tobacco Control Act of 1936, Congress authorized tobacco-producing states to enter into interstate compacts "to enable growers to receive a fair price for such tobacco."[201]

In 1939, President Franklin D. Roosevelt vetoed a bill that would have granted congressional consent in advance to states to enter into compacts relating to fishing in the Atlantic Ocean, because he considered the advance authorization contained in the bill to be overly vague.

5.19.7. Conditional advance consent to a broad category of compacts

In 1951, Congress authorized states to enter into interstate civil defense compacts that, upon enactment, were required to be filed with the U.S. House of Representatives and Senate. These compacts were all deemed to have the consent of Congress unless disapproved by a concurrent resolution within 60 days of filing.[202]

5.19.8. Duration of congressional consent

Congressional consent to an interstate compact is most commonly granted for an indefinite period of time.

However, Congress subjected the Interstate Compact to Conserve Oil and Gas and the Atlantic States Marine Fisheries Compact to sunset provisions when it first consented to those compacts. Later, Congress removed these time restrictions.[203]

The 10 compacts (involving a total of 44 states) authorized by the Low-Level Radioactive Waste Policy Act of 1980 were each approved for the limited period of five years.[204]

Congress is, of course, not obligated to renew its consent.

For example, the Northeast Interstate Dairy Compact was created by the New Eng-

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[199] https://www.law.cornell.edu/uscode/text/4/112

[200] 36 Stat. 961. https://www.law.cornell.edu/uscode/text/16/521a

[201] 49 Stat. 1239.

[202] 64 Stat. 1249.

[203] 86 Stat. 383 and 64 Stat. 467.

[204] 94 Stat. 3347.

land states[205] with authority to fix the price of milk above certain minimum prices. Congress granted its consent to this particular compact for a limited period of time. The Compact attracted considerable opposition from consumer groups as well as midwestern and western dairy states. Consumer advocates opposed the compact, because it increased the retail price of milk. Representatives of midwestern and western dairy states argued that their farmers suffered from low milk prices because of the compact. Wisconsin dairy farmers, in particular, argued that the compact effectively prevented them from selling their products in New England. In 2001, in the face of increasing political opposition, Congress failed to grant an extension to the compact, and the compact therefore became inactive.

5.19.9. Conditional consent by Congress

Congress may impose conditions in granting its consent. For example, it granted its consent to the Wabash Valley Compact in 1959[206] and the Washington Metropolitan Area Transit Regulation Compact in 1960[207] with the proviso that each compact authority had to publish certain specified data and information.

In addition, Congress generally reserves its authority over navigable waters.

Congress usually reserves its right to alter, amend, or repeal its consent to a compact.

In *Tobin v. United States* in 1962, the United States Court of Appeals for the District of Columbia Circuit upheld the authority of Congress to attach conditions to a compact.[208] The U.S. Supreme Court declined to review that decision.

5.19.10. Interaction of compacts with existing or future federal laws

There are unsettled legal questions as to whether the grant of congressional consent to an interstate compact invalidates other federal statutes containing inconsistent provisions. Courts could interpret congressional consent as repealing, relative to the interstate compact, conflicting pre-existing federal statutes.

The question also arises as to the effect of a new federal statute whose provisions conflict with an interstate compact previously approved by Congress. Ostensibly, the consent would be repealed relative to the conflicting provisions—perhaps with the exception of any vested rights protected by the Fifth Amendment to the Constitution.

5.19.11. Presidential involvement in congressional consent

An example of a presidential veto of an interstate compact occurred in 1942 involving Colorado, Kansas, and Nebraska. President Franklin D. Roosevelt vetoed a bill granting congressional consent to the Republican River Compact (perhaps preferring a Democratic river).[209]

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[205] Northeast Interstate Dairy Compact. https://www.dairycompact.org/ Also see https://en.wikipedia.org/wiki/Northeast_Interstate_Dairy_Compact

[206] 73 Stat. 694.

[207] 74 Stat. 1031.

[208] *Tobin v. United States*. 306 F.2d 270 at 272–74. 1962.

[209] Republican River Basin—Veto Message from the President of the United States. *Congressional Record*. Volume 88. Pages 3285–3286. April 2, 1942. https://www.govinfo.gov/content/pkg/GPO-CRECB-1942-pt3

In his veto message, the President said that he would approve the compact if one objectionable part were revised. The three states then revised their compact to satisfy the President's objections. Roosevelt then approved the congressional legislation consenting to the revised compact.

The failure of Congress to grant its consent for the Connecticut River and Merrimack River Flood Control Compacts in the 1930s has been attributed to the threat of a presidential veto.

5.20. FUTURE OF INTERSTATE COMPACTS

It is reasonable to predict that increasing urban sprawl may someday lead to an interstate compact that establishes an "interstate city" encompassing an urban area spread over two or more states.

Although no such interstate city has been created to date, Kansas and Missouri have entered into a compact establishing a metropolitan cultural district for Kansas City, Missouri, and Kansas City, Kansas.[210] The compact includes Missouri's Jackson County and Kansas' Wyandotte County. Other counties are eligible to join if they are adjacent to the state line or other member counties.[211]

In the same vein, the New Hampshire–Vermont Interstate School Compact[212] and the Maine-New Hampshire School District Compact[213] each established interstate school districts.

There are countervailing trends concerning regulatory compacts.

In recent years, Congress has, with increasing frequency, exercised its preemption powers to remove regulatory authority totally or partially from the states. Consequently, there has been a decrease in the number of new regulatory compacts since the mid-1960s.[214]

For example, Connecticut, New Jersey, and New York approved the Mid-Atlantic States Air Pollution Control Compact; however, Congress did not consent to that compact and instead enacted the Air Quality Act of 1967,[215] which preempted state regulatory authority over air pollution abatement.

On the other hand, economic interest groups have successfully lobbied for the establishment of regulatory compacts among states, arguing that coordinated action by the states is sufficient to solve a particular problem. Examples of industry-sponsored com-

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/pdf/GPO-CRECB-1942-pt3-7-1.pdf Information about this compact is at https://compacts.csg.org/compact/republican-river-compact/

[210] Kansas and Missouri Metropolitan Culture District Compact. https://compacts.csg.org/compact/kansas-and-missouri-metropolitan-culture-district-compact/

[211] 114 Stat. 909.

[212] New Hampshire–Vermont Interstate School Compact. https://compacts.csg.org/compact/new-hampshire-vermont-interstate-school-compact/

[213] Maine-New Hampshire School District Compact. https://compacts.csg.org/compact/maine-new-hampshire-school-district-compact/

[214] Zimmerman, Joseph F. 2005. *Congressional Preemption: Regulatory Federalism* Albany, NY: State University of New York Press.

[215] 81 Stat. 485.

pacts include the Interstate Insurance Product Regulation Compact[216] and the Interstate Compact to Conserve Oil and Gas.[217]

In recent years, groups that advocate that the states exercise their powers more vigorously, such as the Goldwater Institute in Arizona, have drafted a number of model interstate compacts that it maintains do not require congressional consent in order to take effect.[218] Several of these proposed compacts rely on the advance consent by Congress to interstate compacts in the field of crime control in the Crime Control Consent Act of 1934.

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[216] Interstate Insurance Product Regulation Compact. https://compacts.csg.org/compact/interstate-insurance-product-regulation-compact/ The Commission's web site is https://www.insurancecompact.org/

[217] Interstate Compact to Conserve Oil and Gas. https://compacts.csg.org/compact/interstate-compact-to-conserve-oil-and-gas/

[218] The Goldwater Institute (https://goldwaterinstitute.org) has proposed numerous interstate compacts over the years, including the Compact for a Balanced Budget. https://goldwaterinstitute.org/article/compact-for-a-balanced-budget/

6 The National Popular Vote Compact

The purpose of the National Popular Vote Compact is to guarantee the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

The Compact will take effect when enacted by states with a majority of the electoral votes (270 of 538). Then, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia will get all the electoral votes from all of the enacting states.

Thus, the candidate receiving the most popular votes nationwide will be guaranteed enough electoral votes to become President.

Section 6.1 presents the text (888 words) of the Compact—also known as the "Agreement Among the States to Elect the President by National Popular Vote."

Section 6.2 explains it on a section-by-section basis.

6.1. TEXT OF THE COMPACT

Table 6.1 Text of the Compact

Clause	Text
	Article I—Membership
I–1	Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.
	Article II—Right of the People in Member States to Vote for President and Vice President
II–1	Each member state shall conduct a statewide popular election for President and Vice President of the United States.
	Article III—Manner of Appointing Presidential Electors in Member States
III–1	Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a "national popular vote total" for each presidential slate.
III–2	The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the "national popular vote winner."
III–3	The presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.
III–4	At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.
III–5	The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress.

(Continued)

Table 6.1 (Continued)

Clause	Text
	Article III—Manner of Appointing Presidential Electors in Member States (continued)
III–6	In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.
III–7	If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees.
III–8	The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.
III–9	This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.
	Article IV—Other Provisions
IV–1	This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.
IV–2	Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.
IV–3	The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.
IV–4	This agreement shall terminate if the electoral college is abolished.
IV–5	If any provision of this agreement is held invalid, the remaining provisions shall not be affected.
	Article V—Definitions
V–1	For purposes of this agreement, "chief executive" shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;
V–2	"elector slate" shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;
V–3	"chief election official" shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;
V–4	"presidential elector" shall mean an elector for President and Vice President of the United States;
V–5	"presidential elector certifying official" shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors;
V–6	"presidential slate" shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;
V–7	"state" shall mean a State of the United States and the District of Columbia; and
V–8	"statewide popular election" shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

6.2. SECTION-BY-SECTION EXPLANATION OF THE COMPACT

6.2.1. Explanation of Article I—Membership

An interstate compact is both a state law and a contract.

Article I of the National Popular Vote Compact identifies the prospective parties to the contract:

> "Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement."

The potential parties to the Compact are the 51 jurisdictions that are currently entitled to appoint presidential electors under the U.S. Constitution. These jurisdictions include the 50 states and the District of Columbia (which acquired the right to appoint presidential electors under terms of the 23rd Amendment ratified in 1961).

The term "member state" refers to a jurisdiction where the Compact has been enacted into law and is currently in effect.

The uncapitalized word "state" (defined in Article V of the Compact) refers to any of these 51 jurisdictions.

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

Article II requires that each member state conduct a popular election for President and Vice President:

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

The term "statewide popular election" is defined in Article V as:

> "a general election at which votes are cast for presidential slates by individual voters and counted on a statewide basis."

From the perspective of the Compact's operation, this clause guarantees that there will be popular votes for President and Vice President to count from each member state. This clause guarantees continuation of the practice of the member states (universal since the 1880 election) to permit the people to vote for President.

As discussed in section 3.3.1, the people of the United States have no federal constitutional right to vote for President and Vice President. The voters chose presidential electors in only six states in the nation's first presidential election in 1789. The people acquired the privilege to vote for President and Vice President as a consequence of state legislative action in their respective states.

Moreover, except in Colorado, the people have no state constitutional right to vote for President and Vice President, and the existing privilege may therefore be withdrawn merely by passage of a state law. Indeed, state legislatures occasionally did precisely that in the early years of the Republic for purely political reasons. For example, just prior to the 1800 presidential election (section 2.6), the Federalist-controlled legislatures of Massachusetts and New Hampshire—each fearing Jeffersonian victories in the upcoming popular

elections in their states—repealed their existing statutes allowing the people to vote for presidential electors and vested that power in themselves.

Because every interstate compact is a contractual obligation among the member states, the provisions of a compact take precedence over any conflicting law of any member state. This principle applies regardless of when the conflicting law may have been enacted. Thus, once a state enters into an interstate compact and the compact takes effect, the state is bound by the compact's terms as long as it remains a member of the compact.

Because a compact is a legally binding contract, a state must remain in the compact until it withdraws from it in accordance with the particular compact's terms for withdrawal (section 5.13.3). Thus, in reading each provision of any interstate compact, the reader may find it useful to imagine that that provision is preceded by the preface:

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

As long as a state remains as a member of the National Popular Vote Compact, Article II establishes the right of its people to vote for President and Vice President.

In addition, this provision requires continued use by member states of another feature of presidential voting that is currently in universal use by the states, namely the short presidential ballot (section 2.14).

Under the short presidential ballot, the voter is presented with a choice among "presidential slates" containing a specifically named presidential nominee and a specifically named vice-presidential nominee. Article II of the Compact does not prevent states from displaying the names of the candidates for presidential elector on the ballot associated with the presidential candidate (as three states currently do). It merely requires that the names of the presidential candidates appear on the ballot.

The term "presidential slate" is defined in Article V of the Compact as:

> "a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons …."

The continued use of the short presidential ballot permits the aggregation, from state to state, of the popular votes that have been cast for the various presidential slates.

If, for example, the voters in a particular state were to cast separate votes for individual presidential electors (as they did in 1960 in Alabama as shown by figure 3.10a and figure 3.10b in section 3.13 and discussed further in section 9.30.12), the winning presidential electors from that state would each inevitably receive a (slightly) different number of popular votes. Thus, there would not be any single number available to add into the nationwide tally being accumulated by each presidential slate.

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

Article III is the heart of the National Popular Vote Compact. It establishes the mechanics of a nationwide popular election by prescribing the "manner of appointing presidential electors in member states."

As previously mentioned, an interstate compact is both a state law and a contract.

In particular, the National Popular Vote Compact is a state law that exercises the state's power under Article II, section 1, clause 2 of the U.S. Constitution:

> "**Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[1] [Emphasis added]

In other words, the National Popular Vote Compact is a state law that expresses the state's choice as to the manner by which it will appoint its presidential electors.

The first three clauses of Article III are the main clauses for implementing nationwide popular election of the President and Vice President.

Officials of each member state must perform three steps:

- **determining** the number of popular votes that have been cast for each presidential slate in each state
- **designating** the "national popular vote winner"
- **appointing** the presidential electors.

First Clause of Article III—the Determining Clause

The purpose of the first clause of Article III is to determine the popular-vote count from each state.

The first clause of Article III states:

> "Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a 'national popular vote total' for each presidential slate."

The phrase "the time set by law for the meeting and voting by the presidential electors" refers to federal law (section 7 of the Electoral Count Reform Act of 2022) that provides:

> "The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day."[2]

For example, the designated day for the Electoral College meeting in 2024 is Tuesday, December 17.

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

[2] Note that under the Electoral Count Act of 1887, the Electoral College meeting day was one day earlier (that is, the first Monday after the second Wednesday in December).

The term "chief election official" is defined in Article V as:

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

The "chief election official" is the official or board established for the purpose of making a final determination of the state's popular-vote count.

In most states, the "chief election official" is a board. For example, it is the State Elections Board in Oklahoma.[3] However, it is the Secretary of State in many states and the Lieutenant Governor in Alaska.

The first clause of Article III requires the chief election official of each member state to "determine" the number of popular votes cast for each presidential slate in each state.

The source of this information is the official or board in each state that is responsible for compiling and certifying the popular-vote count for President.

Appendix D shows what board or official performs this canvassing and certifying function.[4]

The number of popular votes cast for each presidential slate in each state is available shortly after Election Day.

For example, the Oklahoma State Election Board completed the process of counting and certifying the state's popular-vote vote for President a week after Election Day.

The minutes of the Oklahoma State Election Board for November 10, 2020 show that the following action was taken to certify the popular-vote count for President:

> "BUSINESS CONDUCTED: Report by the Secretary, discussion, and possible action regarding the certifications of results in the General Election held on November 3, 2020.
>
> ACTION TAKEN: Ms. Cline moved to certify the results in the General Election held on November 3, 2020. Dr. Mauldin second the motion.
>
> ROLL CALL VOTE: Mr. Montgomery—Aye; Dr. Mauldin—Aye; Ms. Cline—Aye; Motion passed 3–0. (**Summary of Results attached; Official Certification Reports signed and archived**)"[5] [Emphasis added]

Figure 6.1 shows the minutes of the State Election Board certifying the popular-vote count in Oklahoma in 2020.

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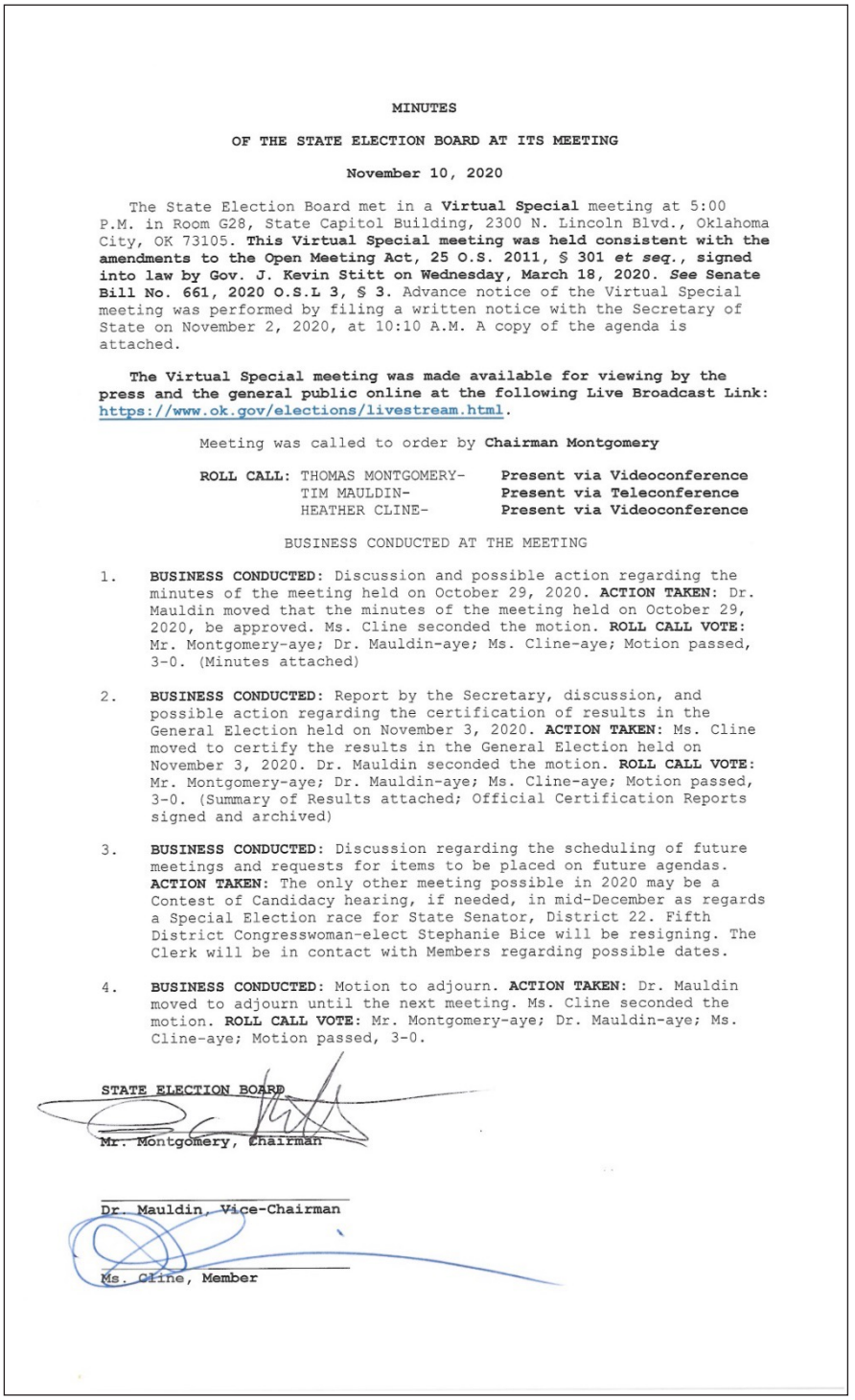
[3] Note that the "chief election official" for purposes of the Compact is not necessarily the same as the "chief election official" for purposes of other state laws. In Michigan, for example, the Board of Canvassers is the "chief election official" for purposes of the Compact. However, for purposes of the Michigan election code, the Secretary of State is the "chief election official."

[4] See also National Conference of State Legislatures. 2024. *Canvass Deadlines*. https://www.ncsl.org/elections-and-campaigns/canvass-deadlines

[5] The Oklahoma State Board of Elections met on November 10, 2020. The agenda of the meeting is available at https://oklahoma.gov/content/dam/ok/en/elections/agendas/agendas-2020/agenda-11102020.pdf. The "meeting packet" containing the statewide vote counts is at https://oklahoma.gov/content/dam/ok/en/elections/election-results/2020-election-results/2020-general-election-results/meeting-packet-11102020.pdf. The minutes of the meeting showing the Board's certification of the vote counts is at https://oklahoma.gov/content/dam/ok/en/elections/minutes/2020-minutes/minutes-11102020.pdf



MINUTES

OF THE STATE ELECTION BOARD AT ITS MEETING

November 10, 2020

The State Election Board met in a **Virtual Special** meeting at 5:00 P.M. in Room G28, State Capitol Building, 2300 N. Lincoln Blvd., Oklahoma City, OK 73105. **This Virtual Special meeting was held consistent with the amendments to the Open Meeting Act, 25 O.S. 2011, § 301 *et seq.*, signed into law by Gov. J. Kevin Stitt on Wednesday, March 18, 2020. *See* Senate Bill No. 661, 2020 O.S.L 3, § 3.** Advance notice of the Virtual Special meeting was performed by filing a written notice with the Secretary of State on November 2, 2020, at 10:10 A.M. A copy of the agenda is attached.

The Virtual Special meeting was made available for viewing by the press and the general public online at the following Live Broadcast Link: https://www.ok.gov/elections/livestream.html.

Meeting was called to order by **Chairman Montgomery**

ROLL CALL:	THOMAS MONTGOMERY-	**Present via Videoconference**
	TIM MAULDIN-	**Present via Teleconference**
	HEATHER CLINE-	**Present via Videoconference**

BUSINESS CONDUCTED AT THE MEETING

1. **BUSINESS CONDUCTED:** Discussion and possible action regarding the minutes of the meeting held on October 29, 2020. **ACTION TAKEN:** Dr. Mauldin moved that the minutes of the meeting held on October 29, 2020, be approved. Ms. Cline seconded the motion. **ROLL CALL VOTE:** Mr. Montgomery-aye; Dr. Mauldin-aye; Ms. Cline-aye; Motion passed, 3-0. (Minutes attached)

2. **BUSINESS CONDUCTED:** Report by the Secretary, discussion, and possible action regarding the certification of results in the General Election held on November 3, 2020. **ACTION TAKEN:** Ms. Cline moved to certify the results in the General Election held on November 3, 2020. Dr. Mauldin seconded the motion. **ROLL CALL VOTE:** Mr. Montgomery-aye; Dr. Mauldin-aye; Ms. Cline-aye; Motion passed, 3-0. (Summary of Results attached; Official Certification Reports signed and archived)

3. **BUSINESS CONDUCTED:** Discussion regarding the scheduling of future meetings and requests for items to be placed on future agendas. **ACTION TAKEN:** The only other meeting possible in 2020 may be a Contest of Candidacy hearing, if needed, in mid-December as regards a Special Election race for State Senator, District 22. Fifth District Congresswoman-elect Stephanie Bice will be resigning. The Clerk will be in contact with Members regarding possible dates.

4. **BUSINESS CONDUCTED:** Motion to adjourn. **ACTION TAKEN:** Dr. Mauldin moved to adjourn until the next meeting. Ms. Cline seconded the motion. **ROLL CALL VOTE:** Mr. Montgomery-aye; Dr. Mauldin-aye; Ms. Cline-aye; Motion passed, 3-0.

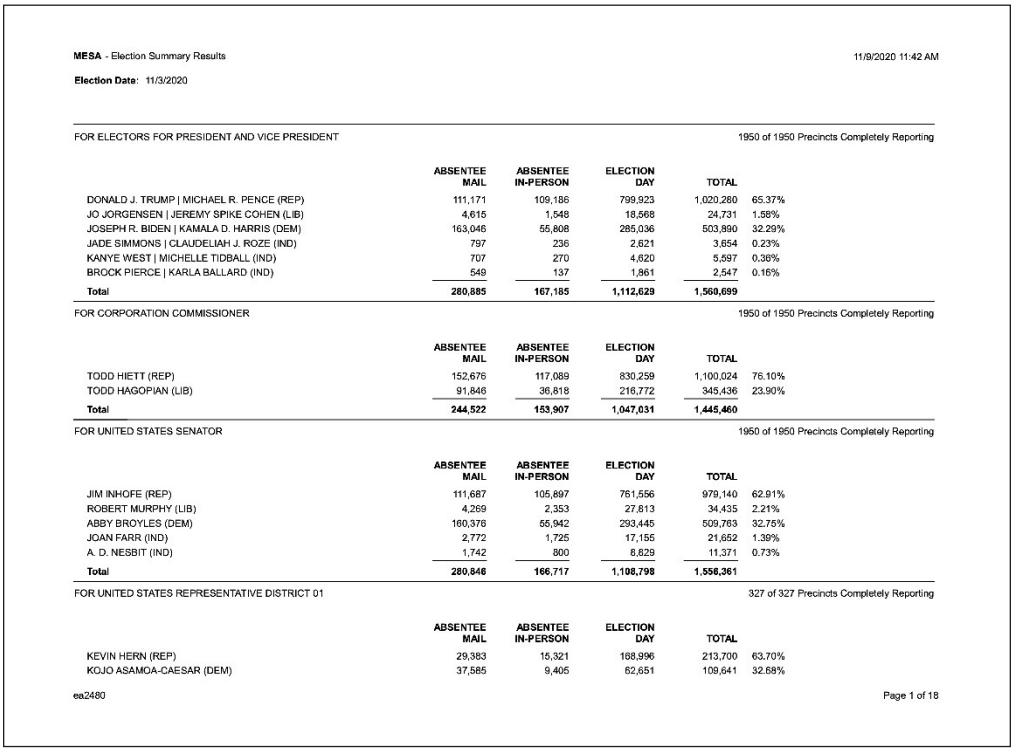
STATE ELECTION BOARD

Mr. Montgomery, Chairman

Dr. Mauldin, Vice-Chairman

Ms. Cline, Member

Figure 6.1 Minutes of the Oklahoma State Election Board certifying the 2020 popular-vote count



MESA - Election Summary Results 11/9/2020 11:42 AM

Election Date: 11/3/2020

FOR ELECTORS FOR PRESIDENT AND VICE PRESIDENT — 1950 of 1950 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
DONALD J. TRUMP | MICHAEL R. PENCE (REP)	111,171	109,186	799,923	1,020,280	65.37%
JO JORGENSEN | JEREMY SPIKE COHEN (LIB)	4,615	1,548	18,568	24,731	1.58%
JOSEPH R. BIDEN | KAMALA D. HARRIS (DEM)	163,046	55,808	285,036	503,890	32.29%
JADE SIMMONS | CLAUDELIAH J. ROZE (IND)	797	236	2,621	3,654	0.23%
KANYE WEST | MICHELLE TIDBALL (IND)	707	270	4,620	5,597	0.36%
BROCK PIERCE | KARLA BALLARD (IND)	549	137	1,861	2,547	0.16%
Total	**280,885**	**167,185**	**1,112,629**	**1,560,699**	

FOR CORPORATION COMMISSIONER — 1950 of 1950 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
TODD HIETT (REP)	152,676	117,089	830,259	1,100,024	76.10%
TODD HAGOPIAN (LIB)	91,846	36,818	216,772	345,436	23.90%
Total	**244,522**	**153,907**	**1,047,031**	**1,445,460**	

FOR UNITED STATES SENATOR — 1950 of 1950 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
JIM INHOFE (REP)	111,687	105,897	761,556	979,140	62.91%
ROBERT MURPHY (LIB)	4,269	2,353	27,813	34,435	2.21%
ABBY BROYLES (DEM)	160,376	55,942	293,445	509,763	32.75%
JOAN FARR (IND)	2,772	1,725	17,155	21,652	1.39%
A. D. NESBIT (IND)	1,742	800	8,829	11,371	0.73%
Total	**280,846**	**166,717**	**1,108,798**	**1,556,361**	

FOR UNITED STATES REPRESENTATIVE DISTRICT 01 — 327 of 327 Precincts Completely Reporting

	ABSENTEE MAIL	ABSENTEE IN-PERSON	ELECTION DAY	TOTAL	
KEVIN HERN (REP)	29,383	15,321	168,996	213,700	63.70%
KOJO ASAMOA-CAESAR (DEM)	37,585	9,405	62,651	109,641	32.68%

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Figure 6.2 Popular-vote counts certified on November 10, 2020, by the Oklahoma State Election Board

The minutes, in turn, refer to the "Official Certification Report."

Figure 6.2 shows the first page of the "Official Certification Report." That document shows that the Trump-Pence slate received 1,020,280 votes and that the Biden-Harris slate received 163,046 votes in Oklahoma in 2020.

The chief election official of each member state might, on his or her own, choose to obtain the certified popular-vote count from each state's canvassing board or official.

However, it would be much more efficient if these officials decided to streamline this process by establishing an administrative clearinghouse in which they designate one or more of their colleagues (perhaps on a rotating basis, from election to election) to act as their agent to collect and distribute copies of the certified popular-vote count produced by each state's canvassing board or official.

The work of the chief election official of each member state—whether acting unilaterally or through a clearinghouse—will be facilitated by the fact that the fourth clause of Article III of the Compact (explained below) provides a direct means by which that official will automatically receive the certified popular-vote count from each other member state.

Existing federal law (section 5 of the Electoral Count Reform Act of 2022) requires that each state's official popular vote count for President (the "canvass") be certified in the form of a Certificate of Ascertainment that is to be sent to the National Archives.

Thus, the Certificate of Ascertainment provides an additional way by which the

chief election official of each member state may receive a state's popular-vote count for President.

The popular-vote count certified by the Oklahoma State Election Board becomes incorporated into the state's "Certificate of Ascertainment."[6]

For example, Oklahoma's 2020 Certificate of Ascertainment issued by Governor Stitt (figure 9.19, figure 9.20, and figure 9.21) noted that the vote counts in his Certificate were the certified counts produced by the State Elections Board.

> "I further certify, that the votes given at said election for the Electors of President and Vice President of the United States as appears by **the certified returns of the Oklahoma State Election Board** and examined by me in accordance with the laws were as follows." [Emphasis added]

Note that the chief election official of each member state will usually not have the Certificate of Ascertainment for the member states. That is, the chief election official of each member state will usually be using the official certified popular-vote count obtained from the canvassing board or official or, in the case of another member state, the official statement sent in accordance with the fourth clause of Article III of the Compact.

The popular vote counts from all 50 states and the District of Columbia are included in the "national popular vote total" regardless of whether the jurisdiction is a member of the Compact. That is, the Compact counts the popular votes from non-member states on an equal footing with those from member states.

Of course, popular votes can only be counted from non-member states if there are popular votes available to count.

Even though all states have permitted their voters to vote for presidential electors in a "statewide popular election" since the 1880 election, non-member states are, of course, not bound by the Compact. In the unlikely event that the legislature of a non-member state were to take the presidential vote away from its own voters (perhaps lodging the choice in the legislature itself), there would be no popular-vote count available from that state. In other words, that state would be voluntarily opting out of the national popular vote count.

Article II of the Compact also requires that all member states continue to use the short presidential ballot, which enables a voter to conveniently cast a single vote for a named candidate for President and a named candidate for Vice President. In the unlikely event that a non-member state were to remove the names of the presidential nominees from the ballot and present the voters with, say, only names of the individual candidates for presidential elector and require its voters to cast separate votes for individual presidential electors as was the case in 1960 in Alabama (as shown by the ballot in figure 3.10a and figure 3.10b and discussed in section 3.13 and also section 9.30.12), there would be no popular-vote count from that state to add to each presidential slate's nationwide tally. In other words, that state would be voluntarily opting out of the national popular vote count.

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[6] The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

The Compact addresses the above two unlikely possibilities by specifying that the popular votes that are to be aggregated to produce the "national popular vote total" are those that are:

> "cast for each presidential slate in each State of the United States and in the District of Columbia **in which votes have been cast in a statewide popular election** …." [Emphasis added]

The term "statewide popular election" is defined in the eighth clause of Article V of the Compact as follows:

> "'statewide popular election' shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis."

In this way, the first clause of Article III of the Compact, in conjunction with the definition of a "statewide popular election," deals with the unlikely possibility that a state opts out of the national popular vote (as discussed in detail in section 9.31.6).

Finally, the first clause of Article III of the Compact also requires the adding up of the number of votes cast for each presidential slate in each jurisdiction in which votes have been cast in a "statewide popular election."

The result of this arithmetic is the "national popular vote total" for each presidential slate." Because each state belonging to the Compact is required to treat the certified popular-vote count from each other state as "conclusive" (as discussed below in connection in the 4th clause of Article III), the results of this arithmetic step will be the same in each member state.

Second Clause of Article III—the Designating Clause

The purpose of this clause is to identify the winner of the presidential election.

The second clause of Article III provides:

> "The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the 'national popular vote winner.'"

Third Clause of Article III—the Appointing Clause

The purpose of Article III is to appoint presidential electors.

The third clause of Article III results in the appointment of presidential electors from each member state:

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

The term "presidential elector certifying official" is defined in Article V as follows:

> "'presidential elector certifying official' shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors."

The Compact governs the appointment of presidential electors only in years when its membership possesses a majority of the electoral votes. Thus, the effect of this clause is that the "national popular vote winner" will receive a majority of the electoral votes when the Electoral College meets in mid-December.

The phrase "nominated in that state in association with the national popular vote winner" refers to the presidential slate that received the most popular votes nationwide. Candidates for the position of presidential elector are nominated, under existing state laws, by the political party (or other political organization) that nominated the presidential and vice-presidential candidate (section 3.2).

Because the purpose of the National Popular Vote Compact is to implement a nationwide popular election of the President and Vice President, it is the *national* popular vote total—not each state's separate statewide popular vote—that determines which presidential electors are appointed in each member state.

For example, if the Republican presidential slate is designated as the "national popular vote winner" under the terms of the Designating Clause (the second clause of Article III), the candidates for presidential elector nominated in association with the Republican presidential slate would win election as members of the Electoral College in every state belonging to the Compact.

Because the Compact becomes effective only when it encompasses states collectively possessing a majority of the electoral votes (i.e., 270 or more of the 538 electoral votes), the presidential slate receiving the most popular votes in all 50 states and the District of Columbia is guaranteed at least 270 electoral votes when the Electoral College meets in December. Note that the national popular vote winner may also receive additional electoral votes from states that do not belong to the Compact.

The Compact is a self-executing state law. It empowers a specific official in each member state to perform each necessary task. The three major tasks include determining the popular vote counts from all the states and adding them up to yield the "national popular vote total" (the Determining Clause), designating the "national popular vote winner" (the Designating Clause), and certifying the appointment of the presidential electors nominated in association with the national popular vote winner in their state (the Appointing Clause).

Fourth Clause of Article III—the Communication Clause

The fourth clause of Article III provides:

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

The deadline in this clause is the same safe harbor deadline contained in section 5 of the Electoral Count Reform Act of 2022 (and the earlier Electoral Count Act of 1887).

For example, the federally established Safe Harbor Day for the 2024 presidential election is Wednesday December 11 (that is, six days before the Electoral College meeting on Tuesday December 17).

This clause of the Compact is a backstop for existing state and federal deadlines.

An additional effect of explicitly stating this deadline is that each member state is, to use the Supreme Court's terminology, expressing its "legislative wish"[7] to receive the benefits of complying with the federal safe harbor deadline.

The word "communicated" in the fourth clause of Article III is intended to allow transmission of a state's "official statement" by secure electronic means that may be available (rather than, say, physical delivery of the official statement by a courier service).

Fifth Clause of Article III—the Conclusiveness Clause

The fifth clause of Article III provides:

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

This clause requires that each member state treat every other state's timely final determination of its popular-vote canvass as conclusive.

That is, the role of the chief election official of each member state is entirely ministerial.

Because federal law requires each state to certify its final determination of its popular-vote count, and because the Compact requires that the chief election official of each member state treat the count from every state as conclusive, all of the member states will, after they perform the simple arithmetic involved, arrive at the same "national popular vote total." That, in turn, means that they will all reach the same conclusion as to which presidential slate to designate as the "national popular vote winner."

Existing state and federal laws provide numerous avenues for adjudicating election disputes between aggrieved presidential candidates.

For example, a state's determination of its popular-vote count may be challenged in five ways:

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[7] The enactment by Congress of the Electoral Count Reform Act of 2022 makes it unnecessary for states to express this "legislative wish." In 2000, the U.S. Supreme Court noted the importance of a state's expressing its "legislative wish" in *Bush v. Gore* (531 U.S. 98 at 113) by saying, "In *McPherson v. Blacker*, 146 U. S. 1 (1892), we explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and 'leaves it to the legislature exclusively to define the method' of appointment. 146 U. S., at 27. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question. Title 3 U. S. C. §5 informs our application of Art. II, §1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors 'shall be conclusive, and shall govern in the counting of the electoral votes' if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush v. Palm Beach County Canvassing Bd.*, ante, at 78: 'Since §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a **legislative wish to take advantage of the 'safe harbor'** would counsel against any construction of the Election Code that Congress might deem to be a change in the law.' If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate **the legislative desire** to attain the 'safe harbor' provided by §5." [Emphasis added]

- state administrative proceedings (e.g., recounts, audits),
- state lower-court proceedings,
- state supreme court proceedings,
- federal lower-court proceedings, and
- federal proceedings at the U.S. Supreme Court.

Indeed, aggrieved presidential candidates used all five ways in both 2000 and 2020.

After the final determination of a state's popular-vote count in the state-of-origin, the Compact requires that each member state treat that state's timely final determination as conclusive.

The Conclusiveness Clause also means that the venue for initiating litigation of a state's popular-vote counts is *state-of-origin*—the same as it is today.

The state or federal courts in the state-of-origin are the appropriate place for resolving issues (under both the Compact and current system) because that is where:

- the events in question took place,
- the records exist,
- the witnesses (if any) are located, and
- the administrative officials and judges are most knowledgeable about the applicable state laws and procedures.

Note that the Conclusiveness Clause of the Compact is an analog of the Full Faith and Credit Clause of the U.S. Constitution. Once a matter is litigated in the state-of-origin, the officials of all other states must honor the decision. The Full Faith and Credit Clause states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[8]

See section 9.30.3 and section 9.30.4 for additional discussion.

Sixth Clause of Article III—National Tie-Breaking

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

> "In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state."

Seventh Clause of Article III—Back-Up Nominating Procedure

Under normal circumstances, presidential electors are nominated in accordance with each state's laws by the state political party or other organization associated with the presidential candidate.

The seventh clause of Article III is a contingency clause designed to ensure that the

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[8] U.S. Constitution. Article IV. Section 1. https://constitution.congress.gov/constitution/article-4/

presidential slate receiving the most popular votes nationwide gets what it is entitled to, namely 100% of the electoral votes of each member state. The clause states:

> "If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees."

This clause addresses five known situations that might prevent the national popular vote winner from receiving all of the electoral votes from each member state.

These unlikely situations arise because of gaps and ambiguities in state election laws concerning the nomination of presidential electors.

The seventh clause of Article III provides a rapid and decisive resolution of any situation that might prevent the presidential slate receiving the most popular votes nationwide from getting all of the electoral votes of each member state.

This clause is based on Pennsylvania's law for nominating presidential electors (section 9.1.20 and section 9.37.2). Under this law (enacted in 1937), each presidential nominee personally nominates *all* of the presidential electors who will run under his or her name in Pennsylvania.[9]

The National Popular Vote Compact uses the Pennsylvania approach only in the rare situation when an incorrect number of presidential electors have been nominated in a given state on behalf of the national popular vote winner. In those rare situations, the state's presidential elector certifying official would then certify the appointment of the national popular vote winner's nominees for presidential elector.

This back-up nominating procedure deals with five known situations.

First, a full slate of presidential electors might not be "nominated in association with" the national popular vote winner in a particular member state because ineligible persons were nominated.

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

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

Despite the Constitution's clear wording, ineligible persons have been repeatedly nominated for the position of presidential elector over the years.

In 2016, the Idaho Republican Party nominated Layne Bangerter and Melinda Smyser for presidential elector, and both were elected in the November general election when Donald Trump carried their state. However, Bangerter and Smyser were federal employees on

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

the staffs of Idaho Senators Mike Crapo and Jim Risch, respectively. Both were replaced during the Electoral College meeting on December 19, 2016, in accordance with a procedure provided by Idaho law.[10]

Similarly, in 2020, the Iowa Republican Party nominated Kolby DeWitt, a staffer for U.S. Senator Joni Ernst. He was elected as a presidential elector when Trump won the state in November. As it happens, Iowa law provides for alternate electors, and the alternate took DeWitt's place.[11]

The situation in Ohio in 2004 was considerably more complicated and had the potential to change the national outcome of the presidential election. Ohio law provides:

> "**At the state convention** of each major political party held in 1952, and in each fourth year thereafter, **persons shall be nominated as candidates for election as presidential electors** to be voted for at the succeeding general election. Within five days after the holding of each such convention, the chairman and secretary thereof shall **certify in writing to the secretary of state the names of all persons nominated at such convention** as candidates for election as presidential electors."[12] [Emphasis added]

In 2004, then-Congressman Sherrod Brown was nominated as a Democratic presidential elector at the Ohio Democratic Party's state convention.

Shortly after the convention adjourned, the Ohio Democratic Party realized that it had nominated an ineligible person to serve as presidential elector.

Congressman Brown then signed a document asserting that he was resigning his nomination as presidential elector.

Officials of the Ohio Democratic Party then executed a document nominating a replacement.

However, given that Brown had been ineligible to have been nominated as a presidential elector in the first place, it was not clear that he could resign.

Moreover, the Ohio statute specifically required that presidential electors be nominated at the state convention—not later. The Ohio statute also did not empower any official of the Ohio Democratic Party to act in lieu of the delegates to the state convention.

Ohio law contains a procedure by which the state's remaining presidential electors can fill vacancies when the Electoral College meets at the state Capitol in mid-December. However, the wording of Ohio's statute was very narrow. The procedure (§3505.39) may only be used:

> "to fill **vacancies existing because** duly elected presidential electors are not present." [Emphasis added]

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[10] Two Idaho presidential electors might be replaced for Monday vote. *Idaho Press-Tribune*. December 15, 2016. https://www.idahopress.com/news/local/two-idaho-presidential-electors-might-be-replaced-for-monday-vote/article_dc58c934-b2c9-5046-bafe-088fefe093d4.html

[11] Dockter, Mason. DeWitt bows out as 4th District elector due to constitutional concerns; Granzow to step in. *Sioux City Journal*. December 12, 2020. https://siouxcityjournal.com/news/local/govt-and-politics/dewitt-bows-out-as-4th-district-elector-due-to-constitutional-concerns-granzow-to-step-in/article_021b7220-f9b0-5594-9792-ba193a2f55ff.html

[12] Ohio Revised Code§ 3513.11.

The Democrats risked losing one electoral vote not because Congressman Brown was going to be absent from the state Capitol on the day of the Electoral College meeting, but because he had never occupied the position of presidential elector in the first place.

Prior to Election Day, the Republican Party of Ohio made it clear that they would vigorously challenge the casting of this electoral vote by *any* Democratic replacement.

The issue was significant at the time because, if John Kerry had won Ohio in 2004, the loss of one electoral vote from Ohio (in conjunction with incumbent President George W. Bush losing New Hampshire) would have resulted in a 269–269 tie in the Electoral College. Based on the partisan composition of the U.S. House of Representatives on January 6, 2005, the House would then have elected Bush as President—even though Kerry would have been entitled to 270 electoral votes.

On the other hand, if Kerry had been the national popular vote winner in 2004, and if the National Popular Vote Compact had governed the conduct of the presidential election in that year, the seventh clause of Article III would have enabled Kerry to expeditiously resolve this legal conundrum by directly nominating a Kerry supporter for the unoccupied position of presidential elector.

As it happened, Kerry did not carry Ohio in 2004, and this hair-splitting legal issue became moot.

The constitutional prohibition against federal appointees serving as presidential electors has generated murky legal questions in numerous other elections.

For example, this issue arose in two states during the prolonged dispute over the presidential election of 1876.

Republican Rutherford B. Hayes was eventually declared to have won the presidency on March 2, 1877—two days before Inauguration Day. Hayes won the presidency by a margin of 185–184 electoral votes, thanks in part to an 8–7 ruling by a special Electoral Commission that gave him all of the disputed electoral votes from Florida, Louisiana, and South Carolina.

However, two additional electoral votes were also in dispute because of the constitutional prohibition against federal appointees serving as presidential electors. Tilden would have become President if he had received either of these two other disputed electoral votes.

The Oregon Republican Party had nominated a postmaster, John W. Watts, as one of the party's three elector candidates. Hayes carried Oregon. However, Watts did not send in his letter of resignation as postmaster until the day *after* Election Day, so he was ineligible as of Election Day. Moreover, the Postmaster General did not acknowledge Watt's resignation until a week *after* Election Day.

Oregon had a law empowering the state's remaining presidential electors (two Republicans in this case) to fill a vacancy among the state's presidential electors that occurs before the date for the Electoral College meeting. However, the Democrats contended that there was no vacancy to fill, because Watts was not eligible in the first place—essentially the same hair-splitting argument that Ohio Republicans made in 2004.

Oregon Democrats in 1876 argued that the Oregon Republican Party had nominated only two candidates for presidential elector. Therefore, the popular votes cast for ineligible candidate Watts should be discarded (as if his name were never on the ballot), and that the elector candidate receiving the next-highest number of popular votes on Election Day (that

is, one of the three Democratic nominees) had been elected as the state's third presidential elector. Again, this is the same argument that Ohio Republicans were making in 2004.

Based on this argument, the Democratic Governor, Lafayette F. Grover, sent a certificate to Washington declaring two Republicans and one Democrat as the state's presidential electors.

Meanwhile, the Oregon Secretary of State submitted a conflicting certificate recognizing the three Republicans—that is, his certificate included the ineligible Postmaster.

A variation of this eligibility issue arose in Vermont. Postmaster Henry N. Sollace (a Republican elector candidate) sent his letter of resignation on the day *before* Election Day, but his resignation was not acknowledged by the Postmaster General until *after* Election Day.[13,14]

If the special Electoral Commission had sided with the Democrats in either the Oregon or Vermont case, Hayes would have lost the presidency by one electoral vote (even after receiving favorable rulings from the Commission concerning Florida, Louisiana, and South Carolina). However, the Commission sided with Hayes by an 8–7 margin concerning both ineligible Postmasters—thus giving Hayes the presidency by one electoral vote.

Second, a third-party or independent candidate could theoretically win the national popular vote without being on the ballot in every state. Third-party or independent presidential candidates who have significant national support generally qualify for the ballot in every state (section 9.30.16). Indeed, a candidate who wins the most popular votes nationwide will, almost certainly, have managed to be on the ballot in every state. In the unlikely event that a minor-party or independent presidential candidate wins the national popular vote, but fails to get onto the ballot in a particular compacting state, there would not be any presidential electors "nominated in association with" the nationwide winner in that particular state.[15] The seventh clause of Article III of the Compact provides a way for that candidate to receive the electoral votes to which he or she is entitled from the member state. It does so by empowering a national popular vote winner to directly nominate presidential electors if the correct number of electors have not been provided through the normal operation of state law.

Third, because of the use of fusion voting in some states, the possibility exists that more presidential electors might be nominated in association with a presidential candidate than the state is entitled to send to the Electoral College. Fusion voting (section 3.12) creates the theoretical possibility that two or more competing slates of presidential electors could be nominated by different political parties in association with the same presidential slate.

Because fusion voting is routinely used in New York, the procedures for handling it in connection with presidential elector slates are a settled issue there. For example, in 2004, voters in New York had the opportunity to vote for the Bush–Cheney presidential

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[13] Holt, Michael F. 2008. *By One Vote: The Disputed Presidential Election of 1876*. Lawrence, KS: University Press of Kansas. Pages 201–203.

[14] Morris, Roy B. 2003. *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*. Waterville, ME: Thorndike Press.

[15] Note that it is possible in many states for a candidate who is not on the ballot to nonetheless file a slate of presidential electors with state election officials so that they can receive write-in votes. See section 3.9.

slate on either the Republican Party line or the Conservative Party line (as shown by the voting machine face in figure 3.8 in section 3.12). Political parties supporting the same presidential-vice-presidential slate generally nominate a common slate of candidates for presidential electors. Thus, the Republican and Conservative parties nominated the same slate of 31 presidential electors for the 2004 presidential election. The popular votes cast for Bush–Cheney on the Republican and Conservative lines were added together and treated as votes for all 31 Republican-Conservative candidates for presidential elector. Similarly, the popular votes cast for the Kerry–Edwards slate on the Democratic Party line and the Working Families Party line were aggregated and attributed to the common Kerry–Edwards slate of presidential electors. In 2004, the Kerry–Edwards presidential slate received the most popular votes in New York and was therefore declared to be elected to the Electoral College. New York's 2004 Certificate of Ascertainment shows this aggregation.[16]

Fusion voting is currently permissible under the laws of several other states under various circumstances. The laws of states could lead to situations in which two competing elector slates are nominated under the banner of the same presidential slate. The seventh clause of Article III provides a way to remedy the unlikely situation of there being two fully populated elector slates with different elector(s) supporting the same national popular vote winner.

Fourth, there is another way in which more presidential electors might be nominated in association with a particular presidential candidate than the state is entitled to send to the Electoral College. In states permitting advance filing of write-in candidates for President (section 3.9), different slates of presidential electors might be filed in association with the same write-in presidential slate. In the unlikely event that such a presidential slate were to win the national popular vote, the winning presidential candidate would have twice as many presidential electors associated with his candidacy in the state involved. The seventh clause of Article III provides an expeditious way for the winning presidential candidate to pare down the list of presidential electors in that state.

Fifth, in some states permitting presidential write-ins, it is possible that an insufficient number of presidential electors may be nominated in association with a particular presidential slate. For example, the Minnesota election code does not specifically require that a full slate of 10 presidential electors be identified at the time of the advance filing of write-in slates (section 3.9). In fact, the law only requires advance filing of the name of one presidential elector, even though Minnesota has 10 electoral votes.[17] Moreover, voters in Minnesota may cast write-in votes for President without advance filing, and it is therefore possible (albeit unlikely) for the national popular vote winner to be a write-in.

Eighth Clause of Article III—Public Information Clause

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

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[16] New York's entire 2004 Certificate of Ascertainment is shown in appendix H (page 809) of the 4th edition of this book available at https://www.every-vote-equal.com/4th-edition

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

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

The unmodified term "statement" is intended to refer to the "official statements" of a state's final determination of its presidential vote (such as required from member states by the fourth clause of Article III) and any intermediate statements that the chief election official may obtain at any time during the process of determining a state's presidential vote. The unmodified term "statement" is also intended to encompass the variety of types of documentation used by various states for officially recording and reporting their presidential count.

For example, the minutes or other records by a state Board of Canvassers (or other board or official) of a certification of the state's popular-vote count would be such a "statement." Of course, a Certificate of Ascertainment issued by the state in accordance with federal law[18] would also be considered to be a "statement."

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

Ninth Clause of Article III—the Governing Clause

The ninth clause of Article III provides:

> "This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes."

This clause operates in conjunction with the first clause of Article IV relating to the date when the National Popular Vote Compact as a whole first comes into effect:

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

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

- the national nominating conventions,[19]
- the fall general election campaign period,
- Election Day on the Tuesday after the first Monday in November,

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

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

- the Electoral College meeting on the first Tuesday after the second Wednesday in December,
- the counting of the electoral votes by Congress on January 6, and
- the scheduled inauguration of the President and Vice President for the new term on January 20.

The ninth clause of Article III addresses the question of whether Article III governs the conduct of the presidential election in a particular year, whereas the first clause of Article V specifies when the Compact as a whole initially comes into effect.

As long as the compacting states possess a majority of the electoral votes on July 20 of a presidential election year, the ninth clause specifies that Article III will govern the upcoming presidential election.

The ninth clause is important because it is theoretically possible that the National Popular Vote Compact could come into effect by virtue of enactment by states collectively possessing a majority of the votes in the Electoral College (currently 270 out of 538), but at some future time, the compacting states might no longer possess a majority of the electoral votes.

This situation could arise in at least five different ways, including a:

- reapportionment of electoral votes among the states resulting from the census held every 10 years,
- change in the total number of electoral votes resulting from the admission of a new state to the Union,
- change in the total number of electoral votes resulting from a federal statutory change in the size of the U.S. House of Representatives,
- change in the total number of electoral votes resulting from a constitutional amendment, and
- withdrawal by a state from the Compact.

The first possibility is that a future federal census might reduce the number of electoral votes cumulatively possessed by the compacting states so that they no longer possess a majority of the electoral votes on July 20 of a presidential election year. This could occur, for example, if the compacting states were to lose population relative to the remainder of the country.

If this contingency (or any of the others listed above) were to occur, the Compact as a whole would remain in effect, because it would have come into initial effect under the first clause of Article IV. However, because the majority requirement would no longer be satisfied, the ninth clause of Article III specifies that the Compact would not govern the upcoming presidential election. That is, the Compact would hibernate through the upcoming election. If subsequent enactments of the Compact were to raise the number of electoral votes possessed by the compacting states above the required majority by July 20 of a presidential election year, the ninth clause of Article III specifies that the Compact would again govern that upcoming presidential election.

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

conceivable that the compacting states would no longer possess a majority of the new number of electoral votes. For example, Puerto Rico is frequently mentioned as a potential new state.

As a third example, if the number of U.S. Representatives (set by federal statute) were changed so that the number of electoral votes possessed by the compacting states no longer accounted for a majority of the new number of electoral votes, the ninth clause of Article III specifies that the Compact would not govern the next presidential election.

Proposals to change the number of members of the House are periodically floated for a variety of reasons. One frequently mentioned reason is that congressional districts have gotten larger and larger as the total population of the country has grown. As another example, in 2005, Representative Tom Davis (R–Virginia) proposed increasing the number of Representatives from 435 to 437 on a temporary basis (until the reapportionment based on the 2010 census) in connection with his (never enacted) bill to give the District of Columbia voting representation in Congress.[20]

As a fourth example, if a federal constitutional amendment were to increase the total number of electoral votes, the number of electoral votes collectively possessed by the compacting states could fall below the required majority.

As a fifth example, if one or more states were to withdraw from the Compact and thereby reduce the number of electoral votes possessed by the remaining compacting states below the required majority on July 20 of a presidential election year, the ninth clause of Article III provides that the Compact as a whole would remain in effect but would not govern the next presidential election.

As a practical matter, the above scenarios can only arise if the number of electoral votes possessed by the compacting states were to hover close to 270.

In all likelihood, the behavior of states with respect to the Compact will parallel their behavior with respect to federal constitutional amendments in that additional states would probably approve the Compact after it first becomes effective. For example, after the 19th Amendment (women's suffrage) was ratified by the requisite number of states (36 out of 48, at the time) and became effective on August 18, 1920, over a dozen additional states signified their approval by ratifying the amendment over a period of years, starting with Connecticut in 1920.

In any case, there is little likelihood of any abrupt surprise arising from any of the five scenarios described above. None of these five scenarios occurs with head-spinning frequency. The question of whether the Compact would govern a particular presidential election would be known, in practice, long before July 20 of a presidential election year for the following reasons.

First, changes resulting from the census would never be a surprise, because the

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[20] Utah was the state that would have become entitled to one of the two additional congressional seats under the existing formula for apportioning U.S. Representatives among the states. The District of Columbia would have received the other seat. As a matter of practical politics, the two additional seats would have been expected to divide equally between the Democrats and Republicans. Under the proposed D.C. Fairness in Representation Act of 2005 (H.R. 2043), the number of seats in the House would have reverted to 435 after the 2010 census.

census does not affect congressional reapportionment until two years after the year in which the census is taken.[21]

Second, admission of a new state to the Union is a rare event, and it only occurs after a laborious multi-year process. The admission of Alaska and Hawaii in 1959 was the last time a new state has been admitted.

Third, enactment of a federal statute changing the number of seats in the U.S. House of Representatives is a time-consuming, multi-step legislative process involving approval of the bill by a committee of each house of Congress, debate and voting on the bill on the floor of each house, and presentment of the bill to the President for approval or disapproval (and consideration by the legislature as to whether to override a veto).

Fourth, enactment of a federal constitutional amendment is a time-consuming, multi-step process involving a "proposing" step at the federal level and a "ratification" step at the state level. The 23rd Amendment gave the District of Columbia electoral votes in 1961. That was the only time a constitutional amendment has altered the allocation of electoral votes.

Fifth, enactment of a state law withdrawing from the Compact is a multi-step legislative process involving approval of the bill by a committee of each house of the state legislature, debate and voting on the bill on the floor of each house, and presentment of the bill to the state's Governor for approval or disapproval (and consideration by the legislature as to whether to override a veto).[22] Moreover, in many states, a new state law does not take immediate effect but, instead, only takes effect after a (typically considerable) delay specified by the state constitution (table 9.40).

6.2.4. Explanation of Article IV—Additional Provisions

The first clause of Article IV specifies the time when the Compact initially could take effect.

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

Note that a state is not counted, for purposes of this clause, until the state statute enacting the Compact is "in effect" in the state in accordance with the state's constitutional schedule specifying when state laws take effect.

The phrase "substantially the same form" is found in numerous interstate compacts and is intended to permit minor variations (e.g., differences in punctuation, differences in numbering, typographical errors, inconsequential omission of words such as "the" or "and") that sometimes occur when the same law is enacted by various states.[23]

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[21] For example, the 2020 federal census (taken in April 2020) did not affect the allocation of electoral votes in the 2020 presidential election. Instead, the apportionment of electoral votes among the states in 2020 was based on the 2010 census.

[22] If the citizen-initiative process were used to withdraw from a compact, that process is also a time-consuming, multi-step process that typically involves an initial filing and review by a designated state official (e.g., the Attorney General), circulation of the petition, and voting in a statewide election (usually the next November general election).

[23] When Congress consents to an interstate compact, the congressional act typically contains language such as "The validity of this compact shall not be affected by any insubstantial difference in its form or language as adopted by the States." See section 5.19.1.

The second clause of Article IV permits a state to withdraw from the Compact at any time but provides for a "blackout" period that delays the withdrawal by approximately six months under certain circumstances:

> "Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term."

The purpose for the delay in the effective date of a withdrawal is to ensure that a withdrawal will not be undertaken—perhaps for partisan political purposes—in the midst of a presidential campaign and, in particular, the period encompassing Election Day in early November, the Electoral College meeting in mid-December, and the counting of electoral votes by Congress on January 6.[24] Note that the Electoral Count Reform Act of 2022 separately requires that presidential electors be appointed in accordance with laws enacted prior to Election Day. The blackout period starts on July 20 of a presidential election year and would normally end on January 20 of the following year (the scheduled inauguration date). Thus, if a statute repealing the Compact in a particular state were enacted and were to come into effect in the midst of the presidential election process, that state's withdrawal would not take effect until completion of the entire current presidential election cycle.

The date for the end of the current President's term is fixed by the 20th Amendment as January 20; however, the Amendment recognizes the possibility that a new President might, under certain circumstances, not have been "qualified" by that date. Thus, the blackout period in the Compact ends when the entire presidential election cycle is completed under the terms of the 20th Amendment.

The third clause of Article IV concerns the process by which each state notifies all of the other states of the status of the Compact. Notices are required when:

- the Compact has taken effect in a particular state;
- the Compact has taken effect generally (that is, when it appears that it has been enacted and taken effect in states cumulatively possessing a majority of the electoral votes); and
- a state's withdrawal has taken effect.

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

The fifth clause of Article IV is a severability clause.

6.2.5. Explanation of Article V—Definitions

Article V of the Compact contains definitions.

There are separate definitions for the "chief election official" and the "presidential elector certifying official," because these terms typically apply to different officials or bodies.

The definition of "presidential slate" in Article V is important because voters cast

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[24] Delays in the effective date of withdrawals are commonplace in interstate compacts. See section 5.15.3 for additional discussion on withdrawals from interstate compacts in general and section 9.25 for a discussion of withdrawal from the National Popular Vote Compact in particular.

votes for a team consisting of a presidential and vice-presidential candidate and because the votes for each distinct slate are aggregated separately in the national count. "Presidential slate" is defined as:

> "a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state."

The above definition permits the substitution of nominees on a given presidential slate if, for example, a nominee were to die during the presidential election cycle,[25] resign from a slate,[26] or become disqualified.

Because ballots in North Dakota and Arizona list only the name of the presidential candidate, the Compact's definition of "presidential slate" contains a savings clause for those states.

Note that this definition comports with present practice in that it treats a slate as a unit containing two particular candidates in a specified order. As discussed in section 3.12 and shown in figure 3.8, Ralph Nader appeared on the ballot in New York in 2004 as the presidential nominee of both the Independence Party and the Peace and Justice Party. Nader ran with Jan D. Pierce for Vice President on the Independence Party line in New York in 2004, but with Peter Miguel Camejo for Vice President on the Peace and Justice Party line. Thus, there were two different "Nader" presidential slates in New York in 2004. Each "Nader" slate had different presidential electors in New York in 2004. The votes for these two distinct "presidential slates" were counted separately (as shown on the sixth page of New York's 2004 Certificate of Ascertainment).[27] That is, there were two distinct presidential slates and two distinct slates of presidential electors. There was no fusion of votes between the Independence Party and the Peace and Justice Party in this situation.

The definition of "statewide popular election" in Article V is important. At the present time, all states conduct a "statewide popular election" for President.

However, if a state were to take the vote for President away from its voters and authorize the state legislature to appoint presidential electors (as Massachusetts and New Hampshire did in the 1800 presidential election, as described in section 2.6), there would be no popular votes available to count from that state, and that state would no longer be conducting a "statewide popular election" for purposes of the Compact.

Similarly, if a state were to abandon the short presidential ballot, that state would no longer be conducting a "statewide popular election" for purposes of the Compact.

If a state were to stop conducting a "statewide popular election," the "national popular vote total" would necessarily not include that state.

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

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

[27] New York's entire 2004 Certificate of Ascertainment is shown in appendix H (page 809) of the 4th edition of this book available at https://www.every-vote-equal.com/4th-edition

7 Strategy for Enacting the National Popular Vote Compact

The National Popular Vote Compact must be enacted by states possessing a majority of electoral votes (i.e., 270 out of 538) in order to take effect. This chapter discusses:

- the current list of states that have enacted the Compact into law (section 7.1),
- the role of state legislatures in enacting the Compact (section 7.2),
- the possible role of the citizen-initiative process (section 7.3), and
- the role of Congress (section 7.4).

7.1. CURRENT STATUS OF THE NATIONAL POPULAR VOTE COMPACT

As of July 2024, the Compact has been enacted into law by 18 jurisdictions together possessing 209 electoral votes—61 votes away from 270. It has been enacted in:

- six small jurisdictions:
  - Delaware–3 electoral votes
  - District of Columbia–3
  - Hawaii–4
  - Maine–4
  - Rhode Island–4
  - Vermont–3
- nine medium-sized states:
  - Colorado–10
  - Connecticut–7
  - Maryland–10
  - Massachusetts–11
  - Minnesota–10
  - New Jersey–14
  - New Mexico–5
  - Oregon–8
  - Washington–12
- three big states:
  - California–54
  - Illinois–19
  - New York–28

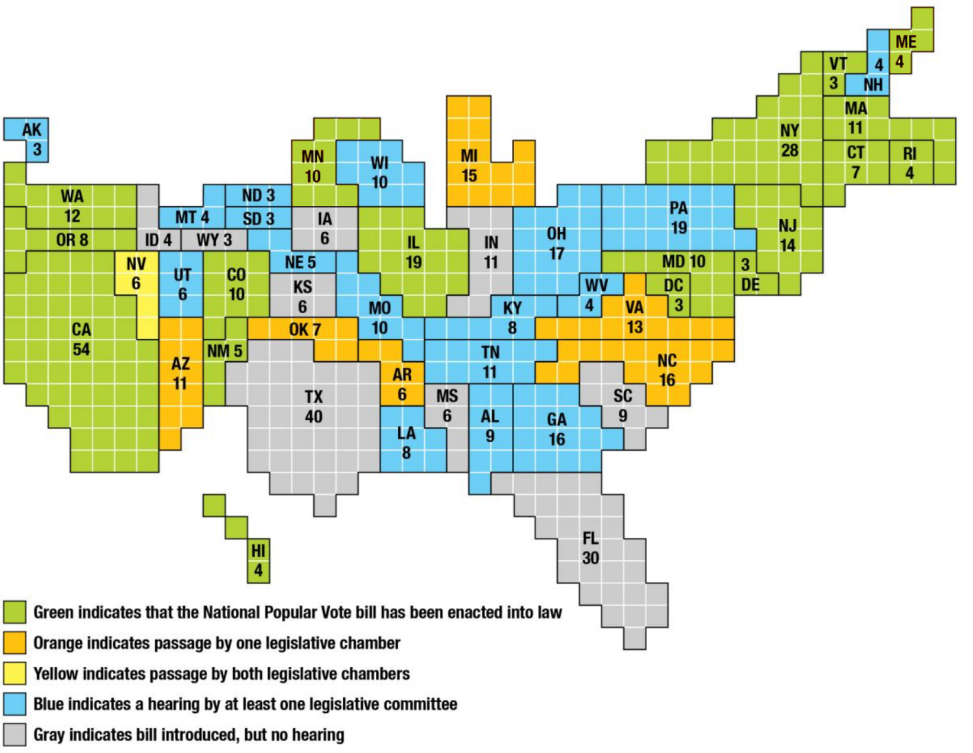

Figure 7.1 Status of the National Popular Vote Compact as of July 2024.

The National Popular Vote Compact has been approved by a total of 43 legislative chambers in 25 jurisdictions. In addition to the 35 legislative chambers of the 18 jurisdictions listed above, the bill has been approved by the following eight legislative chambers in seven states:

- Arizona House—11
- Arkansas House—6
- Michigan House—15
- Nevada Assembly and Senate[1]—6
- North Carolina Senate—16
- Oklahoma Senate—7
- Virginia House—13

A more detailed history of the National Popular Vote Compact is available online.[2] Figure 7.1 shows the status of the Compact in the various states as of July 2024.

[1] In 2023, both houses of the Nevada legislature approved a state constitutional amendment enacting the National Popular Vote Compact. See additional discussion of Nevada in section 7.2.

[2] See https://www.nationalpopularvote.com/news-history

7.2. THE ROLE OF STATE LEGISLATURES

A state legislature typically enacts an interstate compact in the same way that it enacts any other state statute.

The law-making process at the state level generally entails adoption of a proposed legislative bill by a majority vote of each house of the state legislature. In addition, all state Governors currently have veto power over bills (or at least most bills[3]) passed by their legislatures. Legislative bills are presented to the Governor for approval or disapproval.[4]

If a Governor vetoes a bill, the legislation may nonetheless become law if the legislature overrides the veto in the manner specified by the state's constitution.

Overriding a gubernatorial veto typically requires a two-thirds super-majority in each house; however, a three-fifths majority is sufficient in seven states, namely Delaware, Illinois, Maryland, Nebraska (which has a one-house legislature), North Carolina, Ohio, and Rhode Island.

A veto may be overridden by a majority in six states, namely Alabama, Arkansas, Indiana, Kentucky, Tennessee, and West Virginia.

The procedure in the District of Columbia is somewhat different. Prior to 1973, Congress typically approved interstate compacts on behalf of the District. In 1973, Congress passed the District of Columbia Home Rule Act. Under the 1973 Act, the Council of the District of Columbia has the power to approve interstate compacts. In the District's legislative process, the Mayor has veto power, and the Council has power to override a veto. Then, all legislation enacted by the District is subject to potential veto by Congress during a 30-day review period.

An interstate compact may also be adopted by a state by means of a constitutional amendment. In 2023, the Nevada state legislature approved the National Popular Vote Compact as an amendment to the state constitution.[5] If the proposed amendment is approved for a second time by the 2025–2026 legislature, the proposed amendment would be submitted to Nevada voters at the November 2026 election. Because amending the state constitution is a time-consuming multi-step process, the proposed amendment in Nevada contains a provision empowering the state legislature to withdraw from the Compact by ordinary statute—that is, by the same procedure as if the state had originally enacted the Compact by statute. The proposed amendment in Nevada provides:

> "The State of Nevada may withdraw from the National Popular Vote Compact **by statute**, and may rejoin by subsequent statute." [Emphasis added]

7.3. THE ROLE OF THE CITIZEN-INITIATIVE PROCESS

In certain jurisdictions, state statutes or state constitutional amendments may be enacted directly by the voters by means of the citizen-initiative process.

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[3] In some states, there are specific limitations on the Governor's veto power. For example, the North Carolina Governor cannot veto a redistricting bill.

[4] Council of State Governments. 2005. *The Book of the States*. Lexington, KY: The Council of State Governments. Volume 37. Pages 161–162.

[5] The history of Assembly Joint Resolution 6 of 2023 may be found at https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10288/Overview

Table 7.1 The 25 jurisdictions with the citizen-initiative process

State	Statutory initiatives	Constitutional initiatives	Status of National Popular Vote Compact as of July 2024
Alaska	Yes		
Arizona	Yes	Yes	
Arkansas	Yes	Yes	
California	Yes	Yes	Enacted
Colorado	Yes	Yes	Enacted
District of Columbia	Yes		Enacted
Florida		Yes	
Idaho	Yes	Very limited	
Illinois	Advisory only	Very limited	Enacted
Maine	Yes		Enacted
Massachusetts	Yes	Yes	Enacted
Michigan	Yes	Yes	
Missouri	Yes	Yes	
Montana	Yes	Yes	
Nebraska	Yes	Yes	
Nevada	Yes	Yes	
North Dakota	Yes	Yes	
Ohio	Yes	Yes	
Oklahoma	Yes	Yes	
Oregon	Yes	Yes	Enacted
South Dakota	Yes	Yes	
Utah	Yes		
Washington	Yes		Enacted
Wyoming	Yes		
Total	**24**	**18**	**8**

In the citizen-initiative process, if a specified number of voters sign a petition, the proposed statute or constitutional amendment will be submitted to the voters for their approval or disapproval.

Polls conducted by numerous polling organizations over a number of years—using a variety of different wordings of questions—have reported high levels of support for a national popular vote (section 9.22).

This fact suggests that the citizen-initiative process can, and should, be used to enact the National Popular Vote Compact in certain states.

7.3.1. STATES WITH THE CITIZEN-INITIATIVE PROCESS

The voters in 23 states and the District of Columbia have the power to enact statutes through the citizen-initiative process.

In 18 states, the voters also have the power to enact state constitutional amendments through the citizen-initiative process. These states include Florida—a state that does not have the statutory initiative process.

Thus, a total of 25 jurisdictions permit either statutory or constitutional initiatives, as shown in table 7.1.[6]

The National Popular Vote Compact has been enacted in eight of these 25 jurisdictions as of July 2024, as shown in the last column of the table. Thus, there are 17 jurisdictions where the Compact could potentially be enacted using the citizen-initiative process.

One of the co-authors of this book (Joseph F. Zimmerman) wrote *The Initiative: Citizen Law-Making*—a book that provides details on the constitutional and statutory provisions governing the initiative processes in the various states.[7]

In addition, a vast amount of information about the citizen-initiative process is available from the Ballot Initiative Strategy Center.[8]

7.3.2. History of the initiative process

The origin of the citizen-initiative process is generally attributed to various Swiss cantons in the early 19th century.[9]

In 1898, the state constitution of South Dakota was amended to permit the citizen-initiative process.

Oregon adopted the process in 1902. Then, in 1904, Oregon voters became the first in the United States to use the citizen-initiative process to enact new state laws. Those laws created a direct primary and a local option for liquor.[10]

The initiative process spread rapidly to additional states as part of the Progressive movement in the early 20th century.

In 1908, Maine adopted the initiative and referendum processes.

In 1911, California voters adopted the initiative process in the belief that it would reduce the dominance of the state legislature by the railroads and other corporations and that it would reduce the power of political machines.

By 1918, 19 states had adopted the citizen-initiative process. All were west of the Mississippi River, except for Maine, Massachusetts, and Ohio.

The initiative process was included in Alaska's original constitution at the time of that state's admission to the Union in 1959.[11]

7.3.3. The protest-referendum process

In many of the states with the citizen-initiative process, the voters have reserved to themselves an additional power called the "protest-referendum" (or "veto-referendum") process.

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[6] Mississippi had a (rarely used) initiative process for constitutional amendments until the Mississippi Supreme Court declared the process inoperative in 2021. As of May 2024, attempts to restore the initiative process in Mississippi have not been successful. Pender, Geoff. 2023. Senate kills Mississippi ballot initiative without a vote. *Mississippi Today*. March 23, 2023. https://mississippitoday.org/2023/03/23/mississippi-ballot-initiative-dies-again-without-vote/

[7] Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger. Pages 24–25.

[8] The web site of the Ballot Initiative Strategy Center is https://ballot.org.

[9] Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

[10] Eaton, Allen J. 1912. *The Oregon System: The Story of Direct Legislation in Oregon*. Chicago, IL: A.C. McClurg & Co.

[11] Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

This process enables voters to sign a petition to temporarily suspend a law enacted by the legislature and subsequently vote on whether to retain the law in a statewide referendum.

The protest-referendum process must be invoked in a limited period of time immediately after the enactment of the statute. After the expiration of that period, the citizen-initiative process (if it exists in that particular state) could potentially be used to enact a law repealing the statute.

The protest-referendum process is described in the book *The Referendum: The People Decide Public Policy*[12] by Professor Joseph F. Zimmerman (who is also co-author of this book).

The Michigan Constitution (Article II, section 9) provides a good description of both the citizen-initiative process and the protest-referendum process:

> "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for Governor at the last preceding general election at which a Governor was elected shall be required.
>
> "No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.
>
> "Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.
>
> "If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.
>
> "Any law submitted to the people by either initiative or referendum petition and

[12] Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

> approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the Governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail."[13]

The Arizona Constitution provides:

> "The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."[14]

The Ohio Constitution provides:

> "The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives, but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."[15]

7.3.4. Interstate compacts and the citizen-initiative and protest-referendum processes

An interstate compact is both a state law and a legally binding contract among the states involved (chapter 5).

There is no provision of any state constitution that specifically singles out interstate compacts as being ineligible for enactment by the voters by means of the citizen-initiative process or immune from repeal using the protest-referendum process.

Nonetheless, there are numerous state-specific limitations as to subject matter eligible for the citizen-initiative and protest-referendum processes.[16,17]

In general, the subject-matter restraints on the protest-referendum process are more

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[13] Michigan Constitution. Article II, section 9.

[14] Arizona Constitution. Article I, section 1.

[15] Ohio Constitution. Article II, section 1.

[16] Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

[17] The limitations in Illinois are extremely severe. The statutory initiative process in Illinois is advisory only, and the state's constitutional initiative process is limited to matters relating to legislative procedure. Thus,

severe than those applying to the initiative process.[18] For example, in many states, the protest-referendum process cannot be applied to appropriations and other measures involving the support of governmental operations, emergency measures, and the judiciary.

Having said that, both the citizen-initiative and protest-referendum processes have been used in connection with interstate compacts.

In 1988, an initiative petition forced a statewide vote on the question of repealing a law providing for Nebraska's participation in the Central Interstate Low-Level Radioactive Waste Compact. The citizen-initiative process was used because the law involved had been enacted several years earlier by the legislature. In the statewide vote on Proposition 402, voters rejected the proposition to repeal the compact.

In South Dakota in 1984, there was a statewide vote on whether to require the approval of the voters on the state's participation in any nuclear-waste-disposal compact. The measure passed 182,952 to 112,161. In 1985, the South Dakota Supreme Court upheld the referral of the Dakota Interstate Low-Level Radioactive Waste Management Compact to voters.[19]

In addition, legislatures have occasionally directly referred enactment of an interstate compact to their voters. For example, the Maine legislature referred the question of enactment of the Texas Low-Level Radioactive Waste Disposal Compact to its voters in 1993. The question on the ballot was:

> "Do you approve of the interstate compact to be made with Texas, Maine and Vermont for the disposal of the State's low-level radioactive waste at a proposed facility in the State of Texas?"

The proposition received 170,411 "yes" votes and 63,672 "no" votes.

In 2019, the Colorado legislature passed the National Popular Vote Compact, and Governor Jared Polis signed the legislation.[20] Shortly thereafter, the Protect Colorado's Vote organization[21] circulated a protest-referendum petition seeking repeal of the Compact. The Colorado Secretary of State certified the validity of the petition in August 2019—thereby temporarily suspending the state's approval of the Compact until a statewide referendum could be held on the issue.[22]

In the Colorado campaign in 2020, the Compact was defended by the Yes on National Popular Vote organization,[23] Coloradans for National Popular Vote, and Conservatives for Yes on National Popular Vote.

In the statewide vote on Proposition 113 in November 2020, Colorado voters supported

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it would not be possible to enact an interstate compact using the initiative process in Illinois. As it happens, the National Popular Vote Compact has been enacted into law by the legislature and Governor in Illinois.

[18] Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

[19] *Wyatt v. Kundert*. 375 N.W.2d 186 (1985).

[20] Colorado Senate Bill 42 of 2019. https://leg.colorado.gov/bills/sb19-042

[21] https://www.protectcoloradosvote.org/

[22] Davies, Emily. 2019. Colorado approved a national popular vote law. Now it might be repealed. August 2, 2019. *Washington Post*. https://www.washingtonpost.com/politics/colorado-approved-a-national-popular-vote-law-now-it-might-be-repealed/2019/08/02/a305b1de-b468-11e9-8e94-71a35969e4d8_story.html

[23] https://www.YesOnNationalPopularVote.com

the decision of the legislature and Governor to enact the National Popular Vote Compact.[24] Ballotpedia[25] and the National Popular Vote web site[26] provide historical information about the campaign.

7.3.5. May the National Popular Vote Compact be enacted using the citizen-initiative process?

The adoption of the citizen-initiative and protest-referendum processes in the early 20th century has raised the question as to whether a state's voters may exercise these processes in connection with functions that the federal Constitution assigns to state legislatures.

The federal functions to be performed by state legislatures include:

- enactment of state laws governing the conduct of congressional elections—including redistricting—under Article I of the Constitution;
- enactment of state laws expressing a state's choice of the method of its appointing presidential electors under Article II of the Constitution (e.g., the National Popular Vote Compact);
- election of U.S. Senators by the state legislature before the 17th Amendment (ratified in 1913) providing for direct popular election of Senators;
- enactment of state laws regarding the filling of vacancies in U.S. Senate seats after ratification of the 17th Amendment; and
- ratification of federal constitutional amendments, calling state conventions to ratify federal constitutional amendments, and calling a federal constitutional convention.

Article II, section 1, clause 2 of the U.S. Constitution is particularly relevant to the National Popular Vote Compact. It provides:

> "Each State shall appoint, in such Manner as the **Legislature** thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress …." [Emphasis added]

The specific question relevant to the National Popular Vote Compact is whether it may be enacted using the citizen-initiative process (or repealed using the protest-referendum process).

An answer to this question requires an examination of the way that the word "legislature" is used in the U.S. Constitution.

In the century before the 2015 case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, most constitutional scholars would have unhesitatingly opined that the word "legislature" in Article II does not refer to merely the two chambers of the state legislature. Instead, prevailing opinion was that the lawmaking process also includes:

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[24] The official election returns for Proposition 113 are at https://results.enr.clarityelections.com/CO/105975/web.264614/#/detail/1126

[25] Ballotpedia. Colorado Proposition 113, National Popular Vote Interstate Compact Referendum (2020). https://ballotpedia.org/Colorado_Proposition_113,_National_Popular_Vote_Interstate_Compact_Referendum_(2020)

[26] See the Colorado page at the National Popular Vote web site at https://www.nationalpopularvote.com/state/co

- the state's Governor (an official who is manifestly not a member of the legislature), and
- in states that have the citizen-initiative and protest-referendum processes, the state's voters, who, like the Governor, are manifestly not members of the legislature.

Indeed, the Supreme Court's 5–4 ruling in the *Arizona* case in 2015 reached the conclusion that the state's voters could use the citizen-initiative process to create a commission to redistrict the state.

However, the dissenting opinions (notably that of Chief Justice John Roberts) in the *Arizona* decision were exceptionally vigorous.

After President Trump made three appointments to the Supreme Court between 2017 and 2020, many constitutional scholars predicted that the Court was poised to reverse its 2015 decision in *Arizona*.

Moreover, during the same period, a minority of constitutional lawyers were vigorously advancing the so-called "independent state legislature" theory in connection with state laws relating to both congressional elections (under Article I of the Constitution) and presidential elections (under Article II).

Under this theory, when a state legislature enacts laws relating to congressional and presidential elections, it is operating exclusively under authority of the U.S. Constitution. Thus, the state legislature is outside the constraints of its own state constitution (which might, among many things, authorize use of the citizen-initiative process to enact state laws in lieu of the legislature).[27,28]

Under one particularly expansive variation of the theory, the "legislature" that has the power to enact election laws under Article I and Article II consists *only* of the chambers of the state legislature. That is, under this expansive variation of the theory, the legislative process would *not* include:

- presenting a bill relating to congressional or presidential elections to the state's Governor; or
- allowing the state's voters to enact legislation relating to congressional or presidential elections using the citizen-initiative process (or to repeal such laws using the protest-referendum process).

In short, under this variation of the theory, state Governors would have no voice in the legislation involving congressional or presidential elections, and voters would not be able to use the citizen-initiative process or the protest-referendum process in connection with such legislation.

In 2022, a redistricting case from North Carolina (*Moore v. Harper*) presented the U.S. Supreme Court with the opportunity to embrace some or all of the elements of the independent state legislature theory.

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[27] Gellman, Barton. 2022. Trump's next coup has already begun. *The Atlantic*. January 2022. https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/

[28] Amar, Vikram D. and Amar, Akhil Reed. Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish. University of Illinois College of Law Legal Studies Research Paper No. 21-02. February 24, 2022. *Supreme Court Review*. Available at SSRN: https://ssrn.com/abstract=3731755

Because the theory potentially impacted numerous aspects of election law, the case generated an enormous amount of debate in legal circles.[29]

A reversal of the 2015 *Arizona* ruling concerning the use of the meaning of the word "legislature" in Article I could very well have indicated that the citizen-initiative could not be used to enact state legislation under Article II (such as the National Popular Vote Compact).

However, in its decision in *Moore v. Harper* in 2023, the Supreme Court reaffirmed its 2015 ruling in the *Arizona* case as well as its earlier rulings in *Hildebrant* in 1916 and *Smiley* in 1932 (both of which are discussed later in this section).

> "This Court recently reinforced the teachings of *Hildebrant* and *Smiley* in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U. S. 787, a case concerning the constitutionality of an Arizona ballot initiative to amend the State Constitution and to vest redistricting authority in an independent commission. Significantly for present purposes, the Court embraced the core principle espoused in *Hildebrant* and *Smiley*: Whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court dismissed the argument that the Elections Clause divests state constitutions of the power to enforce checks against the exercise of legislative power.
>
> "The basic principle of these cases—reflected in Smiley's unanimous command that a state legislature may not 'create congressional districts independently of' requirements imposed "by the state constitution with respect to the enactment of laws," 285 U. S., at 373—commands continued respect."[30]

The discussion below traces the line of earlier cases in which the Supreme Court has upheld the ability of the voters to exercise power granted to state legislatures by Article I and Article II of the U.S. Constitution.

The word "legislature" appears in 15 places in the U.S. Constitution—13 of which relate to the powers of state legislatures.[31] As will become clear later in this section, the word "legislature" is used with two distinct meanings in the U.S. Constitution, namely:

- **the state's two legislative chambers**—that is, the state house of representatives and the state senate agreeing on a common action—either by sitting together in a joint convention or adopting a concurrent resolution while sitting separately;[32] or

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[29] See, for example, the numerous *amicus* briefs for *Moore v. Harper* at https://www.supremecourt.gov/docket/docketfiles/html/public/21-1271.html

[30] *Moore v. Harper*. 2023. 600 U.S. 1.

[31] Two of the 15 occurrences of the word "legislature" in the U.S. Constitution are unrelated to the powers of state legislatures and will therefore not be discussed further in this chapter. The first such provision is the requirement in Article I, section 2, clause 1 that voters for U.S. Representatives have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The second is the requirement in Article VI, clause 2 that "Members of the several State Legislatures" take an oath or affirmation to support the U.S. Constitution.

[32] For simplicity, we refer to the "two houses" of a state legislature throughout this discussion, even though Nebraska has a unicameral state legislature.

- **the state's law-making process**—that is, the entire process of enacting a state law, including the Governor and perhaps the citizen-initiative and protest-referendum processes**.**

These 13 occurrences of the word "legislature" appear in the following 11 provisions of the U.S. Constitution:

- electing United States Senators in the state legislature (prior to ratification in 1913 of the 17th Amendment providing for popular election of Senators);
- filling a U.S. Senate vacancy (prior to the 17th Amendment);
- ratifying a proposed federal constitutional amendment;
- making an application to Congress for a federal constitutional convention;
- choosing the manner of electing U.S. Representatives and U.S. Senators;
- choosing the manner of appointing presidential electors;
- choosing the manner of conducting a popular election to fill a U.S. Senate vacancy (under the 17th Amendment);
- empowering the state's Governor to fill a U.S. Senate vacancy temporarily until the voters fill the vacancy in a popular election (under the 17th Amendment);
- consenting to the purchase of enclaves by the federal government for "forts, magazines, arsenals, dock-yards, and other needful buildings";
- consenting to the formation of new states from territory of existing state(s); and
- requesting federal assistance to quell domestic violence.

Table 7.2 displays these 11 provisions of the U.S. Constitution referring to the powers of the state "legislature."

Table 7.2 Provisions of the U.S. Constitution referring to powers of the state "legislature"

	Power	Provision of the U.S. Constitution
1	**Electing U.S. Senators** (prior to the 17th Amendment)	"The Senate of the United States shall be composed of two Senators from each State, **chosen by the Legislature thereof**, for six Years; and each Senator shall have one Vote."[a] [Emphasis added]
2	**Filling a U.S. Senate vacancy** (prior to the 17th Amendment)	"If Vacancies happen by Resignation, or otherwise, during the Recess of the **Legislature** of any State, the Executive thereof may make temporary Appointments until the next Meeting of the **Legislature**, **which shall then fill such Vacancies**."[b] [Emphasis added]
3	**Ratifying a proposed federal constitutional amendment**	"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, **when ratified by the Legislatures** of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress … "[c] [Emphasis added]
4	**Making an application to Congress for a federal constitutional convention**	"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, **on the Application of the Legislatures** of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress … "[d] [Emphasis added]

(Continued)

Table 7.2 (Continued)

	Power	Provision of the U.S. Constitution
5	**Choosing the manner of electing U.S. Representatives and Senators**	"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be **prescribed in each State by the Legislature thereof**; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[e] [Emphasis added]
6	**Choosing the manner of appointing presidential electors**	"Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress …."[f] [Emphasis added]
7	**Choosing the manner of conducting a popular election to fill a U.S. Senate vacancy** (under the 17th Amendment)	"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election **as the legislature may direct**."[g] [Emphasis added]
8	**Empowering the Governor to fill a U.S. Senate vacancy temporarily until a popular election is held** (under the 17th Amendment)	"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That **the legislature of any State may empower** the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."[h] [Emphasis added]
9	**Consenting to the purchase of enclaves by the federal government**	"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the **Consent of the Legislature** of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[i] [Emphasis added]
10	**Consenting to the formation of new states** from territory of existing state(s)	"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the **Consent of the Legislatures** of the States concerned as well as of the Congress."[j] [Emphasis added]
11	**Requesting federal military assistance** to quell domestic violence	"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on **Application of the Legislature**, or of the Executive (when the **Legislature** cannot be convened) against domestic Violence."[k] [Emphasis added]

a U.S. Constitution. Article I, section 3, clause 1. Superseded by the 17th Amendment.
b U.S. Constitution. Article I, section 3, clause 2. Superseded by the 17th Amendment.
c U.S. Constitution. Article V.
d U.S. Constitution. Article V.
e U.S. Constitution. Article I, section 4, clause 1.
f U.S. Constitution. Article II, section 1, clause 2.
g U.S. Constitution. 17th Amendment, section 2.
h U.S. Constitution. 17th Amendment, section 2.
i U.S. Constitution. Article I, section 9, clause 17.
j U.S. Constitution. Article IV, section 3, clause 1.
k U.S. Constitution. Article IV, section 4.

In the next 11 subsections of this chapter, we discuss the meaning of the 13 occurrences of the word "legislature" in these 11 provisions of the U.S. Constitution.

As will be seen, history, practice, and law indicate that the word "legislature" in the U.S. Constitution means "the state's two legislative chambers" when the legislature's action consists of a decision that can be expressed in one or two words—that is, the name of the person being elected to a full-term or to fill a vacancy in the U.S. Senate (prior to ratification of the 17th Amendment), a "yes" response to the yes-or-no question of ratifying a proposed constitutional amendment, or a decision to apply to Congress for a federal constitutional convention.

In contrast, history, practice, and law indicate that the word "legislature" in the U.S. Constitution means "the state's law-making process" when detailed legislation is required.

Electing U.S. Senators

Under the original Constitution, each state legislature elected the state's two U.S. Senators. Two methods were commonly used by the states. In some states, the two houses of the state legislature met in a joint convention in which each State Representative and each State Senator cast one vote in the election for the state's U.S. Senator. In other states, the state house of representatives and the state senate voted separately on a concurrent resolution expressing their choice for the state's U.S. Senator.[33] Regardless of which method was used, the state's Governor was *not* part of the constitutional process of electing U.S. Senators. Neither the decision of a joint convention of the two houses nor the concurrent resolution agreed to by both houses of the legislature was presented to the Governor for approval or disapproval. In other words, the word "legislature" in the U.S. Constitution, in connection with the election of U.S. Senators (the first entry in table 7.2), refers to the state's two legislative chambers—not to the state's usual process for making laws.

Filling a U.S. Senate vacancy

Similarly, under the original Constitution, a vacancy in the U.S. Senate was filled by action of the state's two legislative chambers (either voting in a joint convention or acting separately by concurrent resolution). That is, the word "legislature" in the U.S. Constitution, in connection with the filling of U.S. Senate vacancies (the second entry in table 7.2), refers to the state's two legislative chambers.

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[33] Separate voting for U.S. Senators by the two houses of the state legislature, of course, created the possibility of a deadlock between the two houses. Thus, it became common for U.S. Senate seats to remain vacant for prolonged periods. Article I, section 4, clause 1 of the U.S. Constitution provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." In 1866, Congress exercised its power under this constitutional provision to change the "manner" by which state legislatures conducted their Senate elections and to specify the "time" of such elections. Congress required the two houses of each state legislature to meet in a joint convention on a specified day and to meet every day thereafter until a Senator was selected (14 Stat. 243).

Ratifying a proposed federal constitutional amendment

The meaning of the word "legislature" in connection with the ratification of amendments to the federal Constitution (the third entry in table 7.2) was decided by the U.S. Supreme Court in *Hawke v. Smith* in 1920.[34] Article V of the U.S. Constitution provides that proposed amendments

> "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the **Legislatures** of three fourths of the several States …." [Emphasis added]

Before deciding the specific issue in the *Hawke* case in 1920, the U.S. Supreme Court reviewed its 1798 decision in *Hollingsworth et al. v. Virginia*.[35] The *Hollingsworth* case explored the two distinct meanings of the word "Congress" in the U.S. Constitution (the analog of the issue concerning the two meanings of the word "legislature").

The Constitution frequently uses the word "Congress" to refer to the national government's law-making process—that is, the process by which the legislative bills are passed by the two houses of Congress and presented to the President for approval or disapproval. The word "Congress" appears with this meaning in numerous places in the Constitution, including:

> "The **Congress** shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States …."[36] [Emphasis added]

The word "Congress" also appears in Article V:

> "The **Congress**, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution …." [Emphasis added]

The *Hollingsworth* case addressed the question of whether the word "Congress" in the U.S. Constitution meant:

- **the national government's legislative chambers**—that is, the U.S. House of Representatives and U.S. Senate sitting separately and agreeing to a concurrent resolution, or
- **the national government's law-making process**, including the presentment of the proposed action to the President.

In 1798, the U.S. Supreme Court ruled that when the Congress proposes an amendment to the U.S. Constitution, the resolution of ratification need not be submitted to the President for approval or disapproval. Referring to the 1798 *Hollingsworth* case, the Court noted in the 1920 *Hawke* case:

> "At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over

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[34] *Hawke v. Smith*. 253 U.S. 221. 1920.

[35] *Hollingsworth et al. v. Virginia*. 3 Dall. 378. 1798.

[36] U.S. Constitution. Article I, section 8, clause 1.

> the adoption of the Eleventh Amendment. *Hollingsworth et al. v. Virginia*, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1, section 7, of the Constitution. The Attorney General answered that **the case of amendments is a substantive act, unconnected with the ordinary business of legislation**, and not within the policy or terms of the Constitution investing the President with a qualified negative [veto] on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said:
>
> > 'There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution.'
>
> "The court by a unanimous judgment held that the amendment was constitutionally adopted."[37] [Emphasis added]

In other words, the 1798 *Hollingsworth* case concluded that a federal constitutional amendment was *not* the "ordinary business of legislation."

The U.S. Supreme Court then addressed the specific issue in the 1920 *Hawke* case, namely the constitutionality of a 1918 amendment to the Ohio Constitution. This state constitutional amendment extended the protest-referendum process to resolutions of ratification by the Ohio legislature of proposed federal constitutional amendments. Specifically, the 1918 amendment to the Ohio Constitution provided:

> "The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States."

The *Hawke* case arose as a result of the Ohio Legislature's ratification of the 18th Amendment prohibiting the manufacture, sale, and transportation of intoxicating liquors for beverage purposes. On January 7, 1919, the Ohio Legislature passed a concurrent resolution[38] ratifying the Amendment.[39] Ohio's ratification was crucial because the U.S. Secretary of State was in possession of resolutions of ratification from 35 other states, and 36 ratifications were sufficient, at the time, to make a pending amendment part of the U.S. Constitution. A protest-referendum petition was quickly circulated in Ohio. Supporters of the 18th Amendment challenged the petition's validity in state court. The Ohio Supreme Court decided that the legislature's ratification of the 18th Amendment should be temporar-

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[37] *Hawke v. Smith*. 253 U.S. 221 at 229–230. 1920.

[38] A concurrent resolution is a type of resolution that is passed by both houses of the legislature but not submitted to the Governor for approval or disapproval.

[39] The resolution of ratification for the 18th Amendment was adopted by the Ohio Legislature in accordance with the long-standing practice in Ohio (and other states) of not submitting the legislature's resolution to the state's Governor for approval or disapproval.

ily suspended and submitted to the state's voters for approval or disapproval in a statewide referendum. The U.S. Supreme Court, however, decided otherwise:

> "The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—**ratification by a state of a constitutional amendment is not an act of legislation** within the proper sense of the word. **It is but the expression of the assent of the state to a proposed amendment.**"[40] [Emphasis added]

In short, in connection with ratification of amendments to the U.S. Constitution (the third entry in table 7.2), the word "legislature" in the U.S. Constitution refers to the state's two legislative chambers. Ratification is:

- "unconnected with the ordinary business of legislation"[41] and
- "not an act of legislation."[42]

Making an application to Congress for a federal constitutional convention

The word "legislature" appears in the U.S. Constitution in connection with one of the two ways by which amendments to the Constitution may be proposed to the states. Article V provides:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the **Application of the Legislatures** of two thirds of the several States, shall call a Convention for proposing Amendments …." [Emphasis added]

State legislatures sometimes call on Congress to convene a federal Constitutional Convention. For example, prior to congressional passage of the 17th Amendment, 26 states had petitioned Congress for a federal Constitutional Convention to consider the specific question of the popular election of U.S. Senators. In addition, two additional states had, during the period immediately prior to congressional action on the 17th Amendment, issued requests for a federal Constitutional Convention without mentioning the topic to be considered by the Convention. Similarly, by the time Congress acted on the 21st Amendment, almost two-thirds of the states had petitioned Congress for a federal Constitutional Convention to repeal the 18th Amendment.

According to Orfield's *The Amending of the Federal Constitution*, when state legislatures apply to Congress for a federal Constitutional Convention, the long-standing practice of the states has been that the action of the legislature is not presented to the state's Gov-

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[40] *Hawke v. Smith*. 253 U.S. 221 at 229–230. 1920.

[41] *Ibid.* at 230.

[42] *Ibid.*

ernor for approval or disapproval.[43] Instead, the two houses of the state legislature pass a concurrent resolution. Thus, in connection with applications to Congress for a federal Constitutional Convention (the fourth entry in table 7.2), historical practice indicates that the word "legislature" in the U.S. Constitution refers to the state's two legislative chambers.

Choosing the manner of electing U.S. Representatives and Senators

As demonstrated in the previous four sections, judicial precedent and long-standing practice by the states indicate that the word "legislature" in the U.S. Constitution refers, in connection with the first, second, third, and fourth entries in table 7.2, to the state's two legislative chambers—not to the Governor or the citizen-initiative or protest-referendum processes.

In many other parts of the U.S. Constitution, however, the word "legislature" has a different meaning—namely, the state's law-making process. In these parts of the Constitution, "legislature" includes the state's Governor. Moreover, in these parts of the U.S. Constitution, "legislature" may also include the state's voters—who, like the Governor, are plainly not members of the two chambers of the state legislature.

An example of this second meaning of the word "legislature" is found in Article I, section 4, clause 1 of the U.S. Constitution concerning the manner of holding elections for U.S. Representatives and Senators (the fifth entry in table 7.2).

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

The U.S. Supreme Court addressed the meaning of "legislature" in Article I, section 4, clause 1 in *Smiley v. Holm* in 1932.[44] The issue in *Smiley* was whether the Minnesota Governor could veto a law passed by the legislature redrawing the state's congressional districts after the 1930 census. In other words, the question in *Smiley* was whether the word "legislature" refers to the state's two legislative chambers or the state's law-making process, which, in Minnesota in 1932, included the Governor.

The question of whether the word "legislature" includes a state's Governor depends, in large part, on the answer to the following question:

> "When a state exercises authority pursuant to powers granted to it by the U.S. Constitution in connection with deciding on the manner of electing its U.S. Representatives,
>
> (1) does it derive the power to act solely from the U.S. Constitution, or
>
> (2) does it enact the legislation in accordance with the procedures specified in the state's constitution?"

The 1932 *Smiley* case involving the meaning of the word "legislature" in the U.S. Con-

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[43] Orfield, Lester Bernhardt. 1942. *The Amending of the Federal Constitution*. Ann Arbor: The University of Michigan Press.

[44] *Smiley v. Holm*. 285 U.S. 355. 1932.

stitution went to the U.S. Supreme Court over a decade after various cases arising from the adoption of the initiative and referendum processes in the early years of the 20th century. These earlier cases included the 1920 *Hawke* case (discussed above) and the 1916 case of *State of Ohio ex rel. Davis v. Hildebrant* (discussed below). *Smiley* thus provided the Court with the opportunity to put all of these related cases into perspective. The U.S. Supreme Court wrote in *Smiley* in 1932:

> "**[W]henever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view.**"[45] [Emphasis added]

Applying this test, the Court found that the term "legislature" in Article I, section 4, clause 1 referred to "making laws"[46] and therefore included the Governor.

> "[I]t follows, in the absence of an indication of a contrary intent, that **the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments**. **We find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.**"[47] [Emphasis added]

Thus, the word "legislature" in the U.S. Constitution, in connection with the state's deciding on the "manner of holding Elections" for U.S. Representatives" (the fifth entry in table 7.2), refers to the state's process of making laws—not just to the two chambers of the state legislature.

In 1916, the U.S. Supreme Court addressed the specific question of whether the word "legislature" in Article I, section 4, clause 1 of the U.S. Constitution included the voters acting through the processes of direct democracy. The Supreme Court described the origins of *State of Ohio ex rel. Davis v. Hildebrant* as follows:

> "By an amendment to the Constitution of Ohio, adopted September 3d, 1912, the **legislative power was expressly declared to be vested** not only in the senate and house of representatives of the state, constituting the general assembly, but **in the people**, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly." [48] [Emphasis added]

The decision continued:

> "In May, 1915, the general assembly of Ohio passed an act redistricting the state for the purpose of congressional elections, by which act twenty-two congressional districts were created, in some respects differing from the previously

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[45] *Ibid.* at 366.

[46] *Ibid.* at 365.

[47] *Ibid.* at 368.

[48] *State of Ohio ex rel. Davis v. Hildebrant*. 241 U.S. 565 at 566. 1916.

> established districts, and this act, after approval by the Governor, was filed in the office of the secretary of state. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved.
>
> "Thereupon, in the supreme court of the state, the suit before us was begun against state election officers for the purpose of procuring a mandamus, directing them to disregard the vote of the people on the referendum, disapproving the law, and to proceed to discharge their duties as such officers in the next congressional election, upon the assumption that the action by way of referendum was void, and that the law which was disapproved was subsisting and valid."[49]

Summarizing the issue, the Court wrote:

> "**The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the state**, and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed, it was in substance charged that both from the point of view of the state Constitution and laws and from that of the Constitution of the United States, especially [clause] 4 of article 1, providing that
>
> > 'the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators;'
>
> and also from that of the provisions of the controlling act of Congress of August 8, 1911 (chap. 5, 37 Stat. at L. 13, Comp. Stat. 1913, 15), apportioning representation among the states, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. **The court below adversely disposed of these contentions, and held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary**, and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus."[50] [Emphasis added]

The U.S. Supreme Court then upheld the Ohio Supreme Court and rejected the argument that the word "legislature" in Article I, section 4, clause 1 of the U.S. Constitution excluded the referendum process. The popular vote rejecting Ohio's redistricting statute was allowed to stand.

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[49] *Ibid.* at 566–567.

[50] *Ibid.* at 568.

Additionally, the Court noted:

> "Congress recognize[d] the referendum as part of the legislative authority of a state."[51]

In 1920, the U.S. Supreme Court distinguished its decision in *Hawke* from its decision in *State of Ohio ex rel. Davis v. Hildebrant*:

> "But it is said [the Court's view in *Hawke*] runs counter to the decision of this court in *Davis v. Hildebrant* (241 U.S. 565) 36 S. Ct. 708. But that case is inapposite. It dealt with article 1 section 4, of the Constitution, which provides that the times, places, and manners of holding elections for Senators and Representatives in each state shall be determined by the respective Legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. **Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.**"[52] [Emphasis added]

Relying on *Smiley v. Holm*[53] and *State of Ohio ex rel. Davis v. Hildebrant*,[54] the Colorado Supreme Court wrote in *Colorado, ex rel. Salazar v. Davidson* in 2003:

> "[T]he United States Supreme Court has interpreted the word 'legislature' in Article I to broadly encompass any means permitted by state law [including] citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state." [55,56]

Chief Justice Rehnquist, joined by Justices Thomas and Scalia, echoed this view in a dissenting opinion when the U.S. Supreme Court denied review of the *Colorado, ex rel. Salazar v. Davidson* decision. Rehnquist stated that the Court had

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[51] *Ibid.* at 569.

[52] *Hawke v. Smith.* 253 U.S. 221 at 230–231. 1920.

[53] *Smiley v. Holm*. 285 U.S. 355. 1932.

[54] *State of Ohio ex rel. Davis v. Hildebrant*. 241 U.S. 565. 1916.

[55] *Colorado, ex rel. Salazar v. Davidson.* 79 P.3d 1221, 1232 (Colorado 2003).

[56] In *Cook v. Gralike*, 531 U.S. 510, 526 n.20 (2001), the Court declined to consider whether the Elections Clause of Article I, section 4, which is a grant of power to "each State by the Legislature thereof," could be invoked concerning a statute adopted by referendum. The Court reaffirmed, however, the notion in *Smiley* that "[w]herever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view."

> "explained that the focus of our inquiry was **not on the 'body' but the function performed** [and that] the function referred to by Article I, §4, was **the lawmaking process**, which is defined by state law."[57] [Emphasis added]

The distinction between "the lawmaking process" and the two chambers of the state legislature is not new. In fact, this distinction has been made since the earliest days of the U.S. Constitution.

When the U.S. Constitution took effect in 1788, the Governors of only two states had veto power over state laws.[58,59]

The provisions of the Massachusetts Constitution of 1780 (which was in effect at the time when the U.S. Constitution took effect) were substantially the same as the procedures for gubernatorial approval, veto, and legislative override found in most state constitutions today (and substantially the same as the procedures for presidential veto in the U.S. constitution).

> "**No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revisal**; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated, who shall enter the objections sent down by the Governor, at large, on their records, and proceed to reconsider the said bill or resolve; but if, after such reconsideration, two-thirds of the said senate or house of representatives shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of law."[60] [Emphasis added]

On November 20, 1788, both chambers of the Massachusetts legislature approved a bill specifying the manner for electing U.S. representatives. The bill was presented to Governor John Hancock; he approved it, and the bill became law.[61]

The New York Constitution of 1777 (which was in effect at the time when the U.S. Constitution took effect) also had a veto provision. It required that all bills passed by the legislature be submitted for approval or veto to a Council of Revision composed of the Governor, the Chancellor, and the judges of the state supreme court.

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[57] *Colorado General Assembly v. Salazar*, 124 S. Ct. 2228 at 2230. 2004.

[58] Kole, Edward A. 1999. *The First 13 Constitutions of the First American States*. Haverford, PA: Infinity Publishing.

[59] Kole, Edward A. 1999. *The True Intent of the First American Constitutions of 1776–1791*. Haverford, PA: Infinity Publishing.

[60] Massachusetts Constitution of 1780. Chapter I, Section I, Article II.

[61] Smith, Hayward H. 2001. *Symposium*, *Law of Presidential Elections: Issues in the Wake of Florida 2000*. History of the Article II Independent state legislature doctrine. 29 *Florida State University Law Review* 731–785 at 760. Issue 2.

On January 23, 1789, the New York legislature completed its approval of legislation specifying the manner for electing U.S. representatives.[62]

On January 24, the New York Senate:

> "Ordered that Mr. Duane and Mr. Humfrey deliver the bill to the Honorable the Council of Revision."[63]

The bill was presented to the Council, which approved it on January 27, saying:

> "It does not appear improper to the Council that the said bill should become a Law of this State."[64]

Article I, section 4, clause 1 of the U.S. Constitution covers the manner of electing U.S. Senators as well as the manner of electing U.S. Representatives:

> "The Times, Places and **Manner** of holding Elections for **Senators** and Representatives, shall be prescribed in each State by the **Legislature** thereof …." [Emphasis added]

The two meanings of the word "legislature" in the U.S. Constitution are dramatically illustrated by the actions of the first New York legislature that met under the U.S. Constitution (section 2.2). The state's Governor was not part of the constitutional process of electing U.S. Senators under the original Constitution. The two chambers of the state legislature elected the state's U.S. Senators. The Governor of New York was, however, part of the law-making process that decided the *manner* of electing U.S. Senators. For example, in 1789, both houses of the New York legislature passed a bill providing for the manner of electing U.S. Senators. This bill was presented to the Council composed of the Governor, the Chancellor, and judges of the state supreme court. The Council vetoed the bill, and it did not become law.[65] In short, when a state chose the "manner" of electing its U.S. Senators, the word "legislature" in the U.S. Constitution meant "the lawmaking process" (which included the Governor and Council); however, when the state actually elected its U.S. Senators, the same word "legislature" meant only the two legislative chambers (which did not include the Governor or the Council).

Congressional districting is arguably the most important aspect of the "manner" of electing U.S. Representatives.

In recent years, the voters have used the protest-referendum process not only to review congressional districting plans enacted by state legislatures (leading to the 1916 case of *State of Ohio ex rel. Davis v. Hildebrant*), but also to entirely exclude the state legislature from the process of congressional districting.

For example, in 2000, Arizona voters used the citizen-initiative process to adopt a

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[62] DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 343.

[63] *Ibid*. Page 344.

[64] *Ibid*. Page 346.

[65] DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 3.

state constitutional amendment (called "Proposition 106") establishing the Arizona Independent Redistricting Commission to draw the state's congressional and state legislative districts. The petition proposing the state constitutional amendment described the proposal as follows:

> "This citizen-sponsored Arizona Constitutional amendment will create a new 'citizens' independent redistricting commission' to draw new legislative and congressional district boundaries after each U.S. Census. **This amendment takes the redistricting power away from the Arizona Legislature** and puts it in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not "gerrymandered" for any party's or incumbent's advantage."[66] [Emphasis added]

In 2008, California voters established a similar nonpartisan commission using the citizen-initiative process (Proposition 11).

These actions by Arizona and California voters are noteworthy for two reasons.

First, the establishment of a commission was accomplished by a citizen-initiative petition—not the "legislature."

Second, both commissions were established by an amendment to the state constitution, as distinguished from a statutory enactment of "legislation."[67]

In other words, neither the "legislature" nor "legislation" was involved in the decision to exclude the state legislature.

The Arizona Independent Redistricting Commission created the congressional districts that were used throughout the decade following the 2000 census. These districts were generally viewed as favorable to Republicans.

However, Arizona Republicans vigorously objected to the districts created by the commission after the 2010 census. In the period since the 2010 census, the Republicans have controlled both the legislature and Governor's office. During the dispute, the Republicans removed the chair of the commission; however, the Arizona Supreme Court restored her to the position. The districts created by the commission took effect for the 2012 elections.

Then, in June 2012, a lawsuit (authorized by both houses of the legislature) was filed in the U.S. District Court in Arizona challenging the constitutionality of the Arizona Independent Redistricting Commission under Article I, section 4, clause 1 of the U.S. Constitution.

The complaint in *Arizona State Legislature v. Arizona Independent Redistricting Commission et al.* stated:

> "Prop. 106 removes entirely from the Legislature the authority to prescribe legislative and congressional district lines and reassigns that authority wholly to the IRC—a new entity created by Prop. 106.
>
> "Prop. 106 also prescribes the process by which the IRC members are appointed and the process and procedures by which the IRC is to establish legislative and congressional district lines.

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[66] July 6, 2000, application to Arizona Secretary of State by the "Fair Districts, Fair Elections" organization.

[67] See the discussion of Arkansas' implementation of the 17th Amendment in section 8.3.7.

> "**Prop. 106 eliminates entirely the Legislature's prescriptive role in congressional redistricting**…."[68] [Emphasis added]

In June 2015, the U.S. Supreme Court held that Article I of the U.S. Constitution permits a state's voters to create (without involvement of the legislature) an independent commission for congressional redistricting (without involvement of the legislature).[69]

In summary, present-day practice, practice at the time of ratification of the U.S. Constitution, and existing court decisions consistently support the interpretation that the word "legislature" in Article I, section 4, clause 1 of the U.S. Constitution (the fifth entry in table 7.2) does not refer to the two chambers of the state legislature but instead refers to the "lawmaking process" that includes:

- the state's Governor, an official who is manifestly not a member of the two chambers of the state legislature and
- in states that have the citizen-initiative process and protest-referendum processes, the state's voters, who, like the Governor, are manifestly not members of the two chambers of the state legislature.

Choosing the manner of appointing presidential electors

The word "legislature" appears in Article II of the U.S. Constitution (the sixth entry in table 7.2).

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress …."[70] [Emphasis added]

In *U.S. Term Limits v. Thornton*, the U.S. Supreme Court in 1995 noted the parallelism between the use of the word "legislature" in Article I, section 4, clause 1 (relating to the "manner" of electing U.S. Representatives) and the word "legislature" in Article II. The Court wrote:

> "the provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that **the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States**, namely that
>
> > '[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof.' [Art I., §4, cl. 4.]

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[68] Complaint in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission et al.* Page 5.

[69] *Arizona State Legislature* v. *Arizona Independent Redistricting Commission.* 2015. 576 U.S. 787.

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

> "**This duty parallels the duty under Article II** that
>
> > 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.' Art II., §1, cl. 2.
>
> "These Clauses are express delegations of power to the States to act with respect to federal elections."[71] [Emphasis added]

The parallelism noted by the Court supports the power of the people to act legislatively through the citizen-initiative process concerning the manner of electing presidential electors.

The question of whether the word "legislature" includes the state's initiative and referendum processes depends, in large part, on the answer to the following question:

> "When a state exercises authority pursuant to powers granted to it by the U.S. Constitution in connection with deciding on the manner of choosing its presidential electors,
>
> > (1) does it derive the power to act solely from the U.S. Constitution, or
> > (2) does it enact the legislation in accordance with the procedures specified in the state's constitution?"

The leading U.S. Supreme Court case interpreting Article II, section 1, clause 2 of the U.S. Constitution is *McPherson v. Blacker* in 1892.[72] In that case, the Court rejected a challenge to Michigan legislation providing for selection of presidential electors by district, as distinguished from the statewide winner-take-all method that Michigan had been using prior to 1892 and that had become the national norm. In that case, the Court analyzed the meaning of the word "legislature" as used in Article II and noted that the interpretation of this word was governed by the fundamental law of the state. The U.S. Supreme Court wrote:

> "The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, **except as limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, **unless by the fundamental law power is elsewhere reposed**. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of **the legislative power under state constitutions as they exist**."[73] [Emphasis added]

The possibility that a state's legislative power might be "reposed" in a place other than the state legislature is noteworthy, given that the case was decided when the idea of the

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[71] *U.S. Term Limits v. Thornton*. 514 U.S. 779 at 805. 1995.

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

[73] *Ibid*. at 27.

citizen-initiative process was an active topic of public debate (just before South Dakota became the first state to adopt it in 1898).

Given that the citizen-initiative process is generally considered to be a co-equal grant of authority to that given to the state's legislature, the treatment of the process as a legislative power is consistent with the fundamental law of states that have it.

There are two cases that have specifically involved the question of whether the word "legislature" in Article II of the U.S. Constitution includes the initiative and referendum processes.[74]

The first case arose as a result of a 1919 law entitled "An act granting to women the right to vote for presidential electors." This law was passed by the two houses of the Maine legislature and presented to the state's Governor, who signed the law. Under the protest-referendum provisions of the Maine Constitution, if a petition protesting a just-enacted law is filed with the signatures of at least 10,000 voters, the new law is temporarily suspended and referred to the voters for their approval or disapproval in a statewide referendum. A petition was circulated and duly filed with the Governor's office concerning this statute. Before proceeding with the referendum, the Governor raised the question of whether the referendum provision of the Maine Constitution applied to legislation involving the manner of appointing the state's presidential electors. Specifically, he propounded the following question to the Justices of the Maine Supreme Judicial Court:

> "Is the effect of the act of the Legislature of Maine of 1919, entitled 'An act granting to women the right to vote for presidential electors,' approved by the Governor on March 28, 1919, suspended by valid written petitions of not less than 10,000 electors, addressed to the Governor and filed in the office of the secretary of state within 90 days after the recess of the Legislature, requesting that it be referred to the people, and should the act be referred to the people as provided in article 4 of the Constitution of Maine, as amended by Amendment 31, adopted September 14, 1908?"

On August 28, 1919, the Maine Supreme Judicial Court unanimously answered this question in the affirmative. Relying extensively on the 1892 decision of the U.S. Supreme Court in *McPherson v. Blacker*,[75] the Maine Supreme Judicial Court wrote:

> "The language of section 1, subd. 2, is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states.

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[74] Court cases specifically interpreting the word "legislature" in Article II in relation to the citizen-initiative or protest-referendum process are necessarily rare for several reasons. First, the citizen-initiative and protest-referendum processes are only slightly more than 100 years old. Second, the two processes are available in fewer than half of the states. Third, only a handful of the laws that a state enacts in a typical year involve the conduct of elections. Fourth, few new state laws involve the manner of conducting congressional and senatorial elections, and even fewer relate to presidential elections. Fifth, the vast majority of new state laws each year are enacted without the use of either process.

[75] *McPherson v. Blacker*. 146 U.S. 1. 1892. The *Blacker* case is also discussed in section 9.1.1, section 4.3.3, and later in this section.

> 'Each state shall appoint in such manner as the Legislature thereof may direct'

are the significant words of the section, and their plain meaning is that **each state is thereby clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the federal government**, except, of course, in case of attempted discrimination as to race, color, or previous condition of servitude under the fifteenth amendment. The clause,

> 'in such manner as the Legislature thereof may direct,'

means, simply that **the state shall give expression to its will, as it must, of necessity, through its law-making body, the Legislature**. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen.

"**But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts** and resolves having the force of law. **The Legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed**. Nor was it designated by the federal Constitution as a mere agency or representative of the people to perform a certain act, as it was under article 5 in ratifying a federal amendment, a point more fully discussed in the answer to the question concerning the federal prohibitory amendment. 107 Atl. 673. **It is simply the ordinary instrumentality of the state, the legislative branch of the government, the law-making power, to put into words the will of the state in connection with the choice of presidential electors. The distinction between the function and power of the Legislature in the case under consideration and its function and power as a particular body designated by the federal Constitution to ratify or reject a federal amendment is sharp and clear and must be borne in mind.**

"It follows, therefore, that under the provisions of the federal Constitution the state by its legislative direction may establish such a method of choosing its presidential electors as it may see fit, and may change that method from time to time as it may deem advisable; but **the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed** and can be valid and effective only when enacted in compliance therewith."[76] [Emphasis added]

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[76] *In re Opinion of the Justices*. 107 A. 705. 1919. The entire text of this is available in Appendix Q of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

The Court continued:

> "It is clear that this act, extending this privilege to women, constitutes a change in the method of electing presidential electors.…
>
> "this state during the century of its existence prior to 1919, had by appropriate legislative act or resolve directed that only male citizens were qualified to vote for presidential electors. By the act of 1919 it has attempted to change that direction, by extending the privilege of suffrage, so far as presidential electors are concerned, to women. Had this act been passed prior to the adoption of the initiative and referendum amendment in 1908, it would have become effective, so far as legal enactment is concerned, without being referred to the people; but now under Amendment 31 such reference must be had, if the necessary steps therefor are taken."
>
> "**This is the public statute of a law-making body, and is as fully within the control of the referendum amendment as is any other of the 239 public acts passed at the last session of the Legislature**, excepting, of course, emergency acts. **It is shielded from the jurisdiction of that referendum neither by the state nor by the federal Constitution.** In short, the state, through its Legislature, has taken merely the first step toward effecting a change in the appointment of presidential electors; but, because of the petitions filed, it must await the second step which is the vote of the people. The legislative attempt in this case cannot be fully effective until
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> > 'thirty days after the Governor shall have announced by public proclamation that the same has been ratified by a majority of the electors voting thereon at a general or special election.'"[77] [Emphasis added]

When the voters of Maine voted on the suspended law, it was passed by a vote of 88,080 to 30,462.[78]

The second case involving an interpretation of the word "legislature" in Article II of the U.S. Constitution came just prior to the November 2, 2004, presidential election.[79] *Napolitano v. Davidson* involved a federal court challenge to an initiative petition proposing an amendment to the Colorado Constitution to adopt the whole-number proportional method for choosing the state's presidential electors (section 4.2). In that case, a Colorado voter asked that the Colorado Secretary of State be enjoined from holding the election on

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[77] *Id.*

[78] There was a flurry of activity concerning women's suffrage at the time. The Maine legislature adopted its contested law on women's suffrage in presidential elections on March 28, 1919. Congress proposed the women's suffrage amendment to the U.S. Constitution on June 4, 1919, and sent it to the states for ratification. The Maine Supreme Judicial Court announced its decision on August 28, 1919. The Maine Legislature ratified the proposed federal constitutional amendment on November 5, 1919. Tennessee's ratification on August 18, 1920, brought the 19th Amendment to the U.S. Constitution into effect.

[79] Johnson, Kirk. 2004. Coloradans to Consider Splitting Electoral College Votes. *New York Times*. September 19, 2004. https://www.nytimes.com/2004/09/19/politics/campaign/coloradans-to-consider-splitting-electoral-college-votes.html

the proposed amendment. The plaintiff alleged that Amendment 36 violated Article II of the U.S. Constitution in that the voters were attempting to unconstitutionally preempt the role of the "legislature" in connection with the manner of appointing presidential electors.

The Colorado Attorney General defended the Secretary of State. Two representatives of those who had signed initiative petitions to place Amendment 36 on the ballot (the "proponents") were granted the right to intervene in the litigation. Additionally, one Democratic and one Republican candidate for presidential elector in the November 2004 election attempted to intervene.[80]

The Colorado Attorney General unqualifiedly defended the substantive provisions of Amendment 36. In response to the claim that the exercise of the initiative power to allocate presidential electors infringed upon Article II, the Attorney General stated that, when the people of Colorado use the citizen-initiative process, they act as the "legislature." Specifically, the State of Colorado took the position that its voters were fully empowered to act, pursuant to Article II, to allocate presidential electors.

> "Article II, §1 authorizes each state to act in a lawmaking capacity to select the manner in which it appoints its presidential electors …. For example, the lawmaking authority conferred by Article II, §1 encompasses the people's power of referendum when such power is provided by the state constitution. *Cf. Hildebrant*, 241 U.S. at 569. It follows that **the lawmaking authority conferred by Article II, §1 also encompasses the people's power of initiative where the people are empowered by the state constitution to legislate via initiative**."
>
> "**The Proposal (to proportionally allocate presidential electors based on the state's popular vote)** is an initiative by the people of Colorado as authorized by the Colorado Constitution. As such, it **is an exercise of legislative power** for the purpose of appointing presidential electors. **The Proposal, therefore, is authorized by Article II, §1.**"[81] [Emphasis added]

By the time the matter was fully briefed for the court, early voting had commenced in Colorado. Most absentee ballots had been sent to voters. A little more than one week remained until Election Day. On October 26, 2004, Judge Lewis Babcock heard the motions for preliminary injunction, filed by the plaintiff and the elector-intervenors, as well as the motions to dismiss filed by the Colorado Attorney General and the petition's proponents. Judge Babcock denied the former and granted the latter, clearing the way for a vote by the people on Amendment 36 on November 2, 2004.

From the bench, Judge Babcock noted that the matter was not ripe for adjudication, as an actual controversy could be said to exist only if the election were held and a majority of voters were to approve the proposed change in the method of allocating Colorado's presidential electors. Until that time, any opinion would only be advisory in nature.

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[80] The Elector-Intervenors were permitted to brief each of their legal arguments. After addressing the substance of their arguments, however, Judge Babcock ruled from the bench that their attempted intervention was not authorized, as they lacked standing to participate in the litigation.

[81] The Secretary of State's Combined Motion to Dismiss and Response to Motion for Preliminary Injunction at 21–22, filed in *Napolitano v. Davidson*, Civil Action No. 04–B–2114, D.Colo. (2004).

Judge Babcock also noted that the issues involved in this case should be resolved in the first instance by the Colorado state courts and, therefore, that it was proper for the federal courts to abstain from intervening in this matter. Indeed, the Colorado challenge to the initiative petition on Amendment 36 was unusual in that it started in federal court. Most challenges to initiative and referendum petitions start in state courts.

In his oral ruling, Judge Babcock noted that the elector-intervenors had argued that Amendment 36 was "patently unconstitutional." The judge expressly stated that this was not the case, but he added that because he did not have to reach the merits of the case, his ruling should not be taken as a judicial imprimatur concerning the constitutionality of Amendment 36.

In order to obtain a preliminary injunction, one generally must establish (among other things) that there is a substantial likelihood of prevailing on the merits when the matter goes to trial. This standard generally applies when one seeks to enjoin an election or any part of the election process.[82] The federal district court, in evaluating the motions for preliminary injunction, did not find that either the plaintiff or the elector-intervenors had a substantial likelihood of success on the merits with regard to their argument that Amendment 36 violated Article II.

On November 2, 2004, Amendment 36 was rejected by the voters (section 4.2), so the legal issues raised by the pre-election lawsuit were not subsequently addressed in court. Nonetheless, the power of the voters to use the initiative process to change the manner of appointing presidential electors in Colorado was not disturbed by the judiciary.

Long-standing historical practice by the states is consistent with the 1920 decision by the Maine Supreme Judicial Court and the outcome of the 2004 litigation in Colorado concerning the meaning of the word "legislature" in Article II of the U.S. Constitution.

The gubernatorial veto existed in only two states at the time when the U.S. Constitution first took effect in 1788.

In Massachusetts, the Governor of Massachusetts had veto power over legislation. In New York, the Council of Revision (composed of the Governor, the Chancellor, and various judges) had veto power over legislation.[83,84] In both states, a veto could be overridden by a two-thirds vote of both houses of the legislature.

On November 20, 1788, both chambers of the Massachusetts legislature completed the process of approving a bill specifying the manner for appointing the state's presidential electors. This bill was presented to Governor John Hancock—an official who was manifestly not part of the two chambers of the state legislature. Governor Hancock approved the bill, and it became law.[85]

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[82] *Libertarian Party v. Buckley*. 938 F.Supp. 687, 690 (D. Colo. 1997). See also *Chandler v. Miller*. 520 U.S. 305, 311. 1997.

[83] Kole, Edward A. 1999. *The First 13 Constitutions of the First American States*. Haverford, PA: Infinity Publishing.

[84] Kole, Edward A. 1999. *The True Intent of the First American Constitutions of 1776–1791*. Haverford, PA: Infinity Publishing.

[85] Smith, Hayward H. 2001. *Symposium, Law of Presidential Elections: Issues in the Wake of Florida 2000*, History of the Article II Independent state legislature doctrine, 29 *Florida State University Law Review* 731 at 760.

In New York, the legislature began consideration of legislation for choosing U.S. Representatives, U.S. Senators, and presidential electors on December 13, 1788.

On January 23, 1789, both houses of the New York legislature agreed to a bill providing the manner of electing U.S. Representatives (including the districts to be used).[86]

On January 24, the New York Senate:

> "Ordered that Mr. Duane and Mr. Humfrey deliver the bill to the Honorable the Council of Revision."[87]

The bill was presented to the Council, which approved it on January 27, and it became law.[88]

On January 27, the Council approved the bill, saying:

> "It does not appear improper to the Council that the said bill should become a Law of this State."[89]

The Governor then signed a copy of the Council's proceedings, and that signed document was delivered to the legislature. Elections for U.S. Representatives were held on March 3, 1789, in accordance with this law.

The U.S. Constitution specified (at the time) that U.S. Senators would be elected by the state legislature.

In many states, a controversy arose as to whether U.S. Senators would be chosen in a joint convention attended by all of the members of both chambers of the legislature or by a concurrent resolution voted on by each chamber separately.

Use of a joint convention would typically reduce the voting power of the members of the smaller chamber (i.e., the state Senate). More importantly, when political control is divided between the chambers, a joint convention would enable whichever party controlled its chamber by the larger margin to totally dominate the choice of U.S. Senator. Typically, the party controlling the larger chamber (i.e., the Assembly in the case of New York) would control its chamber by the larger margin. Indeed, that was the case in New York in 1789, when the Anti-Federalists controlled the Assembly, and the Federalists controlled the state Senate.

Conversely, use of a concurrent resolution gives both chambers a veto or leverage over the choice of Senator when political control is divided between the chambers. In practice, it may simply prevent the election of anyone.

The legislature passed a bill entitled "An act prescribing the manner of holding elections for Senators to represent this State in the Senate of the United States" providing for use of a concurrent resolution.

This bill was presented to the Council of Revision. The Council vetoed the bill on July 5, 1789, saying:

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[86] DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 343. See pages 361–365 for the text of the law.

[87] *Ibid*. Page 344.

[88] *Ibid*. Page 346.

[89] *Ibid*. Page 346.

> "Because this bill, when two Senators are to be chosen, enacts that in case of the disagreement of the two houses in the nomination, each house shall, out of the nomination of the other, choose one, and that such person shall be the Senator to represent this State; and thus, by compelling each house to choose one of two persons, neither of whom meet with their approbation, establishes a choice of Senators by the separate act of each branch of the Legislature, in direct opposition to the Constitution of the United States, which, in the third section of the first article, declares that they shall be chosen by the legislature."[90]

Under the New York Constitution of 1777, a two-thirds vote of both houses of the legislature would have been necessary to override the Council's veto.[91]

The Anti-Federalist Assembly refused to override the veto. As a result, the bill did not become law, and no U.S. Senators were selected by New York in the 1789 session of the legislature. That is, the state went unrepresented in the U.S. Senate.[92]

The political divisions in New York also prevented New York from appointing presidential electors in the nation's first presidential election.

In 1789, the legislature debated a bill entitled "An act for regulating the manner of appointing electors who are to elect the President, and Vice-President of the United States of America."[93] This legislation specifying the manner of appointing presidential electors was similar to the vetoed bill concerning U.S. Senators. However, the two chambers of the New York legislature did not reach an agreement on the manner of appointing presidential electors in time for the first presidential election in 1789. Consequently, New York did not appoint any presidential electors in the 1789 presidential election.

As the nation's second presidential election (1792) approached, a bill specifying a method for appointing presidential electors passed the legislature. The legislature's bill was presented to the Council on April 12, 1792. The Council approved the bill, and New York appointed presidential electors in the 1792 presidential election.

This legislation called for presidential electors to be elected by the two houses of the state legislature—without involvement of the Governor (or the Council). The Council approved this legislation, and New York participated in the 1792 presidential election.[94] In other words, a legislative bill that empowered the two houses of the legislature to choose

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[90] Street, Alfred B. 1859. *The Council of Revision of the State of New York and its Vetoes*. Albany, NY: William Gould Publisher. Pages 290–291. https://books.google.com/books?id=53w4AAAAIAAJ&pg=PA199&source=gbs_toc_r&cad=3#v=onepage&q&f=false

[91] Under the 1821 Constitution of New York, the Council was abolished, and its veto power was transferred to the Governor alone (subject to possible override by a two-thirds vote of both houses of the legislature).

[92] On January 14, 1793, the Council also vetoed "An act for prescribing the times, places and manner of holding elections for Senators to represent this State in the Senate of the Congress of the United States of America. Street, Alfred B. 1859. *The Council of Revision of the State of New York and its Vetoes*. Albany, NY: William Gould Publisher. Page 418. https://books.google.com/books?id=53w4AAAAIAAJ&pg=PA199&source=gbs_toc_r&cad=3#v=onepage&q&f=false

[93] DenBoer, Gordon, Brown, Lucy Trumbull, and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume 3. Pages 217–435.

[94] An Act for appointing electors in this state for the election of a president and vice president of the United States of America. Passed April 12, 1792. *Laws of New York*. Pages 378–379.

presidential electors, *without the involvement of the Governor (or the Council)*, was nonetheless presented to the Governor (and Council) for approval or veto.

Thus, actual practice in the two states that had the gubernatorial veto at the time when the U.S. Constitution first took effect was that the word "legislature" in Article II meant the state's lawmaking process—not just the two chambers of the state legislature—in connection with the state's decision on the manner of appointing presidential electors.

Present-day practice by the states has remained consistent with practice from the time when the U.S. Constitution first took effect.

Table 7.3 provides a citation to each state's current law specifying the manner of appointing presidential electors.[95] The law concerning the method of appointing presidential electors was not enacted merely by action of the two chambers of the state legislature but instead, was presented to the state's Governor for approval or disapproval, except for West Virginia. In West Virginia, the method of election is contained in the state constitution.[96]

None of the state laws in table 8.2 was enacted by means of the citizen-initiative process; however, there have been numerous initiatives and referenda over the years on provisions of state election laws involving the manner of electing presidential electors.

On February 23, 1917, Maine voted on a "Proposed Constitutional Amendment Granting Suffrage to Women upon Equal Terms with Men." The proposition received 20,604 "yes" votes and 38,838 "no" votes.

In 1919, the Maine Supreme Judicial Court upheld the constitutionality of holding a protest-referendum on a state statute entitled "An act granting to women the right to vote for presidential electors."[97] The voters supported women's suffrage in the 1919 vote.

In the late 1950s and early 1960s, there was considerable controversy in Michigan (and other states) concerning the coattail effect of votes cast for President on races for lower offices. In particular, Republican county and township officeholders in Michigan sought to eliminate the voter's option to vote for all nominees of one party by casting a single so-called *straight-party* vote. When the Republicans ended 14 years of Democratic control of the Governor's office in 1962, the new Republican Governor and the Republican legislature enacted a statute requiring that voters cast a separate vote for President and a separate vote for each other office on the ballot (the so-called "Massachusetts ballot").[98] A protest-referendum petition was circulated and filed, thereby suspending the statute. The voters rejected the statute in the November 1964 election. Thus, presidential electors remained tethered in Michigan to the party's candidates for other offices (if the voter so desired to cast a straight-party ballot).

Similarly, in 1972, an initiative petition was filed in Maine proposing to change the form of the ballot from party columns to individual offices (the Massachusetts ballot). This proposition passed by a vote of 110,867 to 64,506.

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[95] That is, the statewide winner-take-all rule in 48 states and the District of Columbia and the congressional district system in Maine and Nebraska.

[96] Article VII, section 3 (ratified November 4, 1902) specifies that, in all elections, the candidate with "the highest number of votes for either of said offices, shall be declared duly elected thereto."

[97] *In re Opinion of the Justices*. 107 Atl. 705. 1919.

[98] Michigan Public Act 240 of 1964.

Table 7.3 Current state laws for appointing presidential electors

State	Section
Alabama	Ala. Code § 17-19-4, Ala. Code § 17-19-5, Ala. Code § 17-19-6
Alaska	AK ST § 15.15.450
Arizona	A.R.S. § 16-650
Arkansas	Ar. Code §7-8-304
California	Cal. Elec. Code § 15505
Colorado	C.R.S. § 1-11-106
Connecticut	C.G.S. § 9-315
Delaware	15 Del. C. § 5703, 15 Del. C. § 5711
D.C.	D.C. Code § 1-1001.10
Florida	F.S.A. § 9.103.011
Georgia	Ga. Code Ann., § 21-2-499
Hawaii	H.R.S. § 2-14-24
Idaho	ID ST § 34-1215
Illinois	10 ILCS 5/21-2, 10 ILCS 5/21-3
Indiana	IC 3-12-5-7
Iowa	I.C.A. § 50.45
Kansas	KS ST § 25-702
Kentucky	KRS § 118.425
Louisiana	LSA-R.S. 18:1261
Maine	21-A M.R.S. § 723, 21-A M.R.S. § 802
Maryland	MD Code § 11-601
Massachusetts	M.G.L.A. 54 § 118
Michigan	M.C.L.A. 168.42
Minnesota	M.S.A. § 208.05
Mississippi	Miss. Code Ann. § 23-15-605
Missouri	V.A.M.S. 128.070
Montana	Mt. St. §13-25-103. Mt. St. §13-1-103
Nebraska	NE ST § 32-710. NE ST § 32-1040
Nevada	N.R.S. 293.395
New Hampshire	N.H. Rev. Stat. § 659:81
New Jersey	§19:3-26
New Mexico	N. M. S. A. 1978, § 1-15-14
New York	§ 12-102
North Carolina	N.C.G.S.A. § 163-210
North Dakota	ND ST 16.1-14-01
Ohio	R.C. § 3505.33
Oklahoma	26 Okl. St. Ann. § 7-136, 26 Okl. St. Ann. § 10-103
Oregon	O.R.S. § 254.065
Pennsylvania	25 P.S. § 3166
Rhode Island	§ 17-4-10
South Carolina	Code 1976 § 7-19-70
South Dakota	SDCL. § 12-20-35
Tennessee	T. C. A. § 2-8-110
Texas	§ 192.005
Utah	Utah Code 20A-4-304, Utah Code 20A-13-302
Vermont	VT ST T. 17 § 2731, VT ST T. 17 § 2592
Virginia	§ 24.2-675. § 24.2-673
Washington	Rev. Code Wash. (ARCW) § 29A.56.320[a]
West Virginia	Article VII, section 3 of West Virginia Constitution
Wisconsin	W.S.A. 5.01
Wyoming	WY ST § 22-17-117. WY ST § 22-19-103

a Article III, section 4 of the Washington State Constitution specifies that, in all elections, the candidate "having the highest number of votes shall be declared duly elected."

In 1976, an Oklahoma court wrote the following in *McClendon v. Slater* about state legislation concerning the manner of appointing presidential electors:

> "It is fundamental that each state and its Legislature, under a Republican form of government possess all power to protect and promote the peace, welfare and safety of its citizens. The only restraints placed thereon are those withdrawn by the United States Constitution and the state's fundamental law. Art. V, ss 1 and 2 express that these reservations or **withdrawals in the people under the Constitution of the State of Oklahoma are two in nature and as explicitly set out in Art. V, s 2 to be the 'initiative' and the 'referendum' processes**. For our purpose, **no other withdrawal or restraint is placed upon the broad fundamental powers of this state's Legislature** by Art. V of the State Constitution."[99] [Emphasis added]

More recently, voters have considered initiatives for instant run-off voting for presidential electors and other offices in Alaska in 2002, requirements for voter identification in Arizona in 2004, and voting by convicted felons in Massachusetts in 2000.

In *Commonwealth ex rel. Dummit v. O'Connell*, the Kentucky Court of Appeals wrote the following in 1944 in connection with a state law permitting soldiers to vote by absentee ballot for U.S. Representatives, U.S. Senators, and presidential electors:

> "[T]he legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment, even though that enactment be one which the Legislature is authorized by the Federal Constitution to make."[100]

It is important to note that the decision of the U.S. Supreme Court in *Bush v. Gore* in 2000 did nothing to change the meaning of the word "legislature" in Article II of the U.S. Constitution. In that case, the Court settled the dispute over Florida's 2000 presidential vote by halting the manual recount of ballots that the Florida Supreme Court had ordered.

Referring to the 1892 case of *McPherson v. Blacker*,[101] the U.S. Supreme Court wrote in *Bush v. Gore* in 2000:

> "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. **This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature's power to select the manner for appointing electors is plenary**; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28–33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential

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[99] *McClendon v. Slater*. 554 P.2d 774, 776 (Ok. 1976).

[100] *Commonwealth ex rel. Dummit v. O'Connell*. 181 S.W.2d 691, 694 (Ky. Ct. App. 1944).

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

> electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *Id.*, at 35."[102] [Emphasis added]

The U.S. Supreme Court did not change the prevailing definition of the word "legislature" in *Bush v. Gore* but instead identified the source (i.e., *McPherson v. Blacker*) of the undisputed statement that the "legislature" is indeed supreme in matters of choosing the manner of appointing a state's presidential electors. The issues in *Bush v. Gore* did not concern the way that Florida's election code was originally enacted (e.g., whether the election code was presented to the Governor for approval or disapproval or whether the voters had perhaps enacted the election code through the citizen-initiative process). Indeed, the Florida election code at issue in *Bush v. Gore* was not enacted by the legislature alone but instead, was enacted by the ordinary lawmaking process involving presentation of the bill to the Governor for approval or disapproval (as shown in table 7.3).

Rather, *Bush v. Gore* was concerned with the breadth of authority of the Florida Supreme Court to establish a recount process *not found in Florida's pre-existing legislation* after the voters had cast their votes on November 7, 2000. The U.S. Supreme Court specifically identified two issues to be decided in *Bush v. Gore*:

(1) "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. §5, …"[103] and

(2) "whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses."[104]

In reaching its decision in *Bush v. Gore*, the Court referred to the Safe Harbor provision (3 U.S.C. §5).

> "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 ascer-

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

[103] *Bush v. Gore*. 531 U.S. 98 at 103. 2000. Section 5 of the Electoral Count Act of 1887 (which was in effect in 2000) may be found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition. The corresponding provision of the Electoral Count Reform Act of 2022 may be found in Appendix B of this book.

[104] *Bush v. Gore*. 531 U.S. 98 at 103. 2000.

> tainment of the electors appointed by such State is concerned."[105] [Emphasis added]

On December 12, 2000, the Court ruled that insufficient time remained to conduct a constitutional recount before the Electoral College meeting scheduled for December 18, 2000. Accordingly, Bush's 537-vote plurality that had already been certified under terms of the Florida election code was allowed to stand.[106]

In *Bush v. Gore*, the Supreme Court did not address the issue of whether the Florida voters could substitute themselves for the legislature, through the citizen-initiative process or the protest-referendum process, concerning the manner of choosing presidential electors in Florida. In fact, the 1892 case (*McPherson v. Blacker*) cited by the Court in *Bush v. Gore* specifically mentioned the possibility that a state's legislative power might be "reposed" in a place other than the state legislature.

> "**The legislative power is the supreme authority, except as limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, **unless by the fundamental law power is elsewhere reposed**."[107] [Emphasis added]

The citizen-initiative process—representing the authority of the citizens of a state to make their own laws—is consistent with the two exceptions contained in *McPherson v. Blacker*, namely that the legislature's power is supreme "except as limited by the constitution of the state" and except when "power is elsewhere reposed" "by the [state's] fundamental law." Initiatives are limitations on the power of the legislature, because they enable the voters to displace the legislature by enacting laws of their own design. The initiative process is established by the state's fundamental law (i.e., constitution). Indeed, initiatives are the obvious alternative place where the state's legislative power might be "elsewhere reposed."

The citizen-initiative process has consistently been viewed as a limitation on the state legislature. For example, in 1964, the U.S. Supreme Court in *Lucas v. Forty-Fourth General Assembly*[108] approved the use of the initiative to "obtain relief against alleged malapportionment" of state legislative seats. In 1975, *Chapman v. Meier*[109] concerned the adoption of an initiative substituting the will of the voters for the legislature's unwillingness to act. As a reservation of legislative power by the voters, the initiative process is necessarily an element of the fundamental law. In *Eastlake v. Forest City Enterprises, Inc.*, the U.S. Supreme Court wrote in 1976:

> "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See e.g., *The Federalist*, No. 39 (J. Madison). **In establishing legislative bodies, the peo-**

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[105] Title 3, chapter 1, section 5 of the United States Code.

[106] *Bush v. Gore*. 531 U.S. 98 at 110. 2000.

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

[108] *Lucas v. Forty-Fourth General Assembly*. 377 U.S. 713 at 732–733. 1964.

[109] *Chapman v. Meier*. 420 U.S. 1 at 21. 1975.

> **ple can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."**[110,111] [Emphasis added]

In commenting on *Bush v. Gore* in *Breaking the Deadlock*, Judge Richard Posner wrote:

> "[I]t is important that the approach be understood, and not rejected out of hand as meaning, for example, that the Governor of a state cannot veto a proposed law on the appointment of the state's Presidential electors or that the state's supreme court cannot invalidate an election law as unconstitutional. **Article II does not regulate the process by which state legislation is enacted and validated**, any more than it precludes interpretation. **But once the law governing appointment of the state's presidential electors is duly enacted**, upheld, and interpreted, (so far as interpretation is necessary to fill gaps and dispel ambiguities), the legislature has spoken and **the other branches of the state government must back off** …."[112] [Emphasis added]

Bush v. Gore was not about "the process by which state legislation is enacted" but the extent to which the Florida Supreme Court should "back off."

In summary, present-day practice by the states, actual practice by the states at the time that the U.S. Constitution took effect, legal commentary, and court decisions are consistent in supporting the view that the word "legislature" in Article II, section 1, clause 2 of the U.S. Constitution (the sixth entry in table 7.2) means the state's law-making process which includes the state's Governor and the voters in states that have the citizen-initiative and protest-referendum processes.

As Kirby stated in 1962:

> "It is safe to assume that state legislatures are limited by constitutional provisions for veto, referendum, and initiative in prescribing the manner of choosing presidential electors."[113]

There is an analog, at the federal level, to the settled practice of presenting state laws concerning the appointment of presidential electors to the Governor.

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

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

The 23rd Amendment (ratified in 1961) contains the wording "as the Congress may direct." The Amendment provides:

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[110] *Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668 at 672. 1976.

[111] *Cf. James v. Valtierra*, 401 U.S. 137, 141 (1971) "[p]rovisions for referendums demonstrate devotion to democracy."

[112] Posner, Richard A. 2001. *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*. Princeton, NJ: Princeton University Press. Page 111.

[113] Kirby, J. 1962. Limitations on the powers of the state legislatures over presidential elections. 27 *Law and Contemporary Problems* 495 at 504.

> "The District constituting the seat of government of the United States shall appoint in such manner **as the Congress may direct**: A number of electors of President and Vice President…." [Emphasis added].

In implementing the 23rd Amendment, the congressional legislation establishing the winner-take-all rule for the District of Columbia was presented to the President for his approval or disapproval.

Choosing the manner of conducting a popular election to fill a U.S. Senate vacancy

The 17th Amendment (providing for popular election of U.S. Senators) was ratified in 1913—in the midst of the period (1898–1918) when 19 states were adopting the initiative and referendum processes.[114,115] The 17th Amendment provides:

> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election **as the legislature may direct**." [Emphasis added]

The phrase "as the legislature may direct" in the 17th Amendment parallels the wording of Article II of the U.S. Constitution concerning presidential electors:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress …."[116] [Emphasis added]

Moreover, the phrase "as the legislature may direct" in the 17th Amendment and Article II parallels the wording of Article I, section 4, clause 1 of the U.S. Constitution concerning the "manner" of holding elections for U.S. Representatives and Senators:

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

The practice of the states in enacting laws to implement the 17th Amendment is shown in table 7.4. This table provides a citation to each state's law that specifies the manner of holding the popular election to fill a vacancy in the U.S. Senate under the 17th Amendment. The table also shows the section that specifies each state's law that specifies whether the Governor is empowered to make temporary appointments to the U.S. Senate prior to the vacancy-filling election. As can be seen, in no state was enactment of the implementing legislation for the 17th Amendment accomplished merely by action of the two chambers of

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[114] Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger.

[115] Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

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

the legislature. Instead, the actual practice of all states has been to treat the word "legislature" in the 17th Amendment to mean the "lawmaking process." The "lawmaking process" concerning the 17th Amendment has involved legislative bills that have been presented to the state's Governor for approval or disapproval and the use of the citizen-initiative process (in the cases of Arkansas in 1938 and Alaska in 2004).

Arkansas' implementation of the 17th Amendment is noteworthy for two reasons.

First, Arkansas' current implementation of the 17th Amendment was put on the ballot (on November 8, 1938) as a result of a citizen-initiative petition—not by the legislature.

Second, Arkansas' implementation of the 17th Amendment was in the form of an amendment to the state constitution as distinguished from a statutory enactment.

In other words, neither the "legislature" nor "legislation" was involved in implementing the 17th Amendment in Arkansas.[117]

The November 2004 elections provided two additional examples of the interpretation given to the word "legislature" by the states in connection with the 17th Amendment.

When U.S. Senator John Kerry was running for President in 2004, the Democratic–controlled legislature in Massachusetts passed a bill changing the procedure for filling U.S. Senate vacancies in Massachusetts. Under the pre-existing Massachusetts law, the Governor had the power to appoint a temporary replacement, who would serve until the next general election. In other words, if Democrat Kerry had won the presidency in November 2004, then the Republican Governor of Massachusetts would have been able to appoint a Republican to serve in the then-closely-divided U.S. Senate until November 2006 (almost two full years). Under the bill that the legislature passed, the Senate seat would remain vacant until a special election could be held (between 145 and 160 days after the creation of the vacancy). That is, a special Senate election would have been held in Massachusetts in the spring of 2005 if Kerry had been elected President. The legislative bill was presented to Governor Mitt Romney for his approval or disapproval. Thus, the constitutional phrase "as the Legislature thereof may direct" was interpreted to mean the law-making process. Predictably, the Republican Governor vetoed the bill passed by the Democratic legislature. As it happened, the legislature overrode the Governor's veto, and the bill became law.

The election of U.S. Senator Frank Murkowski as Governor of Alaska in 2002 created a vacancy in the U.S. Senate. Murkowski appointed his daughter Lisa to serve the last two years of his Senate term, thereby focusing public attention on the operation of the 17th Amendment in Alaska. An initiative petition was circulated and filed to require that, in the future, a vacancy in the U.S. Senate would remain vacant until a special election could be called. The Alaska Constitution enables the legislature to keep an initiative proposition off the ballot if the legislature responds to the petition by enacting a "substantially" similar law. The legislature's bill resembled the proposal in the petition in that it required a special election to fill a Senate vacancy; however, the legislature's bill differed from the petition in that it authorized the Governor to appoint a temporary Senator prior to the popular election. The legislature's bill was presented to the Governor for his approval or disapproval, and he signed it. The petition's sponsors protested that the legislature's alternative

[117] See the discussion of the Arizona Independent Redistricting Commission created in the November 2000 election and a similar commission created in California in the 2008 election in section 8.3.5.

Table 7.4 Practice by the states concerning the meaning of the word "legislature" in connection with state laws specifying the implementation of the 17th Amendment

State	Sections	Was the legislature's bill presented to the state's Governor?
Alabama	Ala. Code § 36-9-7 Ala. Code § 36-9-8	Yes Yes
Alaska	AK ST § 15.40.140 AK ST § 15.40.145	No—citizen-initiative process
Arizona	A.R.S. § 16-222	Yes
Arkansas	Const. Am. 29, § 1	No—citizen-initiative process
California	Cal. Elec. Code § 10720	Yes
Colorado	C.R.S.A. § 1-12-201	Yes
Connecticut	C.G.S.A. § 9-211	Yes
Delaware	DE ST TI 15 § 7321	Yes
Florida	F.S.A. § 100.161	Yes
Georgia	Ga. Code Ann., § 21-2-542	Yes
Hawaii	HI ST § 17-1	Yes
Idaho	ID ST § 59-910	Yes
Illinois	10 ILCS 5/25-8	Yes
Indiana	IC 3-13-3-1	Yes
Iowa	I.C.A. § 69.8	Yes
Kansas	KS ST § 25-318	Yes
Kentucky	KRS § 63.200	Yes
Louisiana	LSA-R.S. 18:1278	Yes
Maine	21-A M.R.S.A. § 391	Yes
Maryland	MD Code, Election Law, § 8-602	Yes
Massachusetts	M.G.L.A. 54 § 140	Yes
Michigan	M.C.L.A. 168.105	Yes
Minnesota	M.S.A. § 204D.28	Yes
Mississippi	Miss. Code Ann. § 23-15-855	Yes
Missouri	V.A.M.S. 105.040	Yes
Montana	Mt. St. 13-25-202	Yes
Nebraska	NE ST § 32-565	Yes
Nevada	N.R.S. 304.030	Yes
New Hampshire	N.H. Rev. Stat. § 661:5	Yes
New Jersey	§19:3-26	Yes
New Mexico	N. M. S. A. 1978, § 1-15-14	Yes
New York	McKinney's Consolidated Laws of New York, Chapter 47, Article 3	Yes
North Carolina	N.C.G.S.A. § 163-12	Yes
North Dakota	ND ST 16.1-13-08	Yes
Ohio	R.C. § 3521.02	Yes
Oklahoma	26 Okl. St. Ann. § 12-101	Yes
Oregon	O.R.S. § 188.120	Yes
Pennsylvania	25 P.S. § 2776	Yes
Rhode Island	§ 17-4-9	Yes
South Carolina	Code 1976 § 7-19-20	Yes
South Dakota	SDCL. § 12-11-4 SDCL. § 12-11-5	Yes Yes
Tennessee	T. C. A. § 2-16-101	Yes

(Continued)

Table 7.4 (Continued)

State	Sections	Was the legislature's bill presented to the state's Governor?
Texas	§ 204.001	Yes
	§ 204.002	Yes
	§ 204.003	Yes
	§ 204.004	Yes
Utah	§ 20A-1-502	Yes
Vermont	VT ST T. 17 § 2621	Yes
	VT ST T. 17 § 2622	Yes
Virginia	§ 24.2-207	Yes
Washington	RCW 29A.28.030	Yes
	RCW 29A.28.041	Yes
West Virginia	W. Va. Code, § 3-10-3	Yes
Wisconsin	W.S.A. 17.18	Yes
	W.S.A. 8.50	Yes
Wyoming	WY ST § 22-18-111	Yes

approach was not substantially the same as the initiative proposition, because it gave the Governor's appointee the advantage of incumbency in the special election.

On August 20, 2004, the Alaska Supreme Court decided that the legislature's alternative was not substantially the same as the proposition in the initiative petition.[118] At the same time, the Court refused to consider a pre-election challenge to the use of the citizen-initiative process to change the manner of filling a vacancy in the U.S. Senate on the grounds that the U.S. Constitution required the "legislature" to make the decision. The Alaska Supreme Court allowed the voters to vote on the proposition in the petition in the November 2004 election. The voters then enacted the proposition in the petition (Ballot Measure 4) in the November 2004 election by a margin of 165,017 to 131,821.[119]

The phrase "as the Legislature thereof may direct" in the 17th Amendment (the seventh entry in table 7.2) has been interpreted as the state's entire law-making process—not action by the state's legislature two chambers.

Empowering the Governor to temporarily fill a U.S. Senate vacancy until a popular election is held

The word "legislature" also appears in the 17th Amendment in connection with temporary appointments to the U.S. Senate.

> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That **the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election** as the legislature may direct." [Emphasis added]

[118] *State of Alaska et al. v. Trust the People Initiative Committee*. Supreme Court Order No. S–11288.

[119] In the same election, the voters elected Lisa Murkowski to a full six-year term in the Senate by a margin of 149,446 to 139,878.

As shown in table 7.4, the word "legislature" in the 17th Amendment (the eighth entry in table 7.2) has meant the state's entire law-making process—not action by the two chambers of a state's legislature.

Consenting to the federal purchase of enclaves

The U.S. Constitution empowers Congress to exercise exclusive

> "Authority over all Places purchased by the **Consent of the Legislature** of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[120] [Emphasis added]

Prior to ratification of the U.S. Constitution, the states had been paying for the operation and maintenance of 13 lighthouses. Moreover, in 1789, several additional lighthouses were under construction. When the first Congress met in 1789, it offered to fund the operation and maintenance of all the lighthouses; however, Congress insisted that the sites become federal enclaves. Accordingly, Congress passed the Lighthouse Act on August 7, 1789, offering permanent funding for lighthouses on the condition that the state "legislatures" consented to the creation of the federal enclaves by August 15, 1790.[121] The Constitution required consent from the state "legislatures" and thus set the stage for a contemporary interpretation of the word "legislature" in the Enclaves Clause of the U.S. Constitution. The question was whether the word "legislature" referred to the two chambers of the state legislature or "the lawmaking process."

At the time when the U.S. Constitution took effect, the gubernatorial veto existed in Massachusetts and New York.[122] Both chambers of the legislatures of Massachusetts and New York approved legislation consenting to the cession of their lighthouses. These legislative bills were then presented, respectively, to the Governor of Massachusetts (an official who was manifestly not part of the state legislature) and the New York Council of Revision (a body composed of the Governor and other officials who were manifestly not part of the state legislature). The Massachusetts legislation became law on June 10, 1790,[123] and the New York legislation became law on February 3, 1790.[124] Cession legislation was similarly enacted in New York in connection with the construction of a new lighthouse at Montauk in 1792—with the legislative bill again being presented to the Governor and the Council.[125]

Thus, practice by the states in connection with the ninth entry in table 7.2 has interpreted the word "legislature" to mean the state's law-making process in connection with the consent by a state to the acquisition of enclaves by the federal government (the ninth entry in table 7.2).

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[120] U.S. Constitution. Article I, section 9, clause 17.

[121] Grace, Adam S. 2005. *Federal-State "Negotiations" over Federal Enclaves in the Early Republic: Finding Solutions to Constitutional Problems at the Birth of the Lighthouse System*. Berkeley, CA: Berkeley Electronic Press. Working Paper 509. http://law.bepress.com/expresso/eps/509. Pages 1–11.

[122] Kole, Edward A. 1999. *The First 13 Constitutions of the First American States*. Haverford, PA: Infinity Publishing.

[123] Ch. 4, 1790 Massachusetts Laws 77.

[124] New York, Ch. 3, February 3, 1790.

[125] New York, Ch. 4, December 18, 1792.

Consenting to the formation of new states from territory of existing states

The U.S. Constitution provides:

> "No new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the **Consent of the Legislatures** of the States concerned as well as of the Congress."[126] [Emphasis added]

The authors of this book believe that this usage of the word "legislature" refers to the state's law-making process in connection with the consent of a state to the formation of a new state from its territory (the 10th entry in table 7.2).

Requesting federal military assistance to quell domestic violence

The U.S. Constitution provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on **Application of the Legislature**, or of the Executive (when the **Legislature** cannot be convened) against domestic Violence."[127] [Emphasis added]

This provision of the U.S. Constitution (the Guarantee Clause) specifically creates a contrast between the state's "executive" and "legislature."

The Guarantee Clause has only been rarely invoked. On April 4, 1842, Rhode Island Governor Samuel Ward King requested that President John Tyler provide federal military aid to quell a potential insurrection, known as the Dorr Rebellion, in which an alternative government for Rhode Island was attempting to gain recognition and legitimacy. The Governor's request was not accompanied by a simultaneous request from the state legislature. President Tyler took no action in response to the Governor's unilateral request.[128]

Then, in 1844, the Freeholders' legislature of Rhode Island passed a resolution requesting that President Tyler provide federal military aid to quell the Dorrites. President Tyler took no action in response to the legislature's resolution.[129]

The Guarantee Clause of the U.S. Constitution distinguishes the state's "legislature" from the state's Governor. These two requests concerning the Dorr Rebellion in Rhode Island suggest that the word "legislature" in Article IV, section 4 of the U.S. Constitution (the 11th entry in table 7.2) was interpreted, in Rhode Island in the 1840s, to mean the two chambers of the state legislature.

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[126] U.S. Constitution. Article IV, section 3, clause 1.

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

[128] Wiecek, William M. 1972. *The Guarantee Clause of the U.S. Constitution*. Ithaca, NY: Cornell University Press. Page 105.

[129] Gettleman, Marvin E. 1973. *The Dorr Rebellion: A Study in American Radicalism 1833–1849*. New York, NY: Random House. Page 105.

7.3.6. Pre-election versus post-election challenges

The use of the citizen-initiative process to enact the National Popular Vote Compact can be challenged either before or after the statewide vote on the statute proposed by a petition.

Both state and federal courts have been reluctant, as a general principle, to intervene in the citizen-initiative process prior to enactment of a proposition by the voters.

In "Pre-Election Judicial Review of Initiatives and Referendums," James Gordon and David Magleby wrote:

> "Most courts will not entertain a challenge to a measure's substantive validity before the election. A minority of courts, however, are willing to conduct such review. Arguably, pre-election review of a measure's substantive validity involves issuing an advisory opinion, violates ripeness requirements and the policy of avoiding unnecessary constitutional questions, and is an unwarranted judicial intrusion into a legislative process." [130]

The numerous practical difficulties with pre-election judicial challenges to ballot propositions partly explain judicial reluctance to such challenges. As Supreme Court Justice William O. Douglas wrote in his concurring opinion in *Ely v. Klahr* in 1971:

> "We are plagued with election cases coming here on the eve of election, with the remaining time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented."[131]

The practical difficulties associated with pre-election challenges have been compounded in recent years by the increasing use of absentee (mail-in) voting and early voting (where walk-in polling places are operated at designated locations, such as government buildings, for several weeks prior to Election Day).

The general reluctance of courts to prevent a vote on ballot measures proposed by the citizen-initiative process is illustrated by the efforts in the early 1990s to enact state constitutional amendments imposing term limits on members of the U.S. House of Representatives and U.S. Senate. Many questioned whether the proposed state constitutional amendments were consistent with the specific federal constitutional provisions establishing qualifications for these federal offices.

Despite pre-election legal challenges to the initiative petitions in some states, in no instance did the courts prevent a vote by the people on the grounds that congressional term limits violated the U.S. Constitution.

It was only after these propositions had been enacted by the voters in a number of states that the courts examined the constitutionality of the ballot propositions. In 1995, the U.S. Supreme Court held that term limits on members of the U.S. House of Representatives and U.S. Senate could not be imposed at the state level.[132]

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[130] Gordon, James D., and Magleby, David B. 1989. Pre-election judicial review of initiatives and referendums. 64 *Notre Dame Law Review* 298–320 at 303.

[131] *Ely v. Klahr*. 403 U.S. 103 at 120–121. 1971.

[132] *U.S. Term Limits v. Thornton.* 514 U.S. 779. 1995.

The California Supreme Court refused, on July 26, 2005, to remove an initiative proposition from the ballot in California's November 8, 2005, statewide election:

> "The stay issued by the Court of Appeal as part of its July 22, 2005, decision, restraining the Secretary of State from taking any steps, pending the finality of the Court of Appeal's decision, to place Proposition 80 in the ballot pamphlet or on the ballot of the special election to be held on November 8, 2005, is vacated. As the Court of Appeal recognized, California authorities establish that
>
> > 'it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity.' (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.)
>
> "Because, unlike the Court of Appeal, at this point we cannot say that it is clear that article XII, section 5, of the California Constitution precludes the enactment of Proposition 80 as an initiative measure, we conclude that the validity of Proposition 80 need not and should not be determined prior to the November 8, 2005 election. Accordingly, the Secretary of State and other public officials are directed to proceed with all the required steps to place Proposition 80 in the ballot pamphlet and on the ballot of the special election to be held on November 8, 2005. After that election, we shall determine whether to retain jurisdiction in this matter and resolve the issues raised in the petition."[133]

State constitutional restraints on repeal of laws enacted by the citizen-initiative process

In 11 states, there are state constitutional limitations concerning the repeal or amendment of a statute originally enacted by the voters by means of the citizen-initiative process, as shown in table 7.5.[134]

In seven of the 11 states in the table, the constraint on the legislature runs for a specific period of time.

In four of the 11 states, the constraint is permanent—that is, the voters must be consulted in a subsequent referendum about any proposed repeal or amendment.

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[133] *Independent Energy Producers Association et al., Petitioners, v. Bruce McPherson, as Secretary of State, etc., Respondent; Robert Finkelstein et al., Real Parties in Interest*. Case number S135819. July 26, 2005.

[134] The full constitutional provisions may be found in appendix R of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

Table 7.5 State constitutional limitations on the repeal or amendment of statutes enacted by the voters

State	Limitations
Alaska	No repeal within two years; amendment by majority vote anytime
Arizona	Three-quarters vote to amend; amending legislation must "further the purpose" of the measure
Arkansas	Two-thirds vote to amend or repeal
California	No amendment or repeal of an initiative statute by the legislature unless the initiative specifically permits it
Michigan	Three-quarters vote to amend or repeal
Nebraska	Two-thirds vote to amend or repeal
Nevada	No amendment or repeal within three years of enactment
North Dakota	Two-thirds vote to amend or repeal within seven years of effective date
Oregon	Two-thirds vote to amend or repeal within two years of enactment
Washington	Two-thirds vote to amend or repeal within two years of enactment
Wyoming	No repeal within two years of effective date; amendment by majority vote any time

7.4. THE ROLE OF CONGRESS

Congress typically does not consider an interstate compact until it has been enacted by the requisite combination of states.

Congress has the option of explicitly consenting to a compact (section 5.19). It also may implicitly consent to one. As the U.S. Supreme Court wrote in *Virginia v. Tennessee*:

> "Consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them."[135]

Legislation conferring congressional consent on an interstate compact requires a majority vote of both houses of Congress and presentation of the bill to the President. The President can veto such legislation.[136] If the President vetoes the bill, Congress can override the veto by a two-thirds vote of both houses.

Many interstate compacts do not require congressional consent in order to take effect. The question of whether the National Popular Vote Compact requires congressional consent in order to take effect is discussed in detail in section 9.23.3.

[135] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

[136] An example of a presidential veto of an interstate compact occurred in 1942 involving Colorado, Kansas, and Nebraska. President Franklin D. Roosevelt vetoed a bill granting congressional consent to the Republican River Compact. See Republican River Basin—Veto Message from the President of the United States. *Congressional Record*. Volume 88. Pages 3285–3286. April 2, 1942. https://www.govinfo.gov/content/pkg/GPO-CRECB-1942-pt3/pdf/GPO-CRECB-1942-pt3-7-1.pdf

8 How a Nationwide Campaign Would Be Run

This chapter addresses the question of how a presidential campaign would be run if every vote were equal and the winner were the candidate who received the most popular votes nationwide.

8.1. HOW PRESIDENTIAL CAMPAIGNS ARE CURRENTLY RUN

Because of the state-by-state winner-take-all method of awarding electoral votes, candidates have no reason to solicit votes in the general-election campaign in states where the statewide outcome is a foregone conclusion.

Instead, almost all general-election campaign events are conducted in closely divided battleground states.

As Wisconsin Governor Scott Walker said while running for President in 2015:

> "The nation as a whole is not going to elect the next president. Twelve states are."[1]

One of a presidential campaign's most important strategic decisions under the current system is the allocation of the time of its presidential and vice-president candidates among the states. In practice, the allocation of candidate time closely parallels the expenditures for advertising and other campaign activities.

In 2012, all of the general-election campaign events (and almost all campaign expenditures) were concentrated in the 12 states where the outcome was between 45% and 51% Republican—that is, a six percentage-point spread. See section 1.2.3 and figure 1.11. Thirty-eight states were ignored, including 12 of the 13 smallest states and almost all rural, agricultural, Southern, Western, and Northeastern states.

Similarly, in 2016, 94% of the campaign events (375 of the 399) were in the 12 states where the outcome was between 43% and 51% Republican—an eight percentage-point spread. See section 1.2.2 and figure 1.10.

Altogether, there were 627 general-election campaign events in 2012 and 2016. Almost all (96%) of these events in the two campaigns were in 12 closely divided states (Florida,

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[1] CNBC. 2015. 10 questions with Scott Walker. *Speakeasy*. September 1, 2015. Transcript of interview of Scott Walker by John Harwood https://www.cnbc.com/2015/09/01/10-questions-with-scott-walker.html. Video of quote is at timestamp 1:26 at https://www.youtube.com/watch?v=nNZp1g8oUOI. The full quotation is: "The nation as a whole is not going to elect the next president. Twelve states are. Wisconsin's one of them. I'm sitting in another one right now, New Hampshire. There's going to be Colorado, where I was born, Iowa, where I lived, Ohio, Florida, a handful of other states. In total, it's about 11 or 12 states that are going elect the next president."

Pennsylvania, Michigan, Wisconsin, North Carolina, Arizona, Ohio, Virginia, Iowa, Colorado, New Hampshire, and Nevada).

After a presidential campaign decides how much attention (if any) to give to each particular state, the campaign then determines where to campaign within the state.

Inside each battleground state, every vote is equal. Everything that the state has to offer (that is, all of its electoral votes) goes to the candidate who receives the most popular votes in that state. As Governor Walker observed in 2016:

> "Let's be honest. … You're not running for President—**you're running for Governor in twelve states**."[2] [Emphasis added]

Campaign strategist David Plouffe described the 2024 race to *Politico* on September 3:

> "Basically the presidential campaign is seven gubernatorial races and one congressional race. Yes, television ads are important. And yes, national coverage is important. But you've got to think about it that way, which is, you want to be in as many corners of the state as you can, communities large, medium and small."

8.2. A NATIONWIDE PRESIDENTIAL CAMPAIGN WOULD BE DIFFERENT.

There would be no battleground states in a campaign for the presidency based on the national popular vote.

That is, state boundary lines would play no role in determining the importance of a vote to a presidential campaign in a nationwide campaign. The value of a vote would not depend on whether the voter lives in a red state, a blue state, or a closely divided state. Every voter in every state would be equally important in a nationwide campaign.

The best evidence as to how presidential candidates would campaign in an election in which every vote is equal, and in which the winner is the candidate receiving the most popular votes comes from the actual behavior of real-world presidential candidates *inside* the states where they currently campaign.

Thus, in this chapter, we examine how present-day candidates actually conduct presidential campaigns inside today's battleground states.

In the process of examining how campaigns are run inside battleground states, we will answer some additional important questions.

For example, some have speculated that, in a nationwide campaign, candidates would concentrate disproportionately on heavily populated metropolitan areas and ignore rural areas.

The *Morning Telegraph* in Tyler, Texas, editorialized:

> "The strongest argument against National Popular Vote [is that it] would shift the political battles … to big cities. In a popular election, candidates would have to go where the voters are—and that means rural areas would be skipped."[3]

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[2] Quoted in Morrissey, Ed. 2016. *Going Red: The Two Million Voters Who Will Elect the Next President*. New York, NY: Crown Forum. Page 7.

[3] Electoral College is still important. Editorial in *Tyler Morning Telegraph.* July 28, 2015. http://www.tylerpaper.com/TP-Editorials/222279/electoral-college-is-still-important

John W. York, a policy analyst at the Heritage Foundation, wrote in 2019:

> "If the U.S. were to abandon the electoral college in favor of a national popular vote, the same few cities would be the focus of the battle for the White House every cycle. Given that they have limited time and money, **presidential candidates of both parties would be foolish to waste their energy anywhere but the most densely populated urban centers**. This is where the largest concentration of voters are, so racking up the votes in these areas would be the overwhelming focus of any election.
>
> Under a national popular vote, cities like Los Angeles and New York … would thoroughly and perpetually dominate electoral politics as well."[4] [Emphasis added]

If there were any tendency for a nationwide presidential campaign to overemphasize heavily populated metro areas or ignore rural areas, we would see evidence of it in the actual behavior of presidential candidates inside today's battleground states.

Actual presidential campaigns—devised by the nation's most astute political strategists—do not overemphasize the big metro areas or ignore rural areas inside battleground states.

In particular, an examination of the 627 general-election campaign events in the 12 battleground states of 2012 and 2016 shows:

- When presidential candidates campaign to win the electoral votes of a closely divided battleground state under the current system, they campaign throughout the state—big cities, suburbs, exurbs, and rural areas.
- Specifically, the percentage of general-election events in the biggest metro area of each battleground state closely match those areas' share of the population. That is, candidates do not disproportionately concentrate on heavily populated metropolitan areas.
- Similarly, candidates campaign in each battleground state's second-biggest metro area with a frequency that closely matched that area's share of the state's population.
- Moreover, candidates campaign in each battleground state's third-biggest metro area with a frequency that closely matched that area's share of the state's population.

In short, there is nothing special or more valuable about a vote in a metro area compared to a vote elsewhere in the state in an election in which every vote is equal, and in which the winner is the candidate who receives the most popular votes.

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[4] York, John W. 2019. No, the electoral college isn't 'electoral affirmative action' for rural states. *Los Angeles Times*. October 9, 2019. https://www.latimes.com/opinion/story/2019-10-09/electoral-college-affirmative-action-rural-states

Metropolitan statistical areas

A Metropolitan Statistical Area (MSA) is defined by the U.S. Office of Management and Budget as follows:

> "Metropolitan Statistical Areas have at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. … Of 3,142 counties in the United States, 1,180`are in the 384 Metropolitan Statistical Areas."[5]

An average of 33% of the people lived in the biggest metropolitan statistical area of the 12 battleground states of 2012 and 2016—places such as Philadelphia, Detroit, Cleveland, Miami, Phoenix, and Milwaukee.

Table 8.1 shows the population of each of the 2012 and 2016 battleground states, the population of each state's biggest metropolitan statistical area, and the percentage of each state's population living in the state's biggest metro area according to the 2010 census.[6,7,8]

The table shows that an average of 33% of the people lived in the state's biggest metropolitan statistical area (and, of course, that an average of two-thirds of the people live outside the state's biggest metropolitan statistical area).

Table 8.1 Biggest metro areas of the 2012 and 2016 battleground states

State	State's population	Biggest Metropolitan Statistical Area in the state	Biggest MSA's population	Biggest MSA as % of state's population
AZ	6,392,017	Phoenix-Mesa-Scottsdale, AZ	4,192,887	66%
CO	5,029,196	Denver-Aurora-Lakewood, CO	2,543,482	51%
FL	18,801,310	Miami-Fort Lauderdale-West Palm Beach, FL	5,564,635	30%
IA	3,046,355	Des Moines-West Des Moines, IA	476,865	16%
MI	9,883,640	Detroit-Warren-Dearborn, MI	4,296,250	43%
NC	9,535,483	Charlotte-Concord-Gastonia, NC-SC	1,881,147	20%
NH	1,316,470	Boston-Cambridge-Newton, MA-NH	418,366	32%
NV	2,700,551	Las Vegas-Henderson-Paradise, NV	1,951,269	72%
OH	11,536,504	Cleveland-Elyria, OH	2,077,240	18%
PA	12,702,379	Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	4,008,994	32%
VA	7,994,802	Washington-Arlington-Alexandria, DC-VA-MD-WV	2,677,141	33%
WI	5,686,986	Milwaukee-Waukesha-West Allis, WI	1,555,908	27%
	94,625,693	**Total**	**31,644,184**	**33%**

[5] See *United States Office of Management and Budget (OMB) Bulletin 20-01.* March 6, 2020. Page 2. https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf

[6] If a Metropolitan Statistical Area extends into an adjacent state, the population shown in the table is the population living in the battleground state. For example, Camden, New Jersey, and Wilmington, Delaware, are in the Philadelphia metro area; however, the population shown in the table is only the population living in Pennsylvania.

[7] About a third of Virginia's population lives in the Washington D.C. metro area. Similarly, about a third of New Hampshire's population lives in the Boston metro area.

[8] Note that the state's biggest metro area does not necessarily contain the state's biggest city. For example, the Miami-Fort Lauderdale-West Palm Beach Metropolitan Statistical Area does not contain the city of Jacksonville.

Table 8.2 shows that an average of 15% of the population of the 12 battleground states lived in their state's second-biggest metropolitan statistical area—places such as Pittsburgh, Grand Rapids, Columbus, and Madison.

Table 8.2 Second-biggest metro areas of 2012–2016 battleground states

State	State's population	Second-biggest Metropolitan Statistical Area in the state	Second-biggest MSA's population	Second-biggest MSA as % of state's population
AZ	6,392,017	Tucson, AZ	980,263	15%
CO	5,029,196	Colorado Springs, CO	645,613	13%
FL	18,801,310	Tampa-St. Petersburg-Clearwater, FL	2,783,243	15%
IA	3,046,355	Cedar Rapids, IA	257,940	8%
MI	9,883,640	Grand Rapids-Wyoming, MI	988,938	10%
NC	9,535,483	Raleigh, NC	1,069,871	11%
NH	1,316,470	Manchester-Nashua, NH	400,721	30%
NV	2,700,551	Reno, NV	425,417	16%
OH	11,536,504	Columbus, OH	1,901,974	16%
PA	12,702,379	Pittsburgh, PA	2,356,285	19%
VA	7,994,802	Virginia Beach-Norfolk-Newport News, VA-NC	1,641,078	21%
WI	5,686,986	Madison, WI	548,602	10%
	109,617,271	**Total**	**13,999,945**	**15%**

Table 8.3 shows that an average of 9% of the population of the 12 battleground states lived in their state's third-biggest metropolitan statistical area—places such as Allentown, Lansing, Cincinnati, and Green Bay.[9]

Table 8.3 Third-biggest metro areas of 2012–2016 battleground states

State	State's population	Third-biggest Metropolitan Statistical Area in the state	Third-biggest MSA's population	Third-biggest MSA as % of state's population
AZ	6,392,017	Prescott Valley-Prescott, AZ	211,033	3%
CO	5,029,196	Fort Collins, CO	299,630	6%
FL	18,801,310	Orlando-Kissimmee-Sanford, FL	2,134,411	11%
IA	3,046,355	Waterloo-Cedar Falls, IA	167,819	6%
MI	9,883,640	Lansing-East Lansing, MI	464,036	5%
NC	9,535,483	Greensboro-High Point, NC	723,801	8%
NH	1,316,470	Concord, NH Micropolitan Statistical Area	146,445	11%
NV	2,700,551	Carson City, NV	55,274	2%
OH	11,536,504	Cincinnati, OH-KY-IN	1,625,406	14%
PA	12,702,379	Allentown-Bethlehem-Easton, PA-NJ	712,481	6%
VA	7,994,802	Richmond, VA	1,208,101	15%
WI	5,686,986	Green Bay, WI	306,241	5%
	109,617,271	**Total**	**8,054,678**	**9%**

[9] New Hampshire only has two Metropolitan Statistical Areas. Therefore, the Census Bureau's next largest grouping (the "micropolitan" statistical area) is included in this table, namely the Concord, New Hampshire, micropolitan statistical area. The Census Bureau defines a micropolitan statistical area as having "at least one urban cluster of at least 10,000 but less than 50,000 population, plus adjacent territory that has

8.3. ACTUAL PATTERN OF CAMPAIGNING IN THE BIGGEST METRO AREAS VERSUS THE REST OF THE STATE

How do candidates allocate their general-election campaign events to each battleground state's biggest metro area versus the rest of the state?

Specifically, do metro areas such as Philadelphia, Detroit, Cleveland, Miami, Phoenix, and Milwaukee, exercise any kind of intoxicating or magnetic attraction on presidential candidates?

Let's start with the 2012 general-election campaign for President.

In table 8.4:

- Column 2 shows the actual number of general-election campaign events in each state;
- Column 3 shows the actual number of general-election campaign events in each state's biggest metro area;
- Column 5 shows the percentage of the state's population living in the state's biggest metro area; and
- Column 6 shows the actual percentage of general-election campaign events in the state's biggest metro area.

Table 8.4 The biggest metro area's percentage of 2012 events closely matches the area's percent of the state's population.

State	Events in state	Events in biggest MSA	Biggest Metropolitan Statistical Area in the state	Percent of people living in biggest MSA	Actual percent of events in biggest MSA
AZ	0	0	Phoenix-Mesa-Scottsdale, AZ	66%	0%
CO	24	11	Denver-Aurora-Lakewood, CO	51%	46%
FL	40	9	Miami-Fort Lauderdale-West Palm Beach, FL	30%	23%
IA	27	5	Des Moines-West Des Moines, IA	16%	19%
MI	1	1	Detroit-Warren-Dearborn, MI	43%	100%
NC	3	1	Charlotte-Concord-Gastonia, NC-SC	20%	33%
NH	13	4	Boston-Cambridge-Newton, MA-NH	32%	31%
NV	12	7	Las Vegas-Henderson-Paradise, NV	72%	58%
OH	73	12	Cleveland-Elyria, OH	18%	16%
PA	5	2	Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	32%	40%
VA	36	10	Washington-Arlington-Alexandria, DC-VA-MD-WV	33%	28%
WI	18	5	Milwaukee-Waukesha-West Allis, WI	27%	28%
Total	**252**	**67**	**Total for 2012**	**33%**	**27%**

As can be seen from the table for 2012, the actual percentage of events in the battleground states' biggest metro areas (27%) approximately matched the share of the population of these states living in the state's biggest metro areas (33%).

Table 8.5 presents the same information for 2016.

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a high degree of social and economic integration with the core as measured by commuting ties." *United States Office of Management and Budget (OMB) Bulletin 20-01.* March 6, 2020. Page 7. https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf

Table 8.5 The biggest metro area's percentage of 2016 events closely matches the area's percentage of the state's population.

State	Events in state	Events in biggest MSA	Biggest Metropolitan Statistical Area in the state	Percent of people living in biggest MSA	Actual percent of events in biggest MSA
AZ	10	7	Phoenix-Mesa-Scottsdale, AZ	66%	70%
CO	19	6	Denver-Aurora-Lakewood, CO	51%	32%
FL	71	24	Miami-Fort Lauderdale-West Palm Beach, FL	30%	34%
IA	21	7	Des Moines-West Des Moines, IA	16%	33%
MI	22	11	Detroit-Warren-Dearborn, MI	43%	50%
NC	55	13	Charlotte-Concord-Gastonia, NC-SC	20%	24%
NH	21	10	Boston-Cambridge-Newton, MA-NH	32%	48%
NV	17	9	Las Vegas-Henderson-Paradise, NV	72%	53%
OH	48	11	Cleveland-Elyria, OH	18%	23%
PA	54	17	Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	32%	31%
VA	23	7	Washington-Arlington-Alexandria, DC-VA-MD-WV	33%	30%
WI	14	6	Milwaukee-Waukesha-West Allis, WI	27%	43%
Total	**375**	**128**	**Total for 2016**	**33%**	**34%**

As can be seen from the table for 2016, the actual percentage of events in the battleground states' biggest metro areas (34%) closely matched the share of the population of these states living in the state's biggest metro areas (33%).

Table 8.6 combines the facts for the 627 general-election campaign events of 2012 and 2016.

As can be seen from the table for 2012 and 2016, the actual percentage of events in each battleground state's biggest metro area (31%) closely matched the share of the population living in each state's biggest metro area (33%). In fact, the biggest metro areas of the battleground states received a tad less attention than their share of the population.

The reason for the close match is that there is nothing special, more valuable, or more influential about a vote in the state's biggest metro area compared to a vote elsewhere in

Table 8.6 The biggest metro area's percentage of 2012 and 2016 events closely matches the area's percentage of the state's population.

State	Events in state	Events in biggest MSA	Biggest Metropolitan Statistical Area in the state	Percent of people living in biggest MSA	Actual percent of events in biggest MSA
AZ	10	7	Phoenix-Mesa-Scottsdale, AZ	66%	70%
CO	43	17	Denver-Aurora-Lakewood, CO	51%	40%
FL	111	33	Miami-Fort Lauderdale-West Palm Beach, FL	30%	30%
IA	48	12	Des Moines-West Des Moines, IA	16%	25%
MI	23	12	Detroit-Warren-Dearborn, MI	43%	52%
NC	58	14	Charlotte-Concord-Gastonia, NC-SC	20%	24%
NH	34	14	Boston-Cambridge-Newton, MA-NH	32%	41%
NV	29	16	Las Vegas-Henderson-Paradise, NV	72%	55%
OH	121	23	Cleveland-Elyria, OH	18%	19%
PA	59	19	Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	32%	32%
VA	59	17	Washington-Arlington-Alexandria, DC-VA-MD-WV	33%	29%
WI	32	11	Milwaukee-Waukesha-West Allis, WI	27%	34%
Total	**627**	**195**	**Total for 2012 and 2016**	**33%**	**31%**

the state in an election in which every vote is equal, and in which the winner is the candidate receiving the most popular votes.

Table 8.7 shows the data for 67% of the people in Ohio who lived in the rest of the state.

As can be seen, the actual percentage of 2012 and 2016 events outside each battleground state's biggest metro area (69%) closely matched the share of the population living outside each state's biggest metro area (67%)—in fact, it was a tad more.

Table 8.7 Outside the state's biggest metro area, the percentage of 2012 and 2016 events closely matches the area's percentage of the state's population.

State	Events in state	Events outside biggest MSA	Area outside the state's biggest Metropolitan Statistical Area	Percent of people living outside biggest MSA	Actual percent of events outside biggest MSA
AZ	10	3	Outside Phoenix metro area	34%	30%
CO	43	26	Outside Denver metro area	49%	60%
FL	111	78	Outside Miami metro area	70%	70%
IA	48	36	Outside Des Moines metro area	84%	75%
MI	23	11	Outside Detroit metro area	57%	48%
NC	58	44	Outside Charlotte metro area	80%	76%
NH	34	20	Outside metro area	68%	59%
NV	29	13	Outside Las Vegas metro area	28%	45%
OH	121	98	Outside Cleveland metro area	82%	81%
PA	59	40	Outside Philadelphia metro area	68%	68%
VA	59	42	Outside Washington metro area	67%	71%
WI	32	21	Outside Milwaukee metro area	73%	66%
Total	**627**	**432**	**Total for 2012 and 2016**	**67%**	**69%**

8.4. ACTUAL PATTERN OF CAMPAIGNING IN THE SECOND-BIGGEST METRO AREAS OF THE BATTLEGROUND STATES

Now let's consider the second-biggest metro areas of the battleground states—that is, metro areas such as Tampa, Grand Rapids, Pittsburgh, Madison, Tucson, Raleigh, and Columbus.

Table 8.8 shows the data for the second-biggest metro area of each state.

As can be seen from the table, the actual percentage of 2012 and 2016 events in the battleground states' second-biggest metro areas (20%) approximately matched the share of the population of these states living in these areas (15%).

8.5. ACTUAL PATTERN OF CAMPAIGNING IN THE THIRD-BIGGEST METRO AREAS OF THE BATTLEGROUND STATES

Now let's consider the third-biggest metro areas of the battleground states—that is, metro areas such as Orlando, Allentown, Lansing, Green Bay, Prescott, Greensboro, and Cincinnati.

Table 8.9 shows the data for the third-biggest metro area of each state.

As can be seen from the table, the actual percentage of 2012 and 2016 events in the battleground states' third-biggest metro areas (10%) closely matched the share of the population of these states living in these areas (9%).

Table 8.8 The second-biggest metro area's percentage of 2012 and 2016 events closely matched the area's percentage of the state's population.

State	Events in state	Events in second-biggest MSA	Second-biggest Metropolitan Statistical Area in the state	Percent of people living in second-biggest MSA	Actual percent of events in second-biggest MSA
AZ	10	2	Tucson, AZ	15%	20%
CO	43	9	Colorado Springs, CO	13%	21%
FL	111	17	Tampa-St. Petersburg-Clearwater, FL	15%	15%
IA	48	7	Cedar Rapids, IA	8%	15%
MI	23	5	Grand Rapids-Wyoming, MI	10%	22%
NC	58	8	Raleigh, NC	11%	14%
NH	34	16	Manchester-Nashua, NH	30%	47%
NV	29	12	Reno, NV	16%	41%
OH	121	21	Columbus, OH	16%	17%
PA	59	13	Pittsburgh, PA	19%	22%
VA	59	13	Virginia Beach-Norfolk-Newport News, VA-NC	21%	22%
WI	32	3	Madison, WI	10%	9%
Total	**627**	**126**	**Total for 2012 and 2016**	**15%**	**20%**

Table 8.9 The third-biggest metro area's percentage of 2012 and 2016 events closely matched the area's percentage of the state's population

State	Events in state	Events in third-biggest MSA	Third-biggest Metropolitan Statistical Area in the state	Percent of people living in third-biggest MSA	Actual percent of events in third-biggest MSA
AZ	10	1	Prescott Valley-Prescott, AZ	3%	10%
CO	43	2	Fort Collins, CO	6%	5%
FL	111	14	Orlando-Kissimmee-Sanford, FL	11%	13%
IA	48	1	Waterloo-Cedar Falls, IA	6%	2%
MI	23	2	Lansing-East Lansing, MI	5%	9%
NC	58	6	Greensboro-High Point, NC	8%	10%
NH	34	2	Concord, NH Micropolitan Statistical Area	11%	6%
NV	29	1	Carson City, NV	2%	3%
OH	121	15	Cincinnati, OH-KY-IN	14%	12%
PA	59	2	Allentown-Bethlehem-Easton, PA-NJ	6%	3%
VA	59	12	Richmond, VA	15%	20%
WI	32	6	Green Bay, WI	5%	19%
Total	**627**	**64**	**Total for 2012 and 2016**	**9%**	**10%**

8.6. ACTUAL CAMPAIGNING IN THE 12 BATTLEGROUND STATES

We now present detailed data about the 2012 and 2016 campaigns in the battleground states on which the above conclusions are based. We examine the states in order of their number of 2012 general-election campaign events.

8.6.1. Ohio

In 2012, Ohio received more general-election campaign events than any other state. In fact, in 2012, Ohio received the largest percentage of the nation's general-election campaign events than any single state received in recent decades.

Specifically, Ohio has about 3% of the nation's population, but it received 29% (73 of 253) of the entire nation's general-election campaign events in 2012.

Ohio thus presents the opportunity to see—in much finer detail than elsewhere—how real-world presidential candidates actually allocate their limited campaign resources among various parts of a state.

Although some people believe that candidates concentrate their campaigns in heavily populated metropolitan areas and ignore rural areas, a glance at the list of places in Ohio that the presidential candidates actually visited indicates that they campaigned in communities of all sizes and that they campaigned throughout the state.

Presidential and vice-presidential candidates campaigned in places as small as Belmont (population 447) and Owensville (population 794).

They simultaneously campaigned in all eight of the state's medium-sized metropolitan statistical areas (Akron, Canton, Dayton, Lima, Mansfield, Springfield, Toledo, and Youngstown).

They campaigned in Ohio's biggest metropolitan statistical areas (Cleveland, Columbus, and Cincinnati).

Table 8.10 shows the locations of the 73 general-election campaign events in Ohio in 2012, the population of each place visited, the date of the candidate's visit, the county, and the congressional district.[10]

Figure 8.1 shows the geographic distribution of Ohio's 73 general-election campaign events among the state's 16 congressional districts in 2012. As can be seen from the map (and the 5th column of the table), each of the state's 16 congressional districts received attention during the campaign.

Another way to look at Ohio is to divide the state into three major parts as follows:

- The three biggest MSAs (Cleveland, Columbus, and Cincinnati) have 49% of the state's population.
- The eight medium-sized MSAs (Akron, Canton, Dayton, Lima, Mansfield, Springfield, Toledo, and Youngstown) have 29% of the state's population.
- The 53 remaining counties (i.e., the rural counties outside the 11 MSAs) have 22% of the state's population.

Table 8.11 shows the distribution of Ohio's 73 campaign events in 2012 among these three major parts of the state.

As can be seen, the percentage of campaign events that each of these three major parts actually received in 2012 closely matched the area's percentage of the state's population.

In short, the facts from the actual campaign show that presidential candidates did not overemphasize Ohio's three biggest metro areas and did not ignore Ohio's rural areas.

An alternative way to look at the same data is to compare the number of events that a particular part of the state actually received versus the number of events that part of the state would have received if the allocation had been made strictly on the basis of population, as shown in table 8.12.

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[10] The 2020 census population figures come from Census Bureau. 2012. Census Bureau. 2012. *Ohio: 2010 Population and Housing Unit Counts*. August 2012. CPH 2-37. https://www.census.gov/prod/cen2010/cph-2-37.pdf. For the occasional cases when a city, town, or township lies in more than one county for Ohio and each other state in this chapter, the table shows the place's total population and name of the county with the largest portion of the place's population.

Table 8.10 Locations of Ohio's 73 campaign events in 2012

Location	Population	Campaign event	County	CD
Belmont	453	Ryan (10/20)	Belmont	6
Owensville	794	Ryan (9/12)	Clermont	2
Sabina	2,564	Ryan (10/27)	Clinton	15
Yellow Springs	3,487	Ryan (10/27)	Greene	10
Swanton	3,690	Ryan (10/8)	Fulton	5
Vienna	650	Ryan (11/5)	Trumbull	13
Milford	6,709	Biden (9/9)	Clermont	2
Celina	10,400	Romney (10/28)	Mercer	5
Bedford Heights	10,751	Romney (9/26)	Cuyahoga	11
Circleville	13,314	Ryan (10/27)	Pickaway	15
Worthington	13,575	Romney (10/25)	Franklin	12
Marietta	14,085	Ryan (11/3)	Washington	6
Vandalia	15,246	Romney (9/25)	Montgomery	10
Etna	1,215	Romney (11/2)	Licking	12
Fremont	16,734	Biden (11/4)	Sandusky	4
Mount Vernon	16,990	Romney (10/10)	Knox	7
Defiance	16,494	Romney (10/25)	Defiance	5
New Philadelphia	17,288	Ryan (10/27)	Tuscarawas	7
North Canton	17,488	Romney (10/26)	Stark	16
Berea	19,093	Ryan (10/17)	Cuyahoga	9
Painesville	19,563	Romney (9/14)	Lake	14
Portsmouth	20,226	Biden (9/9), Romney (10/13)	Scioto	2
Lebanon	20,033	Romney (10/13)	Warren	1
Sidney	21,229	Romney (10/10)	Shelby	4
Avon Lake	22,581	Romney (10/29)	Lorain	9
Athens	23,832	Obama (10/17), Biden (9/8)	Athens	15
Zanesville	25,487	Biden (9/8), Ryan (10/27)	Muskingum	12
Kent	28,904	Obama (9/26)	Portage	13
Hilliard	28,435	Obama (11/2)	Franklin	15
Bowling Green	30,028	Obama (9/26)	Wood	5
Delaware	34,753	Romney (10/10)	Delaware	12
Marion	36,837	Biden (10/24), Romney (10/28)	Marion	4
Westerville	36,120	Romney (9/26)	Franklin	12
Lima	38,771	Obama (11/2), Ryan (9/24)	Allen	4
Lancaster	38,780	Biden (11/4), Romney (10/12)	Fairfield	15
Findlay	41,202	Romney (10/28)	Hancock	5
Mentor	47,159	Obama (11/3)	Lake	14
Mansfield	47,767	Romney (9/10), Ryan (11/4)	Richland	12
Cuyahoga Falls	49,652	Romney (10/9)	Summit	13
Lakewood	52,131	Biden (11/4)	Cuyahoga	9
Kettering	56,163	Romney (10/30)	Montgomery	10
Springfield	60,608	Obama (11/2)	Clark	8
West Chester	60,958	Romney (11/2)	Butler	8
Lorain	64,097	Biden (10/22)	Lorain	9
Youngstown	66,982	Biden (10/29), Ryan (10/12)	Mahoning	13
Canton	73,007	Biden (10/22)	Stark	7
Dayton	141,527	Obama (10/23), Biden (9/12)	Montgomery	10
Toledo	287,208	Biden (10/23), Romney (9/26)	Lucas	9
Cincinnati	296,943	Obama (9/17, 11/4), Romney (10/25), Ryan (9/25, 10/15)	Hamilton	1
Cleveland	396,815	Obama (10/5, 10/25), Romney (11/4, 11/6), Ryan (10/24)	Cuyahoga	11
Columbus	787,033	Obama (9/17, 10/9, 11/5), Romney (11/5), Ryan (9/29)	Franklin	3

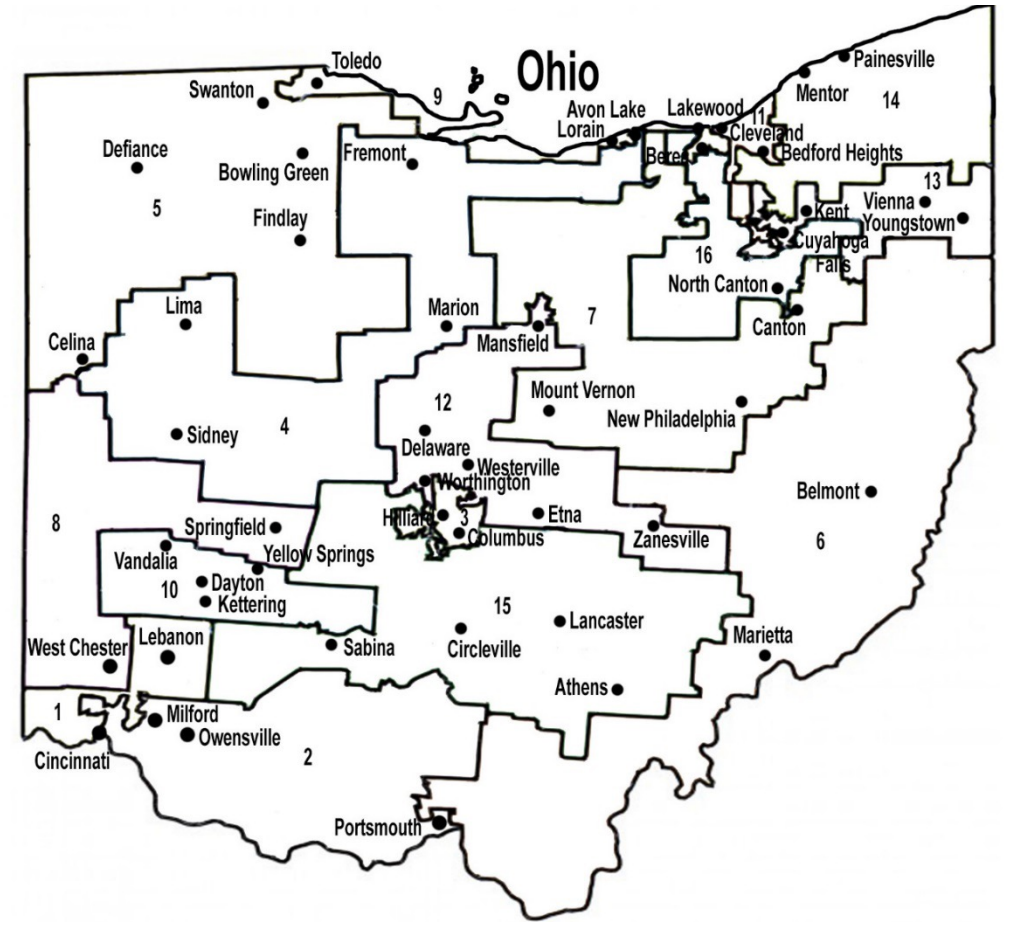

Figure 8.1 Events by congressional district in Ohio in 2012

Table 8.11 2012 candidates campaigned in Ohio's three biggest metro areas, eight medium-sized metro areas, and 53 rural counties in proportion to population

Part of state	Population	Percent of people living in that part of the state	Percent of events in that part of the state
3 biggest MSAs	5,604,620	49%	47%
8 medium sized MSAs	3,335,129	29%	27%
53 remaining counties (rural)	2,596,755	22%	27%
Total	**11,536,504**	**100%**	**100%**

Table 8.12 Number of 2012 campaign events in Ohio's three biggest metro areas, eight medium-sized metro areas, and 53 rural counties

Part of state	Number of events if based on population	Actual number of events
3 biggest MSAs	35.5	34
8 medium-sized MSAs	21.1	21
53 remaining counties (rural)	16.4	18
Total	**73.0**	**73**

Again, there is a near-surgical match.

Yet another way to dissect Ohio is to divide the state into four artificial quadrants—each containing four of the state's 16 congressional districts (and, therefore, a quarter of the state's population). Figure 8.2 shows that each of these four equally populous quadrants received almost exactly a quarter of Ohio's 73 general-election campaign events in 2012.

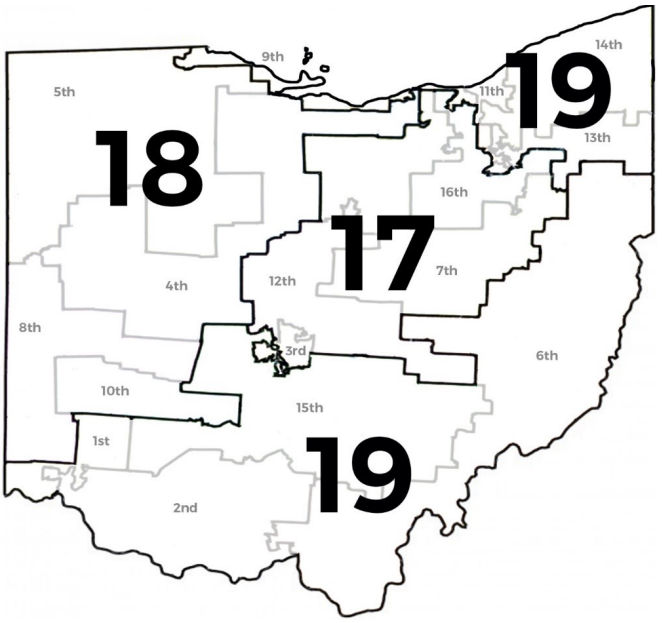

Figure 8.2 Events in each quadrant of Ohio in 2012

Now let's look at Ohio in 2016.

Although Ohio was a battleground state in both the 2012 and 2016 elections, it was much more closely divided in 2012 than in 2016. Generally, the closer the margin in a given battleground state, the more attention the state gets.[11] In 2012, Obama ultimately won Ohio by only a three percentage-point margin of the two-party vote in 2012, whereas Trump won by an eight percentage-point margin in 2016.

Thus, in 2016, Ohio received less attention than it did in 2012 (although still a very considerable amount).

Specifically, in 2016, Ohio received only 12% (48 of 399) of the nation's total general-election campaign events, compared to 29% (73 of 253) of the nation's total in 2012.[12]

Table 8.13 shows the locations of the 48 general-election campaign events in Ohio in 2016 and the population of each place visited.

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[11] See the discussion of the "3/2 rule" in section 9.1.6.

[12] Note that Ohio received only 13 campaign events in 2020 as it transitioned from the nation's most critical battleground state to a Republican-leaning second-tier battleground.

Table 8.13 Locations of Ohio's 48 campaign events in 2016

Location	Population	Campaign event	County
Leetonia	1,959	Pence (9/28)	Columbiana
Gambier	2,391	Kaine (10/27)	Knox
Swanton	3,690	Pence (10/25)	Fulton
Geneva	6,215	Trump (10/27)	Ashtabula
Rossford	6,293	Pence (10/7)	Wood
Canfield	7,515	Trump-Pence (9/5)	Mahoning
Cambridge	10,635	Pence (8/10)	Guernsey
Wilmington	12,520	Trump (9/1, 11/4)	Clinton
Circleville	13,314	Pence (10/22)	Pickaway
Marietta	14,085	Pence (10/25)	Washington
Ashland	20,362	Pence (10/25)	Ashland
Kent	28,904	Clinton (10/31)	Portage
Mason	30,712	Pence (10/17)	Warren
Upper Arlington	33,771	Kaine (10/19)	Franklin
Delaware	34,753	Trump (10/20)	Delaware
Lima	38,771	Pence (7/29)	Allen
Strongsville	44,750	Pence (10/7)	Cuyahoga
Cleveland Heights	46,121	Trump-Pence (9/21)	Cuyahoga
Springfield	60,608	Kaine (10/19), Trump (10/27)	Clark
Lorain	64,097	Kaine (10/27)	Lorain
Youngstown	66,982	Clinton-Kaine (7/30), Trump-Pence (8/15)	Mahoning
Canton	73,007	Trump (9/14)	Stark
Dayton	141,527	Pence (8/10), Kaine (9/12)	Montgomery
Akron	199,110	Trump (8/22), Clinton (10/3)	Summit
Toledo	287,208	Trump (7/27, 10/27), Trump-Pence (9/21), Clinton (10/3)	Lucas
Cincinnati	296,943	Trump (10/13), Clinton (10/31)	Hamilton
Cleveland	396,815	Clinton (8/17, 10/21, 11/4, 11/6), Clinton-Kaine (7/31, 9/5), Trump (9/8), Trump-Pence (10/22)	Cuyahoga
Columbus	787,033	Clinton-Kaine (7/31), Trump (8/1, 10/13), Clinton (10/10), Pence (10/17)	Franklin

Table 8.14 shows the distribution of Ohio's 48 campaign events in 2016 among the three biggest MSAs, the eight medium-sized MSAs, and the 53 rural counties.

As can be seen, the percentage of campaign events that each of these three major parts of the state actually received in 2016 closely matched each area's percentage of the state's population.

Combining the data from 2012 and 2016, table 8.15 shows the distribution of Ohio's 121 campaign events (73 from 2012 and 48 from 2016) among the three biggest MSAs, the eight medium-sized MSAs, and the 53 rural counties.

8.6.2. Florida

Florida received the second-largest number of general-election campaign events in 2012.

Table 8.16 shows the locations of the 40 general-election campaign events in Florida in 2012, the population of each place visited, the date of the candidate's visit, the county, and the congressional district.

Table 8.14 2016 candidates campaigned in Ohio's three biggest metro areas, eight medium-sized metro areas, and 53 rural counties in lockstep with population.

Part of state	Population	Percent of people living in that part of the state	Percent of events in that part of the state
3 biggest MSAs	5,604,620	49%	46%
8 medium-sized MSAs	3,335,129	29%	37%
53 remaining counties (rural)	2,596,755	22%	17%
Total	**11,536,504**	**100%**	**100%**

Table 8.15 2012 and 2016 candidates campaigned in Ohio's three biggest metro areas, eight medium-sized metro areas, and 53 rural counties in lockstep with population.

Part of state	Population	Percent of people living in that part of the state	Percent of events in that part of the state
3 biggest MSAs	5,604,620	49%	46%
8 medium sized MSAs	3,335,129	29%	32%
53 remaining counties (rural)	2,596,755	22%	22%
Total	**11,536,504**	**100%**	**100%**

Table 8.16 Locations of Florida's 40 campaign events in 2012

Location	Population	Campaign event	County	CD
Fernandina Beach	11,487	Ryan (10/29)	Nassau	4
St. Augustine	12,975	Biden (10/20)	St. Johns	6
Oldsmar	13,591	Ryan (9/15)	Pinellas	12
Sun City Center	19,258	Biden (10/19)	Hillsborough	17
Land O'Lakes	31,996	Romney (10/27)	Pasco	12
Panama City	36,484	Ryan (11/3)	Bay	2
Fort Pierce	41,590	Biden (10/19)	St. Lucie	18
Apopka	41,542	Romney (10/6)	Orange	5
Coral Gables	46,780	Obama (10/11), Romney (10/31)	Miami-Dade	26
Pensacola	51,923	Romney (10/27)	Escambia	1
Sarasota	51,917	Biden (10/31), Romney (9/20)	Sarasota	16
Sanford	53,570	Romney (11/5)	Seminole	5
Ocala	56,315	Biden (10/31), Ryan (10/18)	Marion	11
Daytona Beach	61,005	Romney (10/19)	Volusia	6
Delray Beach	60,522	Obama (10/23)	Palm Beach	22
Tamarac	60,427	Biden (9/28)	Broward	20
Kissimmee	59,682	Obama (9/8), Romney (10/27)	Osceola	9
Fort Myers	62,298	Biden (9/29), Ryan (10/18)	Lee	19
Melbourne	76,068	Obama (9/9)	Brevard	8
Boca Raton	84,392	Biden (9/28)	Palm Beach	22
West Palm Beach	99,919	Obama (9/9)	Palm Beach	22
Hollywood	140,768	Obama (11/4)	Broward	23
Port St. Lucie	164,603	Romney (10/7)	St. Lucie	18
St. Petersburg	244,769	Obama (9/8), Romney (10/5)	Pinellas	14
Orlando	238,300	Ryan (9/22)	Orange	7
Tampa	335,709	Obama (10/25), Romney (10/31), Ryan (10/19)	Hillsborough	14
Miami	399,457	Obama (9/20), Romney (9/19 x 2), Ryan (9/22)	Miami-Dade	27
Jacksonville	821,784	Romney (9/12, 10/31)	Duval	5

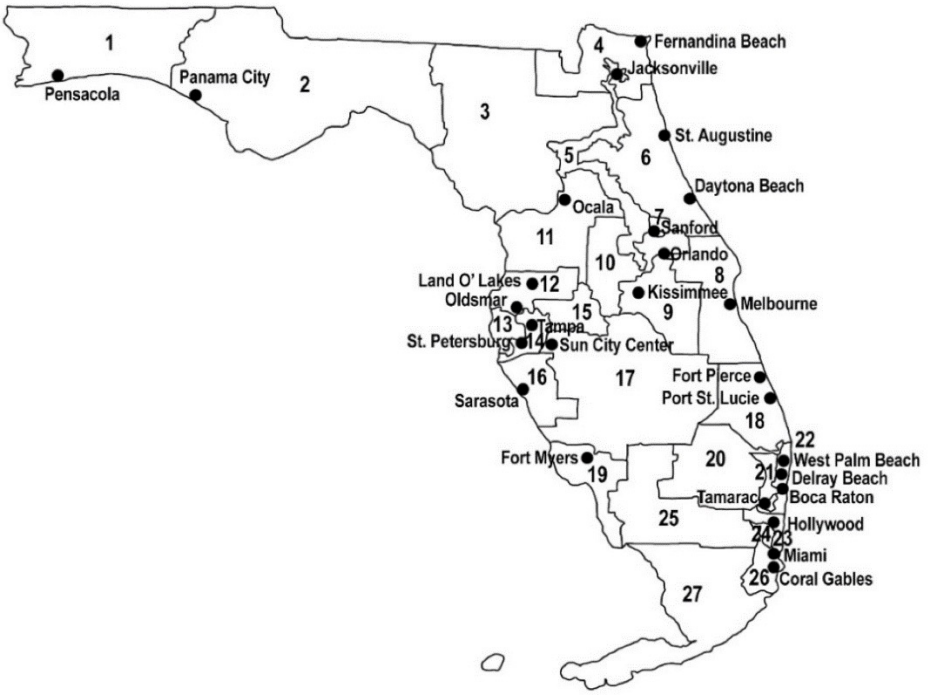

Figure 8.3 Events by congressional district in Florida in 2012

Figure 8.3 shows the geographic distribution of general-election campaign events among Florida's 27 congressional districts in 2012.

Table 8.17 shows the locations of the 71 general-election campaign events in Florida in 2016, and the population of each place visited.

8.6.3. Virginia

Virginia received the third-largest number of campaign events of any state in 2012.

Table 8.18 shows the locations of the 36 general-election campaign events in Virginia in 2012.[13]

Figure 8.4 shows the geographic distribution of general-election campaign events among Virginia's 11 congressional districts in 2012.

Table 8.19 shows the locations of the 23 general-election campaign events in Virginia in 2016 and the population of each place visited.

[13] Note that election results in Virginia are reported for 38 cities separately from their respective counties.

Table 8.17 Locations of Florida's 71 campaign events in 2016

Location	Population	Campaign event	County
Dade City	6,437	Clinton (11/1)	Pasco
Wilton Manors	11,632	Clinton (10/30)	Broward
Panama City Beach	12,018	Pence (11/6)	Bay
St. Augustine	12,975	Trump (10/24)	St. Johns
Maitland	15,751	Pence (10/31)	Orange
Cocoa	17,140	Pence (10/31)	Brevard
Naples	19,537	Trump (10/23)	Collier
Estero	22,612	Trump (9/19)	Lee
Lake Worth	34,910	Clinton (10/26)	Palm Beach
Panama City	36,484	Trump (10/11)	Bay
Fort Pierce	41,590	Clinton (9/30)	St. Lucie
Doral	45,704	Trump (7/27)	Miami-Dade
The Villages	51,442	Pence (9/17)	Sumter
Sarasota	51,917	Pence (8/31), Trump (11/7)	Sarasota
Pensacola	51,923	Trump (9/9, 11/2), Pence (10/14)	Escambia
Coconut Creek	52,909	Clinton (10/25)	Broward
Sanford	53,570	Trump (10/25), Clinton (11/1)	Seminole
Ocala	56,315	Trump (10/12)	Marion
Kissimmee	59,682	Clinton (8/8), Trump (8/11)	Osceola
Daytona Beach	61,005	Kaine (8/2), Clinton (10/29), Trump (8/3)	Volusia
Fort Myers	62,298	Kaine (11/5)	Lee
Melbourne	76,068	Trump (9/27), Kaine (11/4)	Brevard
Sunrise	84,439	Kaine (10/16)	Broward
Lakeland	97,422	Kaine (9/26), Trump (10/12)	Polk
West Palm Beach	99,919	Trump (10/13), Kaine (10/24)	Palm Beach
Clearwater	107,685	Pence (10/31)	Pinellas
Coral Springs	121,096	Clinton (9/30)	Broward
Gainesville	124,354	Kaine (10/23)	Alachua
Pembroke Pines	154,750	Kaine (8/27), Clinton (11/5)	Broward
Fort Lauderdale	165,521	Trump (8/10), Clinton (10/30, 11/1)	Broward
Tallahassee	181,376	Kaine (8/26), Trump (10/25), Kaine (10/28)	Leon
Orlando	238,300	Clinton (9/21), Kaine (9/26, 10/23), Trump (11/2)	Orange
St. Petersburg	244,769	Clinton (8/8), Kaine (11/5)	Pinellas
Tampa	335,709	Trump (8/24, 10/24, 11/5), Clinton (9/6, 10/26)	Hillsborough
Miami	399,457	Clinton (8/9, 10/11, 10/29), Trump (9/16, 10/25, 11/2), Kaine (9/25, 10/15, 10/16, 10/24), Pence (11/4)	Miami-Dade
Jacksonville	821,784	Trump (8/3, 11/3), Pence (9/18)	Duval

Table 8.18 Locations of Virginia's 36 campaign events in 2012

Location	Population	Campaign event	County	CD
Doswell	2,126	Romney (11/1)	Hanover	7
Woodbridge	4,055	Obama (9/21)	Prince William	11
Lexington	6,998	Romney (10/8)	Rockbridge	6
Fishersville	7,462	Romney (10/4)	Augusta	6
Abingdon	8,188	Romney (10/5)	Washington	9
Bristow	15,137	Obama (11/3)	Prince William	1
Bristol	17,662	Ryan (10/25)	Bristol city	9
Fairfax	23,461	Obama (10/5, 10/19), Romney (9/13, 11/5)	Fairfax	11
Fredericksburg	27,307	Ryan (10/16)	Fredericksburg city	1
Sterling	27,822	Biden (11/5)	Loudoun	10
Springfield	30,484	Romney (11/2)	Fairfax	8
Danville	42,996	Ryan (9/19)	Danville city	5
Charlottesville	43,956	Ryan (10/25)	Albemarle	5
Leesburg	45,936	Romney (10/17)	Loudoun	10
Harrisonburg	50,981	Ryan (9/14)	Rockingham	6
Lynchburg	77,113	Biden (10/27), Romney (11/5), Ryan (10/16)	Lynchburg city	6
Roanoke	97,469	Romney (11/1)	Roanoke city	6
Newport News	180,726	Romney (10/8, 11/4), Ryan (9/18)	Newport News city	2
Richmond	210,309	Obama (10/25), Biden (11/5), Romney (9/8, 10/12), Ryan (11/3, 11/6)	Richmond city	3
Chesapeake	228,417	Romney (10/17)	Chesapeake city	4
Chesterfield	323,856	Biden (9/25)	Chesterfield	4
Virginia Beach	447,021	Obama (9/27), Romney (9/8, 11/1)	Virginia Beach	2

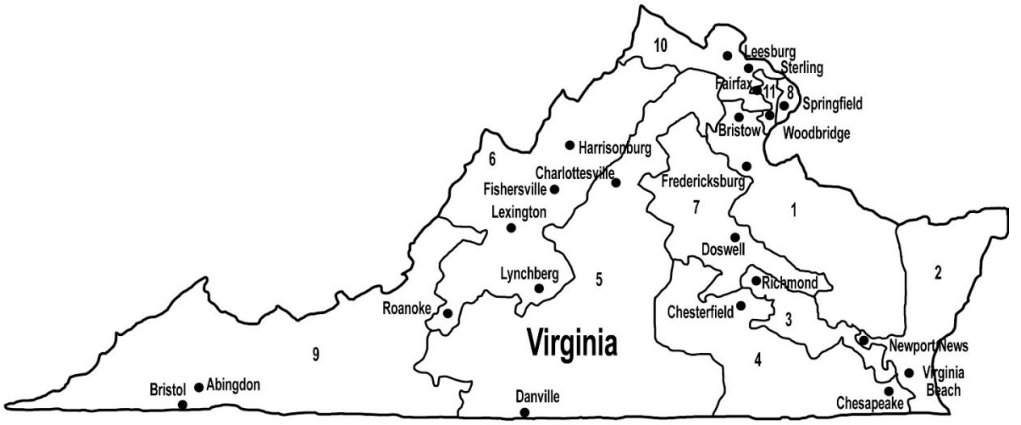

Figure 8.4 Events by congressional district in Virginia in 2012

Table 8.19 Locations of Virginia's 23 campaign events in 2016

Location	Population	Campaign event	County	CD
Paris	281	Pence (9/10)	Fauquier	5
Providence Forge	5,175	Kaine (9/24)	New Kent	1
Ashland	7,225	Pence (10/3)	Hanover	1
Purcellville	7,727	Pence (8/27)	Loudoun	10
Abingdon	7,963	Trump (8/10)	Washington	9
Williamsburg	14,068	Pence (9/20)	Williamsburg city	2
Fairfax	22,565	Pence (11/5), Kaine (11/7)	Fairfax	11
Fredericksburg	24,286	Trump (8/20)	Fredericksburg city	1
Salem	24,802	Pence (10/12)	Salem city	9
Leesburg	42,616	Trump (11/6)	Loudoun	10
Ashburn	43,511	Trump (8/2)	Loudoun	10
Harrisonburg	48,914	Pence (10/5)	Harrisonburg city	6
Lynchburg	75,568	Pence (10/12)	Lynchburg city	6
Roanoke city	97,032	Trump-Pence (7/25), Trump (9/24)	Roanoke city	6
Richmond city	204,214	Kaine (8/1, 11/7)	Richmond city	4
Norfolk city	242,803	Pence (8/4), Kaine (9/9)	Norfolk city	3
Virginia Beach city	437,994	Pence (8/4), Trump (9/6, 10/22)	Virginia Beach city	2

8.6.4. Iowa

Iowa received the fourth-largest number of campaign events in 2012.

Table 8.20 shows the locations of the 27 general-election campaign events in Iowa in 2012.

Table 8.20 Locations of Iowa's 27 campaign events in 2012

Location	Population	Campaign event	County	CD
Van Meter	1,016	Romney (10/9)	Dallas	3
Mount Vernon	4,506	Obama (10/17)	Linn	1
Orange City	6,004	Romney (9/7)	Sioux	4
Grinnell	9,218	Biden (9/18)	Poweshiek	1
Muscatine	22,886	Biden (11/1), Ryan (10/2)	Muscatine	2
Fort Dodge	25,206	Biden (11/1)	Webster	4
Ottumwa	25,023	Biden (9/18)	Wapello	2
Burlington	25,663	Biden (9/17), Ryan (10/2)	Des Moines	2
Clinton	26,885	Ryan (10/2)	Clinton	2
Cedar Falls	39,260	Ryan (11/2)	Black Hawk	1
Dubuque	57,637	Obama (11/3), Romney (11/3), Ryan (10/1)	Dubuque	1
Ames	58,965	Romney (10/25)	Story	4
Council Bluffs	62,230	Biden (10/4), Ryan (10/21)	Pottawattamie	3
Iowa City	67,862	Obama-Biden (9/7)	Johnson	2
Sioux City	82,684	Ryan (10/21)	Woodbury	4
Davenport	99,685	Obama (10/24), Romney (10/29)	Scott	2
Cedar Rapids	126,326	Romney (10/24)	Linn	1
Des Moines	203,433	Obama (11/5), Romney (11/3), Ryan (9/17, 11/5)	Polk	3

Figure 8.5 shows the geographic distribution of general-election campaign events among Iowa's four congressional districts in 2012.

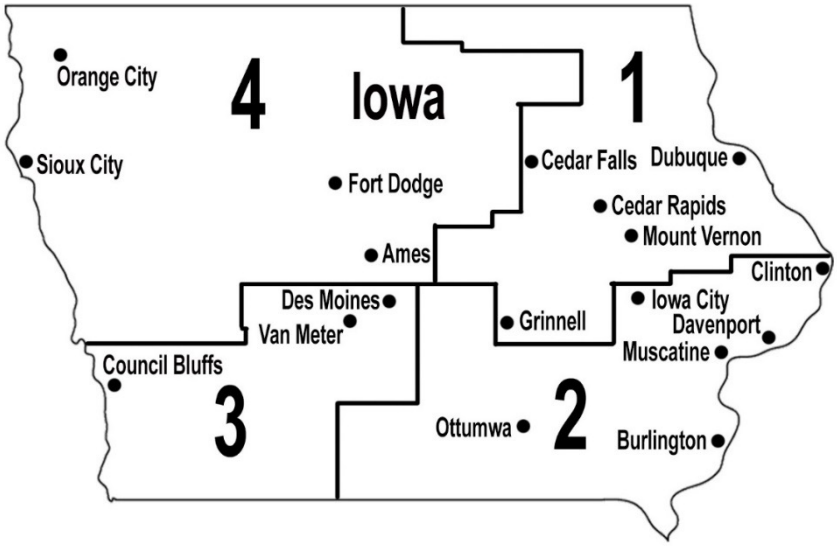

Figure 8.5 Events by congressional district in Iowa in 2012

Table 8.21 shows the locations of the 21 general-election campaign events in Iowa in 2016 and the population of each place visited.

Table 8.21 Locations of Iowa's 21 campaign events in 2016

Location	Population	Campaign event	County
Prole	878	Pence (11/3)	Warren
Newton	15,254	Pence (10/11)	Jasper
Fort Dodge	25,206	Pence (10/27)	Webster
Mason City	28,079	Pence (9/19)	Cerro Gordo
Dubuque	57,637	Pence (9/19), Kaine (11/2)	Dubuque
Ames	58,965	Kaine (9/19)	Story
Council Bluffs	62,230	Trump (9/28)	Pottawattamie
Sioux City	82,684	Trump (11/6)	Woodbury
Davenport	99,685	Trump (7/28)	Scott
Cedar Rapids	126,326	Trump (7/28, 10/28), Kaine (8/17), Pence (8/22), Clinton (10/28)	Linn
Des Moines	203,433	Trump-Pence (8/5), Clinton (8/10, 9/29, 10/28), Trump (8/27, 9/13)	Polk

8.6.5. Colorado

Colorado received the fifth-largest number of general-election campaign events in 2012.

Table 8.22 shows the locations of the 24 general-election campaign events in Colorado in 2012.

Table 8.22 Locations of Colorado's 24 campaign events in 2012

Location	Population	Campaign event	County	CD
Morrison	428	Romney & Ryan (10/23)	Jefferson	2
Johnstown	9,887	Ryan (11/5)	Weld	4
Durango	16,887	Ryan (10/22)	La Plata	3
Golden	18,867	Obama (9/13)	Jefferson	7
Montrose	19,132	Ryan (11/2)	Montrose	3
Pueblo West	29,637	Ryan (10/22)	Pueblo	3
Englewood	30,255	Romney (11/3)	Arapahoe	1
Castle Rock	48,231	Ryan (11/4)	Douglas	5
Greeley	92,889	Biden (10/17), Ryan (11/1)	Weld	4
Arvada	106,433	Biden (11/3)	Jefferson	7
Pueblo	106,595	Biden (11/3), Romney (9/16, 9/24)	Pueblo	3
Fort Collins	143,986	Ryan (9/26)	Larimer	4
Aurora	325,078	Obama (11/4)	Arapahoe	6
Colorado Springs	416,427	Romney (11/3), Ryan (9/26), 10/21)	El Paso	5
Denver	600,158	Obama (10/4,10/24,11/1), Romney (9/23,10/1)	Denver	1

Figure 8.6 shows the locations of general-election events in Colorado in 2012.

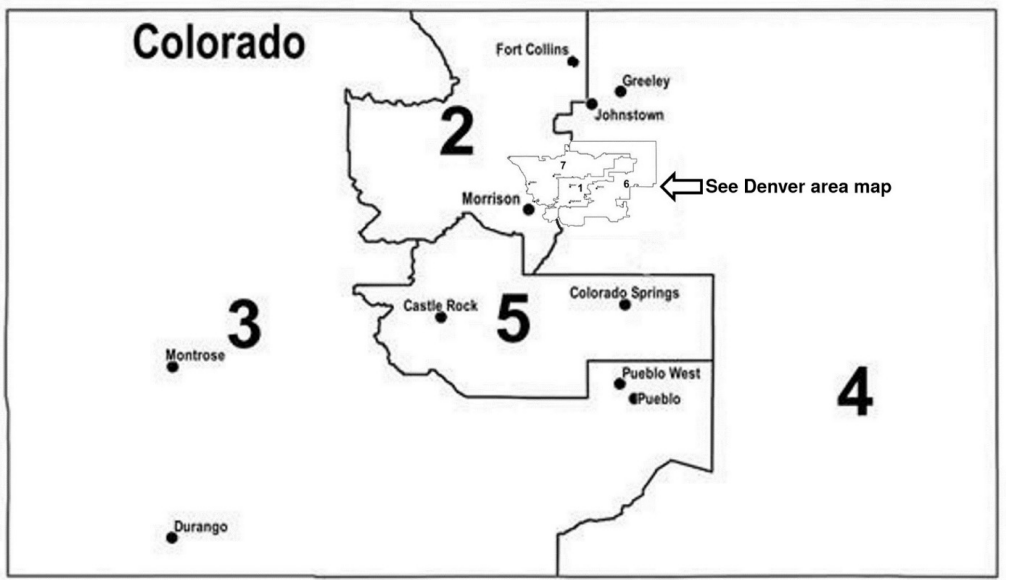

Figure 8.6 Events by congressional district in Colorado in 2012

Figure 8.7 shows the locations of general-election events in the Denver area of Colorado in 2012.

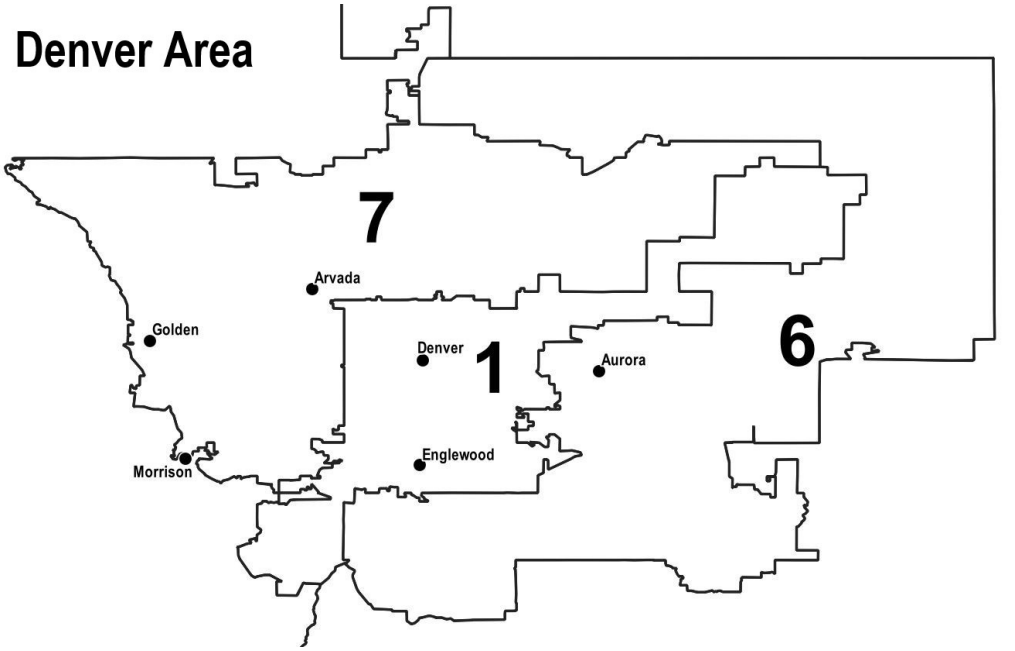

Figure 8.7 Events by Denver-area congressional district in Colorado in 2012

Table 8.23 shows the locations of the 19 general-election campaign events in Colorado in 2016 and the population of each place visited. s

Table 8.23 Locations of Colorado's 19 campaign events in 2016

Location	Population	Campaign event	County
Durango	16,887	Pence (10/19)	La Plata
Golden	18,867	Trump (10/29)	Jefferson
Commerce City	45,913	Clinton (8/3)	Adams
Grand Junction	58,566	Trump (10/18)	Mesa
Loveland	66,859	Trump (10/3), Pence (11/2)	Larimer
Greeley	92,889	Trump (10/30)	Weld
Pueblo	106,595	Trump (10/3), Clinton (10/12)	Pueblo
Colorado Springs	416,427	Trump (7/29, 9/17, 10/18), Pence (8/3, 9/22, 10/26)	El Paso
Denver	600,158	Trump (7/29, 11/5), Pence (8/3), Kaine (10/10)	Denver

8.6.6. WISCONSIN

Wisconsin received the sixth-largest number of events in 2012.

Table 8.24 shows the locations of the 18 general-election campaign events in Wisconsin in 2012.

Table 8.24 Locations of Wisconsin's 18 campaign events in 2012

Location	Population	Campaign event	County	CD
De Pere	23,800	Ryan (9/12)	Brown	8
Superior	27,244	Biden (11/2)	Douglas	7
Beloit	36,966	Biden (11/2)	Rock	2
La Crosse	51,320	Biden (10/12)	La Crosse	3
West Allis	60,411	Romney (11/2)	Milwaukee	5
Eau Claire	65,883	Biden (9/13), Ryan (10/31)	Eau Claire	3
Oshkosh	66,083	Biden (10/26)	Winnebago	6
Waukesha	70,718	Ryan (10/15)	Waukesha	5
Racine	78,860	Ryan (10/31)	Racine	1
Parkside	99,218	Biden (10/26)	Kenosha	1
Green Bay	104,057	Obama (11/1), Ryan (10/31)	Brown	8
Madison	233,209	Obama (9/22, 11/5)	Dane	2
Milwaukee	594,833	Obama (9/22, 11/3), Ryan (11/5)	Milwaukee	4

Figure 8.8 shows the geographic distribution of general-election campaign events among Wisconsin's eight congressional districts in 2012.

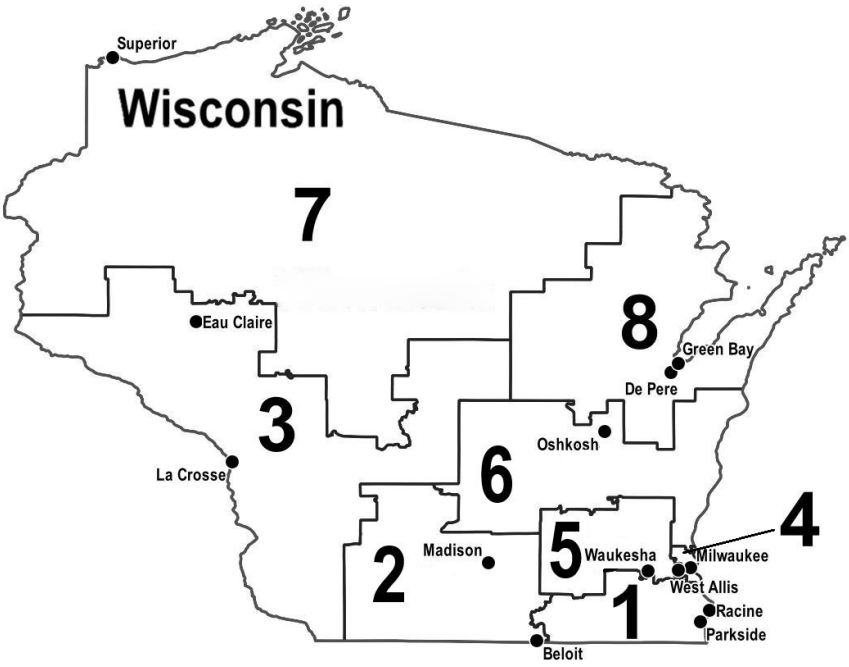

Figure 8.8 Events by congressional district in Wisconsin in 2012

Table 8.25 Locations of Wisconsin's 14 campaign events in 2016

Location	Population	Campaign event	County
Mukwonago	7,355	Pence (11/5)	Waukesha
West Bend	31,078	Trump (8/16)	Washington
La Crosse	51,320	Pence (8/11), Kaine (11/6)	La Crosse
Eau Claire	65,883	Trump (11/1)	Eau Claire
Waukesha	70,718	Pence (7/27), Trump (9/28)	Waukesha
Appleton	72,623	Kaine (11/1)	Outagamie
Green Bay	104,057	Trump-Pence (8/5), Trump (10/17), Kaine (11/6)	Brown
Madison	233,209	Kaine (11/1)	Dane
Milwaukee	594,833	Kaine (8/5), Pence (8/11)	Milwaukee

Table 8.25 shows the locations of the 14 general-election campaign events in Wisconsin in 2016 and the population of each place visited.

Famously, the Democratic campaign neglected the closely divided battleground state of Wisconsin in the 2016 general-election campaign. Nine of the 14 general-election campaign events in 2016 were by the Republican presidential and vice-presidential nominees. Hillary Clinton, the Democratic presidential nominee, never visited Wisconsin during the entire general-election campaign. Moreover, four of the five Democratic general-election events (all by Kaine) were at the last minute in November (when the Clinton campaign began to realize that it was in trouble in Wisconsin).

8.6.7. New Hampshire

New Hampshire received 13 general-election campaign events in 2012.

Table 8.26 shows the location of the 13 general-election campaign events in New Hampshire in 2012.

Figure 8.9 shows the geographic distribution of campaign events among New Hampshire's two congressional districts in 2012.

Table 8.27 shows the locations of the 21 general-election campaign events in New Hampshire in 2016.

Table 8.26 Locations of New Hampshire's 13 campaign events in 2012

Location	Population	Campaign event	County	CD
Newington	753	Romney (11/3)	Rockingham	1
Hanover	11,260	Biden (9/21)	Grafton	2
Portsmouth	21,233	Obama & Biden (9/7)	Rockingham	1
Merrimack	25,494	Biden (9/22)	Hillsborough	1
Dover	29,987	Ryan (9/18)	Strafford	1
Derry	33,109	Ryan (9/29)	Rockingham	1
Concord	42,695	Obama (11/4), Biden (9/7)	Merrimack	2
Nashua	86,494	Obama (10/27), Romney (9/7)	Hillsborough	2
Manchester	109,565	Obama (10/18), Biden (9/22), Romney (11/5)	Hillsborough	1

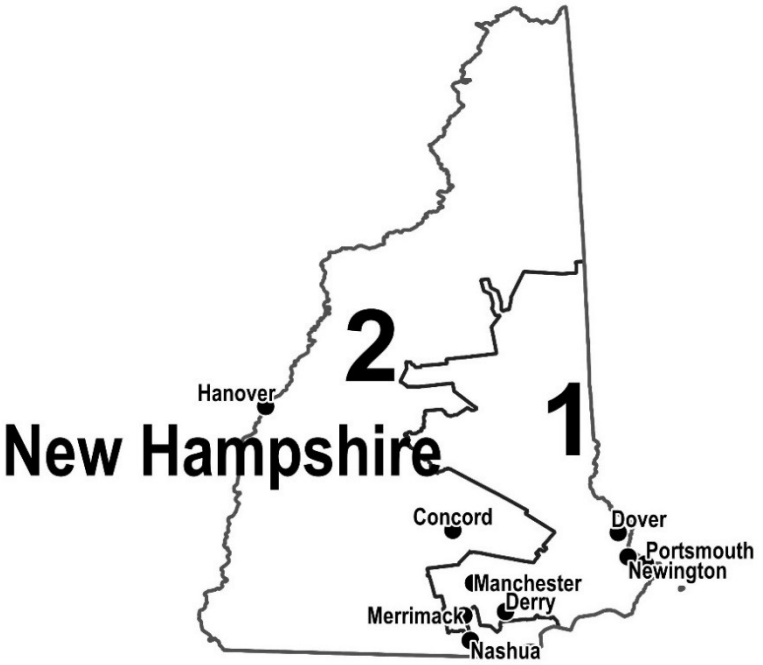

Figure 8.9 Events by congressional district in New Hampshire in 2012

Table 8.27 Locations of New Hampshire's 21 campaign events in 2016

Location	Population	Campaign event	County
Sandown	5,986	Trump (10/6)	Rockingham
Atkinson	6,751	Trump (11/4)	Rockingham
Windham	13,592	Trump (8/6), Pence (11/6)	Rockingham
Exeter	14,306	Kaine (9/15), Pence (10/21)	Rockingham
Durham	14,638	Clinton (9/28)	Strafford
Milford	15,115	Pence (9/26)	Hillsborough
Laconia	15,951	Trump (9/15)	Belknap
Bedford	21,203	Trump (9/29)	Hillsborough
Portsmouth	21,233	Kaine (9/15), Trump (10/15)	Rockingham
Rochester	29,752	Pence (10/30)	Strafford
Nashua	86,494	Pence (10/21)	Hillsborough
Manchester	109,565	Kaine (8/13), Pence (8/18), Trump (8/25, 10/28), Clinton (10/24, 11/6), Trump-Pence (11/7)	Hillsborough

8.6.8. Nevada

Nevada received 13 general-election campaign events in 2012.

Table 8.28 shows the locations of the 13 general-election campaign events in Nevada in 2012.

Table 8.28 Locations of Nevada's 13 campaign events in 2012

Location	Population	Campaign event	County	CD
Sparks	90,264	Ryan (9/7)	Washoe	2
Reno	225,221	Biden (10/17), Romney (10/24), Ryan (11/1, 11/5)	Washoe	2
Henderson	257,729	Romney & Ryan (10/23)	Clark	3
Las Vegas	583,756	Obama (9/12, 9/30, 10/24, 11/1), Biden (10/18), Romney (9/21), Ryan (11/1)	Clark	1

Figure 8.10 shows the geographic distribution of campaign events among Nevada's four congressional districts in 2012.

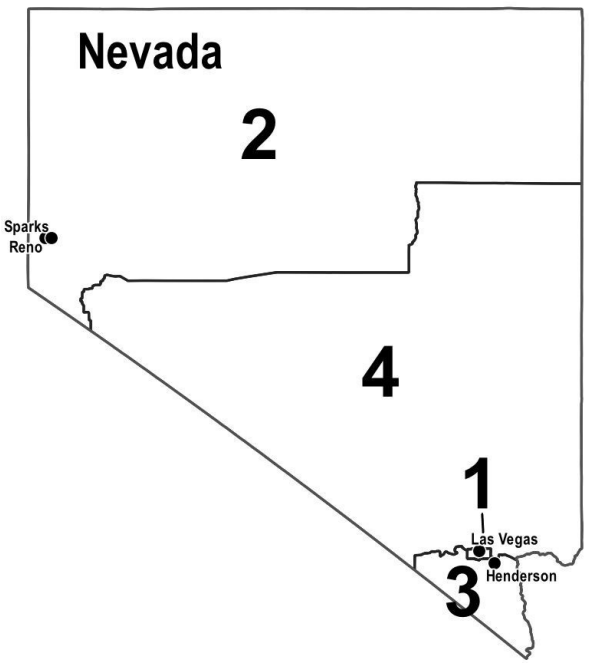

Figure 8. 10 Events by congressional district in Nevada in 2012

Table 8.29 shows the locations of the 17 general-election campaign events in Nevada in 2016.

Table 8.29 Locations of Nevada's 17 campaign events in 2016

Location	Population	Campaign event	County
Carson City	55,274	Pence (8/1)	Carson City
Reno	225,221	Pence (8/1, 10/20, 10/26), Clinton (8/25), Kaine (9/22), Trump (10/5, 11/5)	Washoe
Henderson	257,729	Trump (10/5), Kaine (10/7)	Clark
Las Vegas	583,756	Clinton (8/4, 10/12, 11/2), Pence (8/17), Kaine (8/22, 10/6), Trump (10/30)	Clark

8.6.9. Pennsylvania

The 2012 presidential campaign in Pennsylvania illustrates another important characteristic of the current state-by-state winner-take-all method of awarding electoral votes—namely that battleground status is fleeting and fickle.

The Democratic ticket was comfortably ahead in Pennsylvania throughout the 2012 race. In fact, the Obama-Biden ticket ended up winning Pennsylvania by 323,931 votes—a 53%–47% margin in the two-party vote.

An eight percentage-point spread between the top two candidates is the outer boundary at which presidential campaigning usually occurs under the current winner-take-all system.

Thus, there was almost no general-election presidential campaigning in Pennsylvania in 2012. Pennsylvania received only five of the nation's 253 general-election campaign events, compared to 40 events in 2008, 54 events in 2016, and 47 events in 2020, when the race was much closer in the state.

Neither President Obama nor Vice President Biden bothered to visit Pennsylvania at all during the general-election campaign.

As the campaign drew to a close, Governor Romney and Congressman Ryan made five visits to Pennsylvania—four at the very end of the campaign.

The locations of the five Republican events are shown in table 8.30.

The situation in Pennsylvania was very different in 2016, when the state was hotly contested.

Table 8.31 shows the locations of the 54 general-election campaign events in Pennsylvania in 2016.

There is additional discussion about presidential campaigning in Pennsylvania in section 9.7.

Table 8.30 Locations of Pennsylvania's five campaign events in 2012

Place	Population	Campaign event	County
Morrisville	8,728	Romney (11/4)	Bucks
Middletown	45,436	Ryan (11/3)	Dauphin
Moon Twp	24,185	Ryan (10/20)	Allegheny
Wayne	31,531	Romney (9/28)	Delaware
Pittsburgh	305,704	Romney (11/6)	Allegheny

Table 8.31 Locations of Pennsylvania's 54 campaign events in 2016

Place	Population	Campaign event	County	CD
Youngwood	3,050	Pence (11/1)	Westmoreland	18
Grantville	3,581	Pence (10/5)	Dauphin	11
Chester Twp.	3,940	Trump (9/22)	Delaware	7
Pipersville	6,212	Pence (8/23)	Bucks	8
Ambridge	7,050	Trump (10/10)	Beaver	12
Gettysburg	7,620	Pence (10/6), Trump (10/22)	Adams	4
Hanover Twp	10,866	Kaine (8/31)	Northampton	15
Hershey	14,257	Trump (11/4)	Dauphin	11
Aston	16,592	Trump (9/13)	Delaware	7
Hatfield Twp	17,249	Clinton-Kaine (7/29)	Montgomery	6
Newtown Twp	19,299	Kaine (10/26), Trump (10/21)	Bucks	8
King of Prussia	19,936	Pence (8/23)	Montgomery	7
Johnstown	20,978	Clinton-Kaine (7/30), Pence (10/6), Trump (10/21)	Cambria	12
East Hempfield	23,522	Trump (10/1)	Lancaster	16
Moon Twp	24,185	Pence (11/3), Trump (11/6)	Allegheny	14
Wilkes-Barre	41,498	Trump (10/10)	Luzerne	11
State College	42,034	Kaine (10/21)	Centre	5
York	43,718	Pence (9/29)	York	4
Altoona	46,320	Trump (8/12)	Blair	9
Haverford Twp	48,491	Clinton (10/4)	Delaware	7
Harrisburg	49,528	Clinton (10/4), Clinton-Kaine (7/29), Trump (8/1)	Dauphin	11
Lancaster	59,322	Pence (8/9), Kaine (8/30)	Lancaster	16
Bensalem	60,427	Pence (10/28)	Bucks	8
Scranton	76,089	Trump-Pence (7/27), Clinton (8/15), Pence (9/14), Trump (11/7)	Lackawanna	17
Erie	101,786	Trump (8/12), Kaine (8/30), Pence (11/7)	Erie	3
Allentown	118,032	Kaine (10/26)	Lehigh	15
Pittsburgh	305,704	Clinton-Kaine (7/30, 10/22), Pence (8/9), Kaine (9/5, 10/6), Clinton (11/4, 11/7)	Allegheny	14
Philadelphia	1,526,006	Clinton (8/16, 9/19, 11/5, 11/6, 11/7), Kaine (10/5), Clinton-Kaine (7/29, 10/22)	Philadelphia	2

8.6.10. North Carolina

North Carolina also illustrates the impermanent nature of battleground status in presidential campaigns.

In 2012, the state received only three of the nation's 253 general-election campaign events (compared to 98 in 2008 and 55 in 2016).

The reason for the small number of events in 2012 was that both major political parties concluded that the state was likely to go Republican—as indeed it did.

In fact, neither President Obama nor Republican nominee Mitt Romney bothered to campaign at all in the state in 2012.

In contrast, in 2016, North Carolina was a hotly contested battleground state, and it received a considerable amount of attention.

Table 8.32 shows the locations of the three general-election campaign events in North Carolina in 2012.

Table 8.32 Locations of North Carolina's three campaign events in 2012

Location	Population	Campaign event	County	CD
Asheville	83,393	Biden (10/2), Ryan (10/11)	Buncombe	10
Charlotte	731,424	Biden (10/2)	Mecklenburg	12

Table 8.33 shows the locations of the 55 general-election campaign events in North Carolina in 2016.

Table 8.33 Locations of North Carolina's 55 campaign events in 2016

Location	Population	Campaign event	County
Kenansville	855	Trump (9/20)	Duplin
Selma	6,073	Trump (11/3)	Johnston
Fletcher	7,187	Pence (10/10), Trump (10/21)	Henderson
Winterville	9,269	Clinton (11/3)	Pitt
Davidson	10,944	Kaine (10/12)	Iredell
Smithfield	10,966	Pence (10/28)	Johnston
Kinston	21,677	Trump (10/26)	Lenoir
Sanford	28,094	Kaine (10/31)	Lee
Salisbury	33,662	Pence (10/24)	Rowan
Hickory	40,010	Pence (11/6)	Catawba
Jacksonville	70,145	Pence (10/29), Kaine (10/31)	Onslow
Concord	79,066	Trump (11/3)	Cabarrus
Asheville	83,393	Kaine (8/15, 10/19), Trump (9/12)	Buncombe
Greenville	84,554	Trump (9/6), Pence (11/4)	Pitt
High Point	104,371	Kaine (8/3), Trump (9/20)	Guilford
Wilmington	106,476	Trump (8/9, 11/5), Pence (8/24, 10/18), Kaine (9/6, 11/7)	New Hanover
Fayetteville	200,564	Trump (8/9), Kaine (8/16), Pence (10/18)	Cumberland
Durham	228,330	Kaine (10/20), Clinton (10/23)	Durham
Winston-Salem	229,617	Trump-Pence (7/25), Pence (8/30), Clinton (10/27)	Forsyth
Greensboro	269,666	Kaine (8/3), Clinton (9/15), Trump (10/14), Pence (10/24)	Guilford
Raleigh	403,892	Clinton (9/27, 10/23, 11/3, 11/7), Pence (10/12), Trump (11/7)	Wake
Charlotte	731,424	Trump (8/18, 10/14, 10/26), Pence (8/24, 10/10), Clinton (9/8, 10/2, 10/23), Kaine (10/20, 11/7)	Mecklenburg

8.6.11. Michigan

Michigan is yet another example of the transitory nature of battleground status in presidential campaigns.

Michigan received 10 events in 2008[14] (out of 300 nationally), 22 events in 2016 (out of 399), and 21 events in 2020 (out of 212).

[14] In 2008, the general-election campaign started with Michigan on the list of battleground states. Battleground status is so fleeting that a state can find itself jilted in the middle of the general-election campaign. On October 2, 2008, the McCain campaign (quite reasonably) decided it could not win Michigan and abruptly pulled out of the state.

In 2012, polling showed that the Democratic ticket was comfortably ahead in Michigan throughout the campaign. The Obama-Biden ticket ended up winning the state by a 55%–45% margin in the two-party vote.

Therefore, President Obama, Vice President Biden, and Republican presidential nominee Mitt Romney did not bother to visit Michigan in 2012.

Instead, the state received one visit from Republican vice-presidential nominee Paul Ryan, as shown in table 8.34. Note that nearby Ohio (with approximately the same population as Michigan) received 73 general-election campaign events in 2012.

Table 8.34 Location of Michigan's one campaign event in 2012

Location	Population	Campaign event	County	CD
Rochester	12,711	Ryan (10/8)	Oakland	8

In 2016, by contrast, Michigan was a hotly contested battleground state, and it received a considerable amount of attention, as shown in table 8.35.

Table 8.35 Locations of Michigan's 22 campaign events in 2016

Location	Population	Campaign event	County
Dimondale	1,234	Trump (8/19)	Eaton
Traverse City	14,674	Pence (11/7)	Grand Traverse
Allendale	20,708	Clinton (11/7)	Ottawa
Holland	33,051	Pence (11/5)	Ottawa/Allegan
Portage	46,292	Pence (11/3)	Kalamazoo
Novi	55,224	Pence (7/28), Trump (9/30)	Oakland
Taylor	63,131	Kaine (10/30)	Wayne
Ann Arbor	113,934	Kaine (9/13)	Washtenaw
Lansing	114,297	Pence (11/4)	Ingham
Sterling Heights	129,699	Trump (11/6)	Macomb
Warren	134,056	Trump (10/31)	Macomb
Grand Rapids	188,040	Pence (7/28), Kaine (8/5), Trump (10/31), Trump-Pence (11/7)	Kent
Detroit	713,777	Trump-Pence (8/8), Clinton (8/11, 10/10, 11/4), Trump (9/3), Kaine (10/18)	Wayne

8.6.12. Arizona

In 2012, Arizona was not considered a battleground state and did not receive any general-election campaign events.

In 2016, Arizona emerged as a battleground state, and it received 10 general-election campaign events, as shown in table 8.36.

Arizona received comparatively less attention than other battleground states in 2016, because the state appeared to be safely Republican at the beginning of the general-election campaign. Trump and Pence visited the state in August, September, and October.

Then, toward the end of the campaign, Clinton and Kaine realized that Arizona was

Table 8.36 Locations of Arizona's 10 campaign events in 2016

Location	Population	Campaign event	County
Prescott Valley	38,822	Trump (10/4)	Yavapai
Tempe	161,719	Clinton (11/2)	Maricopa
Mesa	439,041	Pence (9/22, 11/2)	Maricopa
Tucson	520,116	Pence (8/2), Kaine (11/3)	Pima
Phoenix	1,445,632	Pence (8/2), Trump (8/31, 10/29), Kaine (11/3)	Maricopa

closer than previously recognized. They belatedly appeared on November 2 and 3, although their last-minute efforts did not yield a win.

Note that Arizona received far fewer campaign events (10) in relation to its population than the other 11 battleground states in 2016. For example, the closely divided state of New Hampshire (with only two congressional districts) and Iowa (with four congressional districts) each received 21 general-election campaign events in 2016—even though both states have considerably fewer people than Arizona (which has nine congressional districts). New Hampshire received 10.5 campaign events per congressional district. Iowa received 5.25 events per congressional district. However, Arizona received only 1.1 events per congressional district.

Even though Arizona received only 10 general-election campaign events in 2016, the presidential candidates allocated their appearances in different parts of Arizona closely in line with the population distribution in the state.

The state's biggest metropolitan statistical area (Phoenix-Mesa-Scottsdale) has 66% of the state's population, and it received seven of Arizona's 10 events.

The Tucson metropolitan statistical area has 15% of the state's population, and it received two of Arizona's 10 events.

Given that we are talking about a mere 10 events, the allocation of events in Arizona closely paralleled the state's population.

8.7. SAMPLE NATIONWIDE CAMPAIGN

The maps and tables shown earlier in this chapter demonstrate that, *inside* the battleground states, presidential campaigns hew very closely to population in allocating their limited campaigning time to the various parts of the state.

They do this because every vote *inside* a battleground state is equal, and the candidate who receives the most popular votes *inside* the state wins everything that there is to win from that state.

In a nationwide campaign, candidates would campaign throughout the country in the same way as they do today inside battleground states—that is, they would allocate their campaign events to various areas based on population.

The total number of general-election campaign events conducted by the presidential and vice-presidential nominees of the two major parties varies from year to year.

Table 8.37 shows the number of general-election campaign events for the major-party nominees in the six elections between 2000 and 2020.

Because of the COVID pandemic, the number of 2020 campaign events (namely 212) was only about half of the 399 conducted in 2016.

Table 8.37 Number of general-election campaign events 2000–2020

Year	Number of general-election campaign events
2000	439
2004	431
2008	300
2012	253
2016	399
2020	212
Average	**339**

For the sake of illustration, let's suppose that a future presidential campaign consists of the same number of general-election events as 2016—that is, 399.[15]

If the country's current population (331,449,281 according to the 2020 census) is divided by 399, the result is one event for every 830,700 people.

Table 8.38 shows how 399 campaign events would be distributed among the states if candidates were to allocate their campaign events on the basis of population. That is, the number of campaign events for each state (shown in column 3) is obtained by dividing each state's population by 830,700 and rounding off. For purposes of comparison, column 4 shows the actual distribution of 399 campaign events that each state received in 2016 under the current state-by-state winner-take-all system.

Figure 8.11 shows the same information as the table, namely the number of campaign events by state in a nationwide popular election for President.

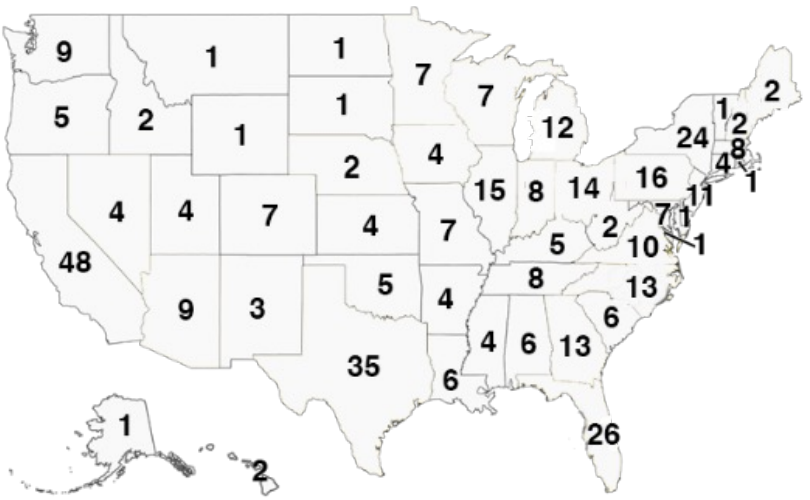

Figure 8.11 Number of campaign events by state in a nationwide popular election for President

[15] By coincidence, 399 is very close to the number of congressional districts in the country (435). Thus, each congressional district in the country would likely receive an average of about one visit in the general-election campaign.

Table 8.38 Number of campaign events for each state in a national popular vote for President

State	Population	Number of events if based on population	Actual number of 2016 events
Alabama	5,024,279	6	
Alaska	733,391	1	
Arizona	7,151,502	9	10
Arkansas	3,011,524	4	
California	39,538,223	48	1
Colorado	5,773,714	7	19
Connecticut	3,605,944	4	1
Delaware	989,948	1	
D.C.	689,545	1	
Florida	21,538,187	26	71
Georgia	10,711,908	13	3
Hawaii	1,455,271	2	
Idaho	1,839,106	2	
Illinois	12,812,508	15	1
Indiana	6,785,528	8	2
Iowa	3,190,369	4	21
Kansas	2,937,880	4	
Kentucky	4,505,836	5	
Louisiana	4,657,757	6	
Maine	1,362,359	2	3
Maryland	6,177,224	7	
Massachusetts	7,029,917	8	
Michigan	10,077,331	12	22
Minnesota	5,706,494	7	2
Mississippi	2,961,279	4	1
Missouri	6,154,913	7	2
Montana	1,084,225	1	
Nebraska	1,961,504	2	2
Nevada	3,104,614	4	17
New Hampshire	1,377,529	2	21
New Jersey	9,288,994	11	
New Mexico	2,117,522	3	3
New York	20,201,249	24	
North Carolina	10,439,388	13	55
North Dakota	779,094	1	
Ohio	11,799,448	14	48
Oklahoma	3,959,353	5	
Oregon	4,237,256	5	
Pennsylvania	13,002,700	16	54
Rhode Island	1,097,379	1	
South Carolina	5,118,425	6	
South Dakota	886,667	1	
Tennessee	6,910,840	8	
Texas	29,145,505	35	1
Utah	3,271,616	4	1
Vermont	643,077	1	
Virginia	8,631,393	10	23
Washington	7,705,281	9	1
West Virginia	1,793,716	2	
Wisconsin	5,893,718	7	14
Wyoming	576,851	1	
Total	**331,449,281**	**399**	**399**

As can be seen in the figure and table, every state and the District of Columbia receives some attention in a nationwide campaign with 399 general-election campaign events.

An additional indication of the way that a nationwide presidential campaign would be run comes from the way that national advertisers (e.g., Ford, Coca-Cola) conduct their sales campaigns. National advertisers seek out customers in small, medium-sized, and large towns as well as rural areas in every state. National advertisers do not advertise exclusively in big cities. Instead, they go after every potential customer, regardless of where the customer is located.

In particular, national advertisers do not write off a particular state merely because a competitor already has a six percentage-point lead in market share in that state (whereas presidential candidates routinely do this as a result of the current state-by-state winner-take-all system).

Furthermore, a national advertiser with a six percentage-point edge in a particular state does not stop trying to make additional sales simply because they are already No. 1 in sales in that state (whereas presidential candidates routinely ignore a state if they have a six percentage-point or larger lead under the current system).

9 | Answering Myths about the National Popular Vote Compact

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

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

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

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

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

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

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

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

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

- extremist and regional candidates (section 9.11)
- mob rule, demagogues, and tyranny of the majority (section 9.12)
- campaigns (section 9.13)
- faithless presidential electors (section 9.14)
- presidential power and mandate (section 9.15)
- the Electoral College producing good Presidents. (section 9.16)
- non-citizen voting (section 9.17)
- voting by 17-year-olds (section 9.18)
- the operation of the Compact (section 9.19)
- replacing dead, disabled, or discredited presidential candidates (section 9.20)
- fraud (section 9.21)
- the National Popular Vote being unpopular (section 9.22)
- congressional consent (section 9.23)
- the District of Columbia (section 9.24)
- withdrawing from the Compact between Election Day and the Electoral College Meeting (section 9.25)
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- unintended consequences (section 9.45)

The 175 myths are listed on the following pages.

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9.1. MYTHS ABOUT THE CONSTITUTION

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

QUICK ANSWER:

- Article II, section 1 of the U.S. Constitution says, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…." The U.S. Supreme Court has repeatedly characterized this power as an "exclusive" and "plenary" and "far-reaching" state power.
- The most salient feature of our nation's current method of electing the President—the winner-take-all method of awarding electoral votes—does not appear in the U.S. Constitution. It was never debated or voted upon at the 1787 Constitutional Convention. It was not mentioned in the *Federalist Papers*. Instead, the winner-take-all method exists only because it was enacted into *state* law by *state* legislatures using their authority under Article II, section 1 of the Constitution.
- The winner-take-all rule was used by only three states in the nation's first presidential election in 1789 (all of which abandoned it by 1800). It was not until the eleventh presidential election (1828) that the winner-take-all method was used by even half the states. The Founders were dead before the winner-take-all rule became the predominant method of awarding electoral votes.
- Existing winner-take-all statutes may be changed in the same way they were enacted—that is, through each state's process for enacting and repealing state laws. A federal constitutional amendment is not necessary to repeal a state law and replace it with a different state law. For example, in 1969, Maine repealed its winner-take-all law and replaced it with the congressional-district method of awarding electoral votes. Nebraska did the same thing in 1991—a reminder that the method of awarding electoral votes is a state decision. In fact, in 2024, Nebraska's Governor urged his state legislature to change the state's congressional-district method of awarding electoral votes.
- The Constitution's grant of exclusive power to the states to decide how electoral votes are awarded was not a historical accident or mistake. It was intended as a check and balance on a sitting President who, in conjunction with a compliant Congress, might manipulate election rules to stay in office.
- The major shortcomings of the current system of electing the President stem from state winner-take-all laws that award all of a state's electoral votes to the candidate who receives the most popular votes within each separate state.

MORE DETAILED ANSWER:

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

Article II, section 1, clause 2 says:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." [Emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The leading case on the power of the states to award their electoral votes is the 1892 case of *McPherson v. Blacker*. The U.S. Supreme Court ruled:

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

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

> The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text."
>
> "In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States."[4] [Emphasis added]

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

> "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. **This is the source for the statement in *McPherson* v. *Blacker***, 146 U.S. 1, 35 (1892), that the State legislature's power to select the manner for appointing electors is **plenary**; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28–33."
>
> "There is no difference between the two sides of the present controversy on these basic propositions."[5] [Emphasis added]

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

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

In short, states may exercise their power to choose the manner of appointing their presidential electors in any way they see fit (provided, of course, that they do not violate any restriction contained elsewhere in the U.S. Constitution).[6,7]

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

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

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

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

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

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

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

Accordingly, repealing state winner-take-all statutes does not require an amendment to the U.S. Constitution. Winner-take-all statutes may be repealed in the same way they were enacted—that is, through each state's process for enacting and repealing state laws.

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

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

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

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

QUICK ANSWER:

- The Founding Fathers at the 1787 Constitutional Convention did not debate, vote on, or endorse the most salient feature of our present-day system of electing the President, namely the winner-take-all method of awarding electoral votes.
- The electoral system that we have today was not designed, anticipated, or favored by the Founding Fathers. Instead, it is the result of decades of evolutionary change driven primarily by the emergence of political parties and the desire of each state's dominant political party not to let the state's minority party get any of the state's electoral votes.
- The winner-take-all method of awarding electoral votes is not mentioned in the *Federalist Papers*.

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

MORE DETAILED ANSWER:

The Founding Fathers at the 1787 Constitutional Convention did not debate, vote on, or adopt the most salient feature of our nation's present-day system of electing the President, namely state winner-take-all statutes (i.e., awarding all of a state's electoral votes to the presidential candidate who receives the most popular votes within each separate state).

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

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

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

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

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

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

> "[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **A small number of persons**, selected by their fellow-citizens from the general mass, will be most likely to possess **the information and discernment requisite to such complicated investigations**." [Emphasis added]

In this regard, the Electoral College was patterned after ecclesiastical and royal elections. For example, the College of Cardinals in the Roman Catholic Church constitutes the world's oldest and longest-running electoral college. Cardinals (with lifetime appoint-

ments) deliberate to choose the Pope. The Holy Roman Emperor was elected by a similar small and distinguished group of "electors." In many kingdoms in Europe, a small group of "electors" would, upon the death of the king, choose the person best suited to be king from a pool consisting of certain members of the royal family or nobility.

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

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

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

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

> "Doubtless **it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive**, but experience soon demonstrated that, **whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power** in respect of a particular candidate. In relation, then, to the independence of the electors, the original expectation may be said to have been frustrated."[8] [Emphasis added]

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

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

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

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

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

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

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

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

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

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

> "No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices."
>
> "This arrangement miscarried. Electors, although often personally eminent, independent, and respectable, officially become voluntary party lackeys and intellectual nonentities to whose memory we might justly paraphrase a tuneful satire:
>
> > 'They always voted at their party's call
> > 'And never thought of thinking for themselves at all'"[11]

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

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

QUICK ANSWER:

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

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[9] Fifteen of the 17 deviating electoral votes for President were "grand-standing" votes (that is, votes cast after the presidential elector knew that his vote would not affect the national outcome). One electoral vote (in Minnesota in 2004) was cast by accident. In addition, 63 electoral votes were cast in an unexpected way in the 1872 presidential election when the losing Democratic candidate died after Election Day, but before the Electoral College met. For details, see section 2.12.

[10] In 2010, the National Conference of Commissioners on Uniform State Laws drafted a "Uniform Faithful Presidential Electors Act" and recommended it for enactment by all the states.

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

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

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

MORE DETAILED ANSWER:

John Samples of the Cato Institute has written the following about the National Popular Vote Compact:

> "NPV brings about this change without amending the Constitution, thereby **undermining the legitimacy of presidential elections**."[12] [Emphasis added]

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

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

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

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

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

Permitting the People to Vote for President

The most significant change that has ever been made in the way the President of the United States is elected was to allow the people to vote for President.

This change was implemented by means of state statutes—not a federal constitutional amendment.

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

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

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

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

> "**The constitution does not provide that the appointment of [presidential] electors shall be by popular vote**, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors**. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object**."[13] [Emphasis added]

As the U.S. Supreme Court wrote in *Bush v. Gore* in 2000:

> "**The individual citizen has no federal constitutional right to vote for electors for the President of the United States** unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."[14] [Emphasis added]

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

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

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

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

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

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

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

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

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

[16] DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Pages 29–31.

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

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

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

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

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

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

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

By 1824, three-quarters of the states had embraced the idea of permitting the people to vote for the state's presidential electors. However, the state-by-state process of empowering the people to vote for President was not completed until the 1880 election—almost a century after the Constitutional Convention.[19]

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

Permitting the people to vote for President was not a violation of the U.S. Constitution but an exercise of a power that the Founding Fathers explicitly assigned to state legislatures in Article II, section 1 of the Constitution.

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

Does John Samples really think that permitting the people to vote for President without passing a federal constitutional amendment "undermine[s] the legitimacy of presidential elections"?

Abolition of Property, Wealth, and Income Qualifications for Voting

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

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

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

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

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

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

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

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

The elimination of property, wealth, and income qualifications was not accomplished by means of a federal constitutional amendment. This change was not improper, inappropriate, or unconstitutional. This substantial expansion of the electorate occurred because state legislatures used a power that rightfully belonged to them to change the method of conducting elections.

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

Women's suffrage

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

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

Wyoming gave women the right to vote in 1869.

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

Congress passed the 19th Amendment in 1919 because:

- women were already voting in 30 states, and
- members of Congress from the remaining states knew that it was only a matter of time before women would obtain the right to vote in their states—with or without the federal constitutional amendment.

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

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

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

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

The decision by 30 separate states to permit women to vote in the 50-year period between 1869 and 1919 was not an "end run" around the U.S. Constitution.

We have not encountered a single person who argues that state legislatures did anything improper, inappropriate, or unconstitutional when they made this very substantial expansion of their electorates. Women's suffrage is another example of state legislatures using the authority granted to them by the U.S. Constitution to institute a major change concerning the conduct of elections.

Women's suffrage was achieved because 30 states exercised their power as the "laboratories of democracy" to change the manner of conducting their own elections.

Direct election of U.S. Senators

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

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

Support for the direct election of Senators grew throughout the 19th century—particularly after popular voting for presidential electors became the norm during the Jacksonian "era of the common man."

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

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

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

By the time the 17th Amendment passed the U.S. Senate in 1912, the voters in 29 states were, for all practical purposes, electing U.S. Senators under various forms of the "Oregon" plan.

18-year-old vote

States took the lead in granting suffrage to 18-year-olds. Citizens under the age of 21 first acquired the right to vote in Georgia, Kentucky, Alaska, Hawaii, and New Hampshire. Then, in 1971, the 26th Amendment to the U.S. Constitution extended the 18-year-old vote to all states.

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

Black suffrage

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

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

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

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

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

The winner-take-all rule

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

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

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

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

In terms of electing the President, state control is precisely what the Founding Fathers intended, and it is precisely what the U.S. Constitution specifies. The Founding Fathers

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

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

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

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

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

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

> "This effort would represent **amendment-free constitutional reform, the way that most other changes have been made in the selection process since 1804**."[28] [Emphasis added]

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

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

Thus, the U.S. Constitution gives *primary*—but not *exclusive*—control to the states over the manner of electing Congress. In the case of congressional elections, the U.S. Constitution gives Congress the power to "make or alter" any state election law. In practice, Congress has exercised a light touch in this area over the years.

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

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

QUICK ANSWER:

- The National Popular Vote Compact would not abolish the Electoral College. Instead, it would change the method of choosing its members. The Compact would make the Electoral College reflect the choice of the voters in all 50 states and the District of Columbia.
- The National Popular Vote Compact would replace existing state winner-take-all statutes with a different state statute, namely one that guarantees the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

MORE DETAILED ANSWER:

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

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

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

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

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

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

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

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

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

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

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

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

QUICK ANSWER:

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

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

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

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

MORE DETAILED ANSWER:

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

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

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

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

> "The Framers considered several ways of electing a president. … On July 17, 1787, **the delegates from nine states voted against direct election of the president**. … The Framers chose an alternative to direct election, which is described in Article II, section 1 of the Constitution. Of course, that decision by the framers need not bind Americans for all time. The Constitution also

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Popular election of presidential electors by districts

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

> "Mr. Wilson made the following motion … 'that the Executive Magistracy shall be elected in the following manner: That the States be divided into ___ districts: & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect ___ members for their respective districts to be electors of the Executive magistracy, that the said Electors of the Executive magistracy meet at ___ and they or any ___ of them so met shall proceed to elect by ballot, but not out of their own body [the] person in whom the Executive authority of the national Government shall be vested.'"[36] [Emphasis added]

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

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

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

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

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

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

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

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

Appointment of presidential electors by state legislatures

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

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

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

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

> "The State legislature's power to select the manner for appointing electors is plenary; **it may, if it so chooses, select the electors itself**, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution."[42] [Emphasis added]

Appointment of presidential electors by Governors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] *Ibid*.

[47] An Act Directing the Mode of Appointing Electors to Elect a President and Vice President of the United States. Passed November 3, 1791. *Laws of 1791*. Page 43. Note that Vermont had a unicameral legislature at the time.

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

Article II, section 1 of the Constitution provides:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: **but no Senator or Representative**, **or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector**." [Emphasis added]

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

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

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

QUICK ANSWER:

- The Great Compromise at the 1787 Constitutional Convention established a bicameral national legislature in which the U.S. House of Representatives was apportioned on the basis of population, and the Senate was structured on the basis of equal representation of the states (i.e., two Senators per state).
- The distribution of political influence among the states in the Electoral College envisioned by the Great Compromise was upset in the 1820s and 1830s by the widespread adoption of the winner-take-all method of awarding electoral votes.
- Because of the winner-take-all method of awarding electoral votes, the numerical allocation of electoral votes among the states bears little relation to a state's clout in choosing the President. Under the winner-take-all rule, political influence in the Electoral College is based on whether a state is a closely divided battleground state.
- This argument aimed at the National Popular Vote Compact (if it were valid) would apply equally to the winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

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

The Great Compromise established a bicameral national legislature in which the U.S. House of Representatives was apportioned on the basis of population, and the U.S. Senate was structured on the basis of equal representation of the states (i.e., two Senators per state).

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

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

A posting to the *Election Law Blog* questioned the constitutionality of the National Popular Vote Compact on the basis of the Great Compromise:

> "The NPVIC also undercuts the Great Compromise which was necessary to creation of the Constitution, by in effect **changing the balance of power in choice of the President so that it does not reflect the two electoral votes that each state is to have** as a result of simply being a state."[49] [Emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The "3/2 rule"

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

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

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

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

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

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

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

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

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

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

[52] Note that the Constitution's allocation of electoral votes to the states governs a state's relative political influence in terms of the process of activating the National Popular Vote Compact. Small states have greater influence than their population alone would warrant in the process of determining when the Compact takes effect.

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

QUICK ANSWER:

- The Equal Protection Clause of the 14th Amendment states, "No state shall … deny *to any person within its jurisdiction* the equal protection of the laws." All voters within the jurisdiction of each state are treated equally by the National Popular Vote Compact.
- The U.S. Constitution does not require that the election laws of all 50 states be identical. Because the Constitution gives the states control over elections, it virtually guarantees that election procedures will *not* be identical from state to state. Differences in election laws from state to state are inherent under the federalist system established by the U.S. Constitution.

MORE DETAILED ANSWER:

The U.S. Constitution does not require that the election laws of all 50 states be identical.

In fact, the Constitution virtually guarantees that election procedures will *not* be identical from state to state, because it gives the states control over elections.

Thus, differences in election laws are inherent under the federalist system established by the U.S. Constitution.

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

For example, some states (e.g., Kentucky and Indiana) close their polling places at 6 P.M., while others (e.g., New York) keep their polls open until 9 P.M. Some states provide extensive opportunities for early voting, while other states have very limited early voting or none at all. Some states conduct their elections entirely by mail, while other states do not. Some states require photo identification at the polls, while others do not. Some states automatically and immediately permit previously incarcerated felons to vote after they serve their prison term, whereas others do not.

Professor Norman Williams of Willamette University has written the following concerning the National Popular Vote Compact:

> "**Aggregating votes from each of the fifty states and District of Columbia raises severe problems under the Equal Protection Clause of the Fourteenth Amendment.**"
>
> "Once the relevant voting community is expanded to include the entire nation, however—as the NPVC seeks to do—it is hard to see how the disparate voting qualifications and systems in each state would be constitutionally tolerable."
>
> "The Court in *Bush v. Gore* did require the deployment of a uniform statewide standard for evaluating and tabulating votes for presidential electors, as well as a system of training election personnel to ensure such uniformity. **If the differences in voting standards between Palm Beach and Miami-Dade counties violated the Equal Protection Clause, so too must the differences between states** that count mismarked ballots as valid, such as

> Massachusetts, and those states, such as California, that typically do not."[53] [Emphasis added]

The actual wording of the Equal Protection Clause of the 14th Amendment does not, however, support Williams' contention that "so too must the differences *between* states."

The Equal Protection Clause of the 14th Amendment states:

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

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

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

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

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

Law professor Vikram David Amar responded to Williams' contention by saying:

> "*Bush v. Gore* (which itself crafted newfangled equal protection doctrine) was concerned with **intrastate—not interstate—non-uniformity**. Under the NPVC, it is hard to see how variations among states results in any one state denying equal protection of the laws 'to any person within its jurisdiction,' insofar as **all persons within each state's jurisdiction (i.e., voters in the state) are being dealt with similarly**. **No single state is treating any people who reside in any state differently than the other folks who live in that state**."[55] [Emphasis added]

Jennings Jay Wilson observed:

> "There is **no legal precedent for inter-state equal protection claims**. Successful equal protection claims have always been brought by citizens being disadvantaged vis-à-vis other citizens of their own state."[56] [Emphasis added]

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

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

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

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

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

In *Williams v. Virginia State Board of Elections*, a three-judge federal court in Virginia considered and rejected an interstate equal protection claim as well as a claim based on the one-person-one-vote principle concerning the constitutionality of the winner-take-all method of awarding electoral votes.

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

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

The three-judge federal court described the plaintiff's *interstate* equal protection argument as follows:

> "Presidential electors provided for in Article II of the Constitution of the United States cannot be selected, plaintiffs charge, by a statewide general election as directed by the Virginia statute. Under it *all* of the State's electors are collectively chosen in the Presidential election by the greatest number of votes cast throughout the entire State."
>
> "Unfairness is imputed to the plan because it gives the choice of *all* of the electors to the statewide plurality of those voting in the election—"winner-take-all"—and accords no representation among the electors to the minority of the voters. **An additional prejudice is found in the result of the system as between voters in different States. We must reject these contentions**.
>
> "Plaintiffs' proposition is advanced on three counts:
>
> > '(1) the intendment of Article II, Section 1, providing for the appointment of electors is that they be chosen in the same manner as Senators and Representatives, that is two at large and the remainder by Congressional or other equal districts;
> >
> > '(2) **the general ticket method violates the "one-person, one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment, i.e., the weight of each citizen's vote must be substantially equal to that of every other citizen**. *Gray v. Sanders*, 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed. 2d 821 (1963); *Wesberry v. Sanders*, 376 U.S. 1, 18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); and
> >
> > '(3) **the general ticket system gives a citizen in a State having a larger number of electors than Virginia the opportunity to effectuate by**

> **his vote the selection of more electors than can the Virginian**.'"[57] [Emphasis added] [Italics in original]

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

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

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

> "Further instances of inequality in the ballot's worth between them as Virginia citizens, plaintiffs continue, and citizens of other States, exists as a result of the assignment of electors among the States. To illustrate, **New York is apportioned 43 electors and the citizen there, in the general system plan, participates in the selection of 43 electors while his Virginia compatriot has a part in choosing only 12.** His ballot, if creating a plurality for his preference, wins the whole number of 43 electors while the Virginian in the same circumstances could acquire only 12."
>
> "Disparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors. **But plainly this unevenness is directly traceable to the Constitution's presidential electoral scheme** and to the permissible unit system.
>
> "For these reasons the injustice cannot be corrected by suit, especially one in which but a single State is impleaded. Litigation of the common national problem by a joinder of all the States was evidently unacceptable to the Supreme Court. *State of Delaware v. State of New York*, supra, 385 U.S. 895, 87 S.Ct. 198. Readily recognizing these impediments, **plaintiffs point to the district selection of electors as a solution, or at least an amelioration, of this interstate inequality of voters**. However, to repeat, this method cannot be forced upon the State legislatures, for the Constitution gives them the choice, and **use of the unit method of tallying is not unlawful**." [Emphasis added]

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[57] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622. Dist. Court, E.D. Virginia (1968). This decision was affirmed by U.S. Supreme Court at 393 U.S. 320 (1969) (*per curiam*).

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

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

> "[The National Popular Vote Compact] would cram voters from across the country into one election pool, despite the fact that different election laws apply to different voters. *Voters would not be more equal*. They would be more unequal. **Lawsuits claiming Equal Protection would certainly follow**.
>
> "Consider the issue of early voters. Voters in Alaska have one set of laws regarding early voting. Other states might have provisions regarding when early voting starts, how long it lasts, or who may early vote and how they may early vote. These differences in laws do not matter when Alaskans are participating in their own election only with Alaskans—all voters are treated equitably with other members of the same election pool. However, if NPV throws Alaskans into another, national electorate, then the difference in laws begin to create many inequities. **Some voters in this election pool, for instance, may have more time to vote than Alaskan voters.** Or maybe others have an easier time registering to early vote. **Alaskans are not treated equitably with other members of the national election pool if they must abide by a more restrictive—or even a less restrictive!—set of election laws."**[59] [Italics in original] [Emphasis added]

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

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

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

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

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

Moreover, if there were such a thing as "interstate equal protection," there would suddenly also be a legal basis for challenging the numerous other interstate inequalities created by the winner-take-all method of awarding electoral votes. For example, Al Gore won five electoral votes by virtue of his margin of 365 popular votes in New Mexico in 2000, whereas George W. Bush won five electoral votes by virtue of his margin of 312,043 popular votes in Utah—an 855-to-1 disparity in the value of a vote between the two states.

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

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

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

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

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

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

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

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

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

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

political group will be in a position to impose politically advantageous voting procedures on the entire country and thereby lock in a self-perpetuating advantage on the national level.

The real question for opponents of state control over elections is whether they would have been comfortable under *all* of the following scenarios:

- Suppose that in 2003 (just prior to the 2004 presidential election), the then-Republican-controlled Congress and a then-sitting Republican President enacted uniform national voting procedures, including photo identification; vigorous purging of the voter rolls of those who did not vote in the immediately preceding election; and closing the polls at 6:00 P.M. in every state.
- Suppose that in 2009, the then-Democratic-controlled Congress and the then-sitting Democratic President enacted uniform national voting procedures, including automatic permanent voter registration; extensive advance voting; and mail-in voting in every state.
- Suppose that in 2017, the then-Republican-controlled Congress and a then-sitting Republican President reinstated their preferred election laws on a nationwide basis.
- Suppose that in 2021, the then-Democratic-controlled Congress and a then-sitting Democratic President reinstated their preferred election laws on a nationwide basis.

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

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

Of course, if a national consensus emerges in favor of uniform federal control of elections at some time in the future, the U.S. Constitution can be so amended to eliminate state control over elections at that time.

Meanwhile, the National Popular Vote Compact is based on the constitutional system that actually exists in the United States and on the reality that there is widespread public and legislative support for state control of elections.

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

That amendment was endorsed by Richard Nixon after it passed the House in 1969. It was also endorsed by Gerald Ford, Jimmy Carter, and members of Congress who later became vice-presidential and presidential candidates, such as Congressman George H.W. Bush (R–Texas) and Senator Bob Dole (R–Kansas).[61]

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

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

> "This legislation has a great deal to commend it. It will correct the wrongs of the present mechanism … by calling for direct election of the President and Vice President. … Yet, in spite of these drastic reforms, the bill is **not** … **detrimental to our federal system or one that will change the departmentalized and local nature of voting in this country**.
>
> "**In electing the President and Vice President, the Constitution establishes the principle that votes are cast by States. This legislation does not tamper with that principle. It only changes the manner in which the States vote**. Instead of voting by intermediaries, the States will certify their popular vote count to the Congress. **The states will maintain primary responsibility for the ballot and for the qualifications of voters. In other words, they will still designate the time, place, and manner in which elections will be held.** Thus, there is a very good argument to be made that **the basic nature of our federal system has not been disturbed**."[62] [Emphasis added]

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

QUICK ANSWER:

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

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

MORE DETAILED ANSWER:

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

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

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

> "**NPV affects the balance of power between federal and state governments** because the House's role in presidential elections will be effectively removed."[64] [Emphasis added]

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

> "The Framers assumed that the election of the President would often require resort to the House of Representatives; in the absence of a stable two-party system, it did not seem inevitable that all presidential elections would result in a majority vote total for any single candidate. **Under the [National Popular Vote] plan, there could never be a situation where the House selected the President**, as the electoral vote is guaranteed to constitute a majority of the total as a precondition of enactment of [the National Popular Vote Compact]."[65] [Emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the event that no candidate wins an absolute majority in the Electoral College, the U.S. Constitution provides for a "contingent election" in which the Congress chooses the President and Vice President (section 1.6).

Some have argued that the Founding Fathers did not expect that the Electoral College would elect the President in most elections. Instead, some have argued that the Founders anticipated that, after George Washington, no candidate would be likely to win a majority of the Electoral College, and the choice for President would routinely devolve on the U.S. House of Representatives.

Under this "designed to fail" theory, the Electoral College would usually merely serve as a screening body to nominate candidates for President, and the U.S. House of Representatives would ordinarily make the final decision.

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

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

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

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

Gregg, a strong supporter of the current system of electing the President and editor of a book defending it, has dismissed the "designed to fail" interpretation of the Constitution by writing:

> "Some interpreters have claimed that the system of presidential election outlined in Article II of the Constitution was designed as a type of grand political shell game. On paper it would seem the president would be elected by a select group close to the people in the states, but in reality, the argument goes, it was established to routinely fail and send the actual selection of the president to the House…"
>
> "If one looks closely at the debates during the Constitutional Convention and the votes of the men who drafted the Constitution, one can see quite clearly that there is little evidence for the thesis that the Electoral College was a jerry-rigged system designed to regularly 'fail' and send the ultimate decision to Congress."[68]

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

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

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

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

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

It is difficult to sustain the argument that preserving the opportunity for the U.S. House of Representatives to choose the President was ever a significant guiding factor in the choice of the size of the House—much less a constitutional imperative. In the time between ratification of the 12th Amendment and 2012, the size of the House has been such as to make the size of the Electoral College an even number in only about half of all presidential elections.

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[68] *Ibid*. Pages 7–9.

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

The Solicitor General's brief to the U.S. Supreme Court in 2010 in the case of *John Tyler Clemons et al. v. United States Department of Commerce* traced the history of the various statutes that set the size of the U.S. House of Representatives.[69]

The Solicitor General's brief shows that Congress did not view protection of its own prerogative to elect the President and Vice President as a guiding factor in setting the size of the House.

> "After each decennial census from 1790 to 1910, Congress reconsidered the number of Representatives, enacting new apportionment legislation 'within two years after the taking of the census.' H.R. Rep. No. 2010, 70th Cong., 2d Sess. 1 (1929) (1929 House Report). Until 1850, Congress first determined the number of persons that would be represented by each Representative, then divided that number into the population of each State, assigned the resulting number of Representatives (less any fractional remainder) to each State, **and summed those numbers to arrive at the overall size of the House of Representatives**. See *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 449–451 (1992). Although Congress repeatedly increased the number of persons represented by each Member of the House, the size of the House continued to grow steadily, rising from 105 Members in 1790 to 243 Members by 1850." [Emphasis added]

If Congress thought that the opportunity to break a tie in the Electoral College was a constitutional imperative—or even a worthy secondary or tertiary objective—it would have been a trivial matter for Congress to accommodate that imperative when it periodically adjusted the size of the House.

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

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

If the U.S. House of Representatives were intended to be a routine part of the procedure for electing the President, the Founding Fathers could have easily specified that the

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[69] The (ultimately unsuccessful) plaintiff in that case argued that the present-day size of the U.S. House of Representatives is unconstitutionally small because it creates unconstitutionally large differences in the number of people represented by congressmen from different states. The lower courts rejected the argument advanced by Clemons, and the U.S. Supreme Court declined to hear the case.

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

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

First, the 1st Congress debated the issue of the size of the House of Representatives and approved a constitutional amendment on that very subject.[70] That particular amendment (part of a package of 12 amendments that included the 10 amendments that are now called "the Bill of Rights") was never ratified by the states. That amendment did not require that the size of the House (and hence the Electoral College) be an even number.

Second, the 1800 presidential election (which produced a tie in the Electoral College) led to a close examination of the procedures for electing the President. Congress approved, and the states ratified the 12th Amendment in time for the 1804 election. Congress could easily have included, in the amendment, a requirement that the size of the U.S. House of Representatives always be an even number.[71,72,73]

Third, the Congress had a convenient opportunity when it drafted the 23rd Amendment (giving the District of Columbia three electoral votes) to increase the likelihood of a contingent election for President by requiring that the size of the House always be chosen so as to ensure that the size of the Electoral College be an even number.

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

QUICK ANSWER:

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

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

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

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

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

MORE DETAILED ANSWER:

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

> "**History illuminates and informs the scope of state power under Article II**. Throughout the nation's history, states have used one of four processes for selecting their presidential electors … **Critically, under all four systems, each state's electors are selected in accordance with the wishes of the people of the state, not the nation generally.**
>
> "**Not once between 1880 and today,** a period in which every state in the union has conducted a statewide popular election for its electors, **has any state selected its electors based on the votes of individuals in other states**. Rather, as the framers expected, states have selected their electors based on the will of state voters, not the nation at large."[74]
>
> "Although Article II, Section 1 of the U.S. Constitution entrusts to the state legislatures the power to determine the manner in which presidential electors are selected, **that power is not plenary** in the customary sense. Rather, **that power is limited**, and the extent of that limitation is borne out **by the historical understanding of the scope of state authority** under Article II. At the time of the Framing of the U.S. Constitution, the framers envisioned a system in which states would select electors in accordance with the sentiments of state citizens, not the nation generally. Moreover, in the years following the Framing, every single state, both original and newly admitted, established a system of selecting presidential electors based either directly or indirectly on the sentiments of state voters. At no point in our nation's history has any state sought to appoint its electors on the basis of voter sentiment outside the state, let alone the national popular vote. **The Constitution's delegation of power to the state legislature must therefore be read in light of this uniform, uncontested understanding that states are required to select electors in accordance with popular sentiment of voters in the state or the districts within it**."[75]

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

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

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

[75] *Ibid*. Page 1523.

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

> "There is no rule of constitutional interpretation, or of judicial duty, which requires the court **…** to **disregard the plan of the electoral college as it actually exists, after a century of practical experience and development**."[76] [Emphasis added]

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

> "From the formation of the government until now, the practical construction of the clause has conceded **plenary power to the state legislatures** in the matter of the appointment of electors."[77]
>
> "In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States."[78]
>
> "The question before us is not one of policy, but of power …. **The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way**."[79] [Emphasis added]

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

QUICK ANSWER:

- The U.S. Supreme Court has repeatedly stated that the power to choose the method of awarding a state's electoral votes is an "exclusive" and "plenary" state power.
- The National Popular Vote Compact does not encroach on federal sovereignty, because the power to choose the method of awarding a state's electoral votes is a state power.

MORE DETAILED ANSWER:

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

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

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

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

[78] *Ibid.* Page 35.

[79] *Ibid.* Pages 35–36.

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

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

> "**Each State** shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…."[81] [Emphasis added]

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

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that **the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.**"
>
> "In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States."[82] [Emphasis added]

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

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

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

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

Note that the U.S. Constitution gives the states considerably more discretion in choosing the manner of appointing their presidential electors than it does in choosing the manner of electing members of Congress.

Article I, section 4, clause 1 of the U.S. Constitution provides:

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

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

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

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

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

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

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

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

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

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

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

QUICK ANSWER:

- Federalism is concerned with the distribution of power between the states and the federal government.
- The power of state governments—relative to the power of the federal government—is not increased or decreased based on whether presidential electors are elected along state boundary lines (as is the case under the current state-by-state winner-take-all system currently used by most states), along congressional district boundary lines (as is currently the case in Nebraska and

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

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

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

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

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

MORE DETAILED ANSWER:

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

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

John Samples argues that a national popular vote would "weaken federalism."

> "Anti-federalists feared the new Constitution would centralize power and threaten liberty."
>
> "The founders sought to fashion institutional compromises that responded to the concerns of the states and yet created a more workable government than had existed under the Articles of Confederation."
>
> "The national government would [be] part of a larger design of checks and balances that would temper and restrain political power."
>
> "The realization of **the NPV plan would continue [the] trend toward nationalization and centralized power**."[87] [Emphasis added]

UCLA law professor Daniel H. Lowenstein has argued:

> "Against all the pressures of nationalization, **it is important to maintain the states as strong and vital elements of our system**."[88] [Emphasis added]

Lowenstein expanded this argument by saying:

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

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

[88] Debate entitled "Should We Dispense with the Electoral College?" sponsored by PENNumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf

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

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

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

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

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

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

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

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

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

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

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

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

John Samples of the Cato Institute has written:

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

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

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

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

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

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

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

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

Justice Kagan continued:

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition, the U.S. Supreme Court noted in *McPherson v. Blacker* in 1892 that a state's constitution can limit the legislature's choices over the manner of appointing the state's presidential electors.

> "The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, **except as limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. **What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist**."[96] [Emphasis added]

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

> "**No State shall** enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but

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

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

> gold and silver Coin a Tender in Payment of Debts; **pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts**, or grant any Title of Nobility." [Emphasis added]

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

For example, John Samples of the Cato Institute wrote:

> "**It is accurate that the Constitution does not explicitly constrain the power of state legislatures in allocating electors**. But a brief consideration of the history of the drafting of this part of the Constitution suggests **some implicit constraints on state choices**."[97] [Emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: **but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.**" [Emphasis added]

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

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

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

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

[101] *Ibid.* Pages 99–100.

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

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

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

Gibson v. Matthews noted:

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

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

The Fidel Castro argument

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

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

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

Ross repeatedly refers to the

> "**finely wrought procedures** found in the Constitution." [Emphasis added]

Ross reminds us that:

> "The Founders spent months debating the appropriate presidential election process for the new American nation."[105]

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

> "**NPV is the opposite of what the Founders wanted, but failure of imagination prevented the Founders from explicitly prohibiting this particular manner of allocating electors**."

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

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

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

> "The [U.S. Supreme] Court has held that 'the State legislature's power to select the manner for appointing electors is plenary.'"
>
> "**Is this power of state legislators completely unrestricted?** If it is, then Rhode Island could decide to allocate its electors to the winner of the Vermont election. In a more extreme move, New York could allocate its electors to the United Nations. **Florida could decide that Fidel Castro always appoints its electors**."[106] [Emphasis added]

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

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

For example, Article 1, Section 8 provides:

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

Article I, Section 10 provides:

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

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

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

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

> "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, **but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person**." [Emphasis added]

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

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

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[106] *Ibid.*

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

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

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

Referring to Great Britain (the villainous analog in 1892 of Fidel Castro), attorney F.A. Baker argued:

> "The crown in England is hereditary, the succession being regulated by act of parliament.
>
> "Would it be competent for a State legislature to pass a similar act, and provide that A. B. and his heirs at law forever, or some one or more of them, should appoint the presidential electors of that State?"[107]

In its unanimous ruling in *McPherson v. Blacker*, the Court answered Baker's argument about whether there were implicit constitutional restrictions on the power of the states to award their electoral votes:

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object. **The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text.**"[108] [Emphasis added]

The Court continued:

> "In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States"[109] [Emphasis added]

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

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

[109] *Ibid.* Page 29.

The argument that the Constitution is obsolete

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

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

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

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

> "**There can be no such thing as an absolutely rigid constitution**. It is an impossibility, although the supreme court in Michigan in its wisdom most solemnly declares, that it will recognize no other."[111] [Emphasis added]

Chiafalo v. Washington in 2020

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

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

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

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

[111] *Ibid.*

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

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

The 10th Amendment argument of Justices Thomas and Gorsuch

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

The 10th Amendment to the Constitution reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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

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

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

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

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

> "**When the Constitution is silent, authority resides with the States or the people.** This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. The application of this fundamental principle should guide our decision here."
>
> "This allocation of power is apparent in the structure of our Constitution. **The Federal Government "is acknowledged by all to be one of enumerated powers**." *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). '[T]he powers delegated by the … Constitution to the federal government are few and defined,' while those that belong to the States 'remain … numerous and indefinite.' *The Federalist No. 45*. … Article I, for example, enumerates various legislative powers in §8, but it specifically limits Congress' authority to the 'legislative Powers herein granted,' §1. **States face no such constraint because the Constitution does not delineate the powers of the States**."
>
> "This structural principle is explicitly enshrined in the Tenth Amendment. That Amendment states that
>
> > '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'
>
> "As Justice Story explained, '[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.' J. Story, *Commentaries on the Constitution of the United States*."
>
> "Thus, '[w]here the Constitution is silent about the exercise of a particular power[,] that is, where the Constitution does not speak either expressly or by necessary implication," the power is "either delegated to the state government or retained by the people." U.S. Term Limits, supra, at 847–848 (THOMAS, J., dissenting)."

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

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

> "Sen. Fred Thompson supports the National Popular Vote Compact, which effectively guts the Electoral College, and ends the Republic as we know it."
>
> "**With this National Popular Vote method, we will no longer be a Republic, but a democracy**. A democracy is the one thing that the Founding Fathers feared more than anything else. Every democracy in the history of the world has devolved into tyranny. Democracy is two wolves and a sheep voting on what's for dinner. The Founding Fathers knew this and made every effort

> to prevent the U.S. from slipping into the abyss. As Franklin said, 'This is a Republic, if you can keep it.' **The National Popular Vote Compact will end the Republic**."[115] [Emphasis added]

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

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

> "The two great points of difference between a democracy and a republic are: first, **the delegation of the government, in the latter, to a small number of citizens elected by the rest**; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended."[116] [Emphasis added]

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

> "The true distinction between these forms was also adverted to on a former occasion. It is, that **in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents**. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region."[117] [Emphasis added]

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

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

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

Today, direct democracy in the United States is confined to an occasional "small spot" (to use Madison's wording in *Federalist No. 14*), such as some New England town meetings.

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

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

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

Popular election of the chief executive does not determine whether a government is a republic or democracy. The division of power between the citizenry and elected officeholders to whom governmental power is delegated is not affected by the boundaries of the regions used to tally popular votes for choosing presidential electors. The United States is neither less nor more a "republic" if its chief executive is elected under the state-by-state winner-take-all method, under Maine and Nebraska's method of awarding electoral votes (where the boundaries of the regions to tally popular votes for choosing presidential electors are congressional districts), or under the National Popular Vote Compact (where popular votes would be tallied on a nationwide basis).

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

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

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

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

> "The United States shall guarantee to every State in this Union a **Republican Form of Government**."[118] [Emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As Senator Fred Thompson said:

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

> "The United States shall guarantee to every State in this Union a Republican Form of Government."[125]

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

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

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

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

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

The Guarantee Clause does not apply to the federal government.

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

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

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

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

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

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

> "The two great points of difference between a democracy and a republic are: first, **the delegation of the government, in the latter, to a small number of citizens elected by the rest**."[127] [Emphasis added]

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

> "The true distinction between these forms was also adverted to on a former occasion. It is, that **in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents**."[128] [Emphasis added]

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

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

The National Popular Vote Compact would do nothing to change the fact that the people delegate power to elected officeholders who, in turn, run the government.

The Guarantee Clause is non-justiciable.

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

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

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

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

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

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

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

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

> "The Guarantee Clause provides for a compound republican government at the national level. … NPV legislation violates the Guarantee Clause by **blurring important state lines in our compound republic**."[131] [Emphasis added]

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

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

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

> "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. **In the compound republic of America, the power surrendered by the people is first divided between two distinct governments**, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. **The different governments will control each other**, at the same time that each will be controlled by itself."[133] [Emphasis added]

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

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

In short, the definition of a "compound republic" is based on there being *two* distinct layers of government—state and federal—each of which is a republic.

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

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

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Clause.

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

[132] Brown, Adam. Do we live in a "compound Constitutional Republic" or something else? *Utah Data Points*. July 11, 2011. http://utahdatapoints.com/2011/07/do-we-live-in-a-compound-constitutional-republic-or-something-else/

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

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

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

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

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

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

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

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated:

> "Without question, the NPV deprives non-participating states of their right under Article V to participate **in deciding whether the Twelfth Amendment, which governs the Electoral College, should be changed.**"[136] [Emphasis added]

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

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

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

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

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

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

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

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

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

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

> "The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment **at such place in each State in accordance with the laws of the State** enacted prior to election day."[137] [Emphasis added]

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

The Privileges and Immunities Clause of the 14th Amendment (ratified in 1868) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "**The individual citizen has no federal constitutional right to vote for electors for the President of the United States** unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that **the State legislature's power to select the manner for appointing electors is plenary**."[139] [Emphasis added]

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

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

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

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

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

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

> "The electoral system as it actually exists is recognized by the 14th and 15th amendments, and by necessary implication, **the general ticket method [i.e., the winner-take-all rule] for choosing presidential electors is made permanent, and the only constitutional method of appointment**.[140]" [Emphasis added]

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

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

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

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

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

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

Section 2 of the 14th Amendment does not give the voters the right to vote for presidential electors for two reasons.

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

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

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

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

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

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

> "The appointment of these electors is thus placed absolutely and wholly with the Legislatures of the several states. **They may be chosen by the Legislature**, or the Legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States, and it is no doubt competent for the Legislature

> to authorize the Governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors."[141] [Emphasis added]

If interpretation of the 14th Amendment argued by the losing attorney (F.A. Baker) in *McPherson v. Blacker* had any validity, the appointment of presidential electors by the Florida legislature in 1868 and by the Colorado legislature in 1876 would have been unconstitutional.

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

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

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

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

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

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

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

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

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

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

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

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

> "**The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [i.e., the 'winner-take-all' rule]**, nor that the majority of those who exercise the elective franchise can alone choose the electors."[144] [Emphasis added]

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

> "**The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.** U.S. Const., Art. II, §1.
>
> "This is the source for the statement in *McPherson* v. *Blacker* … that the State legislature's power to select the manner for appointing electors is plenary.
>
> "There is no difference between the two sides of the present controversy on these basic propositions."[145] [Emphasis added]

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

Under the Compact, voters would continue to vote for presidential electors in all states belonging to the Compact. Far from denying or abridging "the right to vote at any election for the choice of electors for President and Vice President of the United States," the Compact actually reinforces the people's vote for President in compacting states. Article II of the Compact provides:

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

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

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

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

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

[146] The term "statewide popular election" is defined in Article V of the compact as "a general election at which votes are cast for presidential slates by individual voters and counted on a statewide basis."

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

William Josephson, a New York attorney, wrote:

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

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

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

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

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

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

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

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

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

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

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

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

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

The seventh clause of Article III of the Compact provides:

> "If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUICK ANSWER:

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

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

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

MORE DETAILED ANSWER:

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

> "**Justice Stevens' majority opinion seemed wary of statutes that attempt to evade the Constitution's requirements**. Stevens wrote that a state provision
>
> > 'with **the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses** … cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.'
>
> "Allowing such action, he concluded:
>
> > 'trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism.
> > 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.'"[151,152] [Emphasis added]

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

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

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

> "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[153]

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

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

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

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

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

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

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

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

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

> "**Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." [Emphasis added]

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

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

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

> "**The constitution does not provide that the appointment of electors** shall be by popular vote, nor that the electors **shall be voted for upon a general ticket [the winner-take-all rule]** nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and **leaves it to the legislature exclusively to define the method** of effecting the object. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text."
>
> "In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States."[155] [Emphasis added]

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

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

In fact, Article II, section 1, clause 1 contains only one "requirement," which is that presidential electors not hold federal office. The National Popular Vote Compact certainly does not have the "avowed purpose and obvious effect of evading [that] requirement."

The exercise of any legislative power is indisputably also subject to all the other specific "requirements" in the U.S. Constitution that may apply to the exercise of state legislative power.

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

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

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

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

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

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

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

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

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

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

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."[157]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ross claims:

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

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

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

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

In short, the 1998 line-item veto case was concerned with federal legislation that attempted to establish a procedure that contravened the "finely wrought procedure" contained in the U.S. Constitution, whereas the National Popular Vote Compact represents the use by the states of the "finely wrought procedure" actually contained in the Constitution.

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

QUICK ANSWER:

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

MORE DETAILED ANSWER:

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

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

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

> "**Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty**; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties."[161] [Emphasis added]

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

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

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

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

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

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

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

tial electors is one of the state's sovereign powers and, if it is, whether that power can be shared with other states by means of an interstate compact.

A state's "sovereign powers" may be delegated by an interstate compact

The sovereign authority of a state is not easily defined. The federal courts have not defined sovereignty, although they have attempted to describe it on various occasions.

In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* in 1938, the U.S. Supreme Court traced the history of compacts during the colonial period and immediately thereafter and viewed them as a corollary to the ability of independent nations to enter into treaties with one another.

> "The compact … adapts to our Union of sovereign States the age-old treaty making power of sovereign nations."[163]

In *Texas Learning Technology Group v. Commissioner of Internal Revenue* in 1992, the U.S. Court of Appeals for the Fifth Circuit wrote:

> "The power to **tax**, the power of **eminent domain,** and the **police power** are the generally acknowledged sovereign powers."[164] [Emphasis added]

The filling of public offices that are central to the operation of state government (including legislative, executive, or judicial offices and the position of delegate to a state constitutional convention) is regarded as a sovereign state power.[165,166]

The historical practice of the states, the long history of approval of interstate compacts by Congress, and court decisions all support the view that a state's sovereign powers may be granted to a group of states acting through an interstate compact.

Let us consider the three powers mentioned above—taxation, eminent domain, and police power.

Concerning the power to tax, New York and New Jersey granted this sovereign power to the New York–New Jersey Waterfront Commission in certain specified matters in 1953.[167]

Concerning the power of eminent domain and the power to exempt property from taxation, New York and New Jersey delegated these sovereign powers to the Port Authority of New York and New Jersey in certain specified matters. This delegation was upheld in 1944 in *Commissioner of Internal Revenue v. Shamberg's Estate.*[168]

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[163] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* 304 U.S. 92 at 104. 1938.

[164] *Texas Learning Technology Group v. Commissioner of Internal Revenue.* 958 F.2d 122 at 124 (5th Cir. 1992).

[165] See, e.g., *Kingston Associates Inc. v. LaGuardia*, 281 N.Y.S. 390, 398 (S.Ct. 1935) (the exercise of public offices within the legislative, executive, or judicial branches of government); *People v. Brady*, 135 N.E. 87, 89 (Ill. 1922) (same); *People v. Hardin*, 356 N.E.2d 4 (Ill. 1976) (the power to appoint officials to commissions or agencies within the three branches of state government); *State v. Schorr*, 65 A.2d 810, 813 (Del. 1948) (same); and *Forty-Second Legislative Assembly v. Lennon*, 481 P.2d 330, 330 (Mont. 1971) (the role of a delegate to a state constitutional convention).

[166] Engdahl, D. E. 1965. *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?* 64 *Michigan Law Review* 63 at 64–66.

[167] Waterfront Commission Compact. See https://www.wcnyh.gov/docs/wcnyh_act.pdf

[168] *Commissioner of Internal Revenue v. Shamberg's Estate* 144 F.2d 998 at 1005–1006. (2nd Cir. 1944).

The Port Authority of New York and New Jersey has a police force numbering over 1,600 officers. The New York–New Jersey Waterfront Commission also has a police force.

The Columbia River Compact[169] provides a particularly clear example of the surrender of sovereignty inherent in interstate compacts.

This compact concerns fish in the Columbia River. It was enacted by the states of Washington[170] and Oregon[171] in 1915, and it received congressional consent in 1918.[172]

By entering into this compact, each state agreed to make the other state's approval necessary for it to exercise what otherwise would have been its separate and independent legislative power over fish in the Columbia River.

The entire compact follows:

> "There exists between the states of Washington and Oregon a definite compact and agreement as follows:
>
> "**All laws and regulations** now existing or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, or its tributaries, over which the states of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction, **shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states**." [Emphasis added]

The power to appropriate money is another example of a power that is viewed as fundamental to a state.

The Ohio River Valley Water Sanitation Compact provides:

> "The signatory states agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory states…."

In *West Virginia ex rel. Dyer v. Sims*, the U.S. Supreme Court upheld the delegation of West Virginia's appropriation power and wrote in 1950:

> "The issue before us is whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency.
>
> "That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government.

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[169] Columbia River Compact. https://compacts.csg.org/compact/columbia-river-compact/

[170] RCW 77.75.010. https://app.leg.wa.gov/RCW/default.aspx?cite=77.75.010

[171] ORS 507.010. https://oregon.public.law/statutes/ors_507.010

[172] 40 Stat. 515. 1918. An act to ratify the compact and agreement between the States of Oregon and Washington regarding concurrent jurisdiction over the waters of the Columbia River and its tributaries in connection with regulating, protecting, and preserving fish. https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/40/STATUTE-40-Pg515a.pdf

> The West Virginia court does not challenge the general proposition but objects to the delegation here involved because it is to a body outside the State and **because its Legislature may not be free, at any time, to withdraw the power delegated**. … **What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact**. … Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. **The Compact involves a reasonable and carefully limited delegation of power to an interstate agency**."[173] [Emphasis added]

The right to vote for a presidential elector is not beyond the reach of an interstate compact. In the 1970 U.S. Supreme Court case of *Oregon v. Mitchell*, Justice Potter Stewart (concurring in part and dissenting in part) pointed out that if Congress had not acted to bring about uniformity among state durational residency requirements for voters casting ballots in presidential elections, then the states could have adopted an interstate compact to do so.[174]

In short, there is nothing about the nature of an interstate compact that fundamentally prevents the delegation of a state's sovereign power to a group of compacting states.

As Marian Ridgeway wrote:

> "If the state chooses to inaugurate some new pattern of local government [by means of an interstate compact] that is not in conflict with the state's constitution, it can do so, as long as the people lose none of their **ultimate power to control the state itself**."[175] [Emphasis added]

This statement reflects various court decisions that emphasize the ability of a sovereign entity to operate independently of any other.[176]

The U.S. Supreme Court recognized in *McPherson v. Blacker* in 1892 that a state's constitution may limit the power to choose the method of appointing presidential electors:

> "The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states

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[173] *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22 at 30–31. 1950. https://supreme.justia.com/cases/federal/us/341/22/

[174] *Oregon v. Mitchell*. 400 U.S. 112 at 286–287.

[175] Ridgeway, Marian E. 1971. *Interstate Compacts: A Question of Federalism*. Carbondale, IL: Southern Illinois University Press.

[176] See, for example, the 1793 case of *Chisholm v. Georgia* for a discussion of the historic origins of state sovereignty.

> and the citizens of each state. **What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist.** The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned **in the absence of any provision in the state constitution in that regard**. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."[177] [Emphasis added]

The Court rejected a specific argument about what constitutes an appointment by the state:

> "The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the state of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment, because the state is to appoint as a body politic and corporate, and so must act as a unit, and cannot delegate the authority to subdivisions created for the purpose; and **it is argued that the appointment of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors**."[178] [Emphasis added]

The Court answered this argument by ruling:

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, **nor that the majority of those who exercise the elective franchise can alone choose the electors**. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.[179] [Emphasis added]

As far as we are aware, no court has ever invalidated an interstate compact on the grounds that it impermissibly delegated a state's sovereign power.

The National Popular Vote Compact does not delegate a sovereign state power.

There is no authority from any court regarding whether presidential electors exercise a sovereign power of their state.

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[177] *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

[178] *Ibid*. Pages 24–25.

[179] *Ibid*. Page 27.

Given the temporary nature of the function of presidential electors, it is doubtful that a court would rule that presidential electors exercise inherent governmental authority.

In contrast to members of the legislative, executive, or judicial branches of state government or members of a state constitutional convention, the function that presidential electors perform is not one that addresses the sovereign governance of the state. Instead, presidential electors decide the identity of the chief executive of the federal government. That is, the selection of electors is not a manifestation of the way in which the state itself is governed.

If the power to determine a state's electors is deemed not to be a sovereign power of the state, then the ability to delegate it is unquestioned. No court has invalidated an interstate compact for delegating a power that is not central to the organic ability of a state to operate independently as a political and legal entity, no matter how broad the delegation. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, the U.S. Supreme Court ruled that a compact to administer an interstate stream was:

> "binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."[180]

Given the exclusive role of the states to determine the manner of appointing its presidential electors,[181] if the determination of a state's electors is a sovereign power, and its delegation would shift political power to the group of compacting states, the National Popular Vote Compact will not be deemed to compromise federal supremacy.[182] The fact of the delegation would not, in and of itself, violate the U.S. Constitution.

9.1.24. MYTH: Respect for the Constitution demands a constitutional amendment to change the method of electing the President.

QUICK ANSWER:

- The Constitution contains a built-in provision (Article II, section 1) for changing the method of awarding a state's electoral votes. One does not show respect for the Constitution by unnecessarily and gratuitously amending it. Amending the Constitution should be the last resort. The method that is built into the Constitution should be pursued before a constitutional amendment is considered.
- Existing state winner-take-all laws were enacted by state legislatures (rather than a federal constitutional amendment). No one argues that the enactment of existing winner-take-all laws showed disrespect to the Constitution.

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[180] *Hinderlider v. La Plata River & Cherry Creek Ditch Company*. 304 U.S. 92 at 106. 1938.

[181] *McPherson v. Blacker*. 146 U.S. 1. 1892.

[182] See *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*. 472 U.S. 159 at 176. 1985.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has argued:

> "Even assuming that the Electoral College should be eliminated, respect for the Constitution demands that we go through the formal amendment process."[183]

The National Popular Vote Compact does not eliminate the Electoral College. It replaces state winner-take-all statutes (enacted on a piecemeal basis by the states over a period of many decades after the 1787 Constitutional Convention) with a system that guarantees the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

The winner-take-all method is not in the U.S. Constitution. It was not created by means of a federal constitutional amendment. Therefore, the winner-take-all method may be repealed in the same manner it was originally adopted namely by passage of state-level legislation under the authority of Article II, section 1 of the Constitution.

One does not show respect for the Founding Fathers by ignoring the specific method they built into the U.S. Constitution for changing the method of electing the President.

There is nothing in the Constitution that needs to be amended in order for states to switch from their current practice of awarding their electoral votes to the candidate who receives the most popular votes inside their individual states (the winner-take-all method) to a system in which they award their electoral votes to the candidate who receives the most popular votes in all 50 states and the District of Columbia (the National Popular Vote Compact).

One does not show respect for the Constitution by unnecessarily amending it.

Amending the Constitution should be the last resort.

Existing state winner-take-all laws were enacted by state legislatures (rather than a federal constitutional amendment). No one argues that enactment of these existing winner-take-all laws showed disrespect to the Constitution.

9.1.25. MYTH: The most democratic way to change the manner of electing the President is a federal constitutional amendment.

QUICK ANSWER:

- A federal constitutional amendment favored by states representing 97% of the nation's population can be blocked by states representing only 3% of the population.

MORE DETAILED ANSWER:

In her book *Enlightened Democracy: The Case for the Electoral College*, Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, characterizes a federal constitutional amendment as being a fairer and more democratic

[183] Ross, Tara. 2010. The Electoral College Takes Another Hit. September 22, 2010. http://www.nationalreview.com/corner/247368/electoral-college-takes-another-hit-tara-ross

means for replacing state winner-take-all laws than the Compact—because it turns the question of how to elect the President over to "the people."

A federal constitutional amendment must be ratified by 38 of the 50 states. Thus, an amendment favored by states representing 97% of the nation's population could be blocked by the 13 smallest states (representing only 3% of the population).

The winner-take-all rule is not part of the U.S. Constitution. State winner-take-all laws were not adopted by means of a federal constitutional amendment. Therefore, it is difficult to see why the repeal of the existing state winner-take-all laws would require a constitutional amendment—much less why an amendment should be considered a more democratic way to make the change.

9.1.26. MYTH: The Compact cannot be considered by state legislatures, because the U.S. Supreme Court has not already approved it.

QUICK ANSWER:

- The U.S. Supreme Court does not give advisory opinions or advance approvals to proposals pending in state legislative bodies.

MORE DETAILED ANSWER:

While opposing the National Popular Vote Compact in the Connecticut legislature in 2018, State Representative Craig Fishbein said during the House floor debate:

> "What particular Supreme Court case says that this body can deliberate and perhaps vote on this particular compact? … This compact has not been brought before the U.S. Supreme Court."[184]

Representative Charles Ferraro added:

> "I think Representative Fishbein very clearly pointed out that the Supreme Court has not weighed in on this compact."[185]

The U.S. Supreme Court does not give advisory opinions or advance approvals to proposals pending in legislative bodies.

9.1.27. MYTH: The Compact would lead to a federal constitutional convention.

QUICK ANSWER:

- The National Popular Vote Compact has nothing to do with the movement to call a federal constitutional convention.

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[184] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 101.

[185] *Ibid*. Page 115.

MORE DETAILED ANSWER:

The claim that the National Popular Vote Compact is related to—or would somehow lead to—a federal constitutional convention is a recurring and puzzling urban legend.

A posting on Reddit says:

> "The reason [National Popular Vote] exists is to try to get two-thirds of the states to adopt it. If two-thirds of the states adopt it, the constitution forces congress to call a constitutional convention to discuss an amendment to the constitution."[186]

According to Article V of the U.S. Constitution, a constitutional convention can be called either by Congress or by a petition from two-thirds of the states.

A federal constitutional convention would be a meeting whose purpose would be to propose amendments to the U.S. Constitution—or perhaps write an entirely new constitution.

The National Popular Vote Compact is *state* legislation that specifies how presidential electors are to be chosen. The Compact is not an amendment to the U.S. Constitution. It has nothing to do with the movement to call a federal constitutional convention by getting state legislatures to petition Congress for one.

States enact the National Popular Vote Compact into law under the authority of Article II, section 1, clause 2 of the U.S. Constitution:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."

9.1.28. MYTH: The Compact is unconstitutional, because it is not a constitutional amendment.

QUICK ANSWER:

- Opponents of the National Popular Vote Compact frequently use a circular argument that uses the desired conclusion (namely that the National Popular Vote Compact is unconstitutional) as the justification for the claim that the goal of the Compact can only be achieved by means of a constitutional amendment.

MORE DETAILED ANSWER:

John Samples of the Cato Institute argues that the National Popular Vote Compact:

> "circumvent[s] the Constitution's amendment procedures."[187]

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[186] *Reddit*. August 6, 2023. https://www.reddit.com/r/changemyview/comments/15jt1pd/cmv_napavointerco_for_popular_vote_is_an_crappy/

[187] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 14. https://www.cato.org/policy-analysis/critique-national-popular-vote

John Samples' observation that a state legislative body enacted a law without employing the federal Constitution's amendment procedure cannot serve as a substitute for a *specific* legal argument as to why that law violates the Constitution.

Indeed, it is a truism that *every* law enacted by *every* state legislature circumvents the U.S. Constitution's amendment procedures.

However, if a piece of legislation is a valid exercise of a state legislature's power, then there is no requirement that it be enacted using the federal Constitution's amendment procedures.

On the other hand, if the piece of legislation is not a valid exercise of powers granted by the Constitution (that is, if the proposed legislation is unconstitutional), then the constitutional amendment procedure becomes the only way to implement the policy involved.

The fact that a legislative body decided to implement a particular policy by means of a statute is evidence that the legislative body believed that it had authority to enact that statute and that it believed that it was not necessary to implement the policy by means of a constitutional amendment.

The state legislatures that have enacted the National Popular Vote Compact believed that Article II, section 1 of the U.S. Constitution provided them with authority to act:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…."[188] [Emphasis added]

Their belief is supported by the decision of the U.S. Supreme Court in the leading case on the awarding of electoral votes:

> "**The constitution does not provide that the appointment of electors** shall be by popular vote, nor that the electors **shall be voted for upon a general ticket [the winner-take-all rule]** nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and **leaves it to the legislature exclusively to define the method** of effecting the object. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text."
>
> "In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States."[189] [Emphasis added]

Ultimately, John Samples makes a circular argument that uses his desired conclusion (namely that the National Popular Vote Compact is unconstitutional) as the justification for his claim that the goal of the Compact can only be achieved by means of a constitutional amendment.

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[188] U.S. Constitution. Article II, section 1, clause 2.

[189] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

9.1.29. MYTH: A federal constitutional amendment is the superior way to change the system.

QUICK ANSWER:

- State-level action is preferable to a federal constitutional amendment, because it is far easier to amend state legislation than to change a constitutional amendment if some adjustment becomes advisable.
- State-level action is preferable to a federal constitutional amendment, because it leaves existing state control of presidential elections untouched.
- State-level action is preferable, because states would retain their exclusive and plenary power to make future changes in the method of awarding their electoral votes.
- The U.S. Constitution contains a built-in mechanism for changing the winner-take-all method of awarding electoral votes, namely state legislation. State action is the right way to make this change, because it is the way specified in the Constitution.
- Building political support from the bottom-up is more likely to yield success than a top-down approach involving a constitutional amendment.

MORE DETAILED ANSWER:

State action to change the winner-take-all method of awarding electoral votes is preferable to a federal constitutional amendment for several reasons.

First, it is far easier to amend or repeal state legislation than to amend or repeal a constitutional amendment if some adjustment becomes advisable. It is inconsistent for opponents of the National Popular Vote Compact to argue that nationwide election of the President will usher in numerous adverse consequences, but that the change should be implemented in a manner (i.e., a federal constitutional amendment) that is not easily amended or repealed.

Second, the National Popular Vote Compact leaves untouched existing state control over presidential elections. Many of the constitutional amendments concerning the Electoral College that have been introduced and debated in Congress over the years would have reduced or eliminated state control over presidential elections (as discussed in chapter 4).

The Constitution's delegation of power over presidential elections (Article II, section 1) is not a historical accident or mistake. It was intended as a "check and balance" on a sitting President who, with a compliant Congress, might be inclined to manipulate election rules to stay in office.[190] The Founders dispersed the power to control presidential elections among the states, knowing that no single "faction" would likely be in power simultaneously in all states.

Third, under the National Popular Vote Compact, states would retain their power to change the method of awarding their electoral votes in the future. A federal constitutional amendment would eliminate this existing state power.

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[190] In October 2008, the Mayor of New York City, in conjunction with the City Council, amended the City's term-limits law to permit the Mayor to run for a third term.

Fourth, state action is the right way to make the change, because the U.S. Constitution provides a built-in mechanism for changing the method of electing the President. Article II, section 1 permits the states to choose the manner of awarding their electoral votes.

Fifth, passing a constitutional amendment requires an enormous head of steam at the front-end of the process (i.e., getting a two-thirds vote in both houses of Congress). Only 17 constitutional amendments have been ratified since passage of the Bill of Rights by Congress. The last time Congress successfully proposed a federal constitutional amendment that was ratified by the states was the 26th Amendment (voting by 18-year-olds) in 1971. The last constitutional amendment to be ratified was the 27th Amendment (congressional salaries) in 1992.[191] In contrast, state action permits support to bubble up from the people through the state legislative process. The genius of the U.S. Constitution is that it provides a way for both the central government and state governments to initiate change. Building support from the bottom-up is more likely to yield success than a top-down approach.

Debates over the process to be employed to achieve a particular election reform have frequently delayed achievement of that objective. The passage of women's suffrage, for example, was delayed by decades as a result of a long-running argument within the women's suffrage movement over whether to pursue changes at the state level versus a federal constitutional amendment. Women's suffrage was first adopted by individual states using their power, under the U.S. Constitution, to conduct elections. It was 50 years between the time when Wyoming permitted women to vote (1869) and the passage of the 19th Amendment by Congress (1919). By the time Congress finally passed the 19th Amendment, women had already won the right to vote in 30 of the 48 states.

9.2. MYTHS THAT PRESIDENTIAL CANDIDATES REACH OUT TO ALL THE STATES UNDER THE CURRENT SYSTEM

9.2.1. MYTH: The current system forces presidential candidates to reach out to all states.

QUICK ANSWER:

- Far from ensuring that candidates reach out to all states in their pursuit of the presidency, the current state-by-state winner-take-all method of awarding electoral votes regularly results in three out of four states being ignored in the general-election campaign for President.
- Almost all (between 91% and 100%) of the general-election campaign events were concentrated in a dozen-or-so closely divided battleground states in the six presidential elections of the 2000s. Over three-quarters (77%) of all the events in the four presidential elections between 2008 and 2020 (903 of 1,164 events) were concentrated in just nine states. During this period, 22 states were totally ignored, and nine others received only one visit.

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[191] The most recently approved constitutional amendment was the 27th Amendment, which became part of the Constitution in 1992. That amendment had been submitted to the states by the 1st Congress on September 25, 1789—203 years earlier. It remained unratified until 1992. The 27th Amendment provides, "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened."

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted in testimony before a Nevada Senate hearing:

> "Ultimately, the Electoral College ensures that the political parties must **reach out to all the states**."[192] [Emphasis added]

In 2020, Rush Limbaugh said the following about voter fraud in a nationwide vote for President:

> "No matter what anybody tells you, you need to support the Electoral College, and you need to thank your Founding Fathers for it, because it **ensures that everybody in this country has a role in electing the president**. **If they were to succeed and get rid of the Electoral College, five or six states would determine the presidency every election**."[193] [Emphasis added]

In a Heritage Foundation Legal Memo, Thomas Jipping wrote in 2020:

> "America's Founders established the Electoral College so that all states could participate in electing the President—**requiring campaigns to reach the entire country**."[194] [Emphasis added]

Despite the fact that no presidential or vice-presidential candidate has engaged in general-election campaigning in Arkansas since 2000, Doyle Webb, Chairman of the Arkansas Republican Party, said in 2020:

> "Without the Electoral College, candidates for President will just fly over the midsection of the United States, will fly over Arkansas."[195]

The above demonstrably false statements are routinely repeated, with a straight face, by many other defenders of the current state-by-state winner-take-all method of awarding electoral votes.

Table 1.26 and the map in figure 1.14 show the state-by-state distribution of the 1,164 general-election campaign events of the major-party presidential and vice-presidential nominees in the four presidential elections between 2008 and 2020. The table and map show:

- Twenty-two states were totally ignored in these four presidential elections.
- Nine additional states each received only a single visit (out of the total of 1,164) during the entire four-election period.

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[192] Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

[193] Limbaugh, Rush. 2020. SCOTUS 9-0: Electoral College Voters MUST Stay Faithful to State. *Premiere Networks*. July 6, 2020. https://wjno.iheart.com/featured/rush-limbaugh/content/2020-07-06-pn-rush-limbaugh-scotus-9-0-electoral-college-voters-must-stay-faithful-to-state/

[194] Jipping, Thomas. 2020. The National Popular Vote: Misusing an Interstate Compact to Bypass the Constitution. Heritage Foundation Legal Memo No. 272. October 8, 2020. https://www.heritage.org/sites/default/files/2020-10/LM272.pdf

[195] Rose, Shelby. 2020. Democratic Party of Arkansas to vote on electoral college stance. KATV News. October 23, 2020. https://katv.com/news/local/democratic-party-of-arkansas-to-vote-on-electoral-college-stance

- Over three-quarters (77%) of all the general-election events in the four elections (903 of 1,164) were concentrated in nine states.

State winner-take-all laws are the reason why three out of four states and three out of four Americans are ignored in presidential elections. Under the current state-by-state winner-take-all system, voters in non-battleground states receive no attention from either political party, because neither party has anything to gain or lose by campaigning in such states.

A presidential candidate has no reason to spend his or her limited time and money visiting, advertising, and building grassroots support in order to win a state with, say, 58% of its popular vote rather than, say, 55%. Similarly, it does not matter whether a candidate loses a state with 45% rather than 42% of the vote.

Because of this political reality, candidates understandably concentrate their attention on a small handful of closely divided battleground states.

The list of closely divided battleground states is largely stagnant when viewed over a period of two, three, or four consecutive presidential elections. However, even in the short term, the number of "jilted battlegrounds" exceeds the number of "emerging battlegrounds," as discussed in section 1.2.10.

When viewed over several decades, there has been a dramatic shrinkage in the number of closely divided states in presidential elections. For example, all 50 states received general-election campaign events in the 1960 presidential election, as discussed in section 1.2.11.

9.2.2. MYTH: The fact that each state has a unique political, economic, and cultural character is a reason to support the current system.

QUICK ANSWER:

- The fact that each state has a unique political, economic, and cultural character is precisely the reason *not* to support the current state-by-state winner-take-all method of awarding electoral votes. The current system regularly results in three out of four states being ignored in the general-election campaign for President. Over three-quarters of all the events in the four presidential elections between 2008 and 2020 (903 of 1,164 events) were concentrated in just nine states.

MORE DETAILED ANSWER:

"Keep the Electoral College, Because States Matter" is the title of an article by Josiah Peterson in the *National Review* that argued:

> "[States] have **unique geographic and political interests** that ought to be reflected in the agenda of the nation's executive."[196] [Emphasis added]

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[196] Peterson, Josiah. Keep the Electoral College, Because States Matter. *National Review*. May 4, 2018. https://www.nationalreview.com/2018/05/electoral-college-important-states-have-unique-political-interests/

Save Our States (the leading organization that lobbies against the National Popular Vote Compact) has said:

> "To win the presidency, candidates … have to try to win states by addressing the **unique political, economic, and cultural character** of each state's voters."[197] [Emphasis added]

In speaking in opposition to the National Popular Vote Compact during the House floor debate in Connecticut, State Representative Rob Sampson said:

> "I understand that some people might be in favor of [the national popular vote] concept, but there is a legitimate reason … why we don't use that system. Going back to the formation of this country, our **Founding Fathers recognized that the states were different and that the people that lived in them were different**. And that remains the same today. We have some states that are tourism states. We have some states that are devoted to agriculture. We have other states which might be involved in business. But **each of those states has their own interests**."[198] [Emphasis added]

In comparing the key features of the current system of electing the President with the National Popular Vote proposal, Tara Ross defended the current system by saying that it:

> "recognizes that **different states have different needs/priorities**."[199] [Emphasis added]

Ross then criticized a national popular vote for President by saying that it:

> "assumes voters alike nationwide, have the same needs."

The fact that states have different needs, interests, and priorities is precisely the reason *not* to support the current system of electing the President.

Far from ensuring that candidates reach out to all states in their pursuit of the presidency, the current state-by-state winner-take-all method of awarding electoral votes regularly results in three out of four states being ignored in the general-election campaign for President.

Over three-quarters (77%) of all the events in the four presidential elections between 2008 and 2020 (903 of 1,164 events) were concentrated in just nine states (as shown in table 1.26 and the map in figure 1.14).

In addition, 22 states were totally ignored in all four elections between 2008 and 2020. Nine additional states received only one visit during this entire period, and the remaining states received only a few visits during this entire period.

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[197] Save Our States. 2021. Electoral College Encourages Broad Coalitions, Moderation. *Save Our States blog*. Accessed May 22, 2021. https://saveourstates.com/uploads/Electoral-College-encourages-broad-coalitions-moderation.pdf

[198] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 22.

[199] Ross, Tara. 2013. The Electoral College, in a nutshell. May 1, 2013. http://www.taraross.com/2013/05/the-electoral-college-in-a-nutshell-2/

9.2.3. MYTH: The current system encourages coalition-building.

QUICK ANSWER:

- The current state-by-state winner-take-all method of awarding electoral votes actively works against coalition building, because it isolates voters sharing the common interests in one state (e.g., farmers) from like-minded voters in other states.
- It also actively works against coalition-building by reducing the number of states that are politically relevant in presidential elections.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has told numerous state legislative committees that the current system encourages coalition-building. In her testimony to an Alaska committee in 2023, she said:

> "The Electoral College continues to help our country in many ways: It encourages coalition building."[200]

In a video for PragerU, Ross said:

> "The system encourages coalition-building and national campaigning."[201]

Far from encouraging coalition-building, the current state-by-state system does exactly the opposite.

Members of a group sharing common interests and views (e.g., farmers) are siloed by state boundary lines. Their votes are not combined with like-minded voters in other states.

In addition, the current state-by-state winner-take-all method of awarding electoral votes actively works against coalition building by reducing the number of states that are politically relevant in presidential elections (as discussed in section 1.2 and section 9.2.1).

9.2.4. MYTH: The concentration of presidential campaigns in a few states is not a deficiency of the current system, because spectator states may become battleground states.

QUICK ANSWER:

- Although it is true that spectator states can become battleground states (and vice versa), changes in a state's political complexion generally occur slowly. Forty-one states voted for the same party in the four presidential elections between 2008 and 2020.
- Because of the current state-by-state winner-take-all method of awarding electoral votes, a person can easily live out a major portion, or all, of his or

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[200] Testimony of Tara Ross on Senate Bill 61 to Alaska Senate Judiciary Committee. March 13, 2023. Page 5. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=2662

[201] Ross, Tara. 2015. The Electoral College and Why It Matters. *PragerU*. https://www.youtube.com/watch?v=V6s7jB6-GoU

her entire adult life in a state that is totally ignored in the general-election campaign for President. In contrast, in elections for Governor or U.S. Senator, *every* voter in *every* precinct is equally relevant in *every* election. A person's vote in a particular precinct, town, or county is not ignored in an election for Governor or Senator simply because more than 53% or 54% of that voter's neighbors happen to favor another candidate.

- A nationwide vote for President would guarantee that *every* vote in *every* state would be equally relevant in *every* presidential election.

MORE DETAILED ANSWER:

Defenders of the current state-by-state winner-take-all method of awarding electoral votes strenuously argue that the current system forces presidential candidates to pay attention to all the states.

When facts are presented that contradict this manifestly incorrect claim (as they are in section 9.2.1), these same defenders of the current system retreat to the argument that the disproportionate attention received by battleground states is not a deficiency, because spectator states sometimes become battleground states in subsequent years.

For example, Tara Ross has argued that:

> "Safe states and swing states—they change all the time."
>
> "California, used to vote Republican. Now they vote Democrat."[202]

Although it is true that spectator states can become battleground states (and vice versa), changes in a state's political complexion generally occur slowly (as detailed in section 1.2.10 entitled "The Stagnant Battleground").

Most battleground states typically enjoy that status for only a couple of elections—typically during the period when the state's allegiance is shifting from one political party to another.

For example, California voted Republican in all six presidential elections between 1968 and 1988. Then, in 1988, California was a battleground state. George H.W. Bush won the state by 3.5% in that year. However, since then, California has voted Democratic in all eight presidential elections between 1992 and 2020.

New Mexico voted Republican in presidential elections for decades prior to 2000. Then, it was a closely divided battleground state in 2000, 2004, and 2008. Its loyalty oscillated from Democratic to Republican to Democratic in that period. Accordingly, it received an extraordinary amount of attention in those years.[203] Then, as the state's political complexion shifted decisively in the Democratic direction, New Mexico found itself almost totally ignored in 2012, 2016, and 2020.

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[202] Debate at the Dole Institute in Lawrence, Kansas, between Tara Ross and Dr. John R. Koza, Chair of National Popular vote, on November 7, 2011. Timestamp 16:30.

[203] See the tables and maps of general-election campaign events in section 1.2.4 (for 2008), section 1.2.5 (for 2004), and section 1.2.6 (for 2000).

Similarly, Virginia and Colorado were reliably Republican in presidential elections up until and including the 2004 election. Then, they were closely divided battleground states in 2008, 2012, and 2016. Both became spectator states in the 2020 election.

The facts are that:

- Forty-one states voted for the same party in the four presidential elections between 2008 and 2020, as shown in table 1.27.
- Thirty-six states voted for the same party in the six presidential elections between 2000 and 2020, as shown in table 1.28.
- Twenty-nine states voted for the same party in the eight presidential elections between 1992 and 2020, as shown in table 1.29.

Because of the current state-by-state winner-take-all method of awarding electoral votes, a person can easily live out a major portion, or all, of his or her entire adult life in states that are totally ignored in the general-election campaign for President.

For example, the year 2020 was the 108th anniversary of the last time the statewide popular-vote margin in a presidential election in Utah and Nebraska was less than 6%.

In contrast, in elections for Governor or U.S. Senator, *every* voter in *every* county, town, or precinct is equally relevant in *every* election. A person's vote in a particular county, town, or precinct is not ignored in an election for Governor or Senator simply because 53% or 54% of that voter's neighbors happen to favor another candidate.

A nationwide vote for President would guarantee that *every* vote in *every* state would be equally relevant in *every* presidential election.

9.2.5. MYTH: Safe states made up their minds earlier.

QUICK ANSWER:

- The problem with the current system is not that the voters of the spectator states have "made up their mind earlier," but that no presidential candidate cares what's on their minds.
- In each of the six presidential elections between 2000 and 2020, 91% or more of the general-election campaign events were concentrated in about a dozen closely divided battleground states.
- The current system does not force candidates to reach out to undecided voters. There are millions of undecided voters in the 38 or more spectator states that are routinely ignored in the general-election campaign for President. However, no presidential candidate solicits their votes, because they live in politically uncompetitive states.

MORE DETAILED ANSWER:

In an article entitled "Electoral College Means Both Safe and Swing States Are Crucial," Trent England, Executive Director of Save Our States, wrote:

> "Swing states are the late deciders. … Swing states matter because they compel campaigns to reach out to undecided voters."[204]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, testified at the Connecticut committee hearing on March 19, 2018:

> "Safe states are not irrelevant. **They are just states that made up their mind earlier in the process**."[205] [Emphasis added]

This issue is not that the voters of the spectator states "made up their mind earlier," but that no presidential candidate cares what's on their minds.

Under the current system, virtually all general-election campaign events (and a similar fraction of campaign expenditures) are in a handful of closely divided battleground states.

In each of the six presidential elections between 2000 and 2020, 91% or more of the general-election campaign events were concentrated in about a dozen closely divided battleground states (section 1.2.10). Moreover, 41 states voted for the same party in the most recent four presidential elections (table 1.27). The number of closely divided battleground states has been shrinking from decade to decade (section 1.2.11).

The current state-by-state winner-take-all method of awarding electoral votes makes supporters of both a state's majority party and minority party politically irrelevant, because presidential candidates have no reason to pay any attention to the issues of concern to them.

As Wisconsin Governor Scott Walker said in 2015 while running for President:

> "The nation as a whole is not going to elect the next President. Twelve states are."[206]

There are millions of undecided voters in the 38 or more spectator states that are routinely ignored in the general-election campaign for President. However, no presidential candidate solicits their votes, because they live in politically uncompetitive states.

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[204] England, Trent. 2020. Electoral College Means Both Safe & Swing States Are Crucial. *Real Clear Politics*. September 3, 2020. https://www.realclearpolitics.com/articles/2020/09/03/electoral_college_means_both_safe__swing_states_are_crucial__144128.html

[205] Ross, Tara. Testimony to Hearing of Connecticut Government, Administration, and Elections Committee. March 19, 2018. Timestamp 2:32:32. http://ct-n.com/ctnplayer.asp?odID=15124.

[206] CNBC. 2015. 10 questions with Scott Walker. *Speakeasy*. September 1, 2015. Transcript of interview of Scott Walker by John Harwood https://www.cnbc.com/2015/09/01/10-questions-with-scott-walker.html. Video of quote is at timestamp 1:26 at https://www.youtube.com/watch?v=nNZp1g8oUOI. The full quotation is: "The nation as a whole is not going to elect the next President. Twelve states are. Wisconsin's one of them. I'm sitting in another one right now, New Hampshire. There's going to be Colorado, where I was born, Iowa, where I lived, Ohio, Florida, a handful of other states. In total, it's about 11 or 12 states that are going elect the next President."

9.2.6. MYTH: Candidates will only focus on national issues in a national popular vote.

QUICK ANSWER:

- Just as candidates for Governor campaign on both local and statewide issues, presidential candidates would campaign on both state and national issues in a nationwide campaign.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated in written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024:

> "[An] NPV lobbyist explained that once the compact is in effect, presidential **candidates will only focus** on 'issues on a national level' rather than what she termed 'specialized interests' that only affect smaller groups of Americans."[207] [Emphasis added]

Parnell's written testimony cites a 2023 news story about Eileen Reavey's comments. However, Reavey did not say that "candidates will *only* focus" on national issues. She simply said that candidates will be "more concerned" about national issues. The news story that Parnell cited actually reported:

> "Reavey also thinks this [National Popular Vote] movement will encourage presidential candidates to campaign in every state instead of focusing on just a handful of battleground states like Pennsylvania or Nevada. 'We're going to see them being **more concerned** about issues on a national level, rather than really specialized interests that affect a small amount of chronically undecided voters in these states,' said Reavey."[208] [Emphasis added]

Just as candidates for Governor campaign on both local and statewide issues, presidential candidates would campaign on both state and national issues in a nationwide campaign.

9.2.7. MYTH: A national popular vote will simply make a different group of states irrelevant in presidential elections.

QUICK ANSWER:

- Every voter, regardless of location, would matter equally under a national popular vote.
- The best indicator of how campaigns would be run under a national popular

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[207] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 2. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[208] Nevada may join interstate compact to elect president through national popular vote. *3News*. April 7, 2023. https://news3lv.com/news/local/nevada-may-join-interstate-compact-to-nominate-president-through-national-popular-vote

vote is the way they are conducted today for offices where the winner is the candidate who receives the most votes. Serious candidates for Governor solicit voters throughout their entire state. No serious candidate ignores any part of a state if he or she is running in an election where the winner is the candidate who receives the most votes in the entire state. Inside battleground states, presidential candidates solicit voters throughout the entire state.

- When it is suggested that a national popular vote would make some states irrelevant in presidential elections, the obvious question is: "Which states would a presidential candidate totally ignore in an election in which the winner is the candidate who receives the most popular votes?"

MORE DETAILED ANSWER:

Three out of four states and three out of four Americans are ignored in present-day presidential elections conducted under the state-by-state winner-take-all method of awarding electoral votes (as discussed in detail in section 1.2).

John Samples, an opponent of the National Popular Vote Compact, has asserted:

> "Many states now ignored by candidates will continue to be ignored under NPV."[209]

We do not have to speculate on how a campaign would be conducted in an election in which the winner is the candidate who receives the most popular votes, because there is ample evidence available to answer this question. We *know*, from actual experience, how campaigns are conducted.

Serious candidates for Governor or U.S. Senator pay attention to their *entire* electorate. The reason is that every vote is equally important in winning an election in which the winner is the candidate who receives the most popular votes. Focus, for a moment, on a state's congressional districts (remembering that congressional districts within a state contain virtually identical numbers of people). Serious candidates for Governor do not limit their campaigns to just one-quarter of their state's congressional districts while totally ignoring the remaining three-quarters of the state. Taking Wisconsin as a specific example, it would be inconceivable for a serious candidate for Governor to campaign only in the 1st and 2nd congressional districts, while totally ignoring the 3rd, 4th, 5th, 6th, 7th, and 8th districts.

The same principle applies today in present-day presidential races *inside* each closely divided battleground state (as discussed in detail in chapter 8 and section 9.7). Inside a battleground state, every vote is equal. A campaign for Wisconsin's electoral votes under the winner-take-all rule has the same political dynamics as a gubernatorial campaign in the state. Every vote helps a candidate get closer to winning the most votes in the state and thereby capturing all of the state's electoral votes. Inside Wisconsin, for example, presidential candidates campaign throughout the state. Presidential candidates seek votes in Milwaukee, Madison, and Green Bay well as in suburbs, exurbs, small towns, and rural

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[209] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1. https://www.cato.org/policy-analysis/critique-national-popular-vote

areas. Every method of communication (including television, radio, newspapers, magazines, direct mail, billboards, telephone, and the internet) is used to reach *every* voter in the state. It would be politically preposterous to suggest that any presidential candidate would campaign in only certain parts of Wisconsin, to the exclusion of other parts, because every vote is equally important inside a presidential battleground state.

As David J. Owsiany of the Buckeye Institute wrote in the *Columbus Dispatch* in 2012 (when Ohio was a closely divided battleground state):

> "In a swing state such as Ohio, the candidates will visit every area of the state, not just the big cities, because they know winning the popular vote in Ohio—regardless of the margin—means the candidate will get all 18 of the Buckeye State's electoral votes."[210]

An NPR story entitled "Ads Slice Up Swing States With Growing Precision" reported on presidential campaigning in Colorado's small media markets in 2012 (when Colorado was a closely divided battleground state):

> "Republicans outnumber Democrats in El Paso County more than 2 to 1. Barack Obama lost this part of Colorado to John McCain by 19 points in 2008.
>
> "'**It's not a matter of just winning; it's winning by how much**,' says Rich Beeson, a fifth-generation Coloradan and political director for the Romney campaign.
>
> "Presidential campaigns know exactly the margin of victory or defeat that they have to hit in each town in order to carry an entire state. Democratic media strategist Tad Devine says campaigns set extremely specific goals based on hard data."
>
> "**Although no one suggests that President Obama will win Colorado Springs, whether he loses it by 15 or 25 points could determine whether he carries Colorado.**
>
> "Beeson of the Romney campaign says smaller cities are vital to this chess game, especially since they're cheaper to advertise in.
>
> "'A lot of secondary markets are very key to the overall map, whether it's a Charlottesville in Virginia or a Colorado Springs in Colorado,' he says. 'You can't ever cede the ground to anyone.'"[211] [Emphasis added]

When it is suggested that a national popular vote will make a different group of states irrelevant in presidential elections, the obvious question is: "Which states would a presidential candidate totally ignore in an election in which the winner is the candidate who receives the most popular votes?"

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[210] Owsiany, David J. Electoral College helps to make sure that president represents entire nation. *Columbus Dispatch*. September 22, 2012.

[211] Shapiro, Ari. Ads slice up swing states with growing precision. *NPR*. September 24, 2012. http://www.npr.org/2012/09/24/161616073/ads-slice-up-swing-states-with-growing-precision.

The question answers itself.

Under the National Popular Vote Compact, the winner would be the candidate who receives the most popular votes in the entire country. *Every* voter in *every* state would be equally important and politically relevant in *every* presidential election.

9.3. MYTHS ABOUT SMALL STATES

9.3.1. MYTH: Small states have increased clout under the current system.

QUICK ANSWER:

- The current state-by-state winner-take-all method of awarding electoral votes extinguishes the influence of small states in presidential elections. The reason is that political power in presidential elections comes from being a closely divided battleground state. Almost all of the small states are non-competitive one-party states in presidential elections.
- The eight smallest states have about the same combined population (5.9 million) as Wisconsin (5.6 million). These eight smallest states have 24 electoral votes—more than twice Wisconsin's 10 electoral votes. Because Wisconsin is a closely divided battleground state, it received a total of 58 of the nation's 1,164 general-election campaign events in the four presidential elections between 2008 and 2020. In contrast, because the eight smallest states are all one-party states in presidential elections, all together they received only one visit in four elections.

MORE DETAILED ANSWER:

The U.S. Constitution gives each state a number of electoral votes equal to the state's number of U.S. Representatives (which are apportioned on the basis of each state's population) *plus* the state's number of U.S. Senators (two).

Defenders of the current system of electing the President repeatedly assert—with a straight face—that the current system gives small states increased clout in presidential elections.

Trent England, Executive Director of Save Our States, has written:

> "The seven smallest states (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming) and the District of Columbia each have three electoral votes. **A national popular vote would render all low-population states almost permanently irrelevant in presidential political strategy.**"[212] [Emphasis added]

Professor Robert Hardaway of the University of Denver Sturm College of Law has stated:

> "If we had National Popular Vote, you take a state like Alaska, which has a very low population. **If it was a national popular vote, no presidential**

[212] Freedom Foundation. 2010. Brochure. Olympia, Washington.

> **candidate would be interested in going up there**, because the population is so low. But, … if they have three electoral votes, that's the compromise that brought this nation together, that's a lot of votes, **that's a lot of electoral votes compared to the population, so you'll see presidential candidates visiting** some of those outlying areas."[213] [Emphasis added]

Senator Mitch McConnell (R–Kentucky) has asked:

> "If the only vote total that counted was just running up the score, query, when would be the next time if you had a state with one congressmen or two congressmen and you had a tiny population, when would be the next time you would see or hear from any candidate for president?"[214]

Economics Professor Walter E. Williams of George Mason University has said:

> "Were we to choose the president and vice president under a popular vote … presidential candidates **could safely ignore the interests** of the citizens of Wyoming, Alaska, Vermont, North Dakota, South Dakota, Montana and Delaware."[215] [Emphasis added]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States,[216,217,218] has testified at state legislative hearings in Delaware, Nevada, and elsewhere:

> "Minority political interests, particularly the **small states, are protected** [by the current system]."
>
> "Ultimately, **the Electoral College ensures that the political parties must reach out to all the states**."
>
> "NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas and in small states."[219] [Emphasis added]

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[213] Debate at the Larimer County, Colorado, League of Women Voters on June 28, 2012, with Robert Hardaway of the University of Denver Sturm College of Law, Professor Robert Hoffert of Colorado State University, Elena Nunez of Colorado Common Cause, and Patrick Rosenstiel of Ainsley-Shea. Timestamp 18:00. http://www.youtube.com/watch?v=U_yCSqgm_dY

[214] McConnell, Mitch. The Electoral College and National Popular Vote Plan. Heritage Foundation Lecture. December 7, 2011. Washington, DC. Timestamp 19:36.

[215] Williams, Walter E. 2018. The Electoral College debate. *Atlanta Constitution*. October 15, 2018. https://www.myajc.com/news/opinion/opinion-the-electoral-college-debate/TiHmvVp3lCteA0icMwCQEP

[216] Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition.

[217] Ross, Tara. 2017. *The Indispensable Electoral College: How the Founders' Plan Saves Our Control from Mob Rule*. Washington, DC: Regnery Gateway.

[218] Ross, Tara; Cooper, Kate E.; and Ross, Emma. 2016. *We Elect a President: The Story of Our Electoral College*. Dallas, TX: Colonial Press L.P.

[219] Ross, Tara. 2011. Testimony for Delaware Senate on the National Popular Vote Bill (HB 198). June 21, 2010. Ross made identical statements at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

Gary Gregg II of the University of Louisville and editor of *Securing Democracy: Why We Have an Electoral College*,[220] a book defending the current system, said that a national popular vote for President:

> "would mean ignoring every rural and small-state voter in our country."[221]

None of these statements is true.

The eight states with three electoral votes

The major-party nominees for President and Vice President conducted a total of 1,164 general-election campaign events in the four elections between 2008 and 2020.

In table 9.1, the first four columns show the number of general-election campaign events in those four elections that took place in the eight states with three electoral votes.[222,223] The last four columns of the table show the Republican percentage of the two-party vote in each election. The table is sorted according to the Republican nominee's percentage in 2020.

Table 9.1 Presidential campaigns in the eight states with three electoral votes 2008–2020

2020 events	2016 events	2012 events	2008 events	State	2020 R-%	2016 R-%	2012 R-%	2008 R-%
				Wyoming	72%	76%	71%	67%
				North Dakota	67%	70%	60%	54%
				South Dakota	63%	66%	59%	54%
				Montana	58%	61%	57%	51%
				Alaska	55%	58%	57%	61%
				Delaware	40%	44%	41%	37%
				Vermont	32%	35%	32%	31%
			1	D.C.	6%	4%	7%	7%
0	**0**	**0**	**1**	**Total**				

The table shows that there was only one general-election campaign event conducted in the eight smallest states between 2008 and 2020. It was in the District of Columbia in 2008.

The table also shows why both Republican and Democratic presidential candidates almost totally ignored the eight smallest states.

All eight of the smallest states are one-party states in presidential elections. The outcome in each was a foregone conclusion long before Election Day. The two-party vote in these states was not within the narrow range that gives a candidate any chance to change the outcome.

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[220] Gregg, Gary L, II. (editor). 2001. *Securing Democracy: Why We Have an Electoral College*. Wilmington, DE: ISI Books.

[221] Gregg, Gary. Keep Electoral College for fair presidential votes. *Politico*. December 5, 2012.

[222] The District of Columbia received three electoral votes under the 23rd Amendment (ratified in 1961). For convenience, we frequently refer to the District of Columbia as a "state" in this book.

[223] The number of electoral votes presented in this table (and similar tables later in this section) are for the 2012, 2016, and 2020 elections. The (slightly different) number of electoral votes for the 2008 election may be found in table 3.1.

Comparison of the eight smallest states with the battleground state of Wisconsin

Wisconsin's population (5,698,230) is about the same as the combined population of the eight smallest states (5,912,842).[224]

Because of the two senatorial electoral votes that every state receives, the eight smallest states have a whopping 24 electoral votes—compared to only 10 for Wisconsin.

According to the defenders of the current system, the disproportionately large number of electoral votes possessed by the small states gives them increased clout.

However, Wisconsin received a total of 58 general-election campaign events between 2008 and 2020, compared to only one visit for the eight smallest states combined.

Wisconsin received 6% of the nation's 1,164 campaign events during the four elections—even though the state has 2% of the nation's population. That is, it got three times more attention than warranted by its population.

In contrast, the eight smallest states received only 0.1% of the 1,164 campaign events during this period—even though these states have 2% of the nation's population. That is, the smallest states received one-twentieth of the attention that their population warrants.

Figure 9.1 shows that Wisconsin received considerably more attention than the eight smallest states, even though the eight states have considerably more electoral votes.

The current state-by-state winner-take-all method of awarding electoral votes is the reason why the 5.6 million people in Wisconsin received so much attention, and why the equivalent number of people in the eight smallest states received virtually no attention.

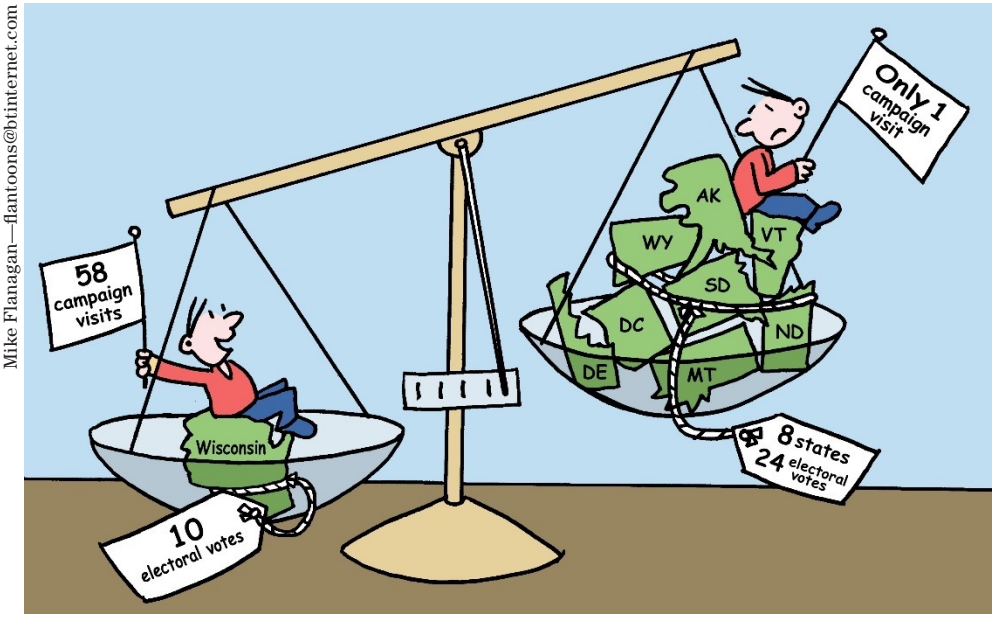

Figure 9.1 The battleground state of Wisconsin received considerably more attention than the eight smallest states, even though the eight small states together have considerably more electoral votes.

[224] The 2010 census is used throughout this section.

A thought experiment involving the eight smallest states

Now suppose the 5.9 million voters of the eight smallest states were not politically isolated inside the boundaries of their respective states but that they lived in a single state.

Given that this imaginary combined state has essentially the same population as Wisconsin, it would have only 10 electoral votes—considerably fewer than the 24 actually possessed by the eight separate states today.

The two-party vote in this imaginary combined state was closely divided in all four presidential elections between 2008 and 2020:

- 51%–49% for Biden in 2020
- 52%–48% for Trump in 2016
- 52%–48% for Obama in 2012
- 54%–46% for Obama in 2008

That is, this imaginary combined state would be equivalent to Wisconsin in terms of:

- population
- number of electoral votes
- competitiveness.

Thus, the voters of this imaginary combined state would be as important in presidential politics as Wisconsin. They would therefore receive essentially the same amount of attention from presidential candidates as Wisconsin currently does.

Presidential candidates would become familiar with the issues of concern to the voters of this imaginary combined state, fashion their platforms to appeal to these voters, communicate their platforms to these voters through advertising, and do all the other things that candidates do to solicit votes (e.g., open offices, run a ground game, encourage grassroots participation).

The same thing would happen under a national popular vote for President. Every voter in this imaginary combined state would suddenly matter to both the Democratic and Republican nominee. A vote in this imaginary combined state would become as valuable as a vote anywhere else in the country.

In short, a national popular vote for President would eliminate the artificial Balkanization of small-state voters and make them politically relevant in presidential elections.

The 13 states with three or four electoral votes

A similar pattern emerges if we expand the definition of a small state to include the 13 states with three or four electoral votes.

Table 9.2 shows the number of general-election campaign events and the Republican percentage of the two-party vote between 2008 and 2020 in the 13 smallest states.

New Hampshire stands out in this table in terms of the amount of attention that it received in these general-election campaigns. It received almost all (50 of the 58) of the campaign events received by this entire group of states.

New Hampshire's 50 general-election campaign events were 4% of the nationwide total of 1,164 events—far in excess of the number warranted by the state's population.

The reason why presidential candidates campaigned vigorously in New Hampshire—while ignoring equally populous states such as Idaho, Rhode Island, and Hawaii and all the

Table 9.2 Presidential campaigns in the 13 states with three or four electoral votes 2008–2020

2020 events	2016 events	2012 events	2008 events	State	2020 R-%	2016 R-%	2012 R-%	2008 R-%	EV
				Wyoming	72%	76%	71%	67%	3
				North Dakota	67%	70%	60%	54%	3
				Idaho	66%	68%	66%	63%	4
				South Dakota	63%	66%	59%	54%	3
				Montana	58%	61%	57%	51%	3
				Alaska	55%	58%	57%	61%	3
4	**21**	**13**	**12**	**New Hampshire**	**46%**	**49.8%**	**47%**	**45%**	**4**
2	3		2	Maine	45%	48%	42%	41%	4
				Delaware	40%	44%	41%	37%	3
				Rhode Island	39%	42%	36%	36%	4
				Hawaii	35%	33%	28%	27%	4
				Vermont	32%	35%	32%	31%	3
			1	D.C.	6%	4%	7%	7%	3
6	**24**	**13**	**15**	**Total**					**44**

other small states—is that its statewide popular vote was closely divided in New Hampshire, whereas the other small states were non-competitive one-party states.[225]

Note that Maine is the only other small state in table 9.2 that received any significant amount of attention among the 13 smallest states.

The reason is that Maine awards two of its electoral votes by congressional district. Its 2nd district (the northern part of the state) was closely divided in three of the four elections (2008, 2016, and 2020).

Presidential candidates campaigned in Maine because they perceived (correctly) that one electoral vote was up for grabs in the northern part of the state. In fact, Donald Trump carried the 2nd district in 2016 and 2020. Meanwhile, the Democratic presidential nominee carried the state as a whole in all four elections because of the heavily Democratic 1st district (centered in Portland). In other words, the state of Maine was not politically competitive, but the 2nd district was.

Table 9.2 also shows that the six states at the top of the table are heavily Republican and did not receive any campaign events in any of the four elections. The Republican presidential nominees (wisely) decided that they could take these states for granted and still win all of their electoral votes.[226] The Democratic nominees (equally wisely) wrote off these solidly red states, because they had no realistic possibility of winning any electoral votes there.

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[225] Note that there were 21 general-election campaign events in New Hampshire in 2016 when the race was extremely close (49.8% to 50.2%), but only four events in 2020 (when there was an eight percentage-point spread between Biden and Trump). That is, the degree of closeness determines the amount of attention that a state receives. See section 9.1.6 for a discussion of the "3/2 rule."

[226] The partisan orientation of these six red states has been the same for a considerable period of time. The Republican nominee carried all of them in all eight presidential elections between 1992 and 2020, except in 1992, when Ross Perot's candidacy enabled Bill Clinton to eke out a plurality in Montana.

Similarly, five of the states at the bottom of table 9.2 are so heavily Democratic that the Democratic nominees knew that they were in the bag. Meanwhile, the Republican nominees knew that those states were hopelessly out of reach.[227]

A thought experiment involving the 12 smallest non-battleground states

Now let's return to the claim that small states have increased clout because of the two senatorial electoral votes that every state receives.

The 12 *non-battleground* small states in table 9.2 (that is, the 13 smallest states except New Hampshire) have a combined population of 11,241,524.

Coincidentally, Ohio has almost the same number of people (11,568,495).

Because of the two senatorial electoral votes that every state receives above the number warranted by its population, the 12 non-battleground small states have 40 electoral votes, whereas Ohio has only about half as many.[228]

Despite having only about half as many electoral votes as the 12 non-battleground small states, Ohio received a total of 196 general-election campaign events in the four elections (out of a total of 1,164 events nationwide). Meanwhile, the 12 non-battleground small states received just eight events out of 1,164. Moreover, seven of those eight events were in Maine in years when the state's northern congressional district was competitive.

The current state-by-state winner-take-all method of awarding electoral votes is the reason why the 11.5 million people in Ohio received so much attention, and why the 11.2 million people in the 12 non-battleground small states received so little attention. Under the current system, political clout does not arise from the number of electoral votes that a state possesses, but from whether the state is closely divided.

If the 11.2 million people in the 12 noncompetitive small states had lived in a single state, that imaginary combined state would have been a closely divided battleground state. Its two-party vote would have been:

- 51%–49% for Biden in 2020
- 51%–49% for Trump in 2016
- 53%–47% for Obama in 2012
- 55%–45% for Obama in 2008.

This imaginary combined state would have essentially the same population as Ohio. However, it would have only 20 electoral votes[229]—not the 40 electoral votes actually possessed by the 12 separate small states.

In other words, the voters of this imaginary combined state would have almost the same population, number of electoral votes, and political complexion as Ohio.

Thus, it would become as important in presidential politics as Ohio's voters, and presidential campaigns would necessarily give the imaginary combined state more or less as much attention as Ohio.

As former Congressman and presidential candidate Tom Tancredo (R–Colorado) wrote in 2012:

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[227] The partisan orientation of these six blue states has been the same for a considerable period of time. The Democratic nominees carried all six of them in all eight presidential elections between 1992 and 2020.

[228] Ohio had 20 electoral votes in 2008, and 18 after the 2010 census.

[229] The imaginary state would have the same 18 electoral votes as Ohio, plus two senatorial electoral votes.

> "Some argue that the present system protects the interests of small states, especially those that hold conservative values. However, today 12 of the 13 smallest states are ignored after party conventions and are derisively referred to as 'flyover' country."
>
> "**Under the [National Popular Vote] plan, an evangelical voter in rural Wyoming would count the same as the union steward in Cleveland.**"[230] [Emphasis added]

The 25 smallest states (three to seven electoral votes)

Let's now generously expand the definition of a small state to include the 25 states with three to seven electoral votes.

Table 9.3 shows the number of general-election campaign events and the Republican percentage of the two-party vote between 2008 and 2020 in the 25 smallest states. These states have a combined population of 46,819,264.

As can be seen in the table, only three of the 25 states (New Hampshire, Nevada, and Iowa) received any significant amount of attention over the course of the four elections. They accounted for almost all (163 out of 189) of the campaign events received by this entire group of states. Fifteen of these smallest states received no attention at all.

The reason why so much attention was lavished on these particular three states becomes apparent by looking at the level of support in each state for each candidate.

New Hampshire, Nevada, and Iowa received almost all of the attention, because they were closely divided. In addition, Maine and Nebraska received a modest number of events, because one congressional district in each state was competitive. New Mexico was competitive in 2008 and received a considerable amount of attention at the time. However, it has not been a battleground state in presidential elections since then.

In a 1979 Senate speech, U.S. Senator Henry Bellmon (R–Oklahoma) described how his views on the Electoral College had changed as a result of serving as national campaign director for Richard Nixon and a member of the American Bar Association's commission studying electoral reform:

> "While the consideration of the electoral college began—and I am a little embarrassed to admit this—I was convinced, as are many residents of smaller States, that the present system is a considerable advantage to less-populous States such as Oklahoma. … As the deliberations of the American Bar Association Commission proceeded and as more facts became known, **I came to the realization that the present electoral system does not give an advantage to the voters from the less-populous States. Rather, it works to the disadvantage of small State voters who are largely ignored in the general election for President.**"[231] [Emphasis added]

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[230] Tancredo, Tom. Should every vote count? *WND*. November 11, 2011. http://www.wnd.com/index.php?pageId=366929

[231] *Congressional Record*. July 10, 1979. Page 17748. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

Table 9.3 Presidential campaigns in the 25 states with three to seven electoral votes 2008–2020

2020 events	2016 events	2012 events	2008 events	State	2020 R-%	2016 R-%	2012 R-%	2008 R-%	EV
				Wyoming	72%	76%	71%	67%	3
			1	West Virginia	70%	72%	64%	57%	5
				North Dakota	67%	70%	60%	54%	3
				Oklahoma	67%	69%	67%	66%	7
				Idaho	66%	68%	66%	63%	4
				Arkansas	64%	64%	62%	60%	6
				South Dakota	63%	66%	59%	54%	3
	1			Utah	61%	62%	75%	65%	6
1	2			Nebraska	60%	64%	61%	58%	5
				Montana	58%	61%	57%	51%	3
	1			Mississippi	58%	59%	56%	57%	6
				Kansas	57%	61%	61%	58%	6
				Alaska	55%	58%	57%	61%	3
5	**21**	**27**	**7**	**Iowa**	**54%**	**55%**	**47%**	**45%**	**6**
11	**17**	**13**	**12**	**Nevada**	**49%**	**49%**	**47%**	**44%**	**6**
4	**21**	**13**	**12**	**New Hampshire**	**46%**	**49.8%**	**47%**	**45%**	**4**
2	3		2	Maine	45%	48%	42%	41%	4
	3		8	New Mexico	44%	45%	45%	42%	5
				Oregon	42%	44%	44%	42%	7
				Delaware	40%	44%	41%	37%	3
	1			Connecticut	40%	43%	41%	39%	7
				Rhode Island	39%	42%	36%	36%	4
				Hawaii	35%	33%	28%	27%	4
				Vermont	32%	35%	32%	31%	3
			1	D.C.	6%	4%	7%	7%	3
23	**70**	**53**	**43**	**Total**					**189**

Senator Robert E. Dole of Kansas, the Republican nominee for President in 1996 and Republican nominee for Vice President in 1976, stated in a 1979 floor speech:

> "Many persons have the impression that the Electoral College benefits those persons living in small states. I feel that this is somewhat of a misconception. Through my experience with the Republican National Committee and as a Vice-presidential candidate in 1976, it became very clear that the populous states with their large blocks of electoral votes were the crucial states. It was in these states that we focused our efforts.
>
> "Were we to switch to a system of direct election, I think we would see a resulting change in the nature of campaigning. While urban areas will still be important campaigning centers, there will be a new emphasis given to smaller states. **Candidates will soon realize that all votes are important, and votes from small states carry the same import as votes from large states.**

> **That to me is one of the major attractions of direct election. Each vote carries equal importance.**
>
> "**Direct election would give candidates incentive to campaign in states that are perceived to be single party states**."[232] [Emphasis added]

The political clout of the small states is not based on the Electoral College.
In discussing the political clout of small states, it is well to remember that the Electoral College is not the bulwark of influence for the small states in the U.S. Constitution.

The small states' source of political clout is the equal representation of the states in the U.S. Senate (and, to a lesser extent, the equal representation of the states in the constitutional amendment process and, to an even lesser extent, the equal representation of the states in contingent elections for President in the U.S. House).

The 13 smallest states (with 3% of the nation's population) have 25% of the votes in the U.S. Senate—an enormously significant source of political clout in fashioning federal legislation (as well as in the confirmation and treaty-making processes).

9.3.2. MYTH: The small states give the Republican Party a systemic advantage in the Electoral College.

QUICK ANSWER:

- Contrary to political mythology, the Republican Party gains no partisan advantage from the 13 smallest states (i.e., those with three or four electoral votes) under the current state-by-state winner-take-all system. Whether measured by number of states, number of electoral votes, or number of popular votes, the smallest states are almost equally divided politically in presidential elections. In fact, there is a slight tilt in favor of the Democrats as measured by all three yardsticks.
- All but one of the smallest states are non-competitive one-party states in presidential elections. The one closely divided small state (New Hampshire) went Democratic in seven of the eight presidential elections between 1992 and 2020.

MORE DETAILED ANSWER:
One of the most frequently repeated statements about presidential elections is the inaccurate claim that the small states give the Republican Party a systemic advantage in the Electoral College.

There were 13 states with three or four electoral votes after the 1990, 2000, and 2010 census.

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[232] *Congressional Record*. January 15, 1979. Page 309. https://www.congress.gov/bound-congressional-record/1979/01/15/senate-section

We examine these states in terms of three yardsticks:

- number of states won by each party,
- number of electoral votes won by each party, and
- number of popular votes won by each party.

Number of small states won by each party between 1992 and 2020

The smallest states have been almost equally divided politically in the eight presidential elections between 1992 and 2020 (with a slight edge to the Democrats).

The Republican presidential nominee almost always carried six small states between 1992 and 2020—Alaska, Idaho, Montana, North Dakota, South Dakota, and Wyoming.

Montana is the only one of these states that did not vote Republican in all eight elections. It went for Bill Clinton in 1992 when independent candidate Ross Perot divided the state's popular vote.

The Democratic presidential nominee carried seven small states between 1992 and 2020—Delaware, the District of Columbia, Hawaii, Maine, New Hampshire, Rhode Island, and Vermont.

New Hampshire is the only one of these states that did not vote Democratic in all eight elections. It went for George H.W. Bush in 2000 when third-party candidate Ralph Nader divided the vote.

Table 9.4 shows which party carried each of the 13 smallest states in the eight presidential elections between 1992 and 2020.[233]

Overall, the Democratic presidential nominee won the smallest states 56 times, while the Republican won them 48 times in the eight presidential elections between 1992 and 2020.

The Democratic presidential nominee won the 13 smallest states by a 7–6 margin in six of the eight elections.

The Democratic nominee won these states by an 8–5 margin in 1992, and the Republican nominee won these states by a 7–6 margin in 2000.

Number of electoral votes won by each party between 1992 and 2020

Table 9.4 also shows that the Democrats won more electoral votes than the Republicans from the smallest states in seven of the eight presidential elections between 1992 and 2020.

Overall, the Democratic presidential nominee won 189 electoral votes from the 13 smallest states, while the Republican won 163 electoral votes.

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[233] The table shows which party's presidential candidate won statewide. Maine awards two of its four electoral votes by congressional district. In 2016 and 2020, Donald Trump won one of Maine's district-level electoral votes by carrying the state's 2nd congressional district, while the Democratic nominee won three electoral votes (representing the state as a whole and the 1st district).

Table 9.4 Presidential voting by the 13 smallest states 1992–2020

State	1992	1996	2000	2004	2008	2012	2016	2020
Delaware	D	D	D	D	D	D	D	D
D.C.	D	D	D	D	D	D	D	D
Hawaii	D	D	D	D	D	D	D	D
Maine	D	D	D	D	D	D	D	D
Rhode Island	D	D	D	D	D	D	D	D
Vermont	D	D	D	D	D	D	D	D
New Hampshire	D	D	R	D	D	D	D	D
Montana	D	R	R	R	R	R	R	R
Alaska	R	R	R	R	R	R	R	R
Idaho	R	R	R	R	R	R	R	R
North Dakota	R	R	R	R	R	R	R	R
South Dakota	R	R	R	R	R	R	R	R
Wyoming	R	R	R	R	R	R	R	R
Democratic states	**8**	**7**	**6**	**7**	**7**	**7**	**7**	**7**
Republican states	**5**	**6**	**7**	**6**	**6**	**6**	**6**	**6**
Democratic EV	**27**	**24**	**20**	**24**	**24**	**24**	**23**	**23**
Republican EV	**17**	**20**	**24**	**20**	**20**	**20**	**21**	**21**

Number of popular votes won by each party between 2000 and 2020

The popular vote in the 13 smallest states has been almost equally divided in the six presidential elections between 2000 and 2020.[234]

Overall, the Democratic presidential nominee won 16,951,920 popular votes (51%) from the 13 smallest states in the six presidential elections between 2000 and 2020, while the Republican won 16,298,161 popular votes (49%), as shown in table 9.5.

Table 9.5 The popular vote in the 13 smallest states was divided 51%–49% in favor of the Democratic presidential nominee in the six presidential elections between 2000 and 2020.

Year	Republican popular votes	Democratic popular votes
2000	2,361,723	2,171,442
2004	2,801,822	2,612,915
2008	2,544,113	3,137,100
2012	2,603,226	2,942,513
2016	2,754,608	2,673,800
2020	3,232,669	3,414,150
Total	16,298,161	16,951,920
Two-party percentage	**49.0%**	**51.0%**

In terms of percentages, the two-party popular vote in the 13 smallest states between 2000 and 2020:

- favored Biden 51.4% to 48.6% in 2020
- favored Trump 50.7% to 49.3% in 2016

[234] Ross Perot received 19% of the national popular vote in 1992 and 8% in 1996.

- favored Obama 53.1% to 46.9% in 2012
- favored Obama 55.2% to 44.8% in 2008
- favored George W. Bush 51.7% to 48.3% in 2004
- favored George W. Bush 52.1% to 47.9% in 2000.

Fourteen states have three or four electoral votes in 2024 and 2028.

West Virginia lost one congressional district as a result of the 2020 census and will therefore have only four electoral votes in 2024 and 2028.

Montana gained one congressional district and will have four electoral votes.

Both states are safely Republican in presidential elections and therefore received no general-election campaign events in the four presidential elections between 2008 and 2020.

New Hampshire continues to be the only one of the 14 smallest states that is likely to be competitive in 2024.

Figure 9.2 shows that the 14 states with three or four electoral votes in the 2024 and 2028 presidential elections were equally divided in the four presidential elections between 2004 and 2020.

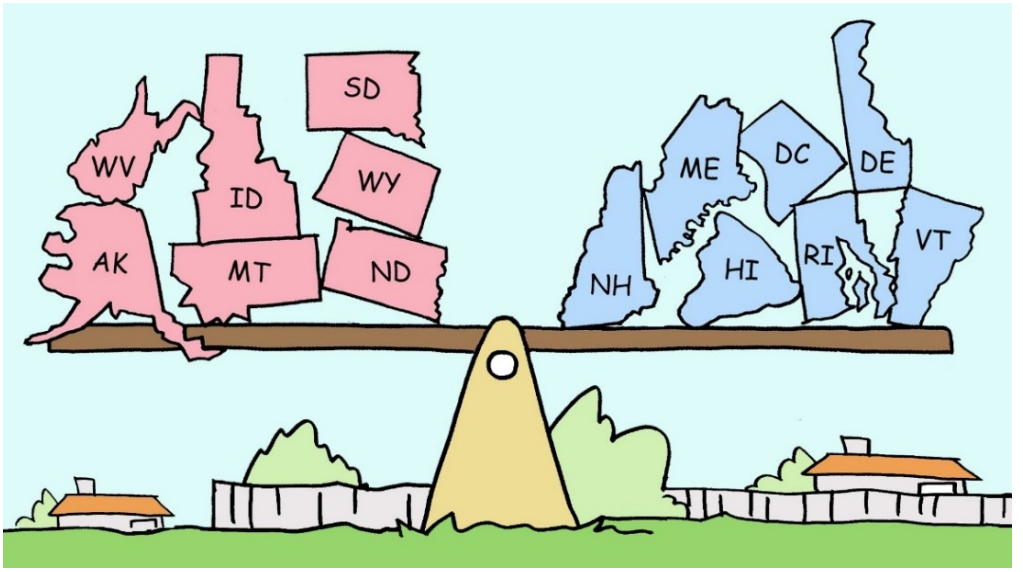

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Figure 9.2 The current 14 smallest states were equally divided by party between 2004 and 2020.

Possible origin of the myth that the small states are Republican in presidential elections

The origin of this myth may be the fact that the 12 smallest states divided 9–3 in favor of the Republicans in the relatively close presidential elections of 1960, 1968, and 1976 as well as the fact that there were Republican landslides in the Electoral College in four other elections during this period (1972, 1980, 1984, 1988).

The 13 smallest states cast 3% of the nation's popular vote while possessing 6% of the electoral votes. That is, the 13 smallest states have 26 electoral votes above what their population would warrant.

Even if these 26 electoral votes unanimously favored the Republican Party (and this is manifestly not the case), 26 electoral votes out of 538 would not create a controlling advantage.

Biden won in 2020 by a 306–232 margin in the Electoral College. Trump won in 2016 with an identical margin. Obama won in 2012 by a 332–206 margin, and he won in 2008 by a 365–173 margin.

9.3.3. MYTH: Thirty-one states would lose power under a national popular vote.

QUICK ANSWER:

- The claim that 31 states would lose power under a national popular vote is based on an arithmetic calculation that bears no relation to what happens in real-world presidential campaigns.
- The claim is based on the ratio of each state's percentage share of the nation's voters to the state's percentage share of the entire country's 538 electoral votes. This ratio creates the impression that the 31 smallest states have enhanced clout in presidential elections under the current system. However, the actual behavior of real-world presidential candidates indicates that political clout comes from being a closely divided state. Presidential candidates concentrate virtually all of their general-election campaigning in battleground states. Because almost all smaller states are one-party states in presidential races, they are politically irrelevant in general-election campaigns for President.

MORE DETAILED ANSWER:

In a 2011 article entitled "National Popular Vote Plan Would Hurt Most States," Morton C. Blackwell, a long-standing member of the Republican National Committee from Virginia, wrote:

> "Thirty-one states would lose power in presidential elections under [the National Popular Vote] plan."
>
> "If NPV had been in effect in 2008, Delaware would have lost 44% of its power. Rhode Island would have lost 51.49% of its power. Wyoming's power would have dropped by 65.48%. The pattern is the same for all the smaller-population states."[235]

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[235] Blackwell, Morton C. National Popular Vote plan would hurt most states. *The Western Journal*. June 25, 2011. Blackwell's 2011 memo and calculations for each state may be found at https://www.leadershipinstitute.org/img/email/nationalpopularvote.pdf. *The Unleash Prosperity Hotline*. Newsletter 3838 (August 18, 2023) of the Committee to Unleash Prosperity discussed Blackwell's memo in its edition under the heading "National Popular Vote Would Screw the Small States."

Blackwell based this statement upon an arithmetic calculation that compares each state's percentage share of the nation's voters in 2008 to the state's percentage share of the entire country's 538 electoral votes.

Table 9.6 shows Blackwell's calculation.

- Column 2 is the state's number of electoral votes.
- Column 3 is the state's percentage share of the entire country's 538 electoral votes. For example, Wyoming's three electoral votes represent 0.56% of the entire country's 538 electoral votes.
- Column 4 is the number of popular votes cast in the state in the 2008 presidential election.
- Column 5 is the state's percentage share of the entire country's 132,454,039 popular votes for President in 2008.[236] For example, Wyoming's 256,035 popular votes for President constituted 0.19% of the nationwide total.
- Column 6 is the difference between column 5 and column 3. For example, the difference between 0.19% and 0.56% is –0.37% for Wyoming. That is, Wyoming's percentage share of the nation's voters in 2008 is less than its percentage share of the entire country's 538 electoral votes.
- Column 7 is the ratio of column 6 to column 3. For example, the –0.37% difference for Wyoming in column 6 is –65.48% of 0.56%. Blackwell then interprets this negative number as demonstrating that Wyoming would lose 65.48% of its power in presidential elections.

Blackwell's arithmetic is correct. However, this arithmetic bears no relation to what happens in real-world presidential campaigns.

Presidential candidates concentrate virtually all of their general-election campaigning in closely divided states.

Because almost all small states are one-party states in presidential races, they are politically irrelevant in the general election campaign for President.

Political clout comes from being a battleground state—not from the ratio of electoral votes to the number of voters (as discussed in detail in section 9.1).

An examination of table 9.2 shows that 11 of the 13 smallest states (those with three or four electoral votes) received no attention at all in the 2008 campaign. The only significant amount of campaigning was in New Hampshire—the sole closely divided state among the 13 smallest states.

Note that the tendency of small-population states to be one-party states in presidential election extends to the 31 smallest states, as shown in table 1.15 and figure 1.12. In fact, 22 of the 31 smallest states were totally ignored under the current state-by-state winner-take-all method of awarding electoral votes.

Yet, Blackwell would have us believe that the current system confers enhanced political clout on these 31 smallest states.

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[236] Blackwell's vote counts differ slightly from those found in Leip's Election Almanac (131,461,581) by about 8,000 votes nationwide. Blackwell's article does not state the source of his vote counts. However, this tiny nationwide discrepancy does not affect Blackwell's argument.

Table 9.6 Morton Blackwell's calculations

State	EV	% of 538	Popular votes	% of popular vote	% difference in power	Change due to NPV
Alabama	9	1.67%	2,105,622	1.59%	–0.08%	–4.97%
Alaska	3	0.56%	327,341	0.25%	–0.31%	–55.68%
Arizona	10	1.86%	2,320,851	1.75%	–0.11%	–5.73%
Arkansas	6	1.12%	1,095,958	0.83%	–0.29%	–25.81%
California	55	10.22%	13,743,177	10.38%	0.15%	1.49%
Colorado	9	1.67%	2,422,236	1.83%	0.16%	9.32%
Connecticut	7	1.30%	1,644,845	1.24%	–0.06%	–4.56%
Delaware	3	0.56%	413,562	0.31%	–0.25%	–44.01%
D.C.	3	0.56%	266,871	0.20%	–0.36%	–64.02%
Florida	27	5.02%	8,453,743	6.38%	1.36%	27.18%
Georgia	15	2.79%	3,940,705	2.98%	0.19%	6.71%
Hawaii	4	0.74%	456,064	0.34%	–0.40%	–53.69%
Idaho	4	0.74%	667,506	0.50%	–0.24%	–31.90%
Illinois	21	3.90%	5,578,195	4.21%	0.31%	7.89%
Indiana	11	2.04%	2,805,986	2.12%	0.07%	3.61%
Iowa	7	1.30%	1,543,662	1.17%	–0.13%	–10.35%
Kansas	6	1.12%	1,264,208	0.95%	–0.17%	–14.78%
Kentucky	8	1.49%	1,858,578	1.40%	–0.08%	–5.64%
Louisiana	9	1.67%	1,979,852	1.49%	–0.18%	–10.49%
Maine	4	0.74%	744,456	0.56%	–0.18%	–24.05%
Maryland	10	1.86%	2,651,428	2.00%	0.14%	7.62%
Massachusetts	12	2.23%	3,102,995	2.34%	0.11%	5.03%
Michigan	17	3.16%	5,039,080	3.80%	0.64%	20.40%
Minnesota	10	1.86%	2,921,147	2.21%	0.35%	18.57%
Mississippi	6	1.12%	1,289,939	0.97%	–0.15%	–13.05%
Missouri	11	2.04%	2,992,023	2.26%	0.21%	10.48%
Montana	3	0.56%	497,599	0.38%	–0.18%	–32.91%
Nebraska	5	0.93%	811,923	0.61%	–0.32%	–34.04%
Nevada	5	0.93%	970,019	0.73%	–0.20%	–21.25%
New Hampshire	4	0.74%	719,643	0.54%	–0.20%	–26.58%
New Jersey	15	2.79%	3,910,220	2.95%	0.16%	5.88%
New Mexico	5	0.93%	833,365	0.63%	–0.30%	–32.35%
New York	31	5.76%	7,721,718	5.83%	0.07%	1.17%
North Carolina	15	2.79%	4,354,571	3.29%	0.50%	17.92%
North Dakota	3	0.56%	321,133	0.24%	–0.32%	–56.71%
Ohio	20	3.72%	5,773,387	4.36%	0.64%	17.25%
Oklahoma	7	1.30%	1,474,694	1.11%	–0.19%	–14.36%
Oregon	7	1.30%	1,845,251	1.39%	0.09%	7.16%
Pennsylvania	21	3.90%	5,996,229	4.53%	0.62%	15.98%
Rhode Island	4	0.74%	475,428	0.36%	–0.38%	–51.49%
South Carolina	8	1.49%	1,927,153	1.45%	–0.04%	–2.35%
South Dakota	3	0.56%	387,449	0.29%	–0.27%	–47.77%
Tennessee	11	2.04%	2,618,238	1.98%	–0.06%	–3.10%
Texas	34	6.32%	8,078,524	6.10%	–0.22%	–3.49%
Utah	5	0.93%	971,185	0.73%	–0.20%	–21.16%
Vermont	3	0.56%	326,822	0.25%	–0.31%	–55.94%
Virginia	13	2.42%	3,753,059	2.83%	0.42%	17.26%
Washington	11	2.04%	3,071,587	2.32%	0.28%	13.68%
West Virginia	5	0.93%	731,691	0.55%	–0.38%	–40.60%
Wisconsin	10	1.86%	2,997,086	2.26%	0.40%	21.65%
Wyoming	3	0.56%	256,035	0.19%	–0.37%	–65.48%
Total	**538**	**100.00%**	**132,454,039**	**100.00%**		

A closer examination of Blackwell's calculation shows that it simply demonstrates a geographical and historical oddity concerning the peculiar distribution of state sizes in the United States, namely that about two-thirds of states happen to have a *below-average* number of electoral votes.

The average number of electoral votes per state is 10.55 (that is, 538 divided by 51).

The fact is that two-thirds of the states have a *below-average* number of electoral votes—that is, 33 states have 10 or fewer electoral votes.

Because each state receives two electoral votes (above and beyond what would be warranted by its population), the percentage share of the nation's 538 electoral votes for each of the 33 below-average-sized states is larger than the state's percentage share of the nation's population.[237]

In short, Blackwell's calculation is just a reflection of the particular geographical distribution of the U.S. population among the states.

9.3.4. MYTH: The small states are so small that they will not attract any attention under any system.

QUICK ANSWER:

- Presidential candidates are not averse to campaigning in small states. In fact, they have lavished a considerable amount of attention on the one small state (New Hampshire with four electoral votes) that has been closely divided in recent general elections for President. Moreover, they have also frequently campaigned in Maine trying to win one electoral vote from the state's competitive 2nd congressional district.
- The other small states (those with three or four electoral votes) are not ignored because they are small, but because they are one-party states in presidential elections.
- Serious candidates for office solicit every vote that could possibly decide whether they win. Every vote in every state would matter in every presidential election in a nationwide vote for President. Under a national popular vote, a voter in a small state would become as important as any other voter in the United States. Moreover, in most cases, small states offer presidential candidates the attraction of considerably lower per-impression media costs.

MORE DETAILED ANSWER:

Because New Hampshire was a closely divided state in the four presidential elections between 2008 and 2020, it received 50 of the 58 general-election events that took place in the 13 smallest states (as shown in table 9.2).

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[237] If there were no differences in voter turnout among states, and no changes in population since the immediately preceding census (eight years earlier in the case of Blackwell's article), a state's percentage share of the 538 electoral votes would be larger for all 33 of the smallest states. Because there are differences in voter turnout from state to state as well as some intra-decade population changes, Blackwell's calculation ends up showing that a state's percentage share of the 538 electoral votes is larger for 31 of the 33 smallest states.

Thus, New Hampshire received 4.2% of the nation's general-election campaign events even though it has only 0.42% of the nation's population.

Because Maine awards electoral votes by congressional district, and its 2nd district was closely divided in three of the four elections between 2008 and 2020, it received some attention (two or three events) in those elections.

Meanwhile, Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, Hawaii, and Idaho were all ignored not because they were small, but because presidential candidates had nothing to gain by paying any attention to their voters under the winner-take-all system.

In short, the table shows that the determinant of whether a state receives attention is whether it is a closely divided state at the state level or, in the case of Maine, whether its 2nd congressional district happened to be competitive in a particular year.

In a nationwide vote for President, every voter in every state would be equally important in every presidential election. Under a national popular vote, a voter in a small state would become as important as any other voter in the United States. Moreover, in many cases, small states offer presidential candidates the attraction of considerably lower per-impression media costs (section 9.13.7).

The fact that serious candidates solicit every voter *who matters* was further demonstrated in 2008 by Nebraska's 2nd congressional district (the Omaha area). The Obama campaign operated three separate campaign offices staffed by 16 people there. The Campaign Media Analysis Group at Kantar Media reported that $887,433 worth of ads were run in the Omaha media market in 2008.[238] The reason for this activity in the Omaha area was that Nebraska awards electoral votes by congressional district. The campaigns paid attention to the 2nd district, because it was closely divided and because one electoral vote was at stake. The outcome in 2008 was that Barack Obama carried the 2nd district by 3,378 votes and thus won one electoral vote from Nebraska.

The fact that serious candidates solicit every vote *that matters* was also demonstrated by the fact that Mitt Romney opened a campaign office in Omaha in July 2012 in order to compete in Nebraska's 2nd district[239] and that the Obama campaign was also active in the Omaha area at the time.[240]

One Nebraska State Senator whose district lies partially in the 2nd congressional district reported a heavy concentration of lawn signs, mailers, precinct walking, telephone calls to voters, and other campaign activity related to the 2008 presidential race in the portion of his state senate district that was inside the 2nd congressional district, but no such activity in the remainder of his state senate district. Indeed, neither the Obama nor the McCain campaigns paid the slightest attention to the people of Nebraska's heavily Republican 1st district or heavily Republican 3rd district, because it was a foregone conclusion that McCain would win both of those districts. The issues relevant to voters of the 2nd

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[238] The 2008 ad spending figure was reported in Steinhauser, Paul. Nevada number one in ad spending per electoral vote. *CNN Politics*. July 4, 2012.

[239] Walton, Don. Romney will compete for Omaha electoral vote. *Lincoln Journal Star*. July 19, 2012.

[240] Henderson, O. Kay. Obama trip targets seven electoral college votes in Iowa, Nebraska. *Radio Iowa*. August 13, 2012.

district (the Omaha area) mattered, while the issues relevant to Nebraska's remaining two districts did not.

When votes matter, presidential candidates vigorously solicit those voters. When votes don't matter, they ignore those areas.

9.3.5. MYTH: The small states oppose a national popular vote for President.

QUICK ANSWER:

- The fact that the small states are disadvantaged by the current state-by-state winner-take-all method of awarding electoral votes has long been recognized by prominent officials from small states. In 1966, the state of Delaware led a group of 12 predominantly small states in bringing a lawsuit at the U.S. Supreme Court aimed at getting winner-take-all laws declared unconstitutional. The plaintiffs argued that the winner-take-all method of awarding electoral votes is unconstitutional because it "debases the national voting rights and political status of plaintiff's citizens and those of other small states."
- As of July 2024, the National Popular Vote Compact has been enacted into law by six small states (Delaware, Hawaii, Maine, Rhode Island, Vermont, and the District of Columbia).
- Polls of public support for a national popular vote for President in small states are substantially the same as those in medium-sized and big states.

MORE DETAILED ANSWER:

Prominent officials from small states have long recognized the fact that the small states are disadvantaged by the current state-by-state winner-take-all method of awarding electoral votes.

Lawsuit by Delaware and other small states challenging the winner-take-all rule

In 1966, the state of Delaware and a group of eleven other predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) argued before the U.S. Supreme Court that the state-by-state winner-take-all rule:

> "debases the national voting rights and political status of **Plaintiff's citizens and those of other small states**."[241] [Emphasis added]

This lawsuit was filed after the flurry of Supreme Court decisions in the 1960s that established the one-person-one-vote principle in connection with congressional and state legislative districts.

Defendant New York's political importance in presidential elections in the 1960s cannot be overemphasized. New York was not only a closely divided state, but it was the nation's biggest state at the time. It possessed the largest number of electoral votes (45). None

[241] *State of Delaware v. State of New York*. 385 U.S. 895. 1966.

of the prominent battleground states in recent elections (e.g., Ohio, Pennsylvania, Florida) has been the biggest or even second-biggest state.

Delaware Attorney General David P. Buckson (R) led the effort. The plaintiff's brief in *State of Delaware v. State of New York* argued:

> "The state unit-vote system [winner-take-all] **debases the national voting rights and political status of Plaintiff's citizens and those of other small states** by discriminating against them in favor of citizens of the larger states. A citizen of a small state is in a position to influence fewer electoral votes than a citizen of a larger state, and therefore his popular vote is less sought after by major candidates. **He receives less attention in campaign efforts and in consideration of his interests."**[242] [Emphasis added]

Delaware's brief also stated:

> "This is an original action by the State of Delaware as *parens patriae* for its citizens, against the State of New York, all other states, and the District of Columbia under authority of Article III, Section 2 of the United States Constitution and 28 U.S. Code sec. 1251. **The suit challenges the constitutionality of the respective state statutes employing the 'general ticket' or 'state unit-vote' system**, by which the total number of presidential electoral votes of a state is arbitrarily misappropriated for the candidate receiving a bare plurality of the total number of citizens' votes cast within the state.
>
> "The Complaint alleges that, although the states, pursuant to Article II, Section 1, Par. 2 of the Constitution, have some discretion as to the manner of appointment of presidential electors, they are nevertheless bound by constitutional limitations of due process and equal protections of the laws and by the intention of the Constitution that all states' electors would have equal weight. Further, **general use of the state unit system by the states is a collective unconstitutional abridgment of all citizens' reserved political rights to associate meaningfully across state lines in national elections**." [Emphasis added]

The plaintiff's brief argued that the votes of the citizens of Delaware and the other plaintiff states are:

> "diluted, debased, and misappropriated through the state unit system."

The U.S. Supreme Court declined to hear the case (presumably because the choice of manner of awarding electoral votes is exclusively a state decision under *McPherson v. Blacker*).

Ironically, the defendant New York is no longer a battleground state. Today, New York suffers the very same disadvantage as Delaware, because it is now politically noncompeti-

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[242] Delaware's brief in the 1966 case may be found at https://www.nationalpopularvote.com/elevenplaintiffs. New York's brief may be found at https://www.nationalpopularvote.com/newyorkbrief. Delaware's argument in its request for a re-hearing may be found at https://www.nationalpopularvote.com/delawarebrief.

tive in presidential elections. Today, a voter in New York is equal to a voter in Delaware—both are politically irrelevant in presidential elections.

The Compact has been enacted by six small states.
As of July 2024, the National Popular Vote Compact has been enacted into law by six small states (Delaware, Hawaii, Maine, Rhode Island, Vermont, and the District of Columbia).

Public opinion in small states supports national popular vote.
Public support for a national popular vote for President is substantially the same in state-level polls of small states, medium-sized states, and big states, as discussed in detail in section 9.22.

9.3.6. MYTH: Equal representation of the states in the U.S. Senate is threatened by the National Popular Vote Compact.

QUICK ANSWER:

- The composition of the U.S. Senate is established and protected by the U.S. Constitution. It cannot be changed by passage of any state law or any interstate compact. In fact, equal representation of the states in the U.S. Senate cannot even be changed by an ordinary constitutional amendment, but instead can only be changed by unanimous consent of all 50 states.
- Changing the winner-take-all method of awarding electoral votes would have no effect on the equal representation of the states in the U.S. Senate.

MORE DETAILED ANSWER:
Equal representation of the states in the U.S. Senate is explicitly established and protected in the U.S. Constitution.

The composition of the U.S. Senate cannot be changed by the passage of any state law or any interstate compact.

In fact, equal representation of the states in the U.S. Senate may not even be amended by an ordinary federal constitutional amendment. Article V of the U.S. Constitution provides:

> "No State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

That is, this feature of the U.S. Constitution may only be changed by a constitutional amendment that, in addition to the usual requirements, is approved by unanimous consent of all 50 states.

The National Popular Vote Compact is concerned with the method of selecting members of the Electoral College. The power to change the method of selecting the manner of appointing presidential electors is explicitly granted to each state by the U.S. Constitution:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[243]

Changing the winner-take-all method of awarding electoral votes would have no effect on the equal representation of the states in the U.S. Senate.

9.4. MYTHS ABOUT BIG STATES

9.4.1. MYTH: Eleven states would control the outcome of a nationwide popular vote for President.

QUICK ANSWER:

- Opponents of a nationwide vote for President sometimes claim that the voters of the 11 most populous states could alone elect a President. However, this criticism is based on the politically preposterous assumption that a particular presidential candidate would receive 100% of the popular vote in each of these 11 states (when, in fact, 54%–46% is the average margin by which the winning candidate wins the 11 most populous states).
- This criticism of a national popular vote has an even more serious flaw—it applies to the current system more than to a national popular vote. Under the *current* state-by-state winner-take-all method of awarding electoral votes, a candidate receiving a plurality of the popular votes in these same 11 states would win a majority of the Electoral College (and hence the presidency). That is, under the *current* system, a President could theoretically be elected with about 25% of the nationwide popular vote.
- In a national popular vote for President, every voter in every state would be equal throughout the United States. A vote cast in a populous state would be no more or less valuable than a vote cast anywhere else.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated that the National Popular Vote Compact:

> "would give the most populous states **a controlling majority** of the Electoral College, **letting the voters of as few as 11 states control the outcome of presidential elections**."[244] [Emphasis added]

A 2011 letter signed by House Speaker John Boehner (R–Ohio), Senator Mitch McConnell (R–Kentucky), and Governor Rick Perry (R–Texas) stated:

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[243] U.S. Constitution. Article II, section 1, clause 2.

[244] Von Spakovsky, Hans. 2011. Protecting Electoral College from popular vote. *Washington Times*, October 26, 2011.

> "The goal of this effort is clear: to put the fate of every presidential election in the hands of the voters in as few as 11 states and thus to give a handful of populous states a controlling majority of the Electoral College."

Brian Mark Weber in *The Patriot Post* wrote in 2020:

> "Think about it: Under NPV, a candidate could theoretically lose 39 states and still win the presidency."[245]

It is true that the 11 biggest states possessed a majority of the electoral votes, according to the 2010 census.[246]

However, the voters of these 11 states alone could elect a President in a nationwide popular vote *only* if one makes the politically preposterous assumption that one candidate receives 100% of the popular vote from each of these 11 states.

The implausibility of this hypothetical scenario is demonstrated by the fact that *no* big state delivered more than 63% of its two-party popular vote to *any* candidate in the six presidential elections between 2000 and 2020 (as shown in table 9.7).

As can be seen in the table, the highest percentage is 63%, and there were only eight cases (out of 66 entries in the table) where the winning candidate won more than 60% of the vote.

More importantly, the average of the entries in the table is 54%.

Note also that many of the percentages in the table are close to 50%, because many of the biggest states were battleground states in one or more elections.[247]

Von Spakovsky's criticism of the National Popular Vote Compact has an even more serious flaw—it applies to the current system more than to a national popular vote.

Table 9.7 Popular-vote percentage won by the winner of the 11 biggest states 2000–2020

State	2000	2004	2008	2012	2016	2020
California	53%	54%	61%	60%	61%	63%
Texas	59%	61%	56%	57%	52%	52%
New York	60%	58%	63%	63%	59%	61%
Florida	49%	52%	51%	50%	49%	51%
Illinois	55%	55%	62%	57%	55%	57%
Pennsylvania	51%	51%	55%	52%	48%	50%
Ohio	50%	51%	52%	51%	51%	53%
Michigan	51%	51%	57%	54%	47%	51%
Georgia	55%	58%	52%	53%	50%	49%
New Jersey	56%	53%	57%	58%	55%	57%
North Carolina	56%	56%	49%	50%	50%	50%

[245] Weber, Brian Mark. 2020. The National Popular Vote Ruse. *Patriot Post.* September 4, 2020. https://patriotpost.us/articles/73202-the-national-popular-vote-ruse-2020-09-04

[246] After the 2020 census, it takes the 12 biggest states to get to a majority of the electoral votes. That is, Virginia must be added to the list of states shown in this section.

[247] Note that a statewide winner often wins a state with less than 50% of the vote when minor-party and/or independent candidates receive a substantial number of votes.

Anyone who is concerned about the possibility that the 11 most populous states might alone control the outcome of a national popular vote by voting unanimously for one candidate should be considerably more agitated about the *current* state-by-state winner-take-all method of awarding electoral votes.

The current system enables a candidate who receives 50.01% (in fact, just a plurality) of the popular votes in the 11 most populous states to win a majority of the Electoral College (and hence the presidency).

That is, under the *current* system, a President could be elected with about 25% of the nationwide popular vote if one makes the politically preposterous assumption that the candidate receives 100% of the vote from each of the 11 states.[248]

9.4.2. MYTH: California and New York would dominate a national popular vote for President.

QUICK ANSWER:

- It is a fact that California has about 37 million people and gave Hillary Clinton 62% of its votes and a popular-vote margin of 4.3 million votes in 2016. However, there is no reason to worry about California dominating a national popular vote for President, because the Republican Party enjoys an equally strong base of support elsewhere in the country. There is a bloc of Republican-leaning south-central states (which Nate Cohn christened "Appalachafornia") with essentially the same population as California (37.9 million). These Republican-leaning states gave Donald Trump essentially the same percentage of its vote (61%) and essentially the same popular-vote margin (4.5 million). In 2020 and 2012, California was similarly counterbalanced by a group of Republican-leaning south-central states.
- If California's Democratic popular-vote margin is worrisome, then the equivalent Republican popular-vote margin must also be. In a nationwide vote for President, votes from California and the equivalent Republican-leaning south-central states would be added together (along with votes from all the other states) to produce a nationwide popular vote. In the calculation of the national popular vote, California voters and those in the equivalent Republican-leaning area would balance each other out. Neither group of voters would be more influential, important, or controlling than the other.
- Similarly, there is no reason to worry about California and New York together dominating the nationwide outcome. A slightly larger group of Republican-leaning south-central states has the same population as California and New York combined. Those Republican-leaning states gave Trump essentially the same percentage of their vote and essentially the same popular-vote margin.

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[248] The current state-by-state winner-take-all method of awarding electoral votes actually permits fewer than 25% of the voters to elect a President. According to calculations made by MIT Professor Alexander S. Belenky, using actual voter-turnout data, an Electoral College majority could have been won with between 16% and 22% of the national popular vote in the 15 elections between 1948 and 2004. Belenky, Alexander S. 2008. A 0-1 knapsack model for evaluating the possible Electoral College performance in two-party U.S. presidential elections. *Mathematical and Computer Modelling*. Volume 48. Pages 665–676.

- Both California and the Republican-leaning south-central states have something in common. Because both areas give about 60% of their votes to their respective preferred parties, all the voters in both areas are ignored by general-election presidential candidates under the current state-by-state winner-take-all method of awarding electoral votes. Both California and the Republican-leaning south-central states would benefit from a nationwide vote, because presidential candidates would pay attention to their voters.
- The misplaced concern about California dominating a national popular vote arises from an exaggerated view of how many people live in California, how many people vote there, and how heavily Democratic the state is. One out of eight of the country's voters lives in California, but four out of 10 of them vote Republican. Meanwhile, one out of eight voters lives in Appalachafornia, and four out of 10 of them vote Democratic. In fact, neither of these areas dominated a nationwide election in which 137 million votes were cast in 2016.
- The talking point about California has first-blush plausibility only because of the historical accident that there are only three states along the Pacific Coast, whereas the Atlantic Coast is divided among 14 states. If California had been admitted to the Union as six separate states (as was discussed at the time), the resulting six states would simply be average-sized states today. California was admitted to the Union as a single state in the pre-Civil-War era because of the then-delicate balance in the U.S. Senate between slave states and free states.
- Civil discourse is undermined by partisan talking points about alternative universes in which certain states are treated as if they are not legitimate parts of the United States. Every loser in every election would have won if carefully selected parts of his election district were excised from the vote count.

MORE DETAILED ANSWER:

California has 37 million people and in 2016 gave Hillary Clinton 62% of its vote and a popular-vote margin of 4.3 million votes.

Some defenders of the current state-by-state winner-take-all method of awarding electoral votes have used Clinton's large lead in California to argue that the state would monopolize the attention of presidential candidates and dominate the choice of President under the National Popular Vote Compact.

Bryan Fischer, a talk-show host on American Family Radio, said:

> "America's Founders knew if every presidential election was decided simply by the popular vote, the larger states such as California and New York would determine the outcome of every election until the end of time."[249,250]

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[249] Fischer, Bryan. 2020. How the Electoral College is supposed to work. *OneNewsNow*. January 24, 2020. https://onenewsnow.com/perspectives/bryan-fischer/2020/01/24/how-the-electoral-college-is-supposed-to-work

[250] The Founding Fathers were indeed prescient because, at the time the Constitution was written, New York was only the fifth largest state according to the 1790 census. *Schedule of the Whole Number of Persons*

Michigan State Representative Ann Bollin said the following about the National Popular Vote Compact in June 2024:

> "The ultimate goal of this legislation is to force Michigan's electoral votes to be determined by the national popular vote, effectively silencing the voices of Michigan residents in favor of those in other states like California or New York."[251]

In an article in the *New York Times* after the 2016 presidential election, Nate Cohn wrote:

> "Conservative analyst Michael Barone [said] the Electoral College serves as a necessary bulwark against big states, preventing California in particular from imposing 'something like **colonial rule over the rest of the nation**.'"[252] [Emphasis added]

These statements overlook the fact that the Republican Party enjoys a virtually identical base of support in a different part of the country.

As political analyst Nate Cohn observed, there is a bloc of Republican-leaning south-central states with the same population as California that gave Trump essentially the same percentage of its vote and the same popular-vote margin as California gave Clinton in 2016.

Cohn gave the name "Appalachafornia" to these Republican-leaning states.[253]

The facts concerning Appalachafornia and California in 2016 are as follows:

- Both areas gave their favored candidate almost identical percentages of their popular vote (61% versus 62%, respectively).
- Both areas gave their favored candidate almost identical margins (4.5 versus 4.3 million votes, respectively).
- Both areas had almost identical populations (37.9 and 37.3 million, respectively). Appalachafornia had 12.25% of the country's population of 309,785,186, while California had 12.05% (according to the 2010 census).

Table 9.8 shows that the Republican-leaning states of Appalachafornia had a combined population of 37,961,426, gave Trump 61% of their vote in 2016, and gave Trump a popular-vote margin of 4,475,297 votes.[254]

Table 9.9 shows that California had a population of 37,341,989, gave Clinton 61% of its vote, and gave Clinton a margin of 4,269,978 votes.

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within the Several Districts of the United States. 1793. Page 3. https://www.census.gov/library/publications/1793/dec/number-of-persons.html

[251] Bollin, Ann. 2024. Press Release: Rep. Bollin reaffirms strong opposition to National Popular Vote compact. June 12, 2024. https://gophouse.org/posts/rep-bollin-reaffirms-strong-opposition-to-national-popular-vote-compact

[252] Cohn, Nate. Why Trump Had an Edge in the Electoral College. *New York Times*. December 19, 2016. http://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html

[253] *Ibid*.

[254] For this table and similar tables in this section, the percentages in columns 5 and 6 are of the total vote.

Table 9.8 Appalachafornia gave Trump a margin of 4,475,297 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Trump margin
Alabama	4,802,982	729,547	1,318,255	34%	62%	588,708
Arkansas	2,926,229	380,494.	684,872.	34%	61%	304,378
Idaho	1,573,499	189,765	409,055	27%	59%	219,290
Kansas	2,863,813	427,005	671,018	36%	57%	244,013
Kentucky	4,350,606	628,854	1,202,971	33%	63%	574,117
Louisiana	4,553,962	780,154	1,178,638	38%	58%	398,484
Montana	994,416	177,709	279,240	36%	56%	101,531
Nebraska	1,831,825	284,494	495,961	34%	59%	211,467
North Dakota	675,905	93,758	216,794	27%	63%	123,036
Oklahoma	3,764,882	420,375	949,136	29%	65%	528,761
South Dakota	819,761	117,442	227,701	32%	62%	110,259
Tennessee	6,375,431	870,695	1,522,925	35%	61%	652,230
West Virginia	1,859,815	188,794	489,371	26%	69%	300,577
Wyoming	568,300	55,973	174,419	22%	68%	118,446
Total	**37,961,426**	**5,345,059**	**9,820,356**	**33%**	**61%**	**4,475,297**

Table 9.9 California gave Clinton a margin of 4,269,978 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Clinton margin
California	37,341,989	8,753,788	4,483,810	62%	32%	4,269,978

Figure 9.3 shows that the political complexion of California is a mirror image of that of a bloc of Republican-leaning south-central states.

In a nationwide vote for President, California would not assert "colonial rule" over the rest of the United States any more than the Republican-leaning south-central states (Appalachafornia) would.

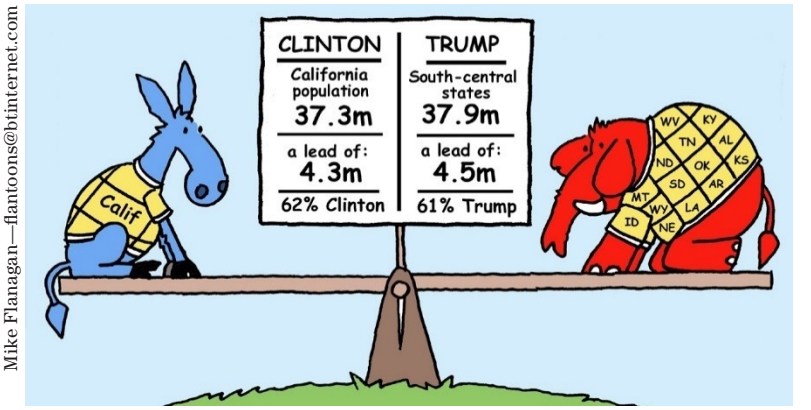

Figure 9.3 The political profile of California is the mirror image of that of a bloc of Republican-leaning south-central states.

In the calculation of the national popular vote, the votes from California and the essentially equivalent Republican-leaning area would balance each other out.

The misplaced concern about California "colonization" arises from an exaggerated view of how many people live in California, how many people vote there, and how heavily Democratic it is.

The facts are that one out of eight of the country's voters lives in California, but four out of 10 of them vote Republican. Out of the 137,125,484 votes cast nationwide for President in 2016, there were 8,753,788 votes for Clinton in California.

Conversely, one out of eight voters lives in Appalachafornia, but four out of 10 of them vote Democratic. Out of the 137,125,484 votes cast nationwide for President in 2016, Trump received 9,820,356 votes from Appalachafornia.

To put it another way, there were 118,551,340 votes cast in places other than California and Appalachafornia together in 2016.

Ironically, the "colonial rule" that Barone bemoans *is actually occurring today*. Both California and the equivalent Republican-leaning area support their respective favored candidates at about the 60% level. That is, neither California nor the Republican-leaning states are closely divided. As a result, both California and the Republican-leaning states are routinely ignored by presidential candidates under the current state-by-state winner-take-all method of awarding electoral votes.

The decision as to who becomes President under the current system is not made by California or the bloc of south-central Republican-leaning states. It is made by the dozen-or-so closely divided battleground states.

If any states are exercising "colonial rule over the rest of the nation," it is the battleground states, because they are the states that actually pick the President under the current system.

California and New York together were also equally balanced in 2016 with a slightly expanded Republican area.

There is a related myth involving California and New York together.

Michael Gomez, another defender of the current state-by-state winner-take-all method of awarding electoral votes, has extended the California "colonization" argument to include New York.

> "Of Hillary Clinton's reported 65,844,954 votes in the 2016 presidential election, 8,753,788 came from California. If California is subtracted from the equation, **Donald Trump wins the national popular vote in the remaining 49 states** by 1,404,903 votes. And if New York is also subtracted, Trump's margin increases to 3,137,876. So, **the notion that the NPVIC would make 'every vote count'**…, as its advocates affirm, **is disproven** when looking at the aforementioned raw number results."[255] [Emphasis added]

Gomez's argument is just as invalid as Barone's.

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[255] Gomez, Christian. National Popular Vote Compact Threatens Republic. *The New American*. February 1, 2017. http://www.thenewamerican.com/usnews/constitution/item/25202-national-popular-vote-compact-threatens-republic

If Nate Cohn's Appalachafornia is expanded to include four additional Republican states (Indiana, Mississippi, Missouri, and South Carolina), the resulting "expanded Appalachafornia" has about the same population (58,098,701) as California and New York together (56,763,044 people). This "expanded Appalachafornia" area has 18.7% of the country's population. California and New York together have 18.3%.

The facts in 2016 concerning the "expanded Appalachafornia" and California and New York together were:

- Both areas gave their favored candidates almost identical percentages of their popular vote (60% and 61%, respectively).
- Both areas gave their favored candidates almost identical margins (6,038,499 and 6,006,563 votes, respectively).
- Both areas had almost identical populations (58.1 and 56.8 million, respectively).

Table 9.10 shows that "expanded Appalachafornia" had a combined population of 58,098,701, gave Trump 60% of its vote in 2016, and gave Trump a margin of 6,038,499 votes.

Table 9.11 shows that California and New York had a combined population of 56,763,044, gave Clinton 61% of their votes, and gave Clinton a margin of 6,006,563 votes.

Of course, there are numerous combinations of Republican states aside from Nate Cohn's Appalachafornia that could be assembled to counterbalance California's vote (and to counterbalance the combined votes of California and New York).

The reality is that 4.3% is the average margin in the national popular vote for President in the eight presidential elections between 1992 and 2020. That is, the presidential vote in

Table 9.10 Expanded Appalachafornia gave Trump a margin of 6,038,499 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Trump margin
Alabama	4,802,982	729,547	1,318,255	34%	62%	588,708
Arkansas	2,926,229	380,494	684,872	34%	61%	304,378
Idaho	1,573,499	189,765	409,055	27%	59%	219,290
Indiana	6,501,582	1,033,126	1,557,286	37%	60%	524,160
Kansas	2,863,813	427,005	671,018	36%	57%	244,013
Kentucky	4,350,606	628,854	1,202,971	33%	63%	574,117
Louisiana	4,553,962	780,154	1,178,638	38%	58%	398,484
Mississippi	2,978,240	485,131	700,714	40%	59%	215,583
Missouri	6,011,478	1,071,068	1,594,511	38%	60%	523,443
Montana	994,416	177,709	279,240	36%	56%	101,531
Nebraska	1,831,825	284,494	495,961	34%	59%	211,467
North Dakota	675,905	93,758	216,794	27%	63%	123,036
Oklahoma	3,764,882	420,375	949,136	29%	65%	528,761
South Carolina	4,645,975	855,373	1,155,389	41%	57%	300,016
South Dakota	819,761	117,442	227,701	32%	62%	110,259
Tennessee	6,375,431	870,695	1,522,925	35%	61%	652,230
West Virginia	1,859,815	188,794	489,371	26%	69%	300,577
Wyoming	568,300	55,973	174,419	22%	68%	118,446
Total	**58,098,701**	**8,789,757**	**14,828,256**	**36%**	**60%**	**6,038,499**

Table 9.11 California and New York together gave Clinton a margin of 6,006,563 votes in 2016.

State	Population 2010	Clinton	Trump	Clinton percent	Trump percent	Clinton margin
California	37,341,989	8,753,788	4,483,810	62%	32%	4,269,978
New York	19,421,055	4,556,142	2,819,557	59%	37%	1,736,585
Total	**56,763,044**	**13,309,930**	**7,303,367**	**61%**	**33%**	**6,006,563**

the United States as a whole is divided approximately equally between the parties. By the way, 4% is approximately the margin of error of a typical national political poll. That is, typical recent presidential campaigns have usually been jump balls.

California and Appalachafornia were also equally balanced in 2012.

Barone's "colonial rule" argument was equally invalid in 2012.

The facts concerning the Republican-leaning south-central states of Appalachafornia and California in 2012 are:

- Both areas gave their favored candidates almost identical percentages (61% and 60%, respectively) of their popular vote.
- Both areas gave their favored candidates similar margins (3.5 million and 3.0 million votes, respectively).
- Both areas had almost identical populations (37.9 million and 37.3 million, respectively).

Table 9.12 shows that the Republican states of Appalachafornia gave Romney 61% of their vote and a margin of 3,520,970 votes in 2012.

Table 9.12 Appalachafornia gave Romney a margin of 3,520,970 votes in 2012.

State	Population 2010	Obama	Romney	Obama percent	Romney percent	Romney margin
Alabama	4,802,982	795,696	1,255,925	38%	61%	460,229
Arkansas	2,926,229	394,409	647,744	37%	61%	253,335
Idaho	1,573,499	212,787	420,911	33%	65%	208,124
Kansas	2,863,813	439,908	689,809	38%	60%	249,901
Kentucky	4,350,606	679,370	1,087,190	38%	60%	407,820
Louisiana	4,553,962	809,141	1,152,262	41%	58%	343,121
Montana	994,416	201,839	267,928	42%	55%	66,089
Nebraska	1,831,825	302,081	475,064	38%	60%	172,983
North Dakota	675,905	124,827	188,163	39%	58%	63,336
Oklahoma	3,764,882	443,547	891,325	33%	67%	447,778
South Dakota	819,761	145,039	210,610	40%	58%	65,571
Tennessee	6,375,431	960,709	1,462,330	39%	59%	501,621
West Virginia	1,859,815	238,269	417,655	36%	62%	179,386
Wyoming	568,300	69,286	170,962	28%	69%	101,676
Total	**37,961,426**	**5,816,908**	**9,337,878**	**38%**	**61%**	**3,520,970**

Table 9.13 shows that California gave Obama 61% of its vote and a margin of 4,269,978 votes in 2012.

Table 9.13 California gave Obama a margin of 3,014,327 votes in 2012.

State	Population 2010	Obama	Romney	Obama percent	Romney percent	Obama margin
California	37,341,989	7,854,285	4,839,958	60%	37%	3,014,327

California and Appalachafornia were also equally balanced in 2020.

The "colonial rule" argument was also invalid in 2020.

The facts concerning the Republican-leaning south-central states of Appalachafornia and California in 2020 are:

- Both areas gave their favored candidates identical percentages (63%) of their popular vote.
- Both areas gave their favored candidates similar margins (4.5 million for Appalachafornia and 5.1 million votes for California).
- Both areas had almost identical populations (39.9 and 39.5 million, respectively).

Table 9.14 shows that the Republican states of Appalachafornia (which had a 2020 population of 39,928,632) gave Trump 63% of their vote and gave him a margin of 4,517,320 votes in 2020.

Table 9.14 Appalachafornia gave Trump a margin of 4,517,320 votes in 2020.

State	Population 2020	Biden	Trump	Biden percent	Trump percent	Trump margin
Alabama	5,024,279	849,624	1,441,170	37%	63%	591,546
Arkansas	3,011,524	423,932	760,647	35%	64%	336,715
Idaho	1,839,106	287,021	554,119	33%	66%	267,098
Kansas	2,937,880	570,323	771,406	42%	57%	201,083
Kentucky	4,505,836	772,474	1,326,646	36%	63%	554,172
Louisiana	4,657,757	856,034	1,255,776	40%	59%	399,742
Montana	1,084,225	244,786	343,602	41%	58%	98,816
Nebraska	1,961,504	374,583	556,846	39%	60%	182,263
North Dakota	779,094	114,902	235,595	32%	67%	120,693
Oklahoma	3,959,353	503,890	1,020,280	32%	67%	516,390
South Dakota	886,667	150,471	261,043	36%	63%	110,572
Tennessee	6,910,840	1,143,711	1,852,475	37%	62%	708,764
West Virginia	1,793,716	235,984	545,382	30%	70%	309,398
Wyoming	576,851	73,491	193,559	27%	72%	120,068
Total	**39,928,632**	**6,601,226**	**11,118,546**	**37%**	**63%**	**4,517,320**

Table 9.15 shows that California (with a 2020 population of 39,538,223), gave Biden 63% of its votes, and gave Biden a margin of 5,103,821 votes in 2020.

Table 9.15 California gave Biden a margin of 5,103,821 votes in 2020.

State	Population 2020	Biden	Trump	Biden percent	Trump percent	Biden margin
California	39,538,223	11,110,250	6,006,429	63%	35%	5,103,821

The talking point about California is the result of a historical accident that put most of the Pacific Coast in one state.

Barone's talking point about California has first-blush plausibility because of the historical accident that there are only three states along the Pacific Coast, whereas there are 14 states on the Atlantic Coast.

In fact, just four of the 14 Atlantic Coast states (Florida, Georgia, South Carolina, and North Carolina) together have considerably more people than California. That is, there is nothing particularly eye-catching about California's population other than the fact that it is contained in one state.

If California had been admitted to the Union as six separate states in 1850 (as was suggested at the time), the populations of none of the resulting six smaller states would be particularly noteworthy today.

California was admitted to the Union as a single state under the Compromise of 1850 because of the then-delicate political balance in the U.S. Senate between slave states and free states. There was talk of creating six new states when the California statehood convention convened in Monterey in September 1849.[256]

However, the political reality in Washington at the time was that the creation of *even one* new free state threatened to upset the existing delicate balance between the 15 slave states and 15 free states in the U.S. Senate.

Prior to 1850, the problem of balancing slave states and free states in the U.S. Senate had been finessed for by carefully orchestrating the admission of one new slave state with each new free state.[257]

For example, the Missouri Compromise of 1820 involved simultaneously admitting a slave state (Missouri) and a free state (Maine). In fact, the creative genius of the Missouri Compromise was to carve Maine out of Massachusetts' existing territory in order to create the necessary new free state.[258]

Prior to the Missouri Compromise of 1820, Alabama and Illinois had been admitted to the Union in the preceding two years. Mississippi and Indiana had been admitted in 1816 and 1817.

After the Missouri Compromise of 1820, Arkansas and Michigan were admitted in 1836 and 1837. Later, two slave states (Texas and Florida) and two free states (Wisconsin and Iowa) were admitted between 1845 and 1848.

Up to 1850, the slave states had maintained parity with the free states in the U.S. Senate. However, by 1850, the free states commanded a clear and growing majority in both the U.S. House of Representatives and the Electoral College.

In 1850, there was no suitable prospective slave state available to balance out the admission of *even one* new free state—much less six new free states.

The possibility of creating more than one state out of the territory that is now California was foreclosed because one of the Monterey convention's first acts was the unanimous adoption of a prohibition against slavery.

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[256] Bordewich, Fergus M. 2012. America's Great Debate: Henry Clay, Stephen A. Douglas, and the Compromise that Preserved the Union. New York, NY: Simon & Schuster. Page 50.

[257] *Ibid*. Page 12.

[258] *Ibid*. Pages 76–79.

The resulting political crisis preoccupied Congress for nine months in 1850 (during which almost no other business was transacted).

The eventual Compromise of 1850 involved admitting the huge area that is now California as a single free state—thereby upsetting the 15–15 balance in the U.S. Senate by only one state. Meanwhile, the South was placated with the enactment of a harsh federal Fugitive Slave Law, a financial bailout of the slave state of Texas, and other concessions.[259]

The result of the Compromise of 1850 was that the population of the Pacific Coast today is largely concentrated in the single state of California.

Democracy is undermined by political talking points about alternative universes in which certain voters are treated as illegitimate.

In an article entitled "If Only You Couldn't Vote," Mark Mellman wrote:

> "A favorite meme in Trump World argues that if it weren't for California, Hillary Clinton would have lost the national popular vote for president, which she won by almost 3 million ballots. … Of course, it's also true that **without … Texas and Alaska, Trump would have lost the Electoral College** along with the popular vote. … **Such attempts to fashion an alternate universe attack a fundamental tenet of American democracy**. … Pitting urban against rural, Texas against California, **rips the 'United' out of the United States**."[260] [Emphasis added]

This recently minted partisan talking point has seeped into state-level politics as well. After Wisconsin Governor Scott Walker (R) lost his 2018 re-election race, Assembly Speaker Robin Vos (R) said:

> "If you took Madison and Milwaukee out of the state election formula, we would have a clear majority."[261]

However, as Mellman pointed out,

> "Without Waukesha, Washington and Ozaukee counties, Scott Walker would not have been elected Governor in the first place."[262]

Indeed, every loser in every election would have won if carefully selected parts of the election district had been excised from the vote count.

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[259] The Compromise of 1850 also included settling a boundary dispute in the Southwest and abolishing the slave trade (but not slavery) in the District of Columbia (the only tangible result of which was that the slave markets moved across the Potomac River to Virginia).

[260] Mellman, Mark. 2018. If only you couldn't vote. *The Hill*. December 18, 2018. https://thehill.com/opinion/campaign/421996-mellman-if-only-you-couldnt-vote

[261] *Ibid*.

[262] *Ibid*.

9.4.3. MYTH: A candidate's entire nationwide margin could come from just one state in a nationwide presidential election.

QUICK ANSWER:

- It is true that a candidate's entire *national-popular-vote* margin came from just one state in six of the 50 presidential elections between 1824 and 2020. However, one candidate's entire *electoral-vote* margin came from just one state in 17 elections—about three times as often.
- This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is actually slightly superior to the current system.

MORE DETAILED ANSWER:

There have been six instances in the 50 presidential elections between 1824 and 2020 in which a candidate's entire *national-popular-vote* margin came from just one state, as shown in table 9.16.[263,264]

However, one presidential candidate's entire *electoral-vote* margin came from just one state in 17 elections—about three times as often, as shown in table 9.17.

Note that one candidate's entire *electoral vote* margin came from just one state in four of the five elections in which that candidate failed to win the most popular votes nationwide (2000, 1888, 1876, and 1824).

This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is actually slightly superior to the current system.

Table 9.16 There have been six presidential elections in which a candidate's entire *national-popular-vote* margin came from just one state.

Year	State	Candidate who won the state	Party	Popular-vote margin of the national popular vote winner	Popular-vote margin of the national popular vote winner coming from the state
2016	California	Clinton	D	2,868,518	4,269,978
2000	California	Gore	D	543,816	1,293,774
1960	Massachusetts	Kennedy	D	118,574	510,424
1888	Texas	Cleveland	D	89,283	142,219
1884	Texas	Cleveland	D	62,670	133,030
1880	Iowa	Blaine	R	8,355	78,059

[263] This comparison starts at 1824 because that was the first year in which a majority of the states (18 of 24) conducted popular elections for presidential elector. By 1828, 22 of the 24 states conducted popular elections.

[264] In 1824, Andrew Jackson led John Quincy Adams in the Electoral College 99–84 (and also led in the national popular vote); however, no candidate received an absolute majority in the Electoral College, because William H. Crawford and Henry Clay also won electoral votes from various states.

Table 9.17 There have been 17 presidential elections in which a candidate's entire *electoral-vote* margin came from just one state.

Year	State	Candidate who won the Electoral College	Party	Electoral-vote margin of the Electoral College winner	Electoral-vote margin of the Electoral College winner coming from the one state
2004	Ohio	G.W. Bush	R	16	20
2000	Florida	G.W. Bush	R	1	25
1976	California	Carter	D	27	45
1968	California	Nixon	R	31	40
1960	New York	Kennedy	D	34	45
1948	New York	Truman	D	37	47
1916	Ohio	Wilson	D	11	24
1888	New York	B. Harrison	R	32	36
1884	New York	Cleveland	D	18	36
1880	New York	Garfield	R	29	35
1876	New York	Hayes	R	0	35
1860	New York	Lincoln	R	28	35
1856	New York	Buchanan	D	25	35
1848	New York	Taylor	Whig	17	36
1844	New York	Polk	D	32	36
1836	New York	Van Buren	D	22	42
1824	Pennsylvania	Jackson	D	15	28

9.4.4. MYTH: Eleven colluding big states are trying to impose a national popular vote on the country.

QUICK ANSWER:

- The asserted "collusion" among the nation's 11 biggest states is demonstrably false, as evidenced by the actual list of states that have adopted the National Popular Vote Compact. As of July 2024, the Compact has been enacted into law by six small states, nine medium-sized states, and three big states.
- If anyone considers the fact that the 11 biggest states possess a majority of the electoral votes represents a danger in terms of adopting the National Popular Vote Compact, this same fact must be regarded as an argument against the *current* state-by-state winner-take-all method of electing the President. Indeed, these same 11 states could, if they were to act in concert, elect a President in every presidential election.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has criticized the Compact on the grounds that "11 colluding states" could, if they were to act in concert, impose a national popular vote on the country.

The 11 biggest states did indeed possess a majority of the electoral votes—270 of 538, according to the 2010 census.[265]

First, the actual list of states that have adopted the National Popular Vote Compact demonstrates that Ross' claimed "collusion" among the nation's 11 biggest states is untrue.

As of July 2024, only four of the 11 biggest states have enacted the National Popular Vote Compact.

Specifically, the Compact has been enacted into law by 18 jurisdictions together possessing 209 electoral votes:

- six small states
  - Delaware–3
  - District of Columbia–3
  - Hawaii–4
  - Maine–4
  - Rhode Island–4
  - Vermont–3
- nine medium-sized states
  - Colorado–10
  - Connecticut–7
  - Maryland–10
  - Massachusetts–11
  - Minnesota–10
  - New Jersey–14
  - New Mexico–5
  - Oregon–8
  - Washington–12
- three big states
  - California–54
  - Illinois–19
  - New York–28

Second, the 11 biggest states have little in common with one another politically. They rarely act in concert on policy issues. These disparate 11 states rarely agree on a choice for President.

Table 9.18 shows the distribution of the 11 biggest states carried by the Republican and Democratic nominees.

Ross considers the fact that the 11 biggest states possess a majority of the electoral votes to be dangerous in terms of adopting the National Popular Vote Compact. If so, this same fact should also be considered as a reason to abandon the *current system* of elect-

[265] After the 2020 census, it takes the 12 biggest states to get to a majority of the electoral votes. That is, Virginia must be added to the list of states shown in this section.

Table 9.18 Winner of the 11 biggest states 2000–2020

Election	Republican	Democratic
2000	TX, FL, OH, GA, NC	CA, NY, IL, PA, MI, NJ
2004	TX, FL, OH, GA, NC	CA, NY, IL, PA, MI, NJ
2008	TX, GA	CA, NY, FL, IL, PA, OH, MI, NC NJ
2012	TX, GA. NC	CA, NY, FL, IL, PA, OH, MI, NC NJ
2016	TX, FL, OH, MI, GA, NC, PA	CA, NY, IL, NJ
2020	TX, FL, OH, NC	CA, NY, IL, PA, MI, GA, NJ,

ing the President, because these same 11 states could (if they ever were to act in concert) impose their choice for President on the country in every presidential election.

Indeed, a mere plurality of voters in states possessing a majority of the electoral votes are sufficient to produce a majority in the Electoral College under the current state-by-state winner-take-all method of awarding electoral votes.

9.5. MYTHS ABOUT BIG COUNTIES

9.5.1. MYTH: A mere 146 of the nation's 3,143 counties would dominate a nationwide popular vote for President.

QUICK ANSWER:

- Opponents of a nationwide vote for President sometimes complain that the voters of the nation's 146 most populous counties (out of 3,143) could alone elect a President. However, this criticism is based on the politically preposterous assumption that one particular candidate would receive 100% of the popular vote in each of these counties (when, in fact, these counties are only about 60% Democratic).
- This criticism applies to the current system more than to a nationwide popular vote. Under the current state-by-state winner-take-all method of awarding electoral votes, a candidate who receives 100% of the popular votes in just 61 counties would win a majority of the Electoral College (and hence the presidency).
- In a national popular vote for President, every voter in every county would be equal throughout the United States. A vote cast in a populous county would be no more or less valuable than a vote cast anywhere else.

MORE DETAILED ANSWER:

Nathan Fleming criticized a national popular vote for President by saying:

> "Just 146 counties (out of 3,000+) could elect a President. Bad idea."[266]
>
> "You could **theoretically** get 50.1% of popular vote with only those 146 counties."[267] [Emphasis added]

[266] Fleming, Nathan. *Twitter.* August 23, 2014. https://twitter.com/StephenFleming/status/503298466731524096

[267] Fleming, Nathan. *Twitter.* August 23, 2014. https://twitter.com/StephenFleming/status/503308470117220353

It is a fact that a majority of the nation's voters live in the 146 most populous counties (out of 3,143 counties).[268]

However, the key word in Fleming's criticism is "theoretically."

In fact, the voters of these 146 counties could elect a President in a nationwide popular vote *only* if you make the politically preposterous assumption that one candidate receives 100% of the vote from each of these counties. However, these 146 high-population counties voted only 59% Democratic in the 2012 presidential election—nowhere near the 100% on which Fleming's scary scenario is based.

This criticism of a national popular vote has an even more serious flaw—it applies to the current system more than to a national popular vote.

Anyone who is bothered about the hypothetical possibility that 146 counties might control the outcome of a national popular vote should be considerably more agitated about the *current* state-by-state winner-take-all method of awarding electoral votes. The current system enables a candidate who receives 100% of the popular votes in just 61 counties to win a majority of the Electoral College (and hence the presidency).

Under the current system, a candidate receiving 100% of the popular vote in a mere 61 counties in 2012 would have:

- won a majority of the statewide popular vote in each of the 18 states containing those 61 counties; and
- therefore won 100% of the electoral votes from each of those 18 states; and
- therefore won the presidency, because those 18 states have a majority of the nation's 538 electoral votes.

Moreover, these 61 counties contained only 26.6% of the nation's voters.

Table 9.19 lists these 61 counties and 18 states for 2012.

- Columns 1 and 2 indicate the state and its number of electoral votes.[269]
- Column 3 shows the state's presidential vote in 2012.
- Column 4 shows a majority of the state's presidential vote.
- Column 5 shows the number of the state's most populous counties that, if 100% of their voters were to support one candidate, would constitute a majority of the state's presidential vote.
- Column 6 lists the specific counties.
- Column 7 shows the total presidential vote for those counties.
- Column 8 shows the percentage of the national popular vote cast in those counties.

For example, California had 55 electoral votes in 2012. A total of 13,038,547 votes were cast for President in 2012 in the state. A statewide majority was therefore 6,519,275. Five populous counties cast 6,801,011 votes for President—more than half of the state's vote. Those five counties were Los Angeles County with 3,181,067 votes; San Diego County with 1,192,282; Orange County with 1,122,664; Riverside County with 661,907; and Santa Clara

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[268] Hickey, Walter and Weisenthal, Joe. Half of the United States Lives in These Counties. *Business Insider*. September 4, 2014. http://www.businessinsider.com/half-of-the-united-states-lives-in-these-counties-2013-9

[269] The District of Columbia is treated as a state with one county for purposes of this discussion.

Table 9.19 The 61 counties

State	EV	Statewide vote	Majority of statewide vote	Number of biggest counties providing majority of statewide vote	Counties	Total vote in listed counties	Percent of national popular vote in listed counties
AZ	11	2,306,559	1,153,281	1	Maricopa	1,380,959	1.1%
CA	55	13,038,547	6,519,275	5	Los Angeles, San Diego, Orange, Riverside, Santa Clara	6,801,011	5.3%
CT	7	1,558,075	779,039	2	Fairfield, Hartford	788,370	0.6%
DC	3	293,764	146,883	1	Washington, D.C.	293,764	0.2%
DE	3	413,890	206,946	1	New Castle	251,996	0.2%
FL	29	8,490,162	4,245,082	8	Miami-Dade, Broward, Palm Beach, Hillsborough, Orange, Pinellas, Duval, Brevard	4,406,259	3.4%
HI	4	434,697	217,350	1	Honolulu	296,742	0.2%
IL	20	5,244,174	2,622,088	3	Cook, Du Page, Lake	2,700,172	2.1%
KS	6	1,159,971	579,987	4	Johnson, Sedgwick, Shawnee, Wyandotte	584,506	0.5%
MA	11	3,128,134	1,564,068	4	Middlesex, Worcester, Essex, Norfolk	1,824,390	1.4%
MD	10	2,707,327	1,353,665	4	Montgomery, Prince George's, Baltimore, Anne Arundel	1,488,673	1.2%
MI	16	4,740,250	2,370,126	5	Wayne, Oakland, Macomb, Kent, Genesee	2,372,520	1.8%
NV	6	1,014,918	507,460	1	Clark	691,190	0.5%
NY	29	7,061,925	3,530,964	7	Kings (Brooklyn), New York (Manhattan), Queens, Suffolk, Nassau, Erie, Westchester	3,879,885	3.0%
RI	4	446,049	223,026	1	Providence	239,786	0.2%
TX	38	7,993,851	3,996,927	8	Harris, Dallas, Tarrant, Bexar, Travis, Collin, Denton, Fort Bend	4,175,421	3.2%
UT	6	1,019,815	509,909	2	Salt Lake, Utah	561,887	0.4%
WA	12	3,141,106	1,570,554	3	King, Pierce, Snohomish	1,648,921	1.3%
Total	**270**	**64,193,214**	**32,096,630**	**61**		**34,386,452**	**26.6%**

County with 643,091. If those five counties had cast 100% of their votes for a single presidential candidate, that candidate would have won all of California's electoral votes. The actual vote for President for these five counties was 6,801,011, which was 5.3% of the national popular vote for President.

Figure 9.4 shows the 61 counties.

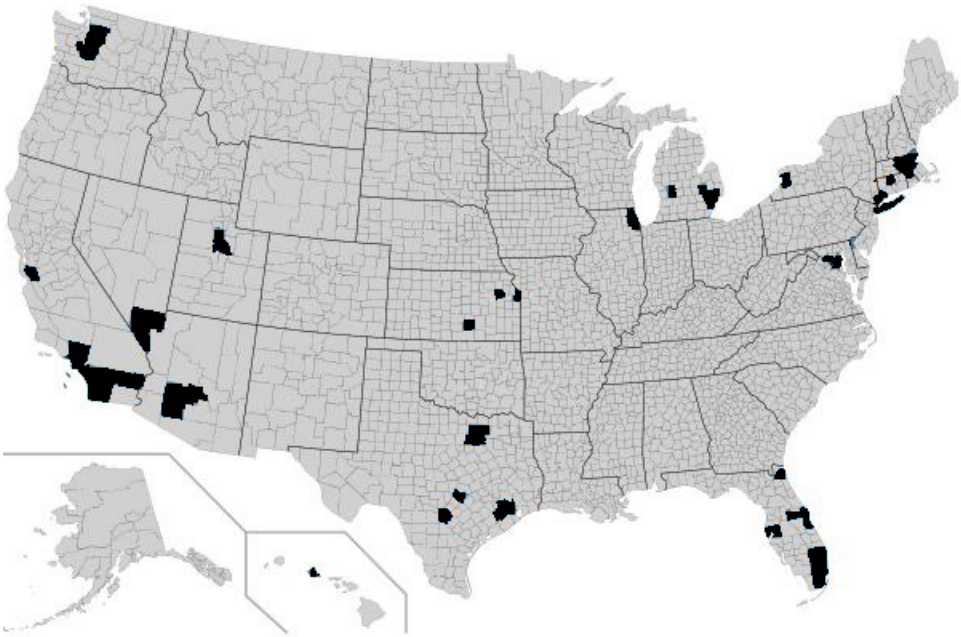

Figure 9.4 The 61 counties

The above analysis and map come from a FairVote report[270] by Nathan Nicholson and additional research by Andrea Levien of FairVote (who analyzed the 2004 election and showed a similar pattern).

In any event, there is nothing special—much less controlling—about the voting power of the voters in the 146 biggest counties, any more than there is anything special or controlling about the voting power of the voters in the remaining 2,997 counties.

Moreover, counties do not vote for President—voters do. County boundaries were not established for the purpose of electing the President and have never played any specific role in presidential elections. County boundaries (especially in the early states in the eastern and midwestern parts of the country) were typically established to enable people to conveniently reach the county seat for voting and other business.

[270] Nicholson, Nathan. Fighting Misconceptions about a National Popular Vote for President. FairVote report. September 12, 2014. http://www.fairvote.org/fighting-misconceptions-about-a-national-popular-vote-for-president

9.6. MYTHS ABOUT BIG CITIES

9.6.1. MYTH: Big cities would dominate a national popular vote for President.

QUICK ANSWER:

- The 100 biggest cities contain almost one-fifth of the U.S. population (about 65 million people). To put this in perspective, the population of Baton Rouge, Louisiana—the nation's 100th biggest city—is 225,128.
- Rural America contains one-fifth of the population (about 66 million).
- Under a national popular vote, every vote would be equal throughout the United States. A vote cast in a big city would be no more influential or controlling than a vote cast anywhere else.

MORE DETAILED ANSWER:

David Barton, founder of Wall Builders, in an interview with Conservative Broadcasting Network (CBN) said:

> "If you just went to a popular vote—there are 35,000 cities in the United States. **Twenty cities have the majority of the vote in America.** You could win a presidential campaign by just spending your time in 20 cities—who cares about the other 34,980 cities."[271] [Emphasis added]

First, these statistics are all wrong. The population of the 20 biggest cities is 331,449,281—only 10.4% of the U.S. population.

In fact, the 100 biggest cities contain only 19.6% of the U.S. population (64,983,448 people out of 331,449,281), according to the 2020 census.[272]

Second, the voters of the 20 biggest cities do not vote unanimously in favor of any candidate.

Barton's statement is illustrative of numerous similar erroneous statements based on claims that:

- the nation's big cities are bigger than they actually are;
- rural America is smaller than it actually is; and
- presidential campaigns would ignore any group of voters when every vote is equal and the winner is the candidate who receives the most popular votes.

A look at our country's actual demographics contradicts these misstatements.

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[271] Wishon, Jennifer. 2020. As Blue States Push to Abolish Electoral College, Critics Warn: "You Would Have Violence." *CBN News*. March 23, 2020. https://www1.cbn.com/cbnnews/us/2020/march/as-blue-states-push-to-abolish-electoral-college-critics-warn-you-would-have-violence

[272] U.S. Census Bureau. 2021. *City and Town Population Totals: 2020-2021.* SUB-IP-EST2021-POP. Accessed February 15, 2023. https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html#tables

The 100 biggest cities have one-fifth of the U.S. population.

Let's start with the facts concerning how big the big cities are.

The 100 biggest cities contain 64,983,448 people—19.6% of the U.S. population of 331,449,281, according to the 2020 census.[273]

To put this in perspective, the nation's 100th biggest city is Baton Rouge, Louisiana (with a population of 225,128). To put it another way, about 80% of the U.S. population lives in places with populations of less than 225,000.

The nation's largest city (New York City) has 8,804,190 people and constitutes 2.7% of the nation's population. The 10 biggest cities together (New York, Los Angeles, Chicago, Houston, Phoenix, Philadelphia, San Antonio, San Diego, Dallas, and San Jose) constitute 7.9% of the nation's population.

The 50 biggest cities together constitute 15.3% of the nation's population. To put this in perspective, the nation's 50th biggest city is Arlington, Texas (with a population 394,218).

The 100 biggest cities together constitute 19.6% of the nation's population—that is, almost one in five Americans live in the 100 biggest cities.

Table 9.20 shows the population of the 100 biggest cities.

Rural America is one-fifth of the U.S. population.

The population of rural America is 66,300,254 people—20.0% of the U.S. population.[274,275]

Figure 9.5 shows that rural America has almost the same population as the 100 biggest cities (actually a tad more). Each has about one-fifth of the U.S. population.

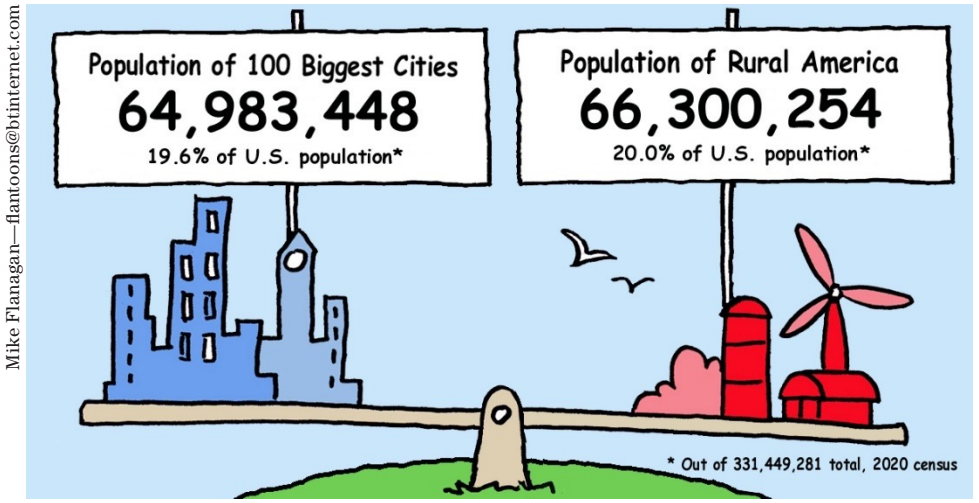

Figure 9.5 The 100 biggest cities and rural America each have about one-fifth of the U.S. population.

[273] *Ibid.*

[274] U.S. Census Bureau. 2023. *2020 Census Urban Areas Facts*. February 9, 2023. Accessed February 15, 2023. https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2020-ua-facts.html

[275] U.S. Census Bureau. 2022. *2020 Census Urban-Rural Classification Fact Sheet*. https://www.census.gov/content/dam/Census/library/factsheets/2022/dec/2020-census-urban-rural-fact-sheet.pdf

Table 9.20 Population of the 100 biggest U.S. cities

Rank	City	Population	
1	New York, New York	8,804,190	Biggest city is 2.7% of U.S. population
2	Los Angeles, California	3,893,986	Top 2 cities are 3.8% of U.S. population
3	Chicago, Illinois	2,747,231	Top 3 cities are 4.7% of U.S. population
4	Houston, Texas	2,302,792	Top 4 cities are 5.4% of U.S. population
5	Phoenix, Arizona	1,607,739	Top 5 cities are 5.8% of U.S. population
6	Philadelphia, Pennsylvania	1,603,797	Top 6 cities are 6.3% of U.S. population
7	San Antonio, Texas	1,434,270	Top 7 cities are 6.8% of U.S. population
8	San Diego, California	1,385,922	Top 8 cities are 7.2% of U.S. population
9	Dallas, Texas	1,304,442	Top 9 cities are 7.6% of U.S. population
10	San Jose, California	1,014,545	Top 10 cities are 7.9% of U.S. population
11	Austin, Texas	959,549	
12	Jacksonville, Florida	949,577	
13	Fort Worth, Texas	918,377	
14	Columbus, Ohio	905,672	
15	Indianapolis, Indiana	887,752	
16	Charlotte, North Carolina	874,541	
17	San Francisco, California	873,965	
18	Seattle, Washington	735,157	
19	Denver, Colorado	715,522	
20	Washington, District of Columbia	689,545	
21	Nashville-Davidson, Tennessee	689,504	
22	Oklahoma City, Oklahoma	681,387	
23	El Paso, Texas	678,587	
24	Boston, Massachusetts	676,216	
25	Portland, Oregon	652,089	Top 25 cities are 11.5% of U.S. population
26	Las Vegas, Nevada	641,825	
27	Detroit, Michigan	639,614	
28	Louisville-Jefferson, Kentucky	632,689	
29	Memphis, Tennessee	632,207	
30	Baltimore, Maryland	585,708	
31	Milwaukee, Wisconsin	577,235	
32	Albuquerque, New Mexico	564,563	
33	Fresno, California	542,161	
34	Tucson, Arizona	541,349	
35	Sacramento, California	522,754	
36	Kansas City, Missouri	507,969	
37	Mesa, Arizona	504,500	
38	Atlanta, Georgia	498,602	
39	Omaha, Nebraska	490,627	
40	Colorado Springs, Colorado	479,260	
41	Raleigh, North Carolina	467,592	
42	Long Beach, California	466,302	
43	Virginia Beach, Virginia	459,470	
44	Miami, Florida	442,265	
45	Oakland, California	439,349	
46	Minneapolis, Minnesota	428,403	
47	Tulsa, Oklahoma	412,458	
48	Bakersfield, California	402,907	
49	Wichita, Kansas	397,070	
50	Arlington, Texas	394,218	Top 50 cities are 15.3% of U.S. population

(Continued)

Table 9.20 (Continued)

Rank	City	Population	
51	Aurora, Colorado	386,241	
52	New Orleans, Louisiana	383,997	
53	Tampa, Florida	382,769	
54	Cleveland, Ohio	373,091	
55	Urban Honolulu CDP, Hawaii	350,943	
56	Anaheim, California	347,015	
57	Lexington-Fayette, Kentucky	322,570	
58	Stockton, California	320,759	
59	Corpus Christi, Texas	317,929	
60	Henderson, Nevada	317,521	
61	Riverside, California	314,347	
62	St. Paul, Minnesota	311,448	
63	Newark, New Jersey	310,876	
64	Santa Ana, California	310,538	
65	Cincinnati, Ohio	310,242	
66	Orlando, Florida	307,674	
67	Irvine, California	305,313	
68	Pittsburgh, Pennsylvania	303,160	
69	St. Louis, Missouri	301,578	
70	Greensboro, North Carolina	297,899	
71	Jersey City, New Jersey	292,412	
72	Anchorage, Alaska	291,247	
73	Lincoln, Nebraska	291,114	
74	Plano, Texas	285,900	
75	Durham, North Carolina	283,547	
76	Buffalo, New York	278,302	
77	Chandler, Arizona	276,330	
78	Chula Vista, California	276,025	
79	Toledo, Ohio	270,726	
80	Madison, Wisconsin	268,414	
81	Gilbert Town, Arizona	268,302	
82	Fort Wayne, Indiana	263,852	
83	Reno, Nevada	263,436	
84	North Las Vegas, Nevada	262,678	
85	St. Petersburg, Florida	258,277	
86	Lubbock, Texas	257,180	
87	Irving, Texas	256,793	
88	Laredo, Texas	255,181	
89	Winston-Salem, North Carolina	249,443	
90	Chesapeake, Virginia	249,422	
91	Glendale, Arizona	248,345	
92	Garland, Texas	246,132	
93	Scottsdale, Arizona	241,488	
94	Norfolk, Virginia	238,005	
95	Boise City, Idaho	235,670	
96	Fremont, California	232,084	
97	Santa Clarita, California	229,213	
98	Spokane, Washington	228,831	
99	Richmond, Virginia	226,610	
100	Baton Rouge, Louisiana	225,128	Top 100 cities are 19.6% of U.S. population
	Total for 100 biggest cities	**64,983,448**	

The myth about big cities may stem from the incorrect belief that big cities are bigger than they actually are, and that they account for a greater fraction of the nation's population than they actually do.

It is certainly true that most of the biggest cities in the country have a Democratic majority. However, most exurbs, small towns, and rural areas generate Republican majorities. Suburbs of big cities are usually politically divided.

If big cities controlled the outcome of elections, every Governor and every U.S. Senator in every state with a significant city would be a Democrat. However, innumerable Republicans have won races for Governor and U.S. Senator without ever carrying the biggest city in their respective states.

When presidential candidates campaign to win the electoral votes of a closely divided battleground state, they campaign throughout the state. The big cities do not receive all the attention—much less control the outcome.

Philadelphia, Pittsburgh, Detroit, and Milwaukee certainly have not monopolized the attention of presidential candidates when they have campaigned in the battleground states of Pennsylvania, Michigan, and Wisconsin. Moreover, these cities manifestly do not control the statewide outcomes. In 2016, Hillary Clinton won Philadelphia, Pittsburgh, Detroit, and Milwaukee but did not carry Pennsylvania, Michigan, or Wisconsin.

Even if one makes the far-fetched assumption that a candidate could win 100% of the votes in the nation's 100 biggest cities, that candidate would have won only 20% of the national popular vote.

A big city that is located in a closely divided state is critically important in presidential races (as are the suburban, ex-urban, and rural parts of that state).

However, big cities that are located in spectator states such as Houston, Chicago, and Seattle are politically irrelevant (as are all other parts of those states).

The current state-by-state winner-take-all system elevates the political importance of a city such as Milwaukee that is located in the battleground state of Wisconsin, while minimizing the importance of a city such as Baltimore that is located in a spectator state such as Maryland (which has the same 10 electoral votes as Wisconsin).

9.6.2. MYTH: One major reason for establishing the Electoral College was to prevent candidates from campaigning only in big cities.

QUICK ANSWER:

- Given the historical fact that 95% of the U.S. population in 1790 lived in places with fewer than 2,500 people, it can be safely said that the Founding Fathers were not concerned about presidential candidates campaigning in big cities.
- If the Founding Fathers were concerned about the political clout of big cities, they were totally derelict in addressing the problem. The U.S. Constitution makes no distinction between a vote cast in a city versus a vote cast anywhere else in a state. Moreover, state winner-take-all laws enacted under the authority of Article II, section 1 of the Constitution do not treat votes cast in a city any differently from votes cast in small towns or rural areas.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated:

> "A major reason for establishing the Electoral College in the first place [was] to prevent elections from becoming contests where presidential candidates would simply campaign in big cities for votes."[276]

In an op-ed entitled "Electoral College Is Evidence of Founders' Brilliance," Joseph Mendola wrote:

> "In 1787, the Founders were concerned that the popular vote system **would give the two largest population enclaves in the country at that time—Philadelphia and New York—the power to choose the president**, taking away the voice of farmers and working people in less populous states."[277] [Emphasis added]

Dave Cooper of Churubusco, Indiana (population 1,796) wrote in the *Churubusco News* in 2018:

> "The founders were very clever when they conceived the idea of the Electoral College. Why, they wrote, should a large metropolitan area like New York City have more influence than a very small rural village?"[278]

According to the 1790 census,[279] the combined population of New York City and Philadelphia was 61,653—a mere 1.6% of the country's total population of 3,929,214.

Table 9.21 shows that the combined population of the only five cities in the country with a population of over 10,000 was 109,835—a mere 2.8% of the country's population of 3,929,214 at the time.

Moreover, there were only 24 places with a population over 2,500 in 1790. Their combined population was 201,655—a mere 5% of the country's population.

Table 9.21 Population of the only five cities in the U.S. with population over 10,000 according to 1790 census

Rank	City	Population
1	New York	33,131
2	Philadelphia	28,522
3	Boston	18,320
4	Charleston	16,359
5	Baltimore	13,503
Total		**109,835**

[276] Von Spakovsky, Hans. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

[277] Mendola, Joseph. 2018. Electoral College is evidence of Founders' brilliance. *Concord Monitor*. July 25, 2018. https://www.concordmonitor.com/Working-people-rule-18933239

[278] Cooper, Dave. 2018. State Electoral College? *Churubusco News*. December 5, 2018. https://www.kpcnews.com/article_b0f22275-71be-583e-bc99-c993326e230f.html

[279] See *1790 Census: Whole Number of Persons within the Districts of the U.S.* 1793. https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1790.html

In other words, 95% of the country's population lived in places with fewer than 2,500 people in 1790.

If the Founding Fathers had been concerned about the political clout of big cities, they were derelict in addressing this problem. Indeed, nothing in the U.S. Constitution makes any distinction between a vote cast in a city and a vote cast elsewhere in a state.

Moreover, the winner-take-all method of awarding electoral votes does not treat votes cast in a city any differently from votes cast in small towns or rural areas. All votes are equal inside each state.

While the current system makes a voter in a big city located in a closely divided state (such as Philadelphia, Phoenix, and Milwaukee) very important in presidential elections, it also makes every voter in a small town or rural area important.

Likewise, the current system makes a voter in a big city located in a spectator state (e.g., Chicago, Houston, and New York City) politically irrelevant in presidential elections, and it also renders a voter in a small town or rural area of a spectator state unimportant.

Finally, the Founding Fathers were *not* concerned that "presidential candidates would campaign in big cities for votes," because they weren't concerned with candidates campaigning *anywhere*.

Instead, they envisioned the Electoral College as an elite deliberative body. John Jay (the presumed author of *Federalist No. 64*) described the Electoral College in 1788:

> "As the **select assemblies for choosing the President** … will in general be **composed of the most enlightened and respectable citizens**, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues."[280] [Emphasis added]

Alexander Hamilton (the presumed author of *Federalist No. 68*) wrote in 1788:

> "[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **A small number of persons**, selected by their fellow-citizens from the general mass, will be most likely to possess **the information and discernment requisite to such complicated investigations**."[281] [Emphasis added]

Moreover, the Founding Fathers were divided (and, accordingly, the Constitution is silent) as to whether the voters should even be allowed to vote for these aristocratic presidential electors.

The 1787 Constitutional Convention left that question to the states. Only six of the 10 states that participated in the nation's first presidential election in 1789 allowed their voters to vote for the state's presidential electors.

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[280] The powers of the senate. *Independent Journal*. March 5, 1788. *Federalist No. 64*.

[281] Publius. The mode of electing the President. *Independent Journal*. March 12, 1788. *Federalist No. 68*.

9.7. MYTHS ABOUT BIG METROPOLITAN AREAS

9.7.1. MYTH: Presidential candidates will concentrate on the populous metropolitan areas in a national popular vote for President.

QUICK ANSWER:

- Under a national popular vote, every vote would be equal throughout the United States. A voter in a big metropolitan area would be no more influential or controlling than a voter anywhere else.

MORE DETAILED ANSWER:

John W. York, a policy analyst at the Heritage Foundation, wrote in 2019:

> "If the U.S. were to abandon the electoral college in favor of a national popular vote, the same few cities would be the focus of the battle for the White House every cycle. Given that they have limited time and money, **presidential candidates of both parties would be foolish to waste their energy anywhere but the most densely populated urban centers**. This is where the largest concentration of voters are, so racking up the votes in these areas would be the overwhelming focus of any election. Under a national popular vote, cities like Los Angeles and New York … would thoroughly and perpetually dominate electoral politics as well."[282] [Emphasis added]

When every vote is equal, candidates for office know that they need to solicit voters throughout their *entire* constituency in order to win.

Contrary to what York says, presidential candidates would not be "foolish" to campaign throughout the entire electorate—they would be crazy not to.

In a national popular vote for President, a voter in a populous metro area would be no more valuable or important than a vote cast in a suburb, an exurb, a small town, or a rural area. Big metro areas would not receive all the attention or even a disproportionate amount of attention—much less control the outcome.

Perhaps the most convincing evidence for the fact that big metro areas do not control elections comes from looking at the way that presidential races are actually run inside today's battleground states.

Inside a battleground state in a presidential election *today*, every vote is equal, and the winner is the candidate who receives the most popular votes in that state.

That is, the way to win everything that the battleground state has to offer (that is, all of its electoral votes) is identical to the way to win everything that the National Popular Vote Compact has to offer.

If there were any tendency for a nationwide presidential campaign to overemphasize heavily populated metro areas or ignore rural areas, we would see evidence of this ten-

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[282] York, John W. 2019. No, the electoral college isn't 'electoral affirmative action' for rural states. *Los Angeles Times*. October 9, 2019. https://www.latimes.com/opinion/story/2019-10-09/electoral-college-affirmative-action-rural-states

dency in the way presidential campaigns are actually conducted inside today's closely divided states.

Let's use Pennsylvania as an example.

Pennsylvania's population of 12.7 million people is divided into two almost equal parts:[283]

- 6.4 million living in the Philadelphia[284] and Pittsburgh[285] metropolitan statistical areas and
- 6.3 million living in the rest of the state (often called "the T").[286]

Pennsylvania was a closely divided "battleground" state in 2016. It received 54 of the nation's 399 general-election campaign events.

Table 9.22 shows the locations of Pennsylvania's 54 general-election campaign events in 2016. As can be seen, the campaigns visited a mix of small towns, middle-sized places, and big cities.

Figure 9.6 is a map showing the locations of Pennsylvania's 54 campaign events in 2016.

These 54 events were divided almost exactly in proportion to population between the two halves of the state.

- 28 events in the Philadelphia and Pittsburgh metro areas
- 26 events in "the T"

In 2016, the Democratic ticket won the Philadelphia and Pittsburgh metro areas by a 60%–40% margin, while the Republican ticket won "the T" by 62%–38%. Overall, the Republican ticket won the state in 2016 by a 50.4%–49.6% margin, as shown in table 9.23.

In 2016, there were 28 Republican events (Trump, Pence) and 26 Democratic events (Clinton, Kaine). Each ticket devoted somewhat more attention to the parts of the state where it had highest support. However, taken together, the overall result is that the biggest metro areas and "the T" each received almost exactly the same overall amount of attention, as shown in table 9.24.

Chapter 8 provides additional information on the distribution of campaign events in the big metropolitan statistical areas of other battleground states versus the less populous parts of those same states.

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[283] Pennsylvania had a population of 12,702,379, according to the 2010 census. The Philadelphia Metropolitan Statistical Area (MSA) and the Pittsburgh MSA had a combined population of 6,365,279 (50.1% of the total), while the remainder of the state had a population of 6,337,100 (49.9% of the total).

[284] The Philadelphia metropolitan statistical area (MSA) consists of five counties (Philadelphia County, Montgomery, Bucks, Delaware, and Chester).

[285] The Pittsburgh MSA consists of seven counties (Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland).

[286] The rest of the state consists of 55 counties.

Table 9.22 Locations of Pennsylvania's 54 events in 2016

Place	Population	Campaign event	County	CD
Youngwood	3,050	Pence (11/1)	Westmoreland	18
Grantville	3,581	Pence (10/5)	Dauphin	11
Chester Twp.	3,940	Trump (9/22)	Delaware	7
Pipersville	6,212	Pence (8/23)	Bucks	8
Ambridge	7,050	Trump (10/10)	Beaver	12
Gettysburg	7,620	Pence (10/6), Trump (10/22)	Adams	4
Hanover Twp.	10,866	Kaine (8/31)	Northampton	15
Hershey	14,257	Trump (11/4)	Dauphin	11
Aston	16,592	Trump (9/13)	Delaware	7
Hatfield Twp.	17,249	Clinton-Kaine (7/29)	Montgomery	6
Newtown Twp.	19,299	Kaine (10/26), Trump (10/21)	Bucks	8
King of Prussia	19,936	Pence (8/23)	Montgomery	7
Johnstown	20,978	Clinton-Kaine (7/30), Pence (10/6), Trump (10/21)	Cambria	12
East Hempfield	23,522	Trump (10/1)	Lancaster	16
Moon Twp.	24,185	Pence (11/3), Trump (11/6)	Allegheny	14
Wilkes-Barre	41,498	Trump (10/10)	Luzerne	11
State College	42,034	Kaine (10/21)	Centre	5
York	43,718	Pence (9/29)	York	4
Altoona	46,320	Trump (8/12)	Blair	9
Haverford Twp.	48,491	Clinton (10/4)	Delaware	7
Harrisburg	49,528	Clinton (10/4), Clinton-Kaine (7/29), Trump (8/1)	Dauphin	11
Lancaster	59,322	Pence (8/9), Kaine (8/30)	Lancaster	16
Bensalem	60,427	Pence (10/28)	Bucks	8
Scranton	76,089	Trump-Pence (7/27), Clinton (8/15), Pence (9/14), Trump (11/7)	Lackawanna	17
Erie	101,786	Trump (8/12), Kaine (8/30), Pence (11/7)	Erie	3
Allentown	118,032	Kaine (10/26)	Lehigh	15
Pittsburgh	305,704	Clinton-Kaine (7/30, 10/22), Pence (8/9), Kaine (9/5, 10/6), Clinton (11/4, 11/7)	Allegheny	14
Philadelphia	1,526,006	Clinton (8/16, 9/19, 11/5, 11/6, 11/7), Kaine (10/5), Clinton-Kaine (7/29, 10/22)	Philadelphia	2

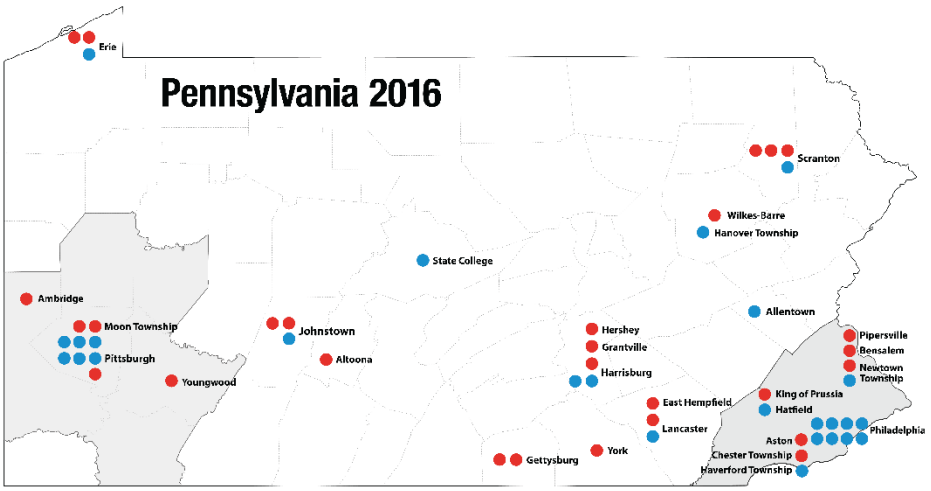

Figure 9.6 Locations of Pennsylvania's 54 events in 2016

Table 9.23 Pennsylvania 2016 outcome

	Republican	Democratic
2 biggest metro areas	40.4%	59.6%
"The T"	61.8%	38.2%
Total	**50.4%**	**49.6%**

Table 9.24 Partisan breakdown of Pennsylvania's 54 events in 2016

	Republican	Democratic	Total
2 biggest metro areas	11	17	28
The T	17	9	26
Total	**28**	**26**	**54**

Illogic of York's concern about densely populated urban centers

One wonders why York expresses concern about the amount of attention received by the half of Pennsylvania's population living in the state's two biggest metro areas, but expresses no similar concern about the essentially equal amount of attention conferred on half of the state's population living outside the biggest metro areas.

Moreover, there is nothing in the provisions of the U.S. Constitution that established the Electoral College and nothing in the state laws that enacted the winner-take-all system that makes any distinction between popular votes cast in "densely populated urban centers," compared to votes cast elsewhere in the state.

2012 Campaign in Pennsylvania

The 2012 presidential campaign in Pennsylvania illustrates another important characteristic of the current state-by-state winner-take-all method of awarding electoral votes—namely that battleground status is fleeting and fickle.

The Democratic ticket was comfortably ahead in Pennsylvania in 2012. In fact, the Obama-Biden ticket ended up winning the state by 323,931 votes—a 54%–46% margin.

An eight percentage-point spread between the top two candidates is the outer boundary at which presidential campaigning usually occurs under the current winner-take-all system. In fact, almost all campaigning takes place in states where the top two candidates are within six percentage points of each other, and the vast majority of that campaigning occurs in states where the spread is considerably less than six percentage points.

Because polling showed that the Democratic ticket was comfortably ahead in Pennsylvania throughout 2012, Pennsylvania received only five of the nation's 253 general-election campaign events in 2012—compared to 54 events in 2016 and 47 events in 2020. That is, Pennsylvania received only about one-tenth of the attention in 2012 that it received in 2016 and 2020.

Pennsylvania's spectator status in 2012 was further evidenced by the fact that neither President Obama nor Vice President Biden bothered to make even one visit to Pennsylvania during the general-election campaign.

As the campaign drew to a close, Governor Romney and Congressman Ryan made five visits to Pennsylvania—four at the very end of the campaign.

The locations of Pennsylvania's five general-election campaign events in 2012—all Republican—are shown in table 9.25.

Table 9.25 Locations of Pennsylvania's five events in 2012

Place	Population	Campaign event	County
Morrisville	8,728	Romney (11/4)	Bucks
Middletown	45,436	Ryan (11/3)	Dauphin
Moon Twp.	24,185	Ryan (10/20)	Allegheny
Wayne	31,531	Romney (9/28)	Delaware
Pittsburgh	305,704	Romney (11/6)	Allegheny

9.8. MYTHS ABOUT RURAL STATES AND RURAL VOTERS

9.8.1. MYTH: Rural states would lose political influence under a national popular vote.

QUICK ANSWER:

- None of the 10 most rural states was a closely divided battleground state in 2020, 2016, or 2012. Political clout in the general-election campaign for President under the current state-by-state winner-take-all method of awarding electoral votes comes from being a closely divided state.
- In contrast, in a national popular vote for President, rural voters would not be siloed by state boundaries. The rural population of the United States is almost exactly equal to the population of the 100 biggest cities. The rural population consists of 59,492,267 people (19.3% of the U.S. population, according to the 2010 census). The population of the 100 biggest cities consists of 59,849,899 people (19.3% of the U.S. population).

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, wrote:

> "**NPV will lessen the need of presidential candidates to obtain the support of voters in rural areas** and in small states."[287] [Emphasis added]

Hans von Spakovsky of the Heritage Foundation has stated:

> "The NPV scheme would … diminish the influence of smaller states and rural areas of the country."[288]

The myth that the current state-by-state winner-take-all method of awarding electoral votes is advantageous to rural states is not supported by the facts.

Rural states have almost no political influence in the general-election campaign for President under the current state-by-state winner-take-all method of awarding electoral votes.

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[287] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[288] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

The reason is that political clout under the current system comes from being a closely divided state, and rural states are usually one-party states in presidential elections.

The 10 states with the highest percentage of rural residents are:

- Maine–61%[289]
- Vermont–61%
- West Virginia–51%
- Mississippi–51%
- Montana–44%
- Arkansas–44%
- South Dakota–43%
- Kentucky–42%
- Alabama–41%
- North Dakota–40%.

None of the 10 most rural states was a closely divided state in 2020, 2016, or 2012.

Moreover, even if one considers the 20 most rural states, only four were battleground states in 2020, 2016, or 2012, namely New Hampshire (12th most rural), Iowa (13th most rural), North Carolina (16th most rural), and Wisconsin (20th most rural).

In table 9.26:

- Column 2 shows each state's total population.
- Column 3 shows the state's urban-suburban population.
- Column 4 shows the state's rural population.
- Column 5 shows the percentage of the state's population that is rural (column 2 divided by column 4). Nationwide, this percentage is 19.27%.
- Column 6 shows the state's "rural index"—obtained by dividing the state's rural percentage by the overall national rural percentage of 19.27%. An index provides a quick way to compare a state with the nation as a whole. An index above 100 indicates that the state is more rural than the nation as a whole, whereas an index below 100 indicates that the state is less rural. The states appear in the table in descending order based on their "rural index."

In contrast, in a national popular vote for President, voters in rural states would not be siloed by state boundary lines.

The country's rural population is almost exactly equal to the population of the 100 biggest cities.

Specifically, the rural population, as defined by the U.S. Census Bureau, was 59,492,267 people—that is, 19.3% of the country's population of 308,745,538 according to the 2010 census.[290]

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[289] The state of Maine as a whole has voted Democratic for President since 1992. Maine awards two of its four electoral votes by congressional district. Maine's 2nd district was closely divided in 2016 and 2020. In fact, Donald Trump carried that district in both years.

[290] U.S. Census Bureau. *2010 Census Urban and Rural Classification and Urban Area Criteria*. https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html

Table 9.26 Rural population by state

State	Total population	Urban-suburban population	Rural population	Rural percent	Rural index
Maine	1,328,361	513,542	814,819	61%	318
Vermont	625,741	243,385	382,356	61%	317
West Virginia	1,852,994	902,810	950,184	51%	266
Mississippi	2,967,297	1,464,224	1,503,073	51%	263
Montana	989,415	553,014	436,401	44%	229
Arkansas	2,915,918	1,637,589	1,278,329	44%	228
South Dakota	814,180	461,247	352,933	43%	225
Kentucky	4,339,367	2,533,343	1,806,024	42%	216
Alabama	4,779,736	2,821,804	1,957,932	41%	213
North Dakota	672,591	402,872	269,719	40%	208
New Hampshire	1,316,470	793,872	522,598	40%	206
Iowa	3,046,355	1,950,256	1,096,099	36%	187
Wyoming	563,626	364,993	198,633	35%	183
Alaska	710,231	468,893	241,338	34%	176
North Carolina	9,535,483	6,301,756	3,233,727	34%	176
Oklahoma	3,751,351	2,485,029	1,266,322	34%	175
South Carolina	4,625,364	3,067,809	1,557,555	34%	175
Tennessee	6,346,105	4,213,245	2,132,860	34%	174
Wisconsin	5,686,986	3,989,638	1,697,348	30%	155
Missouri	5,988,927	4,218,371	1,770,556	30%	153
Idaho	1,567,582	1,106,370	461,212	29%	153
Indiana	6,483,802	4,697,100	1,786,702	28%	143
Nebraska	1,826,341	1,335,686	490,655	27%	139
Louisiana	4,533,372	3,317,805	1,215,567	27%	139
Minnesota	5,303,925	3,886,311	1,417,614	27%	139
Kansas	2,853,118	2,116,961	736,157	26%	134
Michigan	9,883,640	7,369,957	2,513,683	25%	132
Georgia	9,687,653	7,272,151	2,415,502	25%	129
Virginia	8,001,024	6,037,094	1,963,930	25%	127
New Mexico	2,059,179	1,594,361	464,818	23%	117
Ohio	11,536,504	8,989,694	2,546,810	22%	115
Pennsylvania	12,702,379	9,991,287	2,711,092	21%	111
Oregon	3,831,074	3,104,382	726,692	19%	98
Delaware	897,934	747,949	149,985	17%	87
Washington	6,724,540	5,651,869	1,072,671	16%	83
Texas	25,145,561	21,298,039	3,847,522	15%	79
Colorado	5,029,196	4,332,761	696,435	14%	72
Maryland	5,773,552	5,034,331	739,221	13%	66
New York	19,378,102	17,028,105	2,349,997	12%	63
Connecticut	3,574,097	3,144,942	429,155	12%	62
Illinois	12,830,632	11,353,553	1,477,079	12%	60
Arizona	6,392,017	5,740,659	651,358	10%	53
Utah	2,763,885	2,503,595	260,290	9%	49
Rhode Island	1,052,567	955,043	97,524	9%	48
Florida	18,801,310	17,139,844	1,661,466	9%	46
Hawaii	1,360,301	1,250,489	109,812	8%	42
Massachusetts	6,547,629	6,021,989	525,640	8%	42
Nevada	2,700,551	2,543,797	156,754	6%	30
New Jersey	8,791,894	8,324,126	467,768	5%	28
California	37,253,956	35,373,606	1,880,350	5%	26
D.C.	601,723	601,723	0	0%	0
Total	**308,745,538**	**249,253,271**	**59,492,267**	**19.27%**	**100**

The 100 biggest cities in the United States had 59,849,899 people—that is, 19.3% of the U.S. population).[291]

The 2020 census confirmed that the country's rural population is almost exactly equal to the population of the 100 biggest cities, as shown by the data in section 9.6.1.

9.9. MYTHS ABOUT ABSOLUTE MAJORITIES AND RUN-OFFS

9.9.1. MYTH: The absence of an absolute majority requirement is a flaw in the Compact.

QUICK ANSWER:

- Neither the current system of electing the President nor the National Popular Vote Compact requires an absolute majority of the popular vote to win. If traditional plurality voting is considered a flaw, the current system has the same flaw.
- No state requires that a candidate receive an absolute majority of its popular vote in order to win the state's electoral votes.
- No federal constitutional provision or law requires that a candidate receive an absolute majority of the national popular vote in order to become President.
- More than a third (16 of 46) of the nation's Presidents came into office without winning an absolute majority of the national popular vote (and five of them came into office without winning the most popular votes nationwide). Lincoln was elected President with 39% of the nationwide popular vote in 1860.
- The vast majority of elective offices in the United States are filled on the basis of winning the most votes (a plurality) rather than an absolute majority.
- This myth about run-offs is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is equivalent to the current system.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has criticized the National Popular Vote Compact on the grounds that it does not require that the winner receive an absolute majority of the popular votes. She told a Delaware Senate committee:

> "The compact … would give the presidency to the candidate winning the 'largest national popular vote total.' Note that it says the 'largest' total.' **It is not looking for a majority winner**."[292] [Emphasis added]

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[291] *Wikipedia*. List of United States cities by population. http://en.wikipedia.org/wiki/List_of_United_States_cities_by_population Accessed November 16, 2019.

[292] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

John Samples of the Cato Institute criticizes the Compact by saying:

> "If a plurality suffices for election, **a majority of voters may have chosen someone other than the winner**."[293] [Emphasis added]

In an article entitled "The Electoral College Is Brilliant, and We Would Be Insane to Abolish It," Walter Hickey writes:

> "Without the electoral college system, **a President could be elected with a plurality rather than an outright majority**."[294] [Emphasis added]

These three writers fail to mention that the current system of electing the President is identical to the National Popular Vote Compact in that it uses America's traditional plurality-voting system.

No current federal constitutional provision or law requires that a candidate receive an absolute majority of the national popular vote in order to become President.

No current state law requires that a candidate receive an absolute majority of the state's popular vote in order to win the state's electoral votes.[295]

More than a third (16 of 46) of the nation's Presidents up to 2020 came into office without winning an absolute majority of the national popular vote (and five of them came into office without even winning the most popular votes nationwide):

- John Quincy Adams in 1826
- James Polk in 1844
- Zachary Taylor in 1848
- James Buchanan in 1856
- Abraham Lincoln in 1860
- Rutherford Hayes in 1876
- James Garfield in 1880
- Grover Cleveland in 1884 and 1892
- Benjamin Harrison in 1888
- Woodrow Wilson in 1912 and 1916
- Harry Truman in 1948
- John Kennedy in 1960
- Richard Nixon in 1968
- Bill Clinton in 1992 and 1996
- George W. Bush in 2000
- Donald Trump in 2016.

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[293] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 2. https://www.cato.org/policy-analysis/critique-national-popular-vote

[294] Hickey, Walter. 2012. The Electoral College is brilliant, and we would be insane to abolish it. *Business Insider*. October 3, 2012. http://www.businessinsider.com/the-electoral-college-is-brilliant-2012-10.

[295] The two states that use ranked choice voting (RCV) in their presidential election (Maine starting in 2020, and Alaska starting in 2024) do *not* require an absolute majority of their popular vote in order to win their electoral votes. Instead, they require a majority of the ballots expressing a choice at a given state of the RCV tabulation.

Lincoln was elected with 39% of the nationwide popular vote in 1860.

Presidential candidates frequently win a state's electoral votes without receiving an absolute majority of its popular vote.

In 2016, no candidate received an absolute majority of the popular vote in 13 states (almost all of which were the closely divided battleground states that decided the 2016 election).

Donald Trump's percentages of the popular vote in the six states from this group that he carried were:

- Arizona–48%
- Florida–49%
- Michigan–47%
- Pennsylvania–48%
- Utah–45%
- Wisconsin–47%

Hillary Clinton's percentages of the popular vote in the seven states from this group that she carried were:

- Colorado–48%
- Maine–48%
- Minnesota–46%
- Nevada–48%
- New Hampshire–47%
- New Mexico–48%
- Virginia–49.8%

In 1992, no candidate received an absolute majority of the statewide popular vote in 49 of the 50 states.[296]

The public seems content with the plurality-vote system. There was certainly no outcry from the public, the media, Congress, or state legislators when Truman (1948), Kennedy (1960), Nixon (1968), or Clinton (1992 and 1996) were elected with less than an absolute majority of the national popular vote.

Moreover, the vast majority of all other elections in the United States are decided on the basis of winning a plurality of the popular votes (the so-called "first past the post" system) rather than an absolute majority.

Mayoral elections in Richmond, Virginia

We know of only one place in the United States that currently selects its chief executive using an Electoral College type of arrangement.

The Mayor of Richmond Virginia is chosen under a system that resembles the Electoral College in that it applies the winner-take-all rule to districts within the jurisdiction served by the office.

There are nine city-council districts in the city.

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[296] Bill Clinton received 53% of the popular vote in Arkansas in 1992. He also won 84% of the popular vote in the District of Columbia.

The Richmond City Charter (section 3.01.1) states:

> "In the general election, the person receiving the most votes in each of at least five of the nine city council districts shall be elected mayor. Should no one be elected, then the two persons receiving the highest total of votes city wide shall be considered nominated for a runoff election. … In any such runoff election, write-in votes shall not be counted, and the person receiving the most votes in each of at least five of the nine city council districts shall be elected mayor."[297,298]

9.9.2. MYTH: The absence of a run-off is a flaw in the Compact.

QUICK ANSWER:

- No state requires a run-off when the leading presidential candidate fails to receive an absolute majority of its popular vote.
- No federal constitutional provision or law requires a run-off when the leading presidential candidate fails to receive an absolute majority of the national popular vote.
- The vast majority of elective offices in the United States are filled without a run-off.
- This myth about run-offs is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is equivalent to the current system.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, complains that the Compact does not require a run-off election when the leading candidate fails to win an absolute majority of the national popular vote:

> "[Under the National Popular Vote Compact] no candidate is required to obtain majority support. [It] does not include a run-off provision. **Electoral votes are given to the winner of any plurality—even a very small one**.[299] [Emphasis added]

Of course, this criticism applies equally to the current system.

No state requires a run-off when the leading presidential candidate fails to receive an absolute majority of its popular vote.

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[297] Richmond Virginia City Charter. https://law.lis.virginia.gov/charters/richmond/

[298] For a history of this system, see Katta, Venugopal. 2017. Nine Districts: How Richmond came to possess one of America's strangest rules for electing a Mayor. Election Law Society. February 15, 2017. https://stateofelections.pages.wm.edu/2017/02/15/nine-districts-how-richmond-came-to-possess-one-of-americas-strangest-rules-for-electing-a-mayor/

[299] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

Presidential candidates who did not receive an absolute majority of the state's popular vote routinely win a state's electoral votes.

No federal constitutional provision or law requires a run-off when the leading candidate fails to receive an absolute majority of the national popular vote.

After the 1992 election (in which no candidate received an absolute majority of the popular vote in 49 of the 50 states),[300] we cannot recall any demand from legislators, the public, the media, or anyone else for a run-off election.

The National Popular Vote Compact operates in a manner consistent with the widely held view in the United States that the winner of an election should be the candidate who receives the most popular votes (that is, a plurality).

As for Ross' concern that "Electoral votes are given to the winner of any plurality—even a very small one," the fact is that small pluralities frequently decide the outcome under the current state-by-state winner-take-all method of awarding electoral votes (section 1.3).

For example, George W. Bush received all of Florida's electoral votes (and the presidency) because he received 537 more popular votes than Al Gore in Florida in 2000.

In 2016, Donald Trump received all of the electoral votes of Michigan, Wisconsin, and Pennsylvania by winning pluralities of 10,704 and 22,748 and 44,292 in those states, respectively.

Practical considerations concerning run-off elections

Run-offs, like all election procedures, have advantages and disadvantages.

Run-off elections could tilt the playing field in favor of a candidate who is in a position to come up with significant amounts of additional money on very short notice.

Run-off elections would increase the difficulty and cost of administering elections to some degree. It is already difficult to recruit the mass of citizen volunteers needed to conduct elections. It might be difficult to recruit volunteers on short notice after the first election.

The additional time to conduct a run-off election would be an additional consideration.

Before a run-off election for President could be called, it would be necessary to determine whether the run-off should be held in the first place. That is, it would be necessary to ascertain the results of the first election.

Finalization of the initial count of the first election requires processing all absentee ballots and all provisional ballots (a process that currently takes up to 10 days in some states). It also requires certifying all the local counts to the state official or board that, in turn, certifies the statewide result. This multi-step process typically attracts litigation in close presidential elections.

Then, if the leading candidate's total vote in the first election happens to be close to the threshold for triggering a run-off, there could be a demand for a recount. Such demands typically lead to litigation (from the leading candidate) over whether the requested recount is justified.

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[300] Bill Clinton received 53% of the popular vote in Arkansas in 1992. He also won 84% of the popular vote in the District of Columbia. However, no candidate received an absolute majority of the popular vote in 49 states.

Current federal law specifies that the Electoral College meets on the Tuesday after the second Wednesday in December—42 days after Election Day.

Absent a major streamlining of state election laws and procedures, an identical period (more or less) would be required to reach a final determination of the results of the first election of a two-election process.

At that point, the run-off campaign could commence.

Then, after the run-off, it would seem that a second period of 42 days (more or less) would be required to reach a final determination of the results of the run-off.

If, at some time in the future, the public decides that it wants the benefits of a run-off, ranked choice voting (also aptly referred to as "instant run-off voting") offers a way to build the run-off into the initial election, thereby eliminating many of the disadvantages of a separate run-off election (section 9.27.1).

9.10. MYTHS ABOUT THE PROLIFERATION OF CANDIDATES AND A BREAKDOWN OF THE TWO-PARTY SYSTEM

9.10.1. MYTH: There will be a proliferation of candidates, Presidents being elected with 15% of the popular vote, and a breakdown of the two-party system under the Compact.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential for preventing a proliferation of candidates and presidential candidates being elected with as little as 15% of the vote, we would see evidence of these conjectured problems in elections that do not employ an Electoral College type of arrangement. The chief executive of every state is currently elected by popular vote rather than an Electoral College type of arrangement. The evidence shows that 88% of the gubernatorial winners received more than 50% of the vote; 97% of the winners received more than 45%; 99% of the winners received more than 40%; and 100% of the winners received more than 35%.
- Eight states originally had an Electoral College type of arrangement for electing their chief executives but later made the transition to a statewide popular election. The historical record shows no proliferation of candidates, no 15% winners, and no break-down of the two-party system. If an Electoral College type of arrangement were essential for preventing a proliferation of candidates and presidential candidates being elected with as little as 15% of the vote, we would have seen evidence of these conjectured problems in these eight states.
- The two-party system does not owe its existence to the Electoral College or the winner-take-all method of awarding electoral votes. The two-party system first emerged at the national level in 1796. That was 32 years *before* a majority of the states adopted the winner-take-all method.
- Duverger's Law (based on worldwide studies of elections) asserts that plurality-vote elections do not result in a proliferation of candidates or candidates being elected with tiny percentages of the vote. To the contrary, plurality-vote elections sustain and support a two-party system.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, speculates that a national popular vote would lead to a proliferation of candidates and Presidents who are elected with a tiny percentage of the vote:

> "[The National Popular Vote Compact] is not even looking for a minimum plurality. Thus, **a candidate could win with only 15 percent of votes nationwide**."[301] [Emphasis added]

Ross has also stated:

> "The most likely consequence of a change to a direct popular vote is the **breakdown of the two-party system**."[302] [Emphasis added]

Hans von Spakovsky of the Heritage Foundation has written:

> "NPV could destabilize America's two-party system."[303]

If an Electoral College type of arrangement were essential for avoiding these conjectured outcomes, we should see evidence of this outcome in elections that do not employ it.

Evidence from plurality-vote popular elections for state chief executive

A nationwide campaign for President would have the same political dynamics as existing campaigns for state chief executive. In both cases, every voter is equal, and the winner is the candidate receiving the most popular votes from the jurisdiction served by the office.

When state chief executives are elected in statewide plurality-vote popular elections, there is no evidence of a proliferation of candidates, candidates winning with 15% of the vote (or any similar small percentage), or a breakdown of the two-party system.

In the 1,027 general elections for Governor in the United States between 1946 and 2015:

- 88% of the winners received more than 50% of the vote (908 out of 1,027).
- 97% of the winners received more than 45% of the vote (1,001 out of 1,027).
- 99% of the winners received more than 40% of the vote (1,013 out of 1,027).
- 100% of the winners received more than 35% of the vote.[304]

Table 9.27 shows the 26 general elections (out of 1,027) for Governor between 1946 and 2014 in which the winner received less than 45% of the popular vote.

As a practical matter, it is generally easier for a minor-party or independent candidate to launch a gubernatorial campaign in a smaller state than a larger state. Indeed, more than half (14 of 26) of the Governors who were elected with less than 45% of the vote in table 9.27 were in states with only three or four electoral votes (Alaska, Hawaii, Idaho,

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[301] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[302] *Ibid.*

[303] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. Page 9. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[304] FairVote. 2015. *Plurality in Gubernatorial Elections.* http://www.fairvote.org/plurality-in-gubernatorial-elections

Table 9.27 The 26 general elections for Governor between 1946 and 2014 (out of 1,027) in which the winning candidate received less than 45% of the vote

Winning percentage	Winner	State	Year
35.4%	Angus King	Maine	1994
36.1%	Lincoln Chafee	Rhode Island	2010
36.2%	John G. Rowland	Connecticut	1994
36.6%	Benjamin J. Cayetano	Hawaii	1994
37.0%	Jesse Ventura	Minnesota	1998
38.1%	John Baldacci	Maine	2006
38.2%	Paul LePage	Maine	2010
38.2%	George D. Clyde	Utah	1956
38.9%	Walter J. Hickel	Alaska	1990
39.0%	Rick Perry	Texas	2006
39.1%	Jay S. Hammond	Alaska	1978
39.1%	James B. Longley	Maine	1974
39.7%	Evan Mecham	Arizona	1986
39.9%	John R. McKernan Jr.	Maine	1986
40.1%	Norman H. Bangerter	Utah	1988
40.4%	Lowell P. Weicker Jr.	Connecticut	1990
40.7%	Gina Raimondo	Rhode Island	2014
41.1%	Tony Knowles	Alaska	1994
41.4%	Meldrim Thomson Jr.	New Hampshire	1972
41.4%	Don Samuelson	Idaho	1966
42.2%	Michael O. Leavitt	Utah	1992
43.3%	Brad Henry	Oklahoma	2002
43.7%	Mark Dayton	Minnesota	2010
44.4%	Tim Pawlenty	Minnesota	2002
44.6%	Nelson A. Rockefeller	New York	1966
44.9%	Jim Douglas	Vermont	2002

Maine, New Hampshire, Rhode Island, and Vermont). That fact suggests that there would be fewer such winning candidacies in a larger (that is, nationwide) election.

Evidence from states that made the transition from an electoral college to popular election for Governor

At the time when the U.S. Constitution came into effect in 1789, Governors were elected by popular vote in only five of the original 13 states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island).[305]

Seven of the original states had an Electoral College type of arrangement for electing their chief executive—either by means of specially elected gubernatorial electors or an election in which state legislators acted as an electoral college.[306]

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[305] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Pages xix and xx.

[306] In Pennsylvania, the office of Governor was not created until 1790. Once the office was created in 1790, it was popularly elected.

In six of these seven original states, there was a transition before the Civil War from an Electoral College type of arrangement for electing the state's chief executive to statewide popular elections.[307]

In addition, Kentucky was admitted to the Union in 1792 and subsequently made the transition from an Electoral College type of arrangement for selecting its Governor to popular elections.

These transitions provide further evidence concerning the incorrectness of speculations about popular elections resulting in a proliferation of candidates, candidates being elected with 15% or other small percentages of the popular vote, and the breakdown of the two-party system.

Let's examine what happened in these transitions from an Electoral College type of arrangement to popular elections.

Under the 1792 Kentucky Constitution, the Governor was elected by a state-level electoral college. Seats in the lower house of the legislature were apportioned among the counties on the basis of population.[308] Every four years, the voters of each county were entitled to vote for a number of gubernatorial electors equal to the county's number of members of the legislature's lower house. Each voter[309] was allowed to vote for all of his county's gubernatorial electors—that is, the election of electors was conducted on a countywide winner-take-all basis.[310] The winning gubernatorial electors then met two weeks later to choose the Governor.[311] This state-level electoral college was used to elect the Governor in 1792 and 1796.

When Kentucky's constitution was revised in 1799, the gubernatorial electoral college was abolished and replaced by a statewide popular election for Governor starting in 1800.[312]

Were there any 15% governors after Kentucky transitioned from a gubernatorial electoral college to a popular election for Governor?

In 81% of the subsequent pre-Civil-War gubernatorial elections in Kentucky (that is, 13 of 16 elections), the winning candidate for Governor received more than 50% of the statewide popular vote. The winners of the other three elections received 49%, 39%, and 33%.[313]

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[307] South Carolina did not make its transition to popular election of the Governor until after the Civil War. South Carolina began popular elections for Governor in its 1865 Reconstruction Constitution. Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Page 268.

[308] Article I, section 6 of 1792 Kentucky Constitution. http://www.wordservice.org/State%20Constitutions/usa1038.htm

[309] Voters in Kentucky at the time meant "free male inhabitants above the age of 21years."

[310] Article I, section 10 of 1792 Kentucky Constitution. http://www.wordservice.org/State%20Constitutions/usa1038.htm

[311] Article II, section 1 of 1792 Kentucky Constitution. http://www.wordservice.org/State%20Constitutions/usa1038.htm

[312] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Page 68.

[313] In the 1820 Kentucky gubernatorial race, the winner (John Adair) received 32.8%, and his three opponents received 31.9%, 20.0%, and 15.3%. Curiously, this unusual four-way gubernatorial race occurred at the same time as the so-called "First Party System" at the national level was collapsing and being replaced and by the "Second Party System." The First Party System was characterized by competition between the Federalist

That is, there were no 15% winners after the abolition of Kentucky's electoral college for choosing the Governor. During this period, nine of the 16 elections were two-person races; three were three-person races; two were four-person races; and there was no competition at all in two races.

In Delaware, the transition occurred in 1792. After Delaware's transition, 91% of the pre-Civil-War gubernatorial races (21 of 23) were two-person races, and the winning candidate received between 50.1% and 55.2% of the popular vote. In the two three-person races, the winners each received 48% of the popular vote.[314] That is, there was no proliferation of candidates, and there were no 15% winners.

After Georgia's transition in 1825, 100% of the 18 winners in the pre-Civil-War gubernatorial races received more than 50% of the vote. There were 16 two-person races and two three-person races. Again, there was no proliferation of candidates, and there were no 15% winners.[315]

After North Carolina's transition in 1836, 100% of the 13 winners of the pre-Civil-War gubernatorial races received more than 50% of the vote. All of these general-election races were two-person races (usually between Democrats and Whigs).[316]

After Maryland's transition in 1838, 100% of the six winners of the pre-Civil-War gubernatorial races received more than 50% of the vote.[317] These general-election races were all two-person races (all between Democrats and Whigs).[318]

After New Jersey's transition in 1844, 100% of the seven winners of the pre-Civil-War gubernatorial races received more than 50% of the vote. These general-election races were all two-person races (all between Democrats and Whigs).[319]

After Virginia's transition in 1851, 100% of the three winners of the pre-Civil-War gubernatorial races received more than 50% of the vote.[320] These general-election races were all two-way races.[321]

Table 9.28 shows that 94% of the 86 gubernatorial winners received more than 50% of the vote in the seven states that transitioned from an Electoral College type of arrangement for electing the Governor to statewide popular elections before the Civil War.

Party of John Adams and Alexander Hamilton and the Democratic-Republican Party of Thomas Jefferson, James Monroe, and James Madison. The Second Party System was characterized by competition between the Democratic Party of Andrew Jackson and the Whig Party. The transition between the two regimes manifested itself at the national level in 1824 by the multi-candidate presidential race in which Andrew Jackson received 41% of the recorded national popular vote; John Quincy Adams received 31%; Henry Clay received 13%; and William Crawford received 11%. See Ratcliffe, Donald. 2015. *The One-Party Presidential Contest: Adams, Jackson, and 1824's Five-Horse Race*. Lawrence, KS: University Press of Kansas.

[314] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860: The Official Results by State and County*. Jefferson, NC: McFarland & Company Inc. Pages 26–28.

[315] *Ibid*. Pages 30–45.

[316] *Ibid*. Pages 181–189.

[317] *Ibid*. Pages 96–98.

[318] *Ibid*. Pages 181–189.

[319] *Ibid*. Pages 96–98.

[320] *Ibid*. Pages 96–98.

[321] *Ibid*. Pages 283–286.

Table 9.28 Winning percentages in gubernatorial races in the seven states that transitioned from an Electoral College type of arrangement to statewide popular election before the Civil War

State	Year	Number of races	Number of winners with less than 50% of popular vote	Number of winners with more than 50% of popular vote	Percentage of winners with more than 50% of popular vote
Delaware	1792	23	2	21	91%
Georgia	1825	18	0	18	100%
Kentucky	1800	16	3	13	81%
Maryland	1838	6	0	6	100%
New Jersey	1844	7	0	7	100%
North Carolina	1836	13	0	13	100%
Virginia	1851	3	0	3	100%
Total		**86**	**5**	**81**	**94%**

Note that this 94% percentage is even higher than the percentage of post-World-War-II gubernatorial races in which the winner won with more than 50% of the popular vote that we mentioned earlier in this section.

In the five races where no candidate received more than 50% of the popular vote, the winning candidates received 48% and 48% in the two Delaware races and 49%, 39%, and 33% in the three Kentucky races. There were no 15% winners.

Table 9.29 shows that 87% of the gubernatorial races were two-person races:

- 2% of the races were uncontested;
- 87% of the races had two candidates;
- 8% of the races had three candidates;
- 2% of the races had four candidates; and
- no races had more than four candidates.

Table 9.29 Number of candidates in gubernatorial races in the seven states that transitioned from an Electoral College type of arrangement to statewide popular election before the Civil War

State	Year	Number of races	Number of races with 1 candidate	Number of races with 2 candidates	Number of races with 3 candidates	Number of races with 4 candidates	Percent of races with 2 candidates
Delaware	1792	23		21	2		87%
Georgia	1825	18		16	2		89%
Kentucky	1800	16	2	9	3	2	56%
Maryland	1838	6		6			100%
New Jersey	1844	7		7			100%
North Carolina	1836	13		13			100%
Virginia	1851	3		3			100%
Total		**86**	**2**	**75**	**7**	**2**	**87%**

The above pattern also applies to the one state that transitioned from an Electoral College type of arrangement to statewide popular election after the Civil War—South Carolina. All of South Carolina's nine gubernatorial elections between 1865 and 1882 were two-person races (so that the winning candidate received more than 50% of the popular vote).[322]

The two-party system does not owe its existence to the Electoral College or the winner-take-all method of awarding electoral votes.

The two-party system first emerged at the national level in 1796—32 years *before* a majority of the states adopted the winner-take-all method of awarding electoral votes.

There were no political parties at the national level in the nation's first and second presidential elections in 1789 and 1792 when George Washington won 100% of the votes in the Electoral College. See sections 2.2 and 2.4.

Because of inevitable differences of opinion on various policy issues, this unanimity ended with the first election in which Washington was not a candidate.

In the 1796 election, the congressional caucus of the Federalist Party and the caucus of the Democratic-Republican Party nominated candidates for President and Vice President. Both national parties ran slates of presidential electors at the state level supporting their nominees (section 2.5).

Given that only three states had winner-take-all laws in the 1789, 1792, and 1796 elections, it can hardly be argued that the Electoral College—much less the winner-take-all method of awarding electoral votes—created the two-party system in the United States.

Duverger's Law

After studying election systems around the world, the French sociologist Maurice Duverger observed and explained the tendency of plurality-vote elections to prevent a proliferation of candidates and to sustain a two-party system.[323]

Duverger observed that voters tend to shy away from parties or candidates who have no chance of winning. Indeed, the effect of voting for a splinter candidate who cannot win is usually to help a candidate whose views are diametrically opposite to the voter's own views.

For example, 97,488 Floridians voted for Green Party presidential candidate Ralph Nader in 2000. George W. Bush carried Florida by a mere 537 popular votes. The votes cast for Nader enabled George W. Bush to win the electoral votes of Florida and thereby win the presidency.[324]

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[322] After 1882, Jim Crow laws resulted in many general elections for Governor in South Carolina having either one unopposed candidate or one candidate (that is, the Democratic nominee) who received an overwhelming number of votes. In any case, there was no proliferation of candidates, and there were no 15% Governors.

[323] Duverger, Maurice. Political Parties: The Organization and Activity in the Modern State. 1959. New York, NY: John Wiley & Sons. Translated by Barbara and Robert North.

[324] Similarly, in New Hampshire in 2000, Ralph Nader received considerably more votes than the margin between George W. Bush and Al Gore (the second-place candidate in the state).

Similarly, in 2008, votes cast for Bob Barr (the Libertarian presidential candidate) enabled Barack Obama to win North Carolina's electoral votes.[325] In 2008, votes cast for Ralph Nader enabled John McCain to win Missouri's electoral votes.[326]

In 2020, Libertarian presidential candidate Jo Jorgensen received considerably more popular votes in Arizona, Georgia, and Wisconsin than Biden's margin over Trump in these states, as shown in table 9.30.

Table 9.30 Libertarian vote in Arizona, Georgia, and Wisconsin in 2020

State	Electoral Votes	Biden	Trump	Jorgensen	Biden margin over Trump
Arizona	11	1,672,143	1,661,686	51,465	10,457
Georgia	16	2,473,633	2,461,854	62,229	11,779
Wisconsin	10	1,630,866	1,610,184	38,491	20,682
Total	**37**	**5,776,642**	**5,733,724**	**152,185**	**42,918**

Specifically, Jorgensen received more than three times as many votes (152,185) as Biden's combined margin over Trump in the three states (42,918). These three states together possessed 37 electoral votes. Without the 37 electoral votes from these three states, there would have been a 269–269 tie in the Electoral College. On January 6, 2021, the Republican Party had a majority of the House delegations and would have been in a position to choose Trump as President.[327]

Because of the severe penalty that plurality voting imposes on third-party and independent candidates, political groups with broadly similar platforms tend to coalesce behind one candidate in order to enable that candidate to win the most votes—and thereby get elected to office.

The result of Duverger's worldwide study of voting systems is often called "Duverger's Law."

9.10.2. MYTH: Spoiler candidates are quarantined by the current system.

QUICK ANSWER:

- Far from quarantining spoiler candidates, the current state-by-state winner-take-all method of awarding electoral votes amplifies the payoff to spoilers and therefore increases the incentive to launch such campaigns.
- This criticism aimed at the National Popular Vote Compact is one of many examples in this book of a problem that applies equally to both the current system and the Compact.

[325] In North Carolina in 2008, Bob Barr (the Libertarian candidate) received considerably more votes than the margin between Barack Obama and John McCain (the second-place candidate in the state).

[326] In Missouri in 2008, Ralph Nader received considerably more votes than the margin between John McCain and Barack Obama (the second-place candidate in the state).

[327] On January 6, 2021, the Democrats had a majority of the House membership and controlled the chamber, but the Republicans had a majority of the House delegations.

MORE DETAILED ANSWER:

It has been claimed that:

> "The current system quarantines … spoilers … within a small number of states."[328]

In fact, far from quarantining spoiler candidates, the current state-by-state winner-take-all method of awarding electoral votes greatly increases the payoff to potential spoilers and, therefore, increases their incentive to launch such campaigns.

The current system offers a potential spoiler the alluring prospect of finding one or more states where the spoiler's narrow appeal can flip all of a state's electoral votes and thereby possibly flip the national outcome.

In 2000, for example, George W. Bush won a 537-vote plurality in Florida. Ralph Nader's 97,488 popular votes in Florida in 2000 were more than sufficient to flip all of the state's electoral votes to Bush and thereby decide the presidency in an election in which 105,396,627 votes were cast nationally.[329]

In 2020, Libertarian presidential candidate Jo Jorgensen received considerably more popular votes in Arizona, Georgia, and Wisconsin than Biden's margin over Trump in these states, as shown in table 9.30. Without the 37 electoral votes from these three states, there would have been a 269–269 tie in the Electoral College. On January 6, 2021, the Republican Party had a majority of the House delegations and would have been in a position to choose Trump as President.[330]

Segregationist Strom Thurmond had a strong regional appeal and won 38 electoral votes in 1948 by carrying Alabama, Louisiana, Mississippi, and South Carolina.[331] Similarly, segregationist George Wallace won 46 electoral votes in 1968 by carrying Alabama, Arkansas, Georgia, Louisiana, and Mississippi.

In 2024, an NBC News story entitled "Operatives with GOP ties are helping Cornel West get on the ballot in a key state" said:

> "Democrats fear West's potential to siphon votes from President Joe Biden in places where he is on the ballot in a close election, and some Republicans are publicly discussing ways to boost West and other minor candidates like Robert F. Kennedy Jr. and the Green Party's Jill Stein in the hopes of splitting the anti-Donald Trump coalition."[332]

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[328] One of the authors of this book peer-reviewed an article submitted to an academic journal containing this claim. After receiving the reviewer's comments, the author of the article decided that this claim was false and removed it from the article that was eventually published.

[329] Nader was the most prominent minor-party nominee in the 2000 election. He received far more votes nationally and in Florida than any other minor-party candidate. The Reform Party (whose nominee was Pat Buchanan) was the minor-party that received the second-largest number of votes nationally and in Florida. However, the Reform Party nominee received only 17,484 votes in Florida.

[330] On January 6, 2021, the Democrats had a majority of the House membership and controlled the chamber, but the Republicans had a majority of the House delegations.

[331] In 1948, Thurmond received 37 electoral votes by carrying the four states along with one additional electoral vote from a Democratic elector in Tennessee (section 3.7.6).

[332] Seitz-Wald, Alex. 2024. Operatives with GOP ties are helping Cornel West get on the ballot in a key state. *NBC News*. June 7, 2024. https://www.nbcnews.com/politics/2024-election/operatives-gop-ties-are-helping-cornel-west-get-ballot-key-state-rcna153110

Under the current system, minor-party and independent candidates have significantly affected the outcome in 42% (eight out of 19) of the presidential elections between the end of World War II and 2020 by switching electoral votes from one major-party candidate to another, including:

- Henry Wallace in 1948
- Strom Thurmond in 1948
- George Wallace in 1968
- John Anderson in 1980
- Ross Perot in 1992 and 1996
- Ralph Nader in 2000
- Ralph Nader in 2008
- Bob Barr in 2008
- Gary Johnson in 2016
- Jill Stein in 2016
- Jo Jorgensen in 2020.

The current system also entices potential spoilers with another disproportionate payoff, namely denying an absolute majority of the electoral votes to any candidate. That result would either throw the choice of President into the U.S. House of Representatives or enable the spoiler to use his or her presidential electors to bargain with the major parties. This latter prospect has proven especially alluring to regional candidates, such as segregationist Strom Thurmond (who won 39 electoral votes in 1948 with only 2.4% of the national popular vote) and segregationist George Wallace (who won 46 electoral votes in 1968 with 13.5%).

The National Popular Vote Compact eliminates the possibility of a presidential election being thrown into Congress (section 1.6).

9.11. MYTHS ABOUT EXTREMIST AND REGIONAL CANDIDATES

9.11.1. MYTH: Extremist candidates and radical politics would proliferate under a national popular vote.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential to prevent the election of extremist candidates, then large numbers of extremists would win elections that do not employ an Electoral College type of arrangement (which, of course, includes virtually every other election for public office in the United States).
- After more than two centuries of gubernatorial elections and more than one century of direct election of U.S. Senators, we see no evidence of the emergence of extremist candidates in elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated that the National Popular Vote Compact:

> "could also radicalize American politics."[333]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted that if the President were elected by a national popular vote,

> "extremist candidates could more easily sway an election."[334]

If an Electoral College type of arrangement were essential to prevent the election of extremist candidates, then large numbers of extremists would win elections that do not employ an Electoral College type of arrangement (which, of course, includes virtually every other election for public office in the United States).[335]

At the time the U.S. Constitution came into effect in 1789, Governors were popularly elected in five states (Connecticut, Massachusetts, New Hampshire, New York, and Rhode Island).

Today, all Governors are chosen in elections in which every vote is equal and in which the winner is the candidate receiving the most popular votes.

After over two centuries of actual experience in over 5,000 statewide elections for state chief executive, the radicalization of politics predicted by von Spakovsky and Ross has yet to materialize.

Similarly, U.S. Senators were elected by state legislatures under the original U.S. Constitution. However, since ratification of the 17th Amendment in 1913, U.S. Senators have been elected by the people.

As Neil Peirce wrote in his seminal 1968 book *The People's President: The Electoral College in American History and Direct-Vote Alternative*:

> "If a direct vote really did lead to increased class antagonisms, ideologically oriented campaigns, and a lack of political moderation, we should have seen these factors at work already in the states, where every Governor is chosen today by direct vote of the people. The major states especially could be said to be microcosms of the entire nation. … Yet direct vote has not led to extremism in the states; indeed, the overwhelming majority of U.S. Governors have tended to be practical problem-solvers rather than ideological zealots. Nor has the U.S. Senate become a stomping group for extremists in the wake of the 17th Amendment, which shifted the selection of Senators from state legislatures to direct vote of the people."[336]

Candidates who attempt to win an election have a strong incentive to capture "the

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[333] Von Spakovsky, Hans. Popular vote scheme. *The Foundry*. October 18, 2011.

[334] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[335] We know of only one other office in the United States that is filled using an Electoral College type of arrangement, namely the Mayor of Richmond Virginia (section 9.9.1).

[336] Peirce, Neal R. 1968. *The People's President: The Electoral College in American History and Direct-Vote Alternative*. New York, NY: Simon & Schuster. Page 257.

middle" of their electorate. Counting the votes on a nationwide basis (instead of a statewide basis) would not change this imperative.

Given this historical record, there is no reason to expect the emergence of some new and currently unseen political dynamic if the President were elected in the same manner as virtually every other public official in the United States.

Nonetheless, Professor Daniel J. Singal of Hobart and William Smith Colleges warns:

> "Tom Golisano's proposal in his essay 'Make Every State Matter' to elect presidents on the basis of the popular vote rather than the Electoral College may sound appealing at first, but would in fact **wreak havoc on our national political system** in ways that he clearly does not understand.
>
> "Put simply, the Electoral College has turned out to be one of the most brilliant innovations the Founding Fathers devised when writing the Constitution. Its virtue is that **it directs our politics to the center of the political spectrum, helping us to avoid the extremism that might otherwise rule the day**."
>
> "**In states that are up for grabs independent voters in the middle of the political spectrum become crucial**. Since those states are usually decided by a few percentage points, the **candidates must gear their messages to appeal to those 'swing voters,' who by definition are not strong partisans** and thus open to either side."[337] [Emphasis added]

Singal also overlooks the fact that there are millions of "voters in the middle of the political spectrum" in the states that get no attention at all under the current state-by-state winner-take-all method of awarding electoral votes. He provides no reason why these "voters in the middle" would not be similarly "crucial" if the President were elected from a nationwide electorate. What is the justification for making "voters in the middle" in today's spectator states less important than the like-minded voters in battleground states?

The current Electoral College system has produced the same winner as a national popular vote in 54 of the nation's 59 presidential elections. Which of these 54 national popular vote winners were radicals and extremists?

9.11.2. MYTH: Regional candidates will proliferate under a national popular vote.

QUICK ANSWER:

- If an Electoral College type of arrangement were essential for avoiding regional candidates, we should see evidence of regional candidates in elections (such as gubernatorial elections) that do not employ an Electoral College type of arrangement.
- After more than two centuries of gubernatorial elections and more than one century of direct election of U.S. Senators, we see no evidence of the emergence of regional candidates or parties in statewide elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes.

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[337] Singal, Daniel J. The genius of the Electoral College. *Democrat and Chronicle*. Rochester, New York. August 23, 2012.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, raises the following question:

> "What if voters in New York and Massachusetts throw all their weight behind one regional candidate?"[338]

If an Electoral College type of arrangement were essential for avoiding Ross' concern, we would see evidence of regional candidates or parties in elections that do not employ an Electoral College.

When the chief executives of states (that is, Governors) are chosen in elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes, we do not see the emergence of, for example, an Eastern Shore Party in Maryland, an Upper Peninsula Party in Michigan, a Philadelphia Party in Pennsylvania, a Sierra Party in California, an Upstate Party in New York, or a Panhandle Party in Florida.

Similarly, we do not see regional parties nominating candidates to run for the U.S. Senate.

In fact, plurality voting *discourages* the formation of regional parties. The reason is that a vote for a niche candidate usually produces the politically counter-productive effect of electing a candidate whose views are diametrically opposite to those of the voter, as discussed in more detail in the section on Duverger's Law (section 9.10.1).

Ross' criticism of the National Popular Vote Compact concerning regional candidates is an example of a criticism that actually applies more to the current state-by-state winner-take-all method of awarding electoral votes than to a national popular vote for President.

Based on historical evidence, regional candidates are far more common under the state-by-state winner-take-all system of electing the President than in elections in which every vote is equal and in which the winner is the candidate who receives the most popular votes in the entire jurisdiction involved.

In 1948, Henry Wallace (a leftist candidate for President) and South Carolina Governor Strom Thurmond (a pro-segregation candidate for President) each received 1.2 million popular votes. However, Strom Thurmond (who carried four southern states) won 39 electoral votes in 1948, whereas Henry Wallace (whose support was distributed more evenly throughout the country and therefore carried no states) received no electoral votes.

Ross Perot's percentage of the national popular vote in 1992 was twice the percentage received in 1968 by Alabama Governor George Wallace (a pro-segregation candidate). However, Perot's support was distributed fairly evenly across the country, and he therefore won no electoral votes in 1992. In contrast, George Wallace won 46 electoral votes in 1968 by carrying five southern states (Alabama, Arkansas, Georgia, Louisiana, and Mississippi).

In short, the current state-by-state winner-take-all method of awarding electoral votes perversely discriminates against minor-party and independent candidates who have a broad national base of support, while encouraging regional minor-party candidates.

It gives regional candidacies such as Strom Thurmond and George Wallace the opportunity to affect the national outcome by carrying certain states outright as well as shifting

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[338] Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

electoral votes of other states from one major-party candidate to another. The current system also gives regional candidates the hope of being able either to throw the presidential election into the U.S. House of Representatives or to use their presidential electors to bargain with the major-party candidates before the Electoral College meeting in December.

9.11.3. MYTH: The current system prevents the election of a candidate with heavy support in one region while being strongly opposed elsewhere.

QUICK ANSWER:

- There is nothing in the state-by-state winner-take-all method of awarding electoral votes that prevents the election of a candidate with heavy support in one region while being strongly opposed elsewhere. Indeed, in 1860, Abraham Lincoln won a majority in the Electoral College (and, therefore, the presidency) after receiving 1,855,993 popular votes from the North and a mere 1,887 popular votes from the South.

MORE DETAILED ANSWER:

University of Denver Sturm College of Law Professor Robert Hardaway, author of *The Electoral College and the Constitution: The Case for Preserving Federalism*,[339] has written:

> "**The Electoral College was designed** to ensure that support for any presidential candidate was broad as well as deep; **to prevent, for example, the election of a president who gained an insuperable popular vote margin in but one region of the country**—say the South—even while being opposed in all other regions of the country.[340] [Emphasis added]

There is no federal constitutional or statutory requirement concerning the regional distribution of votes necessary for election to the presidency.

The regional distribution of popular votes among the states is not a precondition for awarding electoral votes under any state's winner-take-all law.

This fact was dramatically illustrated in the 1860 presidential election, when Lincoln received no popular votes (and, of course, no electoral votes) from nine southern states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and Texas).[341] Lincoln received a mere 1,887 popular votes from Virginia in 1860.[342]

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[339] Hardaway, Robert M. 1994. *The Electoral College and the Constitution: The Case for Preserving Federalism*. Westport, CT: Praeger.

[340] Hardaway, Robert M. 2017. The French election shows the risk of abolishing the Electoral College. May 21, 2017. http://historynewsnetwork.org/article/165928

[341] In 1860, South Carolina (the first state to secede from the Union) was the only state in the country where the legislature selected the state's presidential electors. However, if South Carolina voters had been allowed to vote for President, it is unlikely that Lincoln would have received any substantial number of popular votes in that hotbed of secessionism—much less any electoral votes.

[342] Community pressure was the reason why Lincoln received so few popular votes in the southern states. Until the 1890s, voting in the United States was not secret. Moreover, there were no government-printed ballots. Thus, community pressure significantly influenced voting in the days before the secret ballot (the so-called "Australian ballot"). Votes were cast in various ways, including *viva voce* or by the voter depositing a paper

Table 9.31 1860 election results

	Lincoln (R)	Douglas (D)	Breckinridge (SD)	Bell (CU)	EV-R	EV-ND	EV-SD	EV-CU
AL	0	13,618	48,669	27,835			9	
AR	0	5,357	28,732	20,063			4	
FL	0	223	8,277	4,801			3	
GA	0	11,581	52,176	42,960			10	
LA	0	7,625	22,681	20,204			6	
MS	0	3,282	40,768	25,045			7	
NC	0	2,737	48,846	45,129			10	
SC	0	0	0	0			8	
TN	0	11,281	65,097	69,728				12
TX	0	0	47,548	15,438			4	
VA	1,887	16,198	74,325	74,481				15
CA	38,733	37,999	33,969	9,111	4			
CT	43,486	17,364	16,558	3,337	6			
DE	3,822	1,066	7,339	3,888			3	
IL	172,171	160,215	2,331	4,914	11			
IN	139,033	115,509	12,295	5,306	13			
IA	70,302	55,639	1,035	1,763	4			
KY	1,364	25,651	53,143	66,058				12
ME	62,811	29,693	6,368	2,046	8			
MD	2,294	5,966	42,482	41,760			8	
MA	106,684	34,370	6,163	22,331	13			
MI	88,450	64,889	805	405	6			
MN	22,069	11,920	748	0	4			
MO	17,028	58,801	31,362	58,372		9		
NH	37,519	25,887	2,125	412	5			
NJ	58,346	62,869	0	0	4	3		
NY	362,646	312,510	0	0	35			
OH	221,809	187,421	11,303	12,193	23			
OR	5,344	4,131	5,074	212	3			
PA	268,030	16,765	178,871	12,776	27			
RI	12,244	7,707	0	0	4			
VT	33,808	8,649	1,866	217	5			
WI	86,113	65,021	888	161	5			
	1,855,993	**1,381,944**	**851,844**	**590,946**	**180**	**12**	**72**	**39**

Table 9.31 shows that Lincoln received almost no popular votes and no electoral votes from the 11 southern states that later seceded from the Union. The four candidates in that election were:

- Abraham Lincoln (Republican)
- Stephen A. Douglas (northern Democrat)
- John C. Breckenridge (southern Democrat)
- John Bell (Constitutional Union).

The table is arranged so that the 11 Confederate states are at the top. Lincoln won the most popular votes nationwide.

"ticket" (typically printed by the voter's political party in the party's distinctive color) into a glass bowl or ballot box in the full view of observers. See figures 3.6 and 3.7 for examples of such party tickets. See section 3.10 for a discussion of the introduction of government-printed ballots.

He also won the required absolute majority of the electoral votes. The final electoral-vote count was:

- Lincoln (Republican)–180
- Douglas (Northern Democrat)–12
- Breckenridge (Southern Democrat)–72
- Bell (Constitutional Union)–39.

Moreover, almost all presidential elections—both before and after the Civil War—have had a pronounced regional pattern, including most modern presidential elections (as discussed further in the next section).

9.11.4. MYTH: It is the genius of the Electoral College that Grover Cleveland did not win in 1888, because the Electoral College works as a check against regionalism.

QUICK ANSWER:

- The state-by-state winner-take-all method of awarding electoral votes does not protect against regionalism.
- In 1888, the state-by-state winner-take-all method of awarding electoral votes gave the presidency to one *regional* candidate (Republican Benjamin Harrison) who received fewer popular votes nationwide rather than another *regional* candidate (Democrat Grover Cleveland) who received more popular votes nationwide.

MORE DETAILED ANSWER:

One of the shortcomings of the state-by-state winner-take-all method of awarding electoral votes is that it is possible for a candidate to win the presidency without winning the most popular votes nationwide.

Of the 59 presidential elections between 1789 and 2020, there have been five elections in which the candidate with the most popular votes nationwide did not win the presidency (table 1.1).

The election of 1888 between Democrat Grover Cleveland and Republican Benjamin Harrison was one such election.

Trent England, Executive Director of Save Our States, has written:

> "Because of the Electoral College, Cleveland's intense regional popularity—even when it gave him a raw total majority—was not enough to win the presidency.
>
> "Successful presidential campaigns must assemble broad, national coalitions.
>
> "**It is the genius of the Electoral College that Grover Cleveland did not win in 1888. The Electoral College works as a check against regionalism** and radicalism.

> "American politics are more inclusive, moderate, stable, and nationally unified because of the Electoral College."[343] [Emphasis added]

Figure 9.7 shows the distribution of electoral votes in the 1888 presidential election. Democrat Grover Cleveland's states are shown in black, and Republican Benjamin Harrison's states are thatched. The white portions of the map represent territories that were not states in 1888.

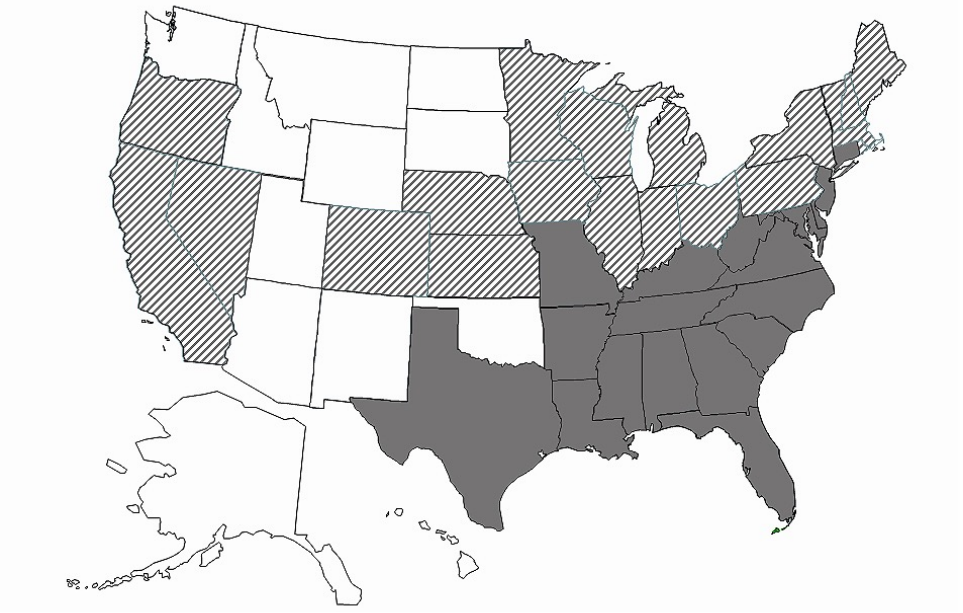

Figure 9.7 Results of 1888 election

It is certainly true that this map shows a regional concentration of states (in black) carried by Grover Cleveland—the candidate who received the most popular votes nationwide.

However, this same map shows a regional concentration of support for the loser of the national popular vote—Benjamin Harrison.

How is "the genius of the Electoral College" demonstrated by giving the presidency to a *regional* second-place candidate (Benjamin Harrison), in preference to a *regional* first-place candidate (Grover Cleveland)?

Moreover, let's look closer at England's assertion that Cleveland was the regional candidate in the 1888 election. Cleveland carried two northern states (namely New Jersey and Connecticut), whereas Harrison carried no southern or border states. That is to say, of the two candidates, Harrison did a manifestly poorer job than Cleveland of reaching across the geographic divisions reminiscent of the recently concluded Civil War.

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[343] England, Trent. What Grover learned at (the) Electoral College: American politics are more inclusive, moderate, stable, and nationally unified because of the Electoral College. December 15, 2009. http://www.saveourstates.com/2009/what-grover-learned-at-the-electoral-college/.

As to the actual history of the situation, Cleveland failed to win the Electoral College in 1888 because he lost one state (New York with 36 electoral votes) by the slender margin of 14,373 popular votes. He lost New York because of his intra-party feud with Tammany Hall.

England's claims about the "genius" of the Electoral College are incorrect for an additional reason. Indeed, England did not mention that Cleveland ran for President three times and won the same southern states in all three races.

Cleveland won the presidency in 1884 and then lost it in 1888 solely because of narrow margins in one decisive state—New York.

In 1892, he won the presidency, thanks to winning New York and some other states.

If the "genius" of the state-by-state winner-take-all system is praiseworthy for denying Cleveland the presidency in one election (1888), why does England not criticize that same system for handing him the presidency in two other elections (1884 and 1892)?

Moreover, the regional pattern of the presidential election immediately *before* Cleveland's three runs (that is, 1880) was almost identical to that of the 1888 election.

In figure 9.8, 1880 Democrat Winfield Hancock's states are shown in black, and Republican James Garfield's states are thatched.

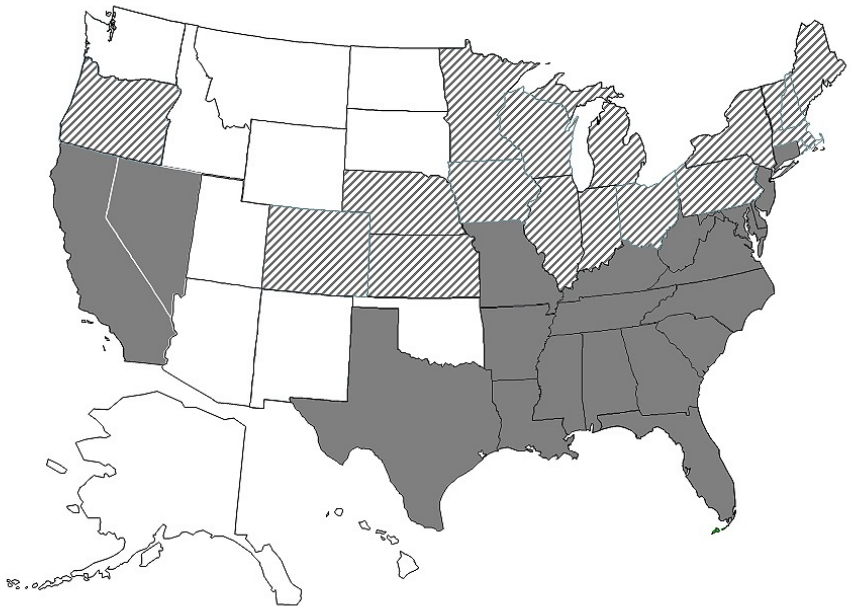

Figure 9.8 Results of 1880 election

How is Trent England's claim that "the Electoral College works as a check against regionalism" illustrated by the election in 1880 of Garfield—a manifestly regional candidate?

In fact, most *pre*-Civil-War elections, starting with the nation's first competitive election in 1796, exhibited a distinctly regional pattern.

Moreover, most *post*-Civil-War elections evidenced a regional pattern similar to that of the 1880 and 1888 elections.

In fact, a comparison of the map for the 2012 presidential election with the maps for 1880 and 1888 shows that regionalism was alive and well in the nation's 57th presidential election.

In figure 9.9, the states that Barack Obama won in 2012 are shown in black, and Republican Mitt Romney's states are thatched.

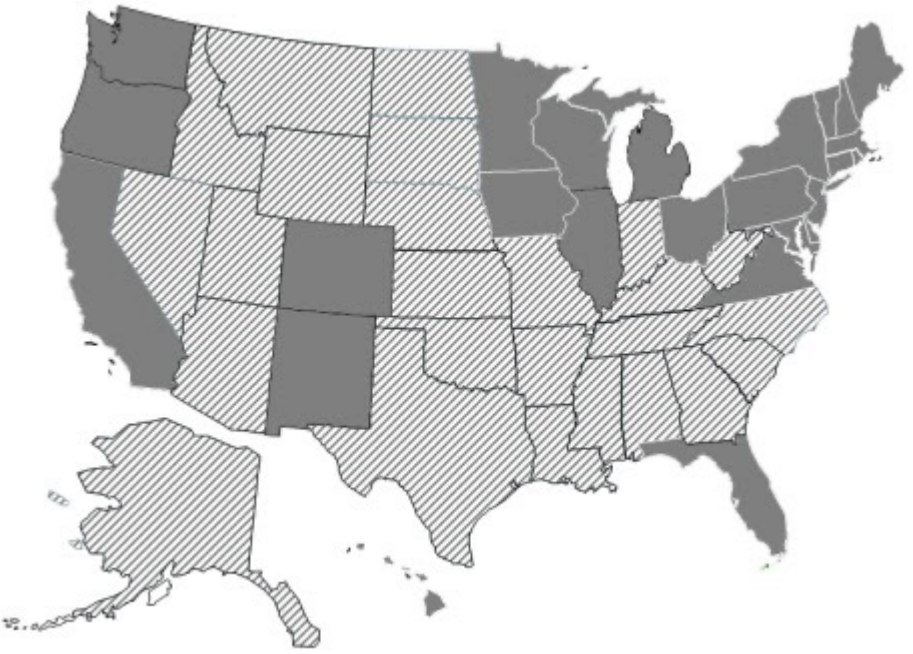

Figure 9.9 Results of 2012 election

Trent England's claim that "the Electoral College works as a check against regionalism" was not true *during* the Gilded Age when Cleveland ran, was not true *before* the Gilded Age, and is not true today.

Finally, let's return to England's claim about radicalism:

> "It is the genius of the Electoral College that Grover Cleveland did not win in 1888. **The Electoral College works as a check against** regionalism and **radicalism**."[344]

Does anyone know of any credible historian or political observer who regards Grover Cleveland as a radical?

[344] *Ibid.*

9.12. MYTHS ABOUT MOB RULE, DEMAGOGUES, AND TYRANNY OF THE MAJORITY

9.12.1. MYTH: A national popular vote would be mob rule.

QUICK ANSWER:

- The American people currently cast votes for President in 100% of the states, and they have done so since 1880. If anyone is inclined to use the term "mob" to characterize the American electorate, it is a long-settled fact that the mob already determines the winners in American presidential elections.
- The issue presented by the National Popular Vote Compact is not whether the mob will rule in presidential elections, but whether the mob's votes will be tallied on a state-by-state basis versus a nationwide basis—that is, whether the mob in a handful of closely divided battleground states should be more influential than the mob in the remaining states.

MORE DETAILED ANSWER:

This myth apparently originates from the failure (by some) to realize that the American people cast votes for President in 100% of the states, and that they have done so in all the states since 1880.[345]

If anyone is inclined to use the term "mob" to characterize the American electorate, it is a long-settled fact that the mob rules in American presidential elections.

The issue presented by the National Popular Vote Compact is not whether the "mob" will rule in presidential elections, but whether the mob's votes will be tallied on a state-by-state basis versus a nationwide basis.

The National Popular Vote Compact is concerned with the relative importance of popular votes cast in different states for presidential electors. Under the current system, presidential candidates concentrate their attention in the general-election campaign on voters in a handful of closely divided battleground states, while ignoring voters in the remaining states.

The Compact would address this shortcoming of the current system by making every vote equally important in every state in every presidential election.

Thus, the issue presented by the National Popular Vote proposal is not whether the mob will rule but whether the mob in a dozen-or-so battleground states should be more important than the mob in the remaining states.

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[345] In fact, starting with the 1836 election, no more than one state failed to allow the voters to vote for presidential electors. Between 1836 and 1860, South Carolina was the one state whose legislature chose the state's presidential electors. In 1868, the Florida legislature chose the state's presidential electors. The last time presidential electors were chosen by any state legislature was 1876 in Colorado.

9.12.2. MYTH: The Electoral College acts as a buffer against popular passions.

QUICK ANSWER:

- The Electoral College has never operated as a deliberative body or as a buffer against popular passions in its choice for President.
- There is no reason to think that the Electoral College would ever operate as a buffer against the winner of a presidential election, regardless of whether the winner is determined on the basis of the state-by-state winner-take-all method of awarding electoral votes or the national popular vote.

MORE DETAILED ANSWER:

This myth apparently originates from the failure (by some) to realize that the Electoral College has never acted as a buffer against popular passions.

It is true that the Founding Fathers envisioned that the Electoral College would consist of "wise men" (and they meant *men*) who would deliberate on the choice of the President and "judiciously" select the best candidate for the office.

As John Jay (the presumed author of *Federalist No. 64*) wrote in 1788:

> "As the **select assemblies for choosing the President** … will in general be **composed of the most enlightened and respectable citizens**, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues."[346] [Emphasis added]

As Alexander Hamilton (the presumed author of *Federalist No. 68*) wrote in 1788:

> "[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **A small number of persons**, **selected by their fellow-citizens from the general mass**, will be most likely to possess **the information and discernment requisite to such complicated investigations**."[347] [Emphasis added]

The vision of the Founding Fathers for a deliberative Electoral College was never realized in practice—primarily because the Founders did not anticipate the emergence of political parties.

In the nation's first two presidential elections (1789 and 1792), the Electoral College *did not* act as a deliberative body or as a buffer against popular passions. Instead, it acted in harmony with the virtually unanimous nationwide consensus favoring George Washington as President.

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[346] The Powers of the Senate. *Independent Journal*. March 5, 1788. *Federalist No. 64*.

[347] Publius. The mode of electing the President. *Independent Journal*. March 12, 1788. *Federalist No. 68*.

As soon as George Washington announced that he would not run for a third term as President in 1796, a competition for power emerged between two parties holding opposing views about how the country should be governed.

As a result, in 1796, the Federalists and the Republicans nominated presidential candidates at caucuses composed of each party's members of Congress.

Given that the President and Vice President were to be elected by the Electoral College, as soon as there were centrally designated nominees, each party presented the public with its list of candidates for presidential elector. These elector candidates made it known that they intended to act as willing rubber stamps for their party's nominees. They made their intentions known by means of advertisements in newspapers, public statements, and having their names appear on their party's printed lists of elector candidates.

In short, neither party wanted the Electoral College to act as a deliberative body in 1796, because each wanted to elect their nominees for President and Vice President (section 2.5).

Since the emergence of political parties in 1796, members of the Electoral College have almost always voted for the nominees determined by the nominating caucus or convention of their political party (section 3.7).

That is, the Electoral College does not, as a practical matter, act as a deliberative body or as a buffer against popular passions.

There is no reason to think that the Electoral College would ever operate as a buffer against the winner of a presidential election—regardless of whether presidential electors are elected on the basis of the state-by-state winner-take-all rule or the national popular vote.

9.12.3. MYTH: The Electoral College would prevent a demagogue from coming to power.

QUICK ANSWER:

- The National Popular Vote Compact would not abolish the position of presidential elector or the Electoral College. Thus, there would be no reduction in whatever protection (if any) that the current Electoral College system might provide in terms of preventing a demagogue from coming to power in the United States. However, there is no reason to think that the Electoral College would prevent a demagogue from being elected President—regardless of whether its members are elected under the state-by-state winner-take-all method of awarding electoral votes or a national popular vote.
- It is the responsibility of the voters to ensure that no future President of the United States is a demagogue.

MORE DETAILED ANSWER:

A Georgia state legislator wrote one of his constituents in 2023:

> "The reason for the creation of the Electoral College by our founding fathers and its inclusion in the constitution is to have a means of preventing a populist

> 'man on a horse,' who makes wild appeals to the emotions of the voters of the nation from becoming the President of the United States. It is a safeguard that our founders felt to be most important. I agree with them."[348]

There is nothing about the state-by-state winner-take-all method of awarding electoral votes that favors or impedes demagogues.

Presidential electors are loyal supporters of the nominee of their political party.

There is no reason to think that presidential electors nominated by a demagogue's political party would be less loyal to their party's nominee than a presidential elector representing a non-demagogic candidate. If anything, presidential electors nominated by a demagogue's party would probably likely be more fiercely loyal to their candidate.

Thus, it is unlikely that the current Electoral College system could prevent a demagogue from being elected President—regardless of whether votes for presidential elector are tallied on the basis of the state-by-state winner-take-all rule or on the basis of the total nationwide popular vote.

The National Popular Vote Compact would not abolish the position of presidential elector or the Electoral College. Thus, there would be no reduction in whatever protection (if indeed there is any) that the current structure of the Electoral College might offer in terms of preventing a demagogue from coming to power.

It is certainly conceivable that a majority of the voters might, at some time in the future, support a demagogue for President of the United States. However, if they were to do so, there is no reason to think that the Electoral College or winner-take-all method of awarding electoral votes would save the voters from themselves.

Likewise, there is no reason to think that a nationwide popular vote would necessarily save the voters from themselves.

Ultimately, it is the responsibility of the voters to ensure that no demagogue becomes President of the United States.

9.12.4. MYTH: Hitler came to power by a national popular vote.

QUICK ANSWER:

- Adolf Hitler did not come to power in Germany as a result of winning the nationwide popular vote or by winning a majority of seats in Parliament.

MORE DETAILED ANSWER:

It is sometimes asserted that Adolf Hitler came to power in Germany as a result of a national popular vote and that the Electoral College method of electing the President would prevent a similar demagogue from coming to power in the United States.[349]

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[348] Email forwarded to National Popular Vote by a Georgia voter. May 11, 2023.

[349] The issue of a demagogue becoming President comes up with moderate frequency, including at a November 13, 2012, debate on the National Popular Vote Compact held at a meeting of the National Policy Council of the American Association of Retired Persons in Washington, D.C. The debaters included Vermont State Representative Chris Pearson, Professor Curtis Gans, and Dr. John R. Koza (chair of National Popular Vote).

Adolf Hitler did not come to power in Germany as a result of a national popular vote. In fact, Hitler was rejected by almost a two-to-one nationwide popular vote margin when he ran for the presidency of the Weimar Republic in 1932.

Specifically, in the March 13, 1932, election for President, the results were:

- Hindenburg (the incumbent)—49.6%
- Hitler (National Socialist)—30.1%
- Thälmann (Communist)—13.2%
- Duesterberg (Nationalist)—6.8%.[350]

Because President Hindenburg did not receive an absolute majority of the votes, a run-off was held on April 10, 1932, among the top three candidates. The results of the run-off were:

- Hindenburg (the incumbent)—53.0%
- Hitler (National Socialist)—36.8%
- Thälmann (Communist)—10.2%.

On July 31, 1932, parliamentary elections were held in Germany. At that time, Hitler's National Socialist Party won the largest number of seats in the Reichstag (230 out of 608); however, these 230 seats were far from a parliamentary majority.

On November 6, 1932, another parliamentary election was held, and Hitler's party lost ground. Its number of seats was reduced to 196 seats out of 608 in the Reichstag.

Despite the voters' rejection of Hitler in the April 1932 presidential election, despite their rejection of his party in the July 1932 parliamentary elections, and despite the decline of his party in the November 1932 parliamentary elections, a backroom political deal was orchestrated in January 1933 by power brokers who (quite mistakenly) thought they could control Hitler.

As part of this deal, President Hindenburg appointed Adolf Hitler as Chancellor of Germany on January 30, 1933.

Once in power as Chancellor, Hitler quickly used his position (and, in particular, the control over the police that he acquired as part of the deal) to establish a one-party dictatorship in Germany.

9.12.5. MYTH: The current system prevents tyranny of the majority.

QUICK ANSWER:

- Winner-take-all statutes enable a mere *plurality* of voters in each state to control 100% of a state's electoral vote, thereby extinguishing the voice of the remainder of the state's voters. The state-by-state winner-take-all rule does not prevent a "tyranny of the majority" but instead *is an example of it.* As Missouri Senator Thomas Hart Benton said in 1824, "This is … a case … of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."

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[350] Shirer, William L. 1960. *The Rise and Fall of the Third Reich.* New York, NY: Simon and Shuster.

- Under the American system of government, protection against a "tyranny of the majority" comes from specific protections of individual rights contained in the original Constitution and the Bill of Rights; the "checks and balances" provided by dividing government into three branches (legislative, executive, and judicial); the existence of an independent judiciary; and the fact that the United States is a "compound republic" in which governmental power is divided between two distinct levels of government—state and national.
- It is impossible to discern any specific threat of "tyranny of the majority" that was posed by the first-place candidates in the five elections in which the Electoral College elevated the second-place candidate to the presidency (1824, 1876, 1888, 2000, and 2016).

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has written:

> "The U.S. election system addresses the Founders' fears of a 'tyranny of the majority,' a topic frequently discussed in the *Federalist Papers*. In the eyes of the Founders, this tyranny was as dangerous as the risks posed by despots like King George."[351]

State winner-take-all statutes enable a mere *plurality* of voters in each state to control 100% of a state's electoral vote, thereby extinguishing the voice of all the other voters in a state.

Suppressing the voice of a state's minority is, by definition, an example of "tyranny of the majority." The state-by-state winner-take-all rule does not prevent a "tyranny of the majority" but instead *is an example of it*.

In 1824, Missouri Senator Thomas Hart Benton said the following about the winner-take-all rule in a Senate speech:

> "The general ticket system, now existing in 10 States was the offspring of policy, and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States, to enable them to consolidate the vote of the State. … **The rights of minorities are violated** because a majority of one will carry the vote of the whole State. … **This is … a case … of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed**."[352] [Emphasis added]

The winner-take-all rule treats all the voters who did not vote for the first-place candidate *as if* they had voted for the first-place candidate.

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[351] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[352] 41 *Annals of Congress* 169. February 3, 1824. https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=041/llac041.db&recNum=2

In each of the six presidential elections between 2000 and 2020, the current system prevented 44% to 46% of the nation's voters from helping their candidate in the decisive stage of the selection process—that is, in the Electoral College. For example, in 2020, the winner-take-all rule resulted in 68,942,639 voters being zeroed out at the state level—44% out of the nation's 158,224,999 voters. This issue is discussed in greater detail in section 1.7.

Five elections in which the second-place candidate became President

If the winner-take-all rule protects the nation against a "tyranny of the majority," it would be appropriate to inquire as to what specific threat of "tyranny" was posed by the first-place candidate in the five elections in which the Electoral College elevated the second-place candidate (1824, 1876, 1888, 2000, and 2016).

What "tyranny" did the winner-take-all rule prevent by not giving the White House to the candidate receiving the most popular votes nationwide in 1888 (Grover Cleveland) and instead installing the second-place candidate (Benjamin Harrison)?

If Andrew Jackson presented the threat of "tyranny" in 1824 (when the Electoral College system denied him the presidency), why did he not present an equal threat in 1828 and 1832 (when he *was* elected by the Electoral College)?

Constitutional protections against tyranny of the majority

The U.S. Constitution provides multiple protections against a "tyranny of the majority."

First, there are numerous protections of individual rights contained in specific clauses of the Constitution, such as the prohibition of *ex post facto* laws, prohibition of bills of attainder (i.e., legislative acts that impose criminal penalties on named individuals), and prohibition on religious tests for office. Numerous additional protections were added by the Bill of Rights.

Second, an independent judiciary provides significant protection against "tyranny of the majority."

Third, the division of the federal government into three independent branches (legislative, executive, and judicial) provides additional protection against a "tyranny of the majority."

Fourth, additional protection comes from the fact that the United States is a "compound republic" in which governmental power is divided between two distinct levels of government—state and national. James Madison explained the concept of a "compound republic" in *Federalist No. 51*:

> "**In the compound republic of America, the power surrendered by the people is first divided between two distinct governments**, and then the portion allotted to each subdivided among distinct and separate departments. **Hence a double security arises to the rights of the people. The different governments will control each other**, at the same time that each will be controlled by itself."[353] [Emphasis added]

[353] Publius. The structure of the government must furnish the proper checks and balances between the different departments. *Independent Journal.* February 6, 1788. *Federalist No. 51.*

In the words of President Theodore Roosevelt:

> "If the minority is as powerful as the majority, there is no use of having political contests at all, for there is no use in having a majority."[354]

9.13. MYTHS ABOUT CAMPAIGNS

9.13.1. MYTH: Campaign spending would skyrocket if candidates had to campaign in every state.

QUICK ANSWER:

- Presidential candidates make every effort to raise as much money for their campaigns as they can from donors throughout the country. The total amount of money that is spent on presidential campaigns is controlled by the amount of money that is available—not by the (virtually unlimited) number of opportunities to spend money.
- Under both the current state-by-state winner-take-all system and nationwide voting for President, candidates allocate the pool of money available to them from donors in the manner that they believe will maximize their chance of winning. Under the current system, virtually all of the money and campaign events are concentrated in a handful of closely divided battleground states, while three out of four states and three out of four voters get virtually no attention.
- The National Popular Vote Compact would not increase the total number of dollars available from donors. Candidates and their supporters would continue to raise as much money as they possibly could. The mere existence of three dozen additional states where a candidate should campaign in order to win a nationwide election would not, in itself, generate any additional money. However, in a nationwide election, candidates would have to allocate the available money among all the states rather than to just a dozen-or-so closely divided battleground states.

MORE DETAILED ANSWER:

The total amount of money that a presidential campaign can spend is determined by the amount of money that it can raise—not by the (virtually unlimited) opportunities for spending money.

There are two major steps in campaign budgeting.

First, presidential campaigns and their supporters try to raise as much money as possible from all sources available to them. All serious presidential campaigns raise money nationally.

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[354] Theodore Roosevelt, Address to the Federal Club, New York City, March 6, 1891. In Hagedorn, Hermann (editor). 1926. *The Works of Theodore Roosevelt*. Volume 14. Page 129.

Second, after a campaign organization ascertains how much money it has available, it engages in a resource-allocation process in order to decide how to spend the money in the most advantageous way.

Today, the controlling factor in allocating resources is the state-by-state winner-take-all method of awarding electoral votes. Under the current system, campaigns concentrate their spending on a handful of closely divided states and ignore the remaining states. They do this because they have nothing to lose, and nothing to gain, by trying to win votes in states where they are comfortably ahead or hopelessly behind.

For example, under the current system:

- 98% of the ad spending in 2012 was spent in 12 states (table 1.12).
- 99.75% of the ad spending in 2008 was spent in 16 states (table 1.16).

The National Popular Vote Compact would not increase the total number of dollars available from donors.

Under both the current state-by-state system and a national-popular-vote system, candidates would raise as much money as they possibly could from donors throughout the country.

However, once the money is raised, the resource-allocation process would be very different in a nationwide presidential election than under the current system. The reason is that every voter in every state and the District of Columbia would matter in a nationwide election. The available money would necessarily be allocated much more broadly than is the case today. Of course, for any given amount of available money, it would be impossible to run a campaign in every state at the same per-capita level of intensity as recent campaigns in the dozen-or-so battleground states.

Consider Ohio and Illinois in 2008. Both states had 20 electoral votes at the time. However, Ohio was a closely divided state at the time, while Illinois was a safely Democratic state. Ohio received $16,845,415 in advertising (table 1.16), whereas Illinois received only $53,896 in advertising. Ohio also received 62 of the 300 general-election campaign events (table 1.15), while Illinois received none. That is, under the current state-by-state winner-take-all system, Illinois was almost totally ignored, while Ohio received an enormous amount of attention in the general-election campaign.

In contrast, in a nationwide vote for President, it would be suicidal for a presidential campaign to ignore Illinois. Some of the available pool of money would necessarily be reallocated to Illinois, because a voter in Illinois would be just as valuable as a voter in Ohio under the Compact. The likely result would be that Ohio and Illinois would receive approximately equal attention, because they are approximately equal in population.

The role of unpaid volunteers would change under a national popular vote. Under the current system, there is considerable grassroots campaigning for President in the battleground states, because people in those states know that their votes and those of their neighbors matter. However, in the spectator states, there is no significant grassroots campaigning for President under the current system (except for the relatively small number of people who make phone calls into battleground states or physically travel to battleground states in order to campaign). Under a national popular vote, campaigning would become worthwhile in every state. Increased volunteer activity could partially counter the effect of large donations in political campaigns.

9.13.2. MYTH: The length of presidential campaigns would increase if candidates had to travel to every state.

QUICK ANSWER:

- Critics of a national popular vote for President argue that the length of the general-election campaign for President would have to be increased if candidates had to "travel to 50 states to court voters."
- In fact, there is plenty of time between the late-summer nominating conventions and Election Day to conduct a nationwide campaign for President. For example, in 2016, the major-party presidential and vice-presidential candidates conducted 399 general-election campaign events. Because of the current state-by-state winner-take-all method of awarding electoral votes, the candidates allocated two-thirds of these 399 visits to just seven states. The effect of the National Popular Vote Compact would be that candidates would have to allocate their campaigning time differently from how they do under the current system. Every voter in every state would be equally important in a nationwide presidential election. When every voter is equally important, those same 399 visits could be—and necessarily would be—spread over the entire country.

MORE DETAILED ANSWER:

In an article entitled "The Electoral College is Brilliant, and We Would Be Insane to Abolish It," Walter Hickey writes:

> "Nobody wants to make the presidential election season any longer ….
>
> "**If you make it so a President has to travel to 50 states to court voters**, **that's going to take time**."
>
> "**Dragging it out more months**, jet setting from California to New York on weekends, that would make an already annoying election period into a downright intolerable one."[355] [Emphasis added]

As Hickey correctly points out, the National Popular Vote Compact would force presidential candidates to "travel to 50 states to court voters."

Indeed, we view that as a highly desirable feature—not a bug—of a national popular vote for President.

In 2016, the major-party presidential and vice-presidential candidates conducted 399 general-election campaign events.[356] Because of the current state-by-state winner-take-all method of awarding electoral votes, almost four-fifths (79%) of all the campaign events (315 of 399) took place in eight states:

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[355] Hickey, Walter. 2012. The Electoral College is brilliant, and we would be insane to abolish it. *Business Insider*. October 3, 2012. http://www.businessinsider.com/the-electoral-college-is-brilliant-2012-10 .

[356] Because of the COVID pandemic, there was an unusually low number (212) of general-election campaign events in 2020.

- Florida–71 events
- North Carolina–55 events
- Pennsylvania–54 events
- Ohio–48 events
- Virginia–23 events
- Michigan–22 events
- Iowa–21 events
- New Hampshire–21 events.

There is no reason that candidates could not have distributed these 399 campaign visits across all 50 states, instead of concentrating them in a small number of states. Planes, trains, and automobiles enable candidates to easily travel to any part of the county.

In fact, on a typical day during the fall general-election campaign, presidential candidates typically travel from one end of the country to the other in order to maximize the number of appearances (and attendant local media coverage) on a given day.

More than a half century ago, during the 1960 general-election campaign, Vice President Richard M. Nixon personally campaigned in all 50 states, and Senator John F. Kennedy did so in 43 states in the period between August 1 and November 7 (as shown in table 1.30).

The effect of a national popular vote for President would be that candidates would have to allocate their campaigning visits differently from how they do under the current system.

Every voter in every state would be equally important in every presidential election under the National Popular Vote Compact. If every voter were equally important, those same 399 visits could be—and necessarily would be—allocated throughout the entire country.

Although one cannot predict exactly how a future presidential campaign might unfold under the National Popular Vote Compact, it is likely that presidential candidates would distribute their limited number of campaign events among the states roughly in proportion to population (as shown in table 8.38 and figure 8.11).

9.13.3. MYTH: It is physically impossible to conduct a campaign in every state.

QUICK ANSWER:

- The average number of general-election campaign events in the six presidential elections between 2000 and 2020 was 339.
- There is no physical reason why presidential candidates could not allocate the number of visits that they currently make to include all 50 states.

MORE DETAILED ANSWER:

Nevada Senator Keith Pickard told the Nevada Senate Committee on Legislative Operations and Elections on April 24, 2019, that it is:

> "impossible physically to do a 50-state campaign."

Table 8.37 shows the number of general-election campaign events for the major-party nominees for President and Vice President for the six presidential elections between 2000 and 2020. The average number of general-election campaign events in these six presidential elections was 339.[357]

Planes, trains, and automobiles enable candidates to easily travel to any part of the country. There is no physical reason why presidential and vice-presidential candidates could not visit all 50 states during the general-election campaign period starting after the national nominating conventions.

Let's suppose that a future presidential campaign consists of the same number of general-election campaign events as 2016 (that is, 399).

If the country's population (331,449,281 according to the 2020 census) is divided by 399, the result is one general-election campaign event for every 830,700 people.

In a nationwide popular vote for President, every vote would be equal, and the candidate receiving the most votes would win. Thus, a voter in one state would be just as important as a voter in any other state.

Table 8.38 and figure 8.11 show how 399 campaign events would be distributed among the states if candidates were to allocate their campaign events on the basis of population. That is, the number of campaign events for each state (shown in column 3) is obtained by dividing each state's population by 830,700 and rounding off. For purposes of comparison, column 4 shows the actual distribution of 399 general-election campaign events that each state received in 2016 under the current state-by-state winner-take-all system.

As can be seen in the figure and table, every state would receive some attention in a nationwide campaign with 399 general-election campaign events—that is, there would be a 50-state campaign for President.

9.13.4. MYTH: The effects of hurricanes and bad weather are minimized by the current system.

QUICK ANSWER:

- Under the current state-by-state winner-take-all system, a small difference in turnout (caused by bad weather or any other factor) in one part of a closely divided battleground state can potentially switch the electoral-vote outcome in that state (and hence the national outcome of the presidential election). In contrast, a localized reduction in turnout would be unlikely to materially affect the outcome of a nationwide vote for President.
- A national popular vote for President would reduce the likelihood of bad weather changing the national outcome of a presidential election.

[357] Note that this six-election average of 339 general-election campaign events reflects the impact of the COVID pandemic, which substantially reduced the number of campaign events in 2020 to only 212—about half of the 399 events in 2016.

MORE DETAILED ANSWER:

Thaddeus Dobracki has stated that the current state-by-state winner-take-all method of electing the President:

> "negates the effect of exceptionally high or low turn-out in a state by giving the state a fix[ed] number of electors. For example, **if bad weather, such as a hurricane, were to hit North Carolina**, then instead of losing influence because of a low turnout, **that state would still get its normal allocation of Electoral College votes**."[358] [Emphasis added]

The current state-by-state winner-take-all system does indeed ensure that a state affected by turnout-depressing weather (such as a hurricane) would nonetheless cast its *full number* of electoral votes in the Electoral College.

However, under the winner-take-all system, those electoral votes may be cast in a very different way because of the changed turnout.

Under the current system, a small difference in turnout (caused by bad weather or any other factor) in one part of a closely divided state can potentially flip the state's electoral-vote outcome—and thereby also potentially determine the national outcome of a presidential election.

In contrast, a localized reduction in turnout in one part of one state would be unlikely to materially affect the outcome of a nationwide vote for President.

Bad weather regularly affects the outcome of both state and federal elections.

John F. Kennedy might have received a far larger majority of the popular vote in the then-battleground states of Illinois and Michigan had the weather been better in Chicago and Detroit on Election Day in 1960. As Theodore White wrote in *The Making of the President 1968*:

> "The weather was clear all across Massachusetts and New England, perfect for voting as far as the crest of the Alleghenies. But from Michigan through Illinois and the Northern Plains states it was cloudy: **rain in Detroit and Chicago**, light snow falling in some states on the approaches of the Rockies."[359] [Emphasis added]

Similarly, bad weather in a part of a closely divided state frequently affects which candidate carries the state in a state or federal election.

A turnout-depressing weather event on North Carolina's hurricane-prone coast would adversely affect the Republican Party under the winner-take-all rule if it were to occur on or shortly before Election Day.

For example, the disposition of North Carolina's entire bloc of 15 electoral votes was decided by President Obama's statewide plurality of 14,177 popular votes in 2008.

Table 9.32 shows that 14 of the 17 counties on North Carolina's Atlantic coast voted heavily Republican in the 2008 presidential election. As can been seen from the table, John

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[358] Dobracki, Thaddeus. *The Morning Call*. September 21, 2012. http://discussions.mcall.com/20/allnews/mc-electoral-college-madonna-young-yv--20120920/10?page=2

[359] White, Theodore H. 1969. *The Making of the President 1968*. New York, NY: Atheneum Publishers. Page 7.

Table 9.32 Vote of North Carolina in 17 coastal counties in 2008

Coastal County	McCain	Obama	Republican margin	Democratic margin
Currituck	7,234	3,737	3,497	
Camden	3,140	1,597	1,543	
Pasquotank	7,778	10,272		2,494
Perquimans	3,678	2,772	906	
Chowan	3,773	3,688	85	
Bertie	3,376	6,365		2,989
Washington	2,670	3,748		1,078
Tyrrell	960	933	27	
Dare	9,745	8,074	1,671	
Hyde	1,212	1,241		29
Beaufort	13,460	9,454	4,006	
Pamlico	3,823	2,838	985	
Carteret	23,131	11,130	12,001	
Onslow	30,278	19,499	10,779	
Pender	13,618	9,907	3,711	
New Hanover	50,544	49,145	1,399	
Brunswick	30,753	21,331	9,422	
Total	**209,173**	**165,731**	**50,032**	**6,590**

McCain built up a net 43,433-vote margin from the state's 17 coastal counties. Thus, a hurricane hitting North Carolina's coast (causing disruption and evacuations) could easily shift the state's potentially critical bloc of electoral votes from one party to the other—potentially resulting in the state's electoral votes being cast in a way that is unrepresentative of voter sentiment in the state.

There was considerable speculation that Hurricane Sandy (which made landfall in Pennsylvania a week before the November 6, 2012, presidential election) might reduce voter turnout in the heavily Democratic city of Philadelphia (in the eastern part of the state). In contrast, the Republican central part of the state is much farther from the Atlantic Ocean. Lower turnout in Philadelphia had the potential of flipping the statewide plurality from Democrat Barack Obama to Republican Mitt Romney—thereby flipping the state's 20 potentially critical electoral votes. Such an outcome would not have been reflective of normal voter sentiment in Pennsylvania as indicated by virtually every statewide poll before Election Day in 2012.[360]

In a state such as Florida, the political effect of a hurricane would depend on the location of the hurricane's landfall.

Tampa is in Hillsborough County on the state's west coast. It was the site of the 2012 Republican National Convention. Hurricanes frequently hit Florida's west coast. In the November 2000 presidential election, George W. Bush received 180,794 votes in Hillsborough County, compared to Al Gore's 169,576 votes—giving Bush a county-wide margin of 11,218 votes. In 2000, Bush won Florida by 537 votes out of 5,963,110 votes. If a hurricane

[360] See the tabulation of statewide polls at the web site using the Gott-Colley median method of analyzing poll statistics at http://www.colleyrankings.com/election2012/

had even slightly depressed turnout in Hillsborough County on Election Day in November 2000, all of Florida's electoral votes would have gone to Al Gore (giving him all of Florida's 25 electoral votes and making him President).

Conversely, if bad weather were to depress turnout in the more Democratic counties (such as Miami-Dade, Broward, and Palm Beach) in southeastern Florida, the Republican presidential nominee would benefit.

It does not take an event as dramatic as a hurricane to change the outcome of a presidential election. For example, there is evidence that rain in part of Florida decided the national outcome of the 2000 presidential election (section 1.3.3).

9.13.5. MYTH: Plutocrats could cynically manipulate voter passions under the Compact.

QUICK ANSWER:

- Plutocrats can fund and manipulate election campaigns regardless of whether electoral votes are awarded on a state-by-state winner-take-all basis or a nationwide basis.

MORE DETAILED ANSWER:

Bill Cibes submitted written testimony to a Connecticut legislative committee in 2013, saying:

> "The NPV Compact would greatly enhance the influence of plutocrats who can afford to buy national advertising to cynically manipulate the passions of a nationwide electorate. Rich individuals, corporations and businesses, under the *Citizens United* decision, can now fund ideological propaganda that can sway the national popular vote."[361]

Plutocrats can fund and manipulate campaigns regardless of whether electoral votes are awarded on a state-by-state winner-take-all basis or a nationwide basis.

9.13.6. MYTH: Presidential campaigns would become media campaigns because of the Compact.

QUICK ANSWER:

- All presidential campaigns will be predominantly media campaigns, regardless of whether the target audience consists of the 60 to 95 million people living in the handful of closely divided battleground states or the 330 million people living in the entire country.
- A national popular vote for President might somewhat reduce the media's role, because it would make grassroots activity worthwhile in the 38-or-so states

[361] Cibes, Bill. 2013. Testimony at hearing of Connecticut Committee on Government, Administration, and Elections. February 25, 2013.

that are totally ignored under the current state-by-state winner-take-all method of awarding electoral votes.

- This criticism aimed at the National Popular Vote Compact is one of many examples in this book of a problem that applies equally to both the current system and the Compact.

MORE DETAILED ANSWER:

David Davenport, a defender of the current state-by-state winner-take-all method of awarding electoral votes, wrote in the *Washington Examiner* in 2018:

> "How would [candidates] campaign if there were only a national popular vote? They … **appear on popular media**. It is hard to say that this is a preferable campaign."[362] [Emphasis added]

Curtis Gans and Leslie Francis wrote in 2012:

> "By its very size and scope, **a national direct election will lead to nothing more than a national media campaign**, which would propel the parties' media consultants to inflict upon the entire nation what has been heretofore limited to the so-called battleground states: an ever-escalating, distorted arms race of tit-for-tat unanswerable attack advertising polluting the airwaves, denigrating every candidate and eroding citizen faith in their leaders and the political process as a whole.
>
> "Because a direct election would be, by definition, national and resource allocation would be **overwhelmingly dominated by paid television advertising, there would be little impetus for grassroots activity.**[363] [Emphasis added]

These criticisms of a national popular vote for President ignore the fact that, in a country with 330 million people, all presidential campaigns will be predominantly media campaigns.

This will be the case regardless of whether the target audience consists of the 60 to 95 million people living in the handful of closely divided battleground states or the 330 million people living in the entire United States.

Gans and Francis say that there would be "little impetus for grassroots activity" in a national popular vote for President. However, a nationwide campaign for President would make grassroots activity worthwhile in the spectator states that are ignored under the current state-by-state winner-take-all system. Thus, a national popular vote for President would slightly reduce the media's role in the campaign.

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[362] Davenport, David. 2018. Connecticut joins the quiet campaign to undermine constitutional presidential elections. *Washington Examiner*. May 21, 2018. https://www.washingtonexaminer.com/opinion/connecticut-joins-the-quiet-campaign-to-undermine-constitutional-presidential-elections

[363] Gans, Curtis and Francis, Leslie. Why National Popular Vote is a bad idea. *Huffington Post*. January 6, 2012.

9.13.7. MYTH: Candidates would concentrate on metropolitan markets because of lower television advertising costs.

QUICK ANSWER:

- The cost per impression of television advertising (the costliest component of presidential campaigns) is generally considerably higher—not lower—in major metropolitan media markets.

MORE DETAILED ANSWER:

John Samples of the Cato Institute has stated:

> "NPV will encourage presidential campaigns to focus their efforts in **dense media markets where costs per vote are lowest**."
>
> "In general, because of the relative costs of attracting votes, the NPV proposal seems likely at the margin to **attract candidate attention to populous states**."[364] [Emphasis added]

Claremont College Professor Michael Uhlmann stated in a January 20, 2012, debate at the Sutherland Institute in Salt Lake City:

> "Under the National Popular Vote system, necessarily, there's going to be tilting toward where the greater masses of votes are contained—in the larger cities and the immediate suburbs. That's where the votes are. **That's where they can be reached the most cheaply. That's where the maximum bang for the media buck gets paid**. I think that's the likely tendency."[365] [Emphasis added]

The arguments made by both Samples and Uhlmann are contrary to the facts.

The cost of television advertising (by far the costliest component of presidential campaigns) is generally considerably *higher* on a per-impression basis in the larger media markets than in smaller markets.

Based on 488 quotations from television stations in media markets of various sizes for 30-second prime-time television ads for the weeks of October 15 and 22, 2012, compiled by Ainsley-Shea (a Minneapolis public relations firm) in July 2012, the average cost per impression was:

- 4.235 cents for the 1st–5th markets,
- 4.099 cents for the 26th–30th markets, and
- 3.892 cents for the 101st–105th markets.

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[364] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 12. https://www.cato.org/policy-analysis/critique-national-popular-vote

[365] The debate at the Sutherland Institute on January 20, 2012, in Salt Lake City involved Dr. John R. Koza, Chair of National Popular Vote, Claremont College Professor Michael Uhlmann, and Trent England (a lobbyist opposing the National Popular Vote Compact and currently Executive Director of Save Our States). The event was moderated by Sutherland President Paul T. Mero.

Table 9.33 Television ads in New York City—the nation's No. 1 media market—averaged 5.19 cents per impression.

Station	Time	Program	Rating	Share	Gross rating points	Cost	Cost per 1,000
WABC	M 10–11	Castle	4.2	13.0%	8.4	$60,027	$46.58
WABC	Tu 9–10	Happy Endings	7.4	16.0%	14.8	$70,032	$31.06
WABC	W 10–11	Nashville	4.4	10.2%	8.8	$70,032	$51.55
WABC	Th 9–10	Grey's Anatomy	5.1	11.1%	10.2	$100,045	$63.94
WABC	F 8–9	Shark Tank	1.4	4.0%	2.8	$36,016	$81.45
WABC	Sat 8–11	ABC College Football	1	3.8%	2	$24,011	$74.53
WABC	Sun 7–8	America's Funniest Home Videos	1.3	4.4%	2.6	$20,009	$49.26
WNBC	M 8–10	The Voice	1.3	3.6%	2.6	$80,036	$203.05
WNBC	Tu 10–11	Parenthood	2.8	6.4%	5.6	$45,020	$52.45
WNBC	W 9–10	Law & Order SVU	3.4	7.5%	6.8	$60,027	$57.14
WNBC	Th 10–11	Rock Center	2.6	6.1%	5.2	$30,014	$37.50
WNBC	F 10–11	Dateline FR–NBC	2	5.0%	4	$25,011	$41.67
WNBC	Sat 9–10	Dateline	1	3.6%	2	$15,007	$49.02
WNBC	Sun 8:15–11:30	NFL Regular Season Football	6.8	20.1%	13.6	$100,045	$47.98
WCBS	M 8–9	How I Met Your Mother/Partners	4.1	12.0%	8.2	$60,027	$47.85
WCBS	Tu 10–11	Vegas	4.9	11.1%	9.8	$50,023	$33.47
WCBS	W 8–9	Survivors	3.6	8.8%	7.2	$50,023	$45.37
WCBS	Th 8–9	Big Bang–CBS/ RLS–ENGMNT–CBS	5.6	13.3%	11.2	$80,036	$46.78
WCBS	F 8–9	CSI:NY	3.3	9.2%	6.6	$30,014	$29.41
WCBS	Sta 9–10	Average	2.2	7.9%	4.4	$13,006	$19.40
WCBS	Sun 10–11	The Mentalist	3.2	9.7%	6.4	$60,027	$61.60
WPIX	M 8–10	90210/Gossip Girl	0.8	2.2%	1.6	$28,013	$115.70
WPIX	Tu 8–10	Hart of Dixie/Emily Owens	1.1	2.5%	2.2	$28,013	$81.87
WPIX	W 8–10	Arrow/Supernatural	0.7	1.7%	1.4	$28,013	$127.27
WPIX	Th 8–10	Vampire Diaries/ Beauty	2.4	5.4%	4.8	$28,013	$38.25
WPIX	F 8–10	Top Model/Nikita	0.8	2.2%	1.6	$17,008	$66.93
WPIX	Sat 8–10	Friends	0.2	0.9%	0.4	$17,008	$223.68
WPIX	Sun 8–10	Seinfeld	0.3	0.9%	0.6	$17,008	$173.47
		Total			**155.8**	**$1,241,558**	**$51.90**

The details of television advertising costs in the 1st, 26th, and 101st largest media markets further illustrate the conclusion that television advertising is generally more expensive in the larger media markets than in smaller markets.

Table 9.33 shows the cost of a 30-second prime-time television slot in New York City—the nation's No. 1 media market. Columns 1, 2, and 3 show the station, the time of day (all P.M.), and the program name, respectively. Columns 4, 5, and 6 show the rating,[366] share, and gross rating points (GRP), respectively, for adults 18 and older. Column 7 shows the

[366] The Nielsen "Live+3" ratings track both live airings and DVR playback (through 3:00 A.M.). Based on November 2011 DMA.

Table 9.34 Television ads in Indianapolis—the nation's No. 26 media market—averaged 3.98 cents per impression.

Station	Time	Program	Rating	Share	Gross rating points	Cost	Cost per 1,000
WRTV	M 8–10	Dancing with the Stars	8.5	15.6%	17	$16,007	$44.94
WRTV	Tu 10–11	Private Practice	6	12.6%	12	$16,007	$63.49
WRTV	W 10–11	Nashville	5.5	12.6%	11	$16,007	$69.57
WRTV	Th 9–10	Grey's Anatomy	6.8	12.4%	13.6	$20,009	$70.42
WRTV	F 9–10	Primetime	2	4.4%	4	$10,005	$119.05
WRTV	Sat 8–11	Saturday Movie	2.7	7.1%	5.4	$4,802	$42.86
WRTV	Sun 7–8	America's Funniest Home Videos	2.2	4.8%	4.4	$12,005	$130.43
WTHR	M 10–11	Revolution	3.2	7.1%	6.4	$6,003	$44.78
WTHR	Tu 10–11	Parenthood–NBC	4	8.4%	8	$8,004	$47.62
WTHR	W 9–10	Law & Order	6	12.1%	12	$7,003	$27.78
WTHR	Th 9–10	Office/Parks & Recreation	4.4	8.1%	8.8	$8,004	$43.48
WTHR	F 10–11	Dateline FR–NBC	2.9	7.2%	5.8	$4,002	$33.33
WTHR	Sa 8–9	NBC Encores	2.3	6.4%	4.6	$2,401	$25.00
WISH	M 10–11	Hawaii 5–0–CBS	6.2	13.9%	12.4	$5,002	$19.08
WISH	Tu 9–10	NCIS:LA–CBS	9	17.7%	18	$8,004	421.28
WISH	W 10–11	CSI	5.8	13.1%	11.6	$6,003	$25.00
WISH	Th 9–10	Person of Interest–CBS	6	11.0%	12	$10,005	$39.68
WISH	F 8–9	CSI:NY	4.2	10.9%	8.4	$3,201	$18.18
WISH	Sa 10–11	48 Hours	4.5	12.0%	9	$2,001	$10.64
WISH	Sun 9–10	The Good Wife	7	11.7%	14	$7,003	$23.81
WTTV+S2	M–Sun 8–11	Average	1.2	2.6%	16.8	$7,003	$19.23
		Total			**215.2**	**$178,480**	**$39.80**

cost of the slot. Column 8 shows the cost per 1,000 impressions (that is, the cost in column 7 divided by the media market's population of 15,334,000). The average cost for New York City was $51.90 per 1,000 impressions—that is, 5.19 cents per impression.

The similarly computed cost of a 30-second prime-time television slot in Los Angeles—the nation's No. 2 media market—averaged $56.53 per 1,000 impressions—5.653 cents per impression.

Table 9.34 shows the cost of a 30-second prime-time television slot in Indianapolis—the nation's No. 26 media market. Column 8 shows the cost per 1,000 impressions (that is, the cost in column 7 divided by the market's population of 2,094,000). The average cost for Indianapolis was $39.80 per 1,000 impressions—3.98 cents per impression.

Table 9.35 shows the cost of a 30-second prime-time television slot in the nation's No. 101 media market—Fort Smith, Fayetteville, Springdale, and Rogers, Arkansas. Column 8 shows the cost per 1,000 impressions (that is, the cost in column 7 divided by the market's population of 573,000). The average cost for this market is $30.84 per 1,000 impressions—3.084 cents per impression.

Soliciting every available vote is a strategic necessity when the winner of an election is the candidate who receives the most popular votes.

Table 9.35 Television ads in the Fort Smith, Fayetteville, Springdale, and Rogers, Arkansas market—the nation's No. 101 media market—averaged 3.084 cents per impression.

Station	Time	Program	Rating	Share	Gross rating points	Cost	Cost per 1,000
KHBS+S2	M 9–10	Castle	8.7	19.7%	17.4	$2,401	$24.00
KHBS+S2	Tu 9–10	Private Practice	6.4	14.9%	12.8	$2,401	$32.43
KHBS+S2	W 9–10	Nashville	5.7	15.2%	11.4	$2,601	$39.39
KHBS+S2	Th 8–9	Grey's Anatomy	5.6	12.0%	11.2	$3,602	$56.25
KHBS+S2	F 8–9	Shark Tank	2.3	6.1%	4.6	$700	$26.92
	Sun 6–7	America's Funniest Home Videos	3.8	10.7%	7.6	$1,201	$27.27
KNWA	M 9–10	ROCK–WLLMS–NBC	1.4	3.2%	2.8	$1,921	$120.00
KNWA	Tu 9–10	Parenthood–NBC	2.5	5.8%	5	$3,602	$128.57
KNWA	W 9–10	AVG. ALL WKS	1.5	4.1%	3	$1,501	$83.33
KNWA	Th 9–10	Prime Suspect–NBC	1.2	2.9%	2.4	$1,201	$85.71
KNWA	F 8–9	GRIMM–NBC	3.9	10.1%	7.8	$1,501	$34.09
KFSM	M 7–8	How I Met Your Mother–CBS/ 2 Broke Girls–CBS	8.4	18.3%	16.8	$1,601	$16.67
KFSM	Tu 7–8	NCIS–CBS	14	31.6%	28	$2,401	$15.00
KFSM	W 8–9	Criminal Minds	5.5	14.2%	11	$1,801	$28.13
KFSM	Th 8–9	Person of Interest–CBS	9.5	20.4%	19	$1,901	$17.59
KFSM	F 7–8	CSI	5.5	17.1%	11	$1,201	$18.75
KFSM	Sat 9–10	48 Hour Mystery	4.5	12.7%	9	$1,000	$19.23
KFSM	Sun9–10	The Mentalist	6.5	15.8%	13	$1,901	$25.68
		Total			**193.8**	**$34,435**	**$30.84**

An NPR story entitled "Ads Slice Up Swing States with Growing Precision" reported on presidential campaigning in small media markets:

> "'**It's not a matter of just winning; it's winning by how much**,' says Rich Beeson, a fifth-generation Coloradan and political director for the Romney campaign."
>
> "Beeson of the Romney campaign says **smaller cities are vital to this chess game, especially since they're cheaper to advertise in.**
>
> "'A lot of secondary markets are very key to the overall map, whether it's a Charlottesville in Virginia or a Colorado Springs in Colorado,' he says. 'You can't ever cede the ground to anyone.'"[367] [Emphasis added]

[367] Shapiro, Ari. Ads slice up swing states with growing precision. *NPR*. September 24, 2012. http://www.npr.org/2012/09/24/161616073/ads-slice-up-swing-states-with-growing-precision

9.14. MYTHS ABOUT FAITHLESS PRESIDENTIAL ELECTORS

9.14.1. MYTH: Faithless presidential electors would be a problem under the Compact.

QUICK ANSWER:

- Faithless electors have never changed the outcome of a presidential election. There have been 24,068 electoral votes cast for President in the nation's 59 presidential elections between 1789 and 2020. Samuel Miles' vote in 1796 for Thomas Jefferson was the only instance when a presidential elector might have thought—at the time that he cast his vote—that he might affect the national outcome for President.
- To the extent that anyone believes that faithless electors are a practical problem, the U.S. Supreme Court ruled in *Chiafalo v. Washington* in 2020 that the states have constitutional authority to remedy it. In fact, many states have adopted the Uniform Faithful Presidential Electors Act or versions of it. Moreover, the major political parties have been more diligent than ever (particularly since 2016) in nominating reliable presidential electors.
- The National Popular Vote Compact would virtually eliminate the (already small) possibility of faithless electors actually affecting the outcome of a presidential election, because the Compact would typically generate a significant exaggerated margin of victory in the Electoral College for the national popular vote winner.
- This myth about faithless electors is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is at least equal (and arguably superior) to the current system.

MORE DETAILED ANSWER:

The Founding Fathers envisioned that the presidential electors would be outstanding citizens who would exercise independent judgment in choosing the best person to become President.

However, the Founders' expectations were almost immediately dashed with the emergence of political parties in the nation's first contested presidential election in 1796.

Since 1796, presidential electors have been party stalwarts nominated by their party to cast their vote in the Electoral College for their party's nominee. That is, presidential electors are willing rubber stamps for their party's nominee for President (section 2.5).

Faithless electors have never changed the outcome of a presidential election. There have been 24,068 electoral votes cast for President in the nation's 59 presidential elections between 1789 and 2020.

Samuel Miles' vote in the Electoral College for Thomas Jefferson in 1796 was the only instance when a presidential elector might have thought—at the time that he cast his vote—that his vote might affect the national outcome for President (section 3.7.7).

As the U.S. Supreme Court said in *Chiafalo v. Washington*:

> "Faithless votes have never come close to affecting an outcome."[368]

Nonetheless, the theoretical possibility of faithless electors exists under *both* the current system and the National Popular Vote Compact.[369]

To the extent that anyone believes that faithless electors are a practical problem, the U.S. Supreme Court ruled in *Chiafalo v. Washington* in 2020 that the states have constitutional authority to remedy it.

In fact, many states have adopted the Uniform Faithful Presidential Electors Act or versions of it—both before and since *Chiafalo*.

Moreover, the major political parties have been more diligent than ever (particularly since 2016) in nominating reliable presidential electors.[370]

The National Popular Vote Compact is actually superior to the current system in that it reduces the likelihood that a wayward elector would ever impact the ultimate outcome. Under the Compact, the national popular vote winner would generally receive an exaggerated margin of the votes in the Electoral College in any given presidential election. The reason is that the Compact guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would receive at least 270 electoral votes from the states belonging to the Compact. Then, beyond that guaranteed minimum bloc of 270 electoral votes, the national popular vote winner would generally receive *additional* electoral votes from whichever non-compacting states he or she happened to carry (under existing statutes in those states).

For example, if the compacting states were to possess 270 electoral votes, and if the 268 electoral votes possessed by the non-compacting states were equally divided between the two major-party candidates, the national popular vote winner could receive an additional 134 electoral votes (that is, a grand total of 404 out of 538 electoral votes). The cushion created by these additional electoral votes would make it even less likely that faithless electors could affect the outcome of a presidential election.

9.14.2. MYTH: It might be difficult to coerce presidential electors to vote for the nationwide popular vote winner.

QUICK ANSWER:

- No coercion would be required to force presidential electors to vote for the national popular vote winner under the National Popular Vote Compact, because the Compact (like the current system) results in the election to the

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[368] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 17 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

[369] For example, in September 2012, three Republican electors (who had favored Ron Paul during that year's fight for the party's nomination) publicly raised doubt as to their loyalty to Mitt Romney, the eventual Republican presidential nominee. See Baker, Mike. Three Electoral College members may pass on GOP ticket. *Associated Press*. September 12, 2012.

[370] Washington State passed a version of the Uniform Faithful Presidential Electors Act in 2019—that is, after the 2016 election, but before the U.S. Supreme Court case decided in July 2020.

> Electoral College of presidential electors who are avid supporters of the national popular vote winner. The Compact does not depend on any presidential elector voting contrary to his or her own preference and conscience.

MORE DETAILED ANSWER:

In a 2022 article, William Josephson, an opponent of the National Popular Vote Compact, raised the following question based on the hypothesis that the Compact was in effect for the 2024 presidential election and that Donald Trump was a candidate:

> "Assume that new NPV states are added to the existing NPV states to constitute an elector majority. Further assume that President Trump runs for President as the Republican candidate in 2024 and wins the popular vote but not an elector majority. **How likely is it that electors in Blue NPV states**, like California and New York, all of which probably would not have voted for President Trump, would, as required by the NPV, **actually cast their elector votes for President Trump**?"[371] [Emphasis added]

Josephson's scenario is based on a total misunderstanding of how the Compact would operate.

The U.S. Constitution says:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[372]

The National Popular Compact is a state law that expresses the state's choice as to the "manner" of appointing its presidential electors.

The Compact specifies that the winning candidates for presidential elector in each member state will be the persons who have been nominated in that state *in association with* the national popular vote winner.

That is, a state's presidential electors will be from the same political party as the candidate who won the most popular votes in all 50 states and the District of Columbia.

Thus, all the presidential electors in states belonging to the Compact will be avid supporters of the national popular vote winner and will, therefore, gladly vote for that candidate.

Let's assume that the Republican presidential nominee wins the national popular vote and that the Compact is in effect. Under the terms of the Compact, all the presidential electors from California (and all other states belonging to the Compact) would be the persons *nominated by each state's Republican Party*. That is, they would all be Republican party activists. The bloc of (at least) 270 presidential electors appointed under the Compact

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[371] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 774. https://repository.law.miami.edu/umlr/vol76/iss3/5/

[372] U.S. Constitution. Article II, section 1, clause 2.

would reflect the decision of the voters nationwide in favor of the Republican presidential nominee.

Thus, none of these 270 (or more) Republican presidential electors would be asked to vote contrary to his or her own political inclinations or conscience. Instead, each of them would vote in harmony with their own strongly held personal choice, namely the Republican presidential nominee who had just won the national popular vote.

Under the Compact, presidential electors in the member states would operate as willing rubber stamps for the nationwide choice of the voters—just as presidential electors currently act as willing rubber stamps for the statewide choice of the voters (or the district-wide choice in Maine and Nebraska).

Josephson mistakenly thinks that the presidential electors from California would be Democratic Party activists. That is not how the Compact would operate.

9.14.3. MYTH: Presidential electors might succumb to outside pressure and abandon the national popular vote winner.

QUICK ANSWER:

- Presidential electors are loyal party activists who were nominated for that position precisely because they can be relied upon to act as willing rubber stamps for their party's presidential nominee.
- The unlikelihood of presidential electors succumbing to outside pressure is illustrated by the fact that none of the 271 Republican presidential electors in 2000 voted for Al Gore despite the fact that Gore received the most popular votes nationwide and despite the fact that the American public overwhelmingly believed (then and now) that the President should be the candidate who wins the national popular vote. Instead, all 271 Republican presidential electors dutifully voted for their party's nominee in accordance with the universal understanding of the system that was in effect at the time.

MORE DETAILED ANSWER:

Some have suggested that, under the National Popular Vote Compact, presidential electors might, after the people vote in November, succumb to outside pressure and abandon the national popular vote winner (and instead vote in favor of the winner of the popular vote in their state).

This hypothetical scenario is based on the following incorrect assumptions:

- There is any substantial pool of people who would support the notion of changing the rules after the public has voted on Election Day.
- The public favors the current state-by-state winner-take-all system for electing the President, and hence there would be a vast pool of people to apply pressure on presidential electors.
- The presidential electors supporting the presidential candidate who had just won the national popular vote, under laws that were in place on Election Day, would care about—much less succumb to—pressure from people supporting the opposing party's candidate.

The reality is that there would be no substantial pressure in the first place. The public simply does not favor the current state-by-state winner-take-all method for awarding electoral votes (section 9.22).

The environment in which this hypothetical scenario would arise has the following four elements:

- In polls since 1944, a substantial majority of the American people have said that they favored the idea that the presidential candidate receiving the most votes throughout the United States should win the presidency. Far from being attached to the state-by-state winner-take-all method of awarding electoral votes, the public strongly opposes it.
- The legislature of the state involved has responded to the wishes of its own voters and enacted the National Popular Vote Compact.
- States possessing a majority of the electoral votes (essentially half the population of the country) have similarly enacted the Compact, and the Compact has taken effect nationally.
- A nationwide presidential campaign has been conducted, over a period of many months, with the candidates, the media, and everyone else in the United States knowing and expecting that the winner of the national popular vote will, in accordance with laws in effect at the time, become President.

The hypothetical scenario is based on the notion that when the Electoral College meets in December, the 270 (or more) presidential electors (who are avid supporters of their own party's presidential candidate who had just won the national popular vote) would respond to the preferences of supporters of the losing party.

In fact, there would be little inclination for party activists to vote against their own strongly held personal preferences, against their own party's presidential nominee, against their own state's law, and against the desires of an overwhelming majority of their state's voters who favor a national popular vote for President.

Moreover, there is evidence from recent experience against the hypothesized scenario.

In November 2000, Al Gore won the national popular vote by a margin of 543,816 votes. However, there were 271 Republican presidential electors (just one more than the 270 needed to elect a President) who had just been selected under the laws in place at the time. None of the 271 Republican presidential electors in 2000 voted for Al Gore despite the fact that Gore had received the most popular votes nationwide and despite the fact that the American public overwhelmingly believed that the President should be the candidate who wins the national popular vote. Nonetheless, all 271 Republican presidential electors voted for their party's nominee. They did so in accordance with the universal understanding of the system that was in effect at the time.

Similarly, in 2016, Hillary Clinton won the national popular vote by a margin of 2,868,518 votes over Donald Trump. On Election Day, 306 Republican presidential electors were elected. Although two Republican presidential electors from Texas defected from Donald Trump when the Electoral College met in December, their reason for not voting for their own party's nominee had nothing to do with the fact that Trump did not win the most popular votes nationwide. Instead, both questioned Trump's fitness for office and voted for

a prominent Republican in lieu of Trump (section 3.7.6). Meanwhile, 304 of the 306 Republican presidential electors voted for their party's nominee.

9.14.4. MYTH: The decision-making power of presidential electors would be unconstitutionally usurped by the Compact.

QUICK ANSWER:

- The National Popular Vote Compact would operate in the same way as the current system. That is, it would appoint presidential electors who have been nominated in association with a particular presidential candidate. The Compact then leaves it to the states to decide on the appropriate way, if any, to regulate presidential electors.

MORE DETAILED ANSWER:

Shawn M. Flynn, a former special assistant U.S. attorney for the Eastern District of Virginia, wrote in the *Washington Times* in 2022 that the National Popular Vote Compact:

> "could undermine elector voting rights since the 12th Amendment does not prohibit 'faithless electors,' and an interstate compact could usurp elector voting decision-making power."[373]

Flynn is incorrect for two reasons.

First, states do have the power to control their presidential electors. The U.S. Supreme Court ruled in *Chiafalo v. Washington* in 2020 that:

> "Nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington [State] does."[374]

Second, the National Popular Vote Compact says nothing about the decision-making power of presidential electors.

Instead, the Compact would operate on the basis of the same principles as the current system. That is, each political party would nominate passionate party activists for the ceremonial position of presidential elector under existing state laws. Each party would select its nominees for presidential elector precisely because they are avid supporters of the party's presidential candidate and because they can be relied upon to act as willing rubber stamps for the party's nominee.

Then, both the Compact and the current system let the states decide on whether to further regulate presidential electors.

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[373] Flynn, Shawn M. 2022. Undermining the Electoral College to delegitimize the draft Dobbs decision. *Washington Times*. May 16, 2022. https://www.washingtontimes.com/news/2022/may/16/undermining-the-electoral-college-to-delegitimize-/

[374] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

Under both the Compact and the current system, the states are free to enact laws addressing the question of how presidential electors vote in the Electoral College, including:

- giving their presidential electors discretion as to how to vote in the Electoral College;
- telling their presidential electors how they *should* vote, but providing no penalty if they deviate from expectations;
- telling their presidential electors how they *must* vote and penalizing them if they do not vote as expected;
- telling their presidential electors how they *must* vote and invalidating the vote of a faithless elector during the Electoral College meeting, immediately removing the faithless elector from office, and immediately replacing the faithless elector with a compliant person.

States currently use all four approaches, as discussed in section 3.7.

9.15. MYTHS ABOUT PRESIDENTIAL POWER AND MANDATE

9.15.1. MYTH: The President's powers would be dangerously increased (or dangerously hobbled) by a national popular vote.

QUICK ANSWER:

- The National Popular Vote Compact is state legislation. It does not change anything in the U.S. Constitution. As such, it does not increase or decrease any power given to the President by the U.S. Constitution.

MORE DETAILED ANSWER:

The actual effect of the National Popular Vote Compact would be to change the boundaries of the "district" from which presidential electors are elected.

- Under the current system, state boundary lines define the "districts" from which presidential electors are elected. Although it is usually not described in this way, presidential electors today are elected from U.S. senatorial districts. The only exception is that two presidential electors in Maine and three in Nebraska are elected by congressional district.
- Under the National Popular Vote Compact, presidential electors would be elected from a single nationwide "district."

Changing these "district" boundaries would not change anything in the U.S. Constitution nor increase or decrease any power given to the President by the Constitution.

9.15.2. MYTH: The exaggerated lead produced by the Electoral College enhances an incoming President's ability to lead.

QUICK ANSWER:

- The current system does not reliably give an incoming President a larger percentage share of the electoral vote than his share of the national popular vote. Sometimes it does, but sometimes it does not.

- There is no historical evidence that Congress, the media, the public, or anyone else has been more deferential to an incoming President who received a larger percentage of the electoral vote than his percentage of the popular vote.
- If anyone believes that an exaggerated margin in the Electoral College helps the President to lead, the National Popular Vote Compact would do an even better job than the current system of creating this illusion.
- Every Governor in the United States is currently elected without the advantage of an Electoral College type of arrangement. Yet, no one would seriously argue that Governors are hobbled in the execution of their offices because they do not have the assistance of a state-level electoral college to exaggerate their margin of victory and create an illusory mandate.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein has argued:

> "**The Electoral College** turns the many winners who fail to win a majority of the popular vote into majority winners. It also **magnifies small majorities in the popular vote into large majorities.** These effects of the Electoral College enhance Americans' confidence in the outcome of the election and thereby **enhance the new president's ability to lead**."[375] [Emphasis added]

At the Commonwealth Club in San Francisco, Lowenstein said:

> "What the Electoral College tends to do is to make majorities that wouldn't exist in the popular vote. … In … these close elections … the **people think of that person as somebody who won by a majority** [because] he did in the Electoral College. And I think that **helps the President to govern**."[376] [Emphasis added]

In fact, there is no historical evidence that Congress, the media, or the public has been more deferential to an incoming President after an election in which he received a larger percentage in the Electoral College than his percentage of the popular vote.

- In 1992, Bill Clinton received 370 electoral votes (69% of the total) while receiving only 43% of the popular vote. We are not aware of any plausible line of reasoning—much less anything resembling evidence—that Clinton's exaggerated margin in the Electoral College yielded him any deference or mandate or helped him to lead. In fact, he encountered stiff resistance from Congress on many of his early policy initiatives, and many of them (e.g., gays in the military, health care) were defeated.
- In 1968, Richard Nixon received 301 electoral votes (56% of the total) while receiving only 43.4% of the popular vote. In 1960, John F. Kennedy received

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[375] Debate entitled "Should We Dispense with the Electoral College?" sponsored by PENNumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf .

[376] Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008. Timestamp 0:20. https://www.youtube.com/watch?v=ec9-vGUQkmk

303 electoral votes (56% of the total) while receiving only 49.7% of the popular vote. We are not aware of any plausible argument or evidence that Nixon's or Kennedy's exaggerated margin in the Electoral College helped them to lead or govern.

If anyone believes that an exaggerated margin in the Electoral College helps a President to lead and govern, the National Popular Vote Compact would do an even better job than the current system of creating this illusion.

In fact, under the Compact, the nationwide winning candidate would almost always receive an exaggerated margin in the Electoral College. The Compact guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would receive at least a majority of the electoral votes (270 of 538) from the states belonging to the Compact. Then, in addition to this guaranteed minimum, the national popular vote winner would generally receive *some additional* electoral votes from whichever non-member states he or she happened to carry.

Suppose, for example, that the non-compacting states were to split equally and that the compacting states were to supply only the very minimum of 270 electoral votes. In that case, the national popular vote winner would receive an exaggerated margin of about 75% of the votes in the Electoral College—that is, about 404 of the 538 electoral votes.

Even if the national popular vote winner were to receive only a quarter of the electoral votes from non-compacting states, he or she would receive 337 electoral votes—that is, slightly more than Obama's 332 electoral votes in 2012 and considerably more than received by George W. Bush in 2000 and 2004, by Donald Trump in 2016, or by Joe Biden in 2020.

If anyone believes that an exaggerated margin in the Electoral College helps an incoming President to lead, the National Popular Vote Compact would do an even better job than the current system of creating this illusion.

Of course, the current state-by-state winner-take-all method of awarding electoral votes does not reliably produce a larger percentage share of the electoral vote in the Electoral College than the candidate's share of the national popular vote.

Even worse, the current system frequently confers the presidency on a candidate who fails to win the most popular votes nationwide (section 1.1.1).

Finally, it should be noted that every Governor in the United States is currently elected without the advantage of an Electoral College type of arrangement. Yet, no one would seriously argue that Governors are hobbled in the execution of their offices because they do not have the assistance of a state-level electoral college to exaggerate their margin of victory and create an illusory mandate.

9.16. MYTH THAT THE ELECTORAL COLLEGE PRODUCES GOOD PRESIDENTS.

9.16.1. MYTH: The Electoral College produces good Presidents.

QUICK ANSWER:

- Attempts to link the Electoral College and the state-by-state winner-take-all method of awarding electoral votes with the production of good Presidents are based on selective use of data.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein has argued that there are "11 good reasons"[377] not to change the current system of electing the President to a nationwide popular election:

> "The Electoral College produces good presidents. … The Electoral College has produced Washington, Jefferson, Jackson, Lincoln, Cleveland, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, and Reagan."[378]

Although these 11 Presidents were indeed distinguished, Lowenstein does not offer any argument connecting the ascension of these 11 individuals to the presidency with the Electoral College or the current state-by-state winner-take-all method of awarding electoral votes.

Lowenstein starts his list with George Washington. However, it was universally recognized at the 1787 Constitutional Convention that Washington would be the first President, and he was elected unanimously in both 1789 and 1792. Washington would have become President under virtually any election system, including a nationwide election.

Lowenstein's remarks were made in a debate about whether to change the current state-by-state winner-take-all system to a nationwide popular election.

However, Washington was elected *before* the era when the state-by-state winner-take-all rule became widespread. Only three states used the state-by-state winner-take-all method of awarding electoral votes when George Washington was elected in 1789 and 1792.[379]

Lowenstein credits the Electoral College with success when it resulted in the election of "good Presidents" such as Thomas Jefferson. However, he does not criticize the Electoral College for failing to elect Jefferson on two of the three occasions when he ran (1796 and 1800).[380]

Moreover, the single time (1804) when the Electoral College elected Jefferson occurred *before* the era when the state-by-state winner-take-all rule became widespread.[381]

Lowenstein includes two Presidents on his list of 11 good Presidents who were *defeated* in the Electoral College after receiving the most popular votes nationwide, namely Andrew Jackson in 1824 and Grover Cleveland in 1888. Why does Lowenstein credit the

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[377] Panel discussion at the Commonwealth Club in San Francisco on October 24, 2008. Timestamp 2:16. https://www.youtube.com/watch?v=ec9-vGUQkmk

[378] Debate entitled "Should We Dispense with the Electoral College?" sponsored by PENNumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf

[379] New Hampshire, Maryland, and Pennsylvania used the winner-take-all rule in the nation's first presidential election (1789) and in the second election (1792). All three of these states repealed their winner-take-all laws by the time of the 1800 election.

[380] In 1800, the Electoral College handed Jefferson a tie, throwing the election into the U.S. House of Representatives, where 36 ballots were required to elect Jefferson. In any case, only two states (Rhode Island and Virginia) conducted a popular election using the state-level winner-take-all method of awarding electoral votes in the 1800 election.

[381] In 1804, only seven states (Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, and Virginia) conducted a popular election using the state-level winner-take-all method of awarding electoral votes.

Electoral College with success when it elected Jackson in 1828 and Cleveland in 1884 and 1892, but not criticize it for failing to elect Jackson in 1824 and Cleveland in 1888?[382]

Moreover, another "good President" on Lowenstein's list, namely Theodore Roosevelt, won the Electoral College on one occasion when he ran (in 1904), but lost the Electoral College on the other occasion when he ran (in 1912).

Lowenstein also credits the winner-take-all rule for producing Harry Truman and Theodore Roosevelt, even though they both became President as the result of the death of their predecessors.

More importantly, Lowenstein does not offer any argument as to why several Presidents on his list (or other equally talented individuals) could not have risen to the presidency in the absence of the Electoral College or the winner-take-all method of awarding electoral votes.

How, specifically, was the Electoral College or winner-take-all method of awarding electoral votes essential to the emergence of, say, Lincoln, Franklin Roosevelt, Eisenhower, or Reagan? All of them won both the most popular votes nationwide as well as the Electoral College on each occasion when they ran.

Moreover, Lowenstein provides no argument as to why a system in which the candidate who receives the most popular votes in all 50 states and the District of Columbia would necessarily not result in good Presidents.

Finally, and perhaps most tellingly, Lowenstein's list of 11 good Presidents fails to account for the 35 other Presidents produced by the Electoral College.

In particular, Lowenstein does not mention the pantheon of not-so-good Presidents produced by the Electoral College, including those who:

- were totally ineffectual when the country faced a major economic crisis (e.g., Van Buren and Hoover);
- were ineffectual, if not downright harmful, as the country hurtled down the road to civil war (e.g., Buchanan, Pierce, Taylor, and Fillmore);
- ran exceedingly corrupt administrations (e.g., Grant and Harding);
- was a traitor (i.e., Tyler); and
- were so thoroughly mediocre and forgettable that they cannot be named here because the authors of this book cannot recall their names.[383]

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[382] Lowenstein includes Thomas Jefferson on his list even though the Electoral College defeated Jefferson in 1796.

[383] For a discussion about various bad Presidents, see C-SPAN's *Presidential Historians Survey 2021* at https://www.c-span.org/presidentsurvey2021/?page=overall. Also see Rottinghaus, Brandon and Vaughn, Justin S. 2018. *Official Results of the 2018 Presidents & Executive Politics Presidential Greatness Survey*. https://sps.boisestate.edu/politicalscience/files/2018/02/Greatness.pdf. Also see Dvorak, Petula. 2018. The 10 worst presidents: Besides Trump, whom do scholars scorn the most? *Washington Post*. February 20, 2018. https://www.washingtonpost.com/news/retropolis/wp/2018/02/20/the-10-worst-presidents-besides-trump-who-do-scholars-scorn-the-most/?utm_term=.0396a77d6ebf.

9.17. MYTHS ABOUT NON-CITIZEN VOTING

9.17.1. MYTH: A state could pass a law allowing non-citizens to vote for President.

QUICK ANSWER:

- Existing federal law makes it unlawful for any non-citizen (properly documented or not) to vote in any election for President, U.S. Senator, or U.S. Representative.
- If it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would exist independently of whether electoral votes are awarded under the current state-by-state winner-take-all method or on a nationwide basis. Moreover, if it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would be more serious under the current winner-take-all system, because a relatively small number of votes in a closely divided battleground state could more easily affect the national outcome than they would in a nationwide vote for President.
- This criticism aimed at the National Popular Vote Compact is one of many examples in this book of a concern—if it had any validity at all—that would apply equally to both the current system and the Compact.

MORE DETAILED ANSWER:

Writing in the *Union County Georgia GOP Blog*, Dale Allison wrote that under national popular vote:

> "We would be turning our elections over to the states and large cities who allow non-citizens to vote."[384]

Michigan State Representative Rachelle Smit's office issued a statement on March 7, 2023 (the date of a hearing before the House Elections Committee on HB 4156) saying:

> "With a national popular vote, radical left-wing states can and will inflate their voter rolls with illegal immigrants to create invincible majorities."

At a hearing of the Missouri Senate Judiciary Committee on March 30, 2016, Jeremy Cady of the Missouri Alliance for Freedom criticized the National Popular Vote bill (SB 1048) by claiming that some states could let non-citizens vote for President—thereby diluting Missouri's votes.

In fact, no state may allow non-citizens (properly documented or not) to vote for President, because existing federal law prohibits them from voting for President, U.S. Senator, or U.S. Representative. Federal law provides:

> "It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice Presi-

[384] Allison, Dale. 2016. Say 'No' to National Popular Vote. March 15, 2016. http://ucgop.us/2016/03/15/say-no-to-national-popular-vote/#

> dent, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia …"[385]

It is important to note that *if* it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would exist independently of whether electoral votes are awarded under the current state-by-state winner-take-all method or on a national-popular-vote basis.

Moreover, if it were possible for a state to pass a law allowing non-citizens to vote for President (and it is not), that risk would be more serious under the current winner-take-all system, because a relatively small number of votes in a closely divided battleground state could more easily affect the national outcome than they would in a nationwide vote for President.

9.17.2. MYTH: The Motor Voter Registration law in California (and elsewhere) allows non-citizens to vote.

QUICK ANSWER:

- The Motor Voter Registration law in California (and other states with similar laws) does not allow non-citizens (properly documented or not) to vote.
- California law requires that an applicant to vote attest to their eligibility (including U.S. citizenship) and provides significant penalties for false statements. The requirements and penalties apply equally regardless of how a person signs up to vote—whether in-person, by mail, online, on-the-street during voter registration drives, on Election Day (in states allowing same-day registration), or at an office of the Department of Motor Vehicles.
- Moreover, existing federal law makes it unlawful for any non-citizen (properly documented or not) to vote in any election for President, U.S. Senator, or U.S. Representative.
- Any risk arising from non-citizen voting exists independently of whether electoral votes are awarded using the current state-by-state winner-take-all method or on the basis of the national popular vote. Moreover, that risk would be more serious under the current winner-take-all system, because a relatively small number of popular votes in a closely divided battleground state could potentially affect the national outcome by flipping a substantial bloc of electoral votes.

MORE DETAILED ANSWER:

It is sometimes suggested that the Motor Voter Registration law in California (and other states with similar laws) allows non-citizens (properly documented or not) to vote.[386]

In fact, California law makes U.S. citizenship a requirement for voting.

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[385] United States Code. Title 18. Section 611.

[386] Richardson, Valerie. California motor-voter law will flood rolls with noncitizens, critics predict. *The Washington Times*. October 11, 2015. https://www.washingtontimes.com/news/2015/oct/11/critics-predict-new-california-motor-voter-law-wil/https://www.washingtontimes.com/news/2015/oct/11/critics-predict-new-california-motor-voter-law-wil/

> "A person entitled to register to vote shall be a **United States citizen**, a resident of California, not in prison or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election."[387] [Emphasis added]

In addition, California law imposes penalties for illegally registering to vote.

> "Every person who willfully causes, procures, or allows himself or herself or any other person to be registered as a voter, knowing that he or she or that other person is not entitled to registration, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months or two or three years, or in a county jail for not more than one year."[388]

In addition, California's Motor Voter Registration law requires applicants for voter registration to attest to their citizenship.

> "(b) (1) The department [of Motor Vehicles] shall provide to the Secretary of State, in a manner and method to be determined by the department in consultation with the Secretary of State, the following information associated with each person who submits an application for a driver's license or identification card pursuant to Section 12800, 12815, or 13000 of the Vehicle Code, or who notifies the department of a change of address pursuant to Section 14600 of the Vehicle Code:
>
> "(A) Name.
>
> "(B) Date of birth.
>
> "(C) Either or both of the following, as contained in the department's records: (i) Residence address, (ii) Mailing address.
>
> "(D) Digitized signature, as described in Section 12950.5 of the Vehicle Code.
>
> "(E) Telephone number, if available.
>
> "(F) Email address, if available.
>
> "(G) Language preference.
>
> "(H) Political party preference.
>
> "(I) Whether the person chooses to become a permanent vote by mail voter.
>
> "(J) Whether the person affirmatively declined to become registered to vote during a transaction with the department.
>
> "(K) **A notation that the applicant has attested that he or she meets all voter eligibility requirements, including United States citizenship, specified in Section 2101**."[389] [Emphasis added]

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[387] California Elections Code Section 2101.

[388] California Elections Code Section 18100(a).

[389] California Elections Code Section 2263.

This requirement for attestation of eligibility (including U.S. citizenship) and the significant penalties for violations are *identical* whether the person registers to vote in-person, by mail, online, on-the-street during voter registration drives, on Election Day (in states allowing same-day registration), or at an office of the Department of Motor Vehicles.

Moreover, existing federal law (Section 611 of 18 United States Code) prohibits non-citizens (either legal resident aliens or undocumented persons) from voting for President, U.S. Senator, or U.S. Representative:

> "It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia …"

If a person is willing to risk significant criminal penalties in order to register to vote, the nature of the evidence needed to obtain a conviction is *identical* regardless of whether the person registered at the Department of Motor Vehicles or elsewhere.

As a practical matter, legal aliens are generally very careful about complying with the law, because a violation would jeopardize their ability to stay in the country in addition to imposing significant criminal penalties.

Undocumented aliens are even more cautious, because any official interaction with government carries the risk of deportation in addition to the election law's significant penalties.

Indeed, both types of aliens are among the least likely persons to risk so much in order to cast a vote for a distant politician.

It is important to note that any risk arising from alien voting arising from any state's Motor Voter Registration law exists independently of whether electoral votes are awarded using the current state-by-state winner-take-all method or on a nationwide basis.

Under the current state-by-state winner-take-all method of awarding electoral votes, a relatively small number of popular votes in a closely divided state could potentially affect the national outcome by flipping a substantial bloc of electoral votes.

9.17.3. MYTH: Only citizens impact the allocation of electoral votes under the current system.

QUICK ANSWER:

- The U.S. Constitution requires that the census count all "persons"—including non-citizens (both legal resident aliens and undocumented persons) for the purpose of apportioning electoral votes among the states. Thus, even though non-citizens cannot vote for President, they count for the purpose of apportioning electoral votes among the states.
- Under the current method of electing the President, *legal* voters in states that acquired additional electoral votes (because of the disproportionate presence of non-citizens in their states) deliver additional electoral votes to their preferred presidential candidate. That is, the voting power of the *legal* voters is increased because of the presence of non-citizens in their state.

- Overall, the Democrats had a net 10 electoral-vote advantage in the 2012, 2016, and 2020 presidential elections from the 15 states whose representation was affected by the counting of non-citizens in allocating electoral votes among the states.
- Excluding non-citizens from the calculation used to apportion seats in the U.S. House of Representatives would require a federal constitutional amendment.
- The National Popular Vote Compact would eliminate the distortion in presidential elections caused by the disproportionate presence of non-citizens in certain states. It would equalize the vote of every legal voter in the country by guaranteeing the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

MORE DETAILED ANSWER:

Under federal law, non-citizens (whether legal resident aliens or undocumented persons) cannot vote in presidential elections.

Nonetheless, non-citizens significantly impact presidential elections, because they affect the allocation of electoral votes among the states.

In an interview on March 18, 2024, with Don Lemon, Elon Musk stated:

> "A disproportionate number of illegal immigrants go to blue states, they amplify the effect of a blue state vote. … The Democrats would lose approximately 20 seats in the House if illegals were not counted in the census, and that's also 20 less electoral votes for President. So, illegals absolutely affect who controls the House and who controls the presidency."[390,391]

The U.S. Constitution requires that the census be used to determine each state's number of seats in the U.S. House of Representatives. Each state receives a number of electoral votes equal to the state's number of Representatives plus two (representing the state's two U.S. Senators).

The Constitution specifies that the census count all "persons," thereby including non-citizens living in the United States in the count:

> "Representatives … shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free **Persons**, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[392,393] [Emphasis added]

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[390] Don Lemon Interview of Elon Musk. *YouTube*. March 18, 2024. Timestamp 24:00. https://www.youtube.com/watch?v=hhsfjBpKiTw&t=1399s

[391] See section 4.1.8 for a lengthier quotation from this interview.

[392] U.S. Constitution. Article I, section 2, clause 3. The provisions concerning indentured servants, "Indians not taxed," and slaves ("other persons") are not applicable today.

[393] No doubt, the reason why the Constitution specified that the census would count "persons," instead of trying to count eligible voters, was that the states had complicated and widely varying criteria for voter eligibility in 1787. In most states, eligibility depended on property, wealth, and/or income. Moreover, the

Thus, a state with a disproportionally large number of non-citizens (whether legal resident aliens or undocumented persons) acquires additional U.S. House seats and, hence, additional electoral votes.

Then, the voting power of citizens who vote in such states is increased because of the presence of those non-citizens in their state.[394]

To the extent that non-citizens disproportionately live in states that vote Democratic, the Democrats win a certain number of electoral votes because of the presence of non-citizens in those states (even though those non-citizens do not vote).

Excluding non-citizens from the calculation used to apportion seats in the U.S. House of Representatives would require a federal constitutional amendment.

The National Popular Vote Compact would eliminate the distortion in presidential elections caused by the disproportionate presence of non-citizens in certain states. It would equalize the vote of every legal voter in the country by guaranteeing the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

9.18. MYTH ABOUT VOTING BY 17-YEAR-OLDS

9.18.1. MYTH: There would be a mad political rush by states to give the vote to 17-year-olds under the Compact.

QUICK ANSWER:

- Lowering the voting age to 17 would have only a marginal effect on the electorate. Seventeen-year-olds represent only about 1.2% of the U.S. population. Only about a third of 17-year-olds would be likely to vote if permitted. A third of 1.2% is only 0.4%. If a candidate had a three-to-two lead among 0.4% of the electorate (that is, a lead of 0.24% to 0.16%), that would translate into a net lead of 0.08% in favor of that candidate.
- There is little political support for giving the vote to 17-year-olds. For example, in a statewide vote in 2020, California voters defeated a constitutional amendment to allow 17-year-olds who would become 18 by the time of the next general election to vote in primary elections and special elections.
- The ratification in 1971 of the 26th Amendment (lowering the voting age to 18) did not have any noteworthy political effect in the 1972 presidential election.

MORE DETAILED ANSWER:

It is unlikely that a nationwide vote for President would result in a mad rush by states to lower the voting age to 17.

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requirements for voting were often more stringent for the upper house of the state legislature than for the lower house.

[394] See section 4.1.8 for details of an analysis by Professor Leonard Steinhorn and the Center for Immigration Studies.

In any event, lowering the voting age to 17 would have only a marginal effect on the electorate.

For one thing, 17-year-olds represent only about 1.2% of the U.S. population.

More importantly, relatively few young people vote, compared to the rest of the population.

Table 9.36 shows the percentage of the U.S. population who voted in the November 2020 general election.[395]

Table 9.36 Percentage of population who voted in 2020, by age

Age	Percentage who voted in 2020
18 years	40%
19 years	47%
20 years	49%
21 years	46%
22 years	51%
23 years	53%
24 years	51%
25 to 34 years	54%
35 to 44 years	57%
45 to 54 years	62%
55 to 64 years	68%
65 to 74 years	73%
75 years and over	70%
Total	**61%**

As can be seen from the table, the percentage of older Americans who voted in the November 2020 general election was:

- 70% for those aged 75 and over
- 73% for those aged 65–74
- 68% for those aged 55–64.

The percentage of younger Americans was considerably lower, and the percentage declined sharply by age:

- 49% for those aged 20
- 47% for those aged 19
- 40% for those aged 18.

This sharp decline from age 20 to 19, and from age 19 to 18, suggests that considerably fewer than 40% of 17-year-olds would be likely to vote if they were permitted to do so.

If, for the sake of argument, a third of the 1.2% of the population whose age is between 17 and 18 were to vote, that would increase the electorate by 0.4%.

If a candidate had a three-to-two lead among this 0.4% sliver of the electorate (that

[395] U.S. Census Bureau. Reported Voting and Registration, by Sex and Single Years of Age: November 2020. https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html

is, a lead of 0.24% to 0.16%), that would translate into a net lead of 0.08% in favor of that candidate.

Moreover, as a practical matter, there is little support for giving the vote to 17-year-olds in the first place. For example, in a statewide vote in 2020, California voters rejected a constitutional amendment to allow 17-year-olds who would become 18 by the time of the next general election to vote in primary elections and special elections.[396]

The 26th Amendment (lowering the voting age from 21 to 18) was ratified by the states in 1971. However, the newly enfranchised voters (aged 20, 19, and 18) did not have any noteworthy effect in the 1972 presidential election. As the *Washington Post* noted:

> "In the end, Nixon wound up getting nearly half of the vote of the young first-time voters."[397]

Although the 26th Amendment does not prevent states from lowering their voting age below 18, there is little reason to expect that to happen, and even less reason to be concerned if it did.

9.19. MYTHS ABOUT THE OPERATION OF THE COMPACT

9.19.1. MYTH: The New Hampshire primary and Iowa nominating caucuses would be eliminated by the Compact.

QUICK ANSWER:

- New Hampshire's "First in the Nation" presidential primary and the Iowa caucuses are part of the process of selecting delegates to the national party conventions that nominate presidential candidates.
- The National Popular Vote Compact would not affect any state's laws or any political party's procedures for nominating the President. The Compact is concerned only with the November *general-election* for President.

MORE DETAILED ANSWER:

Michael Maibach, a Distinguished Fellow at Save Our States and Director of the Center for the Electoral College,[398] has written:

> "An NPV scheme would mean … The Iowa and New Hampshire primaries would never be held again."[399]

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[396] *Ballotpedia*. California Proposition 18, Primary Voting for 17-Year-Olds Amendment (2020). https://ballotpedia.org/California_Proposition_18,_Primary_Voting_for_17-Year-Olds_Amendment_(2020)

[397] Frommer, Frederic J. 2022. Americans under 21 first voted 50 years ago. It didn't go as expected. *Washington Post*. October 29, 2022. https://www.washingtonpost.com/history/2022/10/29/nixon-mcgovern-1972-young-voters/

[398] The Center for the Electoral College identifies itself (at its web site at https://centerelectoralcollege.us/) as "a project of the Oklahoma Council of Public Affairs." Save Our States also identifies itself as a project of the Oklahoma Council of Public Affairs.

[399] Maibach, Michael. 2020. Beware of The National Popular Vote Bill in Richmond. *Roankoke Star*. August 31, 2020. https://theroanokestar.com/2020/08/31/beware-of-the-national-popular-vote-bill-in-richmond/

The New Hampshire "First in the Nation" primary and the Iowa caucuses are part of the process of selecting delegates to the national party conventions that nominate presidential candidates.

The National Popular Vote Compact is concerned only with the November *general election* for President. In particular, the Compact is concerned with the process of selecting the presidential electors who attend the Electoral College in mid-December.

The National Popular Vote Compact does not affect any state's laws or any political party's procedures for nominating the President.

The New Hampshire primary and Iowa caucuses are creations of state laws and nominating procedures established by the political parties.

For example, in 2024, the Democratic National Committee altered the role of the New Hampshire presidential primary and the Iowa caucuses in the nominating process. This action by the DNC had nothing to do with the National Popular Vote Compact.

9.19.2. MYTH: The Compact is a copy of the flawed French presidential election system.

QUICK ANSWER:

- The 2002 and 2022 French presidential system was widely (and justifiably) criticized because it resulted in voters being presented with the unpalatable choice of a right-wing and far-right-wing candidate in the final round of the election. This anomalous result occurred because all of the left-wing candidates were eliminated in a multi-party primary that was used to nominate the two candidates for the final round of the election.
- The existing American system for nominating presidential candidates for the final general election in November does not have the flaws of the French system. The National Popular Vote Compact would not change the existing American system for nominating presidential candidates.

MORE DETAILED ANSWER:

Professor Norman Williams of Willamette University incorrectly equates the National Popular Vote Compact with France's flawed multi-party primary system for nominating presidential candidates.

> "The French President is elected on a nationwide popular vote **of the sort that the NPVC seeks to introduce in the U.S.**"[400] [Emphasis added]

Williams' statement is false. Specifically:

- The existing American system for nominating presidential candidates for the general election in November is nothing like the French system for nominating candidates.
- The existing American system for nominating presidential candidates for

[400] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 204.

the final general election in November does not have the flaws of the French system.

- The National Popular Vote Compact would not change the existing American system for nominating presidential candidates.

Here are the facts about the French presidential election system.

The French presidential election system starts with a *multi-party* primary (the first round) in which candidates *from different parties* are forced to compete for one of two spots in the final general election (the second round). Then, the two candidates nominated in the primary (the first round) become the nominees who compete for the presidency in the final general-election (the second round).

Consequently, there is no guarantee in the French presidential election system that the final general election will include a candidate representing the main left-wing political party and a candidate representing the main right-wing political party.

In early 2002 in France, Jacques Chirac was the leading right-wing candidate, and Lionel Jospin was the leading left-wing candidate. Polls showed a very close race in the expected match-up of Chirac and Jospin in the final general election. In fact, 32 separate national polls in the month preceding the primary (the first round) showed both Chirac and Jospin with support in the narrow range of 48%–52% in the final general election.[401]

It was widely expected that Chirac and Jospin would come in first and second in the multi-party primary in April, and that they would then run against one another in the final general election in May.[402]

These expectations were upset, because there were numerous prominent left-wing candidates in the primary (including an independent socialist, a Green, a Trotskyist, and others in addition to Jospin), while the conservative vote in the primary was divided between only two candidates—Jacques Chirac and the ultra-conservative Jean-Marie Le Pen.

In the primary in 2002, Chirac came in first place (with 5.6 million votes), and ultra-conservative Le Pen (with 4.8 million votes) edged out the leftist Jospin (with 4.6 million votes) for second place.

Thus, voters were forced to choose in the final general election between a conservative (Chirac) and an ultra-conservative (Le Pen).

Left-wing voters (who would have enthusiastically voted for Jospin over Chirac) were forced to make the unpalatable choice of voting for one of the conservatives or not voting in the final general election.

The result was that the general election was a runaway in which the conservative (Chirac) won an unprecedented 82% of the nationwide popular vote.

The French presidential election system was widely (and justifiably) criticized for denying the voters any real choice in the final general election.

Contrary to Williams' statement, the National Popular Vote Compact is not a copy of the flawed French system.

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[401] *Wikipedia*. Opinion polling for the 2002 French presidential election: Jospin–Chirac. Accessed April 26, 2022. https://en.wikipedia.org/wiki/Opinion_polling_for_the_2002_French_presidential_election#Jospin%E2%80%93Chirac

[402] Prior to 2002, one right-wing candidate and one left-wing candidate had emerged from the first round of every presidential election since France's adoption of its current system in 1958.

In particular, U.S. presidential candidates are not nominated in a French-style *multi-party* primary. The National Popular Vote Compact does not alter the existing American system for nominating presidential candidates in any way—much less "import" the French system.

Under the existing system for nominating presidential candidates in the United States, a Democratic presidential nominee emerges after competing against other Democrats in state-level primaries and caucuses. A Republican candidate emerges *separately* after competing against fellow Republicans in state-level primaries and caucuses. Similarly, the presidential nominees of minor parties emerge after competing against other members of their party for their party's nomination.

Then, after the nominating process is over, the eventual Democratic nominee, the eventual Republican nominee, and various minor-party nominees compete in the November general election.

Moreover, the general election for President in the United States is not limited to two candidates (as it is in France).

Under the existing system for nominating presidential candidates in the United States, there is no possibility that the voters would face a choice such as that faced by French voters in 2002, namely two Republicans—but no Democrat and no minor-party alternatives in the November general election.

French voters were faced with a similar situation in 2022. Two right-of-center candidates (incumbent President Emmanuel Macron and ultra-conservative Marine Le Pen, daughter of the 2002 candidate) received 28% and 23% of the vote in the multi-party primary, respectively. Meanwhile, Jean-Luc Mélenchon, the leading left-of-center candidate received only 22% of the vote in the primary and therefore did not win a spot in the final general election. The result was that French voters were again forced to choose between two right-of-center candidates in the final general election in 2022.

> "Most of the voters [for radical left candidate Jean-Luc Mélenchon] detest Macron's policies and most of them abhor his persona. … In the words of some Mélenchon voters, it is a case of 'choosing between plague and cholera.'"[403]

A post-election poll showed that more Mélenchon supporters had abstained than voted for Macron in the final general election in France (and virtually none supported Le Pen).[404]

The top-two system in Louisiana, Washington, and California

Louisiana has long used a top-two nominating process that is essentially the same as the French presidential system. In recent years, both Washington and California have adopted top-two systems.

The multi-party primaries in these states often produce undesirable situations in the

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[403] Marlière, Philippe. 2022. The left in France must vote against Le Pen – but Macron isn't making it easy. *The Guardian*. April 23, 2022. https://www.theguardian.com/commentisfree/2022/apr/23/france-vote-le-pen-macron-tv-debate-far-right

[404] See "How did people vote" graph in Crisp, James. 2022. How Marine Le Pen could win the next French election. *The Telegraph*. April 25, 2022. https://www.telegraph.co.uk/world-news/2022/04/25/marine-le-pen-could-win-next-french-election/

final general election that are similar to those produced by the French presidential election, namely two right-wing or two left-wing candidates win the top-two primary, and the electorate is presented with a very limited choice in November.

For example, the primary in California's heavily Republican 4th state Senate district (the Sierra Nevada area) in June 2022 featured six Republicans and two Democrats. The two Democrats on the ballot got 23% and 20%, while the six Republicans got 17%, 15%, 15%, 5%, 3%, and 2%.[405] Because only the top two candidates from the primary advance to the general-election ballot (with write-ins not allowed), voters in this heavily Republican district were forced to choose between two Democrats. The result was that a heavily Republican district was represented in Sacramento by a Democrat.

Similarly, the primary in California's heavily Democratic 31st congressional district in June 2012 included a multiplicity of prominent Democrats (including San Bernardino Council member Pete Aguilar), but only two prominent Republicans (Gary G. Miller and Bob Dutton). Because of the fragmentation of the Democratic vote in the primary, the two Republicans emerged from the top-two primary—with Democrat Aguilar running third. The result was that a heavily Democratic district was represented in Congress by a Republican.

Similar situations occurred in California's 76th state Assembly district in 2018, the 38th state Assembly district in 2020,[406] and the 4th state Senate district in 2022.[407] As *Ballot Access News* reported in 2023:

> "**The problem that the majority party might be kept off the general election ballot is so well-known that** ever since California voters voted for a top-two system in 2010, **no other state has put it into place**. Voters have defeated top-two systems since then in Arizona in 2012, Oregon in 2014, and South Dakota in 2016."[408] [Emphasis added]

In any case, the National Popular Vote Compact would not import France's flawed top-two presidential election system into the United States.

9.19.3. MYTH: The Compact cannot handle changes that might arise from a future census.

QUICK ANSWER:

- The National Popular Vote Compact only governs a particular presidential election if its member states cumulatively possess a majority of the electoral votes on July 20 of a presidential election year. If that condition is not satisfied in a particular presidential election year, the Compact hibernates for that election.

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[405] California Secretary of State. 2022. *Primary Election Results*. June 7, 2022. https://electionresults.sos.ca.gov/returns/state-senate/district/4

[406] Winger, Richard. 2022. California Bill to Repeal Top-two Introduced. *Ballot Access News*. July 1, 2022. Page 2.

[407] Winger, Richard. 2022. Report Review: In-Depth Analysis of California's Top-two Election System. *Ballot Access News*. July 1, 2023. Page 3.

[408] *Ibid.*

MORE DETAILED ANSWER:

An absolute majority of the electoral votes is required to elect a President in the Electoral College.

William Josephson, a New York attorney who opposes the National Popular Vote Compact, wrote:

> "**An Electoral College majority is not static, but NPV seems to assume that it is.** If the NPV states ever constitute an elector majority, demographic changes will almost certainly alter it. **Yet, NPV ignores that**, even though it must know that the allocation of electors among the states changes, as a result of reapportionment of House. of Representatives seats after the Census every ten years. **If any NPV member's Electoral College majority is no longer an elector majority, what happens to NPV?** Is it suspended until it regains a majority? **NPV does not say**."[409] [Emphasis added]

Contrary to what Josephson asserts, the National Popular Vote Compact was specifically designed to deal with this contingency (and several other related contingencies, as discussed in section 6.2.3).

Article III, clause 9 of the Compact states:

> "This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes."

Thus, for example, if the compact were to go into effect with states possessing 270 or more electoral votes, but then the compacting states collectively were to end up with fewer than 270 votes on July 20 of some subsequent presidential-election year (perhaps because of a census), the Compact would simply hibernate until such time as its members again collectively possessed at least 270 votes. That is, the Compact would remain in effect, but it would not "govern" that year's presidential election.

If subsequent enactments of the Compact were to raise the number of electoral votes possessed by the compacting states above the required majority by July 20 of an upcoming presidential election year, the ninth clause of Article III specifies that the Compact would again govern that election.

As a practical matter, this scenario could only arise if the number of electoral votes possessed by the compacting states were to hover very close to 270.

Moreover, changes in the number of electoral votes due to the census occur at a glacial pace.

For example, among the 15 jurisdictions that had enacted the Compact into law at the time of the 2020 census, California, Illinois, and New York each lost one electoral vote as a result of that census, while Colorado and Oregon each gained an electoral vote. The combined number of electoral votes possessed by compacting states at the time of the

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[409] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 786. https://repository.law.miami.edu/umlr/vol76/iss3/5/

2020 census thus changed by only one electoral vote—from 196 to 195. As it turned out, even that small change was illusory. In the 2020 census, New York lost one electoral vote to Minnesota (which had not approved the Compact at the time).[410] However, Minnesota enacted the Compact in 2023. Thus, there was no *net* effect on the Compact's total number of electoral votes as a result of the 2020 census.

The next census will be in 2030, and the resulting allocation of electoral votes will apply to the 2032 election.

9.19.4. MYTH: Voters from states outside the Compact would not have an equal opportunity to influence the selection of the President.

QUICK ANSWER:

- The National Popular Vote Compact would include popular votes from *all* 50 states and the District of Columbia in computing the national popular vote total. All voters in all states would be treated equally under the Compact—regardless of whether their state is a member of the Compact.

MORE DETAILED ANSWER:

In an article entitled "Interstate Agreement Scheme to Elect President by Popular Vote Is Unconstitutional," attorney Paul Ballonoff wrote:

> "**The states that are parties to the agreement would effectively elect the president**. Amendment 12 of the Constitution states that **the votes of all states' electors are counted**, not just a select group of electors from select [states] that signs an interstate agreement."[411] [Emphasis added]

U.S. Senator Mitch McConnell (R–Kentucky) said the following about the National Popular Vote Compact:

> "Under NPV, **voters in states that haven't signed onto the compact will be treated differently than voters in states that have**."[412] [Emphasis added]

The National Popular Vote Compact includes popular votes from *all* 50 states and the District of Columbia in computing the national popular vote total—regardless of whether the state belongs to the Compact.

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[410] Leib, David A. and Karnowski, Steve. 2021. Minnesota avoids losing House seat to New York by 89 people. April 26, 2021. *Associated Press*. https://apnews.com/article/census-2020-minnesota-government-and-politics-7cc6973f4a275aafcab3b1285845454a

[411] Ballonoff, Paul. 2018. Interstate Agreement Scheme to Elect President by Popular Vote Is Unconstitutional. *The Tenth Amendment Center Blog.* July 25, 2018. https://blog.tenthamendmentcenter.com/2018/07/interstate-agreement-scheme-to-elect-president-by-popular-vote-is-unconstitutional/

[412] McConnell, Mitch. The Electoral College and National Popular Vote Plan. Heritage Foundation Lecture. December 7, 2011. Washington, D.C. Timestamp 19:36.

The first clause of Article III of the Compact provides:

> "The chief election official of each member state shall determine the number of votes for each presidential slate **in each State of the United States and in the District of Columbia** in which votes have been cast in a statewide popular election **and shall add such votes together to produce a 'national popular vote total'** for each presidential slate." [Emphasis added]

All voters in all states would be treated equally under the Compact—regardless of whether their state is a member.

Nothing in the Compact modifies the counting procedures of the 12th Amendment. In fact, the operation of the National Popular Vote Compact relies on the 12th Amendment's procedures for counting electoral votes:

> "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President … The President of the Senate shall, in the presence of the Senate and House of Representatives, open **all the certificates**, and the votes shall then be counted." [Emphasis added]

Note also that the political complexion of the particular states belonging to the National Popular Vote Compact would not affect the outcome of the presidential election.

The National Popular Vote Compact requires that all the electoral votes of all the states belonging to the Compact be awarded to presidential electors nominated in association with the winner of the national popular vote. When the Compact is in operation, the states belonging to the Compact would have at least a majority of the electoral votes—that is, enough electoral votes to elect a President. Thus, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would be assured sufficient electoral votes to be elected to the presidency.

9.19.5. MYTH: A state's popular vote count would matter only in the event of a nationwide tie in the popular vote.

QUICK ANSWER:

- Every voter's vote from every state would count in every presidential election in determining which candidate wins the national popular vote.

MORE DETAILED ANSWER:

With 158,224,999 votes having been cast in the 2020 presidential election, a tie in the national popular vote would be extraordinarily unlikely.

To deal with this unlikely contingency, the National Popular Vote Compact contains a tie-breaking procedure. Specifically, the sixth clause of Article III of the Compact states:

> "In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state."

That is, the Compact uses the statewide winner-take-all rule as its tie-breaking procedure.[413]

James David Dickson is Managing Editor of the news outlet of Mackinac Center for Public Policy. Note the word "only" (in bold below) in Dickson's erroneous op-ed in *The Hill* on April 1, 2023:

> "As the Michigan House Fiscal Agency found in its study of National Popular Vote, the state vote count would matter **only** in the event of a tie in the popular vote. That's all but a statistical impossibility.
>
> > 'In the event of a tie of the National Popular Vote winner, the governor would certify the slate of whichever candidate received the most votes in Michigan,'
>
> the nonpartisan agency wrote. In the name of 'one person, one vote,' state-level votes would be reduced from the deciding factor to a mere tiebreaker."[414] [Emphasis added]

First, Dickson inaccurately quotes the Michigan House Fiscal Agency's report. Here is everything that the Michigan House Fiscal Agency actually said about a nationwide tie:

> "In the case of a tie for the national popular vote winner, each member state would appoint electors pledged to the candidate that won the popular vote in that state. (This is the 'winner takes all' system currently used by most states.)"[415]

Second, the word "only" (in bold in Dickson's op-ed above) misrepresents what is actually contained in the National Popular Vote Compact.

The facts are that, under the Compact, every voter's vote in every state (including every voter's vote in Michigan) would count directly toward the national count of that individual voter's preferred presidential candidate. The votes of all voters in all 50 states and the District of Columbia would be added together to produce the "national popular vote total." The presidential candidate who received the largest "national popular vote total" would be designated as the "national popular vote winner." That candidate would receive all of the electoral votes of all of the member states. Because the member states would possess a majority of the electoral votes, that candidate would become President.

In short, every voter's vote from every state would count in every presidential election in determining which candidate wins the national popular vote.

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[413] In the even more unlikely event of a tie in the national popular vote and a tie in the electoral votes computed by the Compact's tie-breaking procedure, there would be a contingent election in Congress.

[414] Dickson, James David. 2023. National Popular Vote is a return to politics of smoke-filled back rooms. *The Hill*. April 1, 2023. Page 2. Accessed April 4, 2023. https://thehill.com/opinion/campaign/3926499-national-popular-vote-is-a-return-to-politics-of-smoke-filled-back-rooms/

[415] Michigan House Fiscal Agency. 2023. Legislative Analysis: House Bill 4156 as introduced. March 7, 2023. http://www.legislature.mi.gov/(S(mnvc4tf3wdfnsazw3ltmdrz2))/mileg.aspx?page=GetObject&objectname=2023-HB-4156

9.19.6. MYTH: The Compact is flawed, because it conflicts with an existing state law.

QUICK ANSWER:

- Even if there were a conflict between the National Popular Vote Compact and Connecticut's existing law on ballot wording (and there is not), an interstate compact always takes precedence over a pre-existing state law.

MORE DETAILED ANSWER:

In speaking in opposition to the National Popular Vote Compact in Connecticut, State Representative Christopher Davis said during the House floor debate in 2018:

> "Currently when the citizens of Connecticut (and I believe every other state) go to the ballot, they are in fact casting ballots for electors of individuals. In fact, **our ballot in 2016 said 'presidential electors for'** and then you voted for that person. With the drafting of this language for this bill, it would be my interpretation that the ballot language would have to be changed and instead the citizens of Connecticut would not be voting for electors, but instead voting directly for those candidates."[416]
>
> "**If this law were to be passed and signed by the Governor, then this language would be conflicting to other state statutes.**"[417] [Emphasis added]

First, there is, in fact, no conflict between the National Popular Vote Compact and Connecticut's existing law on ballot wording.

Second, and more importantly, even if there were a conflict, it wouldn't matter, because an interstate compact always takes precedence over a pre-existing state law.

Concerning the first point, Connecticut voters will cast their vote for "presidential electors" under the Compact in the same way that they now do.

Connecticut, like all other states, uses the so-called "short presidential ballot" that enables voters to vote for the presidential and vice-presidential candidates (section 2.14). The voter's vote is then "deemed" to be a vote for each of the seven candidates for the position of presidential elector who were nominated in Connecticut in association with the voter's chosen presidential-vice-presidential slate. The Compact does not change Connecticut's use of the short presidential ballot. The Compact does not change the appearance or wording of Connecticut's ballot.

The Compact changes the way votes are counted to determine which presidential electors are declared elected in Connecticut.

Under Connecticut's current winner-take-all law, the state's seven presidential electors would be the presidential-elector candidates who were nominated by the party whose presidential nominee received the most popular votes inside the state of Connecticut.

In contrast, under the National Popular Vote Compact, the state's seven presidential

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[416] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 62.

[417] *Ibid*. Page 63.

electors would be the presidential-elector candidates who were nominated by the party whose presidential nominee received the most popular votes in all 50 states and the District of Columbia.

In any case, there would be no need to modify the existing Connecticut law calling for the words "presidential electors for" to appear on ballots.

Concerning the second point, Representative Davis' argument would not be valid even *if* there were an actual conflict between a pre-existing Connecticut law and the National Popular Vote Compact.

Conflicts between provisions of an interstate compact and state law are always resolved in favor of the compact.

As the U.S. Court of Appeals for the Third Circuit wrote in *McComb v. Wambaugh*:

> "A Compact also takes precedence over statutory law in member states."[418]

9.20. MYTH ABOUT REPLACING DEAD, DISABLED, OR DISCREDITED PRESIDENTIAL CANDIDATES

9.20.1. MYTH: A major benefit of the current system is that it permits replacement of a dead, disabled, or discredited presidential candidate between Election Day and the Electoral College meeting.

QUICK ANSWER:

- The National Popular Vote Compact would not abolish the Electoral College. Both the Compact and the current system would operate identically in terms of being able to replace a dead, disabled, or discredited presidential candidate in the 42-day period between Election Day in November and the Electoral College meeting in mid-December.
- Both major political parties have an established procedure for choosing a replacement for their nominees for President and Vice President.
- This myth is similar to many of the myths about the National Popular Vote Compact in this book in that the Compact deals with a hypothetical problem in a manner that is identical to the current system.

MORE DETAILED ANSWER:

UCLA Law Professor Daniel H. Lowenstein points out that the existence of the Electoral College permits expeditious replacement of a dead, disabled, or discredited President-Elect in the brief 42-day period between Election Day in November and the Electoral College meeting in mid-December.[419]

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[418] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

[419] Election Day is the Tuesday after the first Monday in November. Depending on the year, Election Day can be any date from November 2 to November 9. The meeting date of the Electoral College is the Tuesday after the second Wednesday in December under the Electoral Count Reform Act of 2022. It can be any date from December 14 (if Election Day is November 2) to December 20 (if Election Day is November 8). In every case, there are 42 days between Election Day and the meeting date of the Electoral College. For example,

Lowenstein says that this feature of the Electoral College is:

> "what might someday turn out to be the Electoral College's greatest benefit."[420]

Lowenstein continues:

> "What is needed for such problems is a political solution. And the Electoral College is ideal for the purpose. The decision would be made by people in each state selected for their loyalty to the presidential winner. Therefore, abuse of the system to pull off a *coup d'etat* would be pretty much out of the question. But in a situation in which the death, disability or manifest unsuitability plainly existed, the group would be amenable to a party decision, which seems to me the best solution."[421]

Because the National Popular Vote Compact does not abolish the Electoral College, both the current state-by-state winner-take-all method of awarding electoral votes and the Compact would operate in identical ways in dealing with the contingency replacing a presidential or vice-presidential nominee who dies, becomes disabled, or is discredited during this particular 42-day period. That is, the Compact would not affect the ability of the Electoral College to perform the function envisioned by Professor Lowenstein.

Note that after selection of the President and Vice President (whether by the Electoral College or in a contingent election in Congress held on January 6), section 3 of the 20th Amendment (ratified in 1933) governs:

> "If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."

Thus, because of the 20th Amendment, the period in which Lowenstein envisions the Electoral College could replace a nominee for President or Vice President is rather brief. There are 1,461 days in a President's four-year term. The 42 days between Election Day and the Electoral College meeting constitute less than 3% of that time. The original Constitu-

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in 2024, Election Day will be Tuesday November 5, and the meeting date for the Electoral College will be Tuesday December 17.

[420] Debate entitled "Should We Dispense with the Electoral College?" sponsored by PENNumbra (University of Pennsylvania Law Review) available at http://www.pennumbra.com/debates/pdfs/electoral_college.pdf.

[421] *Ibid.*

tion, the 20th Amendment, and the 25th Amendment provide the procedure for 97% of the four-year period involved (that is, the Vice President would be the replacement).[422,423]

This myth is similar to many myths about the National Popular Vote Compact in this book in that the Compact deals with a hypothetical problem in a manner that is identical to the current system.

9.21. MYTHS ABOUT FRAUD

9.21.1. MYTH: Fraud is minimized under the current system, because it is hard to predict where stolen votes will matter.

QUICK ANSWER:

- It is *not* hard to predict where stolen votes will matter under the current state-by-state winner-take-all system of electing the President. Stolen votes matter in the closely divided battleground states.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, made the following comment about fraud under the current state-by-state winner-take-all method of awarding electoral votes:

> "Fraud is minimized because it is hard to predict where stolen votes will matter."[424]

Contrary to what Ross asserts, there is no difficulty in determining where stolen votes will matter. Voters matter, and they only matter, in closely divided battleground states.

The battleground states are well-known to anyone who follows politics.

In the spring of 2008, both major political parties acknowledged that there would be 14 battleground states (involving only 166 of the nation's 538 electoral votes) in the 2008 presidential election.[425]

Two years before the 2012 presidential election, a televised debate on C-SPAN among candidates for the chairmanship of the Republican National Committee focused on the question of how the party would conduct the 2012 presidential campaign in the 14 states that were expected to decide the election.[426]

In June 2012, the *New York Times* reported that the 2012 presidential campaign was effectively being conducted in nine battleground states (Florida, Ohio, Virginia, North Carolina, Iowa, Pennsylvania, Colorado, Nevada, and New Hampshire).[427]

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[422] Procedural Rules for the 2020 Democratic National Convention. *Call for the 2020 Democratic National Convention*. August 25, 2018. Page 19. https://democrats.org/wp-content/uploads/2019/02/2020-Call-for-Convention-WITH-Attachments-2.26.19.pdf

[423] Rules of the Republican Party. Adopted August 24,2020. Amended April 14, 2022. https://prod-static.gop.com/media/Rules_of_the_Republican_Party_090921.pdf

[424] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[425] Already, Obama and McCain Map Fall Strategies. *New York Times*. May 11, 2008.

[426] Freedomworks debate on December 1, 2010, available at http://www.freedomworks.org/rnc.

[427] Peters, Jeremy W. Campaigns Blitz 9 Swing States in a Battle of Ads. *New York Times*. June 8, 2012.

In a July 2012 article describing his "3-2-1 strategy," Karl Rove identified the six states that would probably decide the 2012 election.[428]

In October 2000, the *New York Times* reported the following about Florida:

> "**The parties and the presidential candidates are concentrating their campaigns in Florida in these last, tense days before the election on the cities and towns along Interstate 4**.
>
> "The nearly three million voters who live more or less along the maddeningly overcrowded, 100-mile-long highway that bisects the state from Daytona Beach on the Atlantic Coast to the Tampa Bay on the Gulf of Mexico are the swing voters in this, the largest of the swing states.
>
> "They may be getting more attention these days than any other voters in the country as the candidates compete for Florida's 25 electoral votes.
>
> "'**This state is the key to this election,' Vice President Al Gore declared** at a rally in Orlando earlier this month, 'and Central Florida is the key to this state.'"[429] [Emphasis added]

Under the current state-by-state winner-take-all system, those who wish to cheat know exactly where they need to go in order to potentially sway the national outcome. In 2000, for example, a significant number of electoral votes were determined by a small handful of popular votes:

- Florida—537 popular votes
- Iowa—4,144 popular votes
- New Hampshire—7,211 popular votes
- New Mexico—366 popular votes
- Oregon—6,765 popular votes
- Wisconsin—5,708 popular votes.

If the 2000 election had been conducted on a nationwide basis, it would have been necessary to overturn a margin of 543,816.

It is far easier to fraudulently manipulate 537 votes in Florida (and thereby flip the outcome nationally), and do so without being detected, than to overturn a margin of 543,816.

9.21.2. MYTH: A national popular vote would be a guarantee of corruption, because every ballot box in every state would become a chance to steal the presidency.

QUICK ANSWER:

- Executing electoral fraud without detection requires a situation in which a very small number of people can have a very large impact.

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[428] Rove, Karl. Romney's roads to the White House: A 3-2-1 strategy can get him to the magic 270 electoral votes. *Wall Street Journal*. May 23, 2012.

[429] Rosenbaum, David E. The 2000 campaign: The Battlegrounds: Florida interstate's heavy campaign traffic. *New York Times*. October 25, 2000.

- Under the current state-by-state winner-take-all method of awarding electoral votes, there are huge incentives for fraud and mischief, because a small number of people in a closely divided battleground state can affect enough popular votes to swing all of that state's electoral votes. Under the current system, every vote in every precinct matters inside every battleground state.

MORE DETAILED ANSWER:

The 2012 Republican National Platform stated that electing the President by a national popular vote would be:

> "a guarantee of corruption as every ballot box in every state would become a chance to steal the presidency."[430]

Under the *current* state-by-state winner-take-all method of awarding electoral votes of electing the President, *every* vote in *every* ballot box matters inside *every* closely divided battleground state and therefore today represents "a chance to steal the presidency."

Executing electoral fraud without detection requires a situation in which a very small number of people can have a very large impact. Under the current state-by-state winner-take-all method of awarding electoral votes, there is a huge payoff for fraud and mischief, because a small number of popular votes in a closely divided battleground state can flip a substantial bloc of electoral votes.

Under the current state-by-state winner-take-all system, those who wish to cheat know exactly where they need to go in order to potentially sway the national outcome (namely the battleground states).

In 2004, President George W. Bush had a nationwide lead of 3,012,179 popular votes. However, if 59,152 Bush voters in Ohio had shifted to Senator John Kerry, Kerry would have carried Ohio and thus become President. It would be far easier for potential fraudsters to manufacture 59,152 votes in Ohio than to manufacture 3,012,179 votes (51 times more votes) nationwide. Moreover, it would be far more difficult to conceal fraud involving three million votes.

The outcome of a presidential election is less likely to be affected by fraud with a single large nationwide pool of votes than under the current state-by-state winner-take-all system where microscopic margins in one, two, or three states frequently decide the presidency.

As former Congressman and presidential candidate Tom Tancredo (R–Colorado) wrote:

> "The issue of voter fraud … won't entirely go away with the National Popular Vote plan, but it is harder to mobilize massive voter fraud on the national level without getting caught, than it is to do so in a few key states. Voter fraud is already a problem. The National Popular Vote makes it a smaller one."[431]

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[430] 2012 Republican National Platform adopted in Tampa, Florida, on August 28, 2012.

[431] Tancredo, Tom. Should every vote count? November 11, 2011. http://www.wnd.com/index.php?pageId=366929.

U.S. Senator Birch Bayh (D–Indiana) summed up the concerns about possible fraud in a 1979 Senate speech:

> "Fraud is an ever-present possibility in the Electoral College system, even if it rarely has become a proven reality. With the electoral college, relatively few irregular votes can reap a healthy reward in the form of a bloc of electoral votes, because of the unit rule or winner-take-all rule. Under the present system, fraudulent popular votes are much more likely to have a great impact by swinging enough blocs of electoral votes to reverse the election. A like number of fraudulent popular votes under direct election would likely have little effect on the national vote totals.
>
> "I have said repeatedly in previous debates that there is no way in which anyone would want to excuse fraud. We have to do everything we can to find it, to punish those who participate in it; but **one of the things we can do to limit fraud is to limit the benefits to be gained by fraud.**
>
> "**Under a direct popular vote system, one fraudulent vote wins one vote in the return. In the electoral college system, one fraudulent vote could mean 45 electoral votes, 28 electoral votes.**
>
> "So, the incentive to participate in 'a little bit of fraud,' if I may use that phrase advisedly, can have the impact of turning a whole electoral bloc, a whole State operating under the unit rule. Therefore, so the incentive to participate in fraud is significantly greater than it would be under the direct popular vote system."[432] [Emphasis added]

9.22. MYTH THAT NATIONAL POPULAR VOTE IS UNPOPULAR

9.22.1. MYTH: National Popular Vote Is unpopular.

QUICK ANSWER:

- Polls conducted by different polling organizations over a number of years, using a variety of wordings of questions, all report high levels of support for a national popular vote.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated:

> "National Popular Vote Inc., … one of California's lesser-known advocacy organizations, want[s] to 'scratch off' the Electoral College—**without getting the consent of the majority of Americans**."[433] [Emphasis added]

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[432] *Congressional Record*. March 14, 1979. Page 5000. https://www.congress.gov/bound-congressional-record/1979/03/14/senate-section

[433] Von Spakovsky, Hans. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

The National Popular Vote Compact would go into effect when enacted by states possessing a majority of the votes in the Electoral College.

Moreover, polls conducted by different polling organizations over a number of years, using a variety of wordings of questions, all report high levels of support for a national popular vote.

Pew Research Center's multi-year nationwide poll

The Pew Research Center has conducted periodic polls since 2000 on the question of how the President should be elected.

According to its June 2023 poll:

> "Nearly two-thirds of U.S. adults (65%) say the way the president is elected should be changed so that the winner of the popular vote nationwide wins the presidency."[434]

Figure 9.10 shows the course of public opinion on this issue between 2000 and 2023.

Concerning partisan support, the same June 2023 Pew poll showed:

> "47% support moving to a popular vote system. GOP support for moving to a popular vote is the highest it's been in recent years—up from 37% in 2021 and just 27% in the days following the 2016 election."

Figure 9.11 shows the course of partisan views on this issue between 2000 and 2023.

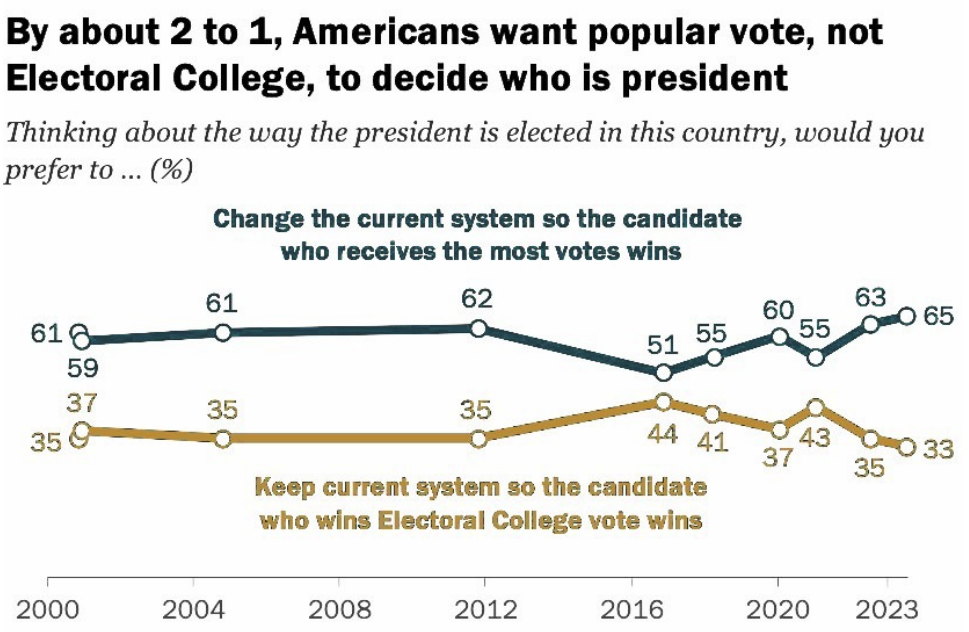

Figure 9.10 Pew poll results 2000–2023

[434] Kiley, Joselyn. 2023. Majority of Americans continue to favor moving away from Electoral College. *Pew Research Center*. September 25, 2023. https://www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/

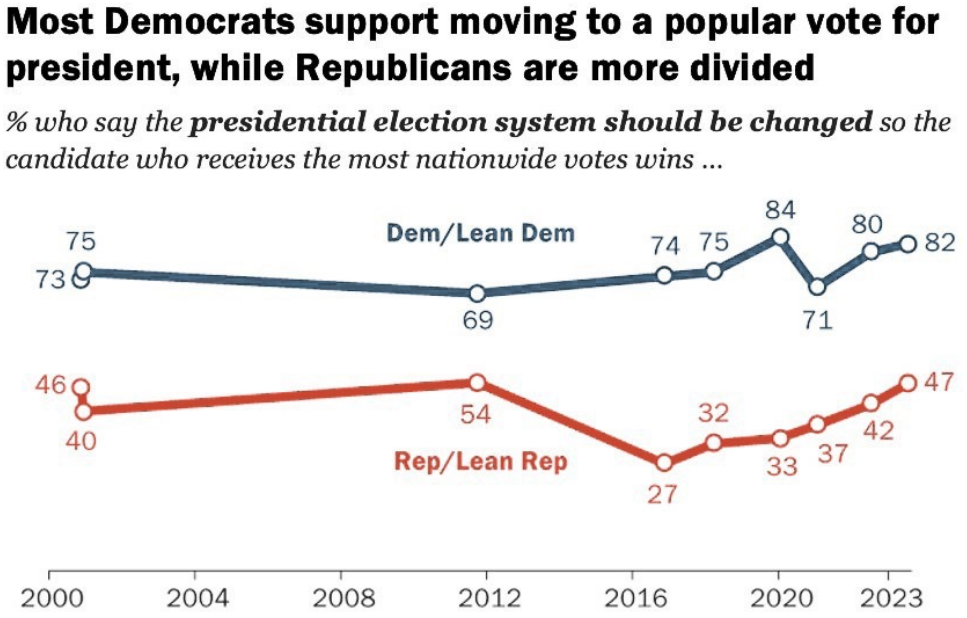

Figure 9.11 Pew poll results by party 2000–2023

The 2023 Pew report found that 63% of conservative Republicans favor the current system, while 63% of moderate and liberal Republicans support a national popular vote.

> "A clear majority—63%—of conservative Republicans prefer keeping the current system, while 36% would change it. The balance of opinion reverses among moderate and liberal Republicans (who make up a much smaller share of the Republican coalition). A majority of moderate and liberal Republicans (63%) say they would back the country moving to a popular vote for president."

Figure 9.12 shows the 2023 Pew results by ideology and party.

A person's position on the issue varies with their degree of political engagement. The 2023 Pew report found:

> "Political engagement—being interested in and paying attention to politics—is associated with views about the Electoral College, particularly among Republicans. Highly politically engaged Republicans overwhelmingly favor keeping the Electoral College: 72% say this, while 27% support moving to a popular vote system."

Figure 9.13 shows the 2023 Pew results by ideology and party.

As to age, the 2023 Pew poll found:

> "Younger adults are somewhat more supportive of changing the system than older adults. About seven-in-ten Americans under 50 (69%) support this. That share drops to about six-in-ten (58%) among those 65 and older."

Figure 9.14 Pew 2023 poll results by age.

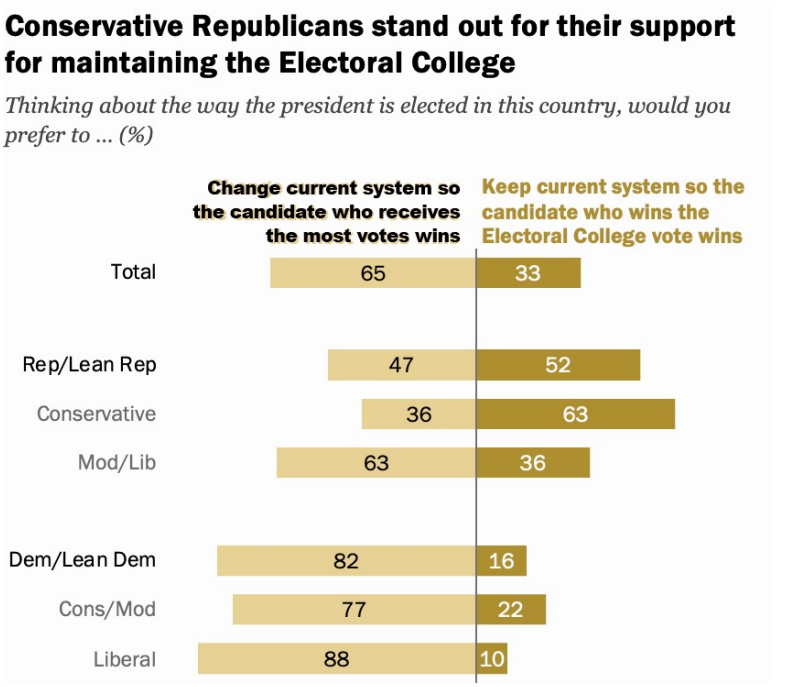

Figure 9.12 Pew 2023 poll results by ideology and party

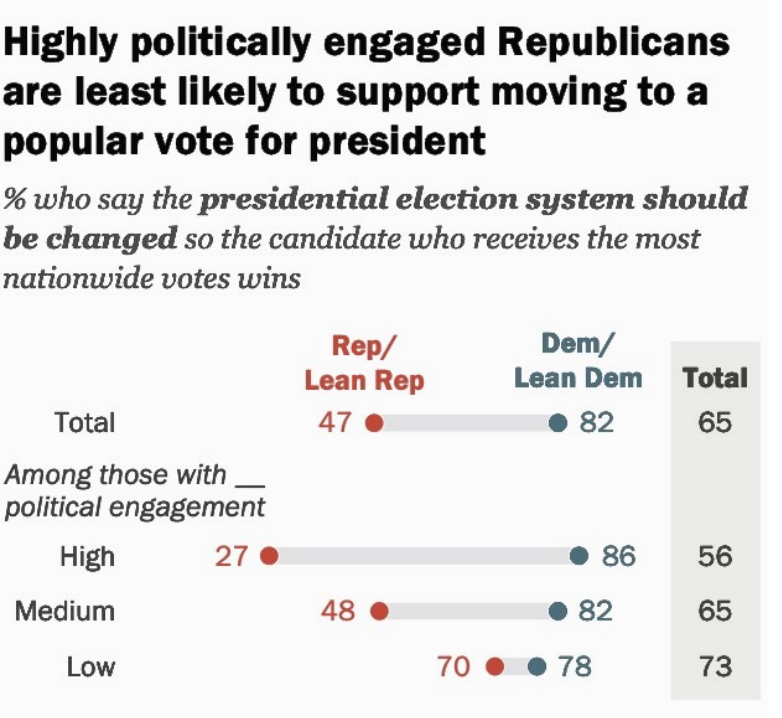

Figure 9.13 Pew 2023 poll results by political engagement

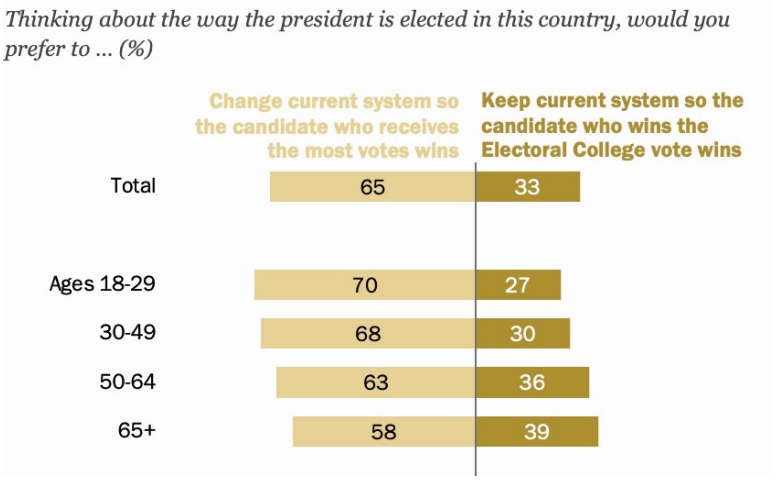

Figure 9.14 2023 poll results by political engagement

Nationwide polls starting in 1944

The public has strongly supported a nationwide popular election of the President for over six decades.

According to a Gallup report entitled "Americans Have Historically Favored Changing Way Presidents Are Elected," the first nationwide poll on the topic of direct election of the President is believed to have been a 1944 Gallup poll that asked:

> "It has been suggested that the electoral vote system be discontinued and Presidents of the United States be elected by total popular vote alone. Do you favor or oppose this proposal?"[435]

In a June 22–27, 1944, Gallup poll, 65% favored the proposal for a national popular vote for President; 23% disapproved; and 13% had no opinion.

In 1977 and 1980, the nationwide Gallup poll asked:

> "Would you approve or disapprove of an amendment to the Constitution which would do away with the Electoral College and base the election of a President on the total vote cast throughout the nation?"[436]

In a Gallup poll on January 14–17, 1977, 73% approved of the proposed constitutional amendment for a national popular vote for President; 15% disapproved; and 12% had no opinion.

In a November 7–10, 1980, Gallup poll, 67% approved of the proposed constitutional

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[435] Gallup News Service. 2000. *Americans Have Historically Favored Changing Way Presidents Are Elected.* November 10, 2000. Page 1. https://news.gallup.com/poll/2323/americans-historically-favored-changing-way-presidents-elected.aspx

[436] *Ibid.*

amendment for a national popular vote for President; 19% disapproved; and 15% had no opinion.[437]

The Gallup News Service has also reported:

> "The greatest level of support, 81%, was recorded after the 1968 election when Richard Nixon defeated Hubert Humphrey in another extremely close election."[438]

In 2007, the *Washington Post*, the Kaiser Family Foundation, and Harvard University conducted a nationwide poll that showed 72% support for direct nationwide election of the President.[439]

A 2010 nationwide poll prepared for the Aspen Institute by Penn Schoen Berland and released at the Aspen Ideas Festival found:

> "74 percent agree it is time to abolish the Electoral College and have direct popular vote for the president."[440]

State-level polls

State-level polls on the issue of a national popular vote for President have been conducted by a number of pollsters and organizations at various times.

In California in August 2007, Fairbank, Maslin, Maullin & Associates conducted a poll of 800 likely voters in California for Californians for the Fair Election Reform organization. Voters were asked about a:

> "proposal [that] would guarantee that the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia will win the presidency. Would you generally support or oppose switching to a system in which the presidency is decided by the actual votes in all 50 states combined?"

The results of this 2007 poll in California were that 69% would support a change to national popular vote; 21% would oppose the change; and 9% didn't know.

In California in October 2008, the Public Policy Institute of California (PPIC) conducted a telephone survey of 2,004 Californians that asked:

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[437] Other Gallup polls on this subject are discussed in Carlson, Darren K. 2004. Public flunks electoral college system. November 2, 2004. *Gallup Daily News*. See http://www.gallup.com/poll/13918/Public-Flunks-Electoral-College-System.aspx. See also Saad, Lydia. 2011. Americans would swap electoral college for popular vote. *Gallup Daily News*. October 24, 2011.

[438] Gallup News Service. 2000. *Americans Have Historically Favored Changing Way Presidents Are Elected*. November 10, 2000. Page 2. https://news.gallup.com/poll/2323/americans-historically-favored-changing-way-presidents-elected.aspx

[439] The Washington Post-Kaiser Family Foundation-Harvard University: Survey of Political Independents. 2007. Page 12. https://www.washingtonpost.com/wp-srv/politics/interactives/independents/post-kaiser-harvard-topline.pdf

[440] Time Aspen Ideas Festival 2011 full report. http://www.slideshare.net/PennSchoenBerland/time-aspen-ideas-festival-2011-full-report

> "For future presidential elections, would you support or oppose changing to a system in which the president is elected by direct popular vote, instead of by the Electoral College?"[441]

The results of the 2008 PPIC poll in California were that 70% would support a change to a national popular vote; 21% would oppose the change; and 10% didn't know.

In New York in October 2008, the Global Strategy Group conducted a poll on the National Popular Vote Compact and reported:

> "Voters in New York are largely in favor of switching to a system that elects the President of the United States according to vote totals in all 50 states. Two-thirds of voters (66%) currently support the proposal, while just a quarter (26%) is in opposition to it. Support for the proposal is broad across demographics as a majority of each subgroup is in favor of it."

Polls conducted by Public Policy Polling in various years for the National Popular Vote organization reported high levels of public support for a national popular vote for President in battleground states, spectator states, small states, southern states, border states, and elsewhere.

Table 9.37 shows the results, by party, from these polls.[442]

The poll in Nebraska is noteworthy because that state awards three of its five electoral votes by congressional district under a law first used in the 1992 election. In 2008, Barack Obama won Nebraska's 2nd congressional district (the Omaha area), thereby winning one of the state's electoral votes. In 2020, Joe Biden also won the 2nd district.

A survey of 977 Nebraska voters conducted on January 26–27, 2011, contained a comparative question about a national popular vote, Nebraska's current congressional-district method, and the statewide winner-take-all method.

Voters were first asked:

> "How do you think we should elect the President: Should it be the candidate who gets the most votes in all 50 states, or the current Electoral College system?"

The survey showed 67% overall support for a national popular vote for President. On this first question, support for a national popular vote by political affiliation was 78% among Democrats, 62% among Republicans, and 63% among others. By congressional district, support for a national popular vote was 65% in the 1st congressional district, 66% in the 2nd district (which voted for Obama in 2008), and 72% in the 3rd district. By gender, support for a national popular vote was 76% among women and 59% among men. By age, support for a national popular vote was 73% among 18–29-year-olds, 67% among 30–45 year-olds, 65% among 46–65 year-olds, and 69% among those older than 65. By race, support for a national popular vote was 68% among whites and 63% among others.

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[441] *PPIC Statewide Survey: Californians and Their Government*. October 2008.

[442] Cross-tabs and other details about these polls (and other polls) are available at https://www.nationalpopularvote.com/polls

Table 9.37 Results, by party, from state-level polls

State	Republican	Democratic	Other	Overall
Alaska	66%	78%	69%	70%
Arizona	60%	79%	57%	67%
Arkansas	71%	88%	79%	80%
California	61%	76%	74%	70%
Colorado	56%	79%	70%	68%
Connecticut	67%	80%	71%	74%
Delaware	69%	79%	76%	75%
D.C.	48%	80%	74%	76%
Florida	68%	88%	76%	78%
Idaho	75%	84%	75%	77%
Iowa	63%	82%	77%	75%
Kentucky	71%	88%	70%	80%
Maine	70%	85%	73%	77%
Massachusetts	54%	82%	66%	73%
Michigan	68%	78%	73%	73%
Minnesota	69%	84%	68%	75%
Mississippi	75%	79%	75%	77%
Montana	67%	80%	70%	72%
Nebraska	62%	78%	63%	67%
Nevada	66%	80%	68%	72%
New Hampshire	57%	80%	69%	69%
New Mexico	64%	84%	68%	76%
New York	66%	86%	70%	79%
Ohio	65%	81%	61%	70%
Oklahoma	75%	84%	75%	81%
Oregon	70%	82%	72%	76%
Pennsylvania	68%	87%	76%	78%
South Carolina	64%	81%	68%	71%
South Dakota	67%	84%	75%	75%
Utah	66%	82%	75%	70%
Vermont	61%	86%	74%	75%
Washington	65%	88%	73%	77%
West Virginia	75%	87%	73%	81%
Wisconsin	63%	81%	67%	71%
Wyoming	66%	77%	72%	69%
Average	**66%**	**82%**	**71%**	**74%**

Voters were then asked to choose among three alternative methods of awarding Nebraska's electoral votes:

- 16% favored a statewide winner-take-all method of awarding electoral votes;
- 27% favored Nebraska's current congressional-district method of awarding electoral votes; and
- 57% favored a national popular vote.

Table 9.38 shows the results of this second question by political affiliation.

Table 9.38 Nebraska results, by political affiliation, on three alternative methods of electing the President.

Method	Democrat	Republican	Other
Candidate who gets the most votes in all 50 states	65%	53%	51%
Nebraska's current district system	26%	27%	32%
Statewide winner-take-all system	9%	20%	17%

Table 9.39 shows the results of this second question by congressional district. Note that the 2nd district was the district carried by Obama in 2008.

Table 9.39 Nebraska results, by political affiliation, on three alternative methods of electing the President.

Method	First district	Second district	Third District
Candidate who gets the most votes in all 50 states	53%	58%	59%
Nebraska's current district system	26%	31%	26%
Statewide winner-take-all system	21%	12%	15%

See section 9.37.1 for a discussion of polls in Utah, Connecticut, and South Dakota in which voters were asked a push question that highlighted the fact that the state's electoral votes would be awarded to the winner of the national popular vote in all 50 states under the National Popular Vote Compact—rather than the winner of the statewide popular vote.

9.23. MYTHS ABOUT CONGRESSIONAL CONSENT

9.23.1. MYTH: The Compact is flawed, because Congress did not consent to it prior to its consideration by state legislatures.

QUICK ANSWER:

- The U.S. Supreme Court has ruled that the Constitution imposes no requirement as to when congressional consent to an interstate compact is obtained. If a particular compact requires congressional consent, it can be obtained before, during, or after the period when the compact is being considered by the states. Most commonly, Congress considers a compact after the requisite combination of states has approved it.

MORE DETAILED ANSWER:

The U.S. Supreme Court stated in *Virginia v. Tennessee*:

> "The constitution does not state when the consent of congress shall be given, **whether it shall precede or may follow the compact made, or whether it shall be express or may be implied**."[443] [Emphasis added]

[443] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

Thus, congressional consent is not required prior to a state legislature's consideration of an interstate compact.

If a particular compact requires congressional consent, Congress can consider the matter before, during, or after the period when the states are considering it.

Sometimes Congress gives its consent in advance to a particular compact or a broad category of compacts.

For example, Congress gave its consent in advance to compacts in the Low-Level Radioactive Waste Policy Act of 1980, the Tobacco Control Act of 1936, the Crime Control Consent Act of 1934, and the Weeks Act of 1911 (section 5.19).

When Congress granted its consent in 1921 to a Minnesota–South Dakota compact relating to criminal jurisdiction over boundary waters, it simultaneously granted its advance consent in case Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin were to adopt a similar compact (section 5.19).

9.23.2. MYTH: The National Popular Vote Compact is flawed, because it fails to mention congressional consent in its text.

QUICK ANSWER:

- The absence of a mention of Congress in the text of a particular interstate compact provides no guidance as to whether Congress must give its consent in order for the compact to become effective. Because every interstate compact is subordinate to the U.S. Constitution, compacts typically do not specifically mention congressional consent in their text—even if the particular compact clearly requires congressional consent and even if the compacting states intend to seek it.

MORE DETAILED ANSWER:

Some interstate compacts require congressional consent, whereas others do not (as discussed in detail in the next section of this chapter).

Because every interstate compact is subordinate to the U.S. Constitution, compacts typically do not specifically mention congressional consent in their text—even if the particular compact clearly requires congressional consent and even if the compacting states intend to seek it.

The absence of a mention of Congress in the text of a particular interstate compact provides no guidance as to whether Congress must give its consent prior to the compact becoming effective.

For example, the text of the Multistate Tax Compact was silent as to the role of Congress. It simply said that the compact would go into effect when seven states approved it.

The states involved initially sought congressional consent. However, they encountered ferocious opposition in Congress by lobbyists for business interests that would be subjected to the compact's audit provisions.

Relying on the Supreme Court's 1893 decision in *Virginia v. Tennessee*[444] and its 1976

[444] *Virginia v. Tennessee*. 148 U.S. 503 at 520. 1893.

decision in *New Hampshire v. Maine*,[445] the compacting states then decided to implement the compact without congressional consent (as discussed in detail in the next section of this chapter).

U.S. Steel challenged the states' power to do so.

In 1978, the U.S. Supreme Court ruled that the Multistate Tax Compact did not require congressional consent.[446]

If U.S. Steel had won in the Supreme Court, the compacting states would, of course, have been forced to return to Congress and try to overcome the opposition.

Similarly, the text of the 1921 Agreement of New York and New Jersey establishing the Port Authority was silent as to the role of Congress. Relying on the 1893 case of *Virginia v. Tennessee*, New York and New Jersey did not originally intend to seek congressional consent. The compact simply said that it would take effect when approved by both states.

When the Port Authority sought to borrow money—a novelty at the time for interstate authorities—it found that bankers and potential investors were hesitant to purchase bonds in the absence of congressional consent. The two states then decided to seek, and quickly obtained, congressional consent for their compact.[447]

The silence of most interstate compacts as to the steps required to bring them into effect are analogous to the texts of most bills passed by state legislatures and Congress.

The steps required to bring a proposed piece of legislation into effect are specified by a state's constitution (for state legislation) and by the U.S. Constitution (for federal laws), respectively.

Thus, the texts of state and federal legislative bills do not recite all the steps required to bring them into effect. They do not explicitly state, for example, that a legislative bill must be presented to the chief executive for approval or veto, and they do not itemize the procedures for overriding a veto if the executive does not approve.

9.23.3. MYTH: Congressional consent is required before the National Popular Vote Compact can take effect.

QUICK ANSWER:

- Some interstate compacts require congressional consent in order to take effect, while others do not.
- The U.S. Supreme Court has ruled that congressional consent is only necessary for interstate compacts that "encroach upon or interfere with the just supremacy of the United States." The U.S. Supreme Court has also repeatedly ruled that states have "exclusive" and "plenary" power to choose the method of appointing their presidential electors.
- Because the choice of manner of appointing presidential electors is exclusively a state decision, there is no federal power—much less federal supremacy—

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[445] *New Hampshire v. Maine*. 426 U.S. 363. 1976.

[446] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. 1978.

[447] Zimmerman, Joseph F. 1996. *Interstate Relations: The Neglected Dimension of Federalism*. Westport, CT: Praeger.

to encroach upon. Therefore, under established compact jurisprudence, congressional consent would not be necessary for the National Popular Vote Compact to become effective.

- No court has ever invalidated an interstate agreement for lack of congressional consent.
- Opponents of the National Popular Vote Compact have stated that they intend to litigate the question of whether it requires congressional consent after it is approved by the requisite combination of states. Therefore, the National Popular Vote organization has been working to obtain support in Congress for the Compact.

MORE DETAILED ANSWER:

The Compacts Clause of the U.S. Constitution (Article I, section 10, clause 3) provides:

> "No state shall, without the consent of Congress, … enter into any agreement or compact with another state…."[448]

In 2023, the Congressional Research Service summarized the judicial precedents concerning congressional consent of interstate compacts:

> "One of the most common questions to arise under the Compact Clause is whether congressional consent is required for a particular state commitment. A literal reading of the Compact Clause would require congressional approval for any interstate compact, but the Supreme Court has not endorsed that approach in interstate compacts cases. Instead, the Court adopted a functional interpretation in which **only interstate compacts that increase the political power of the states while undermining federal sovereignty require congressional consent**.[449] [Emphasis added]

Early 19th-century federal and state court decisions concerning congressional consent

Although it was not until 1893 that the U.S. Supreme Court explicitly ruled that some interstate compacts can go into effect without congressional consent, the Supreme Court in 1808 accepted the validity of an interstate compact that had gone into effect without congressional consent.

In their seminal article on interstate compacts, Felix Frankfurter (later a Justice of the U.S. Supreme Court) and James Landis identified the Virginia and Tennessee Boundary Agreement of 1803 as the earliest example of an interstate compact that went into effect without congressional consent.

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[448] The full wording of clause 3 is: "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

[449] Congressional Research Service Legal Sidebar. 2023. Interstate Compacts: An Overview, June 15, 2023. Page 2. https://crsreports.congress.gov/product/pdf/LSB/LSB10807

> "The agreement was ratified by Virginia on January 22, 1803, and by Tennessee on November 3, 1803. In *Robinson v. Campbell* (1808, U.S.) 3 Wheat. 212,[450] **the Supreme Court assumed the validity of the compact**."[451] [Emphasis added]

Frankfurter and Landis also identified the Georgia and Tennessee Agreement of 1837 as the earliest example of a compact (other than a boundary compact) that went into effect without congressional consent.

> "By the Act of January 24, 1838, Tennessee granted a railroad company the privilege of a right of way through the State, on condition that upon the extension of its line through Georgia the latter State would give it the same privileges. By the Act of December 23, 1847, Georgia granted the railroad the same privileges.
>
> "In *Union Bridge R. R. Co. v. E.T. & Ga. R. R. Co.* (1853) 14 Ga. 327,[452] **the Court held that this was not such a compact as required the assent of Congress in order to make it valid**."[453] [Emphasis added]

Concerning section 10 of Article I of the U.S. Constitution, the Georgia Supreme Court wrote:

> "This prohibition applies only to such an 'agreement or compact' … as may, in any wise, conflict with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government."[454]

Frankfurter and Landis also identified other compacts that went into effect, with court approval but without congressional consent during the 19th century.[455]

Virginia v. Tennessee in 1893

In 1893, the U.S. Supreme Court first provided an explicit test for deciding whether a particular interstate compact requires congressional consent in order to become effective.

The two states involved in the case of *Virginia v. Tennessee* had never obtained congressional consent for a boundary agreement that they had reached earlier in the 19th century.

The Court observed:

> "**There are many matters upon which different states may agree that can in no respect concern the United States.** If, for instance, Virginia

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[450] *Robinson v. Campbell*, 16 U.S. 212, 3 Wheat. 212, 4 L. Ed. 372 (1818). https://cite.case.law/us/16/212/

[451] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal*. Pages 749–750. May 1925.

[452] *Union Branch Rail Road v. East Tennessee & Georgia R. R.*, 14 Ga. 327 (1853) https://cite.case.law/ga/14/327/

[453] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal*. Page 752. May 1925.

[454] 14 Ga. 327 at 339.

[455] Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal*. Page 752. May 1925.

> should come into possession and ownership of a small parcel of land in New York, which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of congress before it could make a valid agreement with Virginia for the purchase of the land."
>
> "If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of congress before it could contract with New York for the transportation of the exhibits through that state in that way."
>
> "If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session."[456] [Emphasis added]

Having established that congressional consent is not necessarily required for every interstate compact, the Court then reframed the question in the case:

> "If, then, the terms 'compact' or 'agreement' in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of congress must be obtained**, to what compacts or agreements does the constitution apply**?"[457] [Emphasis added]

The Court then answered:

> "**We can only reply by looking at the object of the constitutional provision**, and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. '*Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words; and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.
>
> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that **the prohibition is directed to the formation of any com-**

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[456] *Virginia v. Tennessee*. 148 U.S. 503 at 518. 1893.

[457] *Ibid*.

> **bination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."**[458] [Emphasis added]

Developments between 1893 and 1978

Relying on the Supreme Court's decision in *Virginia v. Tennessee* in 1893, the legislatures of New York and New Jersey did not submit the Palisades Interstate Park Agreement of 1900 to Congress for its consent.[459]

In the same vein, the legislatures of New Jersey and New York originally had no intention of submitting the 1921 Port of New York Authority Compact to Congress. The compact simply specified that it would become effective:

> "when signed and sealed by the Commissioners of each State as hereinbefore provided and the Attorney General of the State of New York and the Attorney General of New Jersey."[460]

This compact broke new ground by establishing a new governmental entity that was separate from the administration of each state and administered by its own governing body.

The newly created Authority's bankers and bond counsels advised the Authority that potential investors might be hesitant to lend money to the then-unprecedented entity in the absence of congressional consent. Thus, the two states sought, and quickly obtained, congressional consent for the compact.[461]

In the 1950s, the U.S. House of Representatives approved a bill granting consent to the Southern Regional Education Compact; however, the Senate did not concur, because it concluded that the subject matter of the compact—education—was entirely a state prerogative.[462] That compact then went into effect without congressional consent.

In *New Hampshire v. Maine* in 1976, the Supreme Court reaffirmed its 1893 ruling in *Virginia v. Tennessee* that not all interstate agreements require congressional consent.[463]

U.S. Steel Corporation v. Multistate Tax Commission in 1978

The case of *U.S. Steel Corporation v. Multistate Tax Commission* in 1978[464] is the most important recent judicial precedent on the issue of whether congressional consent is nec-

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[458] *Ibid.* Page 519.

[459] A subsequent compact, the Palisades Interstate Park Compact of 1937, received congressional consent in 1937. https://ballotpedia.org/Palisades_Interstate_Park_Compact

[460] Agreement of New York and New Jersey establishing Port of New York Authority. 1921. *Laws of 1921*. Chapter 154. Article XXII. Section 2. http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:

[461] Zimmerman, Joseph F. 1996. *Interstate Relations: The Neglected Dimension of Federalism*. Westport, CT: Praeger.

[462] Barton, Weldon V. 1967. *Interstate Compacts in the Political Process*. Chapel Hill, NC: University of North Carolina Press. Pages 132–133.

[463] *New Hampshire v. Maine*. 426 U.S. 363. 1976.

[464] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452, 454. 1978.

essary for interstate compacts. In that case, the U.S. Supreme Court reaffirmed its 1893 holding in *Virginia v. Tennessee*.[465]

The Multistate Tax Compact addressed issues relating to multistate taxpayers and uniformity among state tax systems. The compact created a commission empowered to conduct audits of multistate businesses and gave such businesses a choice of formulas for calculating their state taxes.[466]

Like many others, the compact was silent as to congressional consent, even though the compacting parties originally intended to seek it. The compact simply stated:

> "This compact shall enter into force when enacted into law by any seven states."[467]

By 1967, the requisite number of states had approved the compact, and it was submitted to Congress for consent.

However, the compact languished in Congress because of the fierce opposition of business interests that were concerned about the multi-million-dollar tax audits that the compact was certain to generate.

The frustrated states then decided to rely on the 1893 judicial precedent in *Virginia v. Tennessee*. They proceeded with the implementation of the compact without congressional consent.

Led by U.S. Steel, businesses opposed to the compact challenged the constitutionality of the states' action.

The Supreme Court's 1978 decision in *U.S. Steel Corporation v. Multistate Tax Commission* reinforced the Court's 1893 decision as to the criteria for determining whether a particular interstate compact requires congressional consent.

Justice Powell wrote the Court's opinion, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist, and Stevens.

In holding that the Multistate Tax Compact could go into effect without congressional consent, the Court wrote:

> "**Read literally, the Compact Clause would require the States to obtain congressional approval** before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.
>
> "**The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in [the 1893 case] *Virginia v. Tennessee*.[468] His conclusion [was] that the Clause could not be read literally** [and the Supreme Court's 1893 decision has been] approved in sub-

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[465] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[466] Additional history and information about this compact is described in *The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 4. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[467] The web site of the Multistate Tax Commission is at https://www.mtc.gov The Multistate Tax Compact is at https://compacts.csg.org/compact/multistate-tax-compact/

[468] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

sequent dicta, but this Court did not have occasion expressly to apply it in a holding until our recent [1976] decision in *New Hampshire v. Maine*,[469] supra."

"Appellants urge us to abandon *Virginia v. Tennessee* and *New Hampshire v. Maine*, but provide no effective alternative other than a literal reading of the Compact Clause. At this late date, **we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.**"[470] [Emphasis added]

The Court ruled that:

"**the test is whether the Compact enhances state power *quaod*** [with regard to] **the National Government**."[471] [Emphasis added]

The Court also noted that the compact did not:

"authorize the member states to exercise any powers they could not exercise in its absence."[472]

The National Popular Vote Compact does not encroach upon federal supremacy and hence does not require congressional consent.

The power of each state to choose the manner of awarding its electoral votes is specified in Article II, section 1, clause 2 of the Constitution:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[473]

In *McPherson v. Blacker* in 1892, the Supreme Court ruled:

"**The appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States."[474] [Emphasis added]

The absence of federal power—much less federal supremacy—over the choice of method of appointing presidential electors is made especially clear by comparing the constitutional provision dealing with *presidential* elections in Article II with the parallel provision concerning *congressional* elections in Article I.

Article I, section 4 of the Constitution concerning congressional elections states:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the**

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[469] *New Hampshire v. Maine*, 426 U.S. 363. 1976.

[470] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. at 459–460. 1978.

[471] *Ibid*. Page 473.

[472] *Ibid*. Page 473.

[473] U.S. Constitution. Article II, section 1, clause 2.

[474] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

> **Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators." [Emphasis added]

Article I gives states *primary*—but not *exclusive*—control over congressional elections. At any time, Congress can "make or alter" any state law regarding the manner of conducting congressional elections.

In contrast, Article II concerning presidential elections gives the states *exclusive* control over the manner of appointing presidential electors.

The National Popular Vote Compact does not encroach on the "just supremacy of the United States," because the states have the *exclusive* power to choose the method of appointing their presidential electors.

There is simply no federal power—much less federal supremacy—to encroach upon.

An opponent of the National Popular Vote Compact, Professor Michael T. Morley at the Florida State University College of Law, wrote in 2020:

> "Perhaps the most obvious objection to the National Popular Vote Compact is that it is invalid under the Compact Clause unless and until Congress consents to it. **Under the Court's longstanding interpretation of the Clause, however, congressional approval is likely unnecessary.** In any event, if states collectively holding 270 or more electoral votes joined the Compact, Congress would likely grant its approval at some point, perhaps when Democrats controlled both Congress and the Presidency. Thus, **at most, the Compact Clause reflects a potential constitutional speed bump, not an impenetrable barrier.**"[475]

In discussing the "speed bump," it appears that as soon as *either* political party wins control of both houses of Congress and the presidency, the filibuster procedure in the U.S. Senate is likely to be abolished.[476,477]

Other opponents of the National Popular Vote Compact, such as Professor Derek Muller, have vigorously argued that it does require congressional consent.[478,479] Other scholars have reached the opposite conclusion.[480]

In any event, opponents of the National Popular Vote Compact have stated that they intend to litigate the question of whether it requires congressional consent after it is ap-

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[475] Morley, Michael T. 2020. The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact. *Harvard Law & Policy Review*. Volume 15. Issue 1. Page 100. https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2021/08/HLP109.pdf

[476] Willick, Jason. 2024. Sinema predicts the Senate filibuster's unfortunate demise. *Washington Post*. May 9, 2024. https://www.washingtonpost.com/opinions/2024/05/09/sinema-filibuster-congress-american-decline/

[477] Hulse, Carl. 2024. Is the End of the Filibuster Near? *New York Times*. March 13, 2024. https://www.nytimes.com/2024/03/13/us/politics/filibuster-senate-manchin-sinema.html

[478] Muller, Derek T. 2007. The compact clause and the National Popular Vote Interstate Compact. *Election Law Journal*. Volume 6. Number 4. Pages 372–393. https://www.liebertpub.com/doi/10.1089/elj.2007.6403

[479] Muller, Derek T. 2008. More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks. *Election Law Journal*. Volume 7. Number 3. Pages 227–232. https://www.liebertpub.com/doi/abs/10.1089/elj.2008.7307

[480] Hendricks, Jennifer S. 2008. Popular election of the president: Using or abusing the Electoral College? *Election Law Journal*. Volume 7. Pages 218–226. https://www.liebertpub.com/doi/10.1089/elj.2008.7306

proved by the requisite combination of states. Therefore, the National Popular Vote organization has been working to obtain support in Congress for the Compact.

A mere federal "interest" does not constitute a threat to federal supremacy.
In discussing whether the National Popular Vote Compact requires congressional consent, Tara Ross, a lobbyist against the Compact who works closely with Save Our States, has argued that the federal government has an "interest" in the matter.

> "**The federal government has at least one important interest at stake**. As Professor Judith Best has noted, **the federal government has a vested interest in protecting its constitutional amendment process**. If the NPV compact goes into effect, its proponents will have effectively changed the presidential election procedure described in the Constitution, without the bother of obtaining a constitutional amendment."[481] [Emphasis added]

As discussed at length in section 9.1.1, the National Popular Vote Compact would not change "the presidential election procedure described in the Constitution." Indeed, no state law can do that.

Instead, the National Popular Vote Compact would change *state* winner-take-all statutes. None of these state winner-take-all statutes was originally adopted by means of a federal constitutional amendment.

The winner-take-all method of appointing presidential electors was not debated by the Constitutional Convention or mentioned in the *Federalist Papers*. It was used by only three states in the nation's first presidential election in 1789, and all three states (Maryland, New Hampshire, and Pennsylvania) had abandoned it by 1800. It was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states.

These state winner-take-all laws may be changed in the same manner as they were adopted—that is, by passage of a new state law changing the state's method of appointing its presidential electors.

Thus, the National Popular Vote Compact does not interfere with any federal "interest" in protecting the constitutional amendment process.

More importantly, the Supreme Court specifically addressed the question of whether the mere existence of a federal "interest" is sufficient to require that a compact obtain congressional consent. In responding to a point raised in the dissenting opinion, the seven-member majority of the Supreme Court stated (in footnote 33 of its opinion):

> "**The dissent appears to confuse potential impact on 'federal interests' with threats to 'federal supremacy.'** It dwells at some length on the unsuccessful efforts to obtain express congressional approval of this Compact, relying on the introduction of bills that never reached the floor of either House. This history of congressional inaction is viewed as 'demonstrat[ing] … a federal interest in the rules for apportioning multistate and multinational income,'

[481] Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

> and as showing 'a potential impact on federal concerns.' Post, at 488, 489. **That there is a federal interest no one denies**.
>
> "The dissent's focus on the existence of federal concerns misreads *Virginia v. Tennessee* and *New Hampshire v. Maine*. **The relevant inquiry under those decisions is whether a compact tends to increase the political power of the States in a way that 'may encroach upon or interfere with the just supremacy of the United States.'** *Virginia v. Tennessee*, 148 U.S., at 519. **Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant**. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval.
>
> "In this case, the Multistate Tax Compact is concerned with a number of state activities that affect interstate and foreign commerce. But as we have indicated at some length in this opinion, **the terms of the Compact do not enhance the power of the member States to affect federal supremacy in those areas**.
>
> "**The dissent appears to argue that the political influence of the member States is enhanced by this Compact**, making it more difficult—in terms of the political process—to enact pre-emptive legislation. We may assume that there is strength in numbers and organization. But enhanced capacity to lobby within the federal legislative process falls far short of threatened 'encroach[ment] upon or interfer[ence] with the just supremacy of the United States.' Federal power in the relevant areas remains plenary; no action authorized by the Constitution is 'foreclosed,' see post, at 491, to the Federal Government acting through Congress or the treaty-making power.
>
> "The dissent also offers several aspects of the Compact that are thought to confer 'synergistic' powers upon the member States. Post, at 491–493. **We perceive no threat to federal supremacy in any of those provisions.** See, e.g., *Virginia v. Tennessee*, supra, at 520."[482] [Emphasis added]

The U.S. Supreme Court subsequently repeated the point that it made in 1978 in footnote 33 of its decision in *U.S. Steel Corporation v. Multistate Tax Commission* concerning the irrelevance of the existance of a "federal interest." In overturning a lower court decision in 1981, the Court cited footnote 33 in *Cuyler v. Adams*:

> "The [lower] Court stresses the federal interest in the area of extradition, ante, at 442, n. 10, but, for Compact Clause purposes, **'[a]bsent a threat of encroachment or interference through enhanced state power, the exis-**

[482] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452 at 479. 1978.

> **tence of a federal interest is irrelevant**.' *Multistate Tax Comm'n*, supra, at 480, **n. 33**."[483] [Emphasis added]

Dissenting opinion in *Multistate Tax Commission* concerning impact on non-member states

In their dissenting opinion in *U.S. Steel Corporation v. Multistate Tax Commission*, Justices Byron White and Harry Blackmun argued that courts should consider the possible adverse effects of a compact on non-compacting states in deciding whether congressional consent is necessary for a particular compact. They wrote:

> "A proper understanding of what would encroach upon federal authority, however, must also incorporate encroachments on the authority and power of non-Compact States."[484]

The Court majority addressed the argument raised by the dissent by saying:

> "**Appellants' final Compact Clause argument charges that the Compact impairs the sovereign rights of nonmember States.** Appellants declare, without explanation, that if the use of the unitary business and combination methods continues to spread among the Western States, unfairness in taxation—presumably the risks of multiple taxation—will be avoidable only through the efforts of some coordinating body. Appellants cite the belief of the Commission's Executive Director that the Commission represents the only available vehicle for effective coordination, and conclude that **the Compact exerts undue pressure to join upon nonmember States in violation of their 'sovereign right' to refuse**.
>
> "We find no support for this conclusion. It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods will redound to the benefit of any particular group of States or to the harm of others. **Even if the existence of such a situation were demonstrated, it could not be ascribed to the existence of the Compact. Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist**. Risks of unfairness and double taxation, then, are independent of the Compact.
>
> "Moreover, it is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States. **Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause** of Art. IV, 2, see, e.g., *Austin v. New Hampshire*, 420 U.S. 656 (1975), **it is not clear how our federal structure is implicated**.

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[483] *Cuyler v. Adams*, 449 U.S. 433, 452. 1981.

[484] *U.S. Steel Corp. v. Multistate Tax Commission*. 434 U.S. at 494. 1978.

> Appellants do not argue that an individual State's decision to apportion nonbusiness income—or to define business income broadly, as the regulations of the Commission actually do—touches upon constitutional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission's recommendation."[485] [Emphasis added]

In 1985, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court considered arguments that an interstate compact impaired the sovereign rights of non-member states or enhanced the political power of the member states at the expense of other states. The Court wrote that it:

> "[did] not see how the statutes in question … enhance the political power of the New England states at the expense of other States."[486]

Tara Ross has taken note of the dissenting opinion in *U.S. Steel Corporation v. Multistate Tax Commission* and has argued that:

> "non-compacting states have … important interests."[487]

In particular, Ross has identified three potential "interests" of non-compacting states in the National Popular Vote Compact.

> "NPV deprives these states of their opportunity, under the Constitution's amendment process, to participate in any decision made about changing the nation's presidential election system.
>
> "They are also deprived of the protections provided by the supermajority requirements of Article V."
>
> "The voting power of states relative to other states is changed. NPV is the first to bemoan the fact that 'every vote is not equal' in the presidential election and that the weight of a voters' ballot depends on the state in which he lives. **In equalizing voting power, NPV is by definition increasing the political power of some states and decreasing the political power of other states.**"[488] [Emphasis added]

Concerning Ross' first point, the National Popular Vote Compact has been introduced into all 50 state legislatures and the Council of the District of Columbia, thus providing all states with the "opportunity … to participate."

In *Cuyler v. Adams* in 1981, the Supreme Court discussed the potential impact on non-member states of a compact that allows every state to join:

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[485] *Ibid.* Pages 477–478.

[486] *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System.* 472 U.S. 159 at 176. 1985.

[487] Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

[488] *Ibid.* Page 40.

> "In light of our recent decisions, however, it cannot seriously be contended that the Detainer Agreement constitutes an 'agreement or compact' as those terms have come to be understood in the Compact Clause. In *New Hampshire v. Maine*, 426 U.S. 363 (1976), we held that the 'application of **the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of the political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'** *Id.*, at 369, quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). This rule was reaffirmed in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978), where the Court ruled that **the quoted test 'states the proper balance between federal and state power with respect to compacts and agreements among States.'** Certainly nothing about the Detainer Agreement threatens the just supremacy of the United States or enhances state power to the detriment of federal sovereignty. **As with the 'compact' in Multistate Tax Comm'n, any State is free to join the Detainer Agreement, so it cannot be considered to elevate member States at the expense of nonmembers.** See *Id.*, at 477–478."[489] [Emphasis added]

Ross' second point concerning constitutional amendments was discussed earlier in this section.

Ross' third point concerns the potential effect on the *political value* of a vote cast by voters in some non-compacting states.

The National Popular Vote Compact would treat votes cast in all 50 states and the District of Columbia equally. A vote cast in a compacting state would be, in every way, equal to a vote cast in a non-compacting state. The National Popular Vote Compact does not confer any advantage on states belonging to it, as compared to non-compacting states.

Ross is, in effect, arguing that certain battleground states might have a *constitutional* right to maintain the *excess* political influence of votes cast in their states created by the winner-take-all method of awarding electoral votes—while simultaneously arguing that disadvantaged or altruistic states have no right to exercise their *independent* constitutional power over the method of awarding their electoral votes with the aim of creating equality.

Of course, it has always been the case that one state's choice of the manner of appointing its presidential electors has affected the *political value* of a vote cast in other states. For example, the use of the winner-take-all rule by closely divided battleground states plainly diminishes the political value of the votes cast by citizens in non-battleground states.

It is inherent in the grant by the U.S. Constitution, to each state, of the *independent* power to choose the method of appointing its presidential electors that one state's decision can enhance the political value of votes cast in its state—thereby impacting (and diminishing) the influence of votes cast in other states. This is a direct consequence of federalism and the fact that the Constitution gives each state the independent power to decide the method of appointing its presidential electors.

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[489] *Cuyler v. Adams*. 449 U.S. 433, 450–451. 1981.

Indeed, maximization of Virginia's political clout was the candidly stated purpose of the adoption of winner-take-all in 1800 by Jefferson's supporters, as discussed in section 2.6.1 and as explained in their nine-page broadside entitled "A Vindication of the General Ticket Law" (appendix C).

A present-day battleground state could, of course, eliminate the political effect of its winner-take-all rule on other states by changing its method of appointing its presidential electors. For example, if a battleground state were to change its winner-take-all statute to, say, the whole-number proportional method for awarding electoral votes (section 4.2), presidential candidates would pay almost no attention to that state, because only one electoral vote would be at stake in most cases. However, we are not aware of anyone who currently argues that any present-day battleground state has a constitutional obligation to make such a change in order to reduce its impact on the political importance of voters in other states.

If the Constitution gives a closely divided battleground state the power to choose a method of awarding its electoral votes that increases the political value of votes cast in its state, it also gives the power to non-battleground states to choose a method for awarding their electoral votes to counterbalance the political effects of that decision (and, arguably, create a better overall system in the process).

In any case, the electoral votes of the non-compacting states would, under the National Popular Vote Compact, continue to be cast in the manner specified by the laws of those states. The electoral votes of the non-compacting states would continue to be counted in the Electoral College in the manner provided by the Constitution. In practical terms, the non-compacting states would continue to cast their votes for the winner of the statewide popular vote (or perhaps the district-wide popular vote in Nebraska and Maine) after the National Popular Vote Compact is implemented. No non-compacting state would be compelled to cast its electoral votes for the winner of the national popular vote.

The political impact of the winner-take-all rule on other states has long been recognized as a political reality. It is not California's winner-take-all rule or Wyoming's winner-take-all rule that makes a vote in California and Wyoming politically irrelevant in presidential elections. Indeed, a vote in California and a vote in Wyoming are equal as a result of the widespread use of the state-by-state winner-take-all rule, and both are equally worthless. Instead, it is the use of the winner-take-all rule in closely divided battleground states that diminishes the political value of the votes cast in California and Wyoming.

The Founding Fathers intended, as part of the political compromise that led to the Constitution, to confer a certain amount of extra influence on the less populous states by giving every state a bonus of two electoral votes corresponding to its two U.S. Senators. The Founders also intended that the Constitution's formula for allocating electoral votes would give the bigger states a larger amount of influence in presidential elections. Their goals with respect to *both* small states and big states were never achieved because of the subsequent widespread adoption by the states of the winner-take-all rule. The winner-take-all rule drastically altered the political value of votes cast in both small and big states throughout the country.

Interstate comparisons of the *political value* of votes are not, according to past judicial rulings, a legal basis for contesting any state's decision to adopt a certain method of appointing its own presidential electors under Article II, section 1 of the Constitution.

In 1966, the U.S. Supreme Court declined to act in response to a complaint concerning the political impact of one state's choice of the manner of appointing its presidential electors on another state. In *State of Delaware v. State of New York*, Delaware led a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) in suing New York in the U.S. Supreme Court. At the time of this lawsuit, New York was not only a closely divided battleground but also the state possessing the most electoral votes (43). Delaware argued that New York's decision to use the winner-take-all rule effectively disenfranchised voters in Delaware and the other 11 plaintiff states. New York's (defendant) brief is especially pertinent.[490] The U.S. Supreme Court declined to hear the case—presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision.[491]

In 1968, the constitutionality of the winner-take-all rule was challenged in *Williams v. Virginia State Board of Elections*.[492] A federal court in Virginia upheld the winner-take-all rule. The U.S. Supreme Court affirmed this decision in a *per curiam* decision in 1969.[493] See section 9.1.7.

Developments since 1978

In 2003, Michael S. Greve reported:

> "No court has ever voided a state agreement for failure to obtain congressional consent."[494]

In 2007, the *Harvard Law Review* reported:

> "No court has ever invalidated an interstate agreement for lack of such consent."[495]

In the period since the Supreme Court's decision in *U.S. Steel Corporation v. Multistate Tax Commission* in 1978, numerous compacts that did not receive congressional consent have been challenged in the courts, and none has been invalidated because of lack of congressional consent.

In 1983, *McComb v. Wambaugh* involved the Interstate Compact on Placement of

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[490] Delaware's brief in the 1966 case may be found at https://www.nationalpopularvote.com/elevenplaintiffs. New York's brief may be found at https://www.nationalpopularvote.com/newyorkbrief. Delaware's argument in its request for a re-hearing may be found at https://www.nationalpopularvote.com/delawarebrief.

[491] *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

[492] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622. Dist. Court, ED Virginia 1968.

[493] *Williams v. Virginia State Board of Elections*. 393 U.S. 320 (1969) (*per curiam*).

[494] Greve, Michael S. 2003. Compacts, Cartels, and Congressional Consent. *Missouri Law Review*. Spring 2003. Volume 68. Pages 285–387. See page 289 and also footnote 15 regarding work of David E. Engdahl in 1965. https://scholarship.law.missouri.edu/mlr/vol68/iss2/

[495] *Harvard Law Review*. 2007. The Compact Clause and the Regional Greenhouse Gas Initiative. *Harvard Law Review*. Volume 120. Page 1958. See page 1960. https://harvardlawreview.org/wp-content/uploads/pdfs/the_compact_clause.pdf

Children. That compact had become effective without congressional consent,[496] and it contained a provision that delayed a state's withdrawal for two years. The U.S. Court of Appeals for the Third Circuit held that no encroachment on federal supremacy occurred, because the subject of the compact concerns:

> "areas of jurisdiction historically retained by the states."[497]

In 1983, *Breest v. Moran*[498] involved the New England Interstate Corrections Compact allowing for the transfer of prisoners among detention facilities in the New England states.

In 2002, *Star Scientific, Inc. v. Beales* concerned the Master Settlement Agreement that resolved the lawsuit between states and major tobacco companies and established an administrative body to determine compliance with the agreement. The U.S. Court of Appeals for the Fourth Circuit concluded:

> "The Master Settlement Agreement does not increase the power of the States at the expense of federal supremacy and that, therefore, it is not an interstate compact requiring congressional approval under the Compact Clause."[499]

As Michael S. Greve wrote in 2003:

> "After *U.S. Steel* one can hardly imagine a state compact that would run afoul of the Compact Clause without first, or at least also, running afoul of other independent constitutional obstacles."[500]

9.23.4. MYTH: The topic of elections is not an appropriate subject for an interstate compact.

QUICK ANSWER:

- There are no constitutional restrictions on the subject matter of interstate compacts other than the implicit limitation that it must be among the powers that states are permitted to exercise.
- The U.S. Supreme Court has repeatedly stated that the Constitution gives each state the "exclusive" and "plenary" power to choose the manner of appointing

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[496] The Interstate Compact for the Placement of Children was written with the expectation that congressional consent would not be required if its membership were limited to states of the United States, the District of Columbia, and Puerto Rico. However, the compact invites the federal government of Canada and Canadian provincial governments to become members. The compact specifically recognizes that congressional consent would be required if a Canadian entity desired to become a party to the compact, by providing: "This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the government of Canada or any province thereof." As of 1991, no Canadian entity had sought membership in the compact, and the compact was thus put into operation without congressional consent.

[497] *McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir. 1991).

[498] *Breest v. Moran*, 571 F.Supp. 343 (D.R.I. 1983).

[499] *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002).

[500] Greve, Michael S. 2003. Compacts, Cartels, and Congressional Consent. *Missouri Law Review*. Spring 2003. Volume 68. Pages 285–387. Page 308. https://scholarship.law.missouri.edu/mlr/vol68/iss2/

its presidential electors. Thus, the subject matter of the National Popular Vote Compact is among the powers that the states are permitted to exercise.

MORE DETAILED ANSWER:

The U.S. Constitution places no restriction on the subject matter of an interstate compact other than the implicit limitation that it must be among the powers that states are permitted to exercise.

The National Popular Vote Compact concerns the method of appointment of a state's presidential electors.

The U.S. Constitution explicitly gives each state the power to select the method of appointing its presidential electors:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[501]

The U.S. Supreme Court ruled in *McPherson v. Blacker* in 1892:

> "In short, **the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States. … Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise **the power and jurisdiction of the state is exclusive**, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded."[502] [Emphasis added]

Thus, the subject matter of the National Popular Vote Compact is a state power.

There is currently no other interstate compact concerned specifically with elections. Nonetheless, U.S. Supreme Court Justice Potter Stewart noted the possibility of compacts involving elections in his concurring and dissenting opinion in *Oregon v. Mitchell* in 1970. In that case, the U.S. Supreme Court examined the constitutionality of the Voting Rights Act Amendments of 1970 that removed state-imposed durational residency requirements on voters casting ballots in presidential elections.

Justice Stewart concurred with the majority that Congress had the power to make uniform durational residency requirements in presidential elections.

He also observed:

> "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State. The objective of §202 is clearly a legitimate one. Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. **No State could undertake to guarantee this privilege to its citizens. At most a single State could take steps to**

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[501] U.S. Constitution. Article II, section 1, clause 2.

[502] *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892.

> **resolve that its own laws would not unreasonably discriminate against the newly arrived resident.** Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its own citizens who moved to other States. **Thus, the problem could not be wholly solved by a single State**, or even by several States, since every State of new residence and every State of prior residence would have a necessary role to play. **In the absence of a unanimous interstate compact, the problem could only be solved by Congress."**[503] [Emphasis added]

The states have used interstate compacts in increasingly creative ways—especially since the 1920s. The judiciary has been repeatedly asked to consider the validity of various novel compacts. Nonetheless, we are aware of no case in which the courts have invalidated any interstate compact.[504]

Moreover, in recent years, the courts have accorded even greater deference to the power of states and even wider and freer use of interstate compacts by them.

The 10th Amendment provides an additional argument in favor of a state power:

> **"The powers** not delegated to the United States by the Constitution, **nor prohibited by it to the States, are reserved to the States** respectively, or to the people." [Emphasis added]

Article II, section 1 contains only one restriction on state choices on the manner of appointing their presidential electors, namely that no state may appoint a member of Congress or a federal appointee as presidential elector.

9.23.5. MYTH: The Compact requires congressional consent, but Congress cannot give it.

QUICK ANSWER:

- It is a fact that the choice of method for appointing presidential elections is an exclusive state power. Thus, Congress could not pass, for example, a federal law requiring that presidential electors be appointed on the basis of the national popular vote for President.
- It is a fact that the courts have ruled that congressional consent "converts" an interstate compact into federal law for the purpose of ascertaining whether the courts should interpret a given compact as state or federal law.
- However, no "Catch-22" is created by the above two statements, because the U.S. Supreme Court has specifically ruled that the subject matter of a compact that is to be converted into federal law must be "an appropriate subject for congressional legislation."

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[503] *Oregon v. Mitchell.* 400 U.S. 112 at 286–287. 1970.

[504] There have been cases where a higher court has reversed a ruling by a lower court invalidating an interstate compact. See, for example, *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22. 1950. https://supreme.justia.com/cases/federal/us/341/22/

MORE DETAILED ANSWER:

Ian J. Drake, an assistant professor of political science and law at Montclair State University, claims that there is a "Catch-22" that prevents Congress from giving its consent to the National Popular Vote Compact.

Drake believes that the National Popular Vote Compact requires congressional consent before it can come into effect—a belief that we separately discussed in section 9.23.3.

For the sake of argument in this section, let's say that the National Popular Vote Compact *does* require congressional consent.

Drake argues that the National Popular Vote Compact is "manifestly unconstitutional,"[505] because Congress does not have the power to give its consent:

> "Even if Congress wanted to approve the NPV, it would be unconstitutional to do so. The Supreme Court has held that **Congress' approval of an interstate compact converts the agreement into federal law**. Although **the Constitution leaves the appointment of electors up to the states**—a point NPV proponents repeatedly make—**the submission of the NPV compact to Congress puts Congress in the position of approving a measure that Congress would be prohibited from enacting by itself**. The Constitution does not allow Congress to create a popular vote system on its own initiative. Therefore, how could Congress approve a state-based plan that does the same?"[506] [Emphasis added]

In fact, there is no "Catch-22" here, because Drake has ignored a key element of the Supreme Court's ruling in *Cuyler v. Adams* in 1981:

> "[W]here Congress has authorized the States to enter into a cooperative agreement **and the subject matter of that agreement is an appropriate subject for congressional legislation**, Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question."[507] [Emphasis added]

Drake's argument also misinterprets what it means to "convert" an interstate compact into federal law. The effect of this conversion is to ascertain whether the courts are to interpret a compact under state or federal law—something that is clear from the history leading up to the decision in *Cuyler v. Adams* (covered in section 5.10).

Needless to say, Congress cannot acquire the power to exercise a power that the Constitution assigns exclusively to the states through the legerdemain of approving legislation already passed by the states.

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[505] Drake, Ian J. 2014. New York adding to federal problem. *Albany Times Union*. May 6, 2014. https://www.timesunion.com/opinion/article/N-Y-adding-to-federal-problem-5457487.php

[506] Drake, Ian J. 2016. An alternative to the Electoral College. *Oxford University Press blog*. November 20, 2016. http://blog.oup.com/2016/11/alternative-electoral-college-vote/#comment-2958352

[507] *Cuyler v. Adams*, 449 U.S. 433, 434–435. 1981.

9.23.6. MYTH: The National Popular Vote Compact requires congressional consent because of its withdrawal procedure.

QUICK ANSWER:

- The test established by the U.S. Supreme Court in 1978 as to whether an interstate compact requires congressional consent is based on whether the compact encroaches on federal supremacy—not on the compact's withdrawal procedure.
- The Interstate Compact for the Placement of Children is an example of a compact that did not require congressional consent to become effective and that imposes a two-year delay on the effectiveness of a state's withdrawal. In 1991, this compact was upheld in *McComb v. Wambaugh* despite its withdrawal procedure.

MORE DETAILED ANSWER:

In 2023, the Congressional Research Service stated:

> "In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*,[508] the Supreme Court addressed a constitutional challenge to a system of reciprocal state legislation that limited acquisition of banks in Massachusetts and Connecticut. The Court determined that congressional consent was not required because the reciprocal state legislation scheme lacked four 'classic indicia of a compact,' which are:
>
> '(1) Creation of a joint organization or body,
> '(2) Conditioning one state's action on the actions of other states,
> '(3) Restricting states' power to modify or repeal their laws unilaterally, and
> '(4) A requirement for reciprocal constraints among all states.'"[509]

In *U.S. Steel Corp. v. Multistate Tax Commission*, the U.S. Supreme Court made three observations about the characteristics of the Multistate Tax Compact, including the fact that states could withdraw from that particular compact without delay.

The Multistate Tax Compact permits withdrawal from the compact, without delay or advance notice to other states.

Hans von Spakovsky of the Heritage Foundation has incorrectly interpreted the U.S. Supreme Court's observations in *U.S. Steel Corp. v. Multistate Tax Commission* about the characteristics of the Multistate Tax Compact as "prongs" of a legal test as to whether a compact requires congressional consent:

> "In *U.S. Steel Corp. v. Multistate Tax Commission*, the Supreme Court of the United States held that the Compact Clause prohibited compacts that
>
> 'encroach upon the supremacy of the United States.'

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[508] *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*. 472 U.S. 159. June 10, 1985. https://tile.loc.gov/storage-services/service/ll/usrep/usrep472/usrep472159/usrep472159.pdf

[509] Congressional Research Service Legal Sidebar. 2023. Interstate Compacts: An Overview, June 15, 2023. Page 6. https://crsreports.congress.gov/product/pdf/LSB/LSB10807

"The Court emphasized that the real test of constitutionality is whether the compact

> 'enhances state power *quoad* the National Government.'…

"To determine this qualification, the Court questioned whether:

> (1) The compact authorizes the member states to exercise any powers they could not exercise in its absence;
> (2) The compact delegates sovereign power to the commission that it created; or
> (3) The compacting states cannot withdraw from the agreement at any time.

"Unless approved by Congress, **a violation of any one of these three prongs is sufficient to strike down a compact as unconstitutional**."

"**Under the third prong of the test delineated in *U.S. Steel Corp.*, the compact must allow states to withdraw at any time**. The NPV, however, places withdrawal limitations on compacting states. The plan states that

> 'a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.'

"**This provision is in direct conflict with the *U.S. Steel Corp.* test**."[510] [Emphasis added]

The Supreme Court's three observations about characteristics of the Multistate Tax Compact were not "prongs" of any "test."

The incorrectness of von Spakovsky's interpretation of the Supreme Court's 1978 decision in *U.S. Steel Corp. v. Multistate Tax Commission* is demonstrated by *McComb v. Wambaugh* in 1991 dealing with the enforceability of the Interstate Compact for the Placement of Children, which:

- became effective without congressional consent, and
- *contained a provision that delayed a state's withdrawal for two years.*[511]

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[510] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[511] The Interstate Compact for the Placement of Children was written with the expectation that congressional consent would not be required if its membership were limited to states of the United States, the District of Columbia, and Puerto Rico. However, the compact invites the federal government of Canada and Canadian provincial governments to become members. The compact specifically recognizes that congressional consent would be required if a Canadian entity desired to become a party to the compact by providing: "This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the government of Canada or any province thereof." As of 1991, no Canadian entity had sought membership in the compact, and the compact was thus put into operation without congressional consent.

Article IX of the Interstate Compact for the Placement of Children provides:

> "Withdrawal from this compact shall be by the enactment of a statute repealing the same, **but shall not take effect until two years after the effective date of such statute** and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties, and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal." [Emphasis added]

In *McComb v. Wambaugh*, the U.S. Court of Appeals for the Third Circuit interpreted and applied the test established by the U.S. Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission* concerning the question of whether congressional consent was necessary for a compact to become effective. The U.S. Court of Appeals for the Third Circuit wrote:

> "**The Constitution recognizes compacts** in Article I, section 10, clause 3, which reads, 'No state shall, without the Consent of the Congress … enter into any Agreement or Compact with another State.' **Despite the broad wording of the clause Congressional approval is necessary only when a Compact is 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'** *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468, 98 S.Ct. 799, 810, 54 L.Ed.2d 682 (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734, 37 L.Ed. 537 (1893)).
>
> "**The Interstate Compact on Placement of Children has not received Congressional consent. Rather than altering the balance of power between the states and the federal government, this Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states**. *In re Burrus*, 136 U.S. 586, 593–94, 10 S.Ct. 850, 852-53, 34 L.Ed. 500 (1890); *Lehman v. Lycoming County Children's Services Agency*, 648 F.2d 135, 143 (3d Cir.1981) (en banc), aff'd, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). **Congressional consent, therefore, was not necessary for the Compact's legitimacy.**"
>
> **"Because Congressional consent was neither given nor required, the Compact does not express federal law.** Cf. *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981). **Consequently, this Compact must be construed as state law.** See Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 *Va.L.Rev.* 987, 1017 (1965) ('[T]he construction of a compact not requiring consent … will not present a federal question.')."
>
> "**Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states**."[512] [Emphasis added]

[512] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

As the Third Circuit noted, the test as to whether an interstate compact requires congressional consent is what the U.S. Supreme Court said in the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*:

> "**the test is** whether the Compact enhances state power *quaod* the National Government."[513] [Emphasis added]

Von Spakovsky's "prongs" are not part of any "test" as to whether congressional consent is necessary for an interstate compact to become effective. In particular, the withdrawal provisions of a compact do not determine whether the compact requires congressional consent in order to become effective.

9.23.7. MYTH: A constitutional crisis would be created because of the question about whether the Compact requires congressional consent.

QUICK ANSWER:

- Despite hyperbolic predictions, no constitutional crisis will be created because of the question about whether congressional consent is required before the National Popular Vote Compact can take effect. Instead, a lawsuit will (almost certainly) be filed, and the question of constitutional interpretation will be heard and settled by the courts.

MORE DETAILED ANSWER:

Michael Maibach, a Distinguished Fellow at Save Our States and Director of the Center for the Electoral College,[514] has written:

> "**NPV would create a Constitutional crisis**. The Constitution's Compact Clause (Article 1) requires that state compacts gain Congressional approval."[515] [Emphasis added]

Despite Maibach's hyperbole, no constitutional crisis will be created because of the question about whether congressional consent is required before the National Popular Vote Compact can take effect.

If laws approving the Compact have been enacted (and taken effect) in the requisite combination of states, and congressional consent has not been previously given, a lawsuit will (almost certainly) be filed raising the question of whether congressional consent is required before the Compact can become operative. This question of constitutional interpretation will be heard and settled in an orderly manner by the courts.

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[513] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452 at 473. 1978.

[514] The Center for the Electoral College identifies itself (at its web site at https://centerelectoralcollege.us/) as "a project of the Oklahoma Council of Public Affairs." Save Our States also identifies itself as a project of the Oklahoma Council of Public Affairs.

[515] Maibach, Michael. 2020. Beware of The National Popular Vote Bill in Richmond. *Roanoke Star*. August 31, 2020. https://theroanokestar.com/2020/08/31/beware-of-the-national-popular-vote-bill-in-richmond/

9.23.8. MYTH: Interstate compacts that do not receive congressional consent are unenforceable and "toothless."

QUICK ANSWER:

- Some interstate compacts require congressional consent. However, congressional consent is not required for compacts that do not challenge federal supremacy.
- Far from being "toothless," all interstate compacts are enforceable contracts once they come into effect—regardless of whether congressional consent was required for the compact to go into effect.
- An interstate compact takes precedence over *all* state laws—whether enacted *before* or *after* the state entered the compact. If a state no longer wishes to comply with its obligations under an interstate compact, it must withdraw from the compact in the manner specified by the compact before it adopts a contrary policy.

MORE DETAILED ANSWER:

Professor Norman Williams of Willamette University in Salem, Oregon, raises a variation on John Samples' hypothetical withdrawal scenario (section 9.25):

> "In every state where the state legislature is controlled by the party of the national popular vote loser, there will be calls by disaffected constituents to withdraw from the NPVC."
>
> "In fairness, the NPVC foresees this problem and attempts to address it by forbidding states from withdrawing from the compact after July 20 in a presidential election year. States that are signatories as of July 20 are mandated by the NPVC to adhere to the compact and its rules for appointing electors. Depending on whether Congress ratifies the NPVC, however, that provision is either **toothless** or fraught with difficulties."[516] [Emphasis added]

Williams then presents the following legally incorrect arguments in support of his claim of toothlessness. His argument contains several astonishingly inappropriate legal citations in the footnotes, which we will discuss momentarily:

> "Article I, Section 10 of the U.S. Constitution requires Congress to consent to any interstate compact before it can go into operation. **[Williams' footnote 171 appears here]**
>
> "Let's suppose Congress does not consent to the compact, as its supporters urge is unnecessary despite the seemingly categorical command of the Compact Clause.
>
> "In that case, the compact does not acquire the force of federal law, as congres-

[516] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 215–216.

> sionally endorsed compacts do, and therefore, it remains merely the law of the state.
>
> "**Its status as state law, however, makes it no different from any other statute enacted by the state legislature**.
>
> "And, **like any other state statute, a subsequent legislature can amend or repeal the NPVC** consistent with the state's own constitutionally prescribed legislative process. **[Williams' footnote 175 appears here]**
>
> "A prior legislature may not bind subsequent legislatures through subconstitutional measures, such as statutes or congressionally unratified interstate compacts."[517] **[Williams' footnote 176 appears here]** [Emphasis added]

Williams' statement that "the U.S. Constitution requires Congress to consent to any interstate compact before it can go into operation" is supported by his footnote 171 citing the Compacts Clause of the Constitution.

However, Williams' footnote fails to cite a century and a quarter of compact jurisprudence interpreting the Compacts Clause of the Constitution, including rulings of the U.S. Supreme Court such as the 1893 case of *Virginia v. Tennessee*[518] and the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*[519]—both of which are quoted at length in section 9.23.3.

The facts are that numerous interstate compacts that never received congressional consent are in force today based on the U.S. Supreme Court's rulings in *Virginia v. Tennessee* and *U.S. Steel Corporation v. Multistate Tax Commission*. For example, the Supreme Court ruled that the Multistate Tax Compact—the subject of *U.S. Steel Corporation v. Multistate Tax Commission*—did not require congressional consent in order to go into effect.

Williams' characterization of the Compacts Clause as a "categorical command" fails to acknowledge that the U.S. Supreme Court explicitly ruled in both *U.S. Steel Corporation v. Multistate Tax Commission* and *Virginia v. Tennessee* that the Compact Clause was *not* categorical. As the Court said:

> "Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.
>
> "The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in [the 1893 case] *Virginia v. Tennessee*.[520] His conclusion [was] that the Clause could not be read literally [and this 1893 conclusion has been] approved in subsequent dicta, but this Court did not have

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[517] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

[518] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[519] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. 1978.

[520] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

> occasion expressly to apply it in a holding until our recent decision in *New Hampshire v. Maine*,[521] supra."
>
> "**Appellants urge us to abandon *Virginia v. Tennessee* and *New Hampshire v. Maine*, but provide no effective alternative other than a literal reading of the Compact Clause. At this late date, we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy**."[522] [Emphasis added]

See section 9.23.3 for additional discussion of the U.S. Supreme Court's decisions and criteria for whether a particular interstate compact requires congressional consent.

Williams' statement that a compact's "status as state law … makes it no different from any other statute enacted by the state legislature" is also legally incorrect.

The fact that a congressionally approved compact acquires the status of federal law is unrelated to the question of whether a compact has gone into effect and is an enforceable contract.

Compacts go into operation in one of two ways:

- First, if the compact requires congressional consent, it goes into effect only after (1) being enacted by the requisite combination of states, and (2) Congress confers its consent. A compact that requires congressional consent, but has not received it, simply never goes into effect.
- Second, if the compact does not require congressional consent, it goes into effect after being enacted by the requisite combination of states.

The legal question of whether a particular compact requires congressional consent in order to take effect is answered by whether it satisfies the criteria established by rulings of the U.S. Supreme Court.

When Congress consents to an interstate compact, the compact acquires the status of federal law, and the courts interpret it as federal law (section 5.10). Conversely, a compact that does not require congressional consent does not acquire the status of federal law, and the courts interpret it as state law.

Once a compact is in effect, it is an enforceable contractual arrangement among participating states. The Impairments Clause of the U.S. Constitution provides:

> "No State shall … pass any … Law impairing the Obligation of Contracts."[523]

State courts routinely enforce interstate compacts not requiring congressional consent on the basis of the Impairments Clause.

The question of whether a compact has been converted into federal law is concerned with whether the compact is interpreted as federal or state law. The fact that a compact not requiring congressional consent has not been converted into federal law is unrelated to its enforceability.

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[521] *New Hampshire v. Maine*, 426 U.S. 363. 1976.

[522] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. at 459–460. 1978.

[523] U.S. Constitution. Article I, section 10, clause 1.

A 2012 *state* court ruling involving the Multistate Tax Compact (the same interstate compact that was the subject of the U.S. Supreme Court's decision in *U.S. Steel Corporation v. Multistate Tax Commission*) illustrates this point.

In *The Gillette Company et al. v. Franchise Tax Board*, the California Court of Appeal voided a state law attempting to override a provision of the Multistate Tax Compact (from which California had *not* withdrawn at the time of the decision).

> "In 1972, a group of multistate corporate taxpayers brought an action on behalf of themselves and all other such taxpayers threatened with audits by the Commission. The complaint challenged the constitutionality of the Compact on several grounds, including that it was invalid under the compact clause of the United States Constitution. (*U.S. Steel*, supra, 434 U.S. at p. 458.)
>
> "The high court acknowledged that the compact clause, taken literally, would require the states to obtain congressional approval before entering into any agreement among themselves, 'irrespective of form, subject, duration, or interest to the United States.' (*U.S. Steel*, supra, 434 U.S. at p. 459.) However, it endorsed an interpretation, established by case law, that limited application of the compact clause 'to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' … This rule states the proper balance between federal and state power with respect to compacts and agreements among States.'" (Id. at p. 471, initial quote from *Virginia v. Tennessee* (1893) 148 U.S. 503, 519.)
>
> "Framing the test as whether the Compact enhances state power with respect to the federal government, the court concluded it did not."[524]

The California court continued:

> "Some background on the nature of interstate compacts is in order. **These instruments are legislatively enacted, binding and enforceable agreements between two or more states**."[525]
>
> "**As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not**.[526]
>
> "**Where, as here, federal congressional consent was neither given nor required, the Compact must be construed as state law**. (*McComb v. Wambaugh* (3d Cir. 1991) 934 F.2d 474, 479.) Moreover, **since interstate compacts are agreements enacted into state law, they have dual functions as enforceable contracts between member states and as statutes with legal**

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[524] *The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 6. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[525] *Ibid*. Page 8.

[526] *Ibid*. Page 9.

standing within each state; and thus we interpret them as both. (*Aveline v. Bd. of Probation and Parole* (1999) 729 A.2d 1254, 1257; see Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts* (ABA 2006) § 1.2.2, pp. 15–24 (Broun on Compacts); 1A Sutherland, Statutory Construction (7th ed. 2009) § 32:5; In re C.B. (2010) 188 Cal.App.4th 1024, 1031 [recognizing that Interstate Compact on Placement of Children shares characteristics of both contractual agreements and statutory law].)

"**The contractual nature of a compact is demonstrated by its adoption**: "**There is an offer** (a proposal to enact virtually verbatim statutes by each member state), an **acceptance** (enactment of the statutes by the member states), and **consideration** (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest.)" (Broun on Compacts, supra, § 1.2.2, p. 18.) **As is true of other contracts, the contract clause of the United States Constitution shields compacts from impairment by the states**. (*Aveline v. Bd. of Probation and Parole*, supra, 729 A.2d at p. 1257, fn. 10.) Therefore, upon entering a compact, "it takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide." (Ibid.; accord, *Intern. Union v. Del. River Joint Toll Bridge* (3d Cir. 2002) 311 F.3d 273, 281.) **Thus interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures to certain principles governing the subject matter of the compact**. (Broun on Compacts, supra, § 1.2.2, p. 17.)

"As explained and summarized in *C.T. Hellmuth v. Washington Metro. Area Trans.* (D. Md. 1976) 414 F.Supp. 408, 409 (*Hellmuth*): '**Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties**. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.' Cast a little differently, '[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact.' (*Henderson v. Delaware River Joint Toll Bridge Com'm* (1949) 66 A.2d 843, 849–450.) Nor may states amend a compact by enacting legislation that is substantially similar, unless the compact itself contains language enabling a state or states to modify it through legislation ' "concurred in" ' by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, supra, 311 F.3d at pp. 276–280.)"[527] [Emphasis added]

[527] *Ibid.* Pages 9–11.

The California court thus overturned a California state law overriding the provisions of the Multistate Tax Compact.[528]

Although state courts are more than capable of enforcing interstate compacts (and, in particular, voiding state legislation that attempts to evade a particular state's obligations under a compact), interstate compacts may be (and often are) litigated at the U.S. Supreme Court, as explained in *Interstate Disputes: The Supreme Court's Original Jurisdiction*.[529]

The U.S. Constitution states:

> "**In all Cases** affecting Ambassadors, other public Ministers and Consuls, and those **in which a State shall be Party, the Supreme Court shall have original Jurisdiction**."[530] [Emphasis added]

Williams supports his next legally incorrect statement (that a compact for which congressional consent is unnecessary is "merely" a state law and not an enforceable contract) with a totally inapplicable legal authority. He writes:

> "A subsequent legislature can amend or repeal the NPVC consistent with the state's own constitutionally prescribed legislative process. [Williams' footnote 175 appears here]"[531]

Williams' authority for this legally incorrect statement (that is, his own footnote 175) is the 1951 U.S. Supreme Court decision in *West Virginia ex rel. Dyer v. Sim*.[532] However, this case is not about a state being allowed to evade its obligations under an interstate compact, but about the U.S. Supreme Court ruling that West Virginia *could not* evade its obligations under a compact.

What the U.S. Supreme Court actually said was:

> "But a compact is after all a legal document. … **It requires no elaborate argument to reject the suggestion that an agreement** solemnly entered into between States by those who alone have political authority to speak for a State **can be unilaterally nullified**, or given final meaning by an organ of one of the contracting States. **A State cannot be its own ultimate judge in a controversy with a sister State**."[533] [Emphasis added]

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[528] After the California court's decision in *The Gillette Company et al. v. Franchise Tax Board*, the legislature passed, and the Governor signed, a law exercising the state's right, as provided in the Multistate Tax Compact, to withdraw from the compact (Senate Bill 1015 of 2012). After the effective date of the statute withdrawing from the compact, California became free to change its formula for taxing multi-state businesses. Senate Bill 1015 took effect as a "budget trailer" on July 27, 2012.

[529] Zimmerman, Joseph F. 2006. *Interstate Disputes: The Supreme Court's Original Jurisdiction.* Albany, NY: State University of New York Press.

[530] U.S. Constitution. Article III, section 2, clause 2.

[531] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

[532] *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33–34 (1951). https://supreme.justia.com/cases/federal/us/341/22/

[533] *Ibid*. Page 28.

Williams' final legally incorrect statement and inappropriate footnote are even more astonishing:

> "A prior legislature may not bind subsequent legislatures through subconstitutional measures, such as statutes or congressionally unratified interstate compacts. **[Williams' footnote 176 appears here]**"[534]

Williams cites two authorities for this incorrect statement in his footnote 176:

- the 1996 Nebraska case of *State ex rel. Stenberg v. Moore*,[535] and
- the 1936 Pennsylvania case of *Visor v. Waters*.[536]

In fact, neither case supports Williams' statement, and the ruling in one of them is exactly opposite to what Williams claims.

State ex rel. Stenberg v. Moore was concerned with a 1993 Nebraska state *law* (Legislative Bill 507) that attempted to require future legislatures to provide certain fiscal estimates and provide appropriations when that future legislature took any action that might increase the number of inmates in the state's correctional facilities.

Legislative Bill 507 provided:

> "(1) **When any legislation is enacted after June 30, 1993**, which is projected in accordance with this section to increase the total adult inmate population or total juvenile population in state correctional facilities, **the Legislature shall include in the legislation an estimate** of the operating costs resulting from such increased population for the first four fiscal years during which the legislation will be in effect."
>
> (3) **The Legislature shall provide by specific itemized appropriation**, for the fiscal year or years for which it can make valid appropriations, **an amount sufficient to meet the cost indicated in the estimate contained in the legislation for such fiscal year or years**. The appropriation shall be enacted in the same legislative session in which the legislation is enacted and shall be contained in a bill which does not contain appropriations for other programs.
>
> "(4) **Any legislation enacted after June 30, 1993, which does not include the estimates required by this section and is not accompanied by the required appropriation shall be null and void**." [Emphasis added]

In *State ex rel. Stenberg v. Moore* in 1996, the Nebraska Supreme Court made the unsurprising ruling that it was unconstitutional for the legislature to attempt to bind succeeding legislatures by means of an ordinary state statute.

Significantly, in its ruling, the Nebraska Supreme Court specifically recognized interstate compacts as one of the rare exceptions to the general principle that one legislature cannot bind a future legislature:

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[534] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 216.

[535] *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 348 (Neb. 1996).

[536] *Visor v. Waters*, 182 A. 241, 247 (Pa. 1936).

> "One legislature cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation, **except as to valid contracts entered into by it,** and as to rights which have actually vested under its acts, and no action by one branch of the legislature can bind a subsequent session of the same branch."[537] [Emphasis added]

Thus, the 1996 Nebraska case of *State ex rel. Stenberg v. Moore* cited by Williams does not support his statement, but makes it clear that Williams is just plain wrong.

Williams' citation of the 1936 Pennsylvania case of *Visor v. Waters* also fails to support his claim. *Visor v. Waters* was concerned with an attempt by one house of the Pennsylvania legislature to nullify a previously enacted state statute by means of a resolution passed only by the one house. *Visor v. Waters* was not even about a state statute (much less an interstate compact). The court's ruling said:

> "It is a settled rule that one Legislature cannot bind another and no action by one House could bind a subsequent session of that same House, but when the constituent bodies are united in a statute, **a single House, by a mere resolution cannot set aside and nullify the positive provisions of a law. … A new law can do that, but nothing less than a new law can**."[538] [Emphasis added]

The fact is that there are *no applicable citations* in support of Williams' statements about the unenforceability of interstate compacts. The reason is that Williams is just plain wrong.

Another example of a compact that did not require congressional consent is the Interstate Compact for the Placement of Children. All 50 states and the District of Columbia are parties to this compact.[539]

In *McComb v. Wambaugh* in 1991, the U.S. Court of Appeals for the Third Circuit ruled that the compact took precedence over state law.

> "**The Constitution recognizes compacts** in Article I, section 10, clause 3, which reads, 'No state shall, without the Consent of the Congress … enter into any Agreement or Compact with another State.' **Despite the broad wording of the clause Congressional approval is necessary only when a Compact**

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[537] *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 348 (Neb. 1996).

[538] *Visor v. Waters*. 41 *Dauphin County Reports*. Volume 219 at 227. 1935. In 1936, the Pennsylvania Supreme Court upheld the lower court decision by saying: "The judgment in this case is affirmed on the full and comprehensive opinion of the learned President Judge of the lower court, which is printed at length in 41 *Dauphin County Reports* 219. *Visor v. Waters*, 182 A. 241, 247 (Pa. 1936)."

[539] The Interstate Compact for the Placement of Children was written with the expectation that congressional consent would not be required if its membership were limited to states of the United States, the District of Columbia, and Puerto Rico. However, this compact invites the federal government of Canada and Canadian provincial governments to become members. It specifically recognizes that congressional consent would be required if a Canadian entity desired to become a party by saying: "This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of congress, the government of Canada or any province thereof." At the present time, no Canadian entity has sought membership in the compact.

is 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468, 98 S.Ct. 799, 810, 54 L.Ed.2d 682 (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734, 37 L.Ed. 537 (1893)).

"**The Interstate Compact on Placement of Children has not received Congressional consent. Rather than altering the balance of power between the states and the federal government, this Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states**. *In re Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 852–53, 34 L.Ed. 500 (1890); *Lehman v. Lycoming County Children's Services Agency*, 648 F.2d 135, 143 (3d Cir. 1981) (en banc), aff'd, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). **Congressional consent, therefore, was not necessary for the Compact's legitimacy.**"

"**Because Congressional consent was neither given nor required, the Compact does not express federal law.** Cf. *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981). **Consequently, this Compact must be construed as state law.** See Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 *Va.L.Rev.* 987, 1017 (1965) ('[T] he construction of a compact not requiring consent … will not present a federal question.').

"**Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states**."[540] [Emphasis added]

9.24. MYTHS ABOUT THE DISTRICT OF COLUMBIA

9.24.1. MYTH: The District of Columbia may not enter into an interstate compact, because it is not a state.

QUICK ANSWER

- The District of Columbia belongs to numerous interstate compacts, including ones adopted both before and after ratification of the 23rd Amendment in 1961 and before and after enactment of the District of Columbia Home Rule Act of 1973.
- Membership in interstate compacts is not limited to states. Some compacts include Puerto Rico, the Virgin Islands, American Samoa, and even Canadian provinces.

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[540] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

MORE DETAILED ANSWER:

Apparently thinking that only states can belong to interstate compacts, William Josephson, a New York attorney, complained in 2022 about the District of Columbia becoming a member of the National Popular Vote Interstate Compact:

> "No exercise by Congress of its generalized power to legislate for the District could make the District a state for purposes of the Compact Clause."[541]

Josephson's only authority for this asserted limit on Congress' power is a citation to Article I, section 8, clause 17 of the Constitution, which states:

> "The Congress shall have Power … to **exercise exclusive Legislation in all Cases whatsoever**, **over such District** (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." [Emphasis added]

We fail to discern any limitation on Congress' power involving interstate compacts in this provision of the Constitution.

In any case, the District of Columbia has been a member of numerous interstate compacts—both *before and after* ratification of the 23rd Amendment in 1961 and *before and after* enactment of the District of Columbia Home Rule Act of 1973.

The Council of State Governments lists 27 interstate compacts to which the District of Columbia is a party.[542] Examples include, but are not limited to, the:

- Potomac Valley Compact (1940)
- Civil Defense and Disaster Compact (1954)
- Compact for Education (1984)
- Interstate Compact on the Placement of Children (1989)
- Multi-State Lottery Agreement (1988)
- National Popular Vote Compact (2010).

Many interstate compacts include entities other than states, such as the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and various provinces of Canada.

For example, the Agreement on Detainers[543] includes 49 states, the District of Columbia, Puerto Rico, and the Virgin Islands. Several provinces of Canada are members of the Northeastern Interstate Forest Fire Compact.[544]

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[541] Josephson, William. 2022. States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons. *University of Miami Law Review*. Volume 76. Number 3. Pages 761–824. June 7, 2022. Page 784. https://repository.law.miami.edu/umlr/vol76/iss3/5/

[542] Council of State Governments. National Center for Interstate Compacts. *NCIC Database*. Accessed May 18, 2024. https://compacts.csg.org/database/

[543] Agreement on Detainers. https://compacts.csg.org/compact/interstate-agreement-on-detainers/

[544] Northeastern Interstate Forest Fire Compact. https://compacts.csg.org/compact/northeastern-interstate-forest-fire-protection-compact/

9.24.2. MYTH: Only Congress may enter into interstate compacts on behalf of the District of Columbia.

QUICK ANSWER:

- Congress delegated authority to enter into interstate compacts to the Council of the District of Columbia in the District of Columbia Home Rule Act of 1973.
- The Council has entered into numerous interstate compacts under the authority of the 1973 Act.

MORE DETAILED ANSWER:

Prior to 1973, it was customary for Congress to enact interstate compacts on behalf of the District of Columbia.

However, in the District of Columbia Home Rule Act of 1973, Congress delegated its authority to pass laws concerning the District to the Council of the District of Columbia in all but 10 specific areas listed in section 602(a) of the Act.[545]

The power to enter into interstate compacts was not one of the 10 specific areas listed in section 602(a).

Accordingly, the District of Columbia Council has entered into numerous interstate compacts since 1973.

For example, the Council entered into the Interstate Parole and Probation Compact[546] in 1976 (three years after enactment of the Home Rule Act). In 2000, the Council entered into the Interstate Compact on Adoption and Medical Assistance.[547] In 2002, the Council entered into the Emergency Management Assistance Compact.[548]

In 2010, the District of Columbia approved the National Popular Vote Compact.[549]

9.24.3. MYTH: Only Congress may change the winner-take-all rule for the District of Columbia.

QUICK ANSWER:

- The District of Columbia Council has authority to change its election laws under Congress' delegation of authority to it by the District of Columbia Home Rule Act of 1973.

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[545] D.C. Code § 1-233.

[546] D.C. Code § 24-452.

[547] Title 4, Chapter 3, D.C. St. § 4-326, June 27, 2000, D.C. Law 13-136, § 406, 47 DCR 2850.

[548] Interestingly, the Council originally entered into this compact on an emergency 90-day temporary basis (by D.C. Council Act 14-0081) under the authority of section 412(a) of the Home Rule Act. The Council subsequently entered into this same compact (by D.C. Council Act A14-0317) under the authority of section 602(c)(1) of the Home Rule Act (providing for the usual 30-day congressional review period).

[549] District of Columbia law number 18-274. https://code.dccouncil.gov/us/dc/council/laws/18-274

MORE DETAILED ANSWER:

This myth apparently arises because of the appearance of the word "Congress" in the 23rd Amendment to the U.S. Constitution (ratified in 1961):

> "Section 1. The District constituting the seat of government of the United States shall appoint **in such manner as the Congress may direct**:
>
> "A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the small state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation." [Emphasis added]

Of course, the word "Congress" also appears in Article I, section 8, clause 17 of the Constitution concerning the enumerated powers of Congress in connection with the District of Columbia:

> "The **Congress shall have Power … to exercise exclusive Legislation in all Cases whatsoever, over such District** (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States…."

After ratification of the 23rd Amendment to the Constitution in 1961, Congress enacted a law establishing the winner-take-all method of awarding the District of Columbia's electoral votes (which, at the time, was the method used by all 50 states).

The winner-take-all method for awarding the District of Columbia's electoral votes is currently contained in section 1-1001.10(a)(2) of the D.C. Code:

> "The electors of President and Vice President of the United States shall be elected on the Tuesday next after the 1st Monday in November in every 4th year succeeding every election of a President and Vice President of the United States. Each vote cast for a candidate for President or Vice President whose name appears on the general election ballot shall be counted as a vote cast for the candidates for presidential electors of the party supporting such presidential and vice-presidential candidate. **Candidates receiving the highest number of votes in such election shall be declared the winners**." [Emphasis added]

In the District of Columbia Home Rule Act of 1973, Congress delegated its authority to pass laws concerning the District to the District of Columbia Council in all but 10 specific areas listed in section 602(a) of the Act.[550]

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[550] D.C. Code § 1-233.

Election law is *not* one of the 10 specifically excluded areas in section 602(a) of the Home Rule Act.

Moreover, section 752 of the Home Rule Act explicitly recognizes the authority of the District of Columbia Council concerning elections:

> "Notwithstanding any other provision of this Act [Home Rule Act] or of any other law, **the Council shall have authority to enact any act or resolution with respect to matters involving or relating to elections in the District.**"[551] [Emphasis added]

Therefore, the District of Columbia Council may change section 1-1001.10(a)(2) of the D.C. Code establishing the winner-take-all rule as the method for awarding the District's electoral votes.

In 2010, the District of Columbia approved the National Popular Vote Compact.[552] The Council had the power to do this because Congress had specifically chosen to delegate its power over elections to the Council.

9.24.4. MYTH: Because it is not a state, the District of Columbia cannot bind itself by means of an interstate compact.

QUICK ANSWER:

- The District of Columbia Home Rule Act of 1973 specifically applied the Impairments Clause of the U.S. Constitution to the District, thereby permitting the District to use an interstate compact to bind itself in the same manner as a state.

MORE DETAILED ANSWER:

Because the District of Columbia is not a state, the question has been raised concerning whether it would be bound by an interstate compact in the same way that a state is.[553]

Section 302 of the District of Columbia Home Rule Act states:

> "Except as provided in sections 601, 602, and 603, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act **subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution** of the United States." [Emphasis added]

Section 10 of Article I of the U.S. Constitution contains numerous restrictions on states. In particular, the Impairments Clause states:

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[551] P.L. 93-198, 87 Stat. 774, (1973), codified at D.C. Statutes section 1-207.52.

[552] District of Columbia law number 18-274. https://code.dccouncil.gov/us/dc/council/laws/18-274

[553] In order to promote free-flowing debate, the rules of the *Election Law Blog* do not permit attribution. September 23, 2010.

"No State shall … pass any … Law impairing the Obligation of Contracts."

The Impairments Clause of the U.S. Constitution prevents a state from violating the terms of an interstate compact into which it has entered.

Section 302 of the Home Rule Act explicitly applies the Impairments Clause to the District of Columbia, thereby permitting the District to bind itself to a compact's terms in the same manner as a state.

The Impairments Clause is discussed in greater detail in connection with the National Popular Vote Compact in section 9.25.

9.24.5. MYTH: The enactment of the Compact by the District of Columbia Council is incomplete, because Congress has not approved the Council's action.

QUICK ANSWER:

- The process by which Congress approved of the District of Columbia's action on the National Popular Vote Compact is specified by the District of Columbia Home Rule Act of 1973. All of the requirements of the process were completed on December 7, 2010, in connection with the adoption of the Compact by the District.

MORE DETAILED ANSWER:

The enactment of the National Popular Vote Compact in the District of Columbia in 2010 was governed by the District of Columbia Home Rule Act of 1973.[554]

Under the Home Rule Act, Congress delegated its plenary authority to pass laws concerning the District regarding a wide range of matters (including elections) to the District of Columbia Council.

Section 102 of the Act states:

> "Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, 8, of the Constitution, **the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia**…." [Emphasis added]

Section 601 provides:

> "Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council."

[554] D.C. Code § 1-233.

The District of Columbia Council gave its final approval to the bill (B18-0769) on September 21, 2010. Bill B18-0769 contained the following provision:

> "This act shall take effect following **approval by the Mayor** (or in the event of veto by the Mayor, action by the Council to override the veto), **a 30-day period of Congressional review** as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 21 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and **publication in the District of Columbia Register**." [Emphasis added]

On September 22, 2010, Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, wrote in the *National Review*:

> "And so the dominoes continue to fall. The D.C. Council yesterday approved the National Popular Vote plan that has been pending before several state legislatures. D.C.'s approval comes less than two months after Massachusetts approved the plan. **Two procedural steps remain before NPV is officially enacted in D.C.: The mayor must sign the legislation and Congress has 30 days to review it.** If these two hurdles are overcome, then D.C.'s approval will bring the total number of entities supporting the bill to seven: Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and Washington."[555] [Emphasis added]

Ross then issued a call to action:

> "**The Council's action gives constitutionalists in both parties an excellent opportunity to highlight their allegiance to the Constitution** during this election season. **Constitutionalists in the House and Senate should sponsor resolutions of disapproval** if and when NPV is signed by D.C.'s mayor."[556] [Emphasis added]

Ross' call to action to "constitutionalists in the House and Senate" to "sponsor resolutions of disapproval" is based on the fact that a *single* member of the U.S. House of Representatives or a *single* member of the U.S. Senate may introduce a joint resolution to disapprove any action of the District of Columbia Council.

If the committee to which a disapproval resolution has been referred has not reported the disapproval resolution by 20 calendar days after its introduction, it is in order for a *single* member to make a motion on the floor to discharge the committee.[557]

A single member's motion on the floor to discharge the committee is "highly privileged," and debate on the motion to discharge is limited to one hour.

Note also that a motion by a *single* Senator to discharge a disapproval resolution from committee is *not* subject to a filibuster in the Senate.

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[555] Ross, Tara. The Electoral College takes another hit. *National Review*. September 22, 2010. http://www.nationalreview.com/corner/247368/electoral-college-takes-another-hit-tara-ross

[556] *Ibid*.

[557] Note, in contrast, that a motion to discharge a House committee ordinarily requires a discharge petition bearing the signatures of a majority of House members (218 of 435), not just the support of a single House member.

Thus, a motion to discharge the House or Senate committees of a resolution disapproving of an action of the District of Columbia Council will receive an expeditious vote on the floor of the House or Senate.

In particular, a vote on the floor is ensured, regardless of whether there is majority support for the disapproval resolution in the relevant committee or subcommittee and regardless of whether the leadership of the House or Senate wishes the question to come to a vote.

After the motion to discharge is agreed to on the floor of the House or Senate, debate on a resolution of disapproval itself is limited to 10 hours.

Thus, a resolution disapproving of an action of the District of Columbia Council is assured an expeditious vote on the floor of the House or Senate.

The vote on a resolution of disapproval is *not* subject to a filibuster in the Senate.

In short, a *single* member of the House or a *single* member of the Senate can, without the support of the subcommittee or committee involved, and without the support of the leadership of the chamber, force a vote on the floor of a resolution disapproving of an action of the District of Columbia Council.

The procedure for congressional consideration of an action of the District of Columbia Council is contained in section 604 of the District of Columbia Home Rule Act of 1973.

> "This section is enacted by Congress
>
> "(1) **as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such these provisions are deemed a part of the rule of each House**, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by this section; and they supersede other rules only to the extent that they are inconsistent therewith; and
>
> "(2) with full recognition of the constitutional right of either House to change the rule (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.
>
> "(b) For the purpose of this section, **'resolution' means only a joint resolution, the matter after the resolving clause of which is as follows: 'That the ___ approves/disapproves of the action of the District of Columbia Council described as follows: ___,** the blank spaces therein being appropriately filled, and either approval or disapproval being appropriately indicated; but does not include a resolution which specifies more than 1 action.
>
> "(c) A resolution with respect to Council action shall be referred to the Committee on the District of Columbia of the House of Representatives [now the House Committee on Oversight and Government Reform], or the Committee on the District of Columbia of the Senate [now the Senate Committee on Homeland Security and Governmental Affairs], by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(d) **If the Committee to which a resolution has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order to move to discharge the Committee** from further consideration of any other resolution with respect to the same Council action which has been referred to the Committee.

"(e) **A motion to discharge may be made only by an individual favoring the resolution, is highly privileged** (except that it may not be made after the Committee has reported a resolution with respect to the same action)**, and debate thereon shall be limited to not more than 1 hour**, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(f) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the Committee be made with respect to any other resolution with respect to the same action.

"(g) **When the Committee has reported, or has been discharged from further consideration of, a resolution, it is at any time thereafter in order** (even though a previous motion to the same effect has been disagreed to) **to move to proceed to the consideration of the resolution.** The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(h) **Debate on the resolution shall be limited to not more than 10 hours**, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(i) Motions to postpone made with respect to the discharge from Committee or the consideration of a resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

"(j) Appeals from the decisions of the chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution shall be decided without debate." [Emphasis added]

The National Popular Vote Compact was signed by Mayor Adrian Fenty on October 12, 2010.[558]

On October 18, 2010, the bill was transmitted to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform. In the Senate, it was referred to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. In the House

[558] District of Columbia law number 18-274. https://code.dccouncil.gov/us/dc/council/laws/18-274

committee, it was referred to the Federal Workforce, Postal Service and the District of Columbia Subcommittee.

On October 22, 2010, the bill was published in the *District of Columbia Register*.[559]

Despite Ross' call to action to "constitutionalists in the House and Senate" to "sponsor resolutions of disapproval," not a single member of either the House or Senate introduced a resolution of disapproval or a motion to discharge the committees.

All of the requirements of the District of Columbia Home Rule Act of 1973 concerning congressional consideration were completed on December 7, 2010, and the National Popular Vote Compact became District of Columbia law number 18-274.

Representative Chellie Pingree (D–Maine) made the following remarks on the floor of the U.S. House of Representatives in December 2010:

> "Madam Speaker, I rise today to recognize and congratulate the District of Columbia for its recent enactment of the National Popular Vote bill, which would guarantee the presidency to the candidate who receives the most popular votes in all 50 states and the District.
>
> "Just a few weeks ago, Mayor Fenty signed this important legislation, which was passed by unanimous consent by the D.C. Council. National Popular Vote is now law in 7 jurisdictions, and has been passed by 31 legislative chambers in 21 states.
>
> "The shortcomings of the current system stem from the winner-take-all rule. Presidential candidates have no reason to pay attention to the concerns of voters in states where they are comfortably ahead or hopelessly behind. In 2008, candidates concentrated over two-thirds of their campaign visits and ad money in just six closely divided 'battleground' states. A total of 98 percent of their resources went to just 15 states. Voters in two-thirds of the states are essentially just spectators to presidential elections.
>
> "Under the National Popular Vote, all the electoral votes from the enacting states would be awarded to the presidential candidate who receives the most popular votes in all 50 states and D.C. The bill assures that every vote will matter in every state in every Presidential election.
>
> "I look forward to more states, all across the country passing this important piece of legislation."[560]

Congress may explicitly or implicitly consent to an interstate compact (section 5.19). As the U.S. Supreme Court wrote in *Virginia v. Tennessee* in 1893:

> "Consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them."[561]

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[559] *District of Columbia Register*. Volume 57. Page 9869.

[560] *Congressional Record*. December 15, 2010. Page E2143. https://www.congress.gov/congressional-record/volume-156/issue-166/extensions-of-remarks-section

[561] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

9.25. MYTH ABOUT WITHDRAWING FROM THE COMPACT BETWEEN ELECTION DAY AND THE ELECTORAL COLLEGE MEETING

9.25.1. MYTH: A politically motivated state legislature could throw a presidential election to its preferred candidate by withdrawing from the Compact after the people vote in November.

QUICK ANSWER:

- There are five independent reasons why a state legislature cannot repeal the National Popular Vote Compact *after* the people vote in November, but *before* the Electoral College meets in December, and thereby throw the presidency to the candidate who just lost the national popular vote.
- First, the Electoral Count Reform Act of 2022 requires that presidential electors "shall be appointed … in accordance with the laws of the State *enacted prior to election day*." Thus, a state cannot change its method of selecting presidential electors after state legislators see the election results. This federal law, of course, applies to both the National Popular Vote Compact and the current system.
- Second, federal law also requires that presidential electors "shall be appointed, in each State, on Election Day" (that is, the Tuesday after the first Monday in November). This federal law, of course, applies to both the National Popular Vote Compact and the current system.
- Third, there is more protection against politically motivated post-election mischief under the National Popular Vote Compact than under the current system. The Impairments Clause of the U.S. Constitution prohibits a state from impairing an "obligation of contract." An interstate compact is a legally binding contract. When a state enacts the National Popular Vote Compact into law, it specifically agrees that if it were to withdraw during the six-month period between July 20 of a presidential election year and the January 20 inauguration, the withdrawal would not take effect until after Inauguration Day. Thus, the Impairments Clause is an additional and independent reason why a state cannot withdraw from the National Popular Vote Compact between Election Day and the Electoral College meeting.
- Fourth, a post-election change in the rules would violate the Constitution's Due Process Clause.
- Fifth, even if there were no federal constitutional or no federal statutory obstacles, any attempt by a rogue state to repeal the Compact after the people vote in November would have to overcome daunting political and procedural obstacles at the state level.
- Because the National Popular Vote Compact is a contract that is protected by the Constitution's Impairments Clause, this myth about politically motivated post-election legislative changes is one of many examples in this book of a criticism aimed at the Compact where the Compact is superior to the current system.

MORE DETAILED ANSWER:

John Samples, a Vice President of the Cato Institute, has suggested a hypothetical scenario in which a politically motivated state legislature might try to repeal the National Popular Vote Compact *after* the people vote in November, but *before* the Electoral College meets in December, and thereby throw the presidency to the candidate who had just lost the national popular vote.

Samples suggests that a state belonging to the National Popular Vote Compact could simply:

> "withdraw from the compact when the results of an election become known."[562]

After hastily repealing (that is, withdrawing from) the Compact, the legislature and Governor would then enact some alternative method of appointing the state's presidential electors that would have the political effect of throwing the presidency to the second-place candidate.

The new method of appointing electors might be direct appointment by the legislature of the state's presidential electors, or it might involve switching to the congressional-district or whole-number proportional method of awarding electoral votes.

There are five independent reasons why a state legislature cannot throw a presidential election to the second-place candidate by repealing the National Popular Vote Compact *after* the people vote in November, but *before* the Electoral College meets in December.

Federal law requires that presidential electors be appointed in accordance with the laws "enacted prior to Election Day."

The Electoral Count Reform Act of 2022 (section 1 of title 3 of the United States Code) states:

> "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted **prior to election day**." [Emphasis added]

Thus, a state's chosen method of selecting presidential electors cannot be altered after state legislators see the election results. This law applies, of course, to both the National Popular Vote Compact and the current winner-take-all method of awarding electoral votes.

Presidential electors may only be appointed on Election Day.

No state can appoint presidential electors after the people vote, because:

- The Constitution explicitly gives Congress the power to establish the day for appointing presidential electors.
- Congress has exercised this power by passing a law requiring that every state appoint its presidential electors (whether by popular vote, legislative vote,

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[562] Samples, John. 2008. *A Critique of the National Popular Vote Plan for Electing the President.* Cato Institute Policy Analysis No. 622. October 13, 2008. Page 1. https://www.cato.org/policy-analysis/critique-national-popular-vote

or any other method) on a single specific day in each four-year election cycle (namely, the Tuesday after the first Monday in November).

- The U.S. Supreme Court has explicitly stated that the power of Congress to establish the day for appointing electors is controlling over the states.

Specifically, the U.S. Constitution (Article II, section 1, clause 4) grants Congress the power to establish the *time* for appointing presidential electors:

> "**The Congress may determine the Time of chusing the Electors**, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." [Emphasis added] [Spelling as per original]

Congress has exercised this power by enacting a federal law (quoted above in the previous subsection) that requires each state to appoint its presidential electors on a single day during each four-year election cycle. This single day (referred to as "Election Day") is defined in section 21 of the Electoral Count Reform Act of 2022 as follows:

> "'Election Day' means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, 'election day' shall include the modified period of voting."[563]

The U.S. Supreme Court has explicitly stated that Congress' power to establish the time for appointing presidential electors is controlling over the states. In *McPherson v. Blacker* in 1892, the Court ruled:

> "**Congress is empowered to determine the time of choosing the electors** and the day on which they are to give their votes, which is required to be the same day throughout the United States; **but otherwise the power and jurisdiction of the state is exclusive**, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded."[564] [Emphasis added]

If post-election changes to the method of appointing presidential electors were legally permissible, we would already have seen this maneuver many times in the past—and, in particular, in 2000, 1960, and 2012.

In 2000, Al Gore won the national popular vote by 543,816 votes. By virtue of carrying Florida by 537 popular votes, George W. Bush had 271 electoral votes (one more than the 270 required for election).

The Democrats controlled the law-making process in four states that Bush carried—North Carolina, West Virginia, Alabama, and Arkansas. A post-election change in the

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[563] Earlier federal laws (i.e., the Electoral Count Act of 1887 and the 1845 law) also defined "Election Day" to be the Tuesday next after the first Monday in November (section 3.13).

[564] *McPherson v. Blacker*. 146 U.S. 1 at 35. 1892.

method of appointing presential electors in *any one* of these four states would have given Gore a majority of the Electoral College in 2000—even after crediting Bush with Florida's 25 electoral votes.

Various Democratic state legislators met in North Carolina (and elsewhere) to discuss various post-election maneuvers that might erase Bush's lead in the Electoral College. However, the North Carolina Legislature did not convene and appoint presidential electors who would have voted for Gore, the candidate who received the most popular votes nationwide. Moreover, the legislature did not convene after Election Day, repeal the state's pre-existing winner-take-all law, and pass a new law allocating electoral votes by, say, congressional district or proportionally. Any of these three possible actions in North Carolina alone would have (if legal) given Al Gore a comfortable majority in the Electoral College.

Similarly, the Alabama legislature did not convene after Election Day, repeal its existing winner-take-all law, and pass a new law allocating electoral votes proportionally. Moreover, it did not convene and appoint Democratic presidential electors. Either of these two actions in Alabama alone would have (if legal) given Gore a majority in the Electoral College.

The West Virginia legislature did not convene after Election Day and appoint Democratic presidential electors—an action that alone would have (if legal) given Gore a majority in the Electoral College.

Finally, in Arkansas, the Democrats controlled both houses of the legislature, but the Governor was a Republican. However, a veto in Arkansas can be overridden by a majority vote in the legislature, so the Democrats had veto-proof control of the law-making process at the time. Nonetheless, the Arkansas legislature did not convene after Election Day and appoint Democratic presidential electors—an action that alone would have (if legal) given Gore a majority in the Electoral College.

Note that, if John Samples' hypothetical scenario were legally possible, local politicians in these states could have easily fabricated political spin to justify their actions. For example, they could have conducted public opinion polls in their states about whether the winner of the nationwide popular vote should become President. Indeed, polls taken later showed that 81% of West Virginia voters, 80% of Arkansas voters, and 74% of North Carolina voters supported the proposition that the winner of the nationwide popular vote should become President (section 9.22.1).

Of course, as we all know, none of these four state legislatures took any of the above actions after the November 2000 election, because everyone recognized that post-election appointment of presidential electors would have been illegal.

If such an action had been attempted, it would have been immediately voided in either state or federal court—with no credence being given to the disingenuous political spin offered by local legislators for their post-election change in the rules.

The American people accepted the ascendancy of the second-place candidate to the White House in 2000 (and other years), because everyone understood that result was arrived at using the laws in effect at the time. The American people have accepted second-place Presidents even though a substantial majority (then and now) preferred a national popular vote for President over the state-by-state winner-take-all method of awarding electoral votes.

In 1960, John F. Kennedy won the nationwide popular vote by 118,574 votes. However, Kennedy won only 303 electoral votes—just 34 more than the 269 required for election at the time. This 34-vote margin would have been eliminated if he had not carried Illinois (27 electoral votes) by the slender margin of 8,858 popular votes and South Carolina (eight electoral votes) by 9,571 popular votes.

Some members of the South Carolina legislature suggested that the legislature meet after Election Day, repeal South Carolina's existing winner-take-all law for awarding the state's electoral votes, and then directly appoint non-Kennedy presidential electors. Nothing came of this suggestion in South Carolina in 1960, because federal law specifies that Election Day is the single day in the four-year cycle on which presidential electors may be appointed.

The U.S. Constitution does not require a state to permit its voters to vote for presidential electors. Indeed, in the nation's first presidential election in 1789, the state legislatures of three states appointed presidential electors, and the New Jersey Governor and his Council appointed the electors. The last time when the voters did not directly choose presidential electors was in 1876, when the legislature of the newly admitted state of Colorado appointed the state's presidential electors. However, these appointments of presidential electors by state legislatures were all made on the single day designated by federal law.[565]

If the South Carolina legislature had wanted to appoint presidential electors itself in 1960, it could have done so. However, it would have had to convene on Election Day for the purpose of appointing the state's eight presidential electors.

In 2012, there were Republican Governors and Republican legislatures in five states possessing 90 electoral votes—considerably more than President Obama's 62-vote margin of victory in the Electoral College. The five states were Florida (29), Pennsylvania (20), Ohio (18), Virginia (13), and Wisconsin (10).

If post-election changes in the method of appointing presidential electors had been legally permissible or politically plausible, the legislatures and Governors of these five states could have erased Obama's 62-vote margin in the Electoral College merely by convening after Election Day and switching to either direct legislative appointment of the presidential electors or perhaps the congressional-district method of allocating electoral votes (an approach that would have the patina of being based on the voters' choice). Switching to either method after Election Day would have been sufficient to give Mitt Romney a majority in the Electoral College.

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[565] There is an additional practical political reason why no state legislature would want to appoint presidential electors today. At the time the Constitution was ratified, state legislative elections were typically held on a different day from federal elections. However, today, in all but three states, 100% of the seats in the legislature's lower house (and typically about half of state Senate seats) are up for election on the very same day that the President is being elected. In addition, about a quarter of the nation's Governors are elected on Election Day in presidential election years. Thus, if a state legislature wanted to appoint presidential electors today, it would have to do so on Election Day. That is, the very day when state legislators want to be home in their districts working to get themselves reelected. Instead, they would need to be in their state capitol appointing presidential electors.

The Impairments Clause of the U.S. Constitution prevents a state from repealing the Compact between Election Day and the Electoral College meeting.

Withdrawal from an interstate compact is accomplished by repealing the legislative act by which the state originally approved the compact.

Most interstate compacts permit member states to withdraw from the agreement subject to a specified delay in the effective date of the withdrawal (section 5.13.1).

The National Popular Vote Compact permits any member state to withdraw at any time. However, if the withdrawal occurs during the six-month period between July 20 of a presidential election year and January 20 (Inauguration Day), the effective date of the withdrawal will be delayed until after Inauguration Day.

The second clause of Article IV of the National Popular Vote Compact provides:

> "Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term."

The six-month "blackout" period in the National Popular Vote Compact includes six important events relating to presidential elections, including the:

- national nominating conventions,
- fall general-election campaign period,
- Election Day on the Tuesday after the first Monday in November,
- Electoral College meeting on the first Tuesday after the second Wednesday in December,[566]
- counting of the electoral votes by Congress on January 6, and
- inauguration of the President and Vice President for the new term on January 20.

As the U.S. Supreme Court has repeatedly noted, interstate compacts are contracts.[567] They are construed as contracts under the principles of contract law.

Withdrawal from a compact may only be made in accordance with the terms contained in it.

The Impairments Clause (also called the "Contracts Clause") of the U.S. Constitution (Article I, section 10, clause 1) restricts states as follows:

> "No State shall … pass any … Law impairing the Obligation of Contracts."

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[566] There are 42 days between Election Day and the meeting date of the Electoral College. Depending on the year, Election Day can be any date from November 2 to November 9. The Electoral College meeting can be any date from December 14 (if Election Day is November 2) to December 20 (if Election Day is November 8). For example, in 2024, Election Day will be Tuesday, November 5, and the meeting date for the Electoral College will be Tuesday, December 17.

[567] For example, in April 2023, the Court wrote the following in *New York v. New Jersey* (page 5 of slip opinion at https://www.supremecourt.gov/opinions/22pdf/156orig_k5fl.pdf): "This Court has said that an interstate compact 'is not just a contract,' but also … preempts contrary state law. See *Tarrant Regional Water Dist. v. Herrmann*, 569 U. S. 614, at 627, n. 8 (2013)."

Because of the Impairments Clause, the courts have never allowed *any* state to withdraw from *any* interstate compact without following the procedure for withdrawal prescribed by the compact.

On numerous occasions, federal and state courts have implemented the U.S. Supreme Court's interpretation of the Impairments Clause and rebuffed the occasional (sometimes creative) attempts by states to evade their obligations under interstate compacts.

In 1976, the U.S. District Court for the District of Maryland stated in *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority*:

> "**Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty**; **the compact** governs the relations of the parties with respect to the subject matter of the agreement and **is superior to both prior and subsequent law**. Further, when enacted, **a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered** without the consent of all parties."[568] [Emphasis added]

That is, an interstate compact is one of the rare exceptions to the general principle that one legislature may not bind a future legislature.

The 1999 case of *Aveline v. Pennsylvania Board of Probation and Parole* was concerned with withdrawal from the Interstate Compact for the Supervision of Parolees and Probationers. Section 7 of that compact provides:

> "Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto."[569]

In 1999, the Commonwealth Court of Pennsylvania ruled in *Aveline v. Pennsylvania Board of Probation and Parole*:

> "**A compact takes precedence over the subsequent statutes of signatory states** and, as such, **a state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide**."[570] [Emphasis added]

The 1991 case of *McComb v. Wambaugh* was concerned with withdrawal from the Interstate Compact on Placement of Children. The compact permits withdrawal with two years' notice:

> "Withdrawal from this compact shall be by the enactment of a statute repealing the same, but **shall not take effect until two years after the effective date of such statute** and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under

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[568] *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority* (414 F.Supp. 408 at 409). 1976.

[569] Missouri Revised Statutes. Chapter 217. Section 217.810.

[570] *Aveline v. Pennsylvania Board of Probation and Parole* (729 A.2d. 1254 at 1257, note 10).

> this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal." [Emphasis added]

This particular compact is noteworthy because it is one of the many interstate compacts that did not require (and never received) congressional consent before taking effect (section 5.19). It illustrates that the enforceability of a compact's withdrawal clause has no connection with whether the compact required congressional consent in order to take effect (section 9.23.3).

The United States Court of Appeals for the Third Circuit ruled in *McComb v. Wambaugh* in 1991:

> "Having entered into a contract, a participant state may not unilaterally change its terms. **A Compact also takes precedence over statutory law in member states**."[571] [Emphasis added]

The Court of Appeal of the State of California stated in *The Gillette Company et al. v. Franchise Tax Board* in 2012:

> "**Interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures** to certain principles governing the subject matter of the compact. (Broun on Compacts, supra, § 1.2.2, p. 17.)"[572] [Emphasis added]

The Council of State Governments summarized the nature of interstate compacts as follows:

> "Compacts are agreements between two or more states that bind them to the compacts' provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the substantive principles of contract law and are protected by the constitutional prohibition against laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).
>
> "That means that **compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws.** In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and **they take precedence over conflicting state laws, regardless of when those laws are enacted**.
>
> "However, unlike treaties, compacts are not dependent solely upon the good will of the parties. **Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves.** Moreover, Congress and the courts can compel compliance with the

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[571] *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991).

[572] *The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 10. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

> terms of interstate compacts. That's why **compacts are considered the most effective means of ensuring interstate cooperation**."[573] [Emphasis added]

Both state and federal courts have the power to enforce the Impairments Clause. An example of state-level enforcement of the Impairments Clause is found in *The Gillette Company et al. v. Franchise Tax Board* in 2012. In that case, the California Court of Appeal voided a state law attempting to override a provision of the Multistate Tax Compact[574] (from which California had *not* withdrawn at the time of the court's decision).[575]

> "Some background on the nature of interstate compacts is in order. **These instruments are legislatively enacted, binding and enforceable agreements between two or more states**." [576]
>
> "As we have seen, some interstate compacts require congressional consent, but others, that do not infringe on the federal sphere, do not.[577]
>
> "**Where, as here, federal congressional consent was neither given nor required, the Compact must be construed as state law**. (*McComb v. Wambaugh* (3d Cir. 1991) 934 F.2d 474, 479.) Moreover, **since interstate compacts are agreements enacted into state law, they have dual functions as enforceable contracts between member states and as statutes with legal standing within each state**; and thus we interpret them as both. (*Aveline v. Bd. of Probation and Parole* (1999) 729 A.2d 1254, 1257; see Broun et al., *The Evolving Use and the Changing Role of Interstate Com*pacts (ABA 2006) § 1.2.2, pp. 15–24 (Broun on Compacts); 1A Sutherland, Statutory Construction (7th ed. 2009) § 32:5; *In re C.B.* (2010) 188 Cal.App.4th 1024, 1031 [recognizing that Interstate Compact on Placement of Children shares characteristics of both contractual agreements and statutory law].)
>
> "**The contractual nature of a compact is demonstrated by its adoption**: **There is an offer** (a proposal to enact virtually verbatim statutes by each member state), an **acceptance** (enactment of the statutes by the member states), and **consideration** (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest.)" (Broun on

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[573] The Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

[574] Multistate Tax Compact. https://compacts.csg.org/compact/multistate-tax-compact/ The compact is at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf The web site of the Multistate Tax Commission is at https://www.mtc.gov

[575] After the California court's decision in *The Gillette Company et al. v. Franchise Tax Board*, the legislature passed, and the Governor signed, a law exercising the state's right, as provided in the Multistate Tax Compact, to withdraw from the compact (Senate Bill 1015 of 2012). After the effective date of the statute withdrawing from the compact, California became free to change its formula for taxing multi-state businesses. Senate Bill 1015 took effect as a "budget trailer" on July 27, 2012.

[576] *The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 8. The full opinion may be found in appendix GG on page 1008 of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[577] *Ibid*. Page 9.

Compacts, supra, § 1.2.2, p. 18.) **As is true of other contracts, the contract clause of the United States Constitution shields compacts from impairment by the states**. (*Aveline v. Bd. of Probation and Parole*, supra, 729 A.2d at p. 1257, fn. 10.) Therefore, upon entering a compact, "it takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide." (Ibid.; accord, *Intern. Union v. Del. River Joint Toll Bridge* (3d Cir. 2002) 311 F.3d 273, 281.) **Thus interstate compacts are unique in that they empower one state legislature—namely the one that enacted the agreement—to bind all future legislatures to certain principles governing the subject matter of the compact**. (Broun on Compacts, supra, § 1.2.2, p. 17.)

"As explained and summarized in *C.T. Hellmuth v. Washington Metro. Area Trans.* (D.Md. 1976) 414 F.Supp. 408, 409 (*Hellmuth*): '**Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties**. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.' Cast a little differently, '[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact.' (*Henderson v. Delaware River Joint Toll Bridge Com'm* (1949) 66 A.2d 843, 849–450.) Nor may states amend a compact by enacting legislation that is substantially similar, unless the compact itself contains language enabling a state or states to modify it through legislation '"concurred in"' by the other states. (*Intern. Union v. Del. River Joint Toll Bridge*, supra, 311 F.3d at pp. 276–280.)"[578] [Emphasis added]

The court also stated:

"Were this simply a matter of statutory construction involving two statutes—sections 25128 and 38006—we would at least entertain the FTB's argument that section 25128 repealed the section 38006 taxpayer election to apportion under the Compact formula, and now mandates the exclusive use of the double-weighted sales apportionment formula. However, this construct is not sustainable because it completely ignores the dual nature of section 38006. Once one filters in the reality that **section 38006 is not just a statute but is also the codification of the Compact, and that through this enactment Califor-**

[578] *Ibid*. Pages 9–11.

> **nia has entered a binding, enforceable agreement with the other signatory states**, the multiple flaws in the FTB's position become apparent. **First, under established compact law, the Compact supersedes subsequent conflicting state law. Second, the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts.** And finally, the FTB's construction of the effect of the amended section 25128 runs afoul of the reenactment clause of the California Constitution."
>
> "**By its very nature an interstate compact shifts some of a state's authority to another state or states**. Thus signatory states cede a level of sovereignty over matters covered in the Compact in favor of pursuing multilateral action to resolve a dispute or regulate an interstate affair. (*Hess v. Port Authority Trans-Hudson Corporation* (1994) 513 U.S. 30, 42; Broun on Compacts, supra, § 1.2.2, p. 23.) Because the Compact is both a statute and a binding agreement among sovereign signatory states, having entered into it, California cannot, by subsequent legislation, unilaterally alter or amend its terms. Indeed, as an interstate compact **the Compact is superior to prior and subsequent the statutory law of member states**. (*McComb v. Wambaugh*, supra, 934 F.2d at p. 479; Hellmuth, supra, 414 F.Supp. at p. 409.) This means that the Compact trumps section 25128, such that, contrary to the FTB's assertion, section 25128 cannot override the UDITPA election offered to multistate taxpayers in section 38006, article III, subdivision 1. It bears repeating that the Compact requires states to offer this taxpayer option. If a state could unilaterally delete this baseline uniformity provision, it would render the binding nature of the compact illusory and contribute to defeating one of its key purposes, namely to "[p]romote uniformity or compatibility in significant components of tax systems." (§ 38006, art. I, subd. 2.) **Because the Compact takes precedent over subsequent conflicting legislation, these outcomes cannot come to pass**.[579] [Emphasis added]

The courts have long held that a state that belongs to an interstate compact may not unilaterally renounce the agreement. The U.S. Supreme Court addressed this issue in a 1950 case involving the Ohio River Valley Water Sanitation Compact. The parties to that compact included eight states and the federal government. The compact established a commission consisting of representatives from each of the governmental units. It provided that each state would pay a specified share of the operating expenses of the compact's commission:

> "**The signatory states agree to appropriate for the salaries, office and other administrative expenses**, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory states, one half of such amount to be prorated among the several states in proportion of their population within the district at the last preceding federal

[579] *Ibid.* Pages 15–16.

> census, the other half to be prorated in proportion to their land area within the district." [Emphasis added]

There was considerable political division in the West Virginia state government over the desirability of the compact. The state legislature ratified the compact and, in 1949, appropriated $12,250 as West Virginia's initial contribution to the expenses of the compact's commission.

The state Auditor, however, refused to make the payment from the state treasury. He argued that the legislature's approval of the compact violated the state constitution in two respects. First, he argued that the compact was unconstitutional because it delegated the state's police power to an interstate agency involving other states and the federal government. Second, he argued that the compact was invalid because it bound the West Virginia legislature in advance to make appropriations for the state's share of the commission's operating expenses in violation of a general provision of the state constitution concerning the incurring of "debts."

The West Virginia State Water Commission supported the compact and went to court requesting a mandamus order (a judicial writ ordering performance of a specific action) to compel the Auditor to make the payment from the state treasury. The Supreme Court of Appeals of West Virginia invalidated the legislature's ratification of the compact on the grounds that the compact violated the state constitution.

In 1950, the U.S. Supreme Court reversed the state supreme court and prevented West Virginia from evading its obligations under the compact. The Court wrote in *West Virginia ex rel. Dyer v. Sims*:

> "But a compact is after all a legal document. … **It requires no elaborate argument to reject the suggestion that an agreement** solemnly entered into between States by those who alone have political authority to speak for a State **can be unilaterally nullified**, or given final meaning by an organ of one of the contracting States. **A State cannot be its own ultimate judge in a controversy with a sister State**."[580] [Emphasis added]

The Court continued:

> "That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved **because it is to a body outside the State and because its Legislature may not be free, at any time, to withdraw the power delegated**…. What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. … Here, the State has bound itself to control pollution by the more effective means of an agree-

[580] *West Virginia ex rel. Dyer v. Sims*. 341 U.S. 22 at 28. 1950. https://supreme.justia.com/cases/federal/us/341/22/

> ment with other States. **The Compact involves a reasonable and carefully limited delegation of power to an interstate agency**."[581] [Emphasis added]

Justice Robert Jackson's concurring opinion set forth an additional justification for the Court's decision. Justice Jackson suggested that the Supreme Court did not need to interpret the West Virginia state constitution in order to conclude that the compact bound West Virginia. Instead, he stated that West Virginia was estopped from changing its position after each of the other governmental entities relied upon, and changed their position because of, the compact:

> "**West Virginia assumed a contractual obligation** with equals by permission of another government that is sovereign in its field (the federal government). After Congress and **sister states had been induced to alter their positions and bind themselves to terms of a covenant**, West Virginia should be estopped from repudiating her act. For this reason, I consider that whatever interpretation she put on the generalities of her Constitution, **she is bound by the Compact**."[582] [Emphasis added]

The pre-ratification expectations of states joining a compact are especially important whenever there is a post-ratification dispute among compacting parties concerning voting rights within the compact.

In one case, Nebraska (which was obligated to store radioactive waste under the terms of an interstate compact) sought additional voting power on the compact's commission after the compact had gone into effect. A majority (but not all) of the compact's other members (the so-called "donor" states) consented to Nebraska's request.

Nebraska's request was, however, judicially voided in 1995 in *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*:

> "because changes in 'voting power' substantially alter the original expectations of the majority of states which comprise the compact."[583]

Amplifying the principle of *West Virginia ex rel. Dyer v. Sims*, the courts have noted that a single state cannot obstruct the workings of a compact. In *Hess v. Port Authority Trans-Hudson Corp.*, the U.S. Supreme Court held in 1994 that a compact is:

> "not subject to the unilateral control of any one of the States."[584]

Similarly, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court in 1979 held that a member state may not unilaterally veto the actions of a compact's commission. Instead, the remedy of an aggrieved state consists of withdrawing from the compact in accordance with the compact's terms for withdrawal.[585]

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[581] *Ibid.* Pages 30–31.

[582] *Ibid.* Page 36.

[583] *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*. 902 F.Supp. 1046, 1049 (D.Neb. 1995).

[584] *Hess v. Port Authority Trans-Hudson Corp.* 513 U.S. 30 at 42. 1994.

[585] *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*. 440 U.S. 391 at 399 and 402. 1979.

In *Kansas City Area Transportation Authority v. Missouri*, the U.S. Court of Appeals for the Eighth Circuit in 1981 held that a member state may not legislatively burden the other member states unless they concur.[586]

Moreover, the courts have prevented a compacting state from undermining the workings of that compact. In *Alcorn v. Wolfe* in 1993, the removal of an appointee to a compact commission, initiated by a Governor to inject his political influence into the operations of the commission, was invalidated because it:

> "clearly frustrate[d] one of the most important objectives of the compact."[587]

In *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*, Nebraska was estopped in 1993 from seeking equitable relief to prevent a compact, of which it was a member, from pursuing its central mission.[588] In *New York v. United States*, the U.S. Supreme Court held that the estoppel doctrine was applicable only to the states that have adopted the interstate compact.[589]

In short, a state is estopped from withdrawing from a compact in any manner other than that which it agreed to when it entered into the compact.

Almost every interstate compact contains obligations that a member state would never have agreed to unless it could rely on the enforceability of obligations undertaken by its sister states. Consequently, most interstate compacts impose a delay on withdrawal, because each member state must be able to rely on each contracting party to fulfill its obligations and must have time (and sometimes compensation) to adjust.

The six-month blackout period for withdrawing from the National Popular Vote Compact is reasonable and appropriate in order to ensure that a politically motivated member state does not renege on its obligations after the candidates, the political parties, the voters, and the other compacting states have proceeded through the presidential campaign and election cycle.

The enforceability of interstate compacts under the Impairments Clause is precisely the reason why sovereign states enter into them. If a state were willing to rely merely on the goodwill and graciousness of other states to undertake certain actions (particularly actions that the state would not undertake absent reciprocal action by other states), it could unilaterally enact its own independent law on the subject matter involved or unilaterally enact a uniform state law (and hope that other states would follow suit). However, if a state wants an agreement that is legally binding on other states, it enters into an interstate compact. Indeed, interstate compacts would be pointless if they were not legally binding on the participating states.

Thus, if a Governor and state legislature were to enact legislation purporting to withdraw from the National Popular Vote Compact during the six-month period between July

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[586] *Kansas City Area Transportation Authority v. Missouri*. 640 F.2d 173 at 174 (8th Cir.). 1979.

[587] *Alcorn v. Wolfe*. 827 F.Supp. 47, 53 (D.D.C. 1993).

[588] *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*. 834 F.Supp. 1205 at 1215 (D.Neb. 1993).

[589] *New York v. United States*. 505 U.S. 144 at 183. 1992.

20 of a presidential election year and Inauguration Day (January 20), that legislation would be unconstitutional on its face because of the Impairments Clause.[590]

The Supreme Court has rejected the argument that a state's power under Article II, section 1 is not subject to any restriction found elsewhere in the U.S. Constitution. Article II, section 1 of the U.S. Constitution provides:

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors…."[591] [Emphasis added]

Professor Norman Williams of Willamette University in Salem, Oregon, has made the argument that this grant of power to states under Article II is not subject to any restriction found elsewhere in the U.S. Constitution:

> "It is not clear that the NPVC is valid and enforceable against a state that decides to withdraw from it after July 20 in a presidential election year. Article II of the U.S. Constitution entrusts the method of appointment of the presidential electors to the state legislature. For some, that federal constitutional delegation of authority must be read literally, meaning that **the state legislature's power cannot be circumscribed to any extent or in any manner."**[592] [Emphasis added]

Williams' theory—sometimes called the "imperial legislature"[593] theory—is that Article II's grant of power is unlike any other provision in the Constitution in that it is not subject to any of the Constitution's specific restrictions on the exercise of power.

In particular, Williams' theory is that the Constitution's Impairments Clause does not apply to a state that freely enters into a contractual relationship with other states.

This theory ignores the reality that the vast majority of interstate compacts involve state plenary powers.

It also ignores the fact that the primary reason that states voluntarily enter into interstate compacts is that compacts provide a way to create legally enforceable obligations on other states. A state entering an interstate compact almost always is agreeing to do something that it would only agree to do if it were sure that its partnering states were guaranteed to fulfill their obligations.

The wording "in such manner as the state may direct" is a grant of power permitting

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[590] The general principles of contract law (applicable to parties to *any* contract, whether the parties are state governments or not) provide a separate and independent non-constitutional legal basis for preventing a state from attempting to withdraw from a compact except in the manner specified by the compact.

[591] U.S. Constitution. Article II, section 1, clause 2.

[592] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 219.

[593] The "imperial legislature" theory should not be confused with the "independent legislature" theory. The "imperial legislature" theory contends that when a state legislature exercises its powers under Article II, section 1 of the U.S. Constitution, the legislature is not subject to any other restraint found in the U.S. Constitution. The "independent legislature" theory (which played a role in the 2020 presidential election and the events of January 6, 2021) contends that the legislature is not subject to any restraint found in its *state* Constitution.

each state to exercise a certain power; however, it does not create a power that stands above the rest of the U.S. Constitution or outside the Constitution.

Tellingly, Article II, section 1 does *not* say:

> "**Notwithstanding any other provision of this Constitution**, each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…." [Emphasis added]

Article II, section 1 is neither more nor less than a delegation of a certain power to a certain body (in this case, the state legislature). The exercise of this legislative power is subject to all of the other specific restraints in the U.S. Constitution that may apply to the exercise of legislative power.

Among the specific restrictions on the power of a state under Article II, section 1 are those contained in the 14th Amendment (equal protection), the 15th Amendment (prohibiting denial of the vote on account of "race, color, or previous condition of servitude"), the 19th Amendment (women's suffrage), the 24th Amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

The point can be made best by focusing on Article I, section 10, clause 1 of the U.S. Constitution, which contains the prohibition on impairing an obligation of contract and the prohibition on *ex post facto* (retroactive) laws.

> "**No State shall** enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; **pass any** Bill of Attainder, **ex post facto Law, or Law impairing the Obligation of Contracts**, or grant any Title of Nobility." [Emphasis added]

Everyone would agree that a state legislature has the power under Article II, section 1 to pass a law making it a crime to commit fraud in a presidential election. However, a state legislature may not pass an *ex post facto* law making it a crime to have committed fraud in a *previous* presidential election, because the Constitution's explicit prohibition against *ex post facto* laws operates as a restraint on the grant of power contained in Article II, section 1.

Necessarily, the Constitution's explicit prohibition against a "law impairing the obligation of contract"—appearing in the same clause of the Constitution as the prohibition against *ex post facto* laws—operates as a restraint on the grant of power contained in Article II, section 1.

It is interesting to note that the wording "in such manner as the Congress may direct" also appears in a second place in the Constitution in connection with the specific subject of selecting the manner of appointing presidential electors. The 23rd Amendment to the U.S. Constitution (ratified in 1961) provides:

> "The District constituting the seat of government of the United States shall appoint **in such manner as the Congress may direct** a number of electors of President and Vice President…." [Emphasis added]

Surely, no one would argue that "in such manner as the Congress may direct" (the

exact parallel of the wording of Article II, section 1) means that Congress is not subject to specific provisions of the Constitution restricting the exercise of its plenary legislative power, and that Congress could therefore, for example, exclude women and African Americans from voting in the selection of presidential electors in the District of Columbia, notwithstanding the specific requirements of the 19th Amendment (ratified in 1920) and the 15th Amendment (ratified in 1870). Similarly, no one would argue that Congress could pass an *ex post facto* law making it a crime to have committed fraud in a *previous* presidential election in the District of Columbia.

The wording "as the legislature may direct" appears in another place in the Constitution, namely the 17th Amendment (ratified in 1913). The 17th Amendment allows temporary appointments to fill U.S. Senate vacancies:

> "until the people fill the vacancies by election **as the legislature may direct**." [Emphasis added]

Certainly, no one would argue that the "as the legislature may direct" wording means that a state legislature is not subject to other specific provisions in the Constitution restricting the exercise of legislative power such as, say, the 15th Amendment (ratified in 1870) or the Equal Protection clause of the 14th Amendment (ratified in 1868). A state legislature could not, for example, exclude African American voters in a vacancy-filling election for the U.S. Senate.

In fact, both the U.S. Constitution and state constitutions are replete with plenary powers possessed by their respective legislative bodies.

For example, Congress has plenary power over counterfeiting, federal taxation, and numerous other "enumerated" areas, but no one would argue that its plenary powers are not subject to specific provisions of the Constitution restricting the exercise of all legislative power, such as, say, the specific constitutional prohibition against *ex post facto* laws (Article I, section 9, clause 3).

Similarly, Article I, section 8, clause 17 of the Constitution gives Congress plenary power over the District of Columbia:

> "The Congress shall have Power … to exercise exclusive Legislation in all Cases whatsoever, over such District."

Yet, no one would argue that Congress may pass *ex post facto* laws applicable to the District of Columbia.

Similarly, state legislatures have plenary power over innumerable matters, but no one would argue that these plenary powers are not subject to specific restrictive provisions of the U.S. Constitution and their state constitutions.

Williams' "imperial legislature" interpretation of Article II, section 1 of the Constitution is not new.

In fact, the U.S. Supreme Court ruled on the "imperial legislature" argument in 1968 in interpreting Article II, section 1 in *Williams v. Rhodes* involving the state of Ohio.

> "The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article

> of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors …' to choose a President and Vice President. **There of course can be no question but that this section does grant extensive power to the States** to pass laws regulating the selection of electors. But **the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution**. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. **Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws.** Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote 'for electors for President or Vice President.' Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote where such burdens are expressly prohibited in other constitutional provisions.
>
> "We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that
>
> > 'No State shall … deny to any person … the equal protection of the laws.'"[594] [Emphasis added]

Moreover, in 2020, the U.S. Supreme Court reached the same conclusion about Article II, section 1 in *Chiafalo v. Washington*:

> "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, **absent some other constitutional constraint**." [Emphasis added]

See section 9.23.8 for a discussion of Professor Williams' claim that interstate compacts are "toothless."

A post-election change in the rules would violate the Due Process Clause of the Constitution.

In 2020, the idea was bandied about that a state legislature could meet after Election Day and sidestep the state's existing method of awarding electoral votes (that is, the winner-take-all method) and simply choose a slate of presidential electors to its liking.

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[594] *Williams v. Rhodes*. 393 U.S. 23, 28–29. 1968.

In September 2020, the National Task Force on Election Crises concluded that:

> "A state legislature cannot appoint its preferred slate of electors to override the will of the people after the election."[595]
>
> "Although the power to choose the manner in which electors are appointed means that state legislatures theoretically could reclaim the ability to appoint electors directly *before* Election Day, they may not substitute their judgment for the will of the people by directly appointing their preferred slate of electors *after* Election Day."
>
> "A state legislature's post-Election Day substitution of its own preferences for those of voters raises constitutional concerns. The Supreme Court has explained that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental," and is subject to constitutional due process and equal protection guarantees. *Bush*, 531 U.S. at 104-05. The due process clause, in particular, protects citizens' reasonable reliance on the expectation under state law that they will be able to meaningfully exercise their fundamental right to vote."[596]

Even if there were no federal constitutional or federal statutory obstacles, a rogue state would have to overcome daunting practical political and procedural obstacles at the state level.

Executing John Samples' hypothetical post-election maneuver between Election Day and the Electoral College meeting would require several steps:

- The state legislature and Governor would have to enact a law repealing (that is, withdrawing from) the National Popular Vote Compact.
- The repeal statute would have to take effect in the state involved before the Electoral College meeting.
- The legislature and Governor would have to enact a new statute providing a different way to appoint the state's presidential electors. For example, they might enact a statute allocating the state's electoral votes by congressional district or proportionally, or they might authorize the legislature to appoint the state's presidential electors.[597]
- The statute providing the new way to appoint the state's presidential electors would have to take effect in the state involved before the Electoral College meeting.

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[595] National Task Force on Election Crises. A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election. September 2, 2020. Page 1. https://electiontaskforce.org/a-state-legislature-cannot-appoint-its-own-preferred-slate-of-electors-to-override-the-will-of-the-people/

[596] *Ibid*. Page 3.

[597] Historical precedent, going back to the first presidential election in 1789, is that the authorization for the state legislature to directly appoint presidential electors requires a law presented to the state's Governor for approval or veto (section 7.3.5 and section 2.2).

- If the new way to appoint presidential electors were to involve direct legislative appointment, the legislature would have to appoint the presidential electors.

Seven pre-conditions would have to be satisfied simultaneously in order for the hypothetical maneuver to be executed successfully in a given state. Each of these conditions narrows the number of states where the post-election maneuver could even be contemplated.

First, the same political party would have to control both houses of the legislature and the Governor's office, or the party controlling the legislature would have to have a veto-proof majority.[598] Any attempt to change a state law after Election Day in order to throw the presidency to the second-place candidate would be a partisan maneuver of the most extreme nature. As such, it would arouse the fiercest opposition from the to-be-disadvantaged political party.

Second, the presidential nominee who lost the national popular vote would have to belong to the state's dominant political party. Otherwise, the Governor and legislature would be pleased that the Compact was about to deliver the state's electoral votes to the national popular vote winner.

Third, the state would have to be one of the states that actually belongs to the National Popular Vote Compact. Otherwise, there would be no compact to repeal.

Fourth, because very few state legislatures are in session in November and December of an election year, it would first be necessary to call the legislature into special session. Governors generally have the power to call a special session. In a few states, legislators have independent power to do so. Thus, except in the minority of states where legislative leaders have independent power to summon a special session, even a veto-proof legislative majority would not be sufficient in states where the legislature is not in session, and the Governor is unwilling to convene a special session.

The practical political difficulties of obtaining a special session of a state legislature were illustrated in 2020 when the Trump campaign attempted to recruit state legislators and Governors to change the method of awarding electoral votes after Election Day. For example, even though the Republican Party controlled both houses of the legislature *and* the Governor's office in Arizona and Georgia, Trump supporters found it impossible to convene a special session of the legislature in either state. It also proved impossible to convene the legislatures of three states where the Republicans controlled both houses of the legislatures (Michigan, Pennsylvania, and Wisconsin) but where the Governor was a Democrat.

In its unsuccessful lawsuit in 2020, the Amistad Project of the Thomas More Society complained:

> "**At present state legislatures are unable to meet.** This inability to meet has existed from election day and continues through various congressionally

[598] In most states, a two-thirds super-majority vote of the legislature is necessary to override a Governor's veto. However, a gubernatorial veto can be overridden by a three-fifths vote in seven states (Delaware, Illinois, Maryland, Nebraska, North Carolina, Ohio, and Rhode Island). A gubernatorial veto can be overridden by a majority vote in six states (Alabama, Arkansas, Indiana, Kentucky, Tennessee, and West Virginia). See *Ballotpedia*. Veto overrides in state legislatures. https://ballotpedia.org/Veto_overrides_in_state_legislatures

> set deadlines for the appointment of presidential electors and the counting of presidential elector votes. **The states legislatures of Pennsylvania, Michigan, Wisconsin, Georgia and Arizona** … are unable to review the manner in which the election was conducted, are prevented from exercising their investigative powers and are unable to vote, debate or as a body speak to the conduct of the election. **In sum, State legislatures are impotent to respond to what happened in the November 3, 2020, election.**
>
> **"This impotency is caused by** the ministerial functions of Congress and the Vice President regarding the counting of the Presidential Elector's votes and also **by state law prohibiting the legislative body from meeting without a supermajority or governor or leadership agreement** during a time they can respond to what happened in the election. Accordingly, even if the state legislatures were aware of clear fraud by the executive branch—**the state legislatures could not meet unless a supermajority, or a governor, or legislative leadership agreed they should meet**."[599] [Emphasis added]

Fifth, many state constitutions impose a substantial delay before *any* legislation passed by the legislature can take effect.

There are only 42 days between Election Day in November and the December Electoral College meeting.

It would be pointless to repeal the National Popular Vote Compact after Election Day if the repeal law could not take effect before the Electoral College meeting.

Thus, unless the law repealing the National Popular Vote Compact were to take effect immediately, the presidential electors chosen in accordance with the Compact would have cast their votes long before the repeal law takes effect. In fact, absent immediate effect, the new President would have been inaugurated before a repeal law could take effect in these states.

A newly passed law can be given "immediate effect" in 19 of these 21 states by passing it with a constitutionally specified super-majority (e.g., three-fifths, two-thirds, three-quarters, or four-fifths).

Table 9.40 shows the date when a new state law ordinarily takes effect in each state. In states where a new state law does not ordinarily take effect immediately, column 3 of the table shows the super-majority needed in each house of the legislature in order to give a new law immediate effect.

In 2024, neither political party alone had the super-majorities required to give a bill immediate effect in nine of the 19 states where a bill can be given immediate effect (Alaska, Arizona, Illinois, Maine, Michigan, Nebraska, New Mexico, Virginia, and Texas). Moreover, the required super-majority would be difficult to obtain in the remaining states (even from among members of the state's dominant party) if the purpose were to steal the presidency.

Sixth, the majority party would have to be able to overcome the numerous dilatory

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[599] Complaint. *Wisconsin Voters Alliance v. Pence*. United States District Court for the District of Columbia. December 22, 2020. Pages 5 and 6. https://www.democracydocket.com/wp-content/uploads/sites/45/2020/12/DC-WVA-20201222-complaint.pdf

Table 9.40 Effective dates for new state laws

State	Date when a bill ordinarily takes effect	Super-majority needed to give bill immediate effect
Alabama	Can be immediate	
Alaska	90 days after enactment	Two-thirds
Arizona	90 days after legislature adjourns	Two-thirds (three-quarters if veto was overridden)
Arkansas	90 days after legislature adjourns	Two-thirds
California	January 1 next following a 90-day period from date of enactment. 91 days after special session adjourns	Two-thirds
Colorado	Can be immediate	
Connecticut	Can be immediate	
Delaware	Can be immediate	
Florida	Can be immediate	
Georgia	Can be immediate	
Hawaii	Can be immediate	
Idaho	Can be immediate	
Illinois	June 1 of the following year (if passed after May 31)	Three-fifths
Indiana	Can be immediate	
Iowa	Can be immediate	
Kansas	Can be immediate	
Kentucky	Can be immediate	
Louisiana	Can be immediate	
Maine	90 days after recess	Two-thirds
Maryland	June 1 after adjournment	Three-fifths
Massachusetts	90 days after enactment	Two-thirds
Michigan	90 days after adjournment	Two-thirds
Minnesota	Can be immediate	
Mississippi	Can be immediate	
Missouri	90 days after adjournment	
Montana	Can be immediate	
North Carolina	Can be immediate	
Nebraska	Three months after adjournment	Two-thirds
Nevada	Can be immediate	
New Hampshire	Can be immediate	
New Jersey	Can be immediate	
New Mexico	90 days after adjournment	Two-thirds
New York	20 days after enactment	
North Dakota	August 1	Two-thirds
Ohio	90 days after enactment	Two-thirds
Oklahoma	90 days after adjournment	Two-thirds
Oregon	Can be immediate	
Pennsylvania	Can be immediate	
Rhode Island	Can be immediate	
South Carolina	Can be immediate	
South Dakota	June 1 after adjournment	Two-thirds
Tennessee	Can be immediate	
Texas	90 days after adjournment	Two-thirds
Utah	60 days after adjournment	Two-thirds
Vermont	Can be immediate	
Virginia	July 1 or first day of 4th month after special session	Four-fifths
West Virginia	90 days after passage	Two-thirds
Washington	Can be immediate	
Wisconsin	Can be immediate	
Wyoming	Can be immediate	

parliamentary tactics that enable the minority party to frustrate action in legislative bodies. A highly motivated minority in most state legislatures can delay the enactment of new legislation for a considerable length of time by invoking these tactics.

Although these dilatory tactics cannot delay enactment of a particular bill forever, they are more than sufficient in most states to delay a legislative bill in the brief 42-day period between Election Day and the Electoral College meeting in mid-December.

The available dilatory tactics vary by state, but include:

- quorum requirements;
- filibusters;
- lay-over requirements;
- offering a blizzard of amendments, insisting that no action occur until pending amendments are printed, and demanding a roll call on each amendment; and
- "working to rule"—that is, refusing to waive the numerous notice, scheduling, and other requirements that are routinely waived under ordinary circumstances.

Let's examine these dilatory tactics one-by-one.

The state constitutions of four states (Oregon, Indiana, Tennessee, and Texas) require a two-thirds quorum for a meeting of the legislature.

As the *Oregon Statesman Journal* observed in 2018:

> "Denying a quorum is one of several parliamentary tools the minority party has to slow down progress on legislation, often deployed when they feel ignored or cut out of the lawmaking process."[600]

Legislators opposing certain bills have absented themselves on many occasions in Oregon, notably during the 2023 session.[601]

In Texas in 2003, the Democrats pulled the quorum when the Republicans attempted to pass a politically motivated mid-decade redrawing of the state's congressional districts. In an article entitled "Texas House paralyzed by Democratic walkout," CNN reported:

> "With action in the Texas House brought to a standstill, roughly 50 state Democratic representatives said they would remain in neighboring Oklahoma 'as long as it takes' to block a Republican-drawn redistricting plan that could cost them five seats in Congress. 'There's 51 of us here today, and a quorum of the Texas House of Representatives will not meet without us,' said state Rep. Jim Dunnam, the chairman of the House Democratic Caucus. He spoke with reporters outside a hotel in Ardmore, Oklahoma, where the Democrats have holed up."

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[600] Radnovich, Connor. 2018 *Salem Statesman Journal*. Ambitious goals, new worries come with Oregon Democratic supermajorities. November 9, 2018. https://www.statesmanjournal.com/story/news/politics/2018/11/09/oregon-democratic-supermajority-ambitious-policy-goals-worries/1920930002/ This article discussed the Democrat's *three-fifths* supermajority in 2019 (necessary in Oregon for passing bills for raising revenue) in relation to the *two-thirds* quorum.

[601] Baker, Mike. 2023. In a Year of Capitol Feuds, Oregon Has a Political Breakdown. *New York Times*. June 5, 2023. https://www.nytimes.com/2023/06/04/us/oregon-legislature-republican-walkout.html

> "The Democrats are trying to thwart a GOP redistricting plan they say is being pushed by U.S. Rep. Tom DeLay, the majority leader in the U.S. House of Representatives and a Texan. Democrats call the plan 'an outrageous partisan power grab.' They have gathered in Ardmore, just across the state line and beyond the jurisdiction of Texas state police, whom the House's Republican majority has ordered to bring them back to the state Capitol."[602]

In 2024, neither political party in Texas and Oregon has had a two-thirds super-majority in both houses of the legislature.[603] Thus, it would be futile to even contemplate executing the hypothetical post-election scenario in these two states, because the minority party would simply run out the clock by boycotting the legislative session during the brief period between Election Day in November and the Electoral College meeting in mid-December.

The filibuster (or its functional equivalent) is available to the minority in many states. For example, when the Nebraska Republican Party attempted to repeal the state's congressional-district method of awarding electoral votes and replace it with a winner-take-all law, the bill was blocked by a filibuster in several recent years, including 2024.[604,605]

Many state constitutions impose significant lay-over requirements. For example, the California state constitution imposes a 30-day delay after a bill's introduction before it can even be considered. This constitutional lay-over requirement can only be waived by a three-quarters vote. Neither political party has had a three-quarters super-majority in both houses of the California legislature at any time since World War II. Other state constitutions impose lay-overs before the second chamber of the legislature can consider a bill passed by the first chamber. When lay-over requirements are in state legislative rules (rather than the state constitution), they typically may be suspended only by a super-majority.

A further delay would occur if passage of a repeal law depended on overriding the veto of a governor from the opposing party. Such a governor would surely slow-walk the issuance of his or her veto so as to consume every last day of the available time (typically 10 days).

Seventh, the rogue state(s) would have to cumulatively possess enough electoral votes to matter. In any given election year, it would be unlikely for the states belonging to the National Popular Vote Compact to possess a bare 270 electoral votes. More importantly, the national popular vote winner is likely to have won some—and perhaps many—electoral votes from *non-compacting* states. Thus, the rogue state(s) would have to collectively possess a considerable number of electoral votes in order to throw the presidency to the candidate who lost the national popular vote.

Taken together, John Samples' hypothetical partisan and illegal maneuver of attempt-

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[602] Texas House paralyzed by Democratic walkout. CNN. May 19, 2003. https://search.yahoo.com/search?fr=mcafee&type=D211US667G0&p=texas+quorum+redistricting

[603] In 2024, the Republican Party has a two-thirds super-majority in both houses in Tennessee and Indiana.

[604] Hughes, Paul. 2024. Dover not sure if votes are there for electoral college winner-take-all method. *WJAG Radio*. May 1, 2024. https://www.norfolkneradio.com/news/dover-not-sure-if-votes-are-there-for-electoral-college-winner-take-all-method/article_35af7872-071a-11ef-bac6-ffd922f44ab3.html

[605] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

ing to withdraw from the National Popular Vote Compact after Election Day is both illegal and impractical.

Florida in 2000

The events in the Florida legislature between Election Day and the Electoral College meeting in 2000 are instructive, even though they involved a provision of the Electoral Count Act of 1887 that is no longer in effect.

Because section 1 of the Electoral Count Act of 1887 provided that presidential electors were to be appointed on Election Day, everyone recognized that there was no possibility that the Republican-controlled Florida legislature could meet after Election Day and retroactively decide to ignore the already-cast popular vote and appoint the slate of presidential electors nominated by the Florida Republican Party.[606]

The now-repealed section 2 of the Electoral Count Act of 1887 provided:

> "Whenever any State has held an election for the purpose of choosing electors, and has **failed to make a choice on the day prescribed by law**, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." [Emphasis added]

Republicans in the Florida legislature advanced the argument that if a court were to vacate the initial count of the popular votes cast on Election Day, and if a court-ordered recount were not completed by the federal Safe Harbor Day (i.e., six days prior to the Electoral College meeting), Florida could have been left with no presidential electors at the time of the Electoral College meeting.

This possibility aroused considerable concern, because the Constitution does not require an absolute majority of the electoral votes to become President, but merely:

> "a majority of the whole number of electors **appointed**."[607] [Emphasis added].

Thus, if Florida had failed to appoint its 25 presidential electors in 2000, Al Gore would have had a majority of the electors *appointed* and, therefore, would have been elected President by the Electoral College.

This outcome was clearly unappealing to the Republican-controlled Florida legislature and the Republican Governor, the brother of the Republican presidential nominee.

It was therefore argued at the time that the Florida legislature had the power to act under section 2, because there was a possibility of a "failure to make a choice."

On December 7, 2000, the *New York Times* reported:

> "Nervous about meeting a deadline of next Tuesday for states to pick electors, and with Vice President Al Gore having made remarks indicating that he is not ready to concede, [Senate president, John] McKay and [Speaker Tom] Feeney

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[606] The authors appreciate their conversations with former Congressman Tom Feeney (who was Speaker of the Florida House of Representatives in November 2000) for clarifying the nature of the "reaffirming" resolution.

[607] The 12th Amendment (ratified in 1804) provides: "The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed."

> signed a proclamation today convening a special session of the Legislature beginning on Friday.
>
> "'On Dec. 12, we may find ourselves in a position that calls for our involvement **should there be no finality to the contests that are still pending**,' Mr. McKay said in a joint news conference with Mr. Feeney to announce the decision. 'And it is possible that there may be more filed before this day is out. **It would be irresponsible of us if we failed to put a safety net in place** under the current court conditions."
>
> "Mr. Feeney said he was compelled to call for the special session because we have **a duty to protect Florida's participation in the Electoral College**.'"[608] [Emphasis added]

Thus, the Republican-controlled Florida House of Representatives passed a resolution *reaffirming* the initial *already-certified* vote count favoring the Republican presidential electors supporting George W. Bush.

The Republican-controlled state Senate never took any action on the House's "reaffirming" motion, because the U.S. Supreme Court's decision in *Bush v. Gore* mooted the issue.

Thus, the "failed to make a choice" provision of the Electoral Count Act of 1887 was never invoked.

The Electoral Count Reform Act of 2022 repealed this provision.

9.26. MYTH THAT CANDIDATES WILL BE KEPT OFF THE BALLOT

9.26.1. MYTH: Candidates will be kept off the ballot in a patchwork of states because of the Compact.

QUICK ANSWER:

- The Constitution's Equal Protection Clause and First Amendment provide a strong legal basis for thwarting politically motivated attempts to keep presidential candidates off the ballot. For example, in 2019, courts found five different reasons to invalidate a California law (aimed at Donald Trump) to keep a candidate off the ballot for failure to disclose tax information. In 2024, after a Colorado state court evidentiary hearing found that Donald Trump had engaged in insurrection within the meaning of section 3 of the 14th Amendment, the U.S. Supreme Court ruled that Donald Trump could not be kept off the Colorado ballot.
- Numerous court precedents protecting ballot access indicate that a major-party presidential candidate could not be kept off the ballot.

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[608] Canedy, Dana and Barstow, David. 2000. Florida Lawmakers to Convene Special Session Tomorrow. *New York Times*. December 7, 2000. https://www.nytimes.com/2000/12/07/us/contesting-vote-legislature-florida-lawmakers-convene-special-session-tomorrow.html

- The possibility of keeping candidates off the ballot in a patchwork of states is not a question that arises because of the National Popular Vote Compact. It exists in the current system. This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is equivalent to the current system.

MORE DETAILED ANSWER:

An anonymous posting on the Volokh election blog in 2012 said:

> "A state dominated by one party could try to use NPV to rig a presidential election, by setting ballot qualification requirements that would be very tough for the other party to meet … thus knocking the other party's votes in that state to 0."[609]

The reasons for the failure of past politically motivated attempts to keep particular candidates off the ballot under the current system apply equally to the National Popular Vote Compact.

First, the Constitution's Equal Protection Clause and First Amendment provide a strong legal basis for thwarting politically motivated attempts to keep presidential candidates off the ballot in certain states.

California's unsuccessful 2019 attempt to make ballot access dependent on a presidential candidate's disclosure of tax returns

After Donald Trump was elected President in 2016, bills were introduced in several state legislatures to deny ballot access to a presidential candidate who had not publicly disclosed his or her income tax returns.

In California, a bill (SB 149) entitled the "Presidential Tax Transparency and Accountability Act" was introduced along these lines in 2017.

Before the California legislature acted on the bill, the California Office of the Legislative Counsel concluded that the legislation:

> "would be unconstitutional if enacted."

Despite this prescient warning, the legislature passed the bill.

California Governor Jerry Brown then vetoed the bill, saying:

> "This bill is a response to President Trump's refusal to release his returns during the last election. While I recognize the political attractiveness—even the merits—of getting President Trump's tax returns, **I worry about the political perils of individual states seeking to regulate presidential elections in this manner**. First, it may not be constitutional. Second, it sets a 'slippery slope' precedent. Today we require tax returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards?

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[609] Posting by Valarauko on The Volokh Conspiracy blog on October 30, 2012. http://www.volokh.com/2012/10/30/the-popular-vote-and-presidential-legitimacy/

> And **will these requirements vary depending on which political party is in power?"**[610] [Emphasis added]

Despite Governor Brown's veto in 2017, the California legislature passed a similar bill (SB 27) in 2019. Governor Gavin Newsom signed the bill in 2019.[611]

The courts found five different reasons to invalidate California's 2019 law, including:

- three federal constitutional reasons
- one state constitutional reason
- one reason based on the fact that an existing federal statute pre-empted state laws on the topic.

Federal District Judge Morrison C. England wrote in *Griffin v. Padilla* in 2019:

> "The Court appreciates the State's desire for transparency in the political process. Requiring candidates to disclose tax returns could shed light on sources of income, potential conflicts of interest, and charitable tendencies. This information is important to a voter's ability to evaluate how a candidate's financial interests might affect future decision making."
>
> "It is not the job of the courts, however, to decide whether a tax return disclosure requirement is good policy or makes political sense. Those are questions delegated to the political branches of the federal government, that is Congress and the President, under Articles I and II of the United States Constitution. Those are the branches that make the law. Article III Courts such as this one, on the other hand, are tasked with interpreting the law and evaluating whether laws passed by the other two branches of federal government or by the states are constitutional in the first place. The job of the federal courts is therefore to follow the law and to decide questions based on the United States Constitution, which is the only thing the Court is being asked to do in these cases. Courts created under Article III of the United States Constitution are not concerned with political victories or who may or may not 'win.' Instead, it is the Court's job to make sure the Constitution wins."[612]

Judge England then issued a preliminary injunction barring the enforcement of California's 2019 law as applied to presidential candidates for the following four reasons:

> "The Court finds that Plaintiffs are likely to prevail on the merits of their arguments that the Act
>
> (1) violates the Presidential Qualifications Clause contained in Article II of the United States Constitution;

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[610] Veto message of California Governor Jerry Brown on SB 149. October 15, 2017. https://www.gov.ca.gov/wp-content/uploads/2017/11/SB_149_Veto_Message_2017.pdf

[611] Nick Cahill, 2019. Trump Tax Returns Required by New California Law. *Courthouse News Service*. July 30, 2019. https://www.courthousenews.com/trump-tax-returns-required-by-new-california-law

[612] *Griffin v. Padilla*. 417 F. Supp. 3d 1291 at 1297. (E.D. Cal. 2019). https://scholar.google.com/scholar_case?case=14784440801933178029&q=Griffin+v.+Padilla,&hl=en&as_sdt=2006&as_vis=1

> (2) deprives Plaintiffs of their rights to associate and/or to access the ballot, as guaranteed by the First Amendment of the Constitution;
>
> (3) further violates the Constitution's Equal Protection Clause as set forth in the Fourteenth Amendment; and
>
> (4) is preempted by the provisions of [Ethics in Government Act] in any event."[613]

The federal district court's decision in *Griffin v. Padilla* said:

> "The Presidential Qualifications Clause of the United States Constitution sets forth the eligibility requirements for the Office of President:
>
> > 'No person except a natural born Citizen … shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. U.S. Const., art. II, § 1, cl. 5.'
>
> "The United States Supreme Court analyzed the Constitution's Qualifications Clauses in the seminal case, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). There the Court held that the Framers intended the foregoing language to 'fix as exclusive the qualifications in the Constitution,' 'thereby divest[ing] States of any power to add qualifications.' *Id.* at 801, 806, 115 S.Ct. 1842. The Court reasoned that 'the text and structure of the Constitution, the relevant historical materials, and, most importantly, the basic principles of our democratic system all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power' … *Id.* at 806, 115 S.Ct. 1842. Significantly, the Court rejected any notion that a state can cloak an otherwise impermissible qualification as a ballot access issue subject to regulation by the states under the Elections Clause, stating that states cannot indirectly create new eligibility requirements by 'dressing eligibility to stand for [public office] in ballot access clothing. *Id.* at 831, 115 S.Ct. 1842."[614]

California's 2019 law was also found to be unconstitutional based on First Amendment rights of association and ballot access. The federal district court's decision in *Griffin v. Padilla* said:

> "The Constitution guarantees, among other things, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' *Illinois State Bd. of Elections v. Social Workers Party*, 440 U.S. at 184, 99

[613] *Ibid.* at 1308.

[614] *Ibid.* Page 1298.

> S.Ct. 983 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)). Ballot access restrictions 'implicate the right to vote' because 'limiting the choices available to voters … impairs the voter's ability to express their political preferences.' *Id*. The rights of individual voters to associate with, and vote for, the candidate of their choice 'rank among our most precious freedoms.' *Williams*, 393 U.S. at 30-31, 89 S.Ct. 5 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)). Moreover, as the Supreme Court also noted, the 'freedom to associate as a political party' also 'has diminished practical value if the party can be kept off the ballot.' *Illinois State Bd. of Elections v. Social Workers Party*, 440 U.S. at 184, 99 S.Ct. 983.
>
> "According to Plaintiffs, by barring partisan presidential candidates who decline to release their tax returns from appearing on the California primary ballot, the Act imposes a severe burden on voters' ability to access the ballot and vote for the candidate of their choice. Additionally, President Trump further claims that the Act similarly burdens his ability to appear on the Republican primary ballot and to associate with Republican voters in California. The Trump Campaign as well as the Republican National Committee and the California Republican Party make similar arguments."[615]

In addition, California's 2019 law was found unconstitutional based on the Equal Protection Clause of the 14th Amendment. The federal district court's decision in *Griffin v. Padilla* said:

> "The Fourteenth Amendment's Equal Protection Clause guarantees that 'no state shall … deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const., amend. XIV, § 1. Two of the related cases … argue that the Act is unconstitutional to the extent it requires a political party's candidates for President to disclose his or her tax returns in the primary election but exempts independent candidates from doing so. By distinguishing among constitutionally eligible candidates for President in that manner, Plaintiffs argue that the Act imposes greater burdens on the voting and associational rights of California voters who support major party candidates than those who support independents. According to Plaintiffs, this triggers equal protection concerns. See *Lubin v. Panish*, 415 U.S. at 716, 94 S.Ct. 1315 ('The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters'); see also *Matsumoto v. Pua*, 775 F.2d 1393, 1396 (9th Cir. 1985).[616]

Moreover, the court found that California's 2019 law was pre-empted by the federal Ethics in Government Act.

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[615] *Ibid.* at 1302.

[616] *Ibid.* at 1305.

As the ads on late-night TV say, "But wait, there's more."

Before the U.S. Court of Appeals for the Ninth Circuit could consider an appeal of Judge England's decision, the California State Supreme Court delivered the *coup de grâce* to California's 2019 law by ruling that it violated the state Constitution.[617,618]

Unsuccessful attempt to keep Donald Trump off the ballot in 2024 based on the Insurrection Clause of the 14th Amendment

Section 3 of the 14th Amendment provides:

> "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

After a five-day evidentiary hearing, a Colorado state court found that former President Donald Trump had engaged in insurrection within the meaning of Section 3. That lower court provided no relief to the plaintiffs, because it found that the word "office" in the 14th Amendment did not apply to the presidency.

The Colorado Supreme Court reached the opposite conclusion on the meaning of the word "office" and, after ruling on various other issues, ordered that Trump could not be listed on Colorado's ballot in 2024.

Similar litigation was proceeding in several other states at about the time of the Colorado decision.

In *Trump v. Anderson*, the U.S. Supreme Court reversed the Colorado Supreme Court citing the "patchwork" that would result if single states could keep presidential candidates from the ballot. The Court wrote:

> "The result could well be that **a single candidate would be declared ineligible in some States, but not others**, based on the same conduct (and perhaps even the same factual record).
>
> "**The 'patchwork' that would likely result** from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits*, 514 U. S., at 822. But **in a Presidential election 'the impact of the votes cast in each State is affected by the votes cast'—or, in this case,**

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[617] *Patterson v. Padilla*. 451 P.3d 1171 (Cal. 2019). https://scholar.google.com/scholar_case?case=5187408300869215161&q=Patterson+v.+Padilla.+451+P.3d+1171&hl=en&as_sdt=2006&as_vis=1

[618] *Harvard Law Review*. As the Legislature Has Prescribed: Removing Presidential Elections from the Anderson-Burdick Framework. Volume 135. Issue 4. Page 1082. February 10, 2022. https://harvardlawreview.org/2022/02/as-the-legislature-has-prescribed/

> **the votes not allowed to be cast—'for the various candidates in other States**.' *Anderson*, 460 U. S., at 795. An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times."[619] [Emphasis added]

Numerous court precedents protecting ballot access for minor-party or independent presidential candidates suggest that a major-party candidate would not be kept off the ballot.

The question of ballot access did not, of course, arise until the 1890s, when government-printed ballots were first used in the United States (section 3.11).

Over the years, the *major* political parties have often used numerous sharp-elbowed tactics to try to keep *minor* parties off the ballot. These tactics have included state laws requiring that minor parties submit petitions signed by an unreasonably large number of voters in order to appear on the ballot, that minor parties submit the required petitions by unreasonably early deadlines not applicable to major parties, that minor parties receive an unreasonably large number of votes in order to stay on the ballot, and that an unreasonably large number of voters remain registered with a party for it to stay on the ballot.

In addition, major parties often oppose ballot access for specific minor-party and independent candidates because of a concern (often well placed) that they will become spoilers in a specific upcoming race.

For example, in October 2012, the Pennsylvania Republican Party tried to keep Libertarian presidential nominee Gary Johnson (a former Republican Governor of New Mexico) off the presidential ballot in Pennsylvania.

> "The Pennsylvania Republican Party chairman … said he was not about to give Mr. Johnson an easy opening to play a Nader to Mr. Romney's Gore in Pennsylvania this year."[620]

Despite Pennsylvania Republican Party efforts, courts ordered that Johnson appear on the 2012 ballot in Pennsylvania. Johnson ultimately received only 0.99% of the national popular vote in 2012.

Ballot Access News has listed 40 lawsuits where the courts have invalidated a variety of efforts to keep candidates off the ballot for reasons that go beyond the specific qualifications stated in the state or federal constitutions. The only cases where such laws have been upheld (and only in some states) have involved laws requiring candidates to resign their current office in order to run for another one.

As Richard Winger reported in 2019:

> "Ever since the start of government-printed ballots in 1890, courts have been striking down state election laws (aside from petitions and fees) that prevent

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[619] *Trump v. Anderson*. May 4, 2024. Slip opinion. https://www.supremecourt.gov/opinions/23pdf/23-719_19m2.pdf

[620] Rutenberg, Jim. Spoiler alert! G.O.P. fighting Libertarian's spot on the ballot. *New York Times*. October 15, 2012.

> candidates from getting on the ballot for federal office. [There have been] 40 lawsuits in the last 100 years that have struck down barriers to the ballot. These barriers included loyalty oaths; bans on felons; bans on candidates who were holding a state elective office and hadn't resigned the state job; laws requiring candidates to be registered voters; and laws requiring residency in a particular district or state."[621]

Despite the obstacles, presidential candidates who have significant national support can generally qualify for the ballot in most or all states.

For example, the Libertarian Party received the most votes nationwide of any minor-party in 2020, 2016, and 2012. In 2020, that party was on the ballot for President in all 50 states (when Jo Jorgensen received 1% of the national popular vote). In 2016, it was on the ballot for President in all 50 states (when Gary Johnson received 3% of the national popular vote). In 2012, the Libertarian Party was on the ballot in every state except Oklahoma (when Gary Johnson received 1% of the national popular vote).

See section 9.30.16 for a list of other minor parties that have been on the ballot in all 50 states.

Overall, the lack of success by *major* political parties in keeping *minor* parties off the ballot indicates that it would be even less likely that a major-party presidential candidate could be kept off the ballot in any state.

There is no history of major-party presidential candidates being denied ballot access because of the date of their nominating convention.

After each political party nominates its presidential-vice-presidential slate at its national convention, it must officially notify each state's election officials of its choice so that the state can include the names of the nominees on their ballots (section 3.2.2).

The various state deadlines start in early August.[622]

In 2004, the Republican National Committee scheduled the party's National Convention to start on August 30—considerably later than usual. The convention's late date created the possibility that there would be no Republican presidential candidate on the Alabama ballot in 2004, because the convention was scheduled to be held after Alabama's pre-existing statutory deadline for each political party to provide the name of its national nominees to state officials. The problem was satisfactorily resolved when the Alabama legislature agreed to pass special legislation temporarily changing the state's deadline to accommodate the Republicans.

In 2012, special legislation was required in several states, because the Republican National Convention was held in late August, and the Democratic Convention was held in early September.

In 2024, the Alabama legislature similarly passed special temporary legislation to accommodate the relatively late date (August 19) of the Democratic National Convention.

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[621] Winger, Richard. 2019. Bills to require presidential candidates to show tax returns. *Ballot Access News*. April 1, 2019. https://ballot-access.org/2019/04/28/april-2019-ballot-access-news-print-edition/

[622] For a map showing the various state deadlines, see Vakil, Caroline and Roy, Yash. 2024. Here's how the process to replace Biden would work if he withdraws. *The Hill*. July 6, 2024. https://thehill.com/homenews/campaign/4757220-joe-biden-kamala-harris-donald-trump-withdraw/

In 2024, Ohio Republican legislative leaders initially resisted passing legislation to accommodate the Democratic National Convention (which was scheduled to start 12 days after Ohio's pre-existing statutory deadline). The legislature then adjourned without accommodating the Democrat's schedule. Republican Governor Mike DeWine broke the impasse by calling the legislature into a special session, which then promptly passed the required temporary change in Ohio's deadline to accommodate the Democrats.[623]

The failed attempt to keep Obama off the Kansas ballot is a further reminder that the public does not support attempts to keep candidates off the ballot.

On September 13, 2012, the Kansas State Objections Board (consisting of Republican Secretary of State Kris Kobach and two other Republican statewide officeholders) considered a motion to keep Democrat Barack Obama off the presidential ballot in Kansas.

The *New York Times* reported that the motion was abandoned a day later as a result of "a wave of angry backlash."[624,625]

The public's reaction to the Republican challenge to Obama's access to the ballot in Kansas in 2012 is a further reminder of the fact that the public (even in a state that voted heavily against Obama) would not tolerate an attempt by partisan officials to create a one-party election.

9.27. MYTHS ABOUT RANKED CHOICE VOTING

9.27.1. MYTH: Ranked Choice Voting is incompatible with National Popular Vote.

QUICK ANSWER:

- Groups that oppose both ranked choice voting (RCV) and the National Popular Vote Compact have incorrectly claimed that there is uncertainty as to whether the first-round count or the final-round count produced by RCV should be used in computing the national popular vote. They claim that the uncertainty will create a "constitutional crisis … throwing the nation into turmoil."
- In fact, there is no legitimate uncertainty as to how to interpret state RCV-for-President laws for the purpose of computing the national popular vote total. The statutory interpretation of the RCV-for-President laws is settled law in the only two states currently using RCV (Maine and Alaska). Maine settled any possible question in 2021 before it approved the National Popular Vote Compact, and confirmed its policy decision in 2024 when it enacted the Compact. The Alaska State Supreme Court has ruled: "With ranked-choice voting, the vote count is not final after the first round of tabulation. … According to both

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[623] Svitek, Patrick. 2024. Ohio governor calls special session to ensure Biden gets on ballot. *Washington Post*. May 23, 2024. https://www.washingtonpost.com/politics/2024/05/23/ohio-biden-ballot/

[624] Eligon, John. Kansas ballot challenge over Obama's birth is ended. *New York Times*. September 15, 2012. https://www.nytimes.com/2012/09/15/us/politics/kansas-election-officials-seek-copy-of-obamas-birth-certificate.html

[625] Official Challenge by Joe Montgomery and Obama Response. *New York Times*. September 14, 2012. https://archive.nytimes.com/www.nytimes.com/interactive/2012/09/14/us/politics/20120914-kansas-obama.html?action=click&contentCollection=Politics&module=RelatedCoverage&pgtype=article&region=EndOfArticle

[Alaska's and Maine's] ranked choice voting laws, the vote count is not complete until the final round of tabulation."

- In Oregon and the District of Columbia (where an RCV-for-President law is on the ballot in November 2024) this issue is moot, because both proposed laws explicitly designate the final-round count.

MORE DETAILED ANSWER:

Description of Ranked Choice Voting

Ranked choice voting (RCV) allows the voter to numerically rank candidates on their ballot in order of preference—first choice, second choice, and so forth.

Figure 9.15 shows a sample ballot for the 2020 presidential election in Maine.

Instructions to Voters

To vote, fill in the oval like this ●

To rank your candidate choices, fill in the oval:

- **In the 1st column for your 1st choice candidate.**
- **In the 2nd column for your 2nd choice candidate, and so on.**

Continue until you have ranked as many or as few candidates as you like.

Fill in no more than one oval for each candidate or column.

To rank a Write-in candidate, write the person's name in the write-in space and fill in the oval for the ranking of your choice.

President Vice President	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice	6th Choice
Biden, Joseph R. Harris, Kamala D. Democratic	○	○	○	○	○	○
De La Fuente, Roque "Rocky" Richardson, Darcy G. Alliance Party	○	○	○	○	○	○
Hawkins, Howard Walker, Angela Nicole Green Independent	○	○	○	○	○	○
Jorgensen, Jo Cohen, Jeremy Libertarian	○	○	○	○	○	○
Trump, Donald J. Pence, Michael R. Republican	○	○	○	○	○	○
Write-in	○	○	○	○	○	○

Figure 9.15 Maine 2020 RCV ballot for President

RCV is sometimes called "instant runoff voting," because the ballot-counting process resembles a series of runoff elections.[626]

In the first round of counting in RCV elections, each ballot counts as one vote for the candidate whom the voter ranked as their first choice. If any candidate receives an absolute majority of the votes, the counting process stops. If not, the candidate with the fewest votes is eliminated, and each ballot for the just-eliminated candidate is counted as one vote for that voter's next choice. This process of counting and eliminating the weak-

[626] RCV is also known as the "single transferable vote" or "Hare system," after its inventor, Thomas Hare.

est candidate is repeated until one candidate has the support of a majority of the ballots expressing a choice.[627]

Supporters of RCV argue that it is preferable to the conventional plurality-voting system used in almost all elections in the United States,[628] because the winner has the support of a majority of voters expressing a choice.

RCV supporters argue that it gives candidates a strong reason not to run harshly negative campaigns, because winning often requires earning the support of some voters whose first choice was eliminated.

Moreover, RCV eliminates the dilemma of voting for the lesser of two evils—instead of the candidate who most closely matches the voter's views.

For example, RCV enables Libertarian voters to give their first-choice ranking to the Libertarian Party candidate, but to also give their second-choice ranking to the Republican candidate. Some Green voters might give their first-choice ranking to the Green Party candidate, but then give their second-choice ranking to the Democratic candidate.

In the traditional plurality-voting system, a voter who supports a minor-party or independent candidate often aids the major-party candidate whose views are farthest from the voter's.

For example, 97,488 Floridians voted for Ralph Nader for President in 2000. If those voters had been able to express their second-choice on their ballots, George W. Bush almost certainly would not have carried Florida by 537 votes—and therefore would not have become President.

Similarly, in 2020, Libertarian presidential candidate Jo Jorgensen received more than three times as many popular votes in Arizona, Georgia, and Wisconsin (152,185) as Biden's margin over Trump in those states, as shown in table 9.30. Without the 37 electoral votes from these three states, there would have been a 269–269 tie in the Electoral College. On January 6, 2021, the Republican Party had a majority of the House delegations and would have been in a position to choose Trump as President.[629]

History and constitutionality of ranked choice voting

RCV has been used for decades in numerous municipal elections in the United States.

As of 2024, RCV is used on a statewide basis in Maine and Alaska and by over 50 cities and counties in various states.[630]

Maine was the first state to adopt RCV on a statewide basis. In November 2016, its voters approved an initiative petition that adopted RCV for use in elections for Congress and state offices—but not President.[631]

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[627] In some jurisdictions, the RCV law specifies that the rounds of counting and redistribution continue until two candidates remain (even if a candidate secured an absolute majority in an earlier round).

[628] Georgia, for example, uses the conventional plurality-voting system for President. For all other offices, if a candidate does not receive an absolute majority of the votes, a run-off election is held.

[629] On January 6, 2021, the Democrats had a majority of the House membership and controlled the chamber, but the Republicans had a majority of the House delegations.

[630] FairVote. 2023. Where Is Ranked Choice Voting Used? https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used

[631] *Ballotpedia*. https://ballotpedia.org/Maine_Question_5,_Ranked-Choice_Voting_Initiative_(2016)

In 2017, the Maine Supreme Judicial Court issued an advisory opinion saying that, based on its interpretation of the Maine Constitution, RCV could not be used in *general* elections for *state* offices. The court noted that RCV could be used in *primary* elections for *state* offices and in both primary and general elections for federal offices.[632,633]

As a result, RCV was used in Maine in 2018 for both the primary and general elections for U.S. Senator and U.S. Representative—but only in the June primary election for state offices.[634]

The constitutionality of Maine's RCV law was contested in federal court after RCV played a decisive role in Maine's 2nd congressional district election in 2018.

Both a federal district court and a federal appeals court upheld the constitutionality of Maine's RCV law. Both found RCV to be a "one-person, one-vote" system.[635] These federal-court rulings characterized the objections raised against RCV as primarily differences of opinion as to what constitutes a desirable voting system—rather than valid legal arguments as to what is, or is not, constitutional.[636]

In his 2018 opinion Federal District Judge Walker wrote:

> "Whether RCV is a better method for holding elections is not a question for which the Constitution holds the answer. … **To the extent that the Plaintiffs call into question the wisdom of using RCV, they are free to do so, but … such criticism falls short of constitutional impropriety.** A majority of Maine voters have rejected that criticism and **Article I does not empower this Court to second guess the considered judgment of the polity on the basis of the tautological observation that RCV may suffer from problems, as all voting systems do**. The proper question for the Court is whether RCV voting is incompatible with the text of Article I by giving the language its plain and ordinary meaning."[637] [Emphasis added]

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[632] *Ballotpedia*. https://ballotpedia.org/Maine_Supreme_Judicial_Court_advisory_opinion_on_ranked-choice_voting

[633] In 2017, the Maine legislature passed a law delaying implementation of RCV. However, a protest-referendum petition suspended the legislature's action. The voters rejected the delaying legislation in June 2018.

[634] In June 2018, Maine voters reaffirmed their support for the 2016 RCV law in a referendum on a law passed by the legislature aimed at delaying the implementation of RCV in the state. https://ballotpedia.org/Maine_Question_1,_Ranked-Choice_Voting_Delayed_Enactment_and_Automatic_Repeal_Referendum_(June_2018)

[635] *Baber v. Dunlap*. 376 F. Supp. 3d 125 (D. Maine 2018), appeal dismissed, 2018 WL 8583796 (1st Cir. 2018). The opinion of Judge Walker on December 13, 2018 denying a preliminary injunction is at https://scholar.google.com/scholar_case?case=18197201880727345565&hl=en&as_sdt=6&as_vis=1&oi=scholarr The opinion of United States District Judge Lance Walker on November 15, 2018 denying a temporary restraining order is at https://scholar.google.com/scholar_case?case=9635396658969862750&hl=en&as_sdt=6&as_vis=1&oi=scholarr

[636] Pildes, Richard H. and Parsons, G. Michael. 2021. The Legality of Ranked-Choice Voting. 109 *California Law Review*. Volume 109. Number 5. October 2021. https://www.californialawreview.org/print/the-legality-of-ranked-choice-voting/

[637] *Baber v. Dunlap*. 376 F. Supp. 3d 125 at 135 (D. Maine 2018) https://scholar.google.com/scholar_case?case=18197201880727345565&hl=en&as_sdt=6&as_vis=1&oi=scholarr

In 2019, the Maine legislature passed a law extending RCV to presidential elections.[638]

In 2020, the constitutionality of Maine's law was again challenged in federal court. Federal District Judge Walker upheld Maine's RCV law against the claim that voters were forced to vote for candidates they did not favor.[639]

RCV has also been upheld by the highest courts of Massachusetts and Minnesota in cases involving local elections.[640]

RCV was used for the first time in a presidential election in Maine in 2020 (as shown by the sample ballot in figure 9.15).

In November 2020, an absolute majority of Maine's voters gave Biden their first-choice ranking on a statewide basis. Thus, the statewide RCV counting process ended in the first round. That is, the first-round count was equivalent to the final-round count.

Under Maine law, RCV is separately applied at the statewide level (for two electoral votes) and at the congressional-district level. An absolute majority of voters in the 1st district (the southern part of the state) gave Biden their first-choice ranking. An absolute majority of voters in the 2nd district (the northern part of the state) similarly gave Trump their first-choice ranking. Thus, the first-round count was equivalent to the final-round count in both districts.

Maine is not the only state that will use RCV in the 2024 presidential election.

In November 2020, Alaska voters approved an initiative petition that established a top-four multi-party primary for offices other than President and the use of RCV in general elections for all offices—including President.[641]

In 2021, the Alaska Supreme Court unanimously upheld the constitutionality of RCV.[642,643,644]

In 2022, RCV was used in Alaska in the general election for U.S. Senator and U.S. Representative as well as state offices, including Governor.[645]

In 2023, RCV opponents in Alaska launched an initiative petition to repeal RCV. The

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[638] Rosin, Michael L. 2023. Ranked Choice Voting in Presidential Elections in Maine—A State That Appoints Electors Statewide and By District. *Elections Law Journal: Rules, Politics, and Policy*. October 4, 2023. https://doi.org/10.1089/elj.2022.0035

[639] *Hagopian v. Dunlap*. 2020. 480 F. Supp. 3d 288. https://www.govinfo.gov/content/pkg/USCOURTS-med-1_20-cv-00257/pdf/USCOURTS-med-1_20-cv-00257-0.pdf

[640] Balser, Jimmy. 2022. *Ranked-Choice Voting: Legal Challenges and Considerations for Congress*. Congressional Research Service. October 12, 2022. Page 3. https://crsreports.congress.gov/product/pdf/LSB/LSB10837

[641] The initiative petition also contained various campaign financing provisions as well. *Ballotpedia.* https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020)

[642] Bohrer, Becky. 2021. Judge to hear case challenging ranked-choice election initiative approved by Alaska voters. *Associated Press*. July 9, 2021. https://www.adn.com/politics/2021/07/09/judge-to-hear-case-challenging-ranked-choice-election-initiative-approved-by-alaska-voters/

[643] *Kohlhaas v. State of Alaska*. Alaska Supreme Court opinion. October 21, 2022. https://electionlawblog.org/wp-content/uploads/AK-Supreme-Court-Decision.pdf

[644] Lee, Jeanette. 2022. Alaska Supreme Court Upholds State's New Election System. *Sightline*. January 24, 2022. https://www.sightline.org/2022/01/24/alaska-supreme-court-upholds-states-new-election-system/

[645] Reilly, Benjamin; Lublin, David; and Wright, Glenn, 2023. Alaska's New Electoral System: Countering Polarization or "Crooked as Hell"? *California Journal of Politics and Policy*. Volume 15. Number 1. https://escholarship.org/uc/item/5k75w7xw

opponents included former Governor Sarah Palin, who attributed her loss in her 2022 congressional race to Alaska's use of RCV. Voters are expected to vote on the question of repealing RCV in Alaska in November 2024.

Political context

A substantial percentage of supporters of RCV are supporters of the National Popular Vote Compact (NPV), and vice versa.

Moreover, opponents of RCV are very often opponents of NPV.

Trent England, Executive Director of Save Our States (the leading lobbying organization opposing NPV), also serves as a leading spokesman for Stop RCV (a lobbying organization opposing RCV).

The supporters of these anti-RCV and anti-NPV groups include the Honest Election Project, Heritage Action, and the Oklahoma Council on Public Affairs (OCPA), a think tank that employs Trent England as its Vice President.

Because of the overlap of support for RCV and NPV and the overlap of opposition to RCV and NPV, the opponents of RCV and NPV have attempted to divide the electoral reform community by claiming that RCV and NPV are incompatible.[646] Their aim is to get supporters of NPV to oppose RCV, and to get supporters of RCV to oppose NPV.

Save Our States incorrectly claims that RCV is incompatible with the National Popular Vote Compact.

In 2023, Sean Parnell, Senior Legislative Director of Save Our States, submitted written testimony to the Minnesota Senate Elections Committee claiming:

> "There is a fundamental incompatibility between the National Popular Vote interstate compact (NPV) and an election process used by some states called Ranked Choice Voting (RCV)."[647,648,649]

Jeanne Massey, Executive Director of FairVote Minnesota (the leading advocate for RCV in Minnesota),[650] submitted written testimony to a Minnesota House committee the day after Parnell's testimony:

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[646] Save Our States also incorrectly claims that the National Popular Vote Compact is incompatible with STAR voting (section 9.28.1), range voting (section 9.28.2), approval voting (section 9.28.3), and top-two approval voting (section 9.28.3).

[647] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[648] England, Trent. 2022. *Save Our States video: 6 Questions for Sean Parnell*. https://www.youtube.com/watch?v=TNk3VIoP8dU

[649] Parnell, Sean. 2021. Ranked choice voting makes a National Popular Vote impossible. *Go Erie*. January 24, 2021. https://www.goerie.com/story/opinion/columns/2021/01/24/ranked-choice-voting-makes-national-popular-vote-impossible/4210235001/

[650] Traub, James. 2023. The Hottest Political Reform of the Moment Gains Ground: Inside Jeanne Massey's relentless campaign to fix democracy, starting in Minnesota. *Politico*. April 16, 2023. https://www.politico.com/news/magazine/2023/04/16/ranked-choice-voting-minnesota-00089505

> "I have read the opposing testimony related to RCV and National Popular Vote compatibility, and it is misleading and incorrect. **The testimony comes from an organization opposed to both RCV and NPV and has a clear motive—to hurt both reforms**. … I urge you to disregard the unproven, misleading argument that RCV and NPV are incompatible and support the NPV legislation before you."[651] [Emphasis added]

A policy memorandum from Save Our States says:

> "The National Popular Vote interstate compact (NPV) and an election method known as Ranked Choice Voting (RCV) are … **fundamentally incompatible.**"
>
> "The incompatibility of RCV and NPV could prevent a conclusive determination of which candidate has won the presidency, causing a political, legal, and **constitutional crisis and throwing the nation into turmoil**."[652]

The problem that allegedly will provoke a constitutional crisis was described in written testimony to the Minnesota Senate Elections Committee on January 31, 2023, by Parnell:

> "NPV anticipates that every state will produce a single vote total for each candidate, but **RCV produces at least two: an initial vote count, before the RCV process of transferring votes, and the final vote count** at the conclusion of the RCV process. **This would produce uncertainty**, litigation, and opportunities for manipulation if NPV took effect."[653,654,655] [Emphasis added]

In fact, there is no legitimate uncertainty as to whether to use the first-round count or the final-round count in computing the national popular vote.

Indeed, it would be preposterous to interpret an RCV-for-President law to mean that a state would hand voters a ballot enabling them to rank candidates according to their first, second, and other preferences—but then would ignore everything on the ballot except the voter's first choice.

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[651] Massey, Jeanne. 2023. Testimony before Minnesota House Elections Finance and Policy Committee. February 1, 2023. https://www.house.mn.gov/comm/docs/TYRWZhxR-kCyJCxmXC5Z1Q.pdf

[652] Save Our States. 2021. Policy Memorandum: Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist. April 26, 2021. Page 1.

[653] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[654] According to Save Our States, "The problem is that … the RCV process can yield two different vote counts—an initial total of all voters' first choice votes, and a final number that has eliminated votes for some candidates and added votes to others." See Save Our States Policy Memorandum: Incompatible: Ranked Choice Voting and National Popular Vote Cannot Coexist. April 26, 2021. Page 2.

[655] Save Our States has also stated, "If NPV is in effect, does [an RCV state] report on its Certificate of Ascertainment the initial numbers, or the final numbers after the RCV process has been used? There is no obviously correct answer." See Save Our States Policy Memorandum: Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist. April 26, 2021. Page 4.

Using only the first-round count would negate *the* purpose of having an RCV-for-President law in the first place—namely to give voters the opportunity to rank candidates and have those rankings matter.

Moreover, the outcome of every election in every jurisdiction (state or local) that uses RCV in the United States is based on the final-round count—not just the first-round count or any other intermediate count. Nothing in Alaska's or Maine's RCV laws even hints that the state's final result for President should be arrived at differently than for U.S. Senator, U.S. Representative, or the other offices covered by the state's RCV law.

Finally, voters need to know how their vote for President will be counted before they decide how to vote.

- If only the first-round count is going to matter, many supporters of the Libertarian, Green, and other minor-party nominees for President might well choose to pragmatically give their first-choice ranking to one of the major-party candidates.
- If the final-round count is going to matter, such voters would vote their conscience and give their first-choice ranking to their genuine first choice.

Voters would be misled if the state were to provide them with a ballot allowing them to rank candidates, but then ignore all but their first-choice ranking.

In short, there is no good-faith legal argument in favor of using anything other than the final-round count produced by RCV.

There is no uncertainty about the statutory interpretation in the only two states that currently use RCV in presidential elections.

The interpretation of the RCV-for-President laws is a settled legal question in both of the states that currently use it (Maine and Alaska).

Maine passed its RCV-for-President law in 2019.

In November 2020, Maine used RCV in a presidential election for the first time.

In a *Harvard Law & Policy Review* article[656] written in 2019 and published in 2020, Rob Richie, FairVote's founding Chief Executive Officer, and his co-authors discussed RCV in relation to the National Popular Vote Compact.[657]

At the time of the article, RCV had not yet been used in a presidential election. The article raised the rhetorical question of how the national popular vote total would be computed if the National Popular Vote Compact were in effect, but no presidential candidate were to win an absolute majority of the votes in the first round of RCV counting.

The rhetorical question raised by the *Harvard Law & Policy Review* article did not come up in Maine in the 2020 election, because Biden won an absolute majority of the votes in the first round (both statewide and in each congressional district). Thus, the first-round count was the final-round count.

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[656] Richie, Robert; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review*. Volume 15. Issue 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

[657] Note that Rob Richie is a co-author of this book and of the National Popular Vote Compact.

In 2021, Secretary of State Shenna Bellows proposed an amendment to the state's RCV-for-President law to eliminate any possible ambiguity in the state's RCV-for-President law. Bellow's 2021 proposal designated the final-round RCV tally as Maine's final determination of its presidential vote count. The Maine Governor signed the Secretary of State's recommended bill into law on June 17, 2021. That law provided:

> "§803. Duties of Governor: The Governor shall send a **certificate of the determination** of the electors to the Archivist of the United States under the state seal. The certificate **must state** … **the number of votes each candidate for President received … in the final round of tabulation** under section 723A [Maine's RCV law]."[658] [Emphasis added]

Maine had not enacted the National Popular Vote Compact into law at the time that it clarified its RCV-for-President law in 2021.

When Maine enacted the Compact in 2024, it retained the wording of the 2021 law quoted above and added the following new section specifically referring to Article III of the Compact (which is section 1304 of Maine law):

> "**When the National Popular Vote for President Act governs the appointment of presidential electors**, the Governor has the following duties.
>
> "As soon as possible after the canvass of the presidential count under section 723-A, subsection 7 is determined, the Governor shall send a certificate of determination containing the names of the electors and **the statewide number of votes for each presidential slate that received votes in the final round** to the Archivist of the United States under state seal. **This final round vote is deemed to be the determination of the vote in the State for the purposes of section 1304**.
>
> "As used in this paragraph, 'final round' means the round that ends with the result described in section 723-A, subsection 7, paragraph C, subparagraph (1)."[659] [Emphasis added]

Alaska is the only other state that is poised to use RCV in the 2024 presidential election.

In 2022, the Alaska Supreme Court eliminated any uncertainty about the issue in its unanimous opinion upholding RCV ("Initiative 2") in *Kohlhaas v. State*.

> "**With ranked-choice voting, the vote count is not final after the first round of tabulation**. Maine's law provided that if there were more than two candidates left 'the last-place candidate [was] defeated and a new round [of tabulation began],' repeating until two candidates remained and the candidate with the most votes was declared the winner. Similarly, Initiative 2 specifies that the tabulation 'continues' until two or fewer candidates remain and 'the candidate with the greatest number of votes is elected and the tabulation is complete.' **According to both states' ranked choice voting laws, the vote**

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[658] Maine Rev. Stat. tit. 21-A, § 803. https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html

[659] Chapter 628 Public Law. https://legislature.maine.gov/bills/getPDF.asp?paper=HP1023&item=4&snum=131

> **count is not complete until the final round of tabulation**."[660] [Emphasis added]

In summary, the issue is settled in both Maine and Alaska.

There is no uncertainty about the statutory interpretation of RCV-for-President ballot propositions that voters may enact in November 2024.

In November 2024, Oregon voters will decide whether to use RCV in federal and statewide elections, including the general election for President.[661] Oregon's proposed RCV law explicitly states that the final-round RCV count will be the state's final determination of its presidential vote count. The proposed Oregon RCV law reads:

> "(B) If the National Popular Vote interstate compact set forth in section 1, chapter 356, Oregon Laws 2019, governs the appointment of presidential electors and the election of presidential electors in this state is determined by ranked choice voting:
>
> (i) The determination of which candidates for presidential elector shall be declared elected in this state shall be made in accordance with the provisions of the National Popular Vote interstate compact; and
>
> (ii) **The "final determination" of the presidential vote count reported and certified to the member states of the compact and to the federal government shall be the votes received in the final round of statewide tabulation** by each slate of candidates for the offices of President and Vice President of the United States that received votes in the final round of statewide tabulation."[662] [Emphasis added]

As of July 2024, it appears that an initiative petition to adopt RCV may be on the ballot in November 2024 in the District of Columbia.[663]

The proposed RCV law in the District of Columbia, like Oregon's, explicitly states that the final-round RCV count will be the final determination of its presidential vote count:

> "If the appointment of presidential electors following any general election for President of the United States is governed by the National Popular Vote Interstate Agreement Act of 2010, effective December 7, 2010 (D.C. Law 18-274; D.C. Official Code §1-1051.01), then, in any general election for President and Vice-President of the United States using ranked choice voting:

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[660] *Kohlhaas v. State*. 518 P.3d 1095 at 1121. (2022). https://casetext.com/case/kohlhaas-v-state-2

[661] *Ballotpedia*. 2024. Oregon Ranked-Choice Voting for Federal and State Elections Measure (2024). https://ballotpedia.org/Oregon_Ranked-Choice_Voting_for_Federal_and_State_Elections_Measure_(2024)

[662] Oregon Enrolled Bill HB2004 of 2023 is at https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2004/Enrolled

[663] The Democratic Party of the District of Columbia has filed a lawsuit challenging the use of the initiative process to adopt RCV in the District. See *District of Columbia Democratic Party v. Muriel E. Bowser*. August 1, 2023. https://www.scribd.com/document/663510619/2023-CAB-004732

"(1) The certification of the appointment of electors shall be made in accordance with the provisions of such Act;

"(2) **The final determination of the presidential vote count reported and certified to the States that have enacted such Act**, for purposes of that Act, shall be:

"(A) In an election using ranked choice voting pursuant to subsection (d) of this section, **the votes received in the final round of tabulation** by each slate of candidates for the offices of President and Vice President of the United States that received votes in the final round of tabulation."[664] [Emphasis added]

Other RCV proposals that may be on the ballot in November 2024 do not apply to presidential elections.

In November 2024, Nevada voters will be voting on an initiative petition to adopt the "final 5" system for nominating candidates in the primary and RCV for the general election. However, this proposed legislation does not include President.[665]

As of July 2024, it appears that RCV legislation will also be on the ballot in Arizona and Colorado in November 2024; however, neither of these proposals covers presidential elections.[666]

Similarly, the proposal that may be on the ballot in Idaho in November 2024 does not apply to presidential elections.[667]

9.27.2. MYTH: The Compact does not enable RCV states to control how their votes for President are counted by NPV states.

QUICK ANSWER:

- The National Popular Compact explicitly requires officials in states belonging to the Compact to treat a state's final determination of its presidential vote count as "conclusive."

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[664] The District of Columbia initiative petition may be found at https://makeallvotescountdc.org/ballot-initiative/ Accessed July 29, 2023.

[665] The proposed RCV legislation in Nevada was approved by voters in November 2022. If approved by the voters for a second time in November 2024, it would take effect in 2026. *Ballotpedia*. 2024 https://ballotpedia.org/Nevada_Question_3,_Top-Five_Ranked_Choice_Voting_Initiative_(2022)

[666] A pending initiative proposal in Montana would require candidates for office to win by a majority vote—a requirement that could be achieved by either RCV or a run-off election. If this proposal passes, the legislature would have to decide how to implement the majority-vote requirement. Leifer, Nancy; Haugen, Sharon; and Piske, Becky. 2024. Constitutional Initiative CI-126 and CI-127 would change Montana elections. *Helena Independent Record*. March 26, 2024. https://helenair.com/opinion/column/guest-view-constitutional-initiative-ci-126-and-ci-127-would-change-montana-elections/article_005ba6c8-e79e-11ee-8354-5308ef5cb4d2.html

[667] Ballotpedia. 2024. Idaho Top-Four Ranked-Choice Voting Initiative (2024). https://ballotpedia.org/Idaho_Top-Four_Ranked-Choice_Voting_Initiative_(2024)

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, has written:

> "**Maine has no power to tell California (for example) which set of numbers to use."**
>
> "Officials in various states [belonging to the NPV Compact] would **just decide, on their own and with no legal guidance,** which numbers to use from Maine or any other states using RCV or similar election systems.
>
> "The changes suggested by Secretary Bellows seek to solve this problem by reporting only the final RCV-adjusted numbers to other states on Maine's Certificate of Ascertainment. … **Officials in other NPV states could still decide to ignore Maine's preference** and use the raw numbers from the statewide canvas."[668] [Emphasis added]

Contrary to what England says, every state—whether it is a member of the Compact or not—*does* have the power to tell states belonging to the National Popular Vote Compact how to treat its presidential vote count.

Every state has that power, because the Compact *explicitly* requires officials in states belonging to the Compact to treat every state's final determination of its presidential vote count as "conclusive." Specifically, the fifth clause of Article III of the NPV Compact states:

> "The chief election official of each member state shall **treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate** made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress." [Emphasis added]

Maine's law specifically designates the final-round RCV tally as the state's final determination of its presidential vote count.

Maine's law is not a suggestion, hint, nudge, or plea to the election officials of states belonging to the National Popular Vote Compact. Those officials are legally required by the Compact to treat Maine's final determination of its presidential vote count as "conclusive."

Any ambiguity about how to interpret future RCV-for-President laws will be decided before any election based on the national popular vote.

Although the RCV-for-President laws that voters will consider in the November 2024 election explicitly address the issue of statutory interpretation raised by Save Our States, no "constitutional crisis … throwing the nation into turmoil" would arise if some future RCV-for-President law ever happened to be silent about this issue.

In the unlikely event that some future RCV-for-President law were to fail to address the issue, voters in the state involved would seek a declaratory judgment prior to Election Day so that they would know how their votes would be counted.

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[668] England, Trent. 2021. Failed Attempt to Reconcile NPV, RCV in Maine. *Save Our States Blog*. May 14, 2021. Accessed June 21, 2021. https://saveourstates.com/blog/a-failed-attempt-to-reconcile-npv-rcv-in-maine

This question of statutory interpretation would arise and be resolved *before Election Day* for two reasons.

First, voters need to know how their vote for President will be counted before they decide how to cast it. If only the first-round count is going to matter for President, Libertarian and Green Party voters might pragmatically choose to give their first-choice ranking to one of the major-party candidates. If the final-round count is going to matter, such voters would give their first-choice ranking to their genuine first choice.

Second, courts generally apply the doctrine of *laches* to reject post-election challenges in cases in which the plaintiff was aware of an issue before the election but failed to initiate litigation until seeing the election results.

Thus, it would be virtually mandatory to raise this issue in court before the election and for the courts to settle the question before the election.

As explained in *Dobbs and Robert's Law of Remedies, Damages, Equity, Restitution:*

> "*Laches* is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant."[669]

As the U.S. Court of Appeals for the Fourth Circuit wrote in *Hendon v. North Carolina State Board of Elections*:

> "Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim "to lay by and gamble upon receiving a favorable decision of the electorate" and then, upon losing, seek to undo the ballot results in a court action.'"[670,671,672]

Professor Richard L. Hasen—a leading expert on both election law and the law of remedies—explains that:

> "laches … prevent[s] litigants from securing options over election administration problems."[673]

In short, the question of interpreting a state's RCV-for-President law would be litigated in the state involved, and such litigation would occur prior to the time when voters start to cast their ballots.

Whatever the outcome of litigation of this question of statutory interpretation, that

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[669] Dobbs, Dan B. and Roberts, Captice L. 1993. *Law of Remedies, Damages, Equity, Restitution*. St. Paul, MN: West Academic Publishing.

[670] *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983).

[671] *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988).

[672] Manheim, Lisa Marshall. 2023. Electoral Sandbagging. *UC Irvine Law Review*. Volume 13. Issue 4. November 2023. Pages 1187–1238. Page 1196. https://scholarship.law.uci.edu/ucilr/vol13/iss4/7/

[673] Hasen, Richard L. 2005. Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown. *Washington and Lee Law Review*. Volume 62, Issue 3. Summer 2005. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1284&context=wlulr

state's final determination of its presidential vote count would be made in accordance with the final judicial interpretation of its RCV-for-President law.

While FairVote and virtually all other supporters of RCV believe that the only reasonable interpretation of an RCV-for-President law that is consistent with RCV's essential purpose is that the final-round count should be used to compute the national popular vote total, the alternative interpretation would present no operational difficulty for the National Popular Vote Compact. The Compact simply requires that its member states treat the state-of-origin's "final determination" as "conclusive."

Save Our States continues to complain even after Maine eliminated the alleged ambiguity.

In 2021, Sean Parnell, Senior Legislative Director of Save Our States, testified against the Maine Secretary of State's recommended amendment that eliminates the arguable ambiguity.

In testifying before the Maine Committee on Veterans and Legal Affairs on May 11, 2021, Parnell mentioned the historical fact that in the 1992 race involving incumbent President George H.W. Bush, Bill Clinton, and Ross Perot, one of the major-party candidates came in third in Maine:

- Clinton finished first with 38.8%
- Perot finished second with 30.44%
- Bush finished third with 30.39%.[674]

One of the major-party candidates also came in third in Utah in 1992:

- Bush finished first with 43.3%;
- Perot finished second with 27.3%
- Clinton finished third with 24.7%.[675]

The major-party nominees have come in first or second in 610 of the 612 state-level counts in the 12 presidential elections between 1972 and 2020.

These two cases in 1992 have been the only times since George Wallace's 1968 run for President that a third-party nominee has come in second in any state.[676]

Parnell testified:

> "Under Ranked Choice Voting, if a third party or an independent candidate were to finish ahead of either the Democratic or Republican candidate, … **the votes for that Democratic or Republican candidate get completely erased** and will not be reported.
>
> "In 1992, for example, Ross Perot finished ahead of George Bush in Maine. George Bush would have had subtracted, or never appeared in the national

[674] In Maine in 1992, Bill Clinton received 263,420 votes; Ross Perot received 206,820 votes; and incumbent President George H.W. Bush received 206,504 votes.

[675] In Utah in 1992, incumbent President George H.W. Bush received 322,682 votes and came in first; Ross Perot received 203,400 votes and came in second; and Bill Clinton received 183,429 votes and came in third.

[676] Segregationist Governor George Wallace of Alabama carried five states in 1968.

> vote totals about 207,000 votes. The amendment that your Secretary of State has offered does not address this problem."[677] [Emphasis added]

At a debate conducted by the Broad and Liberty group in Philadelphia in 2021, Sean Parnell said:

> "If you're just using the final votes, then if a candidate—a Democrat or Republican—ever finishes in third place in a state with ranked choice voting, … then **what you wind up doing is literally zeroing out votes**. If you ever have a Republican candidate or Democratic candidate finishing third place in a state with ranked choice voting, then you are literally going to watch **hundreds of thousands, maybe even millions of votes, be completely erased**."[678] [Emphasis added]

Of course, Parnell is a vigorous defender of the current winner-take-all method of awarding electoral votes—a system that actually "erases" the popular votes cast for *every* second-place and *every* third-place candidate in *every* state in *every* election—that is, in *all* 612 state-level vote counts in the 12 presidential elections between 1972 and 2020.[679]

There is another important difference in the transferring that might have occurred under RCV in these two cases out of 612. If RCV and National Popular Vote had been in effect in 1992 when Bush came in third in Maine, and Clinton came in third in Utah, every voter in Maine and Utah would have had their vote counted for a candidate *for whom they had actually voted.* In contrast, the current winner-take-all system routinely transfers the voter's vote to a candidate *for whom the voter did not vote.*

Moreover, Parnell's objection also fails to acknowledge the important fact that every voter makes their choice and casts their vote with an awareness of the existing voting system. The people who voted for Ross Perot in 1992 in Maine and Utah were aware that doing so could either:

(1) switch the state's popular-lead from one major-party candidate to the other, or

(2) result in their state's electoral votes going to Perot—thereby potentially depriving one of the major-party candidates of Maine's four or Utah's six electoral votes.

Aware of the existing rules of the game, these voters cast their ballots for Perot in

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[677] Testimony of Sean Parnell. Maine Committee on Veterans and Legal Affairs. May 11, 2021

[678] Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 7:19 https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s

[679] Of course, if Perot had carried Maine in 1992, neither George H.W. Bush nor Bill Clinton would have received any votes in the Electoral College from Maine under the current winner-take-all method of awarding electoral votes. Similarly, if Perot had carried Utah in 1992, neither Bush nor Clinton would have received any electoral votes from Utah under the winner-take-all method. A Perot first-place showing in Maine or Utah in 1992 would have, under the current system, made it slightly harder for a major-party candidate to accumulate the 270 electoral votes required to be elected President. That is, a Perot victory in Maine or Utah in 1992 would have made it slightly more likely that the presidential election would have been thrown into the U.S. House of Representatives. That is, of course, what third-party candidates often hope to do.

1992. It is condescending to suggest that these voters were ignorant or confused about the implications of their votes. Lawmakers, voters, and the RCV voting system are not obligated to protect the two major-party candidates from the consequences of their own failure to earn enough support to come in first or second place.

Indeed, the precise purpose of RCV is to honor the voter's second choice in case the voter's first-choice candidate cannot win. This is not a bug of RCV, but a feature.

Given that Parnell vigorously defends the current system, which erases the popular votes cast for *every* second-place and third-place candidate in *every* state in *every* election, the concern about what might happen in two elections out of 612 elections is little more than crocodile tears.

9.27.3. MYTH: Slow counting is inherent in Ranked Choice Voting and other alternative voting systems, thus creating problems for the Compact.

QUICK ANSWER:

- Slowness in releasing *unofficial* vote counts from an RCV state will have no effect on the operation of the National Popular Vote Compact, because the Compact uses only the *official* certified counts. Official results for President must be certified by the same federal deadline—whether RCV is used or not.
- The delays in releasing *unofficial* counts on Election Night in some recent RCV elections are attributable to the understandable caution of election administrators in conducting their first RCV elections. There is no technological or other reason why the *unofficial* counts from RCV elections cannot come out as promptly as the unofficial results of non-RCV elections. In fact, in most RCV jurisdictions, unofficial counts are already released on Election Night and updated on the same schedule as unofficial counts from non-RCV races. Any slowness in announcing *unofficial* results is a transitory issue—not an inherent characteristic of RCV.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated in written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024:

> "Final RCV results typically take much longer to be determined than plurality voting. In 2022, the winner of Maine's 2nd congressional district wasn't known until November 16, more than a week after the November 8 election, and Alaska's results weren't announced until November 23 for the state's U.S. House race. In both races, however, most of the first-round vote totals were public on election night or shortly after.
>
> "Assuming this timeline is repeated for presidential election results, the initial votes will be publicly available on or shortly after election night and will be incorporated into media and other counts of the national popular vote. These early tabulations will include hundreds of thousands and perhaps millions of votes that, within the next few weeks, will be removed from the national tally

> for at least one of the two major party candidates, which could easily change the outcome in a close national election. It is not difficult to predict the chaos, confusion, and crisis that would ensue if a candidate initially thought to have won under NPV is suddenly determined to have lost weeks later after having hundreds of thousands of votes erased from their national totals."[680]

This testimony is mistaken in several ways.

First, there was nothing noteworthy—much less scandalous—about Maine taking eight days in 2022 to finish its RCV count in the competitive 2nd congressional district. For example, in 2020, Pennsylvania took until the Saturday after Election Day to finalize its non-RCV count for President in 2020.[681]

Moreover, Alaska's official count is not slow because of RCV. It has always been slow—in part because ballots must be physically transported from remote areas. For example, it took until November 17, 2008, to ascertain that Mark Begich won Alaska's U.S. Senate race in a *non-RCV* election.[682]

Second, any slowness in releasing *unofficial* vote counts from an RCV state will have no effect on the operation of the National Popular Vote Compact, because the Compact uses only the *official* certified counts. Official results for President must be certified by the same federal deadline whether RCV is used or not.

Third, there is no technological or other reason why the unofficial counts from RCV elections cannot come out as promptly as the unofficial results of non-RCV elections. In many RCV jurisdictions, unofficial counts are already released on Election Night and updated on the same schedule as unofficial counts from non-RCV races.

RCV has only been used at the state level in Maine since 2018, and in Alaska since 2022. Election administrators established understandably cautious schedules in conducting their first few statewide elections under RCV. Any slowness in producing unofficial preliminary or official certified vote counts is a transitory issue—not an inherent characteristic of RCV.

Fourth, no vote count is official until all ballots are received, validated, and counted. The delays in releasing *unofficial* counts of some recent elections on Election Night or shortly thereafter are not attributable to RCV, but instead to the understandable caution of election administrators in conducting their first few statewide elections under RCV. These delays in releasing unofficial counts stem from administrative decisions to withhold all unofficial counts until all absentee ballots arrive and get counted, and until all provisional ballots are validated and counted. In any event, official certified results for RCV and non-RCV races take the same amount of time.

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[680] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 3. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[681] Bauder, David. 2020. After waiting game, media moves swiftly to call Biden winner. *Associated Press*. November 7, 2020. https://apnews.com/article/media-calls-joe-biden-winner-bee69f9d1d32e84d68e6164ea956e67a

[682] Blood, Michael R. 2008. Begich wins Alaska senate race. *The Spokesman-Review*. November 17, 2008. https://www.spokesman.com/stories/2008/nov/19/begich-wins-alaska-senate-race/

9.27.4. MYTH: Huge numbers of votes are in jeopardy because of RCV-for-President laws.

QUICK ANSWER:

- Even if there were any legitimate ambiguity in RCV-for-President laws (and there is not), large numbers of votes were never in jeopardy.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, has repeatedly tried to get attention for his incorrect arguments about the ambiguity of RCV-for-President laws (section 9.27.1) by making hyperbolic claims about "hundreds of thousands" or "millions" of votes being in jeopardy.[683]

First, it is important to recognize that the pool of votes being discussed by Parnell is not:

- the total number of voters in the state;
- the total number of votes received by the major-party candidates; or
- the total number of votes received by the minor-party candidates.

Instead, it is the *considerably smaller* number of minor-party ballots that would get redistributed when a minor-party candidate is eliminated in early rounds of RCV counting.

To get a picture about how few votes are involved in this discussion, note that only four minor-party presidential candidates received more than 1% of the national popular vote during the six presidential elections between 2000 and 2020:

- 1% for Jo Jorgensen in 2020,
- 1% for Jill Stein in 2016,
- 3% for Gary Johnson in 2016, and
- 3% for Ralph Nader in 2000.[684]

Recently, opponents of RCV and National Popular Vote (NPV) have frequently cited Alaska as a place where a question of statutory interpretation of RCV counting procedures might conceivably matter (even though the Alaska Supreme Court has already settled the issue).

We can get a rough idea of the magnitude of the difference between the first-round RCV tally and the final-round RCV tally by examining Alaska's vote count in 2016—a year when minor-party candidates received unusually large numbers of votes.

Of the 318,608 votes cast in Alaska in 2016, Libertarian Party nominee Gary Johnson received 18,725, and Green Party nominee Jill Stein received 5,735.

For the sake of argument, let's assume that *all* minor-party voters gave *all* of their second-choice rankings to a major-party candidate.

In particular, let's assume that Hillary Clinton would have received 100% of the second

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[683] Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 7:19 https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s

[684] In 2012, Libertarian nominee Gary Johnson came close to receiving 1% of the national popular vote.

choices of Green Party voters, and that Trump would have received 100% of the second choices of Libertarian Party voters.

The net difference between 18,725 and 5,735 is 12,990. That is, Trump's 46,033-vote margin over Hillary Clinton in Alaska would have increased by 12,990 votes under these assumptions.[685]

These 12,990 votes represent 0.00008 of the total of 158,224,999 votes cast in the 2020 presidential election.

Using standard statistical methods,[686] the probability that 12,990 votes would change the outcome of a nationwide election is 1-in-605. Since presidential elections are conducted every four years, this would mean that 12,990 votes might matter once in 2,420 years.

Second, keep in mind that when one candidate wins an absolute majority of first choices (as happened in Maine in 2020), the RCV counting process generally stops immediately.[687] That is, the first-round count is equivalent to the final-round count, and therefore there is no possible claim of uncertainty about what count to use.

In fact, this outcome is what is most likely to occur in practice.

One presidential candidate won an absolute majority of the state's popular vote in an average of 45 states in the six presidential elections between 2000 and 2020—that is, in 90% of the cases.

In particular, one candidate won an absolute majority:

- in all but five states in 2020[688]
- in all but 12 states in 2016[689]
- in 100% of the states in 2012
- in all but four states in 2008[690]
- in all but three states in 2004[691]
- in all but nine states in 2000.[692]

That is, even if all 50 states were to enact an RCV-for-President law, the first-round count of RCV votes would, based on history, likely be equivalent to the final-round count in an average of 90% of the states.

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[685] There were other minor-party candidates in the race. We assume Castle's 3,866 voters, Fuente's 1,240 voters, and the 9,201 write-in voters divide equally in their preference for the two major-party nominees—that is, these 14,307 votes do not affect the spread between the two major-party nominees.

[686] The statistical calculation used here is the same as that shown in table 9.50 and figure 9.26. Based on historical data of recent presidential elections, the probability that the national popular vote difference between the two major-party candidates lies between 12,990 votes in favor of the Democratic nominee and 12,990 votes in favor of the Republican nominee is the difference between 0.73313 and 0.73148. This difference represents a probability of 0.00165—that is one chance in 605.

[687] In some jurisdictions, the RCV law specifies that the rounds of counting and redistribution continue until two candidates remain (even if a candidate secured an absolute majority on an earlier round).

[688] Arizona, Georgia, North Carolina, Pennsylvania, and Wisconsin.

[689] Arizona, Colorado, Florida, Maine, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Virginia, and Wisconsin.

[690] Indiana, Missouri, Montana, and North Carolina.

[691] Iowa, New Mexico, and Wisconsin.

[692] Florida, Iowa, Maine, Nevada, New Hampshire, New Mexico, Ohio, Oregon, and Wisconsin.

In short, even if there were any legitimate ambiguity in RCV-for-President laws (and there is not), this issue is unlikely to be outcome-determinative in any presidential election.

9.27.5. MYTH: The Compact was not drafted to accommodate RCV.

QUICK ANSWER:

- Leading supporters of RCV worked closely with the National Popular Vote organization in writing the Compact to ensure that the Compact would be compatible with RCV.

MORE DETAILED ANSWER:

A group called "Keep Our 50 States" wrote to the Minnesota Senate Committee hearing the National Popular Vote Compact (SF538) on January 31, 2023, saying:

> "From a process standpoint, NPVIC is the legislative equivalent of inserting first-generation hybrid technology into your brand new Tesla and expecting it to transition seamlessly to the flying cars of the future. The first state Compact legislation passed over 15 years ago and there's been no effort to bring those bills into compliance with other changes in state election standards. Compact states that enact Ranked Choice Voting, for example, face a legal hornet's nest if the Compact ever takes effect."

Although RCV was not used at the state level by any state at the time when the National Popular Vote Compact was written in 2004 and 2005, it is not true that the Compact does not accommodate RCV.

In fact, leading supporters of RCV worked closely with the National Popular Vote organization in writing the Compact to ensure that the Compact would be compatible with RCV.

FairVote was the first organization to endorse the National Popular Vote Compact and is widely recognized as the nation's leading advocacy group for RCV dating back to its inception in 1992. Its founding Chief Executive Officer, Rob Richie, was a co-author of the Compact and was a co-author of this book, starting with its first edition in 2006. Richie spoke at NPV's first press conference announcing the launch of the book and the Compact in 2006.

The Compact anticipated the possibility that states would adopt innovative voting systems, such as RCV, in the future. Accordingly, the Compact was silent as to how a future RCV state's presidential vote count would be tabulated and, more importantly, it explicitly made each state's determination of its presidential vote count "conclusive" on the states belonging to the Compact.[693]

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[693] If, at some future time, a substantial number of states have enacted RCV-for-President laws, those states could choose to form an interstate compact that would pool all their RCV ballots and apply the RCV counting process to the combined pool of ballots. See Richie, Rob; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy. 2020. Toward a More Perfect Union: Integrating, Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review*. Volume 15. Number 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

9.27.6. MYTH: The President of FairVote says that RCV and NPV conflict even after passage of Maine's 2021 law.

QUICK ANSWER:

- This inaccurate statement depends on deceptively quoting the Founding Chief Executive of FairVote.

MORE DETAILED ANSWER:

Sean Parnell is the Senior Legislative Director of Save Our States—an organization that lobbies against both the National Popular Vote Compact (NPV) and ranked choice voting (RCV).

Rob Richie is the founding Chief Executive Officer of FairVote, the leading advocate for RCV since the 1990s. Richie was lead author of an article discussing RCV and NPV in the *Harvard Law & Policy Review* that was written in 2019 and published in 2020.[694]

In his written testimony to the Maine Veterans and Legal Affairs Committee on May 17, 2023, Parnell quoted from page 159 of Richie's law review article, saying:

> "I will note that lobbyists for NPV claim that it's not possible for there to be any **conflict between the compact and RCV** because the nation's leading proponent of RCV (Rob Richie, president of FairVote) helped write the compact. **This ignores a 2021 paper on this issue that Richie** served as the lead author of, which noted:
>
> > 'As currently drafted, the [NPV compact] seems to assume a plurality system…. [U]sing RCV for Presidential elections in states might seem incompatible with [NPV]. Most fundamentally, which votes should be reported out for the purpose of [NPV]? Would it be the first choices among all the candidates? Or would it be the final "instant runoff" totals after the RCV tallies are completed? If that latter choice were made, what if one of the two strongest national candidates was eliminated during the RCV tally in a given state?'"
>
> "**That paper came out in August 2021, months after Maine changed its law**."[695] [Emphasis added]

The deceptive nature of Parnell's written testimony to the Maine committee becomes apparent when one realizes that Richie's law review article was written in 2019 and completed in 2020—not August 2021.

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[694] Richie, Robert; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review.* Volume 15. Issue 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

[695] *Testimony of Sean Parnell, Senior Director, Save Our States Action to the Veterans and Legal Affairs Committee Maine Legislature Re: LD 1502 (An Act to Provide Consistency of Process for Maine's Electoral Votes by Prohibiting Enactment of the National Popular Vote Interstate Compact), May 17, 2023.* Page 3. https://legislature.maine.gov/testimony/resources/VLA20230517Parnell133287385084961870.pdf

That is, Richie's article was written and completed long before the law that the Maine Legislature debated and passed in spring 2021 and that the Governor signed in June 2021.

By inaccurately attributing an August 2021 date to Richie's 2019–2020 article, Parnell gave the impression that Richie was saying that there was a conflict between RCV and the National Popular Vote Compact *after passage of Maine's law in June 2021.*

Richie raised the above rhetorical questions in his 2020 article, and he then answered his own rhetorical questions in the remainder of the article. Richie never stated that the National Popular Vote Compact should not be implemented.

The spring 2021 hearing of the Maine Veterans and Legal Affairs Committee considered the issues raised in Richie's 2020 article.

These rhetorical questions were then answered when the Maine Legislature passed, and the Governor signed, a law on June 17, 2021, specifying that the state's Certificate of Ascertainment would contain the result of the RCV tabulation from the final round.[696]

2020] Toward a More Perfect Union 159

Both the NPVIC and RCV also improve political equality. When the NPVIC takes effect, voters in "safe states" will finally be treated equally to voters in "swing states." Presidential candidates will have incentives to campaign all across the country, not just in the usual five to ten swing states we see today. Similarly, RCV ensures political equality by giving voters across the political spectrum an equal opportunity to express themselves. With RCV, voters can vote with both their "heart" and their "head" by indicating their sincere first-choice candidate—even if that candidate is not perceived as a frontrunner—while having the option to indicate backup choices.

Nevertheless, as currently drafted, the NPVIC seems to assume a plurality system—that is, the candidate with the most popular votes is to be elected President, regardless of how low their percentage of the vote. While this potential of non-majority winners is not worse with NPVIC than in the status quo, it allows a candidate to win despite the opposition of most voters due to vote-splitting between two or more candidates. On the other hand, using RCV for Presidential elections in states might seem incompatible with NPVIC. Most fundamentally, which votes should be reported out for the purpose of NPVIC? Would it be the first choices among all the candidates? Or would it be the final "instant runoff" totals after the RCV tallies are completed? If the latter choice were made, what if one of the two strongest national candidates was eliminated during the RCV tally in a given state? While not an NPVIC deal breaker, it is an ambiguity worth seeking to resolve.

Figure 9.16 Picture showing that the date "2020" appears right at the top of page 159 of Richie's article.

Note that Parnell's deceptive forward-dating of Richie's 2020 article was not accidental or inadvertent.

- Parnell's own footnote to Richie's article in his 2023 written testimony to the Maine Legislature conspicuously omits any date for Richie's published 2020 article.

[696] Maine Rev. Stat. tit. 21-A, § 803. https://www.mainelegislature.org/legis/statutes/21-a/title21-Asec803.html

- The date could not possibly have been inadvertently overlooked. It appears right at the top of page 159 of the 2020 article that Parnell quotes.[697] Figure 9.16 shows the "2020" date at the top of page 159 of Richie's 2020 article. Parnell's quotation comes from paragraph 2 on page 159.

9.28. MYTHS ABOUT STAR, RANGE, AND APPROVAL VOTING

9.28.1. MYTH: STAR voting is incompatible with National Popular Vote.

QUICK ANSWER:

- It is a straightforward matter to draft state legislation for enacting STAR voting that would enable it to operate harmoniously with the National Popular Vote Compact.
- STAR voting is currently not in use today in the United States for any public elections. In May 2024, voters in the city of Eugene, Oregon, rejected an initiative petition to adopt STAR voting for local elections by a 65%–35% margin.

MORE DETAILED ANSWER:

STAR is an acronym for "Score, Then Automatic Runoff."

Figure 9.17 shows a sample STAR ballot.[698]

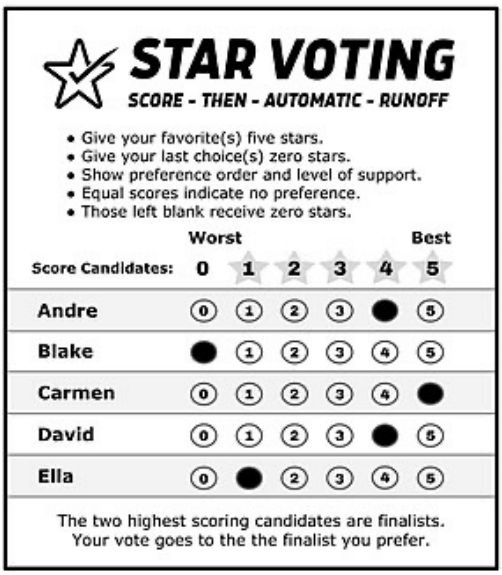

Figure 9.17 Sample STAR ballot

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[697] Richie, Robert; Hynds, Patrick; DeGroff, Stevie; O'Brien, David; and Seitz-Brown, Jeremy 2020. Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact. *Harvard Law & Policy Review.* Volume 15. Issue 1. Winter 2020. Pages 145–207. https://harvardlpr.com/wp-content/uploads/sites/20/2021/08/HLP106.pdf

[698] Figure courtesy of Wikipedia. https://en.wikipedia.org/wiki/STAR_voting

In STAR voting, the voter gives each candidate a score from "no stars" (the worst) to "five stars" (the best). Voters can assign scores to candidates without restriction. That is, a voter need not assign a particular score (e.g., five stars) to any candidate and can give the same score to more than one candidate.

There are two rounds of counting in STAR voting.

In the first round (called the "scoring" round), each candidate's total score is computed by adding up all of that candidate's scores from all the ballots. The two candidates with the highest total scores then proceed to an automatic runoff.[699]

In the second round of counting (the "runoff"), every voter's ballot counts as one vote. One vote goes to whichever finalist an individual voter scored higher. If a voter scored the two finalists equally, that voter is considered to have abstained in the runoff. The candidate receiving the most total votes in the runoff wins.

Ties in the first round are broken in favor of the candidate who was preferred by more voters. Ties in the second round are broken in favor of the candidate who scored higher in the first round.[700]

STAR voting is currently not in use today in the United States for any public elections.

In 2018, voters in Lane County, Oregon (which contains the city of Eugene) rejected an initiative petition to adopt STAR voting for local elections.

In May 2024, voters in the city of Eugene, Oregon, rejected an initiative petition to adopt STAR voting for local elections by a 65%–35% margin.[701]

Sean Parnell, the Senior Legislative Director of Save Our States, provided written testimony to the Veterans and Legal Affairs Committee of the Maine Legislature on January 8, 2024, saying:

> "Approval voting, range voting, and STAR voting … can only work with traditional plurality voting."[702]

That statement is false.

If legislation is being drafted to enact STAR voting at the state level, and STAR voting is to be used in the presidential election, it is a straightforward matter to draft such legislation so that STAR voting would operate harmoniously with the National Popular Vote Compact.

We present the following as the most obvious approach.

Because each voter in STAR voting has one vote in the final round of tabulation involving two candidates, the wording in the RCV legislation that the Oregon legislature put on

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[699] In "score" voting (also called "range" voting), the counting process ends with the first round. STAR voting is a two-step process—hence its name "Score, Then Automatic Runoff."

[700] Information about STAR voting is available at www.StarVoting.org, https://www.equal.vote, and https://en.wikipedia.org/wiki/STAR_voting

[701] The 2024 proposed amendments to the Eugene, Oregon, City Charter to implement STAR voting may be found at https://www.eugene-or.gov/DocumentCenter/View/69921/Proposed-Charter-Amendments---STAR-Voting?bidId=

[702] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 8. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

the November 2024 ballot[703] would be the obvious way to implement STAR voting if it were being used in presidential elections.

That is, the total number of votes earned by the two finalists in the runoff round of STAR voting would be reported in the state's Certificate of Ascertainment.

Thus, a state legislative bill for adopting STAR voting would say:

> "If the Agreement Among the States to Elect the President by National Popular Vote[704] governs the appointment of presidential electors, and the election of presidential electors in this state is determined by STAR voting, the final determination of the presidential vote count reported and certified to the member states of the Agreement and to the federal government shall be the votes received in the final round of statewide tabulation by each slate of candidates for the offices of President and Vice President of the United States that received votes in the final round of statewide tabulation."

A legislative bill for adopting STAR voting will necessarily contain a provision specifying the conditions under which a candidate will be declared elected.

If the state adopting STAR voting has also adopted the National Popular Vote Compact, the condition under which presidential electors will be declared elected is based on the nationwide popular vote—not the statewide count. Therefore, it is important that the following "saving" provision also be part of a state legislative bill for adopting STAR voting:

> "The determination of which candidates for presidential elector shall be declared elected in this state shall be made in accordance with the provisions of the Agreement Among the States to Elect the President by National Popular Vote."

9.28.2. MYTH: Range voting is incompatible with National Popular Vote.

QUICK ANSWER:

- State legislation can be drafted for enacting range voting that would enable it to operate harmoniously with the National Popular Vote Compact.
- Range voting is not used today in any jurisdiction in the United States for public elections.

MORE DETAILED ANSWER:

Range voting (sometimes called "score voting") is essentially the first round of STAR voting.

A range voting ballot could allow for any number of stars (e.g., zero to five, one to 10).

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[703] Oregon Enrolled Bill HB2004 of 2023 is at https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2004/Enrolled

[704] The official name of the National Popular Vote Interstate Compact is the "Agreement Among the States to Elect the President by National Popular Vote."

A ballot for range voting looks substantially the same as a ballot for STAR voting (except, of course, for the description of how the winner is determined). Thus, figure 9.17 also serves to illustrate a range voting ballot.

As in STAR voting, range voting involves assigning scores to candidates without restriction. That is, a voter need not assign a particular score (e.g., five stars) to any candidate and can give the same score to more than one candidate.

In range voting, each candidate's total score is computed by adding up all of that candidate's scores from all of the ballots. The candidate with the highest total score wins.

Range voting is not used today in any jurisdiction in the United States for public elections.

Additional information about range voting is available at https://www.RangeVoting.org and Wikipedia.[705]

Sean Parnell, the Senior Legislative Director of Save Our States, provided written testimony to the Veterans and Legal Affairs Committee of the Maine Legislature on January 8, 2024, saying:

> "Approval voting, range voting, and STAR voting … can only work with traditional plurality voting."[706]

That statement is incorrect.

If legislation is being drafted to enact range voting at the state level, and range voting is to be used in the presidential election, such legislation can be written so that it would operate harmoniously with the National Popular Vote Compact.

Note that in range voting, the sum of the scores assigned by one voter might not equal the total score assigned by another voter. This fact does not matter in STAR voting, because STAR voting has two rounds, and every voter has exactly one vote in the final runoff round.

However, range voting does not have a runoff. Supporters of range voting have suggested, on their web site, a formula that might be considered as a possible solution in case range voting is ever adopted by a state and in case it is ever used in presidential elections.[707]

Then, the two additional provisions presented in connection with STAR voting (section 9.28.1) should also be included in the implementing legislation for range voting.

9.28.3. MYTH: Approval voting is incompatible with National Popular Vote.

QUICK ANSWER:

- It is a straightforward matter to draft state legislation for enacting approval voting that would enable it to operate harmoniously with the National Popular Vote Compact.
- Approval voting is used in municipal elections in Fargo, North Dakota.

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[705] *Wikipedia*. 2023. Accessed July 31, 2023. https://en.wikipedia.org/wiki/Score_voting

[706] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 8. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[707] See https://www.RangeVoting.org Accessed July 31, 2023.

MORE DETAILED ANSWER:

In approval voting, each voter may cast a vote for as many or as few candidates as they like. The candidate receiving the most votes wins.

Figure 9.18 shows a sample ballot for approval voting.[708]

FIGURE 9.18 Sample ballot for approval voting

Additional information about approval voting is available at www.ElectionScience.org and Wikipedia.[709]

In 2018, Fargo, North Dakota, passed a local ballot initiative adopting approval voting for the city's local elections. Approval voting has been used there starting in 2020.[710]

Sean Parnell, the Senior Legislative Director of Save Our States, provided written testimony to the Veterans and Legal Affairs Committee of the Maine Legislature on January 8, 2024, saying:

> "Approval voting, range voting, and STAR voting … can only work with traditional plurality voting."[711]

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[708] Figure courtesy of *Wikipedia*. https://en.wikipedia.org/wiki/Approval_voting#Description

[709] *Wikipedia*. 2023. https://en.wikipedia.org/wiki/Approval_voting

[710] *Ballotpedia*. 2023 Fargo, North Dakota, Measure 1, Approval Voting Initiative (November 2018) Accessed June 29, 2023. https://ballotpedia.org/Fargo,_North_Dakota,_Measure_1,_Approval_Voting_Initiative_(November_2018)

[711] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 8. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

If legislation is being drafted to enact approval voting at the state level, and approval voting is to be used in the presidential election, it is a straightforward matter to draft such legislation so that it would operate harmoniously with the National Popular Vote Compact.

We present the following as the most obvious approach.

Note that in approval voting as used in Fargo, the number of approvals issued by one voter might not equal the number issued by other voters.

Therefore, if approval voting as used in Fargo were being considered for use in presidential elections, a voter issuing N approvals could be deemed to have cast a fractional vote of $1/N$ for each of that voter's approved candidates.

Then, the two additional provisions presented in connection with STAR voting should also be included in the implementing legislation for approval voting (section 9.28.1).

Top-two approval voting

In 2020, voters in St. Louis, Missouri, adopted a variation of approval voting for the city's local elections.[712,713]

Top-two approval voting is identical to STAR voting (and ranked choice voting) in that each voter has one vote in the decisive final round of tabulation.

Thus, the two provisions presented in connection with STAR voting (section 9.28.1) would allow top-two approval voting to operate harmoniously with the National Popular Vote Compact.

Note, however, that there is a runoff for the two candidates receiving the highest number of approvals in top-two approval voting. That is, two election days are required. Thus, harmonizing top-two approval voting with *federal* requirements would presumably require holding the first round of voting prior to Election Day in November.

9.29. MYTHS ABOUT ELECTION ADMINISTRATION

9.29.1. MYTH: A federal election bureaucracy appointed by the sitting President would be created by the Compact.

QUICK ANSWER:

- The National Popular Vote Compact does not create any bureaucracy whatsoever—much less a federal election bureaucracy appointed by the sitting President.
- The National Popular Vote Compact does not change Article II, section 1 of the U.S. Constitution, which gives the states exclusive control over the manner of selecting presidential electors.

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[712] *Ballotpedia*. https://ballotpedia.org/St._Louis,_Missouri,_Proposition_D,_Approval_Voting_Initiative_(November_2020)

[713] The full text of the St. Louis law is at https://drive.google.com/file/d/1CKwHpwBffcT239d57oZep14tt7tj_iIZ/view

- The Compact's operation requires one task to be performed by *existing* state officials of states belonging to the Compact, namely adding up the official popular-vote totals already certified by all the other states. These state-level vote totals would be generated by each state in exactly the same manner as they are today.

MORE DETAILED ANSWER:

Michael Maibach, a Distinguished Fellow at Save Our States and Director of the Center for the Electoral College,[714] wrote in 2020:

> "The NPV scheme would have other dangerous consequences … [and] would put a President in charge of his own reelection."[715]

Professor Robert Hardaway of the University of Denver Sturm College of Law repeated this incorrect claim in his testimony on February 19, 2010, to the Alaska Senate Judiciary Committee:

> "Under the Koza scheme, **who would be the national official who would decide what the popular vote is?** And what would happen if a state officer decides that the popular vote tally is one figure, and **someone from the federal government, like the Congressional Budget Office, the *Congressional Quarterly***,[716] decides that it's something else?" [Emphasis added]

Gary Gregg II, a defender of the current system of electing the President, says:

> "Will we have to create and pay for **a new federal agency** to verify the accuracy of popular vote totals? Probably."[717] [Emphasis added]

A brochure published by the Freedom Foundation of Olympia, Washington, during the time when Trent England was there, suggests that the National Popular Vote Compact would result in:

> "**nationalizing election administration**, potentially putting presidential appointees in charge of presidential elections."[718] [Emphasis added]

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[714] The Center for the Electoral College identifies itself (at its web site at https://centerelectoralcollege.us/) as "a project of the Oklahoma Council of Public Affairs." Save Our States also identifies itself as a project of the Oklahoma Council of Public Affairs.

[715] Maibach, Michael. 2020. Beware of The National Popular Vote Bill in Richmond. *Roanoke Star*. August 31, 2020. https://theroanokestar.com/2020/08/31/beware-of-the-national-popular-vote-bill-in-richmond/

[716] Note that the Congressional Budget Office has nothing to do with elections, and that the Congressional Quarterly is a private publishing corporation.

[717] Gregg, Gary. Keep Electoral College for fair presidential votes. *Politico*. December 5, 2012.

[718] Freedom Foundation. Olympia, Washington.

Trent England, Executive Director of Save Our States and Vice-President of the Oklahoma Council on Public Affairs, wrote in an op-ed:

> "Because of the Electoral College, **the United States has no national election bureaucracy**—no presidential appointee in charge of presidential elections."[719] [Emphasis added]

The U.S. Constitution creates a system based on state control—not federal—of presidential elections in Article II, section 1, clause 2:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."

The National Popular Vote Compact does not change Article II or any other part of the U.S. Constitution.

The states would continue to control elections, as provided by the U.S. Constitution—just as they do today.

There would be no need for any state to change its procedures for compiling and certifying its popular-vote counts because of the Compact.

As to member states, the Compact merely requires that *existing* state officials add up the officially certified popular vote totals from all 50 states and the District of Columbia. This task would take place once every four years.

The Compact does not create any new federal or state governmental positions or bureaucracy—much less presidentially appointed federal officials.

The Founders had good reason to write Article II of the Constitution so as to give the states the power to control the conduct of presidential elections. State control over presidential elections thwarts the possibility of an over-reaching President, in conjunction with a compliant Congress, manipulating the rules governing the President's own re-election. This dispersal of power over presidential elections to the states was intended to guard against the establishment of a self-perpetuating President. In particular, this dispersal of power to the states addressed the Founders' concern about the possible establishment of a monarchy in the United States.

9.29.2. MYTH: The Compact would create a slippery slope leading to federal control of presidential elections.

QUICK ANSWER:

- Establishing federal control over presidential elections would require a federal constitutional amendment that would take control of presidential elections away from the states.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, warned the Missouri Senate Judiciary committee in 2016 that the National Popular Vote Compact would create a slippery slope leading to federal control of elections.

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[719] England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

> "If you have National Popular Vote … you would ultimately have disputes that would cause Americans to demand federal power over elections."

Establishing federal control over presidential elections would require a federal constitutional amendment that would take control of presidential elections away from the states.

At the minimum, this change would require amending the current wording of Article II, section 1, clause 2 of the U.S. Constitution, which reads:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."

A federal constitutional amendment must first be initiated by either Congress (by a two-thirds vote of both houses) or a federal constitutional convention. A proposed amendment must then be ratified by three-quarters of the states—either by the state legislatures or by special state ratifying conventions.

Given that amending the federal Constitution is a time-consuming multi-step process, the slope is steeply upward—and distinctly not downward or slippery.

9.29.3. MYTH: Local election officials would be burdened by the Compact.

QUICK ANSWER:

- Local officials would conduct elections in exactly the same way that they do now.

MORE DETAILED ANSWER:

The National Popular Vote Compact makes no changes in any state's laws or procedures concerning the preparation of ballots, conducting early voting, operating polling places, handling absentee ballots, processing provisional ballots, counting votes, or transmitting local vote counts to state officials.

County, parish, city, town, district, and precinct election officials would administer a presidential election in exactly the same way that they do now.

9.29.4. MYTH: State election officials would be burdened by the Compact.

QUICK ANSWER:

- State election officials in every state would tally and certify the total number of popular votes cast for each presidential slate in their state in the same way that they do now.
- The only change involves the chief election official of states belonging to the Compact, and that change occurs *after* the state's count is certified. At that point, the chief election official of each state belonging to the Compact would add up the popular vote totals for each presidential slate in all 50 states and the District of Columbia in order to determine the national popular vote winner. In adding up the votes from other states, the chief election official of each of the states belonging to the Compact would treat a state's certified vote count as conclusive.

MORE DETAILED ANSWER:

The only change introduced by the National Popular Vote Compact would occur *after* a member state has finished tallying the statewide total number of popular votes cast for each presidential slate.

At that point, the chief election official of each state belonging to the Compact would add up the votes cast for each presidential slate in all 50 states and the District of Columbia to produce the national popular vote total for each presidential slate.

In adding up the votes from other states, the chief election official of each of the states belonging to the Compact would treat every other state's final determination of its vote for President as conclusive.

This "final determination" is typically made by a certain designated body or official (e.g., state board of canvassers, state board of elections, the Secretary of State) in compliance with the state's statutory deadline shortly after Election Day. Any disputes would be resolved—as they are now—by state or federal courts in the state-of-origin (section 6.2.3). That is, the role of the chief election official of each of the states belonging to the Compact is entirely ministerial.

Under the Compact, the presidential slate with the largest national grand total from all 50 states and the District of Columbia would be designated as the "national popular vote winner."

The chief election official of each member state would then certify the election of the entire slate of presidential electors that was nominated in association with the national popular vote winner.

As a matter of efficiency, the chief election officials of the states belonging to the Compact *might* decide to designate (by means of an executive agreement) one of their members to gather up the documentation of each state's final determination and immediately pass that information along to each other compacting state.

The presidential electors would then meet in their states, as they do now, in mid-December and cast their electoral votes.

9.29.5. MYTH: The Compact would be costly to operate.

QUICK ANSWER:

- Fiscal officials who have analyzed the National Popular Vote bill have uniformly concluded that it would impose no significant costs on their states.

MORE DETAILED ANSWER:

When a bill is first introduced in a state legislature, fiscal officials designated by the legislature typically analyze it for its impact on state finances. These fiscal officials then report their findings to the legislature in the form of what is typically called a "fiscal note." Fiscal officials have uniformly concluded that the National Popular Vote Compact would impose no significant costs on their states.

9.30. MYTHS ABOUT VOTE COUNTING

9.30.1. MYTH: There is no such thing as an official national popular vote count.

QUICK ANSWER:

- The legal definition of the "national popular vote total" is contained in the National Popular Vote Interstate Compact. It is defined as the result of adding together the officially certified popular-vote count that existing federal law requires every state to provide and that every state already routinely produces.
- Every state has a law requiring a designated board or official to certify the number of popular votes cast for each presidential candidate shortly after Election Day.
- Long-standing federal law requires that each state issue a certificate containing the official count of the votes cast in the state for President. Current federal law requires issuance of the required Certificate of Ascertainment no later than six days before the Electoral College meeting.
- The Electoral Count Reform Act of 2022 created a special three-judge court for the sole purpose of ensuring the timely issuance and transmission of each state's officially certified vote count to the federal government.

MORE DETAILED ANSWER:

In written testimony to the Michigan House Elections Committee on March 7, 2023, Sean Parnell, Senior Legislative Director of Save Our States (the leading group employing lobbyists to oppose the adoption of the National Popular Vote Compact) said:

> "The core defect of the compact … is that **there is no official national vote count**."[720] [Emphasis added]

Parnell has also written:

> "The NPV compact also **risks causing an electoral crisis** due to its poor design. **There is no official national popular vote count**."[721] [Emphasis added]

Despite Parnell's denials, there *is* an official national popular vote count.

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[720] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact)*. March 7, 2023. Page 2. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[721] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

Long-standing federal law requires that each state issue a certificate containing its vote count.

Since 1792, federal law has required each state to issue a certificate reporting the official results of the presidential election.[722]

Vote counts commonly appeared in pre-1887 certificates.

The Electoral Count Act of 1887[723] included a specific requirement that each state's Certificate of Ascertainment contain the number of popular votes (the "canvass") received by each candidate.[724]

Current federal law (the Electoral Count Reform Act of 2022) provides (in section 5):

> "Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of **each State shall issue a certificate of ascertainment. … Each certificate of ascertainment of appointment of electors shall set forth** the names of the electors appointed and **the canvass** or other determination under the laws of such State **of the number of votes** given or cast for each person for whose appointment any and all votes have been given or cast."[725] [Emphasis added]

Because every state today uses the so-called "short presidential ballot," each state's officially certified vote count consists of the number of popular votes received by each presidential-vice-presidential slate (section 2.14).

Congress passed the Electoral Count Reform Act of 2022 after reviewing the tumultuous events of January 6, 2021.

The 2022 Act contains numerous specific provisions to prevent:

- a recurrence of various maneuvers that occurred after the 2020 presidential election;
- the occurrence of various hypothetical scenarios that were bandied about—but never executed—by those challenging the 2020 election; and
- the occurrence of specific hypothetical scenarios that had been raised in recent years by opponents of the National Popular Vote Compact.

For example, several provisions of the 2022 Act were aimed at countering various hypothetical scenarios involving the issuance of each state's Certificate of Ascertainment and the prompt transmission of the Certificate to the federal government.

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[722] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Page 240. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf

[723] The Electoral Count Act of 1887 may be found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

[724] As an example of a Certificate of Ascertainment, see figure 3.4 showing Vermont's 2008 Certificate. The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

[725] The Electoral Count Reform Act of 2022 may be found in appendix B of this book and is also at https://uscode.house.gov/view.xhtml?path=/prelim@title3/chapter1&edition=prelim.

Section 5(b)(1) of The Electoral Count Reform Act of 2022 provides:

> "It shall be the duty of the executive of each State (1) to transmit to the Archivist of the United States, **immediately after the issuance** of a certificate of ascertainment of appointment of electors and by **the most expeditious method available**, such certificate of ascertainment of appointment of electors." [Emphasis added]

Federal law also requires that the Certificates at the National Archives be "public" and "open to public inspection."

The legal definition of the "national popular vote total" is in the National Popular Vote Compact.

When it takes effect, the National Popular Vote Compact becomes the state law governing the appointment of presidential electors for states belonging to the Compact.

The Compact specifies that the national total be obtained by adding up the officially certified number of popular votes received by each presidential candidate in each state. The first clause of Article III of the Compact provides:

> "The chief election official of each member state shall determine the number of votes for each presidential slate in each state … and **shall add such votes together to produce a 'national popular vote total'** for each presidential slate."[726] [Emphasis added]

The Compact further requires the chief election official of each member state to treat as "conclusive" the officially certified "final determination" of each state's presidential vote counts (discussed in detail in section 9.30.3 and section 9.30.4).

Because of the requirement to treat the officially certified vote counts from each state as "conclusive," the chief election official of each state belonging to the Compact will be adding up the *same* vote counts.

Parnell tries to characterize the process of adding up the 51 numbers for each presidential candidate as some kind of unsolvable puzzle. He told the Minnesota House Elections Finance and Policy Committee on February 1, 2023:

> "There is no official national popular vote count. There are 51 official state vote counts that **national popular vote attempts to cobble together**."[727] [Emphasis added]

However, there is no puzzle, cobbling, or ambiguity when it comes to performing ordinary arithmetic to add up the officially certified vote count that existing federal law requires every state to provide and that every state already routinely produces.

In fact, the National Popular Vote Compact arrives at the "national popular vote total" in the same way as the proposed constitutional amendment that the U.S. House of

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[726] The full text of the Compact is in section 6.1.

[727] Parnell, Sean. 2023. *Testimony at Minnesota House Elections Finance and Policy Committee on HB642*. February 1, 2023. Timestamp 1:11:14. https://www.house.leg.state.mn.us/hjvid/93/896232

Representatives passed by a bipartisan 338–70 vote in 1969. Both are based on ordinary arithmetic applied to the officially certified vote counts that existing federal law requires every state to provide and that every state already routinely produces.

The proposed amendment passed by the House in 1969 simply said:

> "The pair of persons having **the greatest number of votes** for President and Vice President shall be elected…"[728] [Emphasis added]

An examination of the other proposed constitutional amendments that have been introduced in Congress since 1969 contain similar common-sense wording based on applying simple arithmetic to the officially certified vote counts produced by the states (chapter 4).

In short, the various constitutional amendments that have been considered over the years and the National Popular Vote Compact would use the same long-standing laws and procedures as the current system.

A new three-judge federal court has been created to ensure the timely issuance and transmission of each state's presidential vote.

To ensure the timely issuance and transmission of each state's Certificate of Ascertainment, the Electoral Count Reform Act of 2022 created a special three-judge federal court whose sole function is to enforce the federal requirement for the timely "issuance" and prompt "transmission" of each state's Certificate of Ascertainment.

This new court is open *only* to presidential candidates.

Given that the Constitution provides that the Electoral College meet on the same day in every state, this court operates on a highly expedited schedule. Time-consuming delays (such as the five-day notice of 28 U.S.C. 2284b2)[729] do not apply. There is expedited appeal to the U.S. Supreme Court. All of the actions of both the three-judge court and the Supreme Court are to be scheduled so that a final conclusion is reached prior to the Electoral College meeting.

Thus, this special court enables presidential candidates to obtain timely relief from, for example, a rogue Governor who failed or refused to issue the state's Certificate of Ascertainment, issued an incorrect Certificate, or attempted to slow-walk the transmission of the Certificate to federal authorities.

Specifically, the 2022 Act provides:

> "(1) In general.—**Any action brought by an aggrieved candidate for President** or Vice President that arises under the Constitution or laws of the United States **with respect to the issuance of the certification** required under section (a)(1), **or the transmission of such certification** as required under subsection (b), shall be subject to the following rules:

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[728] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

[729] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

"(A) Venue.—The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

"(B) 3-judge panel.—**Such action shall be heard by a district court of three judges**, convened pursuant to section 2284 of title 28, United States Code, except that—

(i) the court shall be comprised of two judges of the Circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

"(C) Expedited procedure.—It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, **consistent with all other relevant deadlines established by this chapter** and the laws of the United States.

"(D) Appeals.—Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, **so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors**.

"(2) Rule of construction.—This subsection—

"(A) shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States; and

"(B) shall not be construed to preempt or displace any existing State or Federal cause of action." [Emphasis added]

In short, federal law guarantees the timely availability of the official count of the certified number of popular votes for each presidential-vice-presidential slate in each state and the District of Columbia before the Electoral College meets.

Other provisions of the Electoral Count Reform Act of 2022

The 2022 Act eliminated several avenues for mischief that existed under earlier federal law.

For example, the 1887 Act contained vague language referring to a Certificate of Ascertainment coming "from a state." After the 2020 presidential election, this vague wording was used to open the door to fraudulent Certificates originating from *non-governmental* sources such as losing candidates for the position of presidential elector (so-called "fake electors").

To foreclose the possibility of a Certificate coming from a non-governmental source in

the future, the 2022 Act specifies that only one state official (by default, the Governor) has the power to issue the Certificate. Moreover, this single Certificate may be subsequently revised only by court action.

The 1887 Act contained another procedure that was open to potential abuse. In the contested 1876 Tilden-Hayes election, there were competing Certificates from several states—typically one from the Governor and another *governmental* source such as the Secretary of State or the Board of Canvassers. The 1887 Act addressed the possibility of Certificates coming from more than one source by providing a tie-breaking procedure. Specifically, if the U.S. House and U.S. Senate were to disagree on which competing Certificate to accept, the impasse would be resolved by the state's Governor. One of the hypothetical scenarios that was bandied about—but never executed—by those challenging the 2020 election was based on certain state Governors overriding the voters of their own state. The 2022 Act eliminated this potential avenue for abuse.

The new three-judge court does not replace any existing avenues for administrative challenges to presidential elections (e.g., recounts) or judicial challenges in state or federal courts prior to the federal Safe Harbor deadline.

9.30.2. MYTH: The Compact is flawed, because it provides no way to resolve disputes.

QUICK ANSWER:

- The reason why the National Popular Vote Compact is silent as to how to adjudicate disputes is that the United States already has a fully operational judicial system throughout the country.
- There is no need for each new federal or state law (including each new interstate compact) to repeat the existing *book-length* state and federal judicial codes that already provide detailed procedures for adjudicating disputes.
- For example, although there was no explicit procedure in Florida's winner-take-all law for adjudicating disputes about the awarding of electoral votes, existing *general* state and federal laws and procedures enabled the 2000 election dispute to be adjudicated on a timely basis. The dispute moved rapidly through state administrative proceedings, state lower-court proceedings, state supreme court proceedings, federal lower-court proceedings, and U.S. Supreme Court proceedings. These same five ways to adjudicate disputes about the awarding of electoral votes were available—and used—during the challenges to the 2020 presidential election. They are available under *both* the National Popular Vote Compact and the current system.
- Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms. For example, while falsely claiming that there is no way to adjudicate disputes under the Compact, they simultaneously claim that litigation under the Compact will overwhelm the courts (see section 9.32.4).

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, wrote in 2021:

> "What if there was a problem with the election or vote counting in another state? **The National Popular Vote has no way to resolve disputes** or deal with even common challenges. … Under the National Popular Vote, controversies in one or more states **could make it impossible to determine a winner**."[730] [Emphasis added]

Parnell's written testimony to the Minnesota Senate Elections Committee on January 31, 2023, said:

> **"NPV provides no mechanism for resolving** differences or **disputes**. … NPV's failure to anticipate the conflict between the compact and RCV, and its additional failure to provide any guidance or process for resolving this and similar issues, makes it **fatally flawed and dangerous to democracy**."[731] [Emphasis added]

Trent England, Executive Director of Save Our States, joined Parnell by saying:

> "Even if state officials knew or suspected that a state's reported vote total was incorrect, **the compact offers no recourse**." [732] [Emphasis added]

The reason why the National Popular Vote Compact is silent as to how to adjudicate disputes is the same reason why almost all new federal or state laws (including virtually all other interstate compacts) are silent about adjudication—namely that the United States already has a fully operational judicial system throughout the country.

There is no need for each new federal or state law (including each new interstate compact) to repeat the existing *book-length* state and federal judicial codes that already provide detailed procedures for adjudicating disputes.[733]

These existing state and federal laws provide five ways to adjudicate election disputes.

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[730] Parnell, Sean. 2021. Protect Florida's Electoral College power. *Herald Tribune*. May 17, 2021. https://www.heraldtribune.com/story/opinion/columns/guest/2021/05/17/opinion-protect-floridas-power-electoral-college/5109604001/

[731] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[732] England, Trent and Parnell, Sean. 2021. National Popular Vote Proposal Will Cause Chaos in the Courts. *Townhall*. February 2, 2021. Note that both England and Parnell signed this article. https://townhall.com/columnists/trentengland/2021/02/02/national-popular-vote-proposal-will-cause-chaos-in-the-courts-n2584075

[733] On rare occasions, Congress or state legislatures have provided that a particular new law be adjudicated in some special way. For example, in 1971, Congress provided a special accelerated procedure (now repealed) for hearing constitutional challenges to the Federal Election Campaign Act. Section 437h specified that constitutional challenges to that act (after being certified as being substantial by a federal district court) would be heard *en banc* by the U.S. Court of Appeals for the District of Columbia Circuit, and, if appealed, proceed to mandatory review by the U.S. Supreme Court. This special accelerated procedure led to the 1976 U.S. Supreme Court decision in *Buckley v. Valeo* (424 U.S. 1). The only other case to reach the U.S. Supreme court under this (now repealed) procedure was the 1981 case of *California Medical Association v. Federal Election Commission* (453 U.S. 182). See pages 467–474 of Douglas, Joshua. 2011.

Specifically, a state's determination of its popular-vote count may be challenged under the National Popular Vote Compact in the same five ways that it can be challenged under the current system, namely:

- state administrative proceedings (e.g., recounts, audits),
- state lower-court proceedings,
- state supreme court proceedings,
- federal lower-court proceedings, and
- federal proceedings at the U.S. Supreme Court.

Indeed, aggrieved presidential candidates used all five ways in both 2000 and 2020.

For example, Florida's winner-take-all law for awarding the state's electoral votes contained no specific mechanism for resolving disputes.

Nonetheless, when a dispute arose in November 2000 involving Florida's popular-vote count, it was adjudicated on a timely basis using pre-existing *general* procedures.

In fact, administrative and judicial proceedings in all five forums occurred during the brief period between Election Day (November 7, 2000) and the Safe Harbor Day (December 12).

The dispute was settled on December 11 by the U.S. Supreme Court—a week before the Electoral College met on December 18, 2000.[734]

In 2020, there were 64 lawsuits and numerous administrative proceedings involving the presidential election in eight states—Arizona, Georgia, Michigan, Minnesota, Nevada, New Mexico, Pennsylvania, and Wisconsin.[735,736]

All of these administrative and judicial proceedings were conducted in accordance with the pre-existing *general* procedures that enable state and federal courts to adjudicate disputes.

All of the proceedings proceeded simultaneously and in parallel in each separate state between Election Day (November 3, 2020) and the Safe Harbor Day (December 8). The Electoral College then met on December 14.

Similarly, in 2016, lawsuits requesting recounts in three closely divided battleground states (Pennsylvania, Michigan, and Wisconsin) were similarly considered and decided in accordance with the pre-existing *general* procedures. As a result of these proceedings, a recount was conducted in Wisconsin. All of the proceedings occurred inside the period between Election Day (November 8, 2016) and the Safe Harbor Day (December 13). The Electoral College then met on December 19.

Today, disputes about popular-vote counts are litigated in the 36-day period between Election Day and the federally established date (six days before the Electoral College meet-

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The Procedure of Election Law in Federal Courts. *Utah Law Review*. Volume 2. Pages 433–488. Available at https://ssrn.com/abstract=1679518

[734] *Bush v. Gore*. 531 U.S. 98. 2000.

[735] See The Ohio State University's Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

[736] Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

ing) for a state arriving at its "final determination" of its popular-vote count and issuing its Certificate of Ascertainment (discussed in section 9.30.1).

Rapid resolution of disputes and finality is required from all states before the Electoral College meets, because the U.S. Constitution requires that all states cast their electoral votes on the same day. The Constitution provides:

> "The Congress may determine the Time of chusing the Electors, and **the Day on which they shall give their Votes; which Day shall be the same throughout the United States**."[737] [Emphasis added] [Spelling as per original]

To guarantee the timely issuance and prompt transmission of each state's Certificate of Ascertainment to the National Archives, the Electoral Count Reform Act of 2022 created a special three-judge federal court. This new court is open only to presidential candidates. It operates on a highly expedited basis, with expedited appeals. All issues must be resolved by the new court and the U.S. Supreme Court before the Electoral College meeting. Additional details about this new court are found in section 9.30.1.

Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms. For example, while falsely claiming that there is no way to adjudicate disputes under the Compact, Save Our States simultaneously asserts that litigation under it will overwhelm the courts (section 9.32.4). Which is it?

While falsely claiming that the Compact allows a state belonging to the Compact to judge and manipulate the election returns from other states (section 9.30.3), Save Our States simultaneously complains that member states are forced to accept the election returns from other states (section 9.30.4). Which is it?

The fact that opponents of the National Popular Vote Compact simultaneously raise contradictory criticisms suggests how much credence should be given to their criticisms.

9.30.3. MYTH: The Compact allows its member states to judge the election returns from other states.

QUICK ANSWER:

- The National Popular Vote Compact does not give officials in the states belonging to the Compact any power to judge, modify, reject, estimate, or manipulate the election returns of other states. Instead, the Compact requires the chief election official of each member state to treat the final determination of the popular-vote count from each state as "conclusive."
- Under the federal system in existence in the United States, once a matter is litigated and decided in a state, the Full Faith and Credit Clause of the U.S. Constitution prevents another state's officials (administrative or judicial) from second-guessing that decision. Thus, questionable popular-vote counts are litigated and decided in judicial and/or administrative proceedings in the state or federal courts in the *state-of-origin*. After each state's final determination of its presidential vote count, the chief election official in the states belonging

[737] U.S. Constitution. Article II, section 1, clause 4.

to the Compact will perform the purely ministerial task of adding up those vote counts.

- Opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms of it. For example, while falsely claiming that the Compact allows its member states to judge, modify, reject, estimate, and manipulate the election returns of other states, they simultaneously claim that the Compact forces member states to accept election returns from other states (see section 9.30.4).

MORE DETAILED ANSWER:

In written testimony submitted to the Minnesota Senate Elections Committee on January 31, 2023, Sean Parnell, Senior Legislative Director of Save Our States, said:

> **"NPV provides no guidance on which vote totals to use in calculating the national vote total**. The choice is left to the chief election official within each compact state. … In a close election, this could **give a group of often obscure state officials the power to manipulate the national vote count based on which vote totals they use from other states**. … This is too much power to vest in any official, and will lead to confusion, controversy, and chaos."[738] [Emphasis added]

In a video produced by Save Our States, Parnell said:

> "The chief election official in an NPV state [has] a pretty broad degree of latitude to, you know, essentially decide the election the way they want to, … **deciding which votes to count, … and which they might reject, and which they might have to estimate**. … And that's a pretty scary scenario."[739] [Emphasis added]

Trent England, the Executive Director of Save Our States, wrote the following in 2021:

> "The NPV compact simply grants power to the top election official in each state to determine the national popular vote winner for that state. In other words, **officials in various states would just decide, on their own and with no legal guidance, which numbers to use** from Maine."[740] [Emphasis added]

England told a meeting at the Heritage Foundation in 2021:

> "You have independent individual elected officials within each of those states, who's actually determining what the national popular vote result is. … **Every**

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[738] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[739] Save Our States. 2022. Six Questions. Video with Trent England and Sean Parnell. May 13, 2022. Timestamp 19:30. https://www.youtube.com/watch?v=TNk3VIoP8dU

[740] England, Trent, 2021. Failed Attempt to Reconcile NPV, RCV in Maine. Save Our States Blog. May 14, 2021. https://saveourstates.com/blog/a-failed-attempt-to-reconcile-npv-rcv-in-maine

> **state in the compact would** have to collect all the vote totals from every other state to **come up with its own total**."[741] [Emphasis added]

Contrary to what Save Our States says, the National Popular Vote Compact does *not* give administrative officials in the states belonging to the Compact any power to judge, modify, reject, estimate, or manipulate the election returns of other states.

Instead, the Compact explicitly states the opposite:

> "The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress [i.e., the Safe Harbor Day]."[742] [Emphasis added]

In short, the chief election officials of the states belonging to the National Popular Vote Compact perform the purely ministerial function of using simple arithmetic to add up the official presidential-vote counts that have been finalized and certified by the state-of-origin.

The National Popular Vote Compact does not give administrative officials of states belonging to the Compact any power to judge, modify, reject, estimate, or manipulate any other state's final determination of its vote count.

In this respect, the Compact parallels the Full Faith and Credit Clause of the U.S. Constitution.

Under our federal system, once *any* matter is litigated in the state-of-origin, the Full Faith and Credit Clause prevents another state's officials (administrative or judicial) from second-guessing that decision. The Constitution states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[743]

As previously discussed in section 9.30.2, there are five ways to litigate a state's popular-vote counts at the administrative and judicial levels starting in the state-of-origin. All five ways are equally available under both the current system and the National Popular Vote Compact.

After this litigation, federal law requires that the state certify its final determination of its popular vote counts no later than six days before the Electoral College meeting (the Safe Harbor Day).

Thus, a questionable popular-vote count from a state will necessarily have been litigated in judicial and/or administrative proceedings in the state-of-origin *before* the officials of the states belonging to the National Popular Vote add up the vote counts from the states.

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[741] England, Trent. 2021. Senator Jim Inhofe on the Value of the Electoral College. Heritage Foundation. May 19, 2021. Timestamp 50:00. https://www.heritage.org/election-integrity/event/virtual-senator-jim-inhofe-the-value-the-electoral-college

[742] Clause 5 of Article III of the Agreement Among the States to Elect the President by National Popular Vote (the National Popular Vote Interstate Compact).

[743] U.S. Constitution. Article IV. Section 1. https://constitution.congress.gov/constitution/article-4/

This principle of federalism was illustrated in 2020 when Texas Attorney General Ken Paxton requested that the U.S. Supreme Court allow the state of Texas to file a complaint against the state of Pennsylvania challenging Pennsylvania's popular-vote count.[744]

The U.S. Constitution gives the Supreme Court exclusive jurisdiction over cases between states, and the Court usually hears such cases.

Nonetheless, on December 11, 2020, the U.S. Supreme Court refused Texas' request to even present its bill of complaint, saying:

> "The State of Texas' motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. **Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections**."[745,746] [Emphasis added]

As will be seen in the next section (section 9.30.4), Save Our States repeatedly contradicts itself in criticizing the Compact. While falsely claiming that the Compact allows its member states to judge, modify, reject, estimate, and manipulate the election returns of other states, Save Our States simultaneously complains that the Compact forces member states to accept the election returns of other states.

The fact that opponents of the National Popular Vote Compact simultaneously raise contradictory criticisms suggests how much credence should be given to them.

9.30.4. MYTH: The Compact forces member states to accept other states' election returns—the exact opposite of the previous myth.

QUICK ANSWER:

- The National Popular Vote Compact does not exempt a questionable state vote count from challenge, oversight, and review. A state's final determination of its popular-vote count may be challenged under the National Popular Vote Compact in the same five ways that it can be under the current system. These five ways include administrative proceedings in the state involved (e.g., recounts, audits) and judicial proceedings in lower state courts, state supreme courts, lower federal courts, and the U.S. Supreme Court. All five ways were used in both 2000 and 2020. All five ways are available under both the Compact and the current system.

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[744] *Texas v. Pennsylvania*. Motion for Leave to File Bill of Complaint. https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf

[745] *Texas v. Pennsylvania*. U.S. Supreme Court Order List. December 11, 2020. 592 U.S. https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

[746] Given that the U.S. Constitution gives the Supreme Court original jurisdiction over disputes between states, two justices raised the issue of whether Texas should have been allowed to file a bill of complaint in *Texas v. Pennsylvania*. Justice Alito issued a statement (joined by Justice Thomas) saying, "In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. … I would therefore grant the motion to file the bill of complaint but would not grant other relief." https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o155.html

- Once a state's questionable popular-vote count has been litigated and decided in judicial and/or administrative proceedings inside the state-of-origin, the National Popular Vote Compact requires officials of the states belonging to the Compact to treat those vote counts as "conclusive."
- Note that opponents of the National Popular Vote Compact frequently contradict themselves in their criticisms of the Compact. For example, while complaining that states belonging to the Compact are forced to accept other state's election returns, Save Our States simultaneously complains that the Compact allows member states to judge the election returns of other states.

MORE DETAILED ANSWER:

Recall that in the previous section (section 9.30.3), Sean Parnell and Trent England of Save Our States claimed that the National Popular Vote Compact is flawed, because it allows a state to judge, modify, reject, estimate, and manipulate another state's election returns.

Nonetheless, Parnell and England simultaneously complain that the Compact is flawed, because it does not allow a state to judge the election returns of other states.

Parnell wrote in 2020:

> "The NPV compact also risks causing an electoral crisis due to its poor design. … **States that join the compact are supposed to accept vote totals from every other state even if they are disputed, inaccurate, incomplete, or the result of fraud or vote suppression**."[747] [Emphasis added]

Trent England, Executive Director of Save Our States, testified before a Missouri Senate committee in 2016 saying:

> "In a National Popular Vote world, the state of **Missouri would, essentially, have to accept—without the ability to investigate or verify**—the results of … the 49 [other] states and the District of Columbia."[748] [Emphasis added]

Trent England and Sean Parnell wrote in 2021:

> "The compact simply says that member states 'shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate….' In other words, **even if state officials knew or suspected that a state's reported vote total was incorrect, the compact offers no recourse**."[749] [Emphasis added]

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[747] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[748] Watson, Bob. 2016. Missouri Senate panel weighs popular vote for president. *Fulton Sun*. March 31, 2016. https://www.fultonsun.com/news/2016/mar/31/senate-panel-weighs-popular-vote-president/

[749] England, Trent and Parnell, Sean. 2021. National Popular Vote Proposal Will Cause Chaos in the Courts. *Townhall*. February 2, 2021. Note that both England and Parnell signed this article. https://townhall.com/columnists/trentengland/2021/02/02/national-popular-vote-proposal-will-cause-chaos-in-the-courts-n2584075

Parnell and England are correct in saying that the National Popular Vote Compact requires its member states "to accept vote totals from every other state."

However, they are wrong in suggesting that the National Popular Vote Compact somehow exempts questionable state vote counts from challenge, oversight, and review.

Election returns that are "inaccurate, incomplete, or the result of fraud or vote suppression" may be challenged under the National Popular Vote Compact in the same five ways that they can be under the current system, including:

- administrative proceedings (e.g., recounts, audits)
- lower state court proceedings,
- state supreme court proceedings,
- lower federal court proceedings, and
- U.S. Supreme Court proceedings.

The Compact and the current system are identical in that challenges must be conducted through the administrative and judicial system of the state-of-origin and/or in the federal court system starting in the state-of-origin.

Indeed, the state-of-origin is the appropriate place for such challenges (under both the Compact and the current system) because it is:

- where the questionable events occurred,
- where the records exist,
- where the witnesses (if any) are located, and
- where the administrative officials and judges are most knowledgeable about the applicable local laws and procedures.

Once a dispute has been litigated and decided in the state-of-origin, the National Popular Vote Compact treats the result as "conclusive."

At that point, the administrative officials of the states belonging to the Compact perform the purely ministerial function of using ordinary arithmetic to add up the vote counts for each presidential candidate from each state.

Note that the National Popular Vote Compact parallels the treatment of disputes under the current system. Given that a state's questionable popular-vote count will necessarily have been litigated in judicial and/or administrative proceedings inside the state-of-origin before it finalizes its vote count, the Full Faith and Credit Clause of the U.S. Constitution requires:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[750]

[750] U.S. Constitution. Article IV. Section 1.

9.30.5. MYTH: California accidentally gave Trump an extra 4.5 million votes in 2016—thus demonstrating that states cannot be relied upon to produce accurate vote counts.

QUICK ANSWER:

- Despite claims by lobbyists opposed to a nationwide vote for President, California did not give Trump an extra 4,483,810 votes in 2016—accidentally or otherwise.
- If the National Popular Vote Compact had been in effect in 2016, the states belonging to the Compact would have uneventfully credited the Trump-Pence ticket with the correct total number of votes from California—4,483,810.
- Defenders of the current state-by-state winner-take-all system of awarding electoral votes repeatedly cast doubt on the accuracy, and even the existence of, the official state-certified popular-vote counts that the National Popular Vote Compact would use. Meanwhile, they simultaneously extol the solidity of the very same state-certified vote counts when those vote counts are used to decide the presidency under the current system—such as the 537-vote margin in Florida that made George W. Bush President in 2000, or the small margins in Michigan, Wisconsin, or Pennsylvania that made Donald Trump President in 2016.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, testified before the Minnesota Senate Elections Committee on January 31, 2023, saying:

> "States … are **not necessarily going to produce an accurate vote total**."[751]
>
> "**California accidentally gave every Trump voter 2 votes in 2016 through a bad ballot design**. Donald Trump under the counting mechanism of the compact would have won, because they **gave him an extra 4.5 million votes**. That seems kind of outrageous to me."[752] [Emphasis added]

In his written testimony to the Michigan House Elections Committee on March 7, 2023, Parnell added:

> "States can sometimes just do strange things that would pose a serious problem for the compact. Because of an odd ballot design in 2016, **California wound up doubling the vote total for Donald Trump on its Certificate**

[751] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

[752] Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:33. https://www.youtube.com/watch?v=ZioPI__L-BM

> **of Ascertainment, crediting him with an extra 4,483,810 votes**."[753] [Emphasis added]

Parnell made similar incorrect statements about California giving Trump an extra 4.5 million votes to the Alaska Senate State Affairs Committee on April 25, 2023,[754] and the Nevada Senate Legislative Operations and Elections Committee on May 2, 2023.[755]

Despite what Parnell says, California's 2016 Certificate of Ascertainment did not give Trump an extra 4,483,810 votes—accidentally or otherwise.

If the National Popular Vote Compact had been in effect in 2016, the states belonging to the Compact would have uneventfully credited the Trump-Pence ticket with the correct total number of votes from California—4,483,810.

Here are the facts.

California's 2016 Certificate of Ascertainment unambiguously states that the Clinton-Kaine ticket's 8,753,788 vote total was "higher" than the vote total of any other ticket listed on the Certificate—including the 4,483,810 votes cast for the Trump-Pence ticket. The Certificate reads:

> "I, Edmond G. Brown, Governor of the State of California, herby certify … the following persons **received the highest number of votes** for Electors of the President and Vice President of the United States for the State of California … **California Democratic Party Electors Pledged to Hillary Clinton for President** of the United States and Tim Kaine for Vice President of the United States … **Number of Votes—8,753,788**."[756] [Emphasis added]

The *only* number appearing anywhere on California's 2016 Certificate of Ascertainment in connection with the Trump-Pence ticket is 4,483,810.

If there were any truth to Parnell's claim that California accidentally gave Trump an extra 4,483,810 votes, then Trump would have received more votes than Clinton's 8,753,788. Therefore, California's Certificate of Ascertainment would necessarily have:

(1) identified the Trump-Pence ticket as having "received the highest number of votes" and

(2) certified the appointment of 55 Trump-Pence presidential electors, instead of the 55 Democratic electors.

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[753] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact), March 7, 2023*. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[754] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote Interstate Compact), April 25, 2023*. Page 3. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238

[755] Parnell, Sean. 2023. *Testimony of Sean Parnell Senior Director, Save Our States Action to the Legislative Operations and Elections Committee, Nevada Senate, Re: AJR6 (The National Popular Vote Interstate Compact), May 2, 2023*. Page 3. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=68316&fileDownloadName=SenLOE_AJR6Testimony_SeanParnell_SeniorDirector_SaveOurStatesAction.pdf

[756] California's 2016 Certificate of Ascertainment is at https://www.archives.gov/files/electoral-college/2016/ascertainment-california.pdf

California's Certificate of Ascertainment did not do either of these things, for the obvious reason that the state did not give Trump the undeserved 4,483,810 votes that Parnell says it did.

In making the false claim that California "accidentally" gave Trump an extra 4,483,810 votes, Parnell neglected to mention that a presidential-vice-presidential ticket can be nominated by more than one political party under California's rarely used "fusion" procedure. In 2016, both the Republican Party and American Independent Party nominated the Trump-Pence ticket. The *combined* support for the Trump-Pence ticket from Republican and American Independent voters was 4,483,810 voters.

After the National Popular Vote organization pointed out the egregious inaccuracy of Parnell's testimony to Michigan and Minnesota state legislators, Parnell doubled down on his false claim. In his written testimony to the Alaska Senate State Affairs Committee on April 25, 2023, Parnell accused National Popular Vote of "errors" and "deception."

> "Lobbyists for National Popular Vote have attempted to dismiss as 'myths' these and other problems when they have been raised in other hearings, but their responses are riddled with errors, false statements, and outright deception. They have claimed, for example, that California's 2016 Certificate of Ascertainment does not include an extra 4,483,810 votes for Trump, and the whole issue is a misunderstanding related to California's use of fusion voting. **But California does not have fusion voting**."[757] [Emphasis added]

However, despite Parnell's assertion to the Alaska Committee on April 25, the fact is that California *does* have fusion voting (and, of course, California did not give Trump an undeserved extra 4,483,810 votes).

As *Ballot Access News* reported the facts of the situation in 2016:

> "On August 13, the American Independent Party held its state convention in Sacramento, and nominated Donald Trump for President and Michael Pence for Vice-President. **The California election code, section 13105(c),**[758] **permits two qualified parties to jointly nominate the same presidential and vice-presidential candidates**. The November ballot will list Trump and Pence, followed by 'Republican, American Independent.' … **This will be the first time since 1940 that two parties in California jointly nominated the same presidential candidate.**"[759,760] [Emphasis added]

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[757] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact) April 25, 2023*. Page 4. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238 . Parnell made a similar statement before the Michigan House Elections Committee on March 7, 2023. See Page 2 of https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[758] Section 13105(c) of the California Election Code is at https://codes.findlaw.com/ca/elections-code/elec-sect-13105/

[759] Winger, Richard. 2016. American Independent Party Formally Nominates Donald Trump and Michael Pence. *Ballot Access News*. August 13, 2016. https://ballot-access.org/2016/08/13/american-independent-party-formally-nominates-donald-trump-and-michael-pence/

[760] A listing of all the states currently using fusion voting can be found in Loepp, Eric and Melusky, Benjamin. 2022. Why Is This Candidate Listed Twice? The Behavioral and Electoral Consequences of Fusion Voting. *Election Law Journal*. June 6, 2022. https://www.liebertpub.com/doi/10.1089/elj.2021.0037

In short, California does have fusion voting for President and used it in 1940 and 2016.

As a thought experiment, consider what would happen if a Certificate of Ascertainment erroneously credited a presidential slate with 4,483,810 votes that it never received. If this issue were to arise today, the aggrieved candidate would likely seek correction from the special three-judge federal court created by the Electoral Count Reform Act of 2022, because that court has the specific power to revise a Certificate under its section 5(C)(1)(B).

Note that opponents of the National Popular Vote Compact repeatedly cast doubt on the accuracy, and even the existence, of official state-certified popular-vote counts.[761]

Meanwhile, they simultaneously extol the solidity of the very same official state-certified vote counts when they are used to decide the presidency under the current system—such as the 537-vote difference in Florida that made George W. Bush President in 2000, or the margins in 2016 of 10,704 in Michigan, 22,748 in Wisconsin, or 44,292 in Pennsylvania that made Donald Trump President.[762]

If there were any truth to Parnell's claim that "States … are not necessarily going to produce an accurate vote total,"[763] then the question would arise as to why anyone should accept the state-produced vote counts that are used today to award electoral votes under the *current* state-by-state winner-take-all method of awarding electoral votes.

9.30.6. MYTH: New York cannot accurately count its votes to save its life.

QUICK ANSWER:

- Despite the claim by lobbyists opposed to a nationwide vote for President that "New York cannot accurately count its votes to save its life," the cited incidents involved harmless minor delays in finalizing vote counts (notably after Hurricane Sandy in 2012) that were unanimously authorized by the bipartisan New York State Board of Elections. In each case, every voter ultimately had his or her vote accurately counted by New York. No candidate complained or was adversely affected. No election outcome was changed.
- The Electoral Count Reform Act of 2022 created clear and firm federal deadlines for states to finalize their vote counts.
- Defenders of the current state-by-state winner-take-all system of awarding electoral votes repeatedly cast doubt on the accuracy, and even the existence,

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[761] In an article entitled "Lawmakers Seek to Change Presidential Elections to Make Them More Risky, Reduce Confidence," Luther Weeks wrote, "There is no official national popular vote number complied and certified nationally that can be used to officially and accurately determine the winner in any reasonably close election." February 3, 2011. http://ctvoterscount.org/lawmakers-seek-to-change-presidential-elections-to-make-them-more-risky-reduce-confidence/

[762] The national popular vote total occasionally appears in existing law for purposes unrelated to the National Popular Vote Compact. For example, an organization can acquire the status of an official political party in Georgia—and hence future ballot access—if the organization "at the preceding … presidential election nominated a candidate for President of the United States and whose candidates for presidential electors at such election polled at least 20 percent of the total vote cast in the nation for that office." [Emphasis added]

[763] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

of the official state-certified popular-vote counts that the National Popular Vote Compact would use. Meanwhile, they simultaneously extol the solidity of the very same state-certified vote counts when those vote counts are used to decide the presidency under the current system—such as the 537-vote margin in Florida that made George W. Bush President in 2000, or the small margins in Michigan, Wisconsin, or Pennsylvania that made Donald Trump President in 2016.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "New York cannot accurately count its votes to save its life."[764]

Parnell told the Minnesota Senate Elections Committee on January 31, 2023:

> "You also have the problem that other states, New York in particular, are **not necessarily going to produce an accurate vote total**. … There are about 425,000 votes that New York was missing off of its 2012 Certificate of Ascertainment."[765] [Emphasis added]

He repeated this claim in testimony to the Alaska Senate State Affairs Committee on April 25, 2023[766] and the Nevada Senate Legislative Operations and Elections Committee on May 2, 2023.[767]

Despite the claims that New York regularly produces inaccurate vote counts, the actual incidents cited by Parnell involved harmless slight delays in finalizing vote counts (notably after Hurricane Sandy in 2012) that were unanimously authorized by the bipartisan New York State Board of Elections.

In 2012, Hurricane Sandy resulted in the temporary relocation of hundreds of thousands of New Yorkers just before Election Day in 2012.

Governor Andrew Cuomo issued Executive Order No. 62, allowing any registered New York voter in the federally declared disaster areas to cast a provisional ballot at *any* polling place in the state. The affected areas consisted of the five counties of New York City (Bronx, Kings, New York, Queens, and Richmond) and the four suburban counties of Nassau, Rockland, Suffolk, and Westchester.

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[764] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:02:20. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

[765] Hearing of the Minnesota Senate Elections Committee on HF642. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

[766] Parnell, Sean. 2023. *Testimony of Sean Parnell, Senior Director, Save Our States Action to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact)*. April 25, 2023. Page 2. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238 Also see https://www.akleg.gov/basis/Bill/Detail/33?Root=SB%2061

[767] Parnell, Sean. 2023. Testimony before Nevada Senate Legislative Operations and Elections Committee. May 2, 2023. Timestamp 4:33:14. https://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20230502/-1/?fk=12298&viewmode=1&autoPlay=false

The result was 400,629 provisional ballots in New York's 2012 election—about four times the number handled in 2008.

Counting provisional ballots is a time-consuming and labor-intensive task under normal circumstances (section 9.30.15). Counting the provisional ballots resulting from Hurricane Sandy was unusually time-consuming, because a provisional ballot given to a voter *outside* his or her normal precinct would almost inevitably contain some local offices for which the voter was not entitled to vote.

The detailed instructions accompanying the Executive Order illustrate the complexity of the situation:

> "For example, a voter staying with family in Orange County who was displaced from Westchester, would be entitled to vote for statewide contests and Supreme Court (because those 2 counties share a judicial district) and possibly a congressional, state senate, or state assembly contest. A voter who sought refuge further upstate might only be eligible to vote in the statewide contests, as they would share no other offices/contests."

The Executive Order required every county in the state to transmit the resulting provisional ballots to the Board of Election in the county where the voter was registered.

When the provisional ballots arrived at each voter's home county, the Board there had to determine, on a laborious case-by-case basis, whether that particular voter was entitled to vote for *each separate contest* that appeared on the sending precinct's provisional ballot. A voter who was temporarily displaced to an adjacent county might, for example, still be in his or her own congressional district, but not his own state senate district. Thus, the voter's vote for Congress would be counted, but their vote for State Senator would not.

Thus, each vote cast on each provisional ballot had to be laboriously analyzed to determine whether that particular out-of-precinct voter was entitled to vote for each office.

After Election Day, it was apparent to everyone that the result of processing the 400,629 provisional ballots could not possibly reverse Obama's statewide win of almost two million votes.

Under the state's existing winner-take-all law, Obama would have been entitled to all of New York's electoral votes—even if he had received *none* of the 400,629 provisional votes.

In this "no harm, no foul" situation, the bipartisan New York State Board of Elections unanimously decided against diverting personnel from hurricane relief to the task of finishing the count of these provisional ballots prior to the Electoral College meeting.

Specifically, the Board unanimously certified a statewide count for President before the Safe Harbor Day without including the provisional ballots. The state's first certified count on December 10, 2012, reported that Obama had received 4,159,441 votes and that Romney had received 2,401,799 votes—a statewide margin of 1,757,642 votes in favor of Obama.

Then, on December 31, 2012, the Board of Elections certified an amended statewide count showing that Obama had received 4,471,871 votes and that Romney had received 2,485,432 votes—a margin of 1,986,439 votes in favor of Obama. In the final count, Obama won 57% of the 400,629 provisional ballots—that is, an additional 228,797 votes.

Manifestly, New York was not a closely divided battleground state in 2012. However, if New York had been in the position of determining the national outcome of the presidential election (as Florida was in 2000, and as Ohio was in 2004), all of these provisional ballots would have been counted expeditiously—regardless of the cost of the overtime or inconvenience.

Because every voter in New York was entitled to vote for President, the obvious course of action would have been to count just each provisional voter's choice for President (and later go back to analyze the eligibility of each vote for lower offices). Thus, if it had been necessary, the presidential count could have been done quickly if New York had been in the position of determining the national outcome of the presidential election.

Douglas Kellner, Co-Chair of the New York State Board of Elections, has stated that if these provisional ballots had had any chance of affecting the presidential election, the Board would have deployed whatever personnel would have been needed to process all of the provisional ballots for President prior to the Electoral College meeting.

If any presidential candidate had felt that New York's delay in counting provisional ballots adversely affected his interests, he could have sought (and undoubtedly would immediately have received) a court order compelling completion of the counting prior to the Electoral College meeting. Of course, if either Romney or Obama had felt that this delay adversely affected their interests, the bipartisan Board would never have voted unanimously to authorize the delay in the first place.

In short, the Board's "no harm, no foul" decision in 2012 was based on common sense.

- No presidential candidate or political party was adversely affected.
- The allocation of electoral votes was not affected.
- The outcome of the election was not affected.
- Every voter ultimately had his or her vote accurately counted and included in the final total.

In 2016 and 2020, New York again did not complete its final count of some provisional ballots until after the Electoral College met (albeit a much smaller number than resulted from Hurricane Sandy). In each of these cases, the bipartisan New York State Board of Elections acted with unanimous consent.

Parnell falsely asserted that previous "no harm, no foul" counting delays under the current system "would be used" in a future election in which a timely and complete popular-vote count would actually matter. Specifically, he told the Minnesota Senate Elections Committee on January 31, 2023:

> "You also have the problem that other states, New York in particular, are not necessarily going to produce an accurate vote total. In the last four presidential elections, New York has provided vote totals, **that would be used under the compact**, that have been missing tens or even hundreds of thousands of votes."[768] [Emphasis added]

[768] Parnell, Sean. 2023. Testimony before Minnesota Senate Elections Committee. January 31, 2021. Timestamp 24:00. https://www.youtube.com/watch?v=ZioPI__L-BM

If anyone is concerned that popular-vote counts might be unavailable because of hurricanes, this problem is infinitely more pressing under the current state-by-state winner-take-all method of awarding electoral votes than it would ever be in an election with a single national pool of 158,224,999 votes.

Hurricanes are not frequent in New York (which has not been a closely divided battleground state for decades).

Hurricanes are far more frequent in Florida (which Bush carried by 537 votes in 2000), Georgia (which Biden carried by 11,779 votes in 2000), and North Carolina (which Obama carried by 14,177 votes in 2008).

In any case, New York's previous history is academic. The Electoral Count Reform Act of 2022 tightened the deadline for states to complete their vote-counting and created a special three-judge federal court to guarantee rapid enforcement of both the requirement for timely "issuance" and prompt "transmission" of each state's Certificate of Ascertainment (section 9.30.1).

New York's previous delays in counting provisional ballots should serve as a reminder as to why a national popular vote for President is needed. Under the state-by-state winner-take-all system, the votes cast by the 400,629 provisional voters in New York were politically irrelevant, because they could not possibly have affected the awarding of New York's electoral votes—with or without a hurricane. In contrast, under a national popular vote, every voter in every state would be politically relevant in every presidential election.

9.30.7. MYTH: The Compact allows vote totals to be estimated.

QUICK ANSWER:

- Nothing in the National Popular Vote Compact allows officials in states belonging to the Compact to estimate the vote counts of other states. Instead, the Compact requires the chief election official of each state belonging to the Compact to treat the final determination of the popular-vote count from each state as "conclusive."

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, said the following in written testimony to the North Dakota Government and Veterans Affairs Committee on March 18, 2021:

> "The language of the compact requires member states to 'determine the number of votes' in each state, which may leave the door open for them to **concoct estimated vote totals** to use. … This means that some compact member states **might use estimated vote totals** for North Dakota."[769] [Emphasis added]

[769] Parnell, Sean. 2021. *Testimony of Sean Parnell, Senior Legislative Director, Save Our States to the Government and Veterans Affairs Committee of the North Dakota House of Representatives. March 18, 2021. Committee Testimony for SB 2271.* Document 9573. All written testimony can be found at https://www.ndlegis.gov/assembly/67-2021/bill-testimony/bt2271.html

Parnell similarly claimed, in written testimony to the Michigan House Elections Committee on March 7, 2023:

> "If for some reason there is not an 'official statement' available to obtain vote totals by the time the compact needs them—for example, if there is a recount still underway or court challenges to results, or if a state is simply refusing to cooperate with the compact, then **the chief election official in NPV member states has the power to estimate vote totals for that state using any methodology they think appropriate**."[770] [Emphasis added]

There is nothing in the National Popular Vote Compact that gives officials in states belonging to the Compact (or anyone else) the authority to estimate vote counts.

Instead, the Compact explicitly requires precisely the opposite:

> "The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate…."[771] [Emphasis added]

9.30.8. MYTH: Differences in state election procedures prevent determination of the national popular vote winner.

QUICK ANSWER:

- Although there are differences in election procedures among the states, the end result of each state's vote-counting process is an officially certified number of the popular votes for each presidential-vice-presidential slate.
- The only thing that the National Popular Vote Compact needs in order to operate is the officially certified vote count that existing federal law requires every state to provide and that every state already routinely produces.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "**It simply will not be possible to conclusively determine which candidate has received the most votes because every state runs its own election** and will continue to do so under the Compact. They run their own election according to their own codes, standards, policies, practices, and procedures.

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[770] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[771] National Popular Vote Compact. Article III, clause 5. The full text of the Compact is at https://www.nationalpopularvote.com/bill-text The Compact may also be found starting on page 4 of Alaska Senate Bill 61 at https://www.akleg.gov/PDF/33/Bills/SB0061A.PDF

> And **those don't always line up well with what the Compact requires**."[772] [Emphasis added]

In written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024, Parnell said:

> "The fact that votes in every state are cast, counted, recounted, and reported **in different ways**, some of which cause serious problems for National Popular Vote."[773] [Emphasis added]

Although there are differences in election procedures among the states, the end result of each state's vote-counting process is the same—that is, the number of popular votes cast for each presidential-vice-presidential slate.

The Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 both require that each state include those numbers (the "canvass") in its Certificate of Ascertainment.

The only thing that the National Popular Vote Compact requires in order to operate are the popular-vote counts that every state already routinely produces.

Moreover, contrary to what Parnell says, the Compact imposes no procedural requirements on the "codes, standards, policies, practices, and procedures" of non-member states. Therefore, there is nothing any state needs to do in order to "line up well with what the Compact requires."

Finally, there is nothing novel about the way the National Popular Vote Compact arrives at the national popular vote total.

The Compact would operate in the same way as the proposed constitutional amendment that the U.S. House of Representatives passed by a bipartisan 338–70 vote in 1969.[774] Both the Compact and the amendment are based on ordinary arithmetic applied to the officially certified vote counts that existing federal law requires every state to provide and that every state already routinely produces.

Since 1969, there have been dozens of other proposed constitutional amendments introduced in Congress for a national popular vote for President (section 4.7). An examination of these proposals shows that they, too, operate in the same way as the National Popular Vote Compact, namely that they simply call for adding up the officially certified popular-vote counts that every state already produces.[775]

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[772] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:01:52. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

[773] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote Interstate Compact)*. January 8, 2024. Page 2. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[774] House Joint Resolution 681. 91st Congress. 1969. https://fedora.dlib.indiana.edu/fedora/get/iudl:2402061/OVERVIEW

[775] Similarly, the Compact's reliance on ordinary arithmetic to ascertain the national popular vote is identical to the procedure used in the proposed Lodge-Gossett constitutional amendment that passed the U.S. Senate by a 64–27 vote in 1950 (section 4.1).

9.30.9. MYTH: A presidential candidate running with multiple vice-presidential running mates would create a problem for the Compact.

QUICK ANSWER:

- The self-destructive tactic of a presidential candidate running simultaneously with different vice-presidential running mates would not affect the operation of the National Popular Vote Compact. This rare occurrence would be uneventfully handled by the Compact in the same way that it is uneventfully handled by the current system.
- No presidential candidate who is seriously seeking the presidency would run simultaneously with different running mates in different states—thereby dividing his or her support across two different presidential-vice-presidential slates and effectively eliminating any chance of victory.
- The myth about a hypothetical presidential candidate running simultaneously with different vice-presidential running mates is one of many examples in this book of a criticism aimed at the Compact that would be handled by the Compact in the same way that it is handled by the current system.

MORE DETAILED ANSWER:

A long-time opponent of the National Popular Vote Compact claimed on the *Election Law Blog* in 2023 that a presidential candidate simultaneously running with different running mates would create problems for the Compact.

> "If disputes arise over … which slates qualify (e.g., **whether the "Stein-Hawkins" ticket in Minnesota in 2016 should be tabulated with "Stein-Baraka" tickets in the rest of the United States**), … the Supreme Court would step in to resolve disputes. … Maybe that's what we want in exchange for a national popular vote."[776] [Emphasis added]

There have been occasional cases when minor-party presidential candidates have engaged in the self-destructive tactic of simultaneously running with different vice-presidential running mates—sometimes even in the same state.

For example, Green Party presidential candidate Jill Stein ran with Howie Hawkins as her vice-presidential running mate in Minnesota in 2016, while simultaneously running with Ajamu Baraka as her running mate in other states.

Both the Compact and the current system operate in the same way in dealing with this rare and self-destructive tactic. Specifically, votes are cast and counted for presidential-vice-presidential slates—not individual candidates for President and individual candidates for Vice President—under both the Compact and the current system.

If Stein had carried Minnesota, her 10 presidential electors would have cast 10 electoral votes for her for President and 10 electoral votes for Howie Hawkins for Vice President.

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[776] In order to promote free-flowing debate, the rules of the *Election Law Blog* do not permit attribution. April 18, 2023.

If Stein had carried any other state(s), the Stein presidential electors would have cast their electoral votes for Ajamu Baraka for Vice President.

In the unlikely event that Stein had received between 270 and 279 electoral votes for President in the Electoral College, she would have been elected President. However, Ajamu Baraka would have received 10 fewer electoral votes for Vice President—not enough to be elected.

Ralph Nader's 2004 presidential campaign in New York was even more bizarre and self-destructive.

New York allows "fusion voting" that permits a candidate to appear on the ballot as the nominee of more than one political party (section 3.12).

For example, in 2004 the Bush-Cheney slate appeared on the ballot in New York as nominees of both the Republican Party and the Conservative Party. Similarly, the Kerry-Edwards slate appeared on the ballot as nominees of both the Democratic Party and the Working Families Party.

In 2004, Nader was on the ballot simultaneously in New York with two *different* vice-presidential running mates. Specifically, Nader ran with Jan Pierce as his vice-presidential running mate on the Independence Party line, and he simultaneously ran with Peter Miguel Camejo on the Peace and Justice Party line.

Article V of the Compact defines the term "presidential slate" as follows:

> "'**Presidential slate**' **shall mean a slate of two persons**, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States …" [Emphasis added]

Clauses 1 and 2 of Article III of the Compact provide:

> "The chief election official of each member state shall determine the number of votes for each **presidential slate** in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a 'national popular vote total' for each **presidential slate**.
>
> "The chief election official of each member state shall designate the **presidential slate** with the largest national popular vote total as the 'national popular vote winner.'" [Emphasis added]

The current system operates in the same way as the Compact in that votes are cast and counted for presidential-vice-presidential slates.

The result was that when Ralph Nader appeared on the ballot in New York in 2004 as the presidential nominee of two different political parties—with two different vice-presidential running mates—New York's Certificate of Ascertainment (figure 3.8) separately recorded the vote counts for the two distinct presidential-vice-presidential slates.

In the unlikely event that the combined vote for the two presidential slates headed by Nader had received more popular votes in New York than any other slate in 2004, Nader would almost certainly not have won New York's electoral votes. Nader would only have

won the state's electoral votes if one of the two dueling Nader slates had received more popular votes in New York than the other Nader slate.

Of course, no presidential candidate who is seriously seeking the presidency would run simultaneously with different running mates in the same state or in different states—thereby dividing his or her support across two different slates and effectively eliminating any chance of victory.

Finally, note that the blogger is incorrect in claiming that direct involvement of the U.S. Supreme Court in presidential elections is the price to pay "in exchange for a national popular vote."

There would have been no need for any court—much less the U.S. Supreme Court—to "step in" to deal with the question of how to handle the votes cast for Stein in Minnesota in 2016 or Nader in New York in 2004. There is simply no ambiguity as to how these votes would be handled under either the Compact or the current system.

In any case, the Supreme Court inserted itself directly into the process of deciding presidential elections in 2000—long before the National Popular Vote Compact came onto the scene. Court involvement is not a price to be paid "in exchange for a national popular vote."

9.30.10. MYTH: Administrative officials in the Compact's member states may refuse to count votes from other states that have policies that they dislike.

QUICK ANSWER:

- No administrative official in any state belonging to the National Popular Vote Compact has the power to refuse to count votes from other states for any reason—much less that some other state has some policy that the official personally dislikes.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, told a meeting at the Heritage Foundation on May 19, 2021, that under the National Popular Vote Compact:

> "You have independent individual elected officials within each of those states, who's actually determining what the national popular vote result is. … Every state in the compact would have to collect all the vote totals from every other state to come up with its own total. … You might have a **Secretary of State of California say, well, we think that states that are requiring voter ID are engaged in vote suppression**. So, you know what? **We're not going to consider the votes from Texas part of the national popular vote**. … Or states using a certain kind of voting machine, or whatever they could come up with."[777] [Emphasis added]

[777] England, Trent. 2021. Senator Jim Inhofe on the Value of the Electoral College. Heritage Foundation. May 19, 2021. Timestamp 50:00. https://www.heritage.org/election-integrity/event/virtual-senator-jim-inhofe-the-value-the-electoral-college

The method of calculating the "national popular vote total" under the National Popular Vote Compact is a matter of law—not by the personal preferences of the election administrators of the Compact's member states.

Article III, clause 1 of the Compact states:

> "The chief election official of each member state shall determine the number of votes for each presidential slate in **each State of the United States** and in the District of Columbia in which votes have been cast in a statewide popular election and **shall add such votes together to produce a 'national popular vote total'** for each presidential slate." [Emphasis added]

Despite what England says, there is nothing in the Compact that authorizes any administrative official of any state belonging to the Compact to refuse to count votes from some other state that has some policy that the official personally dislikes.

In fact, as previously discussed in section 9.30.3, the administrative officials of states belonging to the Compact are required to treat the certified vote counts from other states as "conclusive."

9.30.11. MYTH: The Compact is flawed, because it does not accommodate a state legislature that authorizes itself to appoint the state's presidential electors.

QUICK ANSWER:

- Every state today has a law providing that all of a state's presidential electors will be chosen by the voters—not the state legislature. This has been the case in every state since the 1880 presidential election.
- It is unequivocally true that the Compact would not accommodate a state legislature if it were to decide, at some future time, to designate itself as the authority to choose some or all of the state's presidential electors.
- We regard the enshrinement in the National Popular Vote Compact of the principle that the people should choose as a feature—not a bug.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "A couple of years ago **there was a bill in Arizona proposing that … [some of Arizona's] electoral votes would be chosen by the legislature**. I don't really have an opinion one way or the other on whether this is a good idea or not. But **it's an interesting idea** that's out there. If Arizona were to do that, National Popular Vote would look at that and say, 'there is no statewide popular election for electors.' … That **seems like it's going to be a problem**."[778] [Emphasis added]

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[778] Hearing of Michigan House Election Committee on HB4156. March 7, 2023. Timestamp 1:08:28. https://house.mi.gov/VideoArchivePlayer?video=HELEC-030723.mp4

The 2021 Arizona state legislative bill to which Parnell is referring (HB2426) was one of many bizarre proposals that were introduced in the Arizona legislature after outgoing President Donald Trump failed to overturn the results of the 2020 presidential election in Arizona.

This bill specified that two of the state's electoral votes were to be cast for the presidential-vice-presidential ticket that:

> "Received the highest number of votes from the aggregate vote of all the members of the legislature voting as a single body."[779]

The state's remaining electoral votes would be allocated according to the popular vote in each congressional district. This bill died in committee and has not been re-introduced since.

In addition, in 2024 Arizona Senator Anthony Kern proposed that the Arizona legislature appoint all of the state's presidential electors:

> "A GOP state lawmaker who participated in the 2020 alternate elector strategy has introduced bill that aims to **give state legislature sole authority to appoint presidential electors**."[780] [Emphasis added]

Senator Kern's Senate Concurrent Resolution 1014 (SCR 1014) provided:

> "The Legislature, and no other official, shall appoint presidential electors in accordance with the United States Constitution."[781,782]

It is unequivocally true that the Compact would not accommodate the Arizona legislature if it were to decide, at some future time, to designate itself as the authority to choose some or all of the state's presidential electors.

While Parnell says he does not have "an opinion one way or the other on whether this is a good idea," we do.

The National Popular Vote Compact is squarely based on the principle that the voters—not state legislatures—should choose the President.

Every state today has a law providing that all of a state's presidential electors will be chosen by the voters—not the state legislature. This has been the case in every state starting with the 1880 presidential election.

We regard the enshrinement in the National Popular Vote Compact of the principle that the people should choose as a feature—not a bug.

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[779] Arizona House Bill HB2426 of 2021 may be found at https://apps.azleg.gov/BillStatus/BillOverview/74978

[780] *Election Law Blog.* January 22, 2024. https://electionlawblog.org/?p=140874

[781] Senate Concurrent Resolution SCR 1014. 2024. A concurrent resolution supporting the constitutional appointment of presidential electors by the legislature. https://www.azleg.gov/legtext/56leg/2R/bills/SCR1014P.htm

[782] Note that Senator Kern introduced his 2024 proposal as a concurrent resolution of the legislature (which would not be presented to the Governor for approval or veto) rather than as an ordinary statutory bill (which would be presented to the Governor). His approach was consistent with the so-called "independent state legislature" theory, but inconsistent with the U.S. Supreme Court's decision in 2023 in *Moore v. Harper* (600 U.S. 1).

When a state adopts the National Popular Vote Compact, it obligates itself to continue to conduct a "statewide popular election" for President. Article II of the Compact states:

> "Each member state shall conduct a statewide popular election for President and Vice President of the United States."

Moreover, clause 8 of Article V of the Compact defines a "statewide popular election" as follows:

> "'Statewide popular election' shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis."

If either HB2426 or SCR 1014 were to go into effect in Arizona, that state would no longer be conducting a "statewide popular election" for President and would, therefore, be voluntarily opting out of the Compact's national popular vote count.

As discussed in detail in section 9.31.6, if a state legislature were to choose to opt-out of the national popular vote count, that state's departure would present no operational difficulty in terms of the Compact's ability to compute the national popular vote total from the states that did conduct a "statewide popular election."

Opting out of the national popular vote count would be a very poor policy decision for a state and its voters.

Such legislation would, of course, be vigorously opposed by the political party that normally wins the state involved.

Moreover, a lot of voters would be angry with a state legislature that had disenfranchised them.

9.30.12. MYTH: The 1960 Alabama election reveals a flaw in the Compact.

QUICK ANSWER:

- Neither Kennedy's nor Nixon's name appeared on the ballot in Alabama in 1960, and hence there were no popular votes to count from Alabama for Kennedy or Nixon. No state has used a voting system of this kind for decades.
- In the unlikely event that a state were to adopt Alabama's long-abandoned method of voting, the National Popular Vote Compact would encounter no operational difficulty.
- In the absence of any actual popular-vote count for Kennedy or Nixon in Alabama in 1960, various almanac editors and political writers have bandied about various unofficial (and not very plausible) estimates of how Alabama voters might have voted if they had been allowed to vote directly for Kennedy and Nixon.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, told the Michigan House Elections Committee on March 7, 2023:

> "Historians still argue whether Richard Nixon or John Kennedy won the popular vote in 1960, owing largely to uncertainty over how to count votes from Alabama that year. It's an interesting bit of historical trivia because of course Kennedy won the Electoral College regardless of the Alabama issues, but **under National Popular Vote, not being able to conclusively determine a winner would be a national crisis**."[783] [Emphasis added]

The reason it is arguable whether Kennedy or Nixon would have won the national popular vote in 1960 is that neither Kennedy's nor Nixon's name appeared on the ballot in Alabama in 1960. Figure 3.10a and figure 3.10b in section 3.13 show Alabama's 1960 ballot for President.

Hence there were no popular votes to count from Alabama for Kennedy or Nixon.

The cumbersome voting system that Alabama used in 1960 has not been used by Alabama or any other state for decades.

In the unlikely event that a state were to adopt Alabama's long-abandoned method of voting today, the National Popular Vote Compact would encounter no operational difficulties.

In the early days of the Republic, voters were required to vote for individual candidates for presidential elector rather than the actual candidates for President and Vice President. Thus, a voter in a state with, say, 11 electoral votes (the number that Alabama had in 1960) would have to vote for 11 separate candidates for presidential elector.

By 1960, three-quarters of the states had abandoned this cumbersome and inconvenient way of voting and adopted the so-called "short presidential ballot" (section 2.14). Since 1980, every state has used it.

The short presidential ballot lists the names of the actual candidates for President and Vice President and enables voters to cast a single vote for their chosen presidential-vice-presidential ticket. A vote for a presidential-vice-presidential ticket is then "deemed" to be a vote for all of the individual candidates for presidential electors nominated in association with that ticket in the voter's state.

Back in 1960 in Alabama, each of the Democratic Party's 11 candidates for presidential elector was nominated separately at the time of the primary election.

Segregationists saw Alabama's method of voting as a way to nominate and elect Democratic presidential electors who would not support the Democratic Party's national nominee (that is, John F. Kennedy) in the Electoral College.

The segregationists were partially successful in Alabama's 1960 Democratic primary. They nominated six of Alabama's 11 Democratic candidates for the position of presidential elector.

A majority of Alabama's voters were in the habit of supporting the state's dominant political party (that is, the Democratic Party) in November general elections at the time.

Thus, the voters elected all 11 Democratic presidential electors in the November gen-

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[783] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 4. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

eral election. Each of the 11 winning elector candidates received a slightly different number of popular votes (with each of them receiving about 58% of the statewide vote).

Meanwhile, no Republican presidential electors were chosen in November (with each of them receiving about 42% of the statewide vote).

When the Electoral College met in mid-December, the six segregationist Democratic presidential electors voted for Senator Harry Byrd of Virginia, and the five "loyalist" Democratic electors voted for the person nominated by the Democratic National Convention (that is, Senator John F. Kennedy of Massachusetts).

Today, no state uses the method of voting used in Alabama in 1960. All states use the short presidential ballot. All states today conduct a "statewide popular vote" for President, as that term is defined in the National Popular Vote Compact.

If, after the National Popular Vote Compact comes into effect, any state were to decide to revert to Alabama's abandoned method of voting, that state would no longer be conducting a "statewide popular vote" for President (section 9.31.6). That state would, therefore, be voluntarily opting out of the Compact's national popular vote count (because there obviously would be no vote count for any presidential and vice-presidential candidate from that state).

Reverting to Alabama's 1960 method of voting would be a very poor policy decision for a state and its voters. However, it would present no operational difficulty in terms of the Compact's ability to compute the national popular vote total from the states that did conduct a "statewide popular election."

There would be no "national crisis"—simply a lot of voters angry with a state legislature that disenfranchised them.

There is a continuing academic argument about whether the 1960 election was a wrong-winner election.

The 1960 presidential election in Alabama has fueled an academic discussion about whether that election was an instance of a President (Kennedy, in this case) winning a majority of the Electoral College without having received the most popular votes nationwide.[784]

In the absence of any actual popular vote count for Kennedy or Nixon from Alabama in 1960, the answer is unknowable.

Nonetheless, various political writers have bandied about various ways of estimating how many popular votes Kennedy and Nixon might have received if Alabama voters had been allowed to vote directly for Kennedy or Nixon on a head-to-head basis.

Some have suggested, for example, that Republican Richard Nixon should be credited with six-elevenths of the state's popular vote, because segregationist Democratic Senator Byrd of Viginia received six of Alabama's 11 presidential votes in the Electoral College. That is, these writers advocate equating statewide voter sentiment in the November *general election* to the ratio of segregationists to loyalists who won the *Democratic primary* held earlier in the year.

This method of accounting would credit Nixon with the support of six-elevenths of

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[784] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America.* New Haven, CT: Yale University Press. Second edition. Pages 67–69.

Alabama voters (that is, 55%) in the November general election—even though the Republican candidates for presidential elector received only about 42% of the state's popular vote in November.

This method of accounting of Alabama's popular vote gives Nixon enough additional popular votes nationally to erase Kennedy's modest national-popular-vote margin.

There are obvious problems with this method of accounting. At the time of the November general election, public awareness of the radically different intentions of the 11 Democratic nominees for presidential elector was low, as evidenced by the fact that all 11 received almost the same percentage of the statewide vote (58%). That is, the voters showed no particular preference for the six segregationist Democrats, compared to five loyalist Democrats. They simply voted Democratic. The statewide Democratic popular-vote margin of 58% would have been more or less the same if, say, six, seven, or eight of the 11 Democratic nominees for presidential elector had intended to support Kennedy in the Electoral College or, conversely, if only four, three, or two of them had intended to support him.

Moreover, neither Kennedy nor Nixon were segregationists. In fact, both ran on a pro-civil-rights platform in 1960.

Finally, it is noteworthy that Nixon never publicly supported this method of post-election accounting or claimed to have won the national popular vote in 1960.[785]

See the discussion about the short presidential ballot in section 9.31.6.

9.30.13. MYTH: States will be forced to change their election laws in order to have their votes included in the national popular vote count.

QUICK ANSWER:

- No state would have to make any change in its existing laws or take any action it would not otherwise take, in order to have its votes automatically included in the national popular vote count compiled under the Compact.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated at a debate conducted by the Broad and Liberty group in Philadelphia:

> "A state that doesn't conform their election process to the way National Popular Vote requires, they're effectively locked out."[786]

No state would have to make any change in its existing laws or take any action it would not otherwise take, in order to have its voters automatically included in the national popular vote count compiled under the Compact.

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[785] Edwards, George C., III. 2011. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press. Second edition. Pages 67–69.

[786] Broad and Liberty Debate. 2021. Ditching the electoral college for the national popular vote—The conservative angle. November 29, 2021. Timestamp 4:31. https://www.youtube.com/watch?v=eH4SvE7u5FI&t=945s

9.30.14. MYTH: Absentee and/or provisional ballots are not counted in California when they do not affect the presidential race.

QUICK ANSWER:

- It is simply an urban legend that absentee and provisional ballots are not counted in California (or any other state) when their number is significantly less than the margin in the presidential race in that state.
- A typical general-election ballot contains votes for numerous offices and ballot propositions. Regardless of whether there is any doubt as to which presidential candidate received the most popular votes in a state, all valid ballots (including all valid provisional ballots) must be counted in order to determine the outcome of the numerous other contested races and ballot propositions and because it is the law.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, told a debate audience at American University in 2015:

> "I do know that in some states, if the number of provisionals outstanding is less than the margin, when they finish counting the regular votes, they will not count the provisionals if they can't be decisive."[787]

A blog posting on *Real Clear Politics* by "Southerner01" in 2012 stated:

> "**One thing worth noting is that the true [national] popular vote is rarely even tallied**. For example, **I remember hearing several times that California did not count absentee ballots because the number of absentee ballots was significantly less than the amount by which the Democratic candidate was leading**. Since absentee ballots typically include military votes, the gap might have narrowed, even if wasn't even mathematically possible for the ballots to flip the state. In that case, it's possible that, as an example, Al Gore may not have won the actual [national] popular vote. **I believe there were roughly million absentee ballots not counted in California**, and Gore was leading by about 500,000 votes [nationally]. While that was nowhere near enough to flip the state, it might have changed the [national] popular vote total."[788] [Emphasis added]

Regardless of what Trent England "knows" or what the blogger "remembers hearing," all valid ballots are counted in every state regardless of whether there is any suspense about which presidential candidate is destined to win the state's electoral votes.

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[787] Debate at Washington College of Law, American University on April 22, 2015, with Jamie Raskin, John Koza, Sean Parnell, and Trent England. Timestamp 2:32:00. https://media.wcl.american.edu/Mediasite/Play/18d99c80bb904c998374375d8fc23f4d1d?useHTML5=true

[788] Blog posting by Southerner01. *Real Clear Politics*. October 12, 2012.

Indeed, there has been no suspense about which presidential candidate would win the most popular votes in about three-quarters or more of the states in recent years.

Aside from the legal requirements to count all votes, this urban legend ignores the fact that the presidential race is not the only thing on a state's ballot.

For example, a November general-election ballot in California in a typical presidential-election year contains races for:

- members of Congress
- members of the state legislature
- state, county, and local ballot propositions
- county and municipal offices
- various local school, college, hospital, and other boards
- state and county judges.

There were 10,965,856 votes cast in California in the November 2000 election. Although the uncounted "million" ballots that the blogger heard about could not have reversed Al Gore's 1,293,774-vote lead over George W. Bush in California, these ballots determined the outcome of numerous other races.

9.30.15. MYTH: Provisional ballots would be a problem under the Compact, because voters in all 50 states would matter in determining the winner.

QUICK ANSWER:

- Provisional ballots would be processed and counted in the same way under the National Popular Vote Compact as they are under the current state-by-state winner-take-all method of awarding electoral votes. Validation and counting of provisional ballots is completed in most states within 10 days after Election Day—that is, weeks before the federal Safe Harbor Day and the Electoral College meeting.
- Provisional ballots accounted for 0.5% of the total vote in the November 2022 general election, and 79% of them were validated.
- Because a few thousand votes in one, two, or three states often determine the presidency under the current system, there is a far greater chance that provisional ballots will create problems under the current system than in a nationwide vote.
- This myth that provisional ballots would be a problem under the Compact is one of many examples in this book of a criticism aimed at the Compact where the Compact would be equal or superior to the current system.

MORE DETAILED ANSWER:

The federal Help America Vote Act of 2002 (HAVA) permits a voter to cast a provisional ballot (sometimes also called an "affidavit ballot") under circumstances such as the following:

- The voter is not listed on the election roll for a particular precinct (perhaps because the voter recently moved).
- The voter arrives at the polling place on Election Day but previously requested

an absentee ballot (perhaps because the voter did not receive the absentee ballot or did not use it).

- The voter does not have the type of identification (if any) that may be required by state law.

After the voter fills out a provisional ballot, it is typically inserted into a large envelope whose exterior contains an explanation as to why the ballot was cast on a provisional basis. The outside of the envelope contains the voter's signature and may also contain additional identifying information (e.g., a driver's license number).

Depending on state law, provisional ballots are counted two to 21 days after the election. Most states complete the process within 10 days after the election.[789]

Processing provisional ballots is a tedious administrative process. The *Miami Herald* reported that each provisional ballot takes about 30 minutes to review and inspect.[790] The first step is usually to visually compare the signature on the outside of the envelope with registration records before the provisional ballot is accepted. If a driver's license number is used as part of the identification process, the number provided by the voter on the outside of the envelope may be compared with the state's database of driver's licenses. The specific additional processing required depends on the reason why the provisional ballot was cast in the first place.

According to the federal Election Assistance Commission:

> "**The percentage of ballots that were cast by provisional voters has been steadily declining over the past three election cycles**; 2018 EAVS data show that 1.3% of voters who cast a ballot did so by provisional ballot, and that percentage declined to 0.8% of the electorate in the 2020 EAVS and **0.5% for the 2022** EAVS.
>
> "The total number of provisional ballots cast has declined correspondingly, from 1,852,476 in the 2018 EAVS to 1,712,857 in the 2020 EAVS to **702,042 in the 2022** EAVS."[791] [Emphasis added]

In the November 2022 general election, 0.5% of the ballots were cast by provisional voters, and 78.6% of these provisional ballots cast were accepted and counted (either fully or partially).[792] Thus, the net effect is that about 0.4% of the total vote in the November 2022 general election came from provisional ballots.

Hans von Spakovsky of the Heritage Foundation has stated that a national popular vote for President:

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[789] The National Conference of State Legislatures (NCSL) has a summary of state laws and practices concerning provisional ballots. See National Conference of State Legislatures. 2020. *Provisional Ballots*. https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#don't%20use

[790] Van Sickler, Michael. Provisional ballots spike, but Florida elections supervisors say they're not needed. *Miami Herald*. December 17, 2012. http://www.miamiherald.com/2012/12/17/3145753/provisional-ballots-spike-but.html

[791] Election Administration and Voting Survey Comprehensive Report. Pages 16–17. https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf

[792] *Ibid*. Page 17.

> "would … lead to … contentious fights over provisional ballots."[793]

He has also stated:

> "Every additional vote found anywhere in the country could make the difference to the losing candidate."[794]

We agree with von Spakovsky that any vote "anywhere in the country could make the difference" in a national popular vote for President. Indeed, an important reason to adopt the National Popular Vote Compact is to make *every* vote in *every* state politically relevant in *every* presidential election. We do not view the fact that every vote "could make the difference" as something to be avoided.

Von Spakovsky continued:

> "**If the total number of provisional ballots issued in all of the states is greater than the margin of victory**, a national battle over provisional ballots could ensue.
>
> "Losing candidates would then have the incentive to hire lawyers to monitor (and litigate) the decision process of local election officials."
>
> "Lawyers contesting the legitimacy of the decisions made by local election officials on provisional ballots nationwide could significantly delay the outcome of a national election."[795] [Emphasis added]

Our view is that ballots cast by legitimate voters should be counted. We also believe that a candidate who is slightly behind in a close election has every right to "monitor" the handling of provisional ballots and, if necessary, "litigate" the question of whether a particular voter is legally entitled to have his or her vote counted.

In any event, provisional ballots are far more likely to be outcome-determinative under the current state-by-state winner-take-all system than under a national popular vote.

Under the current system, the outcome of the national election regularly ends up depending on the outcome of one, two, or three closely divided battleground states. The number of provisional ballots in a closely divided state is frequently larger than the margin of victory generated by the non-provisional ballots in that state.

For example, table 9.41 shows the four states in 2020 where Biden's percentage lead was less than 0.8% (the percentage of provisional ballots cast that year).

Of course, the test for whether provisional ballots are outcome-determinative is *not* whether the winner's percentage lead was less than the percentage of provisional ballots cast.

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[793] Von Spakovsky, Hans. 2011. Popular vote scheme. *The Foundry*. October 18, 2011.

[794] Von Spakovsky, Hans. 2011. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

[795] Von Spakovsky, Hans. Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme. Legal memo. October 27, 2011. https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular

Table 9.41 The four states in 2020 where Biden's percentage lead was less than 0.8%

State	Biden	Trump	Biden margin	Biden percentage margin
Georgia	2,473,633	2,461,854	11,779	50.12%
Arizona	1,672,143	1,661,686	10,457	50.16%
Wisconsin	1,630,866	1,610,184	20,682	50.32%
Pennsylvania	3,458,229	3,377,674	80,555	50.59%

For one thing, only about 79% of provisional ballots are accepted.

More importantly, provisional ballots are not unanimous in favor of one candidate. Instead, the leading candidate's percentage of provisional ballots is usually fairly close to that candidate's lead among non-provisional ballots.

Let's do the arithmetic:

- Assume 0.8% of the ballots were provisional (that is, the actual percentage in 2020);
- Assume 79% of the provisional ballots were accepted; and
- assume the provisional ballots divided 55%–45% in favor of one candidate.

In that case, the entire pool of provisional ballots would have contributed only 0.064% to the leading candidate's margin.

A change of 0.064% is equal to only about half of Biden's 50.12% lead in Georgia, only about a third of Biden's 50.16% lead in Arizona, only a fifth of Biden's 50.32% lead in Wisconsin, and only about a tenth of Biden's 50.59% lead in Pennsylvania.

Thus, the total pool of provisional ballots would not have been outcome-determinative in any of the four closest states in 2020.

Similarly, a difference of 0.064% is even less likely to be outcome-determinative in a nationwide election. For example, in the closest national election in the 20th or 21st centuries (that is, the 1960 election), the national-popular-vote margin was 0.17%—three times larger than 0.064%.

Moreover, von Spakovsky's assertion about a nationwide flurry of litigation over provisional ballots is unrealistic.

Provisional ballots do not offer a disgruntled and litigious candidate much promise. Provisional ballots have been in widespread use since the 2004 presidential election. Almost all of the situations that give rise to provisional ballots have been previously encountered, analyzed, adjudicated, and cataloged—thereby establishing precedents on how the vast majority of situations are to be handled. It would be remarkable if some new legal theory could affect more than a tiny fraction of the provisional ballots.

Even if the number of disputed provisional ballots were potentially outcome-determinative, all litigation involving presidential elections must be conducted and decided so as to reach a conclusion inside the overall national schedule for finalizing the results of presidential elections established by the U.S. Constitution and the Electoral Count Reform Act of 2022. This schedule applies equally to elections conducted under the current state-

by-state winner-take-all system as well as those conducted under the National Popular Vote Compact.

9.30.16. MYTH: The ballot access difficulties of minor parties would create a logistical nightmare for the Compact.

QUICK ANSWER:

- Presidential candidates who have significant national support generally qualify for the ballot in all (or almost all) states.
- For example, the Libertarian Party received the most votes nationwide of any minor-party in 2020 and 2016. It was on the ballot for President in all 50 states in 2020 and 2016 (when it received 1% and 3% of the nationwide vote, respectively).
- The process of getting onto the ballot has become considerably easier in recent years. In 2024, an independent or minor-party presidential candidate can get onto the ballot in two-thirds of the states by submitting a petition with between 0.1% and 0.5% of the state's 2020 presidential vote. A petition with between 1.0% and 1.5% of the state's 2020 presidential vote is sufficient in 12 other states. No petition at all is required in four states.
- No logistical nightmare is created when a candidate is not on the ballot in a particular state. The treatment of a candidate who is not on the ballot in a particular state is identical under *both* the current system and the National Popular Vote Compact. The absence of a minor-party or independent candidate from the ballot in a few states does not prevent that candidate from accruing popular and electoral votes from every state in which they receive votes.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, told a Delaware Senate committee that the Compact would create:

> "Logistical nightmares [that] could haunt the country."
>
> "There are … inconsistencies among states' ballots that would skew the election results. … States differ in their requirements for ballot qualification."[796]

Candidates with significant national support generally get on the ballot in all (or almost all) states.

Presidential candidates who have significant national support generally qualify for the ballot in all 50 states (or all but a few states).

- Most recently, the Libertarian Party received the most votes nationwide of any minor-party. It was on the ballot for President in all 50 states in 2020 (when Jo Jorgensen received about 1% of the national popular vote). In 2016 (when Gary

[796] Written testimony submitted by Tara Ross to the Delaware Senate on June 16, 2010.

Johnson received about 3% of the national popular vote), the Libertarian Party was also on the ballot for President in all 50 states.

- Ross Perot was on the ballot in all 50 states in both 1992 (when he received 19% of the national popular vote) and 1996 (when he received 8%).
- George Wallace was on the ballot in all 50 states in 1968 (when he received 13% of the national popular vote).
- John Anderson was on the ballot in all 50 states (when he received 7% of the national popular vote in 1980).
- Lenora Fulani, the nominee of the New Alliance Party, was on the ballot in all 50 states in 1988.
- Robert LaFollette got onto state-printed ballots in all but two states in 1924 (Louisiana and North Carolina).
- In 1912, when then-former President Theodore Roosevelt ran as a third-party candidate and received 27% of the national popular vote, he was on state-printed ballots in all but two states (Oklahoma and North Carolina).
- Henry Wallace was on the ballot in all but three states in 1948.[797]
- Ralph Nader was on the ballot in 45 states in 2008 (when he received ½% of the national popular vote).
- Ralph Nader was on the ballot in 43 states in 2000 (when he received 2% of the national popular vote).

In 2020, there were 34 officially registered minor party or independent candidates for President. Only the Libertarian party's nominee (who received 1.2% of the national popular vote) was on the ballot in all 50 states. The combined total for the other 33 minor-party or independent candidates was 0.6%.

Requirements to get onto the ballot in 2024

Thanks to persistent litigation and lobbying by voting-rights advocates, minor parties, and independent candidates, the process of getting onto the ballot has become considerably easier in recent years.

Minor parties in some states automatically qualify to be on the ballot by virtue of having received a statutorily specified number of votes in a previous election.

State statutory requirements for ballot-access petitions are couched in various ways, including a fixed number of signatures, a certain percentage of the vote for a particular office in a specified previous election, and a certain percentage of the state's registered voters.

Richard Winger, Editor of *Ballot Access News*, has analyzed each state's requirements and restated them in terms of a percentage of the state's previous presidential vote.[798] A presidential candidate can get onto the ballot in the November 2024 presidential election by:

- filing a simple statement in one state;
- paying a filing fee in three states;

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[797] The authors thank Richard Winger, editor of *Ballot Access News*, for this information.

[798] See Winger, Richard. 2022. Presidential Petition Requirements. *Ballot Access News*. April 1, 2022. Page 5.

- submitting a petition with between 0.1% and 0.5% of the state's 2020 presidential vote in 34 states;
- submitting a petition with between 0.5% and 1.0% of the state's 2020 presidential vote in eight states; and
- submitting a petition with between 1% and 1.5% of the state's 2020 presidential vote in four states.

Candidates get credit for votes wherever they get them under both the current system and the Compact.

Even if a particular minor-party or independent candidate is not on the ballot in all 50 states, Tara Ross is incorrect in saying that a "logistical nightmare" would be created because of differences in state ballot-access requirements.

The treatment of a candidate who is not on the ballot in a particular state is identical under *both* the current system and the National Popular Vote Compact.

- Each state's election officials certify every popular vote that is cast and every electoral vote that is earned for each candidate who received popular or electoral votes in their state. A state canvassing board or other designated board or official first certifies the results, and the state's Governor subsequently certifies them in the state's Certificate of Ascertainment.
- A candidate's failure to receive any popular or electoral votes from one state does not cause that candidate to forfeit the popular or electoral votes that he or she earned from another state. All of the popular and electoral votes that the candidate receives are added together to arrive at the candidate's nationwide total.

For example, in 1912, Theodore Roosevelt was not on the ballot in every state when he ran as the nominee of the Progressive (Bull Moose) Party. He nevertheless received 4,120,207 popular votes nationwide and 88 electoral votes from the six states that he carried.

In 1948, Strom Thurmond was not on the ballot in every state. He nevertheless received 1,169,114 popular votes nationwide and 39 electoral votes from the five states that he carried.

9.30.17. MYTH: A state's electoral votes could be awarded by the Compact to a candidate not on a state's own ballot.

QUICK ANSWER:

- This hypothetical scenario is politically implausible, because a presidential candidate who is strong enough to win the most popular votes throughout the entire United States would, almost certainly, have been on the ballot in all 50 states.

MORE DETAILED ANSWER:

In testimony to the Delaware Senate, Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has raised the possibility that a

minor-party or independent presidential candidate might win the national popular vote without being on the ballot in Delaware:

> "Delaware could be required to cast its electoral votes for a candidate who did not qualify for the ballot in Delaware."[799]

It would be unlikely that a minor-party presidential candidate would be strong enough to win the most popular votes nationwide, while being incapable of collecting the 650 signatures necessary to qualify for the ballot in Delaware.

In fact, presidential candidates who have significant national support generally qualify for the ballot in all 50 states (or all but a few states), as detailed in section 9.30.16.

But even if Ross' politically implausible scenario were to occur, the National Popular Vote Compact would deliver precisely its promised result, namely the election of the presidential candidate who received the most popular votes nationwide.

9.31. MYTH THAT THE COMPACT COULD BE THWARTED BY A SINGLE STATE OFFICIAL OR STATE

9.31.1. MYTH: Governors have the "prerogative" to thwart the Compact by simply ignoring it.

QUICK ANSWER:

- Under the U.S. Constitution, the method of awarding a state's electoral votes is specified by state law.
- All state officials are legally bound to comply with their own state's laws for appointing presidential electors. No Governor has the personal "prerogative" to ignore the National Popular Vote Compact if it has been enacted as the state's law for awarding electoral votes.
- This myth about Governors is one of many examples in this book of a criticism aimed at the Compact that—even if valid—would be equally possible under the current system. That is, this criticism provides no reason to favor the current system over the Compact.
- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted and that a single high-handed state official can ignore the law.

MORE DETAILED ANSWER:

Jason Willick, an opinion columnist, wrote in 2023 that a constitutional crisis could arise under the National Popular Vote Compact if Governors were to use what he called their "prerogative" to thwart the operation of the Compact by simply ignoring it.

In an opinion column entitled "This Blue-State Election Compact Could Create a Constitutional Crisis," Willick wrote:

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[799] Written testimony submitted by Tara Ross to the Delaware Senate on June 16, 2010.

> "Would swing-state Democratic governors certify a Republican presidential candidate as the winner of their state's electoral votes if most voters in their states voted for the Democratic candidate? The **governors could claim a prerogative to ignore the compact**."[800] [Emphasis added]

Under the U.S. Constitution (Article II, section 1), the choice of method of awarding the state's electoral votes is specified by state law.

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors…."[801] [Emphasis added]

An interstate compact is both a state law and a legally binding contractual agreement with other states.

The fact that an interstate compact is, first of all, a state law is made clear by the wording typically used by states when adopting compacts—that is, that the compact:

> "Is hereby **enacted into law** and entered into." [Emphasis added]

All state officials, including Governors, are legally bound to comply with their own state's laws for appointing presidential electors—whether the law is a winner-take-all law that awards all of the state's electoral votes based on a statewide plurality, a law awarding electoral votes based on the congressional-district popular vote, or a law awarding electoral votes based on the nationwide popular vote.

In particular, state officials are obligated to comply with the method of awarding electoral votes specified by their state's law—regardless of whether they personally prefer a different method or think it is a poor policy choice.

Moreover, when a state appoints presidential electors, it is performing a function delegated to it by the U.S. Constitution (Article II, section 1).

Federal law requires that:

- A state's appointment of its presidential electors must be in accordance with state law.
- The state law must have been enacted prior to Election Day.

Specifically, section 5(a)(1) of the Electoral Count Reform Act of 2022 requires:

> "The executive of each State shall issue a certificate of ascertainment of appointment of electors, **under and in pursuance of the laws of such State** providing for such appointment and ascertainment **enacted prior to election day**." [Emphasis added]

In short, Willick's scenario would violate both state and federal law.

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[800] Willick, Jason. 2023. This blue-state election compact could create a constitutional crisis. *Washington Post*. June 11, 2023. https://www.washingtonpost.com/opinions/2023/06/11/democratic-electoral-alliance-potential-constitutional-crisis/

[801] U.S. Constitution. Article II, section 1, clause 2.

The Governor's "prerogative"—even if it existed—provides no reason to favor the current system over the Compact.

In his opinion column entitled "This Blue-State Election Compact Could Create a Constitutional Crisis," Willick presented his hypothetical scenario involving a Governor's "prerogative" as a reason not to adopt the National Popular Vote Compact.

If it were true that state Governors have the personal prerogative to ignore the state's law for awarding electoral votes, then they would also have that prerogative today—under the *current* system.

Does Willick seriously believe that Maine's Democratic Governor in 2020 (Janet Mills) had the "prerogative" to refuse to certify the Republican presidential elector chosen by the voters of the state's 2nd congressional district in accordance with her state's existing law—merely by pointing to the fact that the "most voters in [her] state voted for the Democratic candidate"?

Does Willick believe that Nebraska's Republican Governor in 2020 (Jim Pillen) had the "prerogative" to refuse to certify the Republican Democratic presidential elector chosen by the voters of Nebraska's 2nd congressional district in accordance with that state's existing law? After all, the "most voters in [his] state voted for the Republican candidate."

Recall that Donald Trump won the most popular votes in Pennsylvania in 2016 while not winning the most popular votes nationwide. Does Willick believe that Pennsylvania's Democratic Governor in 2016 (Tom Wolf) had the personal prerogative to ignore Pennsylvania's existing winner-take-all law and award all of the state's electoral votes to the national-popular-vote winner?

If Willick actually believes that Governors have the "prerogative" to ignore state laws specifying the method of awarding electoral votes, he could have written the paragraph below rather than the paragraph quoted at the beginning of this section:

> "Would swing-state Democratic governors certify a Republican presidential candidate as the winner of their state's electoral votes if most voters ~~**in their states**~~ **nationally** voted for the Democratic candidate? The governors could claim a prerogative to ignore the ~~**compact**~~ **state's existing winner-take-all law**." [Emphasis added]

If Willick believes that Governors have this personal prerogative, why did he not acknowledge that the very same "constitutional crisis" lurks in the current system?

Willick's hypothetical scenario about Governor's possessing a personal "prerogative" to ignore the National Popular Vote Compact is one of many examples in this book of a criticism aimed at the Compact that—even if legally well-founded—would be equally possible under the current system.

Thought experiment about what would happen if a rogue Governor were to claim the prerogative to ignore the state's law for awarding electoral votes

For the sake of argument, let's consider what would happen if a Governor were to attempt to exercise the "prerogative to ignore the compact" that Willick claims to exist.

Suppose that a Governor were to issue a Certificate of Ascertainment awarding the

state's electoral votes to a candidate different from the one specified by the state's existing law.[802]

The presidential candidate disfavored by the Governor could obtain relief in either federal or state court.

In summarizing the "mechanisms in place to compel states to produce valid certificates" under the Electoral Count Reform Act of 2022, Kate Hamilton writes:

> "The ECRA creates a procedure by which federal courts can hear federal claims brought by presidential candidates 'with respect to a state executive's duty to issue and transmit to Congress the certification of appointed electors. In other words, if a presidential candidate brings a claim under federal law—which could be statutory or constitutional—and successfully argues that they are entitled to a state's electoral votes, then **the ECRA-created three-judge panel could order a state executive to issue a certificate of ascertainment. That court-ordered slate of electors would then become the state's single slate of electors to be counted by Congress, even if not initially certified before the federal deadline**."[803] [Emphasis added]

The Electoral Count Reform Act of 2022 created (in section 5) a special three-judge federal court for the specific purpose of deciding:

> "Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the **issuance** of the certification required under section (a)(1), or the **transmission** of such certification as required under subsection (b)." [Emphasis added]

This court is open only to aggrieved presidential candidates.

It has the power to revise a state's Certificate of Ascertainment. The 2022 Act also specifies that the court-ordered revised Certificate supersedes the original one.

This new court operates on a highly expedited schedule. Time-consuming delays (such as the five-day notice required by 28 U.S.C. 2284b2) do not apply.[804]

There is expedited appeal to the U.S. Supreme Court.

Given that the Constitution requires that the Electoral College meet on the same day in every state, the 2022 Act also requires that all of the actions of both the three-judge court and the Supreme Court be scheduled so that a final conclusion will be reached prior to the Electoral College meeting.

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[802] The unlikely possibility of a Governor refusing to issue any Certificate is discussed separately in section 9.31.2.

[803] Hamilton, Kate. 2023. State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond. *The Yale Law Journal Forum*. November 22, 2023. Pages 271–272. https://www.yalelawjournal.org/forum/state-implementation-of-the-electoral-count-reform-act-and-the-mitigation-of-election-subversion-risk-in-2024-and-beyond#_ftnref11

[804] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

In her discussion of "mechanisms in place to compel states to produce valid certificates," Kate Hamilton also points out that, in many (but not all) states, the disfavored presidential candidate could obtain a writ of mandamus compelling the Governor to carry out the ministerial duty of issuing the Certificate of Ascertainment in accordance with state law.[805]

> "Aggrieved candidates could turn to state courts to force any recalcitrant state officials to perform their legal duties under state law. As Derek T. Muller has written, the writ of mandamus—a remedy issued to public officials requiring them to perform the 'clear legal duty' with which they are tasked by state law—is a potentially useful tool for combatting election subversion caused by state officials refusing to perform their nondiscretionary duties.[806] Mandamus has a clear use as a remedy in the event that a public official—for example, an administrator or member of a board of elections—refuses to perform the ministerial duty required of them by state law, such as canvassing or certifying election results."[807]

9.31.2. MYTH: A rogue Governor could thwart the Compact by simply refusing to issue the state's Certificate of Ascertainment.

QUICK ANSWER:

- Long-standing federal law requires that each state Governor issue an officially certified count of the popular votes cast in the state for each presidential-vice-presidential slate. Specifically, the Electoral Count Reform Act of 2022 requires that each state Governor issue a Certificate of Ascertainment containing the number of popular votes received by each candidate no later than six days before the Electoral College meeting.
- The National Popular Vote Compact does not rely on the personal preference or gracious cooperation of state Governors, but, instead, on their complying with federal law.
- The myth about rogue Governors "throwing the system into chaos" by refusing to issue the state's Certificate of Ascertainment is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that—if

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[805] A writ of mandamus can generally be issued by a state court against lower-level state officials (such as a Secretary of State) or boards (such as a canvassing board) in all states. However, in some states, state courts cannot issue a writ of mandamus against the Governor. See Myer, Edward J. 1905. Mandamus against a Governor. *Michigan Law Review*. June 1905. Volume 3. Number 8. Pages 631–645. https://www.jstor.org/stable/1273996. In those states, the remedy would lie with the federal judiciary under the Electoral Count Reform Act of 2022.

[806] Muller, Derek T. 2023. Election Subversion and the Writ of Mandamus. *William and Mary Law Review*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380829

[807] Hamilton, Kate. 2023. State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond. *The Yale Law Journal Forum*. November 22, 2023. Pages 271–272. https://www.yalelawjournal.org/forum/state-implementation-of-the-electoral-count-reform-act-and-the-mitigation-of-election-subversion-risk-in-2024-and-beyond#_ftnref11

legally possible—would be equally possible under the current system. In fact, the current system would be *more vulnerable* to this scary scenario than the Compact would be. A presidential candidate's entire *electoral-vote* lead came from a single state in 17 elections, but a candidate's entire *national-popular-vote* lead came from a single state in only six elections.

- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted and that a single high-handed state official can ignore the law.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, has advanced the theory that a rogue state Governor can thwart the National Popular Vote Compact by simply refusing to issue the state's Certificate of Ascertainment required by federal law.

In his testimony to the Connecticut Government Administration and Elections Committee in 2014, Parnell said:

> **"A very simple way for any non-member state to thwart the Compact, either intentionally or unintentionally,** would simply be to not submit their Certificate or release it to the public until after the electoral college has met. This simple act would leave states that are members of the compact without vote totals from every state, **throwing the system into chaos**."[808] [Emphasis added]

Parnell wrote the following in 2021 in a memo on the Save Our States Blog:

> "**There are many ways non-member states could accidentally or intentionally interfere with NPV.**"
>
> "**NPV relies on the full cooperation and uniform vote reporting of every state**—including states that refuse to join the compact. This would **lead to an electoral crisis if any state is unable or unwilling to report vote totals cast, counted, and certified in the manner assumed by NPV**."[809] [Emphasis added]

In written testimony to the Michigan House Elections Committee on March 7, 2023[810]

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[808] Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014.

[809] Save Our States. 2021. Can non-member states thwart the NPV compact? Accessed May 22, 2021. https://saveourstates.com/uploads/Non-member-states.pdf

[810] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

and similar testimony in Nevada on May 2, 2023,[811] and Alaska on April 25, 2023,[812] Sean Parnell again asserted that the Compact could be thwarted:

> "If a state is simply refusing to cooperate with the compact."[813]

Under the 12th Amendment, the threshold required to win the presidency in the Electoral College is *not* an absolute majority of the number of electoral votes (as is often stated in informal discussions), but instead a "majority of the whole number of Electors *appointed*."

Thus, the failure of a state to appoint presidential electors would lower the number of electoral votes required to win the presidency in the Electoral College.

If it were true that a Governor had the unilateral power to prevent the appointment of his state's presidential electors, then any Governor whose personal preference differed from that of a plurality of that state's voters could unilaterally lower the number of electoral votes needed by his favored candidate.

A rogue Governor refusing to issue the state's Certificate of Ascertainment would not succeed in thwarting the Compact.

Contrary to the impression created by Save Our States, the process of certifying popular-vote counts does not rely on the personal preference or gracious cooperation of state Governors, but instead on their complying with existing federal law—as required by the Supremacy Clause of the U.S. Constitution.[814]

The Electoral Count Reform Act of 2022 requires:

> "§5(a)(1) Certification—Not later than the date that is **6 days before** the time fixed for the meeting of the electors, **the executive of each State shall issue a certificate of ascertainment** of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

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[811] Parnell, Sean. 2023. *Testimony of Sean Parnell Senior Director, Save Our States Action to the Legislative Operations and Elections Committee, Nevada Senate, Re: AJR6 (The National Popular Vote interstate compact), May 2, 2023.* Page 2. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/ExhibitDocument/OpenExhibitDocument?exhibitId=68316&fileDownloadName=SenLOE_AJR6Testimony_SeanParnell_SeniorDirector_SaveOurStatesAction.pdf

[812] *Testimony of Sean Parnell, Senior Director, Save Our States Action, to the State Affairs Committee of the Alaska Senate Re: SB 61 (The National Popular Vote interstate compact), April 25, 2023.* Page 3. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=26238. Parnell made a similar statement before the Michigan House Elections Committee on March 7, 2023. See Page 2 of https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[813] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[814] The Supremacy Clause of the U.S. Constitution (Article VI, clause 2) provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> "(2) Form of certificate—Each certificate of ascertainment of appointment of electors shall (A) set forth the names of the electors appointed and the canvass or other determination under the laws of such State of **the number of votes** given or cast for each person for whose appointment any and all votes have been given or cast…."[815] [Emphasis added]

The 2022 Act also requires:

> "§5(b)(1) Transmission—It shall be the duty of the executive of each State—(1) to transmit to the Archivist of the United States, **immediately after the issuance** of a certificate of ascertainment of appointment of electors and by **the most expeditious method available**, such certificate of ascertainment of appointment of electors."[816,817] [Emphasis added]

The National Archives is, in turn, required to make the Certificates "public" and "open to public inspection."[818]

As described in more detail in section 9.30.1, the Electoral Count Reform Act of 2022 created a special three-judge federal court whose sole function is to enforce the federal requirement for the timely "issuance" and prompt "transmission" of each state's Certificate of Ascertainment.

The rogue Governor scenario—even if legally possible—provides no reason to favor the current system over the Compact.

The myth about rogue Governors "throwing the system into chaos" by refusing to issue the state's Certificate of Ascertainment is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that—even if legally possible—would be equally applicable to the current system.

If state Governors could refuse to issue their state's Certificate of Ascertainment under the National Popular Vote Compact, then they would necessarily possess this power today under the current system.

Almost every election provides numerous examples of states whose Governors belong to the political party opposite to the party that won their state in the presidential election.

In 2020, for example, Joe Biden won the Electoral College with 36 more electoral votes than the 270 required. Nonetheless, Biden's ascension to the presidency depended on certifications by Republican Governors. Republican Governors certified 42 of Biden's electoral votes in 2020, namely:

- Arizona—11 electoral votes—Governor Doug Ducey (R)
- Georgia—16 electoral votes—Governor Brian Kemp (R)

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[815] The Electoral Count Reform Act of 2022 may be found in appendix B of this book.

[816] The Electoral Count Reform Act of 2022 may be found in appendix B of this book.

[817] Section 5(b)(1) of the 2022 Act further requires the executive of each state "to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate."

[818] This section is similar to the wording of the earlier Electoral Count Act of 1887 (which was in effect between 1887 and 2022).

- Massachusetts—11 electoral votes—Governor Charlie Brown (R)
- Vermont—3 electoral votes—Governor Phil Scott (R)
- Nebraska—1 electoral vote from the 2nd congressional district—Governor Pete Ricketts (R)

Alternatively, for the sake of argument, suppose that Donald Trump in 2020 had won the three states that gave him his Electoral College majority in 2016, namely Michigan, Pennsylvania, and Wisconsin. If Trump had retained these three states in 2020, their 46 electoral votes would have given him eight votes more than the 270 required for election. Nonetheless, Trump's re-election to the presidency in 2020 would have depended on certifications of 68 electoral votes by eight Democratic Governors, namely:

- Kansas—6 electoral votes—Governor Laura Kelly (D)
- Kentucky—8 electoral votes—Governor Andy Beshear (D)
- Louisiana—8 electoral votes—Governor John Bel Edwards (D)
- North Carolina—15 electoral votes—Governor Roy Cooper (D)
- Michigan—16 electoral votes—Governor Gretchen Whitmer (D)
- Pennsylvania—20 electoral votes—Governor Tom Wolf (D)
- Wisconsin—10 electoral votes—Governor Tony Evers (D)
- Maine—1 electoral vote from the 2nd congressional district—Governor Janet Mills (D)

Moreover, if state Governors could refuse to issue their state's Certificate of Ascertainment, the current system would be *more vulnerable* to this scary scenario than the National Popular Vote Compact.

Indeed, a presidential candidate's entire *electoral-vote* lead came from a single state in 17 presidential elections, but a candidate's entire *national-popular-vote* lead came from a single state in only six elections (as shown in table 9.16 and table 9.17 in section 9.4.3).

9.31.3. MYTH: A Secretary of State could change a state's method of awarding electoral votes after the people vote in November, but before the Electoral College meets in December.

QUICK ANSWER:

- The U.S. Constitution gives state legislatures the power to choose their state's method of awarding its electoral votes. No state legislature has delegated this power to its Secretary of State.
- The role of the Secretary of State in certifying the winning slate of presidential electors is ministerial. It does not matter whether the Secretary of State personally thinks that electoral votes should be allocated by congressional district, proportionally, by the winner-take-all rule, or by a national popular vote.
- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted and that a single high-handed state official can ignore the law.

MORE DETAILED ANSWER:

The following concern about the National Popular Vote Compact has been raised by a participant of the *Election Law Blog*:

> "In 2004 George Bush won a majority of the votes nationwide, but John Kerry came within something like 60,000 votes in Ohio of winning the Electoral College while losing the popular vote. Say Kerry won those 60,000 votes in Ohio, and the NPV program was in place with California a signer. In that entirely plausible scenario, does anyone think California's (Democratic) Secretary of State, representing a state that Kerry won by a 10% margin (54%–44%), would actually certify George Bush's slate of electors and personally put George Bush over the top for reelection, as the NPV agreement would have required?"[819]

Article II, section 1 of the U.S. Constitution provides:

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…."[820] [Emphasis added]

The method of awarding electoral votes in each state is controlled by the state's election law—not the personal political preferences of the Secretary of State. No state election law gives the Secretary of State the power to select the manner of appointing the state's presidential electors.

No Secretary of State has the power to ignore or override the National Popular Vote Compact if it is the law in the state, any more than he or she could ignore or override the statewide winner-take-all method of awarding electoral votes.

The role of the Secretary of State in certifying the winning slate of presidential electors is ministerial. That is, the role of the Secretary of State is to execute the state's existing law. It does not matter whether the Secretary of State personally thinks that electoral votes should be allocated by the winner-take-all rule, by congressional district, in a proportional manner, or by a national popular vote.

In the unlikely and unprecedented event that a Secretary of State were to attempt to certify an election using a method of awarding electoral votes different from the one specified by existing state law, a state court would immediately prevent the Secretary of State from violating the law's provisions (by injunction) and compel the Secretary of State to execute the provisions of the law (by mandamus).[821]

Note that if this hypothetical scenario were legally permissible or politically plausible, it would have occurred previously *under the current system*.

In 2000, George W. Bush received 271 electoral votes (including Florida's 25 electoral votes)—just one more than the magic number of 270.

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[819] The rules of the *Election Law Blog* do not permit attribution.

[820] U.S. Constitution. Article II, section 1, clause 2.

[821] Muller, Derek T. 2023. Election Subversion and the Writ of Mandamus. March 5, 2023. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380829https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380829

In 2000, there were 10 states[822] that George W. Bush carried that had a Democratic Secretary of State (or chief election official).[823]

The electoral votes of *any one* of these 10 states would have been sufficient to give Al Gore enough electoral votes to become President.

Of course, none of these 10 Democratic Secretaries of State attempted to override their state's existing winner-take-all law by certifying the election of presidential electors who supported the presidential candidate who received the most popular votes nationwide.

Such a post-election change in the rules of the game would not have been supported by the public (even though the public intensely dislikes the winner-take-all system), would have been nullified by a state court, and almost certainly would have led to the subsequent impeachment of the Secretary of State attempting such a maneuver.

Moreover, awarding electoral votes proportionally in any of nine states with a Democratic Secretary of State at the time would have been sufficient to give Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes).[824] A proportional allocation of electoral votes would have, indisputably, represented the will of the people of each of these nine states more accurately than the state-level winner-take-all rule. This is, of course, a policy argument in favor of proportional allocation of electoral votes—not a legal argument.

In addition, awarding electoral votes by congressional districts in any of three states with a Democratic Secretary of State at the time[825] would have been sufficient to give Al Gore enough electoral votes to become President (even after Bush received all 25 of Florida's electoral votes). A district allocation of electoral votes arguably would have represented the will of the people of each of these three states more closely than the winner-take-all rule. Again, this is a policy argument in favor of a system that a state might adopt, but the states involved had not enacted.

If a state legislature enacts the National Popular Vote Compact, and if the presidential campaign is then conducted with voters and candidates knowing that the Compact will govern the awarding of electoral votes in that state, then the Secretary of State will faithfully execute the state's law.

In short, the hypothesized scenario has no basis in law or political reality.

9.31.4. MYTH: A state could greatly inflate the vote count by reporting the cumulative number of votes cast for all of its presidential electors.

QUICK ANSWER:

- The vote tabulation specified by National Popular Vote Compact is based on the number of popular votes received by each "presidential slate"—not the cumulative number of votes received by all of the separate candidates for presidential elector.

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[822] Al Gore's home state of Tennessee, Alaska, Arkansas, Georgia, Kentucky, Mississippi, Missouri, New Hampshire, North Carolina, and West Virginia.

[823] In Alaska, there is no Secretary of State, and the Lieutenant Governor is the state's chief election official.

[824] All of those previously mentioned except Alaska.

[825] Georgia, Missouri, and North Carolina.

- The (much larger) *cumulative* number of votes cast for all of a state's numerous presidential electors is not relevant to the calculation specified by the Compact.
- This hypothetical scenario is founded on the undemocratic notion that voters do not have a right to have their votes for President counted in accordance with the law.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States and a Vice President of the Oklahoma Council on Public Affairs,[826] proposed the following in a memo entitled "Can Non-Member States Thwart the NPV Compact?" on May 22, 2021:

> "**There are many ways non-member states could accidentally or intentionally interfere with NPV**."
>
> "A non-member state could … **multiply each individual vote by the number of electors, dramatically inflating the reported vote count**. If Oklahoma had done this in 2016, Donald Trump would have received more popular votes nationally than Hillary Clinton."[827] [Emphasis added]

Sean Parnell, Senior Legislative Director of Save Our States, provided written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024, saying:

> "The Compact can be easily gamed or manipulated. … **The chief election official of a state [could] report on its 'official statement' each voter as having cast as many votes as the state has presidential electors.** Based on the 2020 results, if Wyoming's Secretary of State … were to do so, it would add nearly a quarter net million votes to the Republican national vote totals."[828] [Emphasis added]

Let's examine England's and Parnell's claim in relation to Oklahoma—the state where the Oklahoma Council on Public Affairs is located.[829]

Oklahoma has seven electoral votes.

In 2016, 949,136 Oklahoma voters voted for the Trump-Pence presidential slate.[830]

The *cumulative* number of votes for *all seven* Republican presidential electors in Oklahoma in 2016 was 6,643,952—that is, seven times the number of *people* (949,136) who voted for the Trump-Pence slate.

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[826] See web site of the Oklahoma Council on Public Affairs at https://ocpathink.org/about

[827] England, Trent. 2021. Can non-member states thwart the NPV compact? *Save Our States Blog*. Accessed May 22, 2021. https://saveourstates.com/uploads/Non-member-states.pdf

[828] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 6. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[829] Oklahoma ballots (like those of 46 other states) do not show the names of each party's seven candidates for the position of presidential elector. In 2020, only three states (Arizona, Idaho, and South Dakota) listed the names of the elector candidates on their ballots. Figure 3.3 shows Idaho's 2020 presidential ballot.

[830] Oklahoma's 2016 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2016/ascertainment-oklahoma.pdf

The authors of this book concede that England's and Parnell's "one-person-seven-votes" plan would indeed be "dramatically inflating."

England continued his advocacy of the "one-person-seven-vote" plan in a 2023 memo referring to the 2020 election (in which the Trump-Pence presidential slate received 1,020,280 votes[831] in Oklahoma):

> "According to the compact, NPV states **'shall treat as conclusive an official statement' of election returns from other states**. So no discretion, right? … NPV states must accept whatever a non-compact state reports as its results then? No matter what? The problem here is obvious.
>
> "The simplest recourse for anti-NPV states would be to report votes for a presidential slate as a vote for each presidential elector on that slate. **In Oklahoma, that would mean that each voter is casting seven votes**. Instead of Donald Trump receiving 1,020,280 votes in Oklahoma in 2020, the state could have reported the total as 7,141,960."[832] [Emphasis added]

The "one-person-seven-votes" scheme would not disrupt the operation of the National Popular Vote Compact.

There is no ambiguity about the fact that the vote tabulation specified by the National Popular Vote Compact is the number of popular votes received by each "presidential slate"—not the cumulative number of votes received by all of the separate candidates for presidential elector in a state.

The (much larger) cumulative number of votes cast for all of a state's presidential electors is no more relevant to the calculation specified by the Compact than the temperature on the steps of the Oklahoma State Capitol on Election Day.

Article III, clause 1 of the Compact states:

> "[T]he chief election official of each member state shall determine **the number of votes for each presidential slate** in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a 'national popular vote total' for each presidential slate." [Emphasis added]

Article V of the Compact defines the term "presidential slate" as follows:

> "**'presidential slate' shall mean** a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States…." [Emphasis added]

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[831] Oklahoma's 2020 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2020/ascertainment-oklahoma.pdf

[832] Save Our States. 2023. NPV Compact Quirks: Ignoring Non-Compact States. August 25, 2023. Accessed July 13, 2024. https://saveourstates.com/blog/npv-compact-quirks-ignoring-non-compact-states

Article III, clause 5 of the Compact says:

> "The chief election official of each member state shall treat as conclusive an **official statement containing the number of popular votes in a state for each presidential slate**." [Emphasis added]

Recall that when Trent England described his plan for "dramatically inflating" Oklahoma's vote, he started by quoting seven words directly from the National Popular Vote Compact. The seven accurately quoted words are shown in green below. However, England then stopped quoting from the Compact and switched to vague words of his own invention (shown in red below). The relevant sentence in England's explanation is shown below:

> "According to the compact, NPV states 'shall treat as conclusive an official statement' of election returns from other states."[833]

The National Popular Vote Compact does not use the vague words "election returns." It uses the words "number of popular votes in a state for each presidential slate."

The "one-person-seven-votes" plan would not succeed in thwarting the National Popular Vote Compact.

Now, for the sake of argument, let's consider what would have happened if the National Popular Vote Compact had been in effect in 2020 and a hypothetical Oklahoma Governor had tried to implement England's and Parnell's "one-person-seven-votes" plan for "dramatically inflating" Oklahoma's vote.

That is, what would have happened if a Governor had issued a Certificate of Ascertainment containing the number 7,141,960 (the cumulative number of votes received by the seven Republican presidential electors) rather than 1,020,280 (the actual number of *people* who voted for the Trump-Pence slate in 2020)?

As a point of reference, let's start by looking at what Oklahoma's Governor actually did in 2020.

Governor J. Kevin Stitt issued an accurate Certificate in 2020 stating that the Trump-Pence presidential slate received 1,020,280 votes, as shown in figure 9.19, figure 9.20, and figure 9.21.[834]

There are two ways that a hypothetical Governor could have tried to implement England's "one-person-seven-votes" plan.

Case 1—The Governor is forthright and honest.

In Oklahoma (and every other state), the presidential vote count is compiled by some designated body (e.g., the state canvassing board) or official (e.g., the Secretary of State) and their employees.

In Oklahoma, the certified vote count is produced by the State Elections Board.

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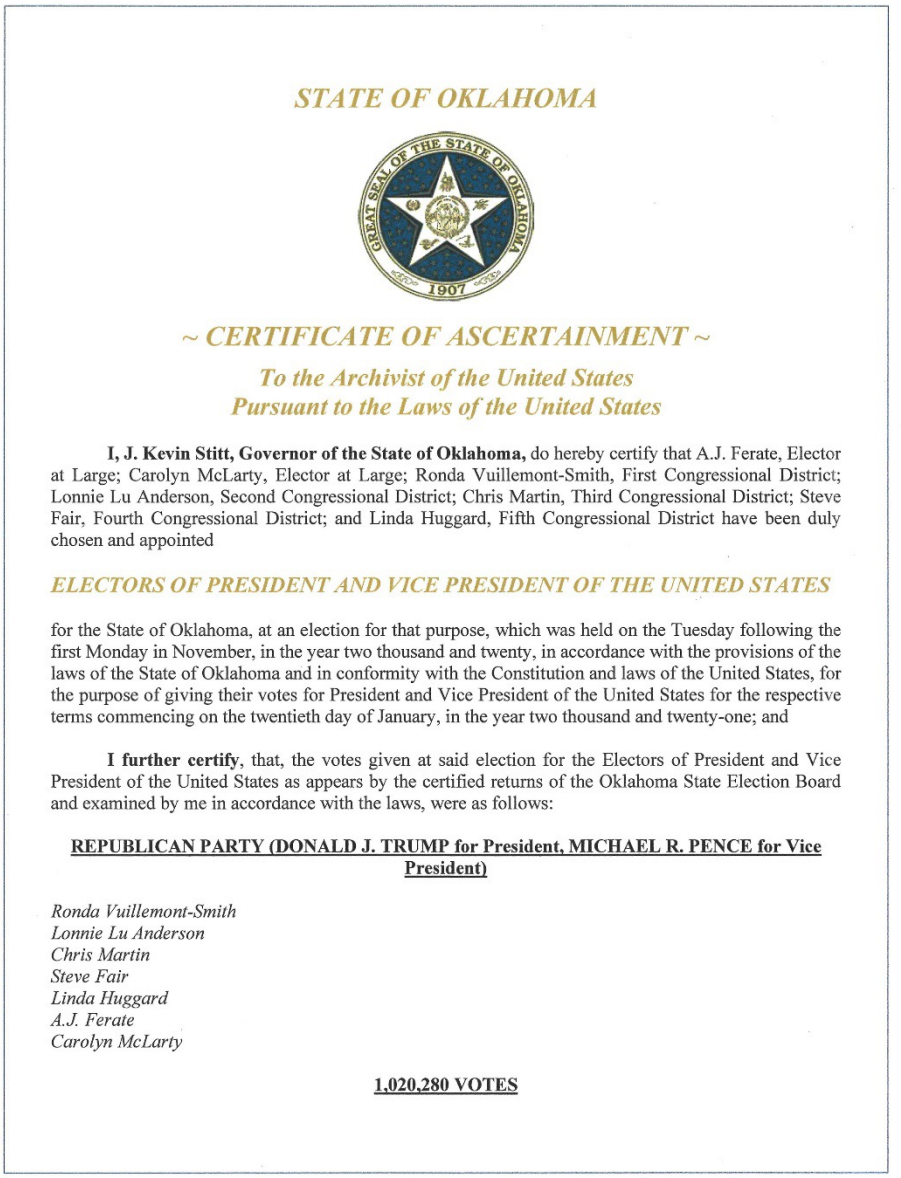
[833] Save Our States. 2023. NPV Compact Quirks: Ignoring Non-Compact States. August 25, 2023. Accessed July 13, 2024. https://saveourstates.com/blog/npv-compact-quirks-ignoring-non-compact-states

[834] Oklahoma's 2020 Certificate of Ascertainment may be also be viewed at the National Archives web site at https://www.archives.gov/files/electoral-college/2020/ascertainment-oklahoma.pdf



STATE OF OKLAHOMA

~ CERTIFICATE OF ASCERTAINMENT ~

To the Archivist of the United States
Pursuant to the Laws of the United States

I, J. Kevin Stitt, Governor of the State of Oklahoma, do hereby certify that A.J. Ferate, Elector at Large; Carolyn McLarty, Elector at Large; Ronda Vuillemont-Smith, First Congressional District; Lonnie Lu Anderson, Second Congressional District; Chris Martin, Third Congressional District; Steve Fair, Fourth Congressional District; and Linda Huggard, Fifth Congressional District have been duly chosen and appointed

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

for the State of Oklahoma, at an election for that purpose, which was held on the Tuesday following the first Monday in November, in the year two thousand and twenty, in accordance with the provisions of the laws of the State of Oklahoma and in conformity with the Constitution and laws of the United States, for the purpose of giving their votes for President and Vice President of the United States for the respective terms commencing on the twentieth day of January, in the year two thousand and twenty-one; and

I further certify, that, the votes given at said election for the Electors of President and Vice President of the United States as appears by the certified returns of the Oklahoma State Election Board and examined by me in accordance with the laws, were as follows:

REPUBLICAN PARTY (DONALD J. TRUMP for President, MICHAEL R. PENCE for Vice President)

Ronda Vuillemont-Smith
Lonnie Lu Anderson
Chris Martin
Steve Fair
Linda Huggard
A.J. Ferate
Carolyn McLarty

1,020,280 VOTES

Figure 9.19 Oklahoma's actual 2020 Certificate of Ascertainment—Page 1

The Board's role as the source of the state's popular-vote count is explicitly acknowledged on page 1 of Governor Stitt's 2020 Certificate of Ascertainment (figure 9.19), which referred to "the certified returns of the Oklahoma State Election Board."

The minutes of the Board (figure 6.1) show that the Board met a week after Election Day in 2020 and certified 1,020,280 votes for the Trump-Pence slate.[835]

[835] The Oklahoma State Board of Elections met on November 10, 2020. The agenda of the meeting https://oklahoma.gov/content/dam/ok/en/elections/agendas/agendas-2020/agenda-11102020.pdf The "meeting packet"

LIBERTARIAN PARTY (JO JORGENSEN for President, JEREMY SPIKE COHEN for Vice President)

Erin Adams
Danny Chabino
Drew Cook
Kevin Hobbie
Rex Lawhorn
Jay Norton
Victoria Whitfield

24,731 VOTES

DEMOCRATIC PARTY (JOSEPH R. BIDEN for President, KAMALA D. HARRIS for Vice President)

Judy Eason McIntyre
Eric Proctor
Jeff Berrong
Christine Byrd
Demetrius Bereolos
Pamela Iron
Shevonda Steward

503,890 VOTES

INDEPENDENT (JADE SIMMONS for President, CLAUDELIAH J. ROZE for Vice President)

Shanda Carter
Terrence Stephens
Hope Stephens
Elizabeth Stephens
Dakota Hooks
Phalanda Boyd
Quincy Boyd

3,654 VOTES

Figure 9.20 Oklahoma's actual 2020 Certificate of Ascertainment—Page 2

If the hypothetical Governor were forthright, the state's Certificate of Ascertainment would make clear that the Trump-Pence slate had received 1,020,280 votes—just as Governor Stitt's actual 2020 Certificate did.

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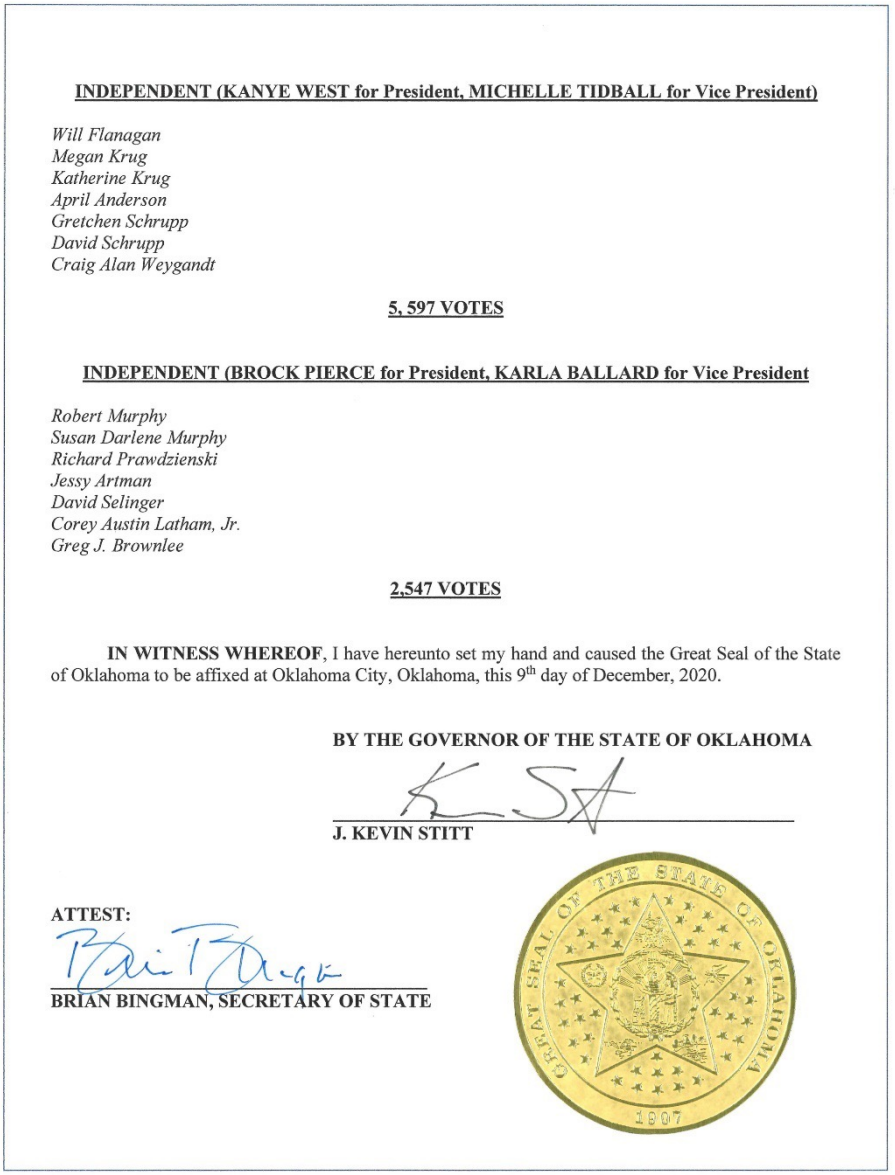
containing the statewide vote counts is at https://oklahoma.gov/content/dam/ok/en/elections/election-results/2020-election-results/2020-general-election-results/meeting-packet-11102020.pdf The minutes of the meeting showing the Board's certification of the vote counts are at https://oklahoma.gov/content/dam/ok/en/elections/minutes/2020-minutes/minutes-11102020.pdf



INDEPENDENT (KANYE WEST for President, MICHELLE TIDBALL for Vice President)

Will Flanagan
Megan Krug
Katherine Krug
April Anderson
Gretchen Schrupp
David Schrupp
Craig Alan Weygandt

5, 597 VOTES

INDEPENDENT (BROCK PIERCE for President, KARLA BALLARD for Vice President

Robert Murphy
Susan Darlene Murphy
Richard Prawdzienski
Jessy Artman
David Selinger
Corey Austin Latham, Jr.
Greg J. Brownlee

2,547 VOTES

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 9th day of December, 2020.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA

J. KEVIN STITT

ATTEST:

BRIAN BINGMAN, SECRETARY OF STATE

GREAT SEAL OF THE STATE OF OKLAHOMA 1907

Figure 9.21 Oklahoma's actual 2020 Certificate of Ascertainment—Page 3

A Governor conceivably might gratuitously include the much larger number (7,141,960) in his Certificate. When properly labeled, the cumulative number of votes cast for the seven Republican candidates for presidential elector would simply be unneeded and irrelevant, but harmless, additional information.

Upon examining Oklahoma's Certificate, the officials of states belonging to the National Popular Vote Compact would, of course, follow their own state's law (that is, the Compact) and use the number specified by the Compact in their calculation of the national popular vote. That is, the officials of states belonging to the Compact would ignore

the irrelevant inflated number (7,141,960) and uneventfully record 1,020,280 votes for the Trump-Pence slate. They would use:

> "the number of popular votes in a state for each presidential slate."[836]

In short, Trent England's "one-person-seven-votes" plan for "dramatically inflating" Oklahoma's vote in order to "interfere with NPV" would fizzle if the Governor were forthright and honest.

Case 2—The Governor is not forthright.

In fact, outright deception is the only way to try to execute England's and Parnell's plan for "dramatically inflating" Oklahoma's vote.

The obvious way to try to execute the deception would be for the hypothetical Governor to issue a Certificate containing Oklahoma's historically used wording (such as used in 2016[837] and 2020 and earlier years) and then insert the inflated cumulative number (7,141,960) in lieu of the actual number of *people* who voted for the Republican presidential slate (1,020,280).

England and Parnell apparently think that inserting a fraudulent number (considerably larger than the state's population) would go unnoticed and unchallenged.

At least two groups would be keenly interested in the fraudulent number.

Lawyers and political operatives working with each presidential campaign routinely scrutinize the actions of canvassing boards, canvassing officials, and Governors throughout every step of the vote-counting and vote-certification process.[838] These scrutineers would have been aware that the Oklahoma State Election Board certified the fact that the Trump-Pence slate received 1,020,280 votes on November 10, 2020 (a week after Election Day).

More importantly, if the National Popular Vote Compact were in effect, the chief election officials of states belonging to it would also be aware that the Oklahoma Board had certified 1,020,280 votes for the Trump-Pence slate.[839] The officials of the states belonging to the Compact would have the minutes of the Oklahoma State Election Board in their possession.

Because the inflated number (7,141,960) in the fraudulent Certificate eventually issued by the hypothetical Governor is manifestly not the number that the Compact requires to be used to compute the national popular vote total, the chief election officials of the states belonging to the Compact would simply use the correct number already in their possession from the state's canvassing board.

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[836] National Popular Vote Compact. Article III, clause 5.

[837] Oklahoma's 2016 Certificate of Ascertainment may be viewed at https://www.archives.gov/files/electoral-college/2016/ascertainment-oklahoma.pdf

[838] 7,141,960 is almost twice Oklahoma's population of 3,959,353 (2020 census).

[839] While the chief election official of each member state might choose to individually monitor the vote-counting and vote-certification process in every other state, it is far more likely—as a matter of practicality and efficiency—that these officials would have pre-designated (by executive agreement) one or two of their members (perhaps on a rotating basis, from year to year) to act as a clearinghouse to collect and distribute certified copies of the officially certified vote count produced by each state's canvassing board or official.

The result would be that England's and Parnell's "one-person-seven-votes" plan for "dramatically inflating" Oklahoma's vote in order to "interfere with NPV" would have no effect on the operation of the Compact.

Although England's and Parnell's plan would have fizzled in terms of interfering with the operation of the Compact, the presidential candidate who won the national popular vote would almost certainly want to see an official correction made in the fraudulent Certificate issued by the hypothetical Governor.

To do this, the disfavored candidate could use state courts. However, a disfavored candidate today would more likely use the special three-judge federal court created by the Electoral Count Reform Act of 2022. This court is open only to presidential candidates and was specifically created to consider cases concerning the "issuance" of a state's Certificate of Ascertainment and its timely "transmission" to the National Archives. The 2022 Act gives this court the power to revise a Governor's fraudulent Certificate.

This new court is to operate on a highly expedited schedule. Time-consuming delays (such as the five-day notice of 28 U.S.C. 2284b2)[840] do not apply. There is expedited appeal to the U.S. Supreme Court. Given that the Constitution requires that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court and the Supreme Court are to be scheduled so that a final conclusion will be reached prior to the Electoral College meeting.

9.31.5. MYTH: Keeping election returns secret could thwart the Compact.

QUICK ANSWER:

- Lobbyists opposing the National Popular Vote Compact have promoted legislation in four states aimed at thwarting the Compact by keeping the popular-vote count secret during the 42 days between Election Day and the Electoral College meeting.
- Federal law guarantees that each state's popular-vote counts would be made public before the Electoral College meets.
- The secret-elections bill promoted by opponents of the Compact would have violated the 1887 federal law that applied at the time it was first proposed. The Electoral Count Reform Act of 2022 provides additional protections against secret elections.
- The secret-elections bill had numerous practical flaws that would have prevented it from ever becoming operational.
- The proposal for conducting secret elections is an antidemocratic parlor game untethered to the real world of law, politics, or public opinion.

[840] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, testified before a Connecticut state legislative committee on February 24, 2014, saying:

> "**A very simple way for any non-member state to thwart the Compact**, either intentionally or unintentionally, would simply be to not submit their Certificate or release it to the public until after the electoral college has met. **This simple act would leave states that are members of the compact without vote totals from every state, throwing the system into chaos**."[841] [Emphasis added]

The first state legislative bill to implement Parnell's plan for secret elections was introduced in New Hampshire on January 8, 2020.[842]

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, wrote in the *Daily Signal* on January 14, 2020:

> "New Hampshire legislators have introduced an election bill that would be **completely unacceptable under normal circumstances. But these are not normal times**.
>
> "Constitutional institutions, especially the Electoral College, are under attack.
>
> "**Extraordinary action may be needed.** Thus, some New Hampshire legislators have proposed to withhold popular vote totals at the conclusion of a presidential election. The numbers would eventually be released, but not until after the meetings of the Electoral College.
>
> "**The idea sounds crazy and anti-democratic. In reality, however, such proposals could save our republic**: They will complicate efforts to implement the National Popular Vote legislation that has been working its way through state legislatures."[843] [Emphasis added]

We agree with Ross that the idea of secret elections is "crazy," "anti-democratic," and "completely unacceptable." We disagree with her call to action to save the Republic.

An article in the conservative publication *Townhall* on January 18, 2020, entitled "National Popular Vote Opponents Are Afraid of the Constitution" took exception to the New Hampshire secret-elections bill:

> "The tinfoil hat wearers, the faction that includes moon-landing deniers and the kind of crackpots William F. Buckley Jr. and Russell Kirk expelled from mainstream conservatism, has set its sights on derailing the National Popu-

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[841] Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014.

[842] New Hampshire House Bill 1531 of 2020 entitled "Relative to the release of voting information in a presidential election." https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/

[843] Ross, Tara. 2020. New Hampshire Is Fighting Back to Defend the Electoral College. *Daily Signal*. January 14, 2020. https://www.dailysignal.com/2020/01/14/new-hampshire-is-fighting-back-to-defend-the-electoral-college/

> lar Vote Interstate Compact. … **One pundit is actually suggesting that the Granite State defy federal law,** specifically section 3, title 3 of the U.S. code—a provision in effect since 1887—to throw a monkey wrench into the final nationwide tally for president. **This particularly nutty idea** would involve New Hampshire refusing to submit the state's official vote count until after electors meet."[844] [Emphasis added]

Shortly thereafter, the New Hampshire House committee unanimously rejected the bill.[845]

Meanwhile, in South Dakota on February 10, 2020, South Dakota Senator Jim Stalzer urged a Senate committee to pass a similar bill:

> "This is a small way we can slow down, delay or even prevent the National Popular Vote from undoing what the founders so carefully put together."[846]

The executive director of the South Dakota Newspaper Association, Dave Bordewyk, testified in opposition to the secret-elections bill, saying:

> "Our concern with this bill is the withholding of the actual votes from the public after an election."
>
> "[Withholding vote totals would raise] suspicions in the minds of those who participated in the election."[847,848]

On February 12, 2020, the South Dakota Senate killed the bill by a 31–1 vote.[849]

In 2021, a similar secret-elections bill was introduced in Mississippi, but it died in committee.[850]

However, a similar bill gained some traction in North Dakota in 2021.[851]

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[844] Herzog, Ashley. 2020. National Popular Vote Opponents Are Afraid of the Constitution. *Townhall*. January 18, 2020. https://townhall.com/columnists/ashleyherzog/2020/01/18/national-popular-vote-opponents-are-afraid-of-the-constitution-n2559694

[845] On January 28, 2020, former Michigan Republican Chair Saul Anuzis testified on behalf of the National Popular Vote organization against the bill. See Testimony Against the Secret Presidential Elections Bill (HB1531) by Saul Anuzis at the New Hampshire House Committee on Election Law https://www.nationalpopularvote.com/sites/default/files/testimony-nh-bill-hb1531-secret_elections-2020-1-28.pdf

[846] Hess, Dana. 2020. GOP bill keeps presidential election vote totals a secret in state. *Rapid City Journal*. February 10, 2020. https://rapidcityjournal.com/news/local/gop-bill-keeps-presidential-election-vote-totals-a-secret-in/article_d557b7d1-19b8-5f57-ae23-e4867bdd7c97.html

[847] *Ibid*.

[848] Heidelberger, Cory Allen. 2020. SB 103: Stalzer Sabotaging National Popular Vote by Keeping South Dakota Vote Count Secret? *Dakota Free Press*. February 10, 2020. https://dakotafreepress.com/2020/02/10/sb-103-stalzer-sabotaging-national-popular-vote-by-keeping-south-dakota-vote-count-secret/

[849] South Dakota SB103 of 2020. Limit the disclosure of presidential election results and to provide for a suspension of such disclosure. http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=103&Session=2020

[850] Mississippi SB2549 of 2021. Election results; prohibit the release of the number of votes cast for the Office of President of the United States. http://billstatus.ls.state.ms.us/2021/pdf/history/SB/SB2549.xml

[851] North Dakota SB2271 of 2021. An Act relating to withholding vote totals for presidential elections. https://ndlegis.gov/assembly/67-2021/regular/bill-overview/bo2271.html?bill_year=2021&bill_number=2271

In written testimony to the North Dakota Senate Government and Veterans Affairs Committee on February 11, 2021, Tara Ross said:

> "**The Electoral College is under attack, and this legislative body can do something about it**. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement."
>
> "**The goal of withholding vote totals is to confuse NPV's efforts to tabulate a national popular vote, without which the compact fails**."[852] [Emphasis added]

Former North Dakota State Senator Curtis Olafson provided written testimony saying:

> "Senate Bill 2271 is intended to thwart the NPVIC should it ever reach 270 Electoral College votes."[853]

On February 10, 2021 (one day before a North Dakota Senate committee hearing), Sean Parnell summarized the Save Our States effort to pass secret election legislation:

> "**What if a state was deliberately trying to thwart the compact? Could they deny NPV compact states access to the vote totals they needed to operate?** Last year legislation was introduced in New Hampshire, HB 1531, that would prevent the release of vote totals prior to the meeting of the Electoral College. Two more states, Mississippi and North Dakota, have similar bills this year (HB 1176 and SB 2271, respectively).
>
> "**This legislation is specifically aimed at thwarting NPV**."[854] [Emphasis added]

The only written testimony submitted to the North Dakota Senate committee hearing on February 11 on the secret-elections bill was the supportive testimony from Tara Ross and former State Senator Olafson. The committee approved the bill, and five days later, the North Dakota Senate passed it by a 43–3 vote.

The Senate-passed bill required that the popular-vote count be kept secret until after the Electoral College meeting (which is currently 42 days after Election Day). It read:

> "Unless a recount has been requested under chapter 16.1-16 or a contest is initiated under this chapter, **a public officer, employee, or contractor of this state or of a political subdivision of this state may not release to the**

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[852] Ross, Tara, 2021. Written testimony on SB 2271 to the North Dakota Senate Government and Veterans Affairs Committee. February 11, 2021. https://ndlegis.gov/assembly/67-2021/testimony/SGVA-2271-20210211-6352-F-ROSS_TARA.pdf

[853] Olafson, Curtis. 2021. Written testimony on SB 2271 to the North Dakota Senate Government and Veterans Affairs Committee. February 11, 2021. https://ndlegis.gov/assembly/67-2021/testimony/SGVA-2271-20210211-6349-F-OLAFSON_CURTIS.pdf

[854] Parnell, Sean. 2021. States consider preemptive measures against National Popular Vote. *Save Our States Blog*. February 10, 2021. Accessed July 13, 2024. https://saveourstates.com/blog/states-consider-preemptive-measures-against-national-popular-vote

> **public the number of votes cast in the general election** for the office of the president of the United States **until after the times set by law for the meetings and votes of the presidential electors in all states**. After the votes for presidential electors are canvassed, **the secretary of state may release the percentage of statewide votes cast for each set of presidential electors to the nearest hundredth of a percentage point**, a list of presidential candidates in order of increasing or decreasing percentage of the vote received by presidential electors selected by the candidates, and the presidential candidate whose electors received the highest percentage of votes."
>
> "**This Act becomes effective** upon certification by the secretary of state to the legislative council of the adoption and enactment of substantially the same form of **the national popular vote interstate compact has been adopted and enacted** by a number of states cumulatively possessing a majority of the electoral college votes."[855] [Emphasis added]

The North Dakota House then held a hearing at which both supporters and opponents of the bill testified.

The web site of the group opposing the secret-elections bill ("No Secret Elections") said:

> "SB2271 is a bill moving through the North Dakota Legislature that would make presidential election vote totals secret until about seven weeks after Election Day, when the Electoral College meets.
>
> "Proponents of the bill think it could stop implementation of the National Popular Vote Interstate Compact, which is progressing towards enactment, by preventing the ascertainment of the national vote for president. They are wrong.
>
> "Whatever one thinks about the National Popular Vote Interstate Compact, the "secret elections" bill, SB2271, is a downright scary idea: It threatens the foundations of North Dakota elections, and it could rob North Dakota voters of their voice in presidential elections.
>
> "Bills almost identical to SB2271 were defeated in the South Dakota Senate by a 32–1 vote in 2020, rejected unanimously by a New Hampshire House committee in 2020, and died in committees in the Mississippi House and Senate already in 2021. North Dakota would be wise also to reject the bizarre idea of keeping election results secret."[856]

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[855] Engrossed Senate bill SB2271. https://ndlegis.gov/assembly/67-2021/regular/documents/21-0828-02000.pdf

[856] See https://www.nosecretelections.com/

Various editorials, op-eds, public comments, and news articles covered the debate.[857,858,859,860]

After the public hearing, the House deleted everything in the Senate bill and replaced it with a bill urging Congress to oppose the National Popular Vote Compact. The House's substitute bill stated:

> "The sixty-seventh legislative assembly urges Congress not to consent to the interstate compact and to oppose any efforts to seek a national popular election of a president other than through an amendment to the Constitution."[861]

A House–Senate conference committee then met to reconcile the differences between the two bills.

The conference committee adopted the House-passed bill expressing the legislature's opposition to the National Popular Vote Compact and added the following provision calling for a study:

> "During the 2021-22 interim**, the legislative management shall consider studying how to defeat the effort of the national popular vote interstate compact** to ensure the electoral college process is preserved as prescribed in the United States Constitution. **The study also must include** examination of how states report presidential election results and **whether states report the results using vote percentages or vote totals**."[862] [Emphasis added]

The conference committee's bill then passed the Senate by a 39–8 vote, and the House by an 80–12 vote, and the Governor signed it.

After the legislature adjourned, "the legislative management" quietly decided not to bother with the study.

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[857] Tribune editorial: Keeping vote count secret a bad solution. *Bismark Tribune*. March 10, 2021. https://bismarcktribune.com/opinion/editorial/tribune-editorial-keeping-vote-count-secret-a-bad-solution/article_b085761c-21c5-545f-abcd-cc6f9af7d638.html

[858] Hennen, Scott. 2021. Bizarre election bill, SB2271, must be defeated. *Minot Daily News*. February 20, 2021. https://www.minotdailynews.com/opinion/community-columnists/2021/02/bizarre-election-bill-sb2271-must-be-defeated/

[859] Port, Bob. 2021. Plain Talk: North Dakota Senate has passed a bill hiding presidential vote counts. *Inforum*. February 24, 2021. https://www.inforum.com/opinion/plain-talk-north-dakota-senate-has-passed-a-bill-hiding-presidential-vote-counts

[860] Gerszewski, Matt. 2021. Letter to editor. *Inforum*. March 3, 2021. https://www.inforum.com/opinion/letter-death-to-north-dakotas-secret-election-act

[861] Engrossed Senate bill SB2271 with House amendments. https://ndlegis.gov/assembly/67-2021/regular/documents/21-0828-03000.pdf

[862] Engrossed Senate bill SB2271 with conference committee amendments. https://ndlegis.gov/assembly/67-2021/regular/documents/21-0828-04000.pdf

The first way that the secret-elections bill violates federal law is that the law requires the state's Certificate of Ascertainment to contain the actual number of popular votes—not percentages.

The law that eventually passed in North Dakota in 2021 asked the legislative leadership to consider conducting an interim study as to:

> "whether states report the results using vote percentages or vote totals."

An elaborate study is not necessary to answer the question of whether a state may report the results of its presidential election using percentages rather than the actual number of votes.

Both the Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 are identical in that they require each state to report the number of votes cast—not percentages.

Both the 1887 law and the 2022 law are identical in that they require:

> "The **canvass** or other determination under the laws of such State of the **number of votes** given or cast for each person for whose appointment any and all votes have been given or cast."[863] [Emphasis added]

North Dakota's 2020 Certificate of Ascertainment (figure 9.22) is an example of a certificate that complies with federal law in that it shows the number of popular votes that each candidate received. As can be seen from North Dakota's 2020 Certificate, the state Board of Canvassers met on November 13 (shortly after Election Day) and certified the number of popular votes won by each presidential slate. A week later (November 20), the Governor and Secretary of State signed the state's Certificate of Ascertainment.

As in most states, North Dakota's Certificate was issued well before the so-called Safe Harbor Day of December 8, 2020, and well before the Electoral College meeting date of December 14, 2020.

The second way that the secret-elections bill violates federal law is that the law requires the state's Certificate of Ascertainment to be issued no later than six days before the Electoral College meets.

No state may play "hide the ball" with its popular-vote counts.

The Electoral Count Reform Act of 2022 requires:

> "§5(a)(1) Certification—Not later than the date that is **6 days before** the time fixed for the meeting of the electors, **the executive of each State shall issue a certificate of ascertainment** of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

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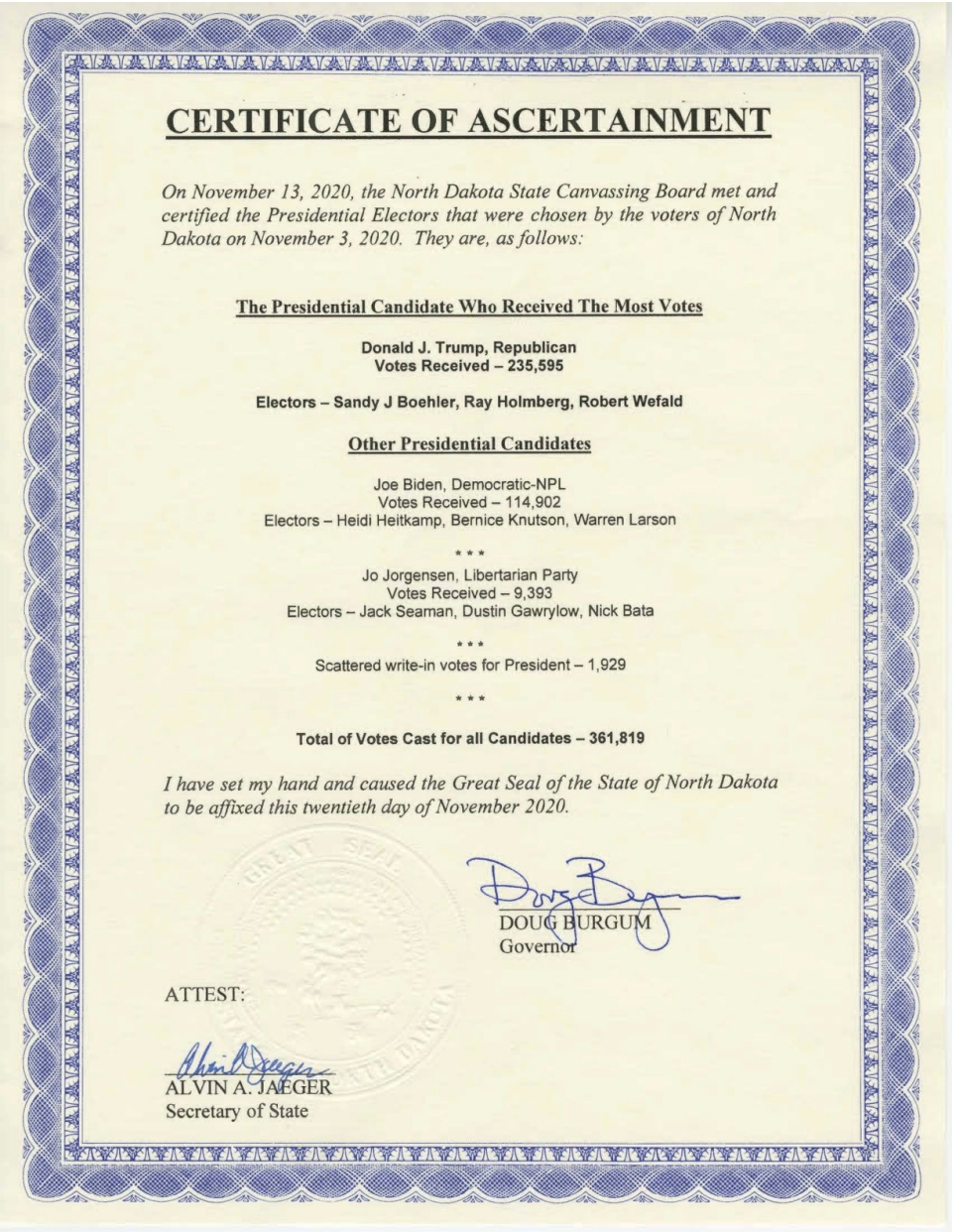
[863] The Electoral Count Reform Act of 2022 is found in appendix B of this book. The earlier Electoral Count Act of 1887 is found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition



CERTIFICATE OF ASCERTAINMENT

On November 13, 2020, the North Dakota State Canvassing Board met and certified the Presidential Electors that were chosen by the voters of North Dakota on November 3, 2020. They are, as follows:

The Presidential Candidate Who Received The Most Votes

Donald J. Trump, Republican
Votes Received – 235,595

Electors – Sandy J Boehler, Ray Holmberg, Robert Wefald

Other Presidential Candidates

Joe Biden, Democratic-NPL
Votes Received – 114,902
Electors – Heidi Heitkamp, Bernice Knutson, Warren Larson

* * *

Jo Jorgensen, Libertarian Party
Votes Received – 9,393
Electors – Jack Seaman, Dustin Gawrylow, Nick Bata

* * *

Scattered write-in votes for President – 1,929

* * *

Total of Votes Cast for all Candidates – 361,819

I have set my hand and caused the Great Seal of the State of North Dakota to be affixed this twentieth day of November 2020.

DOUG BURGUM
Governor

ATTEST:

ALVIN A. JAEGER
Secretary of State

Figure 9.22 North Dakota's 2020 Certificate of Ascertainment

"(2) Form of certificate—Each certificate of ascertainment of appointment of electors shall (A) set forth the names of the electors appointed and the canvass or other determination under the laws of such State of **the number of votes** given or cast for each person for whose appointment any and all votes have been given or cast…." [Emphasis added]

The third way that the secret-elections bill violates federal law is that the law prevents the state's Certificate of Ascertainment from being kept secret until after the Electoral College meeting.

As previously mentioned, the North Dakota Governor and Secretary of State signed the Certificate on November 20, 2020—weeks before the Safe Harbor Day of December 8, 2020, and the Electoral College meeting date of December 14, 2020.

However, even if the Governor and Secretary of State had kept the signed Certificate secret until the Safe Harbor Day (or even if they had delayed issuing the Certificate until that day), they would have been unable to continue to keep North Dakota's vote counts secret.

Federal law requires that the Certificate be "immediately" transmitted to the National Archives in Washington using "the most expeditious method available." A courier from any state capital would take, at most, overnight.

The Electoral Count Reform Act of 2022 requires:

> "§5(b)(1) Transmission—It shall be the duty of the executive of each State—(1) to transmit to the Archivist of the United States, **immediately after the issuance** of a certificate of ascertainment of appointment of electors and by **the most expeditious method available**, such certificate of ascertainment of appointment of electors."[864] [Emphasis added]

Certificates received by the National Archives must be open to public inspection according to section 6 of the 2022 Act.

The requirement for immediate transmission of the Certificate was adopted as a committee amendment during the Senate Administration Committee's consideration of the Electoral Count Reform Act of 2022 in order to prevent secret elections.

As a result of this amendment, a Governor cannot, for example, delay the start of the Certificate's journey to Washington until after the Electoral College meets (and then belatedly send it by "the most expeditious method available").

Thus, if the Governor complies with federal law, the Certificate will arrive at the National Archives in Washington no later than the morning of the fourth day before the Electoral College meeting.

A secret-elections bill would not succeed in keeping a state's vote count secret, because presidential candidates have direct access to a new three-judge federal court whose sole role is to enforce the timely issuance and immediate transmission of Certificates of Ascertainment.

The Electoral Count Reform Act of 2022 created a special three-judge federal court that is open only to presidential candidates.

The new court's sole functions are to guarantee rapid enforcement of the requirement for:

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[864] Section 5(b)(1) of the 2022 Act further requires the executive of each state "to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate."

- timely "issuance" and
- prompt "transmission" of each state's Certificate of Ascertainment to federal officials.

These are precisely the issues that would be presented by an attempt to keep presidential vote counts secret.

This court is to operate on a highly expedited schedule. Time-consuming delays (such as the five-day notice of 28 U.S.C. 2284b2)[865] do not apply. There is expedited appeal to the U.S. Supreme Court.

Given that the Constitution provides that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court and the Supreme Court are to be scheduled so that a final conclusion will be reached prior to the Electoral College meeting.

Secret election laws would deny voters the right to have their vote count.

All 50 states and the District of Columbia currently allow their voters to cast a vote for President. However, each state legislature has the power (under Article II, section 1 of the U.S. Constitution) to choose the method for selecting the state's presidential electors.

Thus, the legislature could authorize itself—instead of the people—to select the state's presidential electors. Indeed, state legislative appointment of presidential electors was the method used by several states in the early years of the Republic.

However, once a state legislature allows its voters to choose the state's presidential electors, each voter acquires the fundamental right to have his or her vote counted.

The U.S. Supreme Court has noted:

> "[I]t is 'as equally unquestionable that **the right to have one's vote counted is as open to protection … as the right to put a ballot in a box**.'" *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964) (quoting *United States v. Mosley*, 238 U.S. 383, 386 (1915))." [Emphasis added]

In the Voting Rights Act, Congress codified the definition of the right to vote to:

> "include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to … having such ballot counted properly and **included in the appropriate totals of votes cast**."[866] [Emphasis added]

Secret elections would deprive the state's voters of the full value of their votes.

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[865] 28 U.S. Code section 2284(b)(2) provides: "If the action is against a State, or officer or agency thereof, at least five days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State."

[866] 52 U.S. Code section 10310(c)(1).

The secret-elections bill would never become operational, because its secrecy provision is automatically suspended if any candidate initiates a recount or a contest. The defects of the original Senate version of North Dakota's secret-elections bill go far beyond noncompliance with federal law.

The author of the North Dakota bill (and the similar bills introduced in New Hampshire, South Dakota, and Mississippi) recognized the inherent conflict between secrecy and the ability to recount or contest an election.

Thus, the North Dakota bill provided that its secrecy requirement would be automatically suspended if a recount (an administrative proceeding) were to be requested or a contest (a judicial proceeding) were to be initiated.

That is, a single presidential candidate could unilaterally disable operation of the North Dakota secret-elections bill merely by requesting a recount or initiating a contest—regardless of the request's merits or its ultimate disposition. Specifically, the bill provided:

> "**Unless a recount has been requested under chapter 16.1-16 or a contest is initiated under this chapter**, a public officer, employee, or contractor of this state or of a political subdivision of this state may not release to the public the number of votes cast in the general election for the office of the president of the United States until after the times set by law for the meetings and votes of the presidential electors in all states." [Emphasis added]

Of course, the Republican presidential nominee would be especially anxious to see North Dakota's popular votes included in the national popular vote total.

Although the current state-by-state winner-take-all method of awarding electoral votes makes North Dakota politically irrelevant in present-day presidential campaigns, the state's overwhelming Republican margin would be very important in a national popular vote for President.

The state of North Dakota gave the 2020 Republican nominee (Trump) a lead of 120,693 votes over the 2020 Democratic nominee (Biden). This margin of 120,693 was considerably greater than Biden's combined margin (42,918) in the three closest states that Biden carried (Georgia, Arizona, and Wisconsin), as shown in table 9.42. These three states together provided Biden with his entire margin of victory in the Electoral College.[867]

Table 9.42 Biden's lead in the three closest states he carried in 2020

State	Trump	Biden	Democratic lead	Electoral votes
Georgia	2,461,854	2,473,633	11,779	16
Arizona	1,661,686	1,672,143	10,457	11
Wisconsin	1,610,184	1,630,866	20,682	10
Total			**42,918**	**37**

[867] Georgia, Arizona, and Wisconsin together possessed 37 electoral votes. Without those three states, Biden's 306–232 victory in the Electoral College would have become a 269–269 tie in the Electoral College. In the event of a tie in the Electoral College, the presidential election would have been thrown into the U.S. House of Representatives (with each state having one vote). In the House, the Republican Party had the 26 votes required to elect a President on January 6, 2021.

Table 9.43 Biden's lead in the four closest states he carried in 2020

State	Trump	Biden	Republican lead	Electoral votes
Georgia	2,461,854	2,473,633	11,779	16
Arizona	1,661,686	1,672,143	10,457	11
Wisconsin	1,610,184	1,630,866	20,682	10
Pennsylvania	3,377,674	3,458,229	80,555	20
Total			**123,473**	**57**

In fact, North Dakota's 120,693-vote Republican margin was almost equal to Biden's combined margin in the *four* closest states that he carried, as shown in table 9.43.

The secret-elections bills contain no plan for running a system of voting and counting that is half-public and half-secret.

Members of Congress, state legislators, numerous other officials, and ballot propositions are on the ballot at the same time as the President.

North Dakota election law specifically requires that each step of the election process for non-presidential offices and ballot propositions be public.

Watchdog groups, candidates, political parties, the media, and ordinary citizens expect to have timely access to the vote counts for non-presidential offices and ballot propositions.

However, the secret-elections bills in New Hampshire, South Dakota, Mississippi, and North Dakota contained no plan for simultaneously conducting and counting secret and non-secret elections.

At the minimum, voting for President would almost certainly have to be conducted using ballots that are separate from those used for the non-secret voting being conducted at the same time and place.

There would be the cost of printing separate ballots for President. The ballots for President would then have to be counted separately from the ballots for other offices—thereby adding to the time required to process the ballots after the polls close.

If electronic voting devices were used (either for everyone or perhaps disabled voters), voting for President would have to be conducted using separate devices. Thus, there would be a cost associated with having a second set of devices.

In short, the secret-elections bills fail to specify how to operate a system of voting and counting that is half-public and half-secret—probably because there is no workable (much less any economic or efficient) way to do that.

The secret-elections bills contain no penalty for the crime of revealing vote counts.

Secrecy can only be maintained if there is some consequence for violating that requirement.

Thus, every "public officer, employee, or contractor of this state or of a political subdivision of this state" involved in conducting a secret presidential election would have to be subject to some fine, jail time, or other penalty for violating the law. However, the secret-elections bills in New Hampshire, South Dakota, Mississippi, and North Dakota contain no penalties.

The secret-elections bills are flawed, because they fail to muzzle the presidential candidates.

Existing North Dakota law provides for both recounting votes[868] and contesting elections in court.[869]

North Dakota law concerning recounts specifically permits the presence of a candidate "personally, or by a representative."

However, the secret-elections bill in North Dakota (and the similar bills in New Hampshire, South Dakota, and Mississippi) did not require secrecy by the candidate or the candidate's representative in either recounts or contests.

Instead, the secrecy requirement would have applied only to a limited group of people, namely:

> "a public officer, employee, or contractor of this state or of a political subdivision of this state."

There is no politically plausible way by which a state could succeed in muzzling a presidential candidate in the midst of a recount or a legal challenge to an election.

Secret court proceedings would necessarily be required for a secret-elections bill to work.

Professor Norman Williams of Willamette College in Oregon recognized that a secret-elections bill could not possibly succeed in achieving its goal without also requiring secret court proceedings. Williams pointed out the necessity of:

> "releasing the vote totals only to the candidates on the condition that the totals are kept confidential until after the Electoral College meets. Such selective release would allow the losing candidate to pursue **a judicial election contest, which itself could be kept closed to the public to ensure the vote total's confidentiality**, but it would frustrate the NPVC [National Popular Vote Compact] by keeping other states from knowing the official vote tally."[870] [Emphasis added]

The secret-elections bills in New Hampshire, South Dakota, Mississippi, and North Dakota did not contain provisions to make court proceedings secret or to require non-disclosure agreements—a tacit acknowledgment that this kind of legislation has no possibility of ever actually going into effect.

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[868] North Dakota Century Code section 16.1-16-01. https://law.justia.com/codes/north-dakota/2015/title-16.1/chapter-16.1-16/

[869] North Dakota Century Code section 16.1-16-02. https://law.justia.com/codes/north-dakota/2015/title-16.1/chapter-16.1-16/

[870] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 213.

Inadvertent errors or fraud could remain undiscovered until after the state's electoral votes were cast in the Electoral College.

Secret vote counts conflict with the principle of having "many eyes" monitor elections.

Today, inadvertent errors (and even fraud) can be uncovered by watchdog groups, candidates, political parties, the media, and ordinary citizens who diligently compare the officially reported vote with what was observed on Election Day at local voting places.

Under all of the proposed secret-elections bills, the counting authority at the state level (e.g., the Board of Canvassers, Secretary of State) would receive the secret counts from local voting places, add them up in secret, and keep both the local and statewide counts secret until after the Electoral College meets.

If vote counts were successfully kept secret at local voting places, the bill would make it impossible for such independent monitoring to occur.

Because the required secrecy would not end until after the Electoral College meeting, inadvertent errors would remain undiscovered.

Supporters of secret elections assume that the public has such a strong attachment to the current winner-take-all rule that they would be willing to abandon the long-standing tradition of having elections closely monitored by the media, civic groups, and challengers and observers representing the parties, candidates, and ballot propositions that happen to be on the ballot at the same time as the presidential election.

Secret vote counts would conflict with provisions of some state constitutions.

In some states, secret vote counts would conflict with the state constitution.

The first secret-elections bill was introduced in New Hampshire.

The New Hampshire Constitution (Article 8) provides:

> "The public's right of access to governmental proceedings and records shall not be unreasonably restricted."

The North Dakota secret-elections bill would not have succeeded in concealing the state's popular-vote count.

Even if the original North Dakota secret-elections bill (and virtually identical bills in New Hampshire, South Dakota, and Mississippi) complied with federal law, and even if there were a solution to the practical and legal problems of implementing secret elections, the proposed legislation would not have succeeded in achieving its goal of concealing the state's popular-vote count.

The reason is that none of these bills required enough secrecy.

The polling books at each local voting location show the total number of voters who voted. This number is closely monitored by candidates, political parties, watchdog groups, the media, and the supporters and opponents of the various statewide ballot measures.

The total number of voters who voted is particularly important, because it provides an absolute cap on the largest number of votes that can possibly be legitimately cast for each race on the ballot. This number is an inherent part of the process of monitoring the security and integrity of elections. It is available at each local voting location.

More importantly, this number is publicly reported on a statewide basis on the

web sites of the North Dakota Secretary of State and the federal Election Assistance Commission.[871,872]

The officially reported statewide total of the number of people who voted in North Dakota in the November 2020 election was 364,499.

Simple arithmetic applied to the *official statewide percentages* that would have been publicly released under the terms of the secret-elections bill would immediately reveal the lowest and highest possible number of votes that each presidential candidate possibly could have received.

If the North Dakota secret-elections bill had been in effect in 2020, 36 votes would have been the difference between the highest and lowest number of popular votes that a presidential candidate could have received.

Nationally, there were 158,224,999 votes cast for President in 2020.

In table 9.44:

- Column 2 shows the number of popular votes received in North Dakota in 2020 by each presidential candidate. These numbers are colored red to indicate that they would have been kept secret under the terms of the North Dakota secret-elections bill. For example, Donald Trump received 235,595 votes. The total number of votes cast for President was 361,819.[873]
- Column 3 shows the percentage of the popular votes received by each candidate to the nearest hundredth of a percent. For example, Trump received 65.11% of the vote. This percentage would have been publicly disclosed under the specific terms of the secret-elections bill. This column and subsequent columns in this table are colored green to indicate that this information would not have been secret under the terms of the secret-elections bill.

Table 9.44 Analysis of North Dakota secret-elections bill

Candidate	Votes	Percent of the candidate's vote rounded off to nearest hundredth	Smallest percent of votes candidate could have received	Largest percent of votes candidate could have received	Smallest number of votes candidate could have received	Largest number of votes candidate could have received	Diff
Status	**Secret**	**Public**	**Public**	**Public**	**Public**	**Public**	**Public**
Trump	**235,595**	**65.11%**	65.105%	65.115%	237,308	237,343	35
Biden	**114,902**	**31.76%**	31.755%	31.765%	115,747	115,783	36
Others	**11,322**	**3.13%**	3,125%	3.135%	11,391	11,427	36
Total	**361,819**	**100.00%**					

[871] North Dakota Secretary of State. *Official 2020 General Elections Results—November 3, 2020*. Accessed July 13, 2024. https://www.sos.nd.gov/elections/election-results

[872] U.S. Election Assistance Commission. 2021. *The Election Administration and Voting Survey: 2020 Comprehensive Report*. Page 28. https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf. Also see https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys

[873] Note that the total number of votes cast for President was 361,819, and that this number is about 99% of those who voted.

- Column 4 shows the *smallest percentage* of votes that each candidate could have received, namely 0.005% less than the percentage in column 3. For example, this percentage for Trump is 65.105%.
- Column 5 shows the *largest percentage* of votes that candidate could have received, namely 0.005% greater than the percentage in column 3. For example, this percentage for Trump is 65.115%.
- Column 6 shows the *smallest number* of votes that a candidate could possibly have received in North Dakota, given the percentage shown in column 4 and the known official number of voters who voted as reported by the Secretary of State (364,499). For Trump, this number was 237,308 votes.
- Column 7 shows the *highest number* of votes that a candidate could possibly have received in North Dakota, given the percentage shown in column 4 and the known official number of voters who voted. For Trump, this number was 237,343 votes.
- Column 8 shows the difference between the lowest possible number of votes from column 6 and the highest possible number of votes from column 7.

Thus, if the North Dakota secret-elections bill had been in operation for the 2020 presidential election, the *publicly available official* information from the state of North Dakota would have established that:

- Trump received somewhere between 237,308 and 237,343 votes—a difference of 35
- Biden received somewhere between 115,747 and 115,783 votes—a difference of 36
- Other candidates together received somewhere between 11,391 and 11,427 votes—a difference of 36.

The popular-vote count from the other 49 states and the District of Columbia in 2020 (shown in table 4.16) was:

- Trump—73,980,280
- Biden—81,153,684
- Others—2,729,216.

When we add in the largest and smallest possible numbers of popular votes for each candidate based on the *publicly available official* information from North Dakota, the nationwide totals will contain 35 or 36 votes of uncertainty:

- Trump—between 74,217,588 and 74,217,623—a difference of 35
- Biden—between 81,269,431 and 82,269,467—a difference of 36
- Others—between 2,740,607 and 2,740,643—a difference of 36.

Thus, the lowest possible nationwide total for Biden would have been 81,269,431, and the highest possible nationwide total for Trump would have been 74,217,623—that is, a nationwide lead for Biden of 7,051,808.

Thus, an accurate designation of the national popular vote winner could be confidently made based on the *publicly available official* information from North Dakota.

Accordingly, if the National Popular Vote Compact had been in effect in 2020, Biden

would have been designated as the "national popular vote winner," and all of the electoral votes of all the states belonging to the Compact would have been awarded to him.

Theoretically, the resulting appointment of presidential electors could be contested; however, the precondition to litigation is the existence of an aggrieved party.

There could only be an aggrieved presidential candidate in the extraordinarily unlikely situation in which the 36 votes were critical to deciding the "national popular vote winner" out of 158,224,999 votes cast nationally.

If the 36 votes (out of 158,224,999 votes cast nationally) could not possibly affect the correctness of the designation of the national popular vote winner, there would be no aggrieved candidate. At most, this would be a case of "no harm, no foul."

Of course, if 36 votes were to matter at the national level, the three-judge federal court (described previously) would use its power to obtain access to North Dakota's actual vote counts and then, if appropriate, use its power to revise the Certificates of Ascertainment submitted by the states belonging to the Compact to reflect the correct national popular vote winner.

9.31.6. MYTH: Abolition of popular voting for President or abolition of the short presidential ballot are "Achilles' heels" that would thwart the Compact.

QUICK ANSWER:

- The National Popular Vote Compact was specifically drafted to prevent a single non-member state from affecting its operation by abolishing popular voting for President or by abolishing the short presidential ballot.

MORE DETAILED ANSWER:

All 50 states and the District of Columbia currently permit the people to vote for President.

Professor Norman Williams of Willamette University has suggested that a single state could obstruct the operation of the National Popular Vote Compact by abolishing popular voting for President.

> "**The most dramatic way in which a non-signatory state could obstruct** the determination of which candidate was the most popular across the nation is for the state to **eliminate its statewide popular elections for President** and have its legislature (or somebody other than the state's voters) appoint its Presidential electors."[874] [Emphasis added]

We agree that Williams' proposal is "dramatic."

Dicta in the U.S. Supreme Court decision in *McPherson v. Blacker* indicate that abandonment of popular voting for presidential electors would be constitutional.[875] It is a his-

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[874] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 209–210.

[875] A contrary view of the dicta in *McPherson v. Blacker* can be found in Bohnhorst, Mark; Fitzgerald, Michael W.; and Soifer, Aviam. 2023. Gaping Gaps in the History of the Independent State Legislature Doctrine: *McPherson v. Blacker*, Usurpation, and the Right of the People to Choose Their President. 49 *Mitchell*

torical fact that, in the nation's first presidential election in 1789, presidential electors were chosen by the state legislature in three states (Connecticut, Georgia, and South Carolina).

An equally dramatic proposal has been advanced by Alexander S. Belenky, who has suggested that a single state could obstruct the operation of the National Popular Vote Compact by abolishing the short presidential ballot.

All 50 states and the District of Columbia currently use the so-called "short presidential ballot"—that is, they permit their voters to vote for President with a convenient single vote (section 2.14).

For example, the use of the short presidential ballot in California permits a voter to cast a convenient single vote for the Trump-Vance slate and to have that single vote be deemed to be a vote for each of the 54 Republican candidates for presidential elector. The short presidential ballot eliminates the burden of casting separate votes for 54 candidates for presidential elector. If the short presidential ballot were not used, a certain number of voters would inevitably get tired or confused while voting separately for 54 candidates. Some voters might vote for candidate(s) for presidential elector from different parties. Other voters might vote for just one elector—an error that was quite common before the short presidential ballot came into universal use.

In any case, the 54 winning elector candidates would inevitably receive slightly different numbers of votes. Consequently, there would be no single number of popular votes attributable to a given presidential-vice-presidential slate in California.

Professor Belenky claimed in an op-ed:

> "Opposing states can turn the plenary right of every state to choose a manner of appointing its electors … into the **NPV's Achilles' heel**.
>
> "By allowing voters to favor individual electors of their choice from any slate of state electors…, **the legislature of each opposing state can make it impossible to tally votes cast there as part of the national popular vote for president**."[876] [Emphasis added]

Belenky's proposed ballot would be, of course, constitutional. Indeed, for most of American presidential history, voters cast votes for individual presidential-elector candidates rather than for presidential candidates. The short presidential ballot did not come into widespread use until the middle of the 20th century.[877]

The presidential ballot in Alabama in 1960 (figure 3.10a and figure 3.10b in section 3.13) shows how a ballot would look under Belenky's proposal. Note that the names of the actual candidates (e.g., John F. Kennedy and Richard Nixon) did not appear on the ballot. Voters were expected to cast 11 separate votes for presidential electors.

Hamline Law Review. Volume 49. Issue 1. Pages 257–315. https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1314&context=mhlr

[876] Belenky, Alexander S. The Achilles Heel of the popular vote plan. *Metro West Daily*. January 29, 2009. https://www.metrowestdailynews.com/story/opinion/columns/2009/01/30/belenky-achilles-heel-popular-vote/41227933007/

[877] The last state to adopt the short presidential ballot was Vermont (in 1980).

Ballots requiring that the voter cast a separate vote for each presidential elector were abolished for the obvious reason that they were inconvenient, confusing, and error prone.

However, neither Williams' nor Belenky's proposal represents an "Achilles' heel" that would permit a single state to paralyze the operation of the National Popular Vote Compact.

In fact, the National Popular Vote Compact was specifically constructed to prevent a single state from thwarting its operation along the lines of Williams' and Belenky's proposals.

Article II of the National Popular Vote Compact creates a legally binding obligation to conduct a popular election for President and Vice President in each member state.

> "Each member state shall conduct a **statewide popular election** for President and Vice President of the United States." [Emphasis added]

The term "statewide popular election" is specifically defined in Article V of the Compact as:

> "a general election at which **votes are cast for presidential slates** by individual voters and counted on a statewide basis." [Emphasis added]

The term "presidential slate" is defined in Article V of the Compact as follows:

> "'Presidential slate' shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state."

That is, the National Popular Vote Compact commits each member state to continue to allow its people to vote for President (something not required by the U.S. Constitution) and also to vote for "presidential slates" rather than individual candidates for presidential elector (something else obviously not required by the Constitution).

These two requirements guarantee that each member state will generate a *single* number representing the popular vote for each presidential-vice-presidential slate as part of a "statewide popular election."

Of course, non-member states are not bound by the National Popular Vote Compact. Although all 50 states and the District of Columbia currently (and wisely) permit their voters to vote for President and (wisely) give their voters the convenience of using the short presidential ballot, a non-member state is not constitutionally obligated to continue these policies.

Thus, a non-member state may effectively opt out of participation in the national popular vote either by repealing its current law establishing the short presidential ballot or by repealing its current law permitting its own voters to vote for President.[878]

The National Popular Vote Compact addresses both of these unlikely possibilities by

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[878] The Colorado Constitution is unique in that it establishes the right of the people to vote for President (starting in 1880). Thus, legislation alone could not deprive the people of the right to vote for President in Colorado. Such a change would require a state constitutional amendment.

specifying that the popular votes that are to be included in the "national popular vote total" are those that are:

> "cast for each presidential slate in **each State of the United States** and in the District of Columbia **in which votes have been cast in a statewide popular election**." [Emphasis added]

If a state continues to let its people vote for President and continues to employ the convenient short presidential ballot, it would be conducting a "statewide popular election" (as that term is specifically defined in the National Popular Vote Compact). That state would, therefore, be automatically included in the "national popular vote total" computed under the National Popular Vote Compact.

In the unlikely event that a non-member state were to pass a law abolishing the short presidential ballot or abolishing popular voting for President, that state would be effectively choosing to opt out of the national popular vote count.

If a state were to opt out of the national popular vote count in either of these two ways, it would, of course, be entitled to appoint its presidential electors in its chosen manner. Its presidential electors would cast their votes for President in the Electoral College, and their electoral votes would be counted along with those cast by presidential electors from every other state. Meanwhile, the National Popular Vote Compact would operate as intended for the remaining states.

Of course, there is no legitimate public policy reason to adopt either Williams' proposal for abolishing popular voting for President or Belenky's proposal to deliberately inconvenience, confuse, and disenfranchise voters.

Both Williams' and Belenky's proposals assume that there would be a Governor and state legislature that is so fanatically opposed to a nationwide vote for President that public opinion would permit them to disenfranchise their own state's voters in order to protest a national popular vote. However, the political reality is that public opinion surveys show high levels of public support for a national popular vote for President in every state for which state-level polls are available, including battleground states, small states, southern states, border states, and other states (section 9.22).

In support of his proposal to abolish popular voting for President, Professor Williams asserts:

> "**Nonsignatory states that traditionally favor one party in the presidential election could eliminate their popular vote without much outcry**. For example, if Utah's Republican-dominated legislature were to return to legislative appointment of its electors in order to undermine the NPVC, **the state's large majority of Republicans would not likely complain**. The end result—the award of the state's electors to the Republican candidate—would be the same. **Ditto for traditionally Democratic states, such as Vermont**.[879] [Emphasis added]

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[879] Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Pages 214–215.

Professor Williams is apparently unaware that 70% of Utah voters have favored a national popular vote for President, including 66% of Utah Republicans. He also is apparently unaware that 75% of Vermont voters have favored a national popular vote for President and that Vermont has enacted the National Popular Vote Compact (section 9.22).

Moreover, states such as Utah and Vermont "that traditionally favor one party in the presidential election" are the most disadvantaged under the current state-by-state winner-take-all rule. It has been decades since Utah or Vermont has received any attention from a presidential candidate in the general-election campaign.

Before the results of the 2012 presidential election were known, it was generally recognized that Mitt Romney could not be elected President in November 2012 without winning the bulk of the closely divided battleground states that Barack Obama had won in 2008.

Six of these battleground states (Ohio, Pennsylvania, Virginia, Florida, Michigan, and Wisconsin) had Republican Governors and Republican legislatures in 2012. These six states possessed 95 electoral votes—coincidentally the exact margin by which Obama won the Electoral College in 2008.

State legislatures have the legal power, *under the current system*, of abolishing popular voting for President.

If abolishing the people's vote for President were politically plausible in the 21st century, as Professor Williams maintains, the Republican Party could have simply appointed 95 Republican presidential electors and saved the expense, effort, and uncertainty of campaigning for President in these six closely divided states. These 95 electoral votes would have effectively guaranteed the presidency to Mitt Romney in 2012.

Yale Law Professor Vikram David Amar commented on Professor Williams' suggestion that popular voting for President could be abolished:

> "Is it really politically plausible to think a state legislature could try, in the twenty-first century, to eliminate the statewide vote for presidential electors? And if it is, **why are we not worried about the equally troubling possibilities for similar subversion under the current regime?**"
>
> "[Is it really politically plausible to think] a state legislature could claim the 'plenary' power that Professor Williams discusses to override a state popular vote?
>
> "The reason these things do not happen is not that the current system lacks loopholes, but rather that the legitimacy of majority rule is so entrenched that **any politician who blatantly tried to subvert the vote would be pilloried**. And given the national polling data in support of a move towards direct national election, it is almost certain that the nonlegal 'democracy norm' would prevent the most blatant of the shenanigans that Professor Williams fears."[880] [Emphasis added]

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[880] Amar, Vikram David. 2011. Response: The case for reforming presidential elections by sub-constitutional means: The Electoral College, the National Popular Vote Compact, and congressional power. 100 *Georgetown Law Journal* 237. Page 249.

Professor Williams is undoubtedly correct in assuming that only a one-party state (e.g., Utah or Vermont) might consider a proposal as extreme as abolishing popular voting for President.

However, a one-party state would be the last place where it would make political sense to do so.

Utah (one of the states suggested by Professor Williams) generated a margin in 2012 in favor of Governor Romney of 488,787 votes. If Utah were to opt out of the National Popular Vote Compact by abolishing popular voting for President when the Compact is in effect, it would cost the Republican nominee for President almost a half million votes.[881]

Thus, if the Governor and legislature of a one-party state were to contemplate opting out of the National Popular Vote Compact as proposed by Professor Williams, the national committee and prospective presidential candidates of the party that would ordinarily win that state's popular vote would exert enormous pressure on the legislature and Governor not to opt out.

In short, Williams' proposal for abolishing popular voting for President and Belenky's proposal to deliberately inconvenience and confuse voters by abandoning the short presidential ballot are parlor games devoid of any connection to real-world politics.

Far from spotting the "Achilles' heel" of the National Popular Vote Compact, Professors Williams and Belenky have actually identified an "Achilles' boot" that would kick out of office any Governor and legislature that attempted to disenfranchise their own voters in the manner proposed by these two opponents of the National Popular Vote Compact.

9.32. MYTHS ABOUT ADJUDICATION OF ELECTION DISPUTES

9.32.1. MYTH: The Compact is flawed, because it does not establish a commission to resolve disputes about popular vote counts.

QUICK ANSWER:

- If, hypothetically, the National Popular Vote Compact had established a commission to try to resolve disputes about popular vote counts, such a commission would prove to be totally superfluous for two reasons. First, this non-judicial commission would be obligated by the Full Faith and Credit Clause of the U.S. Constitution to honor the rulings already made in the state-of-origin. Second, anything a non-judicial commission might try to decide would be immediately appealed to a court, which would then make the final decision.
- Interstate compacts that are intended to execute a small number of very specific actions typically do not have commissions. Compacts that are intended to manage ongoing business operations or to generate a continuing stream of regulations typically have commissions (and also typically have a dedicated staff and budget).

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[881] As another example, North Dakota gave the 2020 Republican nominee (Trump) a lead of 120,693 votes over the Democratic nominee (Biden). This margin of 120,693 was considerably greater than Biden's combined margin (42,918) in the three closest states that Biden carried (Georgia, Arizona, and Wisconsin), as shown in table 9.42.

MORE DETAILED ANSWER:

Opponents of the National Popular Vote Compact have argued that it is flawed, because it does not establish a commission to resolve conflicts.

About half of all interstate compacts are administered entirely by pre-existing state officials and agencies, while the other compacts have commissions.

In his book *Interstate Cooperation: Compacts and Administrative Agreements*,[882] Joseph F. Zimmerman points out that the interstate compacts that have commissions are typically one of two types:

- Facility-management compacts—that is, there is an ongoing need to manage business operations (e.g., bridges, tunnels, airports, seaports, railroads, ferries, marine facilities, office buildings, radioactive waste storage facilities, and industrial development projects). Examples are the New York–New Jersey Port Authority Compact of 1921[883] and the Southwestern Low-Level Radioactive Waste Disposal Compact, where one state operates a storage facility used by other states.[884]
- Regulatory compacts—that is, the compact is intended to create a continuing stream of regulations. Examples include the Interstate Insurance Product Regulation Compact[885] and the Potomac River Compact.[886]

Interstate compacts with commissions typically have dedicated budgets and staff to carry out their functions.

In contrast, what Zimmerman calls "compacts *sans* commissions" are typically those in which the compact is intended to execute one (or a very small number) of precisely defined policies.

There are only three functions that would be performed by the states belonging to the National Popular Vote Compact. They would take place once every four years during a very limited period of time. These functions are well-defined and ministerial in nature, namely to:

(1) **determine the number of votes** for each presidential-vice-presidential slate in each state and the District of Columbia (clause 1 of Article III of the Compact),

(2) **add these numbers together** to get the nationwide total number of votes received by each presidential slate and identify the presidential-vice-presi-

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[882] Zimmerman, Joseph F. 2002. Interstate Cooperation: Compacts and Administrative Agreements. Westport, CT: Praeger Publishers. Chapters 4 and 5.

[883] New York–New Jersey Port Authority Compact of 1921. https://compacts.csg.org/compact/new-york-new-jersey-port-authority-compact-of-1921/ See also https://www.panynj.gov/port-authority/en/index.html

[884] Southwestern Low-Level Radioactive Waste Disposal Compact. https://compacts.csg.org/compact/southwestern-low-level-radioactive-waste-disposal-compact/

[885] Interstate Insurance Product Regulation Compact. https://compacts.csg.org/compact/southwestern-low-level-radioactive-waste-disposal-compact/ The Commission's web site is https://www.insurancecompact.org/

[886] Potomac River Compact. Page 1. https://compacts.csg.org/wp-content/uploads/2024/03/Potomac-River-Compact-of-1958.pdf See also https://compacts.csg.org/compact/potomac-river-compact-of-1958/

dential slate that received the most votes (clause 2 of Article III of the Compact), and

(3) **certify the appointment** in that official's own state of the slate of presidential electors nominated in that official's own state in association with the national popular vote winner (clause 3 of Article III of the Compact).

The second and third functions are, on their face, unambiguous and ministerial. The first function is made unambiguous and ministerial by the fifth clause of Article III of the Compact:

> "The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress."

This is not to say that vote counts cannot be challenged.

Questionable state vote totals can be challenged under the Compact in five ways, including administrative proceedings (e.g., recounts, audits) and proceedings in lower state courts, state supreme courts, lower federal courts, and the U.S. Supreme Court (section 9.30.2).

These five ways of challenging election results are the same ones that are available today under the current system.

Thus, if the popular vote count from a particular state is disputed, that dispute would be adjudicated in the state-of-origin—not in the compacting states.

Once the popular vote count from another state is litigated in the state-of-origin, the Full Faith and Credit Clause of the U.S. Constitution requires every other state to accept the outcome of the litigation in the state-of-origin. The Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[887]

The three functions of the chief election officials of the compacting states listed above are performed *after* each state's final determination of its popular vote count.

Opponents of the National Popular Vote Compact have argued that it is flawed, because it did not create a commission (presumably to second-guess the outcome of litigation already conducted in the state-of-origin).

However, the reality is that a commission would be totally superfluous for two independent reasons:

First, this non-judicial commission would be obligated by the Full Faith and Credit Clause of the U.S. Constitution to honor the rulings already made in the state-of-origin.

Second, anything a non-judicial commission might try to decide would be immediately appealed to a court, which would then make the final decision.

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[887] U.S. Constitution. Article IV. Section 1.

9.32.2. MYTH: States will be able to challenge elections in other states under the Compact.

QUICK ANSWER:

- The National Popular Vote Compact does not create any basis for litigation between states.

MORE DETAILED ANSWER:

A group called "Democrats for the Electoral College" works closely with Save Our States. This group is headed by Jasper Hendricks, who is also Executive Director of the Black Legislative Leadership Network—a group funded by Save Our States.[888]

Hendricks claims that "States could sue other states" as a result of the National Popular Vote Compact:

> "Today, one state cannot sue another state to challenge its election process or results. NPV would change this by requiring states to use results from other states. For the first time, **states would have justiciable interests in other states' elections, leading to endless lawsuits across state lines**."[889] [Emphasis added]

The first sentence above is correct concerning the situation today.

Indeed, this aspect of our federal system of government was illustrated on December 7, 2020—a week before the Electoral College meeting.

At that time, Texas Attorney General Ken Paxton asked the U.S. Supreme Court to allow the state of Texas to file a complaint challenging Pennsylvania's election processes and popular vote count.[890]

Paxton's complaint was an attempt to challenge the election returns from Pennsylvania that showed that Joe Biden had carried the state in November.

The U.S. Constitution gives the Supreme Court original jurisdiction over cases between states.

The Supreme Court ordinarily gives states the chance to present their case.

However, on December 11, 2020, the Court refused Texas' request to file its bill of complaint, saying:

> "The State of Texas' motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. **Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections**."[891] [Emphasis added]

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[888] Black Legislative Leadership Network web site. Accessed July 19, 2024. https://www.blln.org/sar_membership

[889] Democrats for the Electoral College. 2023. Accessed July 13, 2024. https://www.dems4ec.com/

[890] *Texas vs. Pennsylvania*. Motion for Leave to File Bill of Complaint. https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf

[891] *Texas v. Pennsylvania*. December 11, 2020. Order 155-ORIG. 592 U.S. https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf

Nothing on Jasper Hendricks' web site provides any support for his assertion that the National Popular Vote Compact gives any state government a "justiciable interest" in another state's election.

Each state reaches its final determination of its popular vote count (through its Board of Canvassers or other designated board or official).

The Compact certainly does not empower any member state to judge the election returns of any other state—much less initiate litigation disputing another state's returns. Instead, the Compact explicitly forecloses any such effort:

> "The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate…."[892] [Emphasis added]

There is no shortage of ways today to challenge a state's election returns. Indeed, popular-vote counts may be challenged today in the state-of-origin in five ways:

- state administrative proceedings (e.g., recounts, audits),
- state lower-court proceedings,
- state supreme court proceedings,
- federal lower-court proceedings that start in the state-of-origin, and
- federal proceedings at the U.S. Supreme Court.

All five ways were used in both 2000 and 2020.[893]

All five of these existing avenues for litigation will continue to exist under the National Popular Vote Compact.

Once the validity of a state's vote count has been litigated in the state-of-origin, that state cannot possibly complain if its own certified vote count is accepted at face value by states belonging to the Compact.

So, if a vote count has already been litigated in the state-of-origin, and if the states belonging to the Compact are obligated to treat the officially certified vote count of each state as "conclusive," what state does Hendricks think has a "justiciable interest" in the matter?

In any case, there is certainly no shortage of *non-state* litigants today who can challenge election processes or results. In addition, the Electoral Count Reform Act of 2022 explicitly guarantees the presidential candidates themselves direct access to a special three-judge court.

Even if state governments were to acquire the power to challenge the election processes or vote counts of other states, the only practical effect would be to change the identity of the litigants—not the issues to be litigated.

In short, the National Popular Vote Compact does not create any basis for litigation between states. However, even if it did, it is not clear that such a change would have any practical effect.

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[892] National Popular Vote Compact. Article III, clause 5. The full text of the Compact is in table 6.1 and may also be found at https://www.nationalpopularvote.com/bill-text

[893] See The Ohio State University's Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

9.32.3. MYTH: The Compact is flawed, because it is silent as to how disputes between states would be adjudicated.

QUICK ANSWER:

- The National Popular Vote Compact is silent as to how disputes between states would be adjudicated, because that question is answered by the U.S. Constitution.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States (the leading group employing lobbyists to oppose the adoption of the National Popular Vote Compact), testified against the Compact at a Connecticut legislative hearing on a related question:

> "While **the compact creates potential conflicts between states**, it is silent as to how to adjudicate these disputes."[894] [Emphasis added]

The National Popular Vote Compact is indeed silent about this matter.

The reason is that there is no need for the Compact to say anything, because the U.S. Constitution already provides the answer:

> "**In all Cases** affecting Ambassadors, other public Ministers and Consuls, and those **in which a State shall be Party**, the Supreme Court shall have original Jurisdiction."[895] [Emphasis added]

Federal law additionally states:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."[896]

9.32.4. MYTH: The courts will be overwhelmed with litigation under the Compact.

QUICK ANSWER:

- The current state-by-state winner-take-all method of awarding electoral votes creates unnecessary controversy and litigation because it makes the presidency depend on a few thousand votes in one, two, or three decisive states.
- For example, the winner in the Electoral College in 2020 was decided by margins of 11,779 in Georgia, 10,457 in Arizona, and 20,682 in Wisconsin. Recounts, hair-splitting lawsuits, and doubt would have been far less likely if the disgruntled losing candidate had to overcome a nationwide margin such as the national-popular-vote winner's 7,052,7116 margin in 2020.

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[894] England, Trent. 2013. Testimony at Connecticut Government and Administration Committee. February 25, 2013.

[895] U.S. Constitution. Article III, section 2, clause 2.

[896] 28 U.S.C. §1251(a).

- The reason that there are so many lawsuits under the current system is that America's 158,000,000 voters are divided into 51 separate state-level elections. In each presidential election, only a dozen-or-so states are close enough to warrant campaigning by the presidential candidates (that is, within about eight or fewer percentage points). Several of these battleground states frequently end up being very close on Election Day, thereby inviting doubt, recounts, hair-splitting lawsuits, and loss of confidence—even when there was no doubt at all about which candidate won the nationwide popular vote.
- Note that opponents of the National Popular Vote Compact such as Save Our States claim that the Compact will overwhelm the courts with litigation, while the same people simultaneously claim that there is no means of adjudicating disputes under the Compact.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, has said that, because of the Compact:

> "Lawyers would rush into state and federal courts seeking partisan advantage."[897]

These words most accurately describe the *current* state-by-state winner-take-all method of awarding electoral votes.

As UCLA Law Professor Richard L. Hasen and editor of the *Election Law Blog* wrote in 2022:

> "Election litigation rates in the United States have been soaring, with rates nearly tripling from the period before the 2000 election compared to the post-2000 period. In 2020, election litigation rates increased almost 26 percent over rates in 2016."[898]

In 2020, there were 64 lawsuits and numerous additional administrative proceedings involving the presidential election. They were filed in eight closely divided battleground states—Arizona, Georgia, Michigan, Minnesota, Nevada, New Mexico, Pennsylvania, and Wisconsin.[899,900]

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[897] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[898] Hasen, Richard L. 2022. Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come? *Election Law Journal: Rules, Politics, and Policy*. February 22, 2022. Pages 150–154. https://doi.org/10.1089/elj.2021.0050

[899] Ohio State University Moritz College of Law Case Tracker for the 2020 presidential election at https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25

[900] Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

In 2016, the courts considered ordering recounts in three states (Pennsylvania, Michigan, and Wisconsin), and allowed a recount in one state (Wisconsin).

In 2000, the dispute over Florida's 25 electoral votes was considered by:

- administrative proceedings by Florida election officials,
- state court proceedings in lower courts,
- state court proceedings in the Florida Supreme Court,
- federal court proceedings in lower federal courts, and
- proceedings in the U.S. Supreme Court.

The reason there are so many lawsuits under the current system is that America's 158,000,000 voters are divided into 51 separate state-level elections.

In any given election year, a dozen-or-so states are close enough (say, 8 percentage points or less) to give candidates a reason to campaign in those states. Several of these battleground states frequently end up being very close on Election Day. For example:

- Biden's win in the Electoral College in 2020 was decided by margins of 11,779 votes in Georgia, 10,457 in Arizona, and 20,682 in Wisconsin.[901]
- Trump's win in the Electoral College in 2016 was decided by margins of 10,704 votes in Michigan, 22,748 in Wisconsin, and 44,292 in Pennsylvania.
- Bush's win in the Electoral College in 2004 was decided by a margin of 118,601 votes in Ohio.
- Bush's win in the Electoral College in 2000 was decided by a margin of 537 votes in Florida.

Recounts and hair-splitting legal disputes would have been far less likely if the lawyers for the disgruntled loser had to surmount a nationwide margin such as:

- 7,052,711 votes in 2020
- 2,868,518 in 2016
- 4,983,775 in 2012
- 9,549,976 in 2008
- 3,012,179 in 2004
- 543,816 in 2000.

Note that Save Our States simultaneously argues that the National Popular Vote Compact will overwhelm the courts and that there is no means of adjudicating disputes under the Compact.

Sean Parnell, Senior Legislative Director of Save Our States, said in written testimony to the Minnesota Senate Elections Committee on January 31, 2023:

> **"NPV provides no mechanism for resolving** differences or **disputes**. … NPV's failure to anticipate the conflict between the compact and RCV, and its additional failure to provide any guidance or process for resolving this and

[901] Biden's margins in three additional states were also somewhat close in 2020, namely 33,596 votes in Nevada, 80,555 in Pennsylvania, and 154,188 in Michigan.

similar issues, makes it **fatally flawed and dangerous to democracy**."[902] [Emphasis added]

Trent England, Executive Director of Save Our States, joined Parnell in saying:

"Even if state officials knew or suspected that a state's reported vote total was incorrect, **the compact offers no recourse**."[903] [Emphasis added]

9.33. MYTHS ABOUT ADJUDICATION OF THE CONSTITUTIONALITY OF THE COMPACT

9.33.1. MYTH: The constitutionality of the Compact would not be decided until after it is used.

QUICK ANSWER:

- Presidential candidates must know whether an upcoming election is to be conducted on the current state-by-state winner-take-all basis or a nationwide basis. Under the current system, candidates would only solicit votes in a dozen-or-so closely divided states; however, they would solicit votes from every state in the case of a nationwide vote.
- Challenges as to how an upcoming election is to be run—such as what districts are to be used, which candidates will be on the ballot, and how electoral votes are awarded—have historically been decided, by the courts, *before* the election involved. This principle is illustrated by the constitutional challenges to the method of awarding electoral votes that courts decided *before* the 1892 presidential election (when the constitutionality of the congressional-district method of awarding electoral votes was litigated), before the 1968 election (when the constitutionality of the winner-take-all rule was litigated), and before the 2020 election (when the enforceability of state laws concerning faithless presidential electors was litigated and when the constitutionality of the winner-take-all rule was re-litigated). Moreover, the courts have generally rigorously applied the doctrine of *laches* to reject challenges in which the plaintiff was aware of the issue before the election, but waited until after the election results were known to initiate litigation.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, told a meeting at the Heritage Foundation on May 19, 2021, that the system could be gamed by challenging the constitutionality of the National Popular Vote Compact *after* the first election in which it is used.

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[902] Parnell, Sean. 2023. *Save Our States Policy Memo: Ranked-Choice Voting vs. National Popular Vote*. January 27, 2023. https://www.senate.mn/committees/2023-2024/3121_Committee_on_Elections/SF%20538%20-%20Save%20Our%20States%20handout%20RCV%20vs%20NPV.pdf

[903] England, Trent and Parnell, Sean. 2021. National Popular Vote Proposal Will Cause Chaos in the Courts. *Townhall*. February 2, 2021. Note that both England and Parnell signed this article. https://townhall.com/columnists/trentengland/2021/02/02/national-popular-vote-proposal-will-cause-chaos-in-the-courts-n2584075

> "Somebody **sues after the election**. They say … 'We think this somehow violates our rights as California voters.' And you could have one judge just strike the compact down."[904] [Emphasis added]

In general, issues about how an election is to be conducted—such as which districts are to be used, which candidates are on the ballot, and how electoral votes are awarded—have historically been decided by the courts, *before* the election involved. In fact, the only logical time to resolve such issues is before the election.

This principle is illustrated by the fact that challenges to the constitutionality of the method of awarding electoral votes were decided by the courts *before* the 1892, 1968, and 2020 presidential elections.

1892 challenge to the congressional-district method of awarding electoral votes

In 1892, Michigan repealed its existing winner-take-all law and changed to a congressional-district method of awarding the state's electoral votes. In June 1892, the Michigan Supreme Court upheld the constitutionality of that law. Opponents of the new law appealed to the U.S. Supreme Court. Because the November 1892 presidential election was approaching, the U.S. Supreme Court decided the case of *McPherson v. Blacker* on October 11, 1892—that is, before Election Day. The U.S. Supreme Court upheld Michigan's law.[905]

1968 challenge to the state-level winner-take-all method of awarding electoral votes

Similarly, in 1968, the constitutionality of the state-level winner-take-all method of awarding electoral votes was challenged on equal protection grounds. The case of *Williams v. Virginia State Board of Elections* was promptly heard by a three-judge federal court (the usual type of judicial panel for hearing constitutional issues at the time). On July 16, 1968, that court issued its decision upholding the winner-take-all method.[906] See section 2.15.4, section 9.1.13, section 9.1.14, and section 9.25.

2018 challenge to the state-level winner-take-all method of awarding electoral votes

In 2018 (two years before the 2020 election), Equal Citizens, a non-profit organization founded by Harvard Law Professor Lawrence Lessig, organized a coalition of law firms, organizations, academics, and others that brought lawsuits in Massachusetts, Texas, South Carolina, and California, asking that federal courts declare existing state winner-take-all laws unconstitutional.

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[904] England, Trent. 2021. Senator Jim Inhofe on the Value of the Electoral College. Heritage Foundation. May 19, 2021. Timestamp 49:16. https://www.heritage.org/election-integrity/event/virtual-senator-jim-inhofe-the-value-the-electoral-college

[905] *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

[906] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 - Dist. Court, ED Virginia 1968. This decision was affirmed by the U.S. Supreme Court at 393 U.S. 320 (1969) (*per curiam*).

The four substantially similar lawsuits[907,908] were based on an equal protection claim somewhat different from the 1968 case.

The lawsuits were heard by four federal district courts in the states involved. All four district courts reached the same conclusion, namely that the state-by-state winner-take-all method of awarding electoral votes is constitutional.

Equal Citizens then appealed each of the four adverse district-court decisions to the appropriate U.S. Circuit Court of Appeals.

By mid-2020, each of the four appellate courts upheld the decisions reached by their respective district courts. The U.S. Supreme Court declined to review the rulings of the appellate courts. As a result, the 2020 presidential election was conducted under existing winner-take-all laws.

2020 Supreme Court case about faithless electors

Faithless electors played a prominent and controversial role when the Electoral College met on December 19, 2016 (section 3.7).

Litigation ensued after the election as to the power of the states to require presidential electors to vote for the nominees of the political party that nominated the elector.

In the ensuing litigation, there was a conflict between the conclusions reached by the U.S. Court of Appeals for the Tenth Circuit and the Washington State Supreme Court.

With the 2020 presidential election on the horizon, there was increasing concern that unsettled questions concerning faithless electors might play a decisive role in the upcoming election. A number of academic and political organizations filed briefs in the U.S. Supreme Court, urging it to hear and decide the issue before the 2020 election.

As a result, the U.S. Supreme Court heard the cases concerning faithless electors on May 13, 2020. It issued its decision in *Chiafalo v. Washington*[909] on July 6, 2020—thus settling the question prior to Election Day. See section 3.7.8.

Doctrine of *laches*

As explained in Dobbs and Robert's Law of Remedies, Damages, Equity, Restitution:

> "*Laches* is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant."[910]

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[907] The Equal Citizens web site contains the complaints, briefs, and decisions in all four of these cases. See https://equalvotes.us/legal-documents/

[908] Lessig, Lawrence. 2018. Electoral College confusions. *The Hill*. October 31, 2018. https://thehill.com/blogs/congress-blog/politics/413998-electoral-college-confusions?fbclid=IwAR0rpdunHHcISOQ2jf3y1auTqvdCrwI4_oT9zssHqdYys5ve4PEyCJxVlB8#.W9mgbFEI_n4.facebook

[909] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

[910] Dobbs, Dan B. and Roberts Captice L. 1993. *Law of Remedies*, *Damages*, *Equity*, *Restitution*. St. Paul, MN: West Academic Publishing.

As UCLA Law Professor Richard L. Hasen and editor of the *Election Law Blog* explains concerning election litigation:

> "laches … prevent[s] litigants from securing options over election administration problems."[911]

In matters of election litigation, the courts generally apply the doctrine of *laches* to reject challenges in which the plaintiff was aware of an issue before an election but waited to see the election results before raising the issue in court. Thus, the only time to raise such election challenges is before the election involved.

9.33.2. MYTH: Every state and federal court at every level will be bogged down with litigation concerning the constitutionality of the Compact.

QUICK ANSWER:

- Litigation about the constitutionality of the National Popular Vote Compact would most likely involve one case brought in one court (or be quickly consolidated into one case).

MORE DETAILED ANSWER:

In speaking in opposition to the National Popular Vote Compact in Connecticut, State Senator Michael McLachlan said during the Senate floor debate:

> "You could make a fortune as a lawyer running around to states defending the Electoral College, or in the case of NPV you could make a fortune trying to make a fortune trying to defend that. … This is going to be such a legal train wreck that you can't imagine how incredible that's going to be. Just a legal train wreck. **Every state court, state Supreme Court, district courts, Supreme Court is going to be bogged down with this discussion for years**."[912] [Emphasis added]

Senator McLachlan's concern about every state and federal court at every level being "bogged down" is especially inapplicable to the National Popular Vote Compact, because any legal challenge to it would, almost certainly, be initiated by an Attorney General from a non-compacting state (arguing that the non-compacting state would be injured in some way). In that event, the U.S. Constitution directs cases between states to one court:

> "**In all Cases** affecting Ambassadors, other public Ministers and Consuls, and those **in which a State shall be Party**, the Supreme Court shall have original Jurisdiction."[913] [Emphasis added]

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[911] Hasen, Richard L. 2005. Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown. *Washington and Lee Law Review*. Volume 62, Issue 3. Summer 2005. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1284&context=wlulr

[912] Transcript of the floor debate on HB 5421 in Connecticut Senate. May 5, 2018. Page 32.

[913] U.S. Constitution. Article III, section 2, clause 2.

In any event, even if more than one lawsuit were initiated, the litigation would be quickly consolidated into one case.

Connecticut State Representative Daniel Fox observed:

> "Litigation is a fact of life after any legislation is proposed … as it is with any other law or statute that's passed by this body or others."[914]

9.34. MYTHS ABOUT RECOUNTS

9.34.1. MYTH: Recounts would be frequent under a national popular vote.

QUICK ANSWER:

- Recounts in presidential elections would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.
- The number of votes that are likely to be changed by a nationwide recount can be estimated by standard statistical methods applied to historical data. The result of such analysis is that the probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.
- To say it another way, the probability is very low (0.26% or approximately one chance in 369) that a nationwide recount would change the initial winner's lead by more than 24,294 votes.
- Also, the probability is very high (99.74%) that only one nationwide presidential election in 324 would be close enough to be reversed by a recount. That is, one nationwide presidential election every 1,296 years would be close enough to be reversed by a recount.
- Recounts come to mind in connection with presidential elections only because a few thousand votes in a handful of closely divided states regularly decide the presidency under the current state-by-state winner-take-all system.
- Incorrect statements about recounts are often based on misinformation as to how rare recounts are in practice, how few votes are ever changed by recounts, and how few recounts ever change the outcome of an election.
- The myth that recounts would be frequent under a national popular vote is one of many examples in this book of a criticism of the National Popular Vote Compact where the Compact would be distinctly superior to the current state-by-state winner-take-all method of awarding electoral votes.

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[914] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 121.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, testified before the Alaska Senate:

> "A direct election system … would result in … **constant recounts**."[915] [Emphasis added]

As we will show in this section, recounts would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.

In fact, the probability is very high (99.74%) that only one nationwide presidential election in 324 would be close enough to be reversed by a recount. That is, one nationwide presidential election every 1,296 years would be close enough to be reversed by a recount.

Incorrect statements about recounts are often based on misinformation as to how rare recounts are in practice, how few votes are ever changed by recounts, and how few recounts ever change the outcome of an election.

Thus, we start the discussion of recounts with actual historical data about recounts. The "Facts about recounts" section below will show that recounts:

- are rare;
- change very few votes; and
- rarely reverse the original outcome.

We then apply standard statistical methods to show that the probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.

To say it another way, the probability is very low (0.26% or approximately one chance in 369) that a nationwide recount would change the initial winner's lead by more than 24,294 votes.

Facts about recounts

FairVote has compiled historical data on elections[916] that shows that there have been 6,929 statewide general elections[917] in the 24-year period from 2000 to 2023.

Table 9.45 shows the number of statewide general elections by year.

Table 9.46 shows the specific elective office or ballot proposition involved in the 6,929 statewide general elections between 2000 and 2023.

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[915] Oral and written testimony presented by Tara Ross at the hearing of the Alaska Senate State Affairs Committee in February 2011.

[916] Otis, Deb. 2023. *An Analysis of Statewide Elections Recounts 2000—2023*. FairVote. https://fairvote.org/report/election-recounts-2023/. There is a spreadsheet with additional details at https://docs.google.com/spreadsheets/d/1ZSpGqPk7tElu__dRC3ulb3czFFJ72BCsybygpn1IorA/edit#gid=1833378664

[917] FairVote defines a "statewide general election" as a state-level election that provides the opportunity for all citizens—no matter where they live in the state—to vote for the same candidates or to vote on the same ballot question. A majority of such elections occur in November of even-numbered years. However, some elections occur in November of odd-numbered years, and some occur at other times (often the spring) of both even-numbered and odd-numbered years. In addition, statewide ballot propositions sometimes appear on primary election ballots, and there are occasional special statewide general elections (e.g., recalls). Note that a race for the U.S. House of Representatives is a "statewide general election" only if the state has just one seat in the House.

Table 9.45 The number of statewide general elections 2000–2023

Year	Number of elections
2000	538
2001	52
2002	554
2003	79
2004	448
2005	59
2006	598
2007	70
2008	449
2009	40
2010	708
2011	60
2012	419
2013	46
2014	511
2015	56
2016	470
2017	36
2018	523
2019	62
2020	453
2021	67
2022	559
2023	72
Total	**6,929**

Table 9.46 The 6,929 statewide general elections 2000–2023 by type of election

Office	Number of statewide general elections
President*	300
U.S. Senator	421
U.S. Representative	91
Governor	317
Lieutenant Governor	196
Secretary of State	220
Attorney General	262
Treasurer	214
Auditor	148
Comptroller	56
Public Service Commissioner	51
Agriculture or Industries Commissioner	71
Labor Commissioner	21
Insurance Commissioner	56
Public Lands Commissioner	29
Tax Commissioner	7
Corporation Commissioner	29
Railroad Commissioner	14
Public Utilities Commissioner	10
Mine Commissioner	6
Superintendent of Public Instruction or Education	77
Board of Education or Governors	33
University Regent	26
Trustee	10
Judicial positions and retention	1,762
Ballot questions	2,476
Other	26
Total	**6,929**

* Note that the recount of the presidential vote in Florida in 2000 shown in the table was the automatic recount that was required by Florida law and that was held shortly after Election Day. This mechanical recount reduced Bush's initial 1,784-vote lead by 1,247 to a 537-vote lead. This mechanical recount did not involve a hand inspection of each ballot. The Gore campaign subsequently requested a hand recount. This hand recount was halted by the U.S. Supreme Court, thus leaving Bush's 537-vote statewide margin as the final result in Florida.

Table 9.47 shows the number of recounts by year.

There were only 36 recounts among the 6,929 statewide general elections during the 24-year period from 2000 to 2023.[918]

That is, the probability of a recount in a statewide general election is 1-in-192.

[918] Not all recounts are conducted because the apparent losing candidate believes that he or she has any realistic probability of reversing the outcome. Some states conduct automatic recounts that are triggered because the original difference between the top candidates is less than some specified percentage (often 0.1% but sometimes as large as 0.5%) or some specified number of votes. The government pays for automatic recounts. One reason that states conduct automatic recounts is to increase public confidence in elections. Another reason is that recounts provide state officials and the public with the periodic opportunity to audit the operation of the state's election process.

Table 9.47 The number of statewide recounts by year

Year	Number of statewide general elections	Number of recounts
2000	538	5
2001	52	
2002	554	
2003	79	
2004	448	6
2005	59	1
2006	598	3
2007	70	
2008	449	2
2009	40	1
2010	708	3
2011	60	1
2012	419	
2013	46	1
2014	511	4
2015	56	
2016	470	1
2017	36	
2018	523	3
2019	62	
2020	453	2
2021	67	1
2022	559	2
2023	72	
Total	**6,929**	**36**

Table 9.48 shows the change in the initial winner's votes in the 36 statewide recounts between 2000 and 2023. The recounts are listed in chronological order.

- Columns 1, 2, and 3 show the year, state, and race involved in the recount.
- Column 4 shows whether the original result was upheld or reversed.
- Column 5 shows the total number of votes cast for the initial (pre-recount) winner and the initial loser.
- Column 6 shows the initial winner's lead over the initial loser.
- Column 7 shows the final (post-recount) winner's lead over the final loser.
- Column 8 shows the change in the initial winner's lead resulting from the recount. In the case of a recount that does not reverse the original outcome, a negative number in this column indicates that the initial winner's lead was reduced by the recount, and a positive number indicates that the initial winner's lead was increased by the recount. In the case of a recount that reversed the original outcome, the number in this column will always be negative.

Table 9.48 Change in the initial winner's votes in all 36 recounts of statewide general elections 2000–2023

Year	State	Race	Effect of the recount	Total votes	Initial winner's lead	Final winner's lead	Change in initial winner's votes
2000	CO	Education Board	Upheld	1,536,619	1,211	90	–1,121
2000	FL	President	Upheld	5,816,486	1,784	537	–1,247
2000	MT	Public Instruction	Upheld	63,080	64	61	–3
2000	WA	Secretary of State	Upheld	2,137,677	10,489	10,222	–267
2000	WA	U.S. Senator	Upheld	2,396,567	1,953	2,229	276
2004	AK	U.S. Senator	Upheld	289,324	9,568	9,349	–219
2004	AL	Amendment 2	Upheld	1,380,750	1,850	1,846	–4
2004	GA	Court of Appeals	Upheld	414,484	348	363	15
2004	WA	Governor	Reversed	2,742,567	261	129	–390
2004	WY	Amendment A*	Upheld	218,433	858	803	–55
2004	WY	Amendment C	Upheld	233,955	1,282	1,232	–50
2005	VA	Attorney General	Upheld	1,941,449	323	360	37
2006	AL	Amendment	Upheld	816,102	2,642	3,150	508
2006	NC	Court of Appeals	Upheld	1,539,190	3,416	3,466	50
2006	VT	Auditor	Reversed	222,835	137	102	–239
2008	MN	U.S. Senator	Reversed	2,422,965	215	225	–440
2008	OR	Measure 53	Upheld	978,634	550	681	131
2009	PA	Superior Court	Upheld	1,821,869	83,693	83,974	281
2010	AZ	Proposition 112	Upheld	1,585,522	128	194	66
2010	MN	Governor	Upheld	1,829,620	8,856	8,770	–86
2010	NC	Court of Appeals	Upheld	1,079,980	5,988	6,655	667
2011	WI	Supreme Court	Upheld	1,497,330	7,316	7,004	–312
2013	VA	Attorney General	Upheld	2,207,389	165	907	742
2014	MO	Amendment	Upheld	996,249	2,067	2,375	308
2014	NC	Supreme Court	Upheld	2,474,117	5,427	5,410	–17
2014	NM	Public Lands Comm	Upheld	499,330	656	704	48
2014	OR	Initiative	Upheld	1,506,176	802	837	35
2016	WI	President	Upheld	2,785,823	22,177	22,748	571
2018	FL	Agriculture Comm	Upheld	8,059,156	5,326	6,753	1,427
2018	FL	Governor	Upheld	8,119,910	33,600	32,463	–1,137
2018	FL	U.S. Senator	Upheld	8,188,978	12,600	10,033	–2,567
2020	GA	President	Upheld	4,935,716	12,780	12,284	–496
2020	NC	Supreme Court	Upheld	5,391,556	416	401	–15
2021	PA	Commonwealth Court	Upheld	2,561,068	16,804	22,354	5,550
2022	AZ	Attorney General	Upheld	2,508,715	511	280	–231
2022	AZ	Public Instruction	Upheld	2,502,987	8,967	9,188	221
		Average		**2,380,628**	**7,368**		**57**

* The two entries for Wyoming in 2004 require explanation. In Wyoming, a constitutional amendment must be approved by a majority of the total number of votes cast on Election Day—rather than a majority of those voting on the amendment. In other words, failure to vote on a constitutional amendment is effectively a "no" vote. In November 2004, 245,789 votes were cast in Wyoming, so the required majority to pass an amendment was 122,896. Thus, the outcome was determined by the difference between the number of "yes" votes and 122,896 rather than the difference between the number of "yes" and "no" votes. Amendment A received 122,038 "yes" votes (and 96,792 "no" votes) in the initial count and was thus only 858 votes short of the 122,896 votes required for passage. This small shortfall (0.3491% of 245,789) triggered an automatic recount of Amendment A. The recount of Amendment A only changed 55 votes (0.0223% of 245,789). Thus, Amendment A was defeated—that is, the recount did not change the outcome. Amendment C received 124,178 "yes" votes (and 110,169 "no" votes) in the initial count and was thus only 1,282 over the 122,896 votes required for passage. This small overage (0.5216% of 245,789) triggered an automatic recount of Amendment C. The recount of Amendment C changed 50 votes (0.0203% of the 245,789). Thus, Amendment C was passed—that is, the recount did not change the outcome.

Table 9.48 shows that recounts change very little:

- The outcome of the election was reversed in only three of the 36 recounts—that is, only one in 12 recounts reversed the outcome. In other words, the outcome of only one statewide general election in 2,309 was reversed by a recount.
- As one would expect, the initial winner gained votes in about half of the recounts (17 of the 36) and lost votes in the others (as shown in column 8).
- As one would expect, after adding up the gains and losses, the average change in the initial winner's number of votes due to a recount is *near-zero*. Specifically, it is 57 votes—a mere 0.002% of the average number of votes cast in the recounted race (that is, 2,380,628, as shown in column 5). This 57-vote change is a mere 0.8% of the initial winner's average lead (that is, 7,368, as shown in column 6).[919]
- As one would expect, the average *magnitude* (absolute value) of the change in the initial winner's number of votes due to a recount is also near-zero. Specifically, it is 551 votes—a mere 0.02% of the average number of votes cast in the recounted race (that is, 2,380,628). This 551-vote change is also a small fraction of the initial winner's average lead (that is, 7,368).

The only three recounts that overturned the original outcome during the 24-year period were of the:

- 2004 Governor's race in Washington State, where the initial (pre-recount) winner's 261-vote lead became a 129-vote loss;
- 2006 state Auditor's race in Vermont, where the initial winner's 137-vote lead became a 102-vote loss; and
- 2008 U.S. Senate election in Minnesota, where the initial winner's 215-vote lead became a 225-vote loss.

Not surprisingly, the initial winners' leads in the recounts that overturned the outcomes (261, 137, and 215, respectively) were all quite small in comparison to the average lead of all the initial winners in the table (that is, 7,368, as shown in column 6).

In summary, in the 6,929 statewide general elections in the 24-year period between 2000 and 2023:

- There were only 36 recounts. That is, the probability of a statewide general-election recount is 1-in-192.
- The average change in the initial winner's vote count was 57 votes.
- Only 1-in-12 recounts reversed the original result.

[919] The average of the absolute values in column 1 is 551.

Statistics of recounts

The distribution of the number of votes gained or lost by the initial winner as a result of a statewide recount (that is, column 8 of table 9.48) can be characterized by two numbers—the average (mean) and the standard deviation.

The standard deviation of a distribution (called "sigma" or "σ") is a widely used statistical measure of the amount of variation in a set of data. It is described in any elementary textbook on statistics and in numerous tutorials.[920] The standard deviation, σ, of a set of data can be easily computed by spreadsheet software, such as Excel.

The standard deviation of the distribution of changes in the initial winner's number of votes as a result of state-level recounts is 1,134 votes.

As previously mentioned, the average (mean) of the distribution of changes in the initial winner's votes as a result of state-level recounts is 57 votes.

How many votes are likely to be changed by a nationwide recount?

Once we know the standard deviation and mean of distribution of changes produced by state-level recounts, we can estimate the likely number of votes that would be changed if 51 state-level recounts were conducted—that is, if a nationwide recount were conducted.

The number of votes that are likely to be changed by a nationwide recount can be estimated by standard statistical methods applied to data about actual recounts and the data about popular-vote margins in presidential elections.

The results of this analysis are:

- The probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.
- The probability is very high (99.74%) that only one nationwide presidential election in 324 would be close enough to be reversed by a recount. That is, the outcome of only one nationwide presidential election in 1,296 years is likely to be changed by a recount.

Details of the statistical analysis

This section explains how the above conclusion was reached.

The fundamental theorem of statistics (also known as the "Central Limit Theorem") provides a way of computing what is likely to happen when a statistical process (in this case, a state-level recount) is repeated numerous times.

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[920] For example, see *Wikipedia* at https://en.wikipedia.org/wiki/Standard_deviation#Interpretation_and_application.

The Central Limit Theorem tells us that the likely distribution of changes in the initial winner's number of votes resulting from 51 state-level recounts (that is, a national recount) will be the familiar bell-shaped (Gaussian) curve.

In addition, the distribution of the changes in votes resulting from 51 state-level recounts is 8,098 votes. This number is obtained by multiplying 1,134 (the standard deviation associated with one statewide recount) by the square root of 51 (the number of repetitions of the process).

Figure 9.23 shows a Gaussian distribution with a standard deviation of 8,098 votes.

To simplify the explanation of this figure, we *temporarily* assume that the average (mean) of the distribution is zero (when it is, in fact, 57 votes).

The numbers along the horizontal axis at the very bottom of this figure represent the number of votes that the initial (pre-recount) winner would lose or gain as a result of 51 state-level recounts.

The horizontal axis ranges from three times the standard deviation of 8,098 (that is, 24,294) below the mean to three standard deviations above the mean. That is, the figure focuses on a change of –24,294 votes (the initial winner losing that number of votes) to 24,294 votes (the initial winner gaining that number of votes).

The numbers above the number of votes on the horizontal axis correspond to the number of standard deviations. They range from three standard deviations below the mean (–3σ, that is –24,294 votes) to three standard deviations above the mean (3σ, that is 24,294).

A key point about the Gaussian curve is that the *area* under the portion of the curve lying above two points on the horizontal axis equals the *probability* that a nationwide recount will change the number of votes between those two points on the horizontal axis.

For example, consider the portion of the Gaussian curve lying between –8,098 votes and 8,098 votes on the horizontal axis—that is, between one standard deviation below the

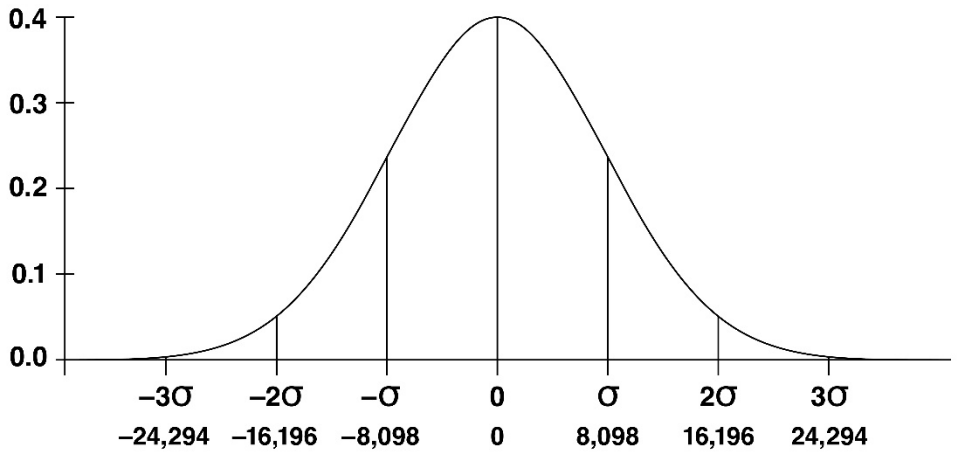

Figure 9.23 Probability that a nationwide recount changes a particular number of votes (assuming an illustrative mean of 0)

mean (zero) and one standard deviation above the mean. This portion of the curve constitutes approximately two-thirds of the area under the Gaussian curve. This tells us that the probability is approximately two-thirds that the initial winner's change in votes due to a nationwide recount will range between –8,098 and 8,098 votes (that is, within one standard deviation on either side of the mean).

Now consider the portion of the Gaussian curve lying between –24,294 votes and 24,294 votes (that is, three standard deviations on either side of the mean). This portion of the curve constitutes 99.74% of the area under the curve. This tells us that the probability is 99.74% that the initial winner's change in votes due to a nationwide recount will range from –24,294 votes to 24,294 votes.

Note that there is only a tiny probability that a recount will change more than 24,294 votes in one direction or the other. Specifically:

- The portion of the Gaussian curve to the left of –3σ accounts for 0.13% of the area under the Gaussian curve. In other words, there is a probability of 0.13% that a recount will subtract more than 24,294 votes from the initial winner's lead.
- The portion of the Gaussian curve to the right of +3σ accounts for the remaining 0.13% of the area under the curve. That is, there is a probability of 0.13% that a recount will add more than 24,294 votes to the initial winner's lead.

Taken together, 0.26% of the area under this curve lies outside of the range between –3σ and 3σ.

A probability of 0.26% corresponds to a chance of 1-in-369.

To put it another way, it is very unlikely (a chance of only 1-in-369) that a nationwide recount will change the initial winner's lead by more than 24,294 votes in one direction or the other.

The above discussion about the previous figure assumed, for simplicity, that the mean of the distribution was zero. That is, the previous figure did not reflect the impact of the near-zero change (57 votes) in the initial winner's number of votes for each recount.

We now make the calculation more precise by considering the impact of the 57 votes.

The average (mean) change in votes resulting from conducting 51 state-level recounts is simply 51 times the average change (57 votes) resulting from one recount—namely 2,907 votes.

Figure 9.24 shows a Gaussian distribution with a standard deviation of 8,098 votes and a mean of 2,907 votes.

This figure shows that the probability is 99.74% that the change in the initial winner's lead after a nationwide recount would be between:

- –21,387—that is, the mean (2,907) *minus* three standard deviations (8,098) and
- +27,201—that is, the mean (2,907) *plus* three standard deviations (8,098).

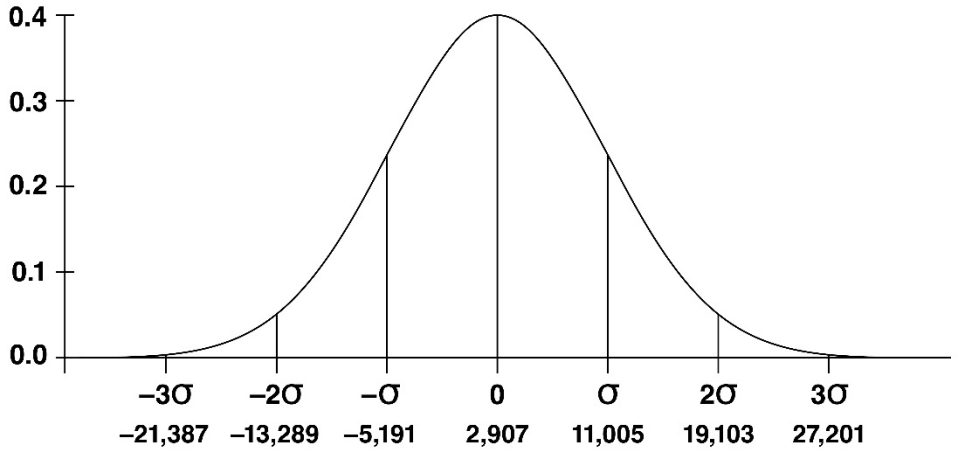

Figure 9.24 Probability that a nationwide recount changes a particular number of votes (with actual mean of 2,907)

Statistics about the winning margins in presidential elections

Table 9.49 shows the national popular vote for the Republican and Democratic presidential nominees for the nine elections between 1988 and 2020.[921]

Column 4 shows the difference in the number of votes between the Republican nominee and Democratic nominee—the "R–D lead."

Table 9.49 The national popular vote for President 1988–2020

Election	Republican	Democrat	R–D lead in votes	R–D lead as a percentage
1988	48,886,097	41,809,074	7,077,023	7.80%
1992	39,103,882	44,909,326	–5,805,444	–6.91%
1996	39,198,755	47,402,357	–8,203,602	–9.47%
2000	50,460,110	51,003,926	–543,816	–0.54%
2004	62,040,611	59,028,432	3,012,179	2.49%
2008	59,934,814	69,456,898	–9,522,084	–7.36%
2012	60,930,782	65,897,727	–4,966,945	–3.92%
2016	62,985,134	65,853,652	–2,868,518	–2.23%
2020	74,215,875	81,268,586	–7,052,711	–4.54%
Total	**497,756,060**	**526,629,978**		
Average			**–3,208,213**	**–2.74%**

As can be seen from the table, the mean (average) of the R–D leads in the 1988–2020 period was –3,208,213 votes.

The standard deviation of this distribution is 5,176,137 votes.

Figure 9.25 is a Gaussian distribution with a mean of –3,208,213 votes and a standard deviation of 5,176,137 votes.

[921] Between 1988 and 2020, the United States has been in an era of close presidential elections, as discussed in section 1.1.2.

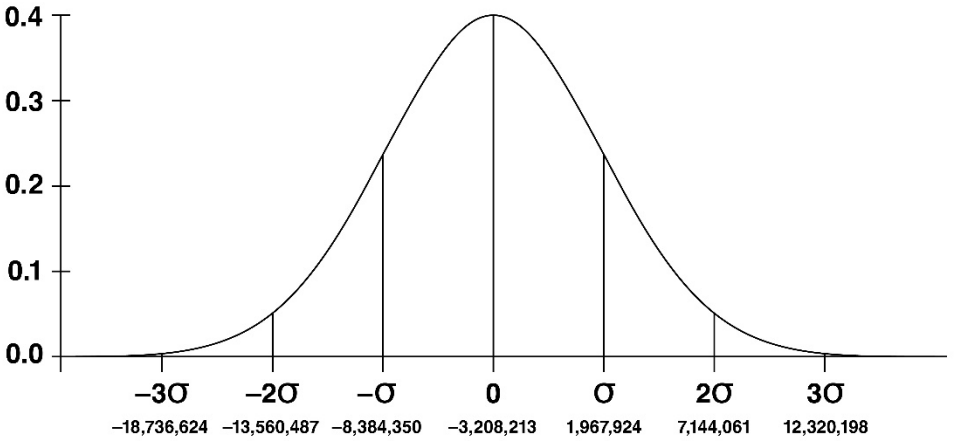

Figure 9.25 Probability that a nationwide presidential election produces various R–D leads in terms of number of votes

Probability that a nationwide recount would change the outcome of a presidential election

We now have the two pieces of information necessary to calculate the probability that a nationwide recount would reverse the outcome of a presidential election:

- statistics about the changes in the initial winner's lead due to a nationwide recount, and
- statistics about the popular-vote leads in recent presidential elections.

Specifically, we now know that a nationwide recount would likely only affect tens of thousands of votes, whereas the winner's nationwide lead in a presidential election ordinarily ranges over many millions of votes.

Thus, if the initial winner's lead is in the millions, it is very unlikely that a nationwide recount will reverse the result.

The laws of statistics give us a way to translate this intuition into a precise calculation of the probability that a nationwide recount will reverse the outcome.

Table 9.50 is based on the Gaussian distribution with a mean of –3,208,213 and a standard deviation of 5,176,137 shown in the previous figure.

- Column 1 shows various R–D leads that might occur. For example, an R–D lead of –18,736,624 corresponds to a Democratic landslide (a negative three-sigma event). An R–D lead of +12,320,198 corresponds to a Republican landslide (a positive three-sigma event).
- Column 2 restates the number of votes shown in column 1 in terms of sigma (the standard deviation).
- Column 3 is the height of the Gaussian curve for a given R–D lead.
- Column 4 provides a way to calculate the area under a selected portion of the Gaussian curve. The number in this column is the cumulative probability (area under the curve). The difference between two entries in this column is the area under a particular portion of the Gaussian curve—that is, it is the probability that the R–D lead in a presidential election lies between two selected values.

Table 9.50 Probability that a nationwide presidential election produces various R–D leads in terms of number of votes

R–D lead	Sigma	Height of Gaussian curve	Cumulative probability
–18,736,624	–3.0	0.004	0.00135
–13,560,487	–2.0	0.054	0.02275
–8,384,350	–1.0	0.242	0.15866
–3,208,213	0.0	0.399	0.50000
–24,294	0.61511	0.330	0.73076
0	0.61981	0.329	0.73231
24,294	0.62450	0.328	0.73385
1,967,924	1.0	0.242	0.84134
7,144,061	2.0	0.054	0.97725
12,320,198	3.0	0.004	0.99865

For example, consider the first and fourth rows of column 4 of this table. These rows correspond to an R–D lead of between –18,736,624 votes (three standard deviations below the mean) and –3,208,213 votes (the mean). The difference between the cumulative probabilities in column 4 is the area under the portion of the curve for this range of votes. This difference is 0.49865. That tells us that there is a 49.865% probability that the R–D lead lies between –18,736,624 votes and –3,208,213 votes.

Now consider the red-colored row of table 9.50. An R–D lead of 0 corresponds to a tie in the national popular vote. A nationwide tie occurs at the 0.61981 point on the sigma scale.

Recall that the probability is very high (99.74%) that a nationwide recount would change the initial winner's lead by fewer than 24,294 votes in one direction or the other.

In other words, if a nationwide recount is going to overturn the result of a nationwide election, the initial winner's R–D lead must be, for all practical purposes, within 24,294 votes of a nationwide tie.

The green-colored row in the table represents an R–D lead of –24,294 votes and corresponds to a sigma of 0.61511.

The blue-colored row in the table represents an R–D lead of 24,294 votes and corresponds to a sigma of 0.62450.

Figure 9.26 highlights the critical area between an R–D lead of –24,294 votes and 24,294 votes.

The area under the (very tiny) portion of the Gaussian curve between the green-colored vertical line and the blue-colored vertical line in the figure is the probability that the R–D lead in a presidential election is between –24,294 votes and 24,294 votes. This area under this portion of the curve is the difference in cumulative probabilities shown in column 4 of the green-colored row and the blue-colored row—that is, the difference between 0.73385 and 0.73076, namely 0.00309. That is, the probability that the R–D lead is between –24,294 votes and 24,294 votes is 0.309% or 1-in-324.

In other words, the probability is very high (99.74%) that a nationwide recount would reverse the outcome of one presidential election in 324.

In the context of presidential elections that occur every four years, a probability of 1-in-324 corresponds to one presidential election in 1,296 years.

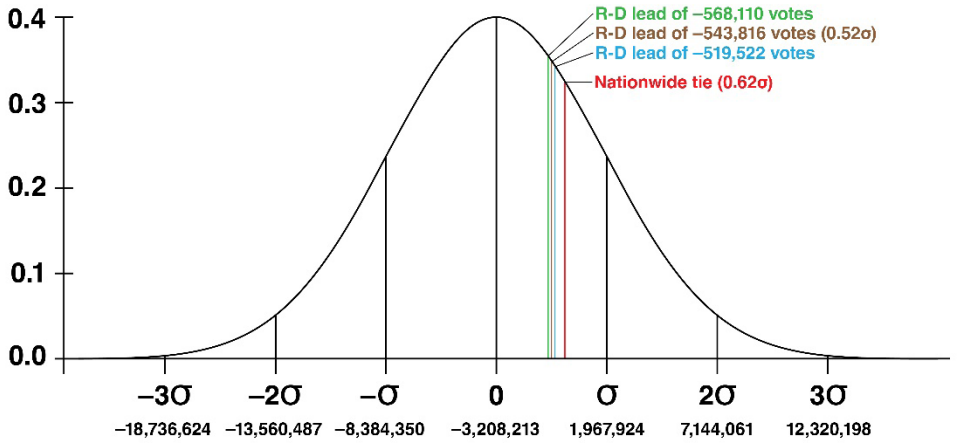

Figure 9.26 Probability that a nationwide election produces a R–D lead of between 24,294 votes in favor of the Democratic nominee and 24,294 votes in favor of the Republican nominee. Note that this figure was inadvertently omitted from the first printing of this edition of this book.

To put it another way, the probability is very high (99.74%) that a nationwide recount would not change the outcome of 323 presidential elections out of 324.

Probability that a nationwide recount would have changed the national popular vote winner in 2000

The question arises as to whether a nationwide recount would have been likely to change the national popular vote winner in 2000.

The 2000 presidential election was the closest election in terms of the national popular vote between 1988 and 2020, as shown in table 9.49. The R–D lead in that election was –543,816 votes. That is, Al Gore led George W. Bush by 543,816 popular votes nationwide.

Recall that we determined above that the probability is very high (99.74%) that the initial winner's lead would be changed by fewer than 24,294 votes in one direction or the other by a nationwide recount.

Therefore, the probability would be 99.74% that Gore's lead would be changed by fewer than 24,294 votes in one direction or the other by a nationwide recount—that is, Gore's lead would end up between 519,522 votes and 568,110 after a nationwide recount.

In short, it is very unlikely that a recount would change the outcome of an election when the initial (pre-recount) winner has a lead as large as 543,816 popular votes nationwide.

Figure 9.27 is a visualization of the conclusion that a nationwide recount of the 2000 election would not have come close to changing the outcome of the election. Even a loss of 24,294 votes would not have closed the gap.

- An R–D lead of 0 votes (that is, a nationwide tie) is represented by the red horizontal line located at a sigma of 0.61981.
- Gore starts with a pre-recount R–D lead of –543,816 votes—represented by a black horizontal line located at a sigma of 0.51475.

- The horizontal blue line at 0.51944σ represents an R–D lead of –519,522 votes—that is, Gore's lead was reduced by 24,294 votes due to the recount.
- The horizontal green line at –0.51005σ represents an R–D lead of –568,110 votes—that is, Gore's lead was increased by 24,294 votes due to the recount.

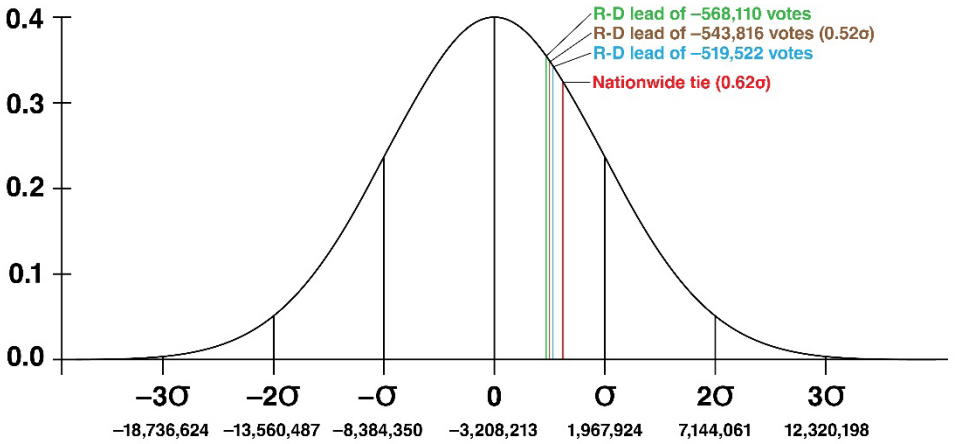

Figure 9.27 Likely result of a nationwide recount in 2000

Probability that a nationwide recount would change the outcome of a presidential election expressed as percentages

The calculations above were based on the *number of votes* that are likely to be changed by a recount in a presidential election.

Table 9.51 shows the *percentage change* in the initial winner's votes in all 36 recounts of statewide general elections between 2000 and 2023.

- Columns 1, 2, 3, and 4 are the same as in table 9.48.
- Column 5 shows the total number of votes for the initial (pre-recount) winner and the runner-up.
- Column 6 shows the change in the initial winner's lead resulting from the recount. This is the same information that appears in column 7 of table 9.48.
- Column 7 shows the change in the initial winner's lead resulting from the recount (column 6) as a percentage of the vote total (column 5).

As can be seen from column 7 of the table, the average (mean) of the distribution of *percentage* changes in the initial winner's vote is 0.00146% (that is, 0.0000146 of the total vote).

The standard deviation of the distribution of percentage changes in the initial winner's vote is 0.0485% (that is, 0.000485).

The average (mean) deviation of the distribution of the percentage changes in votes resulting from 51 statewide recounts (that is, a nationwide recount) is 51 times 0.00146%—that is, 0.0745%.

Table 9.51 Percentage change in the initial winner's votes in all 36 recounts of statewide general elections 2000–2023

Year	State	Race	Effect of the recount	Total votes	Change in initial winner's lead	Percentage change in initial winner's votes
2000	CO	Education Board	Upheld	1,536,619	–1,121	–0.0730%
2000	FL	President	Upheld	5,816,486	–1,247	–0.0214%
2000	MT	Public Instruction	Upheld	63,080	–3	–0.0048%
2000	WA	Secretary of State	Upheld	2,137,677	–267	–0.0125%
2000	WA	U.S. Senator	Upheld	2,396,567	276	0.0115%
2004	AK	U.S. Senator	Upheld	289,324	–219	–0.0757%
2004	AL	Amendment 2	Upheld	1,380,750	–4	–0.0003%
2004	GA	Court of Appeals	Upheld	414,484	15	0.0036%
2004	WA	Governor	Reversed	2,742,567	–390	–0.0142%
2004	WY	Amendment A	Upheld	218,433	–55	–0.0252%
2004	WY	Amendment C	Upheld	233,955	–50	–0.0214%
2005	VA	Attorney General	Upheld	1,941,449	37	0.0019%
2006	AL	Amendment	Upheld	816,102	508	0.0622%
2006	NC	Court of Appeals	Upheld	1,539,190	50	0.0032%
2006	VT	Auditor	Reversed	222,835	–239	–0.1073%
2008	MN	U.S. Senator	Reversed	2,422,965	–440	–0.0182%
2008	OR	Measure 53	Upheld	978,634	131	0.0134%
2009	PA	Superior Court	Upheld	1,821,869	281	0.0154%
2010	AZ	Proposition 112	Upheld	1,585,522	66	0.0042%
2010	MN	Governor	Upheld	1,829,620	–86	–0.0047%
2010	NC	Court of Appeals	Upheld	1,079,980	667	0.0618%
2011	WI	Supreme Court	Upheld	1,497,330	–312	–0.0208%
2013	VA	Attorney General	Upheld	2,207,389	742	0.0336%
2014	MO	Amendment	Upheld	996,249	308	0.0309%
2014	NC	Supreme Court	Upheld	2,474,117	–17	–0.0007%
2014	NM	Public Lands Comm	Upheld	499,330	48	0.0096%
2014	OR	Initiative	Upheld	1,506,176	35	0.0023%
2016	WI	President	Upheld	2,785,823	571	0.0205%
2018	FL	Agriculture Comm	Upheld	8,059,156	1,427	0.0177%
2018	FL	Governor	Upheld	8,119,910	–1,137	–0.0140%
2018	FL	U.S. Senator	Upheld	8,188,978	–2,567	–0.0313%
2020	GA	President	Upheld	4,935,716	–496	–0.0100%
2020	NC	Supreme Court	Upheld	5,391,556	–15	–0.0003%
2021	PA	Commonwealth Court	Upheld	2,561,068	5,550	0.2167%
2022	AZ	Attorney General	Upheld	2,508,715	–231	–0.0092%
2022	AZ	Public Instruction	Upheld	2,502,987	221	0.0088%
		Average		**2,380,628**	**57**	**0.00146%**

The standard deviation of the distribution of the percentage changes in votes resulting from a nationwide recount would, according to the Central Limit Theorem, be 0.0485% times the square root of 51—that is, 0.346%.

The average percentage R–D lead for the nine presidential elections between 1988 and 2020 is –2.74%, as shown in table 9.49. The standard deviation of this distribution of percentages is 5.08%.

9.34.2. MYTH: The Compact should be opposed, because it might not be possible to conduct a recount in every state.

QUICK ANSWER:

- Under the *current* system for electing the President, a timely recount of presidential ballots is usually not obtainable during the brief 42-day period between Election Day and the Electoral College meeting in mid-December. There have been numerous examples, under the current system, where a recount was requested, but never conducted, in closely divided states that decided presidential elections. Most famously, supporters of George W. Bush were able to use the courts to thwart a hand recount of his slender 537-popular-vote lead in the decisive state of Florida in 2000. In 2004, attempts to obtain a recount in the decisive state of Ohio were unsuccessful. In 2016, requests to obtain recounts in two of that election's three decisive states (Michigan and Pennsylvania) were successfully blocked in court by the candidate who was in the lead. In 2020, the results of six closely divided states were vigorously disputed, but a statewide recount was conducted in only one state—Georgia.
- The difficulty of obtaining a timely recount of a presidential election in the brief 42-day period between Election Day and the Electoral College meeting could theoretically be addressed by streamlining state recount laws in all 50 states and the District of Columbia. However, few legislatures have revised their recount laws in the two decades since the dispute over the never-held hand recount in Florida in 2000. A more practical approach would be for Congress to pass a federal law guaranteeing presidential candidates the right to a timely recount.
- There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (as demonstrated in section 9.34.1). Indeed, there would be considerably less need for a recount in a nationwide election than under the current state-by-state winner-take-all method of awarding electoral votes.
- The fact that a recount might not be obtainable in every state is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the criticism also applies to the current system. In fact, given that a recount would almost never be needed under the Compact (section 9.34.1), the Compact is arguably superior to the current system in this respect.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has criticized the National Popular Vote Compact by saying:

> "States have different criteria for what does (or does not) trigger recounts within their borders. … What if the national total is close—**close enough to**

> **warrant a recount—but a recount can't be conducted** because the margins in individual states were not close?"[922] [Emphasis added]

Sean Parnell, the Senior Legislative Director of Save Our States, has written that in a nationwide election for President:

> "Some states would conduct recounts, while others would not."[923]

In fact, the ability to obtain a recount of a presidential vote "close enough to warrant a recount" is largely an illusion *under the current system*.

Indeed, there have been far more instances of a presidential-vote recount being requested than conducted.

In 2000, attempts to get a hand recount of George W. Bush's slender 537-vote margin of victory in the decisive state of Florida were challenged by the Bush campaign and successfully blocked by the U.S. Supreme Court.[924] Given this tiny 537-vote lead, if there ever was an election that warranted a recount, it was the presidential race in Florida in 2000.

In 2004, attempts to obtain a recount of the presidential vote in the decisive state of Ohio were unsuccessful.[925]

In 2016, attempts to obtain recounts of the three decisive states were successfully blocked in court in two of these three states (that is, Michigan and Pennsylvania). Only Wisconsin conducted a recount.[926]

In 2020, 64 lawsuits were filed in six closely divided states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) disputing the election.[927] However, there was a statewide recount for President in only one state—Georgia.[928]

Time is a major factor when it comes to recounting a presidential election.

It is not that a statewide recount takes much time (as discussed in detail in section

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[922] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[923] Parnell, Sean. Opinion: Voting compact would serve Virginians badly. *Virginia Daily Progress*. August 9, 2020. https://dailyprogress.com/opinion/columnists/opinion-commentary-voting-compact-would-serve-virginians-badly/article_10a1c1bd-2ca3-5c97-b46d-a4b15289062d.html

[924] Reagan, Robert Timothy; Margaret S. Williams; Leary, Marie; Borden, Catherine R.; Snowden, Jessica L., Breen, Patricia D., and Jason A. Cantone. 2023. The 2000 Election of the President. *Emergency Election Litigation in Federal Courts: From Bush v. Gore to COVID-19*. Washington, DC: Federal Judicial Center. Pages 1266–1273. https://www.fjc.gov/sites/default/files/materials/55/Emergency-Election-Litigation-in-Federal-Courts.pdf

[925] Reagan, Robert Timothy; Margaret S. Williams; Leary, Marie; Borden, Catherine R.; Snowden, Jessica L., Breen, Patricia D., and Jason A. Cantone. 2023. Complete Ohio 2004 Presidential Recount. *Emergency Election Litigation in Federal Courts: From Bush v. Gore to COVID-19*. Washington, DC: Federal Judicial Center. Pages 1257–1260. https://www.fjc.gov/sites/default/files/materials/55/Emergency-Election-Litigation-in-Federal-Courts.pdf

[926] In the 2026 Wisconsin presidential recount, Trump increased his initial margin by 131 votes. Trump gained 844 votes (from 1,404,440 to 1,405,284), and Clinton gained 713 (from 1,381,823 to 1,382,536).

[927] A survey of the 64 lawsuits in the six states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) may be found in Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*. July 2022. https://lostnotstolen.org/

[928] A recount of two counties in Wisconsin was conducted in 2020.

9.34.2). The problem is that legal maneuvering over whether to conduct a recount and other procedural issues consume some or all of the available time.

The U.S. Constitution requires that the Electoral College meet on the same day throughout the country—thus creating an immovable deadline for completing a recount. Article II, section 1, clause 4 states:

> "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day **shall be the same throughout the United States**." [Emphasis added]

The date for the Electoral College meeting is specified in section 7 of the Electoral Count Reform Act of 2022 as the first Tuesday after the second Wednesday in December.[929]

In 1845, Congress established the Tuesday after the first Monday in November as the uniform nationwide day for appointing presidential electors—that is, Election Day. That date was retained in the Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 and is currently codified as section 1 of title 3 of the U.S. Code.

Thus, there are 42 days between Election Day and the date for the Electoral College meeting under current federal law. In 2024, Election Day is Tuesday, November 5, and the Electoral College meeting is Tuesday, December 17, 2024.

Because of this constitutional provision, all counting, pre-recount litigation, recounting, and post-recount litigation must be conducted so as to reach a final conclusion prior to the uniform nationwide date for the Electoral College meeting in mid-December.

These constitutional and statutory provisions, of course, apply equally to both the current state-by-state winner-take-all system of electing the President and the National Popular Vote Compact.

There are three practical reasons why the time available for conducting a recount of a presidential election is less than 42 days.

First, federal law diminishes the already-brief 42-day period by requiring each state to certify its popular-vote count within six days before the Electoral College meeting (the Safe Harbor Day). There are sound reasons for this six-day period. However, because of this six-day period, only 36 days are available between Election Day and the Safe Harbor Day.[930]

Second, more importantly, as the word "recount" implies, *there cannot be a recount until there is a count.*

Thus, an aggrieved presidential candidate cannot even begin the process of requesting a recount until after the official initial count is completed and certified.

It is true that unofficial vote counts are generally available from virtually every precinct in the country on Election Night or very shortly thereafter. However, various tasks must be performed before a state completes the official initial count.

The total number of days required to complete the official initial count varies by state, and depends on numerous factors determined by state law, including:

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[929] The Electoral Count Reform Act of 2022 (United States Code. Title 3. Section 7) is found in appendix B of this book.

[930] In 2024, Election Day is Tuesday, November 5. The Safe Harbor Day is Wednesday, December 11. The Electoral College meeting date is Tuesday, December 17.

- whether pre-processing of mail-in ballots (i.e., verifying that the voter is registered and verifying the voter's signature) may occur before Election Day, while the polls are open during Election Day, or only after Election Day;
- whether actual counting of mail-in ballots may occur before Election Day, while the polls are open during Election Day, or only after Election Day;
- whether mail-in ballots may be counted if they are received within a certain number of days after Election Day (provided, of course, that they are postmarked by Election Day);
- whether there is an extended deadline for receiving and counting military or overseas ballots;
- how much time is allowed by the state to validate, adjudicate, and cure provisional ballots; and
- how much time, if any, is allowed to cure correctable errors that are identified in provisional ballots.

After all ballots are counted at the local level, official documents certifying the local count must be delivered to the official or body designated by state law. Then, the designated official or body adds the local counts together and certifies the result as the initial statewide count.

A few states (New Hampshire, Oklahoma, South Dakota, and Vermont) routinely complete their official initial account very quickly—sometimes within a week after Election Day. However, most states take several weeks.

The amount of delay is illustrated by the 2012 election. In that year, the Electoral College meeting was on December 18, and the Safe Harbor Day was December 12.

- Nine of the 12 battleground states of 2012[931] completed their official initial presidential count on or after November 29—thus leaving less than two weeks before the Safe Harbor Day.
- Two of the 12 battleground states did not complete their official initial presidential count until December 10—thus leaving only two days.
- One of the 12 battleground states did not complete its official initial presidential count until December 12—thus leaving no time at all.

Third, once the official initial count is completed and certified, the aggrieved candidate's request for a recount will almost inevitably be challenged by the candidate who is leading in the initial count. Such challenges often start at the administrative level but quickly find their way into either state or federal court—and sometimes both. And, of course, each administrative and judicial ruling may be appealed to various higher courts. A decision at the highest state court can often then be appealed to the federal courts. Lawyers for whichever candidate is leading initially are skilled at raising hair-splitting legal questions that generate delay and eventually run out the clock.

Fourth, even if the aggrieved candidate's request for a recount is granted, it may be impossible to obtain a recount in a presidential election matter because of other hurdles and delays built into the existing state recount laws.

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[931] See section 1.2.3 for the list of the 12 battleground states of 2012.

One of the reasons that a recount of a presidential election is unobtainable in practice is that state recount laws were written with state and local offices primarily in mind. For state and local offices, there is no time pressure analogous to the U.S. Constitution's immovable requirement that the Electoral College meet on the same specified day in each state.

Indeed, recounts and associated legal challenges in races for offices other than President often meander on for months after Election Day. For example, the November 2008 Senate contest between Al Franken and Norm Coleman was not finally decided until June 20, 2009.[932]

The situation in Ohio in 2004 illustrates the legal difficulties for recounting or contesting a presidential election after the official initial count.

In Ohio in 2004, there were more than 150,000 provisional ballots. George W. Bush's final margin in the state was 118,601.[933]

Senator John Kerry recognized that historically about two-thirds of provisional ballots are typically judged to be valid. That is, it was likely that about 100,000 of these provisional ballots would eventually be accepted. Kerry also knew, based on historical voting patterns in Ohio, that he was likely to win the eventually accepted provisional ballots by, at the most, a 57%–43% margin. That is, Kerry knew that he would be able, at best, to eke out only about a 14,000-vote margin over Bush from the provisional ballots.

Accordingly, based on Bush's six-digit margin on Election Night and the known statistics concerning provisional ballots, Kerry conceded on the day after Election Day.

However, suppose Bush's apparent Election Night margin had been in the neighborhood of 14,000.

At that point, the many practical problems in Ohio's existing laws concerning recounts and contests would have come into play to frustrate the completion of a recount before the Electoral College meeting.

Professor Danial Tokaji of the Michael E. Moritz College of Law at Ohio State University identified some of the difficulties associated with trying to conduct a potential recount or contest for President in Ohio:

> "There is no specific Ohio statute addressing a contest in a presidential election. Presumably, the generally applicable election contest procedure described above would apply. The Ohio statutory scheme, however, makes no reference to the federal statutes governing presidential election contests. This could prove problematic. Under the 'safe harbor' provision of 3 U.S.C. § 5, Ohio must reach a final determination of election controversies within 35 days of the presidential election. A quick review of Ohio's election contest procedure illustrates the problem. **A contestor must file the petition within 15 days of the election results being certified** (assuming no automatic or requested recount).

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[932] *Wikipedia*. 2008 United States Senate election in Minnesota/ Accessed July 13, 2024. https://en.wikipedia.org/wiki/2008_United_States_Senate_election_in_Minnesota#:~:text=After%20all%20the%20votes%20were,called%20the%20election%20for%20Coleman.

[933] Langley, Karen and McNulty, Timothy. Verifying provisional ballots may be key to election. *Pittsburgh Post-Gazette*. August 26, 2012.

> R.C. 3515.09. Presumably, a contest concerning presidential electors involves a "statewide office" requiring the petition to be filed with the Chief Justice. See R.C. 3515.08. **The court must then set the hearing within the 15-to-30-day window** of R.C. 3515.10. Even without considering the time delay from election day to certification of results, meeting the 35-day safe harbor provision is doubtful. Add to this mix the uncertainty of **the 40-day deposition period** of R.C. 3515.16 if the contest is "in the supreme court." Further consider the effect of an appeal—if possible—and **the 20-day appellate filing window**. **Following the Ohio statutory scheme makes compliance with 3 U.S.C. § 5 unlikely**."[934] [Emphasis added]

The bottom line is that the presidential candidate who is leading in the initial count will usually be able to use existing statutory provisions to "run out the clock" with dilatory tactics until the Safe Harbor Day.[935]

Existing recount laws in other states contain similar unworkable and illogical provisions that make it almost impossible to get a timely recount in a presidential race.

Moreover, in many states, a candidate only has the right to request a recount if the apparent winning candidate's lead in the initial count is within a specified very small percentage. That is, recount laws in many states paradoxically offer the promise of correcting a small error in the initial count—but no way to correct a large error.

When a recount was requested in the closest of the three decisive states in the 2016 presidential election (Michigan), the initial winning candidate (Trump) pointed out that state law did not allow a recount in any precinct where there was a discrepancy between the number of votes cast and the number of people who signed the voting log. One would think that precincts with such a discrepancy would be precisely the ones that an aggrieved candidate might want to recount. Eight years after the 2016 election, a bill advanced in the Michigan legislature to correct this anomaly.[936]

In short, the possibility of conducting a timely recount of a presidential election is largely an illusion under existing state recount laws—regardless of whether the election is conducted under the current state-by-state winner-take-all method of awarding electoral votes or the National Popular Vote Compact.

As explained in section 9.34.1, there would be considerably less need for a recount under a national popular vote than under the current state-by-state winner-take-all method of awarding electoral votes. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result.

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[934] Tokaji, Daniel. 2012. *Election Law@Moritz: Information and Insight on the Laws Governing Federal, State, and Local Elections*. The quotation is from a continuously updated eBook on December 27, 2012. http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount05.html#_edn9

[935] An additional factor would have prevented a recount in Ohio in 2004. The initial count was not certified until the Safe Harbor Day. Thus, a recount would have been impossible in the decisive state of the 2004 presidential election had it been warranted.

[936] See Michigan Senate Bill SB603 of 2024. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-SB-0603&QueryID=159966389 and the Legislative Analysis of the Senate-passed bill by the House Fiscal Agency at https://www.legislature.mi.gov/documents/2023-2024/billanalysis/House/pdf/2023-HLA-0603-6C1B4E59.pdf

Nonetheless, opponents of the National Popular Vote Compact argue that the Compact should be opposed because it might not be possible to recount every state, while simultaneously defending the current state-by-state system under which recounts are usually unobtainable in practice.

The fact that a recount might not be obtainable in every state is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the criticism also applies to the current system. In fact, given that a recount would almost never be needed under the Compact (section 9.34.1), the Compact is arguably superior to the current system in this respect.

In section 9.34.7, we present proposed federal legislation that would guarantee a timely recount to an aggrieved presidential candidate.

9.34.3. MYTH: Conducting a nationwide recount would be a logistical impossibility.

QUICK ANSWER:

- There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could reverse the initial result (as demonstrated in section 9.34.1).
- A recount can be conducted rapidly once an aggrieved presidential candidate surmounts the dilatory legal tactics that often block a recount. The history of presidential recounts in several states demonstrates that there is no logistical obstacle to conducting a recount in the 36-day period between Election Day and the Safe Harbor Day.
- For example, in 2020, Georgia conducted its initial count and two statewide recounts in the brief 36-day period between Election Day and the Safe Harbor Day. The initial statewide count was completed shortly after Election Day. In response to issues raised by Trump supporters, the Secretary of State initiated and completed a hand count of all of the state's nearly five million ballots in six days. Then, at the request of the Trump campaign, the state conducted a third statewide count. Statewide recounts of presidential ballots have been completed in between three and 10 days in other states.
- The personnel and other resources necessary to conduct a recount are indigenous to each state. Thus, a state's ability to conduct a recount inside its own borders is unrelated to whether another state is simultaneously conducting one.

MORE DETAILED ANSWER:

Once an aggrieved presidential candidate surmounts the legal obstacles to obtaining a recount, there is plenty of evidence that a statewide recount of a presidential election can be conducted expeditiously.

The task of recounting the votes cast for President is not a logistical impossibility—as evidenced by the fact that the original counts for *all* offices and ballot questions are routinely completed and certified within a few days after Election Day.

As a matter of prudent planning, the election officials of every state stand ready with contingency plans to carry out their duty to conduct a recount in a timely manner if one is required.

Moreover, no state needs the assistance of any personnel or resources from any other state in order to conduct a statewide recount inside its own borders. The personnel and resources necessary to conduct a recount are entirely indigenous to each state. Votes are counted in parallel at the local level, and recounts are generally conducted at the same local level as the original count. Thus, a state's ability to handle the logistics of a recount within its own borders is unrelated to whether recounts are being simultaneously conducted in other states.

Georgia 2020 statewide recounts

Georgia was a closely divided state in the 2020 presidential election.

The initial statewide count was completed shortly after Election Day.

Then, in response to issues raised by Trump supporters, Georgia Secretary of State Brad Raffensperger initiated a hand recount of 100% of the state's nearly five million ballots in the presidential race (technically a "risk-limiting audit").

This statewide hand count was executed during a period of six calendar days—specifically between Friday November 13 and Wednesday November 18.[937]

Like the original count on Election Night, the Secretary of State's hand recount was conducted separately by each of Georgia's 159 counties. That is, the work was conducted in parallel throughout the state.

Many of Georgia's counties did not take the full six days to finish their work.

The state's largest county (Fulton) finished its hand recount of 528,777 ballots in the first three days.[938,939] Fulton County accomplished its work with 172 two-person counting teams aided by 15 additional people.[940] That is, the task was accomplished with a total 1,077 workdays of effort—that is, at a rate of about 490 ballots per workday.

Similarly, DeKalb County, a large suburban area east of Atlanta, finished recounting its 370,000 ballots for President in three days.

Cobb County, a large suburban area north of Atlanta, finished counting its 393,000 ballots by the end of the fifth day.

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[937] Fausset, Richard and Batra, Jannat. 2020. Examine Ballot. Recite Name. Sort Into Bin. Repeat 5 Million Times. *New York Times*. November 13, 2020. https://www.nytimes.com/2020/11/13/us/georgia-recount-presidential-election.html

[938] Hallerman, Tamar and Kass, Arielle. 2020. Recount Day 3: DeKalb, Fulton finish counting; other counties closing in. *Atlanta Journal*. November 15, 2020. https://www.ajc.com/politics/live-updates-georgia-recount-enters-third-day/IZYV2YQGZVBGDKKR4LPT466BQ4/

[939] Fausset, Richard. 2020. As Tensions Among Republicans Mount, Georgia's Recount Proceeds Smoothly. *New York Times*. November 17, 2020. https://www.nytimes.com/2020/11/16/us/politics/georgia-recount.html

[940] Murchison, Adrianne. 2020. Fulton finishes counting votes for presidential recount. *Atlanta Journal*. November 15, 2020. https://www.ajc.com/politics/live-updates-georgia-recount-enters-third-day/IZYV2YQGZVBGDKKR4LPT466BQ4/

> "Cobb County started the process Friday morning [November 13] with dozens of workers spread out at tables inside of an exhibit hall, sorting ballots into bins featuring the names of the presidential candidates. Approved poll watchers stood close by and looked over the shoulders of workers as they sorted ballots. A handful of members of the general public stood behind caution tape at the edge of the room."[941]

Bryan County, one of Georgia's smaller counties, finished its recount of 21,000 ballots by the afternoon of the first day.[942]

A total of 4.3 million of the state's ballots—almost 90%—were recounted by the end of the fourth day.

In most counties, the recount resulted in no change in the vote count for President. In two counties, the hand count resulted in a modest change. In Fayette County, President Trump gained 449 votes over Vice President Biden as a result of the discovery of a memory card with 2,755 votes that had not been included in the original count.[943]

This hand recounting of all of Georgia's ballots for President was finished throughout the state by Wednesday November 18—that is, within a total of six days.

The results were certified two days later.[944]

On November 22, the still-unsatisfied Trump campaign demanded yet another statewide count. This third count of Georgia's ballot (officially designated as a "recount") involved scanning the ballots by machine. CNN observed:

> "Georgia already conducted an audit of the presidential ballots…. The audit was more rigorous than the recount will be, as **the audit was a hand recount of every ballot, whereas the new recount will be done by a machine rescan**."[945] [Emphasis added]

Overall, Georgia conducted a total of three statewide counts between Election Day and the Safe Harbor Day:

- the original count starting on Election Night,
- the ballot-by-ballot hand count (audit) initiated by Secretary of State Raffensperger, and
- the machine recount demanded by the Trump campaign.

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[941] Moffatt, Emil. With Biden Ahead, Georgia Begins Hand Recount Of Nearly 5 Million Ballots. *NPR*. November 13, 2020. https://www.npr.org/2020/11/13/934592764/with-biden-ahead-georgia-begins-hand-recount-of-nearly-5-million-ballots

[942] Lee, Michelle and Thebault, Reis. 2020. In Georgia, a laborious, costly and historic hand recount of presidential ballots begins. *Washington Post*. November 14, 2020. https://www.washingtonpost.com/politics/georgia-election-recount/2020/11/14/7fc1c82e-25c9-11eb-952e-0c475972cfc0_story.html

[943] Brumback, Kate. 2020. Second Georgia county finds previously uncounted votes. *Associated Press*. November 17, 2020. https://apnews.com/article/election-2020-georgia-elections-voting-machines-voting-018eac6ac24733d63d356ee76f485530

[944] Niesse, Mark; Peebles, Jennifer; and Wickert, David. 2020. Georgia manual recount confirms Biden victory. *Atlanta Constitution*. November 18, 2020. https://www.ajc.com/politics/breaking-georgia-manual-recount-confirms-biden-victory/B7LNNHYZOVGKZBUVAT7NZT3VZE/

[945] Bohn, Kevin. 2020. Trump campaign requests Georgia recount that's unlikely to change his loss in the state. CNN. November 22, 2020. https://www.cnn.com/2020/11/21/politics/georgia-presidential-election-recount/index.html

Wisconsin 2016 statewide recount

In 2016, Wisconsin conducted a full statewide recount in 10 days. As the Wisconsin Elections Commission announced on December 12, 2016:

> "Wisconsin Elections Commission Chair Mark Thomsen today certified results of the presidential election following **a 10-day recount process**, confirming Republican Donald J. Trump the winner in Wisconsin."
>
> "Donald Trump received 1,405,284 votes in the recount compared to 1,404,440 in the original canvass. Hillary Clinton received 1,382,536 votes in the recount compared to 1,381,823 in the recount. The original margin between the top two candidates was 22,617 votes. After the recount, the margin is 22,748. After the recount, Trump's margin over Clinton increased by just 131 votes."[946] [Emphasis added]

Wisconsin 2020 recount of two large counties

In late November 2020, a recount was conducted in Wisconsin's two biggest Democratic counties (Milwaukee and Dane counties) at the request of the Trump campaign.

The 2020 Wisconsin recount was conducted in seven days. It started on Friday November 20 and was completed (after a day off for Thanksgiving) on Friday November 27.[947]

These two counties accounted for about a quarter of the state's total vote.

If a full statewide recount had been requested in Wisconsin in 2020, each of Wisconsin's 72 counties would have separately and independently performed the work. That is, a statewide recount in Wisconsin could have been executed in essentially the same number of calendar days as was the geographically limited recount of Milwaukee and Dane counties. The personnel and other resources necessary to conduct a recount are indigenous to each county. Thus, a county's ability to conduct a recount inside its own borders is unrelated to whether some other county is simultaneously conducting one.

Lycoming County Pennsylvania's recount of 2020 ballots

A belated hand recount of all of Lycoming County Pennsylvania's 2020 presidential ballots was conducted in three days. As reported by the *New York Times* in 2023:

> "**Under pressure from conspiracy theorists and election deniers, 28 employees of Lycoming County counted—by hand—nearly 60,000 ballots. It took three days and an estimated 560 work hours**, as the vote-counters ticked through paper ballots at long rows of tables in the county elections department in Williamsport."

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[946] Wisconsin Elections Commission. 2016. Wisconsin Recount Completed Ahead of Schedule with Relatively Small Changes to Final Totals. December 12, 2016. https://elections.wi.gov/news/wisconsin-recount-completed-ahead-schedule-relatively-small-changes-final-totals

[947] Martinez-Ortiz, Ana. 2020. Trump Sues Wisconsin After Election Recount. *Milwaukee Courier*. December 5, 2020. https://milwaukeecourieronline.com/index.php/2020/12/05/trump-sues-wisconsin-after-election-recount/

> "Mr. Trump ended up with seven fewer votes than were recorded on voting machines in 2020. Joseph R. Biden Jr. had 15 fewer votes. Overall, Mr. Trump gained eight votes against his rival. The former president, who easily carried deep-red Lycoming County in 2020, carried it once again with 69.98 percent of the vote—gaining one one-hundredth of a point in the recount.[948] [Emphasis added]

Lycoming County's reported total of 560 hours (70 workdays) corresponds to a processing rate of 857 ballots per workday.

Rate of processing ballots in a recount

The average processing rate for Fulton County's hand recount in 2020 and Lycoming County's hand recount in 2023 was 674 ballots per workday.

Summary concerning logistics of a nationwide recount

The history of presidential recounts in several states demonstrates that there is no logistical obstacle to conducting a rapid recount in the brief 36-day period between Election Day and the Safe Harbor Day. A statewide recount can be conducted in about a week.

There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. As demonstrated in section 9.34.1, the probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could reverse the original result. Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.

Nonetheless, if there ever were a reason to conduct a nationwide recount, the recount could and would be handled in the same way as they are currently handled—that is, under generally serviceable laws.

In any case, if the national popular vote were ever to be close enough to warrant a nationwide recount, it is virtually certain that the vote would simultaneously be close enough to warrant statewide recounts in several closely divided states.

Any extremely close election will almost certainly engender controversy, and the eventual loser will often go away unhappy.

The guiding principle in such circumstances should be that all votes should be counted fairly and expeditiously.

As U.S. Senator David Durenberger (R–Minnesota) said in the Senate in 1979:

> "There is no reason to doubt the ability of the States and localities to manage a recount, and nothing to suggest that a candidate would frivolously incur the expense of requesting one. And even if this were not the case, the potential danger in selecting a President rejected by a majority of the voters far outweighs the potential inconvenience in administering a recount."[949]

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[948] Gabriel, Trip. 2023. Driven by Election Deniers, This County Recounted 2020 Votes Last Week. *New York Times*. January 15, 2023. https://www.nytimes.com/2023/01/15/us/politics/2020-recount-lycoming-county.html?searchResultPosition=1

[949] *Congressional Record*. July 10, 1979. Pages 17706–17707. https://www.congress.gov/bound-congressional-record/1979/07/10/senate-section

9.34.4. MYTH: The current system acts as a firewall that isolates recounts to particular states.

QUICK ANSWER:

- Far from acting as a firewall that helpfully isolates recounts to particular states, the current state-by-state winner-take-all method of awarding electoral votes repeatedly causes artificial crises and leads to unnecessary recounts.
- The current state-by-state winner-take-all method of awarding electoral votes regularly creates artificial crises, because a few thousand votes in one, two, or three states can decide the presidency. Because the current system divides the nation's voters into 51 separate state-level pools of votes, razor-close elections in a few states are an inevitable and recurring feature of the current system. After the Balkanization of the nationwide vote into 51 separate state-level pools, a certain number of these state-level races for President will inevitably be close. Thus, almost inevitably, a few thousand votes in one, two, or three closely divided states decide the presidency. The nation's 59 presidential elections between 1789 and 2020 have really been 2,339 separate state-level elections.
- There is unlikely to ever be a need to conduct a nationwide recount under the National Popular Vote Compact. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (section 9.34.1). Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.
- A single national pool of votes will drastically reduce the frequency of the artificial crises that are regularly produced by the current system.
- The question of recounts comes to mind in connection with presidential elections only because the current state-by-state system so frequently creates artificial crises and unnecessary disputes. If we were debating the question today of whether to elect Governors by a popular vote, the issue of recounts would never even come to mind, because recounts rarely occur in elections in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes. It is the winner-take-all rule—separately applied to 51 separate jurisdictions—that creates the frequent recounts of presidential ballots.

MORE DETAILED ANSWER:

Trent England, Executive Director of Save Our States, has written:

> "**Containing elections within state lines also means containing election problems.** The Electoral College turns the states into the equivalent of the watertight compartments on an ocean liner. Fraud or process failures can be isolated in the state where they occur and need not become national crises."[950] [Emphasis added]

[950] England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, said in testimony to a Delaware Senate committee:

> "The Electoral College **typically produces** quick and **undisputed outcomes**."[951] [Emphasis added]

The web site of Save the Vote says that one of the advantages of the current system is:

> "**Stability and Certainty: The winner-takes-all approach** in most states ensures a clear winner. It also **prevents endless recounts and legal battles** that could arise from a purely popular vote system."[952] [Emphasis added]

Brendan Loomer Loy claims that the current state-by-state winner-take-all system acts as a helpful firewall that

> "isolate[es] post-election disputes to individual close states."[953]

Far from acting as a firewall that helpfully isolates recounts to particular states, the current state-by-state winner-take-all method of awarding electoral votes repeatedly creates unnecessary fires.

Our nation's 59 presidential elections between 1789 and 2020 have really been 2,339 separate state-level elections.

The current system does not contain and isolate problems. Instead, it repeatedly creates artificial crises.

For example, the dispute over the 1876 presidential election was an artificial crisis created by the state-by-state winner-take-all method of awarding electoral votes.

In that election, Democrat Samuel J. Tilden received 4,288,191 votes—254,694 more than Republican Rutherford B. Hayes (4,033,497). Tilden's nationwide percentage lead of 3.05% was not unsubstantial. It was, for example, greater than George W. Bush's 2004 lead of 2.8%.

The 1876 election was contested because Hayes had extremely narrow popular-vote margins in three states:

- 889 votes in South Carolina,
- 922 votes in Florida, and
- 4,807 votes in Louisiana.

The closeness of the 1876 presidential election in the Electoral College was an artificial crisis created by the state-by-state winner-take-all method of awarding electoral votes.

The closest presidential election of the 20th century was the 1960 election in which John F. Kennedy led Richard M. Nixon by 118,574 popular votes (out of 68,838,219 votes cast nationwide).

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[951] Written testimony submitted by Tara Ross to the Delaware Senate in June 2010.

[952] The Save the Vote web site (accessed July 13, 2024) is at https://www.savethevote2024.com/home

[953] Loy, Brendan Loomer, "Count Every Vote—All 538 of Them" *Social Science Research Network*. September 12, 2007. Available at http://ssrn.com/abstract=1014431

The 1960 presidential election is remembered as being close because a shift of 4,430 voters in Illinois and 4,782 voters in South Carolina would have given Nixon a majority of the electoral votes. If Nixon had carried both Illinois and South Carolina, Kennedy still would have been ahead nationwide by almost 110,000 popular votes, but Nixon would have won the presidency.

The 1960 election in Hawaii was challenged. Nixon led in the initial count. However, Hawaii conducted a recount under judicial supervision, and John F. Kennedy ended up with a 115-vote lead.[954] There would have been no recount in Hawaii in 1960 if the election had been based on the national popular vote, because Kennedy's six-digit nationwide margin was unlikely to be reversed by a recount (section 9.34.1).

The dispute over the 2000 presidential election was an artificial crisis created by the state-by-state winner-take-all method of awarding electoral votes. The dispute arose because George W. Bush's total of 2,912,790 votes in Florida was a mere 537 more than the number of votes that Al Gore received in the state (2,912,353). Under the winner-take-all method of awarding electoral votes, Bush's 537-popular-vote lead entitled him to all 25 of Florida's electoral votes, which in turn gave Bush the presidency.

There was, however, nothing particularly close about the 2000 presidential election on a nationwide basis. Al Gore's nationwide lead was 543,816 popular votes (1,013 times larger) than Bush's 537-vote margin in Florida. Because a six-digit nationwide margin is unlikely to be reversed by a recount (section 9.34.1), no one would even have considered a recount in 2000 if the presidential election had been conducted on the basis of the national popular vote. Only almanac writers and trivia buffs would have cared whether Bush had, or had not, carried Florida by 537 popular votes.

Similarly, the disputes over the 2016 and 2020 presidential elections were created by the state-by-state winner-take-all method of awarding electoral votes—not because the national popular vote was close.

In particular, the 64 lawsuits filed in 2020 in six closely divided states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) were about the relatively small margins in those particular states.[955] However, Biden's margin of victory nationwide was 7,052,711 votes.

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[954] As it happened, the judicial proceedings in Hawaii in 1960 were not completed until after the Electoral College had met. Hawaii's three electoral votes did not affect the outcome of the presidential election. Congress met in joint session on January 6, 1961, to count the electoral votes. The losing presidential candidate, Vice President Richard M. Nixon, presided over the joint session. He graciously permitted Hawaii's electoral votes to be counted in favor of John F. Kennedy (while ruling that this action would not constitute a precedent). A discussion of the similarities and differences between the Hawaii recount in the 1960 election and the "fake" elector slates in the 2020 election appears in Cheney, Kyle. 2022. See the 1960 Electoral College certificates that the false Trump electors say justify their gambit. *Politico*. February 7, 2022. https://www.politico.com/news/2022/02/07/1960-electoral-college-certificates-false-trump-electors-00006186

[955] A survey of the 64 lawsuits in the six states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) may be found in Danforth, John; Ginsberg, Benjamin; Griffith, Thomas B.; Hoppe, David; Luttig, J. Michael; McConnell, Michael W.; Olson, Theodore B.; and Smith, Gordon H. 2022. *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election.* July 2022. https://lostnotstolen.org/

Tara Ross told a Nevada Senate committee:

> "The Electoral College encourages stability and certainty in our political system. **Events such as those that occurred in 2000 are rare.**"[956] [Emphasis added]

The question of recounts comes to mind in connection with presidential elections only because the current state-by-state system so frequently creates artificial crises and unnecessary disputes. If we were debating the question today of whether to elect state Governors by a popular vote, the issue of recounts would never even come to mind, because recounts rarely occur in elections in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes.

9.34.5. MYTH: Unfinished recounts could thwart the operation of the Compact.

QUICK ANSWER:

- An unfinished recount would be handled under the National Popular Vote Compact in the same way that it is handled under the current system.
- Presidential recounts are generally scheduled and conducted by administrators and courts so as to reach a final determination of the state's vote count by the Safe Harbor Day (i.e., six days before the Electoral College meeting).
- In the unlikely event that a recount were to remain unfinished by the Safe Harbor Day, the state involved would nonetheless be obligated to comply with the requirements of the Electoral Count Reform Act of 2022 to issue a Certificate of Ascertainment by that day. Given that a recount can only occur after the completion of an initial certified count, and that the initial certified count is presumptively valid unless overturned, the initial certified count would appear in the state's Certificate. The treatment would be identical under both the current system and the Compact.
- A special three-judge federal court established by the Electoral Count Reform Act of 2022 has the power to revise a state's Certificate of Ascertainment. Thus, if an unfinished recount were to be completed in the six days between the Safe Harbor Day and the Electoral College meeting, the state's count could be expeditiously updated by the three-judge court before the Electoral College meeting.
- If the recount were not completed before the Electoral College meeting, the clock would simply have run out. The U.S. Constitution specifically requires that all presidential electors cast their votes on the same day throughout the country. Thus, if the clock were to run out, the initial official certified vote count would stand—as it did in Florida in 2000.
- The myth about unfinished recounts is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that applies equally to the current system.

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[956] Oral and written testimony presented by Tara Ross at the Nevada Senate Committee on Legislative Operations and Elections on May 7, 2009.

MORE DETAILED ANSWER:

In written testimony to the Michigan House Elections Committee on March 7, 2023, Sean Parnell, Senior Legislative Director of Save Our States, raised concerns about what would happen under the National Popular Vote Compact:

> "If for some reason there is not an 'official statement' available to obtain vote totals by the time the compact needs them—for example, if there is a **recount still underway or court challenges** to results."[957] [Emphasis added]

The answer to this hypothetical scenario applies equally to both the current system and the National Popular Vote Compact.

The U.S. Constitution explicitly requires that the Electoral College meet in each state on the same day throughout the country.

> "The Congress may determine the Time of chusing the Electors, and **the Day on which they shall give their Votes; which Day shall be the same throughout the United States**."[958] [Emphasis added] [Spelling as per original]

Congress has, by statute, determined that the Electoral College will meet on the first Tuesday after the second Wednesday in December.[959]

Historically, administrators and courts have scheduled and executed presidential recounts and litigation so as to reach a final determination of the state's vote count inside the brief 36-day period between Election Day and the Safe Harbor Day (i.e., six days before the Electoral College meeting). Such scheduling has been based on the presumption that each state wishes to enjoy the benefit of the safe harbor provisions of the Electoral Count Act of 1887.[960]

The Electoral Count Reform Act of 2022 increased the importance of the Safe Harbor Day by making it a firm deadline for a state to issue its Certificate of Ascertainment.

Section 5(a)(1) of the 2022 Act requires:

> "Certification—Not later than the date that is **6 days before** the time fixed for the meeting of the electors, **the executive of each State shall issue a certificate of ascertainment**…" [Emphasis added]

Thus, starting in 2024, we can expect administrators and courts to schedule and execute presidential recounts and litigation so as to reach a final determination of the state's vote count inside the period between Election Day and the Safe Harbor Day.

Suppose that, for the sake of argument, a recount and the associated litigation is not finished prior to the federal statutory deadline.

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[957] Testimony of Sean Parnell, Senior Director, Save Our States Action, to the Committee on Elections, Michigan House of Representatives on HB4156 (The National Popular Vote Interstate Compact). March 7, 2023. Page 3. https://house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/elections/meetings/2023-03-07-1/documents/testimony/Sean%20Parnell.pdf

[958] U.S. Constitution. Article II, section 1, clause 4. https://constitution.congress.gov/browse/article-2/section-1/clause-4

[959] The Electoral Count Reform Act of 2022 changed the Electoral College meeting date by one day.

[960] See section 6.2.3 for a discussion of the "legislative wish."

As the name implies, a "recount" can only occur after the completion and certification of the state's initial count. That is, a certified initial count necessarily already exists prior to the start of a recount.

In the unlikely event that a recount were to remain unfinished by the federal deadline, the state involved would nonetheless be obligated to comply with the deadline in the Electoral Count Reform Act of 2022.

Given that a recount can only occur after the completion of an initial certified count, and that an initial certified count is presumptively valid unless overturned, the state's Certificate of Ascertainment would necessarily contain the already-completed and already-certified initial count.

The Electoral Count Reform Act of 2022 recognized the possibility that Certificates of Ascertainment might need revision during the six-day period between the Safe Harbor Day and the Electoral College meeting. Therefore, section 5(c)(1)(B) of the 2022 Act provides:

> "Certificates issued pursuant to court orders—Any certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section."

If the unfinished recount is completed in the six days between the federal deadline and the Electoral College meeting, a special three-judge federal court established by the Electoral Count Reform Act of 2022 has the power to revise an already-issued Certificate of Ascertainment.

This new court—open only to aggrieved presidential candidates—has jurisdiction over the "issuance" of the Certificates of Ascertainment and its "transmission" to the National Archives.

This special court is required to operate on a highly expedited schedule, and there is an expedited appeal to the U.S. Supreme Court.

Given that the Constitution provides that the Electoral College meet on the same day in every state, all of the actions of both the three-judge court (and possible Supreme Court review) are to be scheduled:

> "so that a final order … may occur on or before the day before the time fixed for the meeting of electors."

Specifically, the Electoral Count Reform Act of 2022 Act provides:

> "(1) In general—**Any action brought by an aggrieved candidate for President** or Vice President that arises under the Constitution or laws of the United States **with respect to the issuance of the certification** required under section (a)(1), **or the transmission of such certification** as required under subsection (b), shall be subject to the following rules:
>
> "(A) Venue—The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

"(B) 3-judge panel—**Such action shall be heard by a district court of three judges**, convened pursuant to section 2284 of title 28, United States Code, except that—

(i) the court shall be comprised of two judges of the Circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

"(C) Expedited procedure—It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, **consistent with all other relevant deadlines established by this chapter** and the laws of the United States.

"(D) Appeals—Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, **so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors**." [Emphasis added]

State law in at least one state (Michigan) empowers the state supreme court to order the issuance of a superseding Certificate of Ascertainment if a recount changes the previously certified results before the Electoral College meeting.[961]

As a practical matter, recounts are rare, and they change very few votes. An average of only 551 votes are changed in a statewide recount, according to data compiled by FairVote from all 36 recounts of statewide general elections in the 24-year period between 2000 and 2023 (section 9.34.1).

An unfinished state recount has the potential to slightly change the national popular vote total that each state belonging to the Compact reported on its Certificate of Ascertainment and issued by the Safe Harbor Day.

Given that 551 votes would be an infinitesimal fraction of the more than 158,000,000 votes cast nationally in a presidential election, it would be extremely unlikely that an unfinished state-level recount would change the winner of the national popular vote.

However, for the sake of argument, suppose that 551 votes were to change the winner of the national popular vote.

In that event, the special three-judge court created by the Electoral Count Reform Act of 2022 would provide the newly identified victor with a speedy mechanism for revising all the affected Certificates from the states belonging to the National Popular Vote Compact.

As previously mentioned, the U.S. Constitution specifically requires that all presidential electors cast their votes on the same day. Thus, if a recount were not completed before

[961] See Michigan Public Act 269 of 2023 at https://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0269.pdf The legislative history of this act (Senate Bill 529 of 2023) is at https://www.legislature.mi.gov/(S(ppccw5zb44mss3s3023wkug4))/mileg.aspx?page=getObject&objectName=2023-SB-0529

the Electoral College meeting, the clock would have run out—as it did in Florida in 2000. The originally certified vote count from the state would stand.

In any event, the hypothetical scenario involving unfinished recounting or unfinished litigation would be handled in an identical fashion under both the current system and the National Popular Vote Compact.

The myth about unfinished recounts is one of many examples in this book of a criticism aimed at the National Popular Vote Compact that applies equally to the current system and would be handled in the same way as the current system.

9.34.6. MYTH: Resolution of a presidential election could be prolonged beyond inauguration day because of recounts under the Compact.

QUICK ANSWER:

- The U.S. Constitution and federal law establish a strict overall national schedule for finalizing the results of presidential elections. All counting, recounting, and administrative and judicial proceedings must be conducted so as to reach a final determination prior to the uniform nationwide date established for the Electoral College meeting in mid-December. This constitutional schedule would govern elections conducted under the National Popular Vote Compact in the same way that it controls the schedule of events under the current system.
- It may be argued that the schedule established by the U.S. Constitution and existing federal statutes could rush the count, prevent a recount of presidential ballots (as was the case in 2000, 2004, 2016, and 2020), and possibly even create injustice. However, there can be no denial that this schedule exists, and that it guarantees finality prior to the Electoral College meeting in mid-December.

MORE DETAILED ANSWER:

Brendan Loomer Loy speculates that if we were to have a nationwide popular vote for President:

> "Post-election uncertainty could stretch well into January, raising doubt about whether we would have a clear winner by inauguration day."[962]

In fact, Loy's scary scenario is precluded by the U.S. Constitution and existing federal law.

The U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election.

This constitutional schedule would apply to elections conducted under the National Popular Vote Compact in the same way that it applies to elections conducted today under the current system.

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[962] Loy, Brendan Loomer. 2007. "Count Every Vote—All 538 of Them. *Social Science Research Network*. September 12, 2007. Available at http://ssrn.com/abstract=1014431.

The U.S. Constitution provides:

> "**The Congress may determine** the Time of chusing the Electors, and **the Day on which they shall give their Votes; which Day shall be the same throughout the United States.**"[963] [Emphasis added] [Spelling as per original]

Congress exercised its constitutional power to set the uniform nationwide date for the Electoral College meeting by enacting section 7 of the Electoral Count Reform Act of 2022:

> "The electors of President and Vice President of each State shall meet and give their votes on the **first Tuesday after the second Wednesday in December** next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day."[964] [Emphasis added]

Thus, all counting and recounting must be conducted so as to reach a final determination in the 42-day period between Election Day and the uniform nationwide date established for the Electoral College meeting in mid-December.

Note that the laws governing the final determination of the winner of a presidential election are entirely different from those governing, say, a disputed race for one of the 100 seats in the U.S. Senate or a disputed race for one of the 435 seats in the U.S. House.

For example, Al Franken, the winner of a recount of the 2008 U.S. Senate race in Minnesota, did not take office until July 7, 2009—more than six months after the beginning of a U.S. Senator's term on January 3.

It may be argued that the schedule established by the U.S. Constitution and existing federal statutes could rush the count, prevent a recount (as was the case in 2000, 2004, 2016, and 2020), and possibly even create injustice. However, there can be no denial that this schedule exists, and that it guarantees finality prior to the Electoral College meeting in mid-December.

9.34.7. MYTH: There is no way to guarantee a recount in every state.

QUICK ANSWER:

- One way to solve the problem of guaranteeing a timely recount in a presidential election would be for every state to revise its existing recount laws so as to guarantee an aggrieved presidential candidate a recount as a matter of right. However, state legislatures have not addressed this issue despite the inability of presidential candidates to obtain recounts in 2000, 2004, 2016, and 2020.
- Enactment of the National Popular Vote Compact could create the impetus for the states or the federal government to update recount procedures.
- Alternatively, Congress could use its authority over the count in presidential elections to enact a federal recount law that would give presidential candidates

[963] U.S. Constitution. Article II, section 1, clause 4.

[964] Under the Electoral Count Act of 1887, the Electoral College meeting was held one day earlier—that is, on the first Monday after the second Wednesday in December.

a right to obtain a candidate-paid recount that must be completed prior to the federal Safe Harbor Day.

- A federal recount law would be especially beneficial to the operation of the current state-by-state winner-take-all method for awarding electoral votes. Such a law would also be potentially beneficial under the National Popular Vote Compact, even though there is unlikely to ever be a need to conduct a nationwide recount under the Compact. Under the Compact, the probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (section 9.34.1). Indeed, there would be considerably less need for a recount under a national popular vote system than under the current state-by-state winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

One way to solve the problem of guaranteeing a timely recount in a presidential election would be for every state to revise its existing laws so as to guarantee an aggrieved presidential candidate the right to a timely recount.

Unfortunately, state legislatures have not focused on this issue despite the demonstrated inability of candidates to obtain recounts in 2000, 2004, 2016, and 2020.

Another approach would be for Congress to act.

Although Congress does not control the method of awarding a state's electoral votes, it has constitutional authority over the counting of votes in presidential elections.

Since 1792, federal law has required each state to issue an appropriate certificate reporting its official results to the federal government.[965]

Both the Electoral Count Act of 1887 (which was in effect until 2022) and the Electoral Count Reform Act of 2022 illustrate the exercise of Congress' authority over the count in presidential elections. Both laws require each state to issue a Certificate of Ascertainment containing the state's final determination of the number of popular votes cast in the state for each presidential-vice-presidential slate (that is, the "canvass").

Each state's Certificate of Ascertainment provides supporting evidence for the state's appointment of the presidential electors under the state's chosen method of awarding electoral votes.

In the case of a state using the statewide winner-take-all method of awarding electoral votes, the Certificate contains the canvass of the statewide popular vote for President.[966]

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[965] An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President. 2nd Congress. 1 Stat. 239. March 1, 1792. Page 240. https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf

[966] For example, see figure 3.3 showing Vermont's 2008 Certificate of Ascertainment. The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

In the cases of states such as Maine and Nebraska that award some of their electoral votes by congressional district, the Certificate also contains the district-wide popular vote.[967]

A federal law would be especially beneficial to the operation of the *current* state-by-state winner-take-all method for awarding electoral votes, because it routinely creates close results in one, two, or three closely divided battleground states.

Each presidential election under the current system is really 51 separate state-level elections (as well as congressional-district-level elections in Maine and Nebraska). The nation's 59 presidential elections between 1789 and 2020 have really been 2,339 separate state-level elections. Although the probability of a recount in any single statewide election is low (1-in-192 according to a study of the 6,929 statewide general elections in the 24-year period between 2000 and 2023 as discussed in section 9.34.1), the fact that each presidential election under the *current* state-by-state system is really 51 separate state-level elections means that there is a significant chance of future disputed presidential elections under the *current* system.

A federal law would also be potentially beneficial under the National Popular Vote Compact, even though the probability of recounts would be much lower with a single large national pool of votes. The probability is very high (99.74%) that only one presidential election in 324 (that is, once in 1,296 years) would be close enough that a nationwide recount could overturn the result (section 9.34.1).

Time is of the essence in conducting a recount in a presidential election. The U.S. Constitution and federal law establish a strict overall national schedule for finalizing the results of a presidential election.

In particular, the Constitution requires the Electoral College to meet on the same day throughout the United States. Current federal law requires states to issue their Certificate of Ascertainment six days before the Electoral College meeting (that is, 36 days after Election Day).

Thus, the initial count, pre-recount litigation, the recount, and post-recount litigation proceedings must be conducted so as to reach a final determination in a relatively brief period.

One key consideration in constructing a practical schedule for recounts in presidential elections is the fact that *there cannot be a recount until there is a count.* That is, the precondition for conducting a full ballot-by-ballot recount of a presidential election is rapid completion and certification of the initial count.

Taking all of the above considerations into account, we believe that it would be helpful if Congress were to enact a federal recount law for presidential elections with the following features.

First, a federal recount law should require that each state's chief election official prepare and publish a recount plan 180 days before Election Day. The plan would include:

- a schedule for completing and certifying the initial count of the presidential vote and a schedule for conducting a recount (if requested by any presidential candidate on the ballot in states possessing a majority of the electoral votes)

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[967] The Certificates of Ascertainment for all 50 states and the District of Columbia for 2020 may be found at https://www.archives.gov/electoral-college/2020

involving a one-by-one examination of every ballot (to the extent possible, given the state's voting equipment and procedures) that is completed five days before the federal Safe Harbor Day;

- the cost of the recount—such cost to be paid for, in advance, by the requesting candidate;
- comprehensive standards for determining voter intent for all cases that may be reasonably anticipated given the state's voting equipment and procedures.

Most problems associated with counting votes are well known to state election officials as a result of their years of experience in conducting elections and recounts using their own state's voting equipment and procedures. However, in many states, the standards for resolving these problems are a mixture of various state statutes, case law, administrative procedures at the state and local level, and unwritten practices. Clear rules for determining voter intent in the form of administrative standards would increase the efficiency of the initial count and recount and effectively reduce the number of issues that could be successfully raised in post-recount litigation.

The requesting presidential candidate should be required to pay for the recount. As a practical matter, a presidential candidate who has a realistic chance of overturning an apparent loss of the White House would have no difficulty quickly raising the money to pay for the requested actions.

The right to a recount of a presidential vote count should be given to the presidential candidates themselves, because they are in the best position to make a realistic and pragmatic political judgment, based on available information, as to whether the election involved is close enough to warrant a recount. In practice, a candidate's request would be made on the basis of a mixture of political intelligence concerning actual returns reported by election officials; exit polls; estimates of the number of uncounted mail-in ballots, uncounted provisional ballots, and uncounted military ballots; and historical information and current polling indicating the likely composition of mail-in, provisional, and military ballots.

Note that it is not desirable or possible to impose any preconditions concerning the closeness of the results on requests by the presidential candidates. The fact that the candidate would have to pay the costs of a requested acceleration of the initial count and the costs of a requested recount would act as a disincentive against unrealistic requests.

Second, a federal recount law should make it clear that it is an option in addition to any procedure available under state law, state administrative procedures, or state case law.

Third, the special three-judge federal court (open only to presidential candidates) created by the Electoral Count Reform Act of 2022 should be designated as the forum for any litigation under the federal recount law.

Fourth, there should be a federal deadline for a state to complete and certify its initial vote count for President. Such a deadline would prevent state officials from preventing a recount merely by slow-walking the initial count.

The Compact could provide the impetus for the states or the federal government to update recount laws.

The observation that existing state recount laws are not currently based on national popular vote totals is something of a straw man in that it suggests that existing state recount laws are permanent and unchangeable.

When the U.S. House of Representatives passed the proposed Celler-Bayh constitutional amendment in 1969 to establish a national popular vote for President, by a bipartisan 338–70 vote, there was no procedure for recounts in the amendment.

Similarly, when the U.S. Senate passed the proposed Lodge-Gossett constitutional amendment in 1950 to establish the fractional-proportional method for awarding electoral votes, by a bipartisan 64–27 vote, there was no procedure for recounts in the amendment.

The ratification of either constitutional amendment probably would have provided the impetus to update existing laws regarding timely recounts in presidential elections.

Similarly, the enactment of the National Popular Vote Compact would probably provide the impetus to update existing laws regarding timely recounts in presidential elections.

As Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, said:

> "**To be fair, if NPV were implemented, then many state legislatures would probably work to make their recount statutes more lenient.** Even if these states otherwise disagree with NPV, they would not want to be caught in a situation where they could not participate in a national recount. Moreover, as alluded to previously, many states already provide 'optional recount' statutes that allow recounts to be requested by candidates or voters even without a close margin."[968] [Emphasis added]

9.35. MYTHS ABOUT DURABILITY OF THE COMPACT

9.35.1. MYTH: A state could pop in or out of the Compact for partisan reasons prior to July 20 of a presidential election year.

QUICK ANSWER:

- The National Popular Vote Compact will govern the conduct of a presidential election if it is in effect in states possessing 270 electoral votes on July 20 of a presidential election year.
- This myth that a state legislature and Governor could "pop in and out of" the Compact based on short-term partisan considerations is predicated on the existence of polls that are capable of accurately predicting that the Electoral College vote and national popular vote will diverge in the upcoming November election.
- In fact, polls taken *days* before an election have failed to accurately foresee

[968] Ross, Tara. 2012. *Enlightened Democracy: The Case for the Electoral College*. Los Angeles, CA: World Ahead Publishing Company. Second edition. Page 159.

that the electoral vote will diverge from the national popular vote. As late as the week before the 2000 election, the polls were predicting that George W. Bush was going to win the national popular vote while losing the Electoral College—exactly the opposite of what happened. Similarly, in 2016, no polls predicted that Hillary Clinton would lose the Electoral College vote while winning the national popular vote. Indeed, the fact that 2016 would be a "wrong winner" election did not become apparent until late on Election Night.

- Under the current system, states can change their method of awarding electoral votes right up to *the Monday before Election Day.* If anyone is concerned about the hypothetical scenario in which states "pop in and out of" the National Popular Vote Compact, the Compact's July 20 deadline is superior to the current system's deadline for changing the rules of the game. This myth is one of many examples in this book of a criticism aimed at the National Popular Vote Compact where the Compact is superior to the current system.
- Because of state constitutional provisions and other scheduling issues in state legislatures, a decision to "pop in and out of" the National Popular Vote Compact would, in practice, have to be made considerably earlier than July 20 of the presidential election year.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, asserted in 2017:

> "States will be able to pop in and out of the compact. … The presidential election system would be in a constant state of upheaval."[969]

In a similar vein, David Gringer propounded a hypothetical scenario in 2008 in which the Republican-controlled Texas legislature might "perniciously" enact the National Popular Vote Compact on the basis of mid-year polling indicating that the Republican presidential nominee is poised to win the national popular vote while losing the Electoral College.

In his 2008 article, Gringer hypothesized a 2020 election cycle in which:

> "Early polling shows likely Democratic nominee New York Governor Eliot Spitzer with a substantial lead in Texas over the soon-to-be Republican nominee South Dakota Senator John Thune. If the Democratic nominee carries Texas in the general election, he will have a 'lock' on the electoral college."
>
> "At the behest of Republican Party leaders, the state legislature passes a bill awarding its electoral votes to the winner of the national popular vote. The Republican Governor of Texas signs the bill into law.

[969] Ross, Tara, 2017. Truth catches up with the effort to abolish the Electoral College. *Washington Examiner.* October 19, 2017.

> "With the addition of Texas, enough states now participate for the NPV to take effect."[970]

The Compact governs a given presidential election only if it is in effect in states possessing a majority of the electoral votes on July 20 of a presidential election year. The National Popular Vote Compact specifies that it will:

> "govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes."[971]

Moreover, if a state withdraws from the Compact during the six-month period between July 20 of a presidential election year and the following January 20 (Inauguration Day), the withdrawal will not take effect until after the Inauguration (as discussed in detail in section 9.25).

Thus, the question of whether the National Popular Vote Compact will govern a particular November presidential election is settled on July 20 of each presidential election year.

July 20 usually comes before events such as:

- the national nominating conventions of the major political parties;
- the debates between the candidates nominated at the conventions; and
- the day-to-day conduct of the campaign in the fall, including the numerous unexpected events that occur (e.g., the financial crisis in mid-September 2008).

Polls taken days before an election have consistently failed to accurately foresee that the electoral vote will diverge from the national popular vote. Hypothetical scenarios in which politically motivated states "pop in and out of" the Compact before July 20 of a presidential election year assume the existence of predictive techniques that are sufficiently accurate to convince a state legislature and Governor that the Electoral College vote will diverge from the national popular vote in November.

Both the 2000 and 2016 election illustrate that it is difficult to make an accurate prediction *days* before Election Day—let alone in July—about whether the electoral vote will diverge from the national popular vote.

In 2000, for example, George W. Bush had an average national-popular-vote lead of 2.1% in the 18 polls listed in *Polling Report* for the *five-day* period before Election Day. As shown in table 9.52, Bush was ahead in 14 of the 18 polls and tied in two, while Gore was ahead in only two polls.[972]

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[970] Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. 108 *Columbia Law Review* 182. January 2008. Pages 219–220.

[971] Article III, clause 9 of the National Popular Vote Compact. See section 6.3.3 for a detailed discussion.

[972] Election 2000. *Polling Report*. https://www.pollingreport.com/2000.htm In the table, a pound sign indicates a tracking poll; an asterisk indicates a poll taken without naming the running mate; and an ampersand indicates that undecided voters were allocated. The date is the ending day of the poll.

Table 9.52 National polls in the five days before the 2000 election

Poll	Bush	Gore	Nader	Buchanan	Bush lead over Gore	Day
CBS *	44	45	4	1	–1	Monday
CNN/USA TODAY/GALLUP # @	48	46	4	1	2	Monday
CNN/USA TODAY/GALLUP #	47	45	4	1	2	Monday
IBD/CSM/TIPP * # @	47.9	46	3.7		2	Monday
REUTERS/MSNBC * # @	46	48	5	1	–2	Monday
VOTER.COM * # @	50	45	3.5		5	Monday
VOTER.COM * #	46	41	4	0	5	Monday
ABC # *	48	45	3	1	3	Sunday
HARRIS * @	47	47	5		0	Sunday
HOTLINE *	45	42	4	1	3	Sunday
ICR *	46	44	7	2	2	Sunday
NBC/WALL ST. JOURNAL	47	44	3	2	3	Sunday
PEW @	49	47	4		2	Sunday
PEW	45	43	4		2	Sunday
WASHINGTON POST *	48	45	3	1	3	Sunday
FOX/OPINION DYNAMICS *	43	43	3	1	0	Thursday
MARIST COLLEGE	49	44	2	1	5	Thursday
NEWSWEEK	45	43	5		2	Thursday
Average	**46.7**	**44.6**	**4.0**	**0.7**	**2.1**	

Mike Shannon reported what the Bush campaign thought *six days* before Election Day:

> "**I was the keeper of the George W. Bush campaign map—our color-coded projection of electoral college votes based on our private state tracking polls**."
>
> "The map is a prime example of the uncertainty in projecting presidential races when there is a deeply divided electorate and the potential for late-fall surprises."
>
> "**That map proved wrong just six days later**."
>
> "**Florida, where our nightly polls had shown us holding a five-point lead**."
>
> "New Mexico (Solid Bush), Michigan (Lean Bush) and Wisconsin (Lean Bush) were ultimately won by Al Gore."
>
> "**My conviction … can be summed up in three words: Nobody knows anything.**"[973] [Emphasis added]

[973] Shannon, Mike. 2020. I tracked electoral votes for Bush. Beware of the 2020 forecasts. *Washington Post*. September 23, 2020. https://www.washingtonpost.com/outlook/2020/09/23/bush-gore-electoral-polls/

Two days before Election Day (Sunday November 5, 2000), the lead story on the front page of the *New York Times* said:

> "**Mr. Bush continued to hold leads ranging from one to five percentage points in all the national tracking polls**, in addition to his slight advantage in the electoral college calculations."
>
> "No fewer than a dozen states, with a total of 125 of the 270 electoral votes needed for election, were classified as tossups by politicians, pollsters and academic specialists interviewed by the *New York Times*."[974] [Emphasis added]

Meanwhile, in 2000, the Bush campaign was actively planning for the possibility of losing the Electoral College while winning the national popular vote.

In an article entitled "Bush Set to Fight an Electoral College Loss," the *New York Daily News* reported on Wednesday November 1, 2000:

> "**Quietly, some of George W. Bush's advisers are preparing for the ultimate 'what if' scenario: What happens if Bush wins the popular vote for President, but loses the White House** because Al Gore won the majority of electoral votes?"
>
> "**'The one thing we don't do is roll over,' says a Bush aide. 'We fight.'**
>
> "How? The core of the emerging Bush strategy assumes a popular uprising, stoked by the Bushies themselves, of course.
>
> "In league with the campaign—which is preparing talking points about the Electoral College's essential unfairness—a massive talk-radio operation would be encouraged. 'We'd have ads, too,' says a Bush aide, 'and I think you can count on the media to fuel the thing big-time. Even papers that supported Gore might turn against him because the will of the people will have been thwarted.'
>
> "Local business leaders will be urged to lobby their customers; the clergy will be asked to speak up for the popular will; and Team Bush will enlist as many Democrats as possible to scream as loud as they can. 'You think 'Democrats for Democracy' would be a catchy term for them?' asks a Bush adviser.
>
> "**The universe of people who would be targeted by this insurrection is small—the 538 currently anonymous folks called electors**, people chosen by the campaigns and their state party organizations as a reward for their service over the years."

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[974] Apple, R.W. Jr. 2000. The 2000 campaign: The game plan; Dozen states too close to call in the final days. *New York Times*. November 5, 2000. https://www.nytimes.com/2000/11/05/us/2000-campaign-game-plan-dozen-states-seem-too-close-call-final-days.html?searchResultPosition=10

> "Enough of the electors could theoretically switch to Bush if they wanted to—if there was sufficient pressure on them to ratify the popular verdict."[975] [Emphasis added]

Nate Cohn wrote in 2012:

> "There is a high evidentiary burden for demonstrating that any candidate holds a structural advantage in the Electoral College. The Electoral College almost always follows the popular vote, and even when the popular vote winner fails to secure the necessary electoral votes, it isn't necessarily apparent in advance. **Heading into Election Night 2000, the fear was Gore winning the Electoral College and Bush winning the popular vote. The exact opposite happened only a few hours later.** In an extremely close national election, deviations of only a few percentage points in the closest few states can complicate even the best gamed electoral scenarios."[976] [Emphasis added]

Similarly, when the polls closed on Election Day in 2016, it was not evident that Donald Trump was going to win the Electoral College while losing the national popular vote. That outcome did not become evident until several hours later in the evening.

Thus, in the two elections of the early 2000s when the winner of the electoral vote diverged from the national popular vote, that outcome was not evident days—or even hours—in advance.

Summer polling cannot accurately predict that the electoral vote will diverge from the national popular vote in November.

In an article entitled "Anything Can Change in a Presidential Year," Larry Sabato cited numerous previous inaccurate summer predictions:

> "In June 2004, Kerry led Bush outside the margin of error at 49 percent to 43 percent. Instead, Bush grabbed his second term with 51 percent in November."

> "John McCain actually led Barack Obama by a whisker in Gallup's daily tracking at the beginning of June 2008, 46 percent to 45 percent. It wasn't close in the fall, with Obama winning 53 percent."[977]

In July 1988, Michael Dukakis led George H.W. Bush by 17% in a national Gallup poll and even led Bush by 10% in Bush's home state of Texas.[978] However, the general-election

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[975] Kramer, Michael. Bush set to fight an electoral college loss: They're not only thinking the unthinkable, They're planning for it. *New York Daily News.* November 1, 2000. http://articles.nydailynews.com/2000-11-01/news/18145743_1_electoral-votes-popular-vote-bush-aide

[976] Cohn, Nate. 2012. No, we don't have evidence of an Obama advantage in the Electoral College. *The New Republic*. June 27, 2012.

[977] Sabato, Larry. 2012. Anything Can Change in a Presidential Year. *New York Times*. July 23, 2012. https://www.nytimes.com/roomfordebate/2012/01/17/what-the-polls-cant-tell-us/anything-can-change-in-a-presidential-year

[978] Dukakis Lead Widens, According to New Poll. *New York Times*. July 26, 1988. https://www.nytimes.com/1988/07/26/us/dukakis-lead-widens-according-to-new-poll.html?auth=login-email&login=email

campaign had not even started in July, and Bush won in November with an 8% national lead.

In June 2016, an ABC News-*Washington Post* poll of registered voters nationwide showed Hillary Clinton with a 12-point lead over Trump.[979]

In June 2020, a *New York Times*-Siena College poll showed Biden leading Trump by 14 points.[980]

Similarly, Timothy Stanley reminded us that:

> "In March 1980, President Jimmy Carter led Ronald Reagan by 25 percent in some polls. Reagan went onto win the November election by 51 to 41 percent."[981]

The *New York Times* reported that a nationwide Gallup poll taken on June 4–8, 1992, showed Bill Clinton in *third* place. The results were:

- Ross Perot—39%
- Incumbent President George H.W. Bush—31%
- Bill Clinton—25% support.[982]

Despite this June 1992 poll, Bill Clinton took the lead immediately after the Democratic convention and retained it all the way to Election Day.

Table 9.53 shows a compilation by Nathaniel Rakich of the FiveThirtyEight national polling average 84 days before 12 recent elections (that is, mid-August).[983]

More importantly, presidential elections in which one candidate wins the popular vote while losing the electoral vote are necessarily *close elections*.

Tilden's 3.0% margin in 1876 was the largest difference in the national popular vote among the nation's "wrong winner" elections (table 1.1).

In 2000, the difference in the national popular vote between the two candidates was 0.5% (about a half million votes nationwide).

An article on July 24, 2012, by Nate Silver in the *New York Times*, entitled "State and National Polls Tell Different Tales About State of Campaign,"[984] reinforces the point.

Silver pointed out that the *Real Clear Politics* average of national polls gave President Obama a nationwide lead of 1.3% on July 24, 2012. However, at the same moment, Obama led by a mean of 3.5% in the *Real Clear Politics* averages for 10 battleground states (Ohio,

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[979] Bolton, Alexander. 2020. GOP skeptical of polling on Trump. *The Hill*. June 30, 2020. https://thehill.com/homenews/senate/505151-gop-skeptical-of-polling-on-trump

[980] Cohn, Nate. 2020. In Poll, Trump Falls Far Behind Biden in Six Key Battleground States. *New York Times*. June 25, 2020. https://www.nytimes.com/2020/06/25/upshot/poll-2020-biden-battlegrounds.html

[981] Stanley, Timothy. Why Romney is stronger than he seems. *CNN*. April 10, 2012. https://www.cnn.com/2012/04/10/opinion/stanley-romney-prospects

[982] On the Trail: Poll gives Perot a clear lead. *New York Times*. June 11, 1992. https://www.nytimes.com/1992/06/11/us/the-1992-campaign-on-the-trail-poll-gives-perot-a-clear-lead.html The same article reported that, in a previous Gallup poll in late May, Bush and Perot were tied at 35 percent each, with Clinton at 25 percent.

[983] Rakich, Nathaniel. Twitter. August 11, 2020. https://twitter.com/baseballot/status/1293214167231594496?ref_src=twsrc%5Etfw

[984] Silver, Nate. State and national polls tell different tales about state of campaign. FiveThirtyEight column in *New York Times*. July 24, 2012. https://archive.nytimes.com/fivethirtyeight.blogs.nytimes.com/2012/07/24/state-and-national-polls-tell-different-tales-about-state-of-campaign/?searchResultPosition=3

Table 9.53 Mid-August national polling averages 1976–2020

Year	August leading candidate	Lead of August leading candidate in the national popular vote	Did August leading candidate still lead in the national popular vote on Election Day?	Actual lead of August leading candidate on Election Day	Absolute value of difference
2020	Biden	+8.3%	Yes	+4.0%	4.3%
2016	H. Clinton	+6.6%	Yes	+2.0%	4.6%
2012	Obama	+0.5%	Yes	+3.9%	3.4%
2008	Obama	+2.6%	Yes	+7.2%	4.6%
2004	Kerry	+2.5%	No	–2.4%	.4,9%
2000	G.W. Bush	+10.0%	No	–0.5%	10.5%
1996	B. Clinton	+11.3%	Yes	+8.5%	2.8%
1992	B. Clinton	+20.1%	Yes	+5.6%	14.5%
1988	Dukakis	+5.6%	No	–7.8%	13.4%
1984	Reagan	+16.0%	Yes	+18.2%	–2.2%
1980	Reagan	+22.1%	Yes	+9.7%	12.4%
1976	Carter	+26.6%	Yes	+2.1%	24.5%
	Average				**5.5%**

Virginia, Florida, Pennsylvania, Colorado, Iowa, Nevada, Michigan, New Hampshire, and Wisconsin) that were considered (at the time) to be most likely to determine the outcome of the 2012 election. Both the 1.3% margin and the 3.5% margin cited in Silver's article were *inside* the margin of error for most political polling taken during campaigns.

In any case, a poll is not a prediction. Even if a given political poll had *no* margin of error (e.g., if every voter in the country were polled), it would merely be a snapshot of public opinion as of the particular moment when taken.

State constitutional provisions and state legislative procedures provide numerous tools by which the minority party in a state legislature can frustrate a politically motivated last-minute change in state law.

As a practical matter of state legislative scheduling, a decision to "pop in or out of" the National Popular Vote Compact would have to be made considerably earlier than July 20 of a presidential election year in most states.

For one thing, a large majority of state legislatures are not even in session in mid-July. Thus, a change in a state's method of awarding electoral votes would, in practice, have to be enacted earlier in the year in most states.

Moreover, some state legislatures (including the Texas legislature specifically discussed by Gringer) only meet in regular session at the beginning of each *odd-numbered* year—that is, about a year and a half before the presidential election.

In every state, winning approval of any new state law is a multi-step process that can be derailed at many points.

Moreover, the date of approval of a new state law should not be confused with the date on which the new law *takes effect*.

The National Popular Vote Compact is based on state laws that are *in effect on July 20*. Specifically, the ninth clause of Article III of the Compact provides:

> "This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, **in effect** in states cumulatively possessing a majority of the electoral votes." [Emphasis added]

A new state law that is passed by the legislature and signed by the Governor can be "in effect" by July 20 only in accordance with the state's constitution schedule specifying when new state laws take effect.

Procedures exist in every state legislature to allow a newly enacted law to take effect immediately. However, in many states, these procedures can be invoked only by a super-majority.

Given that the premise of Gringer's hypothetical scenario is that the majority party in Texas (the Republicans) wants to enact the National Popular Vote Compact for a "pernicious" partisan advantage, the Democrats in the legislature would vigorously employ every available dilatory tactic at their disposal to block the bill.

Texas is one of four states with a two-thirds quorum in the legislature. Texas Republicans have never had a two-thirds super-majority in both houses of the legislature.

In 2003, the Democrats pulled the quorum when the Republicans attempted to pass a politically motivated mid-decade redrawing of the state's congressional districts (section 9.25.1). They did so again in 2021 concerning an abortion bill.[985] They would surely do so in the situation envisioned by Grainger.

Moreover, many state constitutions provide for a significant delay between the time a Governor signs a new law and its effective date. Delays of 60, 90, or 120 days are typical (as shown in table 9.40 and discussed in section 9.25.1).

Looking at Texas in particular, new state laws take effect 90 days after enactment. This 90-day delay can only be waived by a two-thirds vote of both houses of the legislature. Texas Republicans have not had a two-thirds super-majority in both houses of the state legislature at any time in the 21st century. Thus, the National Popular Vote Compact would have to be signed into law, at the minimum, by April 20 of a presidential election year in order to be in effect by July 20.

There is an additional reason why Gringer's hypothetical scenario could not be successfully executed by April 20 of the presidential election year.

The Texas legislature is one of a number of state legislatures that meet only for a few months in *odd-numbered* years. Thus, Gringer's hypothetical scenario would have to be executed in Texas during the short biannual session that takes place in the early part of an odd-numbered year—that is, 18 months before a presidential election.

Of course, it is theoretically possible to pass a bill in a special session of a state legislature. However, in Texas, a special session would not be an option for a highly partisan bill. If a special session were called for the purpose of passing an elections bill that is perceived to be of partisan advantage to the Republicans, Texas Democrats will simply prevent the formation of a quorum for the special session. In states with filibusters, the minority opposing the legislation would employ that tactic.

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[985] Eltohamy, Farah. 2021. What it means to break quorum and what you need to know about the Texas House Democrats' dramatic departure. *The Texas Tribune*. July 14, 2021. https://www.texastribune.org/2021/07/14/texas-democrats-walkout-quorum/

A state legislature's dominant party can usually overcome dilatory tactics such as quorum-pulling and filibustering in the longer regular legislative session when there are numerous "must pass" bills. However, in a short special session when only one bill is on the agenda, quorum-pulling and filibustering are generally highly effective.

Section 9.25.1 provides additional details on the difficulties associated with trying to pass legislation over the determined opposition of a legislature's minority.

In short, Tara Ross' assertion that "States will be able to pop in and out" of the Compact is a parlor game that does not reflect real-world state legislative operations.

After the Compact is used in one presidential election, additional states are likely to adopt it.

Under the current state-by-state winner-take-all method of awarding electoral votes, general-election campaigns ignore three-quarters or more of the states (as detailed in section 1.2).

In the first national popular vote for President under the National Popular Vote Compact, presidential candidates will necessarily have to solicit votes from all Americans (chapter 8).

Thus, once a national popular vote for President is conducted, many states that did not belong to the Compact in that first election would likely enact the Compact in order to ensure that they would continue to receive attention in the future.

Thus, the Compact is likely to be law in states with considerably more than 270 electoral votes as its second presidential election approaches. Thus, a considerable number of states would have to want to repeal the Compact in order to return to the old system.

Having said that, the nature of democracy is that laws can be repealed. If the Compact does not have sufficient public support, it would simply not govern future presidential elections.

The Compact's July 20 deadline makes it less vulnerable than the current system to politically motivated last-minute changes by states.

Current federal law (the Electoral Count Reform Act of 2022) provides (in section 1):

> "The electors of President and Vice President shall be appointed, in each State, on election day, **in accordance with the laws of the State enacted prior to election day**." [Emphasis added]

In other words, in the time up to and including *the Monday before Election Day*, a state may switch to, or from, the congressional-district method of awarding electoral votes (such as used in Maine and Nebraska), the winner-take-all method, legislative appointment of presidential electors, the whole-number proportional method, or any other method.

In contrast, the National Popular Vote Compact only governs a presidential election if it is in effect in states possessing a majority of the electoral votes on July 20 of a presidential election year.

If anyone is concerned about the hypothetical scenario in which states "pop in and out of" the National Popular Vote Compact, the fact is that the Compact is distinctly superior to the current system in this respect.

The events in Nebraska in 2024 illustrate the difference between the current system and the Compact.

The Republican presidential nominee has won the statewide vote in Nebraska in every election since 1968.

In 1992, Nebraska switched from the statewide winner-take-all method for awarding electoral votes to the congressional-district system.

In 2008 and 2020, the Democratic presidential nominee won one electoral vote from Nebraska's 2nd congressional district (the Omaha area). Meanwhile, the Republican presidential nominee won the state's other four electoral votes.

The Nebraska legislature has considered proposals to repeal the congressional-district method in every year since 2008.

As the 2024 presidential election approached, Nebraska's Republican Governor Jim Pillen, Donald Trump, and others recognized that there was a politically plausible combination of states that might enable the 2nd district's electoral vote to determine the national outcome of the 2024 presidential election. That combination of states (shown by the map in figure 1.22 section 1.6.4) would produce a 269–269 tie in the Electoral College and throw the presidential election into the U.S. House.

When a presidential election is thrown into the House, each state has one vote. Based on the likely composition of the state delegations on January 6, 2025 (discussed in section 1.6.4), the Republican presidential nominee would be chosen President in the event of a 269–269 tie in the Electoral College.

On the other hand, if the 2nd district were to vote for the Democratic presidential nominee in November 2024, and if Nebraska were to retain its current congressional-district method of awarding electoral votes, the Democratic presidential nominee would win the Electoral College by a 270–268 margin.

In the spring of 2024, Pillen, Trump, and others urged the Nebraska legislature to repeal the state's 1992 law establishing the congressional-district method and replace it with the winner-take-all method of awarding electoral votes.

In reaction to a possible change in Nebraska's law, Democratic legislative leaders in Maine (the only other state using the congressional-district method of awarding electoral votes) threatened to switch Maine to the winner-take-all method.[986] That countermove by Maine would negate the partisan advantage that would be created by the proposed legislation in Nebraska.

The winner-take-all bill was blocked by a filibuster in the Nebraska legislature. Shortly thereafter, the regular sessions of both the Nebraska and Maine legislatures adjourned.[987]

The Nebraska Governor has the power to call a special session of the legislature at any

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[986] Stein, Sam. 2024. Maine Dems say they'll consider cutting off Trump's path, if Nebraska moves to hurt Biden. *Politico*. April 26, 2024. https://www.politico.com/news/2024/04/26/maine-nebraska-electoral-votes-trump-00154645

[987] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

time. In fact, the Governor called a special session of the legislature starting on July 25, 2024, to consider a limited list of topics largely focused on property taxes.[988]

Although legislation to change Nebraska's method of awarding electoral votes was not on the agenda of the July 2024 special session, the Governor indicated that he was willing to call a special session before Election Day on that topic if there were enough votes in the legislature to overcome the filibuster, pass the bill, and give the bill immediate effect.[989] Both actions would require a two-thirds vote in the legislature.

Immediate effect would be critical in order to impact the November 2024 presidential election, because newly passed legislation in Nebraska ordinarily takes effect after a 90-day delay.

In Maine, there is a similar 90-day delay before new laws take effect. As in Nebraska, new laws in Maine can be given immediate effect by a two-thirds vote in the legislature. However, because the Democrats do not have two-thirds of the Maine legislature, any attempt by Maine to counter a potential change in Nebraska would have to be enacted by early August.

On August 10, 2024, the *Nebraska Examiner* reported:

> "Nebraska Republican Party Chairman Eric Underwood confirmed what state senators have told the *Examiner* privately, **that the issue is not dead for 2024**, and Pillen and legislative Republicans are **waiting for the right moment to bring it forward**."
>
> "State lawmakers, including the senator who shepherded the idea last session, State Sen. Loren Lippincott of Central City, have said Pillen would call another special session if he can show the governor he has 33 votes to overcome a promised filibuster."[990] [Emphasis added]

As of the time of this writing, it is not known whether Nebraska law will be changed in time to impact the November 2024 presidential election.

In summary, a state can change its method of awarding electoral votes right up to the day before Election Day under the current system, whereas under the National Popular Vote Compact, a change in method would have to be enacted and take effect by July 20.

If anyone is concerned about the hypothetical scenario in which states "pop in and out of" the National Popular Vote Compact, the Compact's July 20 deadline is superior to the current system's deadline.

The myth that states could "pop in and out of" the National Popular Vote Compact is one of many examples in this book of a criticism aimed at the Compact where the Compact is superior to the current system.

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[988] Nebraska Legislature. Introduced Legislation for July 25th, 2024. https://www.nebraskalegislature.gov/calendar/legislation.php?day=2024-07-25

[989] Sanderford, Aaron. 2024. Nebraska push for winner-take-all will wait in line after property tax relief. *Nebraska Examiner*. July 22, 2024. https://nebraskaexaminer.com/2024/07/22/nebraska-push-for-winner-take-all-will-wait-in-line-after-property-tax-relief

[990] Sanderford, Aaron. 2024. Nebraska's 2nd District steps back into presidential spotlight after crazy month. *Nebraska Examiner*. August 10, 2024. https://nebraskaexaminer.com/2024/08/10/nebraskas-2nd-district-steps-back-into-presidential-spotlight-after-crazy-month/

9.36. MYTHS ABOUT A SYSTEMATIC REPUBLICAN OR DEMOCRATIC ADVANTAGE IN THE ELECTORAL COLLEGE

9.36.1. MYTH: Population growth in Sunbelt states gives the Republicans an ongoing advantage in the Electoral College.

QUICK ANSWER:

- Each state's number of votes in the Electoral College is readjusted every 10 years to reflect the result of the federal census.
- Republican-leaning states gained a total of 18 electoral votes as a result of the 2020 and 2010 census—largely because of rapid population growth in Sunbelt states.
- This gain of 18 electoral votes was illusory, because newcomers with political views different from a state's existing voters often destabilize the state's political equilibrium. In particular, there are eight states (comprising 107 electoral votes) that were solidly Republican for decades, but where fast growth did not benefit the Republican cause. Rapidly growing states such as Virginia, Colorado, and New Mexico were solidly red in presidential elections during the last part of the 20th century. However, they transitioned to being battleground states (for a few elections), and they are now solidly blue. Moreover, fast-growing Arizona, Florida, Georgia, Nevada, and North Carolina have shifted from being solidly red during the last part of the 20th century to being battleground states in the 21st century.

MORE DETAILED ANSWER:

As a result of each recent census, many states that were solidly Republican for decades (mainly in the South and West) have grown rapidly.

These states have consistently gained electoral votes at the expense of other states (mainly in the North) that have usually voted Democratic.

Some have argued that this long-term shift of electoral votes should be interpreted as favoring the Republican Party.

However, rapid population growth is not necessarily advantageous to a state's currently dominant political party.

People move into a state, leave a state, and stay in a state because of various economic, demographic, cultural, and psychological factors.

Because the political outlook of newcomers often differs significantly from that of continuing residents and leavers, rapid population growth often alters a state's political complexion.

The 2010 and 2020 census gave Republicans an additional 18 electoral votes, but destabilized 77 other electoral votes.

Republican-leaning states gained six electoral votes as a result of the 2020 census and 12 electoral votes, thanks to the 2010 census.

The Republican Party would have received six more electoral votes in the 2020 presi-

dential election if the allocation of electoral votes based on the 2020 census had applied to the 2020 election. Specifically:

- Five states that voted Democratic in the 2020 presidential election lost electoral votes as a result of the 2020 census, namely California (–1), Illinois (–1), Michigan (–1), New York (–1), and Pennsylvania (–1). However, two states that voted Democratic in 2020 gained electoral votes, namely Colorado (+1) and Oregon (+1). The result was a net gain of three electoral votes for the Republicans.
- Four states that voted Republican in the 2020 presidential election gained electoral vote(s) as a result of the 2020 census, namely Florida (+1), Montana (+1), North Carolina (+1), and Texas (+2). However, two states that voted Republican in 2020 lost electoral votes, namely Ohio (–1) and West Virginia (–1). The result was a net gain of three electoral votes for the Republicans.

The 2010 census had a similar effect, as indicated by the results of the 2008 and 2012 elections.[991]

- Eight states that voted Democratic in the 2008 and 2012 presidential elections lost electoral votes as a result of the 2010 census, namely Illinois (–1), Iowa (–1), Massachusetts (–1), Michigan (–1), New Jersey (–1), New York (–2), Ohio (–2), and Pennsylvania (–1). However, three states that voted Democratic in 2008 and 2012 gained electoral votes, namely Florida (+2), Nevada (+1), and Washington (+1). The result was a net gain of six electoral votes for the Republicans.
- Five states that voted Republican in the 2008 and 2012 presidential elections gained electoral vote(s) as a result of the 2010 census, namely Arizona (+1), Georgia (+1), South Carolina (+1), Utah (+1), and Texas (+4). However, two states that voted Republican in 2008 and 2012 lost electoral votes, namely Louisiana (–1) and Missouri (–1). The result was a net gain of six electoral votes for the Republicans.

This Republican gain of 12 electoral votes as a result of the 2010 census and the additional gain of six electoral votes as a result of the 2020 census might seem, at first glance, to be helpful to the Republicans.

However, this combined gain of 18 electoral votes was illusory, because it was accompanied by a destabilization of eight states with 107 electoral votes that had been solidly Republican during the last part of the 20th century and the early 2000s.

These eight formerly solidly Republican states are listed below along with their numbers of electoral votes in the 2024 and 2028 elections.

- Virginia (13), Colorado (10), and New Mexico (5) were solidly red for most of the last part of the 20th century. All three voted Republican for President in 2004. However, they transitioned to being solidly blue in presidential elections in 2008, 2012, 2016, and 2020. All three are considered blue states in 2024. These states together have 28 electoral votes.
- North Carolina (16), Arizona (11), Georgia (16), and Nevada (6) were solidly red for most of the last part of the 20th century. All four voted Republican for

[991] See table 3.1 for the distribution of electoral votes in various decades.

President in 2000 and 2004. However, they have transitioned to being closely divided battleground states in recent years. These states together have 49 electoral votes.

- Florida (30) was solidly red for most of the last part of the 20th century. However, it was a closely divided battleground state in 1996 (and, in fact, went Democratic that year) and in 2000 (when it went Republican by a mere 537 popular votes). It went Democratic in 2008 and 2012 and then went Republican in 2016 and 2020 (when Trump won 52% of the two-party vote).

Rapid population growth upset the previously prevailing political equilibrium in each of these eight states and then, more tangibly, increased the payoff to the Democrats when they won those states.

Moreover, rapid population growth in Texas creates the possibility of the nation's second-largest state (with 40 electoral votes in the 2024 and 2028 elections) becoming a battleground state in the future.[992,993]

Figure 9.28 shows that the Republican presidential nominee's percentage of the two-party vote was:

- 62% in 2004 (when Texas had 34 electoral votes)
- 56% in 2008
- 58% in 2012 (when Texas had 38 electoral votes)
- 55% in 2016
- 53% in 2020.

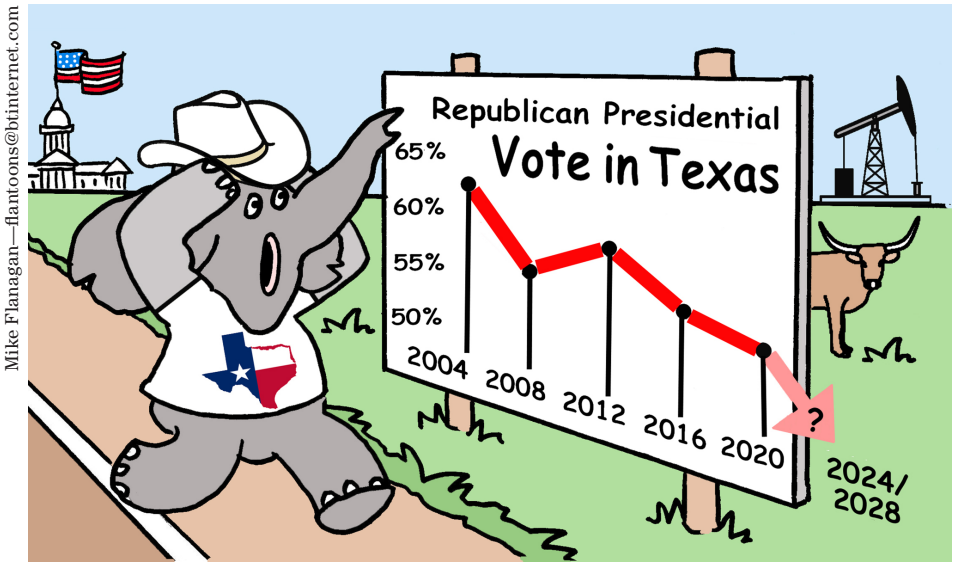

Figure 9.28 Republican presidential vote 2004–2020

[992] Mahtesian, Charles. Obama's Texas battleground prediction. *Politico*. July 18, 2012.

[993] Hallman, Tristan. Obama: Texas will be a battleground state "soon." *Dallas Morning News*. July 17, 2012. The quote from Obama was "You're not considered one of the battleground states, although that's going to be changing soon."

9.36.2. MYTH: The 2000 election illustrates the Republican Party's structural advantage under the current system.

QUICK ANSWER:

- The Republicans won the 2000 presidential election because of George W. Bush's 537 popular-vote margin in Florida out of over five million votes cast there. That razor-thin statewide margin was the composite result of numerous extraordinarily small events that occurred during that campaign—not because of any Republican structural advantage conferred by the state-by-state winner-take-all method of awarding electoral votes.

MORE DETAILED ANSWER:

It is sometimes argued that the Republican victory in the 2000 election is evidence that the Republican Party has a *structural* advantage under the current state-by-state winner-take-all system.

In 2000, George W. Bush won Florida by a margin of 537 popular votes out of 5,963,110 votes cast there.

Indeed, when an election is decided by a margin of 537 votes out of 5,963,110, numerous factors (large and small) necessarily affected the outcome.

As detailed in section 1.3.9, at least four extraordinarily small random events decided the outcome of the presidential race in Florida in 2000:

- the decision by one county official to use the butterfly ballot;
- rain in part of the state on Election Day;
- the use of punch card voting and the resulting hanging chads; and
- the choice of size for the U.S. House of Representatives made in 1911.

There is no way to say whether Al Gore would have become President had the 2000 campaign been conducted on the basis of the national popular vote.

What can be said with certainty is that the patterns of candidate travel and advertising in 2000 would have been entirely different under a national popular vote, because candidates would have solicited votes in every state. Candidates would not have concentrated their efforts so heavily on Florida or any other single state in a nationwide campaign. Almost all (92%) of the general-election campaign events (405 of 439) occurred in 20 states where the Republican percentage of the two-party vote was in the narrow nine-percentage-point range between 44% and 53%, as shown in table 1.19. In a nationwide campaign, the issues discussed would have been different because the candidates would have had to appeal to more than just the voters living in the closely divided states.

9.36.3. MYTH: The Republican Party would find it difficult to win the most votes nationwide.

QUICK ANSWER:

- Over a period of time, the United States has been an evenly divided country. The cumulative nationwide presidential vote in the 31 presidential elections between 1900 and 2020 was virtually tied—50.17% of the two-party vote going to the Republicans and 49.83% going to the Democrats.

MORE DETAILED ANSWER:

Table 9.54 shows the national popular vote for President between 1900 and 2020 and the difference between the Republican and Democratic vote.[994]

Table 9.54 The national popular vote for President 1900–2020

Election	Republican	Democrat	R margin	D margin	R–D margin
1900	7,219,193	6,357,698	861,495		861,495
1904	7,625,599	5,083,501	2,542,098		2,542,098
1908	7,676,598	6,406,874	1,269,724		1,269,724
1912	4,120,207	6,294,326		2,174,119	–2,174,119
1916	8,547,039	9,126,063		579,024	–579,024
1920	16,151,916	9,134,074	7,017,842		7,017,842
1924	15,724,310	8,386,532	7,337,778		7,337,778
1928	21,432,823	15,004,336	6,428,487		6,428,487
1932	15,760,426	22,818,740		7,058,314	–7,058,314
1936	16,679,683	27,750,866		11,071,183	–11,071,183
1940	22,334,940	27,343,218		5,008,278	–5,008,278
1944	22,021,053	25,612,610		3,591,557	–3,591,557
1948	21,970,064	24,105,810		2,135,746	–2,135,746
1952	33,777,945	27,314,992	6,462,953		6,462,953
1956	35,590,472	26,022,752	9,567,720		9,567,720
1960	34,108,157	34,226,731		118,574	–118,574
1964	27,178,188	43,129,566		15,951,378	–15,951,378
1968	31,785,480	31,275,166	510,314		510,314
1972	47,169,911	29,170,383	17,999,528		17,999,528
1976	39,147,793	40,830,763		1,682,970	–1,682,970
1980	43,904,153	35,483,883	8,420,270		8,420,270
1984	54,455,075	37,577,185	16,877,890		16,877,890
1988	48,886,097	41,809,074	7,077,023		7,077,023
1992	39,103,882	44,909,326		5,805,444	–5,805,444
1996	39,198,755	47,402,357		8,203,602	–8,203,602
2000	50,460,110	51,003,926		543,816	–543,816
2004	62,040,611	59,028,432	3,012,179		3,012,179
2008	59,934,814	69,456,898		9,522,084	–9,522,084
2012	60,930,782	65,897,727		4,966,945	–4,966,945
2016	62,985,134	65,853,652		2,868,518	–2,868,518
2020	74,215,875	81,268,586		7,052,711	–7,052,711
Total	**1,032,137,085**	**1,025,086,047**			**227,453**

[994] In 1912, the Republican Party was badly split. The official Republican nominee (incumbent President William Howard Taft) came in third place nationally in both the popular and electoral votes—behind former Republican President Theodore Roosevelt, who ran as the nominee of the Progressive (Bull Moose) Party. Accordingly, this table shows Theodore Roosevelt's vote in the Republican column for 1912, instead of Taft's (smaller) vote.

As can be seen from the table, the United States has been an evenly divided country over the course of time. The cumulative two-party national popular vote in the 31 presidential elections between 1900 and 2020 was:

- 50.17% for the Republicans votes and
- 49.83% for the Democrats.

The results were similarly close for other periods.

If the Roosevelt-Hoover race is viewed as the start of the modern political era, the cumulative national popular vote for the two major parties between 1932 and 2020 was:

- 943,639,400 total Republicans votes—49.59%
- 959,292,643 total Democratic votes—50.41%.

If the 1960 Kennedy-Nixon race is viewed as the start of the modern political era, the cumulative national popular vote for the two major parties between 1960 and 2020 was:

- 775,504,817 total Republicans votes—49.91%
- 778,323,655 total Democratic votes—50.09%.

Between 1988 and 2020, the United States has been in an era of non-landslide presidential elections—that is, elections in which the popular vote difference between the two leading candidates was less than 10%. The cumulative national popular vote for the two major parties between 1988 and 2020 was:

- 497,756,060 total Republicans votes—48.59%
- 526,629,978 total Democratic votes—51.41%.

9.36.4. MYTH: There is a systemic Republican or Democratic advantage in the Electoral College

QUICK ANSWER:

- Because the Republicans won five of the six presidential elections between 1968 and 1988 and numerous states had repeatedly voted for the Republican presidential nominee in that period, an argument (attributed to Horace Busby) became prevalent during the 1980s that the there was a "Republican Electoral College lock" on the presidency.
- Because numerous states had repeatedly voted for the Democratic presidential nominee between 1992 and 2012, an argument (attributed to Ronald Brownstein) became prevalent that the there was a durable Democratic "blue wall" in the Electoral College.
- The conventional wisdom prior to the 2016 election was that the Electoral College favored the Democrats.
- After Donald Trump was elected President in 2016 while losing the national popular vote, the conventional wisdom changed overnight and became that the Electoral College favored the Republicans.

MORE DETAILED ANSWER:

The "Republican Electoral College lock" theory of the 1980s

The Republicans won five of the six presidential elections between 1968 and 1988.

The Republican percentage lead in the national popular vote was substantial in four of these elections—23 percentage points in 1972, 10 in 1980, 18 in 1984, and eight in 1988.

In 1988, a *New York Times* editorial referred to the Republican's "Electoral College lock."

> "This year's fashionable formula goes something like this: … The Republicans have a virtual 'lock' on the Electoral College."
>
> "The political analyst credited with the 'lock' theory is Horace Busby. … Busby concluded that 'the Electoral College … is a Republican institution.' He argued that the addition of important Sunbelt states like Florida and Texas to traditional Republican power bases elsewhere provided a recipe for long-term G.O.P. rule."
>
> "Recent history seems to confirm a Republican tilt. In the last 5 elections, 23 states with 202 electoral votes have voted Republican every time. Thirteen more have voted Republican four times. In 1988, these 36 states would produce 354 electoral votes, far more than the 270 required for a majority."[995]

A 1992 article in the *New York Times* described the Republican "Electoral College lock" as follows:

> "From … observations of what was happening in 1980, Busby postulated a theory that Republicans have an electoral vote 'lock' that gives them an automatic advantage in presidential elections."[996]
>
> "The 'lock,' according to Busby, consists of 29 states with 289 electoral votes—270 are needed to elect a president—that have gone Republican at least 75 percent of the time in the last 32 years."
>
> "Dominance of the Sun Belt, where more and more of the votes and the people are, gave the [Republican] Party an enormous edge in winning the White House—what many analysts described as a lock on the Electoral College."[997]

Shortly after the term "Republican Electoral College lock" came into widespread use in the 1980s, Bill Clinton was elected President in 1992.

The Democratic "blue wall" theory emerged in 2009.

Ronald Brownstein described the "durable" Democratic "blue wall" in 2009:

> "Democrats since 1992 have methodically constructed the party's **largest and most durable Electoral College base in more than half a century. Call it the 'blue wall**.'"

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[995] *New York Times* editorial. 1988. Opinion: The Electoral College's Cold Calculus. *New York Times*. July 8, 1988. https://www.nytimes.com/1988/07/08/opinion/the-electoral-college-s-cold-calculus.html

[996] Sawislak, Arnold. 1982. Horace Busby; NEWLN:Electoral locks and political music. *United Press International*. December 29, 1982. https://www.upi.com/Archives/1982/12/29/Horace-BusbyNEWLNElectoral-locks-and-political-music/6858409986000/

[997] Toner, Robin. 1992. Republicans' 'Electoral Lock' Is Looking Much Less Secure. *New York Times*. August 3, 1992. https://www.nytimes.com/1992/08/03/us/1992-campaign-political-memo-republicans-electoral-lock-looking-much-less-secure.html

> "**18 states and the District of Columbia have now voted for the Democratic nominee** in at least the past five presidential elections."
>
> "[These] strong-holds … are worth a combined 248 Electoral College votes. That's more than 90 percent of the 270 votes required to win the presidency."
>
> **"GOP nominee John McCain did not finish within 10 percentage points of Obama in any of the 18 states (or Washington, D.C.)."**
>
> "The Democrats' grip on such a large electoral bloc forced McCain into the situation that Democrats typically confronted while the Republicans won five of the six presidential elections between 1968 and 1988. Through those years, so many states solidly favored the GOP that analysts in both parties spoke of a Republican 'lock' on the Electoral College."
>
> "The Democrats' current electoral vote stronghold is larger than the Republican base was during the heyday of the GOP lock on the Electoral College."[998]

The 2012 election results seemed to solidify the notion of the Democratic blue wall.

The 2012 election appeared to validate Brownstein's "blue wall."

Chris Cillizza wrote in December 2012:

> "For months leading up to the 2012 election, we wrote about the clear electoral college advantage that President Obama enjoyed."
>
> "The 332 electoral votes that Obama won on Nov. 6 not only affirmed that edge but also raised the question of whether Democrats were in the midst of the sort of electoral college stranglehold that Republicans enjoyed during the 1980s."
>
> "If the 2016 Democratic nominee carried only the states that President Obama won by 4.5 points or more, he/she would end up with 272 electoral votes and a victory."
>
> "**The electoral college math looks decidedly daunting for Republicans as they begin to prepare for 2016 and beyond**."[999] [Emphasis added]

In 2012, Jonathan Bernstein wrote in *Salon*:

> "The Electoral College now favors the Democrats."[1000]

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998 Brownstein, Ronald. 2009. Dems find electoral safety behind a wall of blue. *National Journal Magazine*. January 17, 2009.

999 Cillizza, Chris. 2012. Democrats' electoral college edge—in 1 amazing chart. *Washington Post*. December 10, 2012. http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/10/democrats-electoral-college-edge-in-1-amazing-chart/

1000 Bernstein, Jonathan. 2012. Do Democrats have a permanent Electoral College advantage? Nominate Jeb Bush or Bobby Jindal. It doesn't matter: The Electoral College now favors the Democrats. *Salon*. December 1, 2012. http://www.salon.com/2012/12/01/do_democrats_have_a_permanent_electoral_college_advantage/

In 2015, Chris Cillizza confidently asserted in the *Washington Post*:

> "No matter whom Republicans nominate to face Hillary Rodham Clinton in November 2016, that candidate will start at a disadvantage. It's not polling, Clinton's deep résumé or the improving state of the economy. **It's the electoral college.**
>
> "Yes, the somewhat arcane—yet remarkably durable—way in which presidential elections are decided **tilts toward Democrats** in 2016, as documented by nonpartisan political handicapper Nathan Gonzales in a recent edition of the *Rothenberg & Gonzales Political Report*."
>
> "Gonzales's analysis … reaffirms one of the most important—and undercovered—story lines in presidential politics in the past decade: the **increasing Democratic dominance in the electoral college**."[1001,1002] [Emphasis added]

In June 2016, Shane Goldmacher and Annie Karni wrote in *Politico*:

> "Hillary Clinton's super PAC has begun spending $145 million on ads in eight states through November—and there's a realistic path for her to win the White House even if she carries only one of them. It's a sign of **how strongly tilted the Electoral College map is in Clinton's favor**."[1003] [Emphasis added]

The two-percentage-point Democratic advantage in the Electoral College in 2012 seemed to support the "blue wall" theory.

In 2012, Governor Mitt Romney received 60,930,782 popular votes nationally, compared to 65,897,727 popular votes for Barack Obama (as shown in the actual 2012 election returns found in table 1.10).

That is, Romney received about 48% of the two-party national popular vote—about two percentage points short.

Table 9.55 shows the results of applying a tie-producing uniform shift to actual 2012 election returns. This table will show that even if Romney had received enough additional voter support to create a tie in the national popular vote (preserving each candidate's relative profile in each state), Obama would have won the Electoral College by 285–253.

- Column 2 shows Romney's popular vote in each state after applying a uniform *upward* adjustment of 1.9581343% to his actual popular vote in the state. These upward adjustments add 2,483,472 votes to Romney's nationwide total, giving him 63,414,254 votes.

[1001] Cillizza, Chris. 2015. In 2016 race, an electoral college edge for Democrats. *Washington Post*. March 15, 2015. https://www.washingtonpost.com/politics/in-2016-race-an-electoral-college-edge-for-democrats/2015/03/15/855f2792-cb3c-11e4-a2a7-9517a3a70506_story.html

[1002] Cillizza, Chris. 2012. Democrats' electoral college edge—in 1 amazing chart. *Washington Post*. December 10, 2012. https://www.washingtonpost.com/news/the-fix/wp/2012/12/10/democrats-electoral-college-edge-in-1-amazing-chart

[1003] Goldmacher, Shane and Karni, Annie. 2016. Hillary Clinton's path to victory. *Politico*. June 19, 2016. https://www.politico.com/story/2016/06/hillary-clinton-path-victory-224228#ixzz4C1kM5TAf

- Column 3 shows Obama's popular vote in each state after applying a uniform *downward* adjustment of 1.9581343% to his actual popular vote in the state. These downward adjustments subtract 2,483,472 votes from Obama's nationwide total, giving him 63,414,255 votes. The result of these adjustments to the two candidates is to produce a near-tie in the national popular vote (that is, 63,414,254 to 63,414,255).
- Column 4 shows Romney's percentage of the two-party vote in each state after his upward adjustment. That is, Romney has 50.00% of the nationwide vote after the adjustments. Note that Obama's percentage of the two-party vote in each state (not shown in the table) is simply 100% minus Romney's percentage in each state.
- Column 5 shows the Republican nominee's popular vote margin in each state after his upward adjustment (if he is leading in the state).
- Column 6 shows the Democratic nominee's popular vote margin in each state after his downward adjustment (if he is leading in the state).
- Columns 7 and 8 show the Republican and Democratic electoral votes, respectively, based on their adjusted number of popular votes.

The table is sorted according to Romney's percentage in each state (column 4).

The result of the tie-producing uniform adjustment shown in table 9.55 is that President Obama would lose Florida (29 electoral votes) and Ohio (18 electoral votes). However, even after losing these two states, Obama would have ended up with a 285–253 lead in the Electoral College.

Thus, even if Romney had received enough additional voter support to create a tie in the national popular vote, Obama would still have ended up with a lead of 28 electoral votes.[1004]

The 2016 election revived the belief that the Electoral College favors the Republican Party.

Since the 2016 election, the conventional wisdom has been that the Electoral College favors the Republicans.

A week before the June 27, 2024, debate between President Joe Biden and former President Donald Trump, Jason Willick wrote in the *Washington Post*:

> "The Trump-Biden rematch is too close (40.8 percent to 40.3 percent in the FiveThirtyEight polling average on Wednesday) to handicap with confidence, and too frozen (Trump's barely statistically significant lead has held for months) to deliver much horse-race drama."
>
> "Some unexpected things could happen after the polls close in November."
>
> "The first is the possibility that **Trump ekes out the most votes—and loses the presidency**. Yes, it's unlikely. … But **the winner-take-all electoral col-**

[1004] Note that the table shows that Obama's lead in Virginia (13 electoral votes) shrinks to a razor-thin 701 votes (1,897,522 to 1,896,820). However, even if Romney had won Virginia, Obama would have had a 272–266 lead in the Electoral College.

Table 9.55 Tie-producing uniform adjustment of 2012 election data

State	Romney	Obama	R-percent	R-Margin	D-Margin	R-EV	D-EV
DC	27,029	261,422	9.37%		234,392		3
HI	129,389	298,284	30.25%		168,894		4
VT	98,415	193,522	33.71%		95,108		3
NY	2,621,665	4,335,638	37.68%		1,713,972		29
RI	165,759	271,122	37.94%		105,364		4
MD	1,023,754	1,625,959	38.64%		602,205		10
CA	5,088,528	7,605,715	40.09%		2,517,186		55
MA	1,249,204	1,860,400	40.17%		611,196		11
DE	173,475	234,593	42.51%		61,119		3
NJ	1,548,598	2,052,276	43.01%		503,678		14
CT	665,047	874,928	43.19%		209,881		7
IL	2,236,152	2,918,576	43.38%		682,423		20
ME	305,857	387,725	44.10%		81,867		4
WA	1,350,316	1,695,750	44.33%		345,434		12
OR	787,946	936,717	45.69%		148,771		7
NM	350,496	400,627	46.66%		50,131		5
MI	2,206,893	2,472,932	47.16%		266,038		16
MN	1,376,353	1,490,039	48.02%		113,686		10
WI	1,470,336	1,561,615	48.49%		91,280		10
NV	483,049	511,891	48.55%		28,841		6
IA	761,030	792,131	49.00%		31,101		6
NH	343,615	355,864	49.12%		12,250		4
CO	1,234,161	1,273,887	49.21%		39,726		9
PA	2,791,474	2,879,234	49.23%		87,760		20
VA	1,896,820	1,897,522	49.99%		701		13
OH	2,768,890	2,720,138	50.44%	48,751		18	
FL	4,326,791	4,071,515	51.52%	255,276		29	
NC	2,357,508	2,091,278	52.99%	266,230		15	
GA	2,154,125	1,698,390	55.91%	455,736		16	
AZ	1,277,886	981,000	56.57%	296,886		11	
MO	1,535,432	1,170,804	56.74%	364,627		10	
IN	1,470,934	1,102,496	57.16%	368,438		11	
SC	1,109,586	828,000	57.27%	281,585		9	
MS	735,687	538,008	57.76%	197,678		6	
MT	277,127	192,640	58.99%	84,486		3	
AK	170,302	117,014	59.27%	53,288		3	
TX	4,724,104	3,153,863	59.97%	1,570,241		38	
LA	1,190,669	770,734	60.70%	419,935		8	
SD	217,574	138,075	61.18%	79,499		3	
ND	194,455	118,831	62.07%	75,623		3	
TN	1,509,776	913,263	62.31%	596,514		11	
KS	714,827	418,533	63.07%	296,293		6	
NE	490,282	286,863	63.09%	203,418		5	
AL	1,296,098	755,523	63.17%	540,576		9	
KY	1,121,782	644,778	63.50%	477,003		8	
AR	668,151	374,002	64.11%	294,149		6	
WV	430,426	225,388	65.63%	205,037		5	
ID	433,320	200,378	68.38%	232,941		4	
OK	917,464	417,408	68.73%	500,055		7	
WY	175,666	64,582	73.12%	111,085		3	
UT	760,033	232,380	76.58%	527,653		6	
Total	**63,414,254**	**63,414,255**	**50.00%**			**253**	**285**

lege is a fickle institution. It tilted toward Democrats in 2012, only to deliver the presidency to Trump in 2016, despite Hillary Clinton's popular-vote plurality."[1005] [Emphasis added]

9.37. MYTH ABOUT STATE IDENTITY

9.37.1. MYTH: The Compact disenfranchises voters, because the electoral votes of a member state would sometimes go to a candidate who did not receive the most popular votes in that state.

QUICK ANSWER:

- The primary purpose of a presidential election is to elect a President to serve as the entire country's chief executive for four years—not to choose the small group of presidential electors who meet briefly in mid-December for the ceremonial purpose of casting electoral votes.
- The policy choice presented by the National Popular Vote proposal is whether it is more important that the President be the candidate who received the most popular votes in the entire country, or for the candidate who received the most popular votes in a particular state to get that state's electoral votes.
- The current state-by-state winner-take-all method of awarding electoral votes cancels the vote of every voter whose personal choice differs from the predominant sentiment in their state. Under the National Popular Vote Compact, every voter's vote will be added directly to the national count for that individual's choice for President. It is the current system—not the National Popular Vote system—that disenfranchises voters.
- The National Popular Vote Compact represents the "voice of the state" better than the current winner-take-all system. The most accurate "voice of the state" is how *all* of a state's voters voted—not just how a plurality voted. For example, there were 1,717,077 votes for Biden and 1,484,065 votes for Trump in Minnesota in 2020. The current system created the illusion that Minnesota voters were unanimous for Biden by awarding all 10 of Minnesota's electoral votes to Biden. In the last 12 presidential elections in Minnesota, there were 15,129,587 popular votes cast for the Democratic nominee for President and 13,061,178 popular votes cast for the Republican nominee during that period. However, the Democrats received 120 electoral votes, while the Republicans received none.
- Voters care more about who wins the presidency than which presidential electors get to cast the state's electoral votes in December. When a voter's preferred candidate loses the White House, it is no consolation that the voter's candidate won a plurality in the voter's own state. On Election Night in 2020, Donald Trump's supporters in Texas were not celebrating because the 38

[1005] Willick, Jason. 2024. Three potential wild cards for a razor-close Biden-Trump election. *Washington Post*. June 20, 2024.

Republican Party candidates for presidential elector would be meeting in Austin in December to cast the state's electoral votes for Trump.

- The National Popular Vote Compact would award all the electoral votes of all the member states to the presidential candidate who received the most popular votes from all 50 states and the District of Columbia. Therefore, the national-popular-vote winner could sometimes not be the candidate who received the most votes inside a particular member state. The precise purpose of the Compact is to guarantee the presidency to the candidate who received the most popular votes in all 50 states and the District of Columbia.
- Voters will not be surprised when the nationwide winner becomes President under the National Popular Vote Compact, because the entire presidential campaign will have been run on that basis.
- Official presidential election returns will continue to be published for each state (as well as every county, parish, city, town, and precinct), so that everyone will know the political identity of each state.
- Public opinion polls since the 1940s have shown that voters do not favor the current state-by-state winner-take-all method of electing the President. In fact, most people would be happy if it were gone. This strong support for a national popular vote for President decreases only slightly when people are pointedly asked a push question as to whether it is more important that a state's electoral votes be cast for the presidential candidate who receives the most popular votes in their own particular state, or whether it is more important to guarantee that the President is the candidate who receives the most popular votes in all 50 states and the District of Columbia.
- The concern that a state's electoral votes might be cast, in some elections, for a presidential candidate who did not receive the most popular votes in a particular state is, at the end of the day, a matter of form over substance.

MORE DETAILED ANSWER:

Under the National Popular Vote Compact, all the electoral votes from all the states belonging to the Compact will be awarded to the presidential candidate who receives the most popular votes in all 50 states (and the District of Columbia). The Compact will take effect when enacted by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President (270 of 538).

The policy choice presented by the National Popular Vote Compact is whether it is more important that the President be the candidate who received the most popular votes in the entire country or for the candidate who received the most popular votes in a particular state to get that state's electoral votes.

It is the current system—not the National Popular Vote system—that disenfranchises voters.

In debating the National Popular Vote Compact in Connecticut in 2018, State Representative Laura Devlin said:

> "[If] Connecticut votes for presidential candidate A, but the majority of the rest of the United States chose presidential candidate B, Connecticut would have to put its electoral votes to presidential candidate B, which **totally disenfranchises the popular vote in the State of Connecticut."**[1006] [Emphasis added]

Representative Daniel J. Fox responded by pointing out that no voter in Connecticut would be disenfranchised by the National Popular Vote Compact:

> "**Connecticut's current winner-take-all law creates the illusion that Connecticut's voice was 100 percent for Hillary Clinton** in the 2016 election, when, in fact, it wasn't, because it awards 100 percent of Connecticut's electoral votes to the candidate receiving the most votes in Connecticut. However, Connecticut's true voice was about 900,000 votes for Hillary Clinton and almost 700,000 votes for Donald Trump."[1007] [Emphasis added]

A state's political "identity" is based on how *all* its citizens voted—not just how a plurality voted.

The National Popular Vote Compact would give voice to every voter in every state.

It is the current state-by-state winner-take-all method of awarding electoral votes that effectively disenfranchises voters—not the National Popular Vote Compact. The current system treats voters who supported a candidate who did not win the most popular votes in the state as if they did not exist.

Under the National Popular Vote Compact, every voter's vote is directly added to the national total for his or her candidate.

Voters care more about who wins the presidency than who carried their state.

When voters watch presidential election returns, they are primarily interested in finding out which candidate won the presidency. The question of whether their preferred candidate won their state, congressional district, county, city, or precinct is of secondary concern.

When a voter's preferred candidate loses the White House, it is no consolation that the candidate won a plurality in the voter's own state. On Election Night in 2020, Donald Trump's supporters in Texas were not celebrating because the Republican Party's 38 nominees for presidential electors would be meeting in Austin in December to cast the state's electoral votes for Trump.

The primary purpose of a presidential election is to choose the President—not presidential electors.

The primary purpose of a presidential election is to elect someone to serve for four years as the nation's chief executive—not to choose the group of largely unknown party activists who meet briefly in the state Capitol in mid-December for the ceremonial purpose of casting electoral votes.

The average voter does not derive any satisfaction from knowing that some little-known activist associated with his or her political party won the ceremonial position of

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[1006] Transcript of the floor debate on HB 5421 in Connecticut House of Representatives. April 26, 2018. Page 7.

[1007] *Ibid.* Page 8.

presidential elector. Indeed, it is the rare voter who even knows the name of any presidential elector.

Voters do not favor the current state-by-state winner-take-all method of electing the President, and most people would be happy if it were gone.

Both state and national polls conducted by numerous polling organizations show that voters do not favor the current method of electing the President, as shown by the numerous polls discussed in section 9.22.

We discuss below three polls in which voters were asked a push question that specifically highlighted the fact that the state's electoral votes would be awarded to the winner of the national popular vote under the National Popular Vote Compact—rather than the winner of the statewide popular vote.

A survey of 800 Utah voters conducted on May 19–20, 2009, showed 70% overall support for the idea that the President of the United States should be the candidate who receives the most popular votes in all 50 states. Voters were asked:

> "How do you think we should elect the President: Should it be the candidate who gets the most votes in all 50 states, or the current Electoral College system?"

By political affiliation, support for a national popular vote on the first question was 82% among Democrats, 66% among Republicans, and 75% among others. By gender, support was 78% among women and 60% among men. By age, support was 70% among 18–29 year-olds, 70% among 30–45 year-olds, 70% among 46–65 year-olds, and 68% for those older than 65.

Then, voters were pointedly asked a push question that specifically highlighted the fact that Utah's electoral votes would be awarded to the winner of the national popular vote in all 50 states under the National Popular Vote Compact.

> "Do you think it more important that a state's electoral votes be cast for the presidential candidate who receives the most popular votes in that state, or is it more important to guarantee that the candidate who receives the most popular votes in all 50 states becomes President?"

Support for a national popular vote did drop after this push question was asked, but only from 70% to 66%.

On this second question, support by political affiliation was as follows: 77% among Democrats, 63% among Republicans, and 62% among others. By gender, support was 72% among women and 58% among men. By age, support was 61% among 18–29-year-olds, 64% among 30–45-year-olds, 68% among 46–65-year-olds, and 66% for those older than 65.[1008]

Similarly, a survey of 800 Connecticut voters conducted on May 14–15, 2009, showed 74% overall support for a national popular vote for President. The results for the first question, by political affiliation, were 80% support among Democrats, 67% among Republicans, and 71% among others.

[1008] The Utah survey (and the others cited in this section) was conducted by Public Policy Polling and had a margin of error of plus or minus 3.5%. See https://www.nationalpopularvote.com/polls

Then, voters were asked the following push question that specifically highlighted the fact that Connecticut's electoral votes would be awarded to the winner of the national popular vote in all 50 states.

> "Do you think it more important that Connecticut's electoral votes be cast for the presidential candidate who receives the most popular votes in Connecticut, or is it more important to guarantee that the candidate who receives the most popular votes in all 50 states becomes President?"

Support for a national popular vote dropped after this push question was asked, but only from 74% to 68%.

On the second question, support by political affiliation was 74% among Democrats, 62% among Republicans, and 63% among others.

Moreover, a survey of 800 South Dakota voters conducted on May 19–20, 2009, showed 75% overall support for a national popular vote for President for the first question and 67% for the push question.

Concern that voters will be dismayed when they discover that their state's electoral votes were awarded to a candidate who did not carry their state.

In Nebraska in 2008, Barack Obama won the most popular votes in the state's 2nd congressional district (the Omaha area) and thereby received one electoral vote in the Electoral College. Obama received one of Nebraska's electoral votes despite the fact that John McCain received the most votes in Nebraska as a whole.

Similarly, Joe Biden received one electoral vote from Nebraska in 2020—despite the fact that Donald Trump received the most votes in Nebraska as a whole.

Nebraska's congressional-district method of awarding electoral votes was the choice of the people's elected representatives in the state's legislature. The public, candidates, and media all knew in advance that it was the law that would govern the awarding of the state's electoral votes. In both 2008 and 2020, Nebraska's law (passed in 1992) operated exactly as advertised, namely it delivered one of the state's five electoral votes to the winner of the 2nd congressional district—despite the fact that a different candidate won the statewide popular vote.

Nebraska's legislature has had ample opportunity to repeal Nebraska's congressional-district method of awarding electoral votes and replace it with the winner-take-all method of awarding electoral votes. Indeed, repeal bills have been introduced in the legislature almost every year to repeal the current law.

Moreover, the party (namely the Republican Party) that lost one electoral vote in 2008 and 2020 has controlled the state legislature by roughly a two-to-one margin in recent years.[1009]

[1009] The Nebraska legislature is officially non-partisan; however, two-thirds of the legislators are known Republicans.

In 2021[1010] and 2023,[1011,1012] bills to change Nebraska's district method of awarding electoral votes were again introduced in the Nebraska legislature. Those bills did not pass.

In 2024, despite the strong backing of Governor Jim Pillen and former President Donald Trump, the Nebraska legislature again rejected the bill.[1013] See section 9.35.1.

Similarly, in Maine in 2016 and 2020, Donald Trump won the most popular votes in the state's 2nd congressional district (the northern part of the state) and thereby received one electoral vote in the Electoral College—despite the fact that the Democratic presidential nominee had received the most votes in Maine as a whole. As in Nebraska, the party that lost one electoral vote in 2020 currently controls both houses of the legislature and the Governor's office.

Moreover, the voters in both Nebraska and Maine have had access to the citizen-initiative process, which enables them to pass legislation that their legislature does not.

Concern that voters will be shocked when the national popular vote winner becomes President

Voters will not be shocked when the National Popular Vote Compact operates exactly as advertised and results in the winner of the national popular vote becoming President.

The reason is that the following events will have occurred before Election Day:

- The state legislatures and Governors of states possessing at least a majority of the electoral votes (270 of 538) will have responded to the wishes of their constituents and enacted the National Popular Vote Compact in their state (thus giving the National Popular Vote Compact sufficient support to take effect).
- A nationwide presidential campaign will have been conducted, over a period of many months, with everyone in the United States understanding that the presidential candidate receiving the most votes in all 50 states and the District of Columbia will become President.
- The public will have noticed that presidential candidates will have, for the first time, paid attention to voters in every state instead of just the voters in a handful of closely divided battleground states.
- The focus of polling during the campaign will have been on polls of the popular vote from the entire United States—not state-level polls in a handful of states. In fact, the concept of a battleground state would be obsolete under the National Popular Vote Compact.

[1010] Mayerson, Brett. 2021. Nebraska state senator brings bill to the floor proposing electoral vote system change. January 8, 2021. KTIV TV. https://ktiv.com/2021/01/08/nebraska-state-senator-brings-bill-to-the-floor-proposing-electoral-vote-system-change/

[1011] Bamer, Erin. 2023. Nebraska again considers change to winner-take-all system for presidential races. *Omaha World-Herald*. March 15, 2023.

[1012] The 2023 bill to repeal Nebraska's district method of awarding electoral votes was LB776. https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=4996

[1013] Astor, Maggie. 2024. Nebraska Lawmakers Block Trump-Backed Changes to Electoral System. *New York Times*. April 4, 2024. https://www.nytimes.com/2024/04/04/us/politics/nebraska-winner-take-all-trump.html?smid=url-share

Then, the National Popular Vote Compact will operate exactly as advertised and will deliver a majority of the electoral votes to the presidential candidate who received the most popular votes in all 50 states and the District of Columbia.

A state's political identity would remain known under National Popular Vote.
For those who are concerned about state identity, information as to how many votes each presidential candidate received in a particular state (as well as every county, parish, city, town, district, or precinct) would be known to all—just as is the case today.

The concern that a state's electoral votes might be cast, in some elections, in favor of a candidate who did not carry a particular state is a matter of form over substance.
The purpose of the National Popular Vote Compact is to replace the state-by-state method of awarding electoral votes with a system based on the national popular vote. Current winner-take-all laws enable a second-place candidate to win the presidency, make voters unequal, and make three out of four states and three out of four Americans politically irrelevant in presidential elections.

A thought experiment involving a hypothetical two-state interstate compact
One way to understand how the National Popular Vote Compact would operate is to consider it from the perspective of two states from opposite ends of the political spectrum—say, North Dakota and Vermont.

Politically, these states are almost mirror images of each other. They have approximately the same population, and they each possess three electoral votes. North Dakota is reliably Republican, and Vermont is reliably Democratic in presidential elections. They generate almost identical popular-vote margins for their favored presidential candidate. In 2020, North Dakota generated a 120,693-vote margin for the Republican presidential nominee, and Vermont generated a 130,116-vote margin for the Democratic nominee.

Under the current state-by-state winner-take-all method of awarding electoral votes, presidential candidates do not solicit the support of voters in North Dakota and Vermont, because neither party has anything to gain by paying any attention to them. These two states are not ignored because they are small. They are ignored because neither candidate has anything to win or lose by soliciting votes there. The Democratic presidential nominee is not going to carry North Dakota, and the Republican nominee is not going to carry Vermont.

Consider, for the sake of argument, a hypothetical two-state interstate compact in which both states enact a law agreeing to award their electoral votes to the winner of the combined popular vote in the two states. Such a compact would create a closely divided battleground "super-state" with six electoral votes.

Note that this hypothetical two-state compact operates differently from the National Popular Vote Compact in that North Dakota and Vermont would award their six electoral votes based on the *combined* popular vote from just those two states, whereas the National Popular Vote Compact would award the electoral votes of the enacting states based on the total popular vote in *all 50 states and the District of Columbia*.

Under this hypothetical two-state compact, voters in both states would suddenly mat-

ter in presidential campaigns. We can confidently make that statement, because presidential candidates pay considerable attention to closely divided states with six electoral votes. For example, the closely divided state of Nevada (which has six electoral votes) received 11 of the nation's 212 general-election events in 2020 (section 1.2.1). The six electoral votes available from the two-state compact would be just as winnable and just as valuable as the six electoral votes available from Nevada.

The *benefit* to both North Dakota and Vermont of this hypothetical two-state compact would be that the issues and concerns of their voters would suddenly become relevant in the presidential campaign. Consequently, the candidates would start soliciting votes in those states. When presidential candidates need to solicit votes, they start thinking about the issues that are politically important to the voters involved.

The *price* to both North Dakota and Vermont of this hypothetical compact would be that North Dakota's three presidential electors would not always be Republican, and Vermont's three presidential electors would not always be Democratic. Under the hypothetical two-state compact, the presidential electors who meet in December in Bismarck and Montpelier would reflect the outcome of the combined popular vote in the two states—not just the vote in North Dakota and not just the vote in Vermont.

Currently, the vast majority of states and the vast majority of America's voters are ignored by the presidential candidates because of the state-by-state winner-take-all method of awarding electoral votes. The National Popular Vote Compact would put every voter from all 50 states and the District of Columbia into a single pool of votes for purposes of electing the President. Under the National Popular Vote Compact, *every* voter in *every* state would be politically relevant in *every* presidential election. The Electoral College would reflect the choice of the people in all 50 states and the District of Columbia.

9.37.2. MYTH: The Compact could result in out-of-state presidential electors.

QUICK ANSWER:

- The hypothetical scenario of out-of-staters serving as presidential electors is based on the unlikely scenario that a minor-party or independent presidential candidate wins the most popular votes nationwide, that this candidate did not get onto the ballot in a particular state belonging to the National Popular Vote Compact, and that this candidate (who just won the national popular vote and was in the process of trying to unify the country) would gratuitously offend people in the state involved by appointing out-of-state presidential electors.
- Residency requirements for presidential electors already exist in a number of states. If anyone considers this hypothetical scenario to be a significant problem, the U.S. Supreme Court's *Chiafalo* decision in 2020 affirms that states have ample authority to establish residency requirements for their presidential electors.
- Even if the hypothetical scenario were to happen, the National Popular Vote Compact would have delivered precisely its advertised outcome, namely the election of the presidential candidate who received the most popular votes in all 50 states and the District of Columbia.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, discussed a hypothetical minor-party candidacy of Texas Congressman Ron Paul when the Vermont legislature was debating the National Popular Vote Compact in 2011:

> "Vermont probably did not nominate a slate of electors for Paul because he was not on its ballot. NPV's compact offers a solution, but it is doubtful that voters in Vermont will like it. **Paul would be entitled to personally appoint the three electors who will represent Vermont** in the Electoral College vote. **In all likelihood, he would select Texans to represent Vermont**."[1014] [Emphasis added]

Second, although Ross asserts that it is likely that Ron Paul would appoint Texans as Vermont's presidential electors, historical evidence from the real-world shows that politicians would not behave in this manner.

Under the existing 1937 law in Pennsylvania, *every* presidential candidate, in *every* election, personally chooses *every* presidential elector in Pennsylvania.[1015]

Needless to say, no presidential candidate of either major political party has chosen an out-of-state presidential elector to be a member of Pennsylvania's Electoral College in the many presidential elections since 1937. Indeed, it would be politically preposterous for a presidential candidate to gratuitously insult the voters of any state by selecting out-of-staters to the ceremonial position of presidential elector. It would be even more preposterous for someone who had just won the national popular vote (and was facing the task of unifying the country) to gratuitously insult the voters of any state.

Third, it would be unlikely that a minor-party presidential candidate would be strong enough to win the most popular votes nationwide, while being incapable of collecting the 1,000 signatures necessary to qualify for the ballot in Vermont. In fact, history shows that presidential candidates who have significant national support generally qualify for the ballot in every state as discussed in section 9.30.16.

Fourth, it would be extraordinary that a candidate who had just won the most popular votes in a nationwide election with perhaps 158 million votes could not find three supporters in Vermont.

Fifth, if anyone believes that Ross' hypothetical scenario is politically plausible or potentially harmful, a remedy is readily available. Every state already has the power to adopt residency qualifications for presidential electors, and many have done so. As the U.S. Supreme Court said in *Chiafalo v. Washington* in 2020:

> "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint. … **A State**

[1014] Written testimony submitted by Tara Ross to the Vermont Committee on Government Operations. February 9, 2011.

[1015] Section 2878 of Pennsylvania election law enacted on June 1, 1937.

> **can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period**."[1016] [Emphasis added]

Sixth, the sole role of a presidential elector is to attend a single brief meeting in December for the purpose of dutifully casting a vote in the Electoral College. Unlike members of Congress, presidential electors do not cast discretionary votes on hundreds of anticipated and unanticipated issues over a multi-year period. That is, presidential electors have no ongoing role in setting public policy.

Even if a third-party presidential candidate were to perform the feat of winning the national popular vote, even if that candidate were unable to collect 1,000 signatures to get onto the ballot in Vermont, and even if that candidate were foolish enough to gratuitously insult Vermont by appointing three Texans to vote at the Electoral College meeting in Montpelier in December, the National Popular Vote Compact would nevertheless deliver its advertised result, namely the election to the presidency of the candidate who received the most popular votes nationwide.

9.38. MYTH ABOUT HAMILTON FAVORING THE CURRENT SYSTEM

9.38.1. MYTH: Alexander Hamilton considered our current system of electing the President to be "excellent."

QUICK ANSWER:

- Alexander Hamilton's statement in *Federalist No. 68* saying that the Electoral College is "excellent" is frequently quoted out-of-context in order to suggest that Hamilton (and perhaps other Founding Fathers) would have favored our *current* system of electing the President. In fact, Hamilton's statement does not refer to the currently prevailing winner-take-all method of awarding electoral votes but, instead, to the Founders' never-achieved vision of a "deliberative" and "judicious" Electoral College composed of independently acting presidential electors.
- Hamilton's statement that the Electoral College is "excellent" was made in the *Federalist Papers* during the debate on ratification of the U.S. Constitution—that is, before the Constitution went into effect and long before Hamilton or anyone else could see how the Electoral College would actually operate. In fact, during Hamilton's lifetime, the winner-take-all method of awarding electoral votes was used by only three states in the nation's first presidential election in 1789, and all three states repealed it before 1800. Hamilton died in the summer of 1804—about a quarter of a century before the winner-take-all rule started being used by a majority of the states.
- There is no record of Hamilton ever endorsing the winner-take-all system in which states award 100% of their electoral votes to the candidate who receives the most popular votes in a state. In fact, at the time of the 1787 Constitutional

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[1016] *Chiafalo v. Washington*. 140 S. Ct. 2316. (2020). See page 9 of slip opinion. https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

> Convention and the writing of the *Federalist Papers*, Hamilton favored having the state legislature appoint all of the state's presidential electors—that is, not allowing the people to vote for the presidential electors at all.

MORE DETAILED ANSWER:

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has asserted:

> "[The National Popular Vote Compact] … tears apart a well-established institution that was **admired by the Founding generation** and that has **served America successfully for centuries**. Alexander Hamilton described its reception by the Founding generation, noting that
>
> > 'the mode of appointment of the Chief Magistrate of the United States is almost the only part of the system…which has escaped without severe censure. … I venture somewhat further, and hesitate not to affirm that if the manner of it be not perfect, **it is at least excellent**.'" [Emphasis added]

Trent England, Executive Director of Save Our States, has written:

> "**An 'excellent' system** Alexander Hamilton wrote in *The Federalist* that, if the Electoral College is not perfect, 'it is at least excellent.'"[1017] [Emphasis added]

These out-of-context quotations about the excellence of the Electoral College do not refer to the way that the Electoral College has actually operated since the winner-take-all method of awarding electoral votes became prevalent in the 1830s.

Instead, Hamilton made clear in *Federalist No. 68* (a few sentences after the above out-of-context quotations) that he was referring to the Founders' never-achieved vision of a "deliberative" Electoral College:

> "[The] election should be made by **men most capable of analyzing the qualities** adapted to the station, and **acting under circumstances favorable to deliberation**, and to a **judicious combination** of all the reasons and inducements which were proper to govern their choice. **A small number of persons,** selected by their fellow-citizens from the general mass, will be most **likely to possess the information and discernment requisite to such complicated investigations.**" [Emphasis added]

The practice of presidential electors acting as rubber stamps started at the time of the nation's first contested election in 1796, when political parties started making national nominations for President and Vice President. Once that happened, a party's obvious and necessary path to victory required the nomination of presidential electors who could be relied upon to vote in lockstep in the Electoral College for the party's nominees (section 2.5).

Moreover, Hamilton's statement in *Federalist No. 68* that the Electoral College is "ex-

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[1017] England, Trent. Op-Ed: Bypass the Electoral College? *Christian Science Monitor*. August 12, 2010.

cellent" was made during the debate on ratification of the U.S. Constitution in 1788—that is, *before* Hamilton or anyone else could see how the Electoral College would operate after the Constitution took effect.

In particular, Hamilton's statement came four decades before the winner-take-all method started being used by a majority of the states.

There is no record of Hamilton ever endorsing the system in which states conduct popular elections to award 100% of their electoral votes to the candidate who receives the most popular votes in the state.

In fact, at the time of the 1787 Constitutional Convention and the writing of the *Federalist Papers*, Hamilton favored having the state legislature appoint all of the state's presidential electors—that is, he was not in favor of allowing the people to vote for the presidential electors at all.

Alexander Hamilton died in 1804.

Hamilton's home state of New York did not let the people vote for presidential electors until 1828 (when it used a congressional-district method). It was not until 1832—28 years after Hamilton's death—that New York adopted a law calling for presidential electors to be elected on a statewide winner-take-all basis.

In any case, Alexander Hamilton, the other Founding Fathers, and almost all[1018] the rest of the Founding Generation had been dead for decades before the state-by-state winner-take-all rule became the predominant method for awarding electoral votes.[1019]

Madison opposed the winner-take-all method

James Madison (often regarded as the "father of the Constitution") did not favor the winner-take-all method of selecting presidential electors.

As the U.S. Supreme Court noted in its 1892 decision in *McPherson v. Blacker*,

> "**The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the constitution**, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable."[1020] [Emphasis added]

In fact, Madison was a critic of the winner-take-all method of choosing presidential electors that evolved in the early 1800s. In a letter to George Hay on August 23, 1823, Madison wrote:

> "I have recd. your letter of the 11th. with the Newspapers containing your remarks on the present mode of electing a President, and your proposed remedy for its defects.

[1018] James Madison died in 1836. He was the last member of the Constitutional Convention to die.

[1019] After 1832 (and until 1992), there was never more than one state, in any one presidential election, that did not employ the winner-take-all rule to award all of its electoral votes to the candidate who received the most popular votes in the state.

[1020] *McPherson v. Blacker*. 146 U.S. 1 at 29. 1892.

> "The difficulty of finding an unexceptionable process for appointing the Executive Organ of a Govt. such as that of the U.S. was deeply felt by the Convention; and as the final arrangement of it took place in the latter stage of the Session, it was not exempt from **a degree of the hurrying influence produced by fatigue & impatience in all such bodies**."[1021] [Emphasis added]

Far from praising the winner-take-all method of awarding electoral votes, Madison continued:

> "I agree entirely with you in thinking that the election of Presidential Electors by districts, is an amendment very proper to be brought forward at the same time with that relating to the eventual choice of President by the H. of Reps. **The district mode was mostly, if not exclusively in view when the Constitution was framed & adopted**; and was exchanged for the general ticket [i.e., winner-take-all] & the Legislative election, as the only expedient for baffling the policy of the particular States which had set the example. A constitutional establishment of that mode will doubtless aid in reconciling the smaller States to the other change which they will regard as a concession on their part. And it may not be without a value in another important respect.
>
> "The States when voting for President by general tickets or by their Legislatures, are a string of beeds: When they make their elections by districts, some of these differing in sentiment from others, and sympathizing with that of districts in other States, they are so knit together as to break the force of those Geographical & other noxious parties which might render the repulsive too strong for the cohesive tendencies within the political System."[1022] [Emphasis added] [Spelling as per original]

FairVote's article entitled "Why James Madison Wanted to Change the Way We Vote for President" discusses this letter in greater detail.[1023]

9.39. MYTH ABOUT STATES GAMING THE COMPACT

9.39.1. MYTH: The Compact can be gamed by giving parents one extra vote for each of their minor children.

QUICK ANSWER:

- Opponents of the National Popular Vote Compact claim that the Compact can be "easily gamed" by giving parents one extra vote for each of their minor children, thereby giving the Republican Party a partisan advantage.

[1021] Letter from James Madison to George Hay. August 23, 1823. https://founders.archives.gov/documents/Madison/04-03-02-0109

[1022] *Ibid.*

[1023] FairVote. June 18, 2012. https://fairvote.org/why-james-madison-wanted-to-change-the-way-we-vote-for-president/

- This myth is one of many examples in this book of a criticism aimed at the Compact that—even if legally permissible or politically plausible—would be equally possible under the current system. In fact, given the outsized impact of the very small number of battleground states, the current system is more susceptible to the effects of politically motivated state-level laws than a nationwide vote for President.
- A state law that would give parents one extra vote for each of their minor children would violate the Equal Protection Clause of the 14th Amendment, raise issues of religious discrimination and religious favoritism, and present daunting operational problems.
- There is no shortage of far-fetched state-level schemes for manipulating the electorate for partisan advantage. For example, extra votes could be given to better-educated voters—perhaps one extra vote for each year of college.

MORE DETAILED ANSWER:

Sean Parnell, Senior Legislative Director of Save Our States, stated in written testimony to the Maine Veterans and Legal Affairs Committee on January 8, 2024:

> "**The Compact can be easily gamed** or manipulated. One fairly simple way for a state to increase its influence in the final outcome would be … **allowing parents to cast votes on behalf of their minor children**."[1024] [Emphasis added]

The partisan impact of child voting is freely acknowledged by its proponents. For example, Professor Joshua Kleinfeld of the Antonin Scalia Law School and Professor Stephen E. Sachs, the Antonin Scalia Professor of Law at Harvard Law School, have said that there is a:

> "two-percentage-point increase in the Republican advantage as between non-parents and parents of children under 18."[1025]

The two-percentage-point advantage cited in their article entitled "Let Parents Vote" was based on a 2022 CNN exit poll that asked: "Have any children under 18?"[1026]

Senator J.D. Vance has also advocated child voting.[1027]

There is, of course, no shortage of state-level schemes for manipulating the electorate for partisan advantage.

[1024] *Testimony of Sean Parnell to the Veterans and Legal Affairs Committee of the Maine Legislature Re: LD 1578 (The National Popular Vote interstate compact)*. January 8, 2024. Page 6. https://legislature.maine.gov/testimony/resources/VLA20240108Parnell133489622801109869.pdf

[1025] Kleinfeld, Joshua and Sachs, Stephen E. 2024. Give Parents the Vote. *Notre Dame Law Review*. Page 62. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4723276

[1026] CNN. 2022. Exit Polls. https://www.cnn.com/election/2022/exit-polls/nationalresults/

[1027] Marley, Patrick. 2024. Vance once advocated that children get votes that parents could cast. *Washington Post*. July 25, 2024. https://www.washingtonpost.com/politics/2024/07/24/jd-vance-parents-kids-voting/

Giving extra votes to better-educated voters would skew politics in favor of left-of-center policies.

The 2024 Texas Republican Party's platform advocates settling statewide elections based on the number of counties that a candidate won[1028] even though the U.S. Supreme Court ruled in *Gray v. Sanders* in 1963 that the "country unit rule" system was unconstitutional.[1029]

The current winner-take-all system is more susceptible to state-level manipulation than a national popular vote for President.

Given the outsized impact of the very small number of battleground states, the current system is arguably more susceptible to the effects of politically motivated state-level laws than a nationwide vote for President.

In fact, there is nothing new about attempts to skew the outcome of presidential elections under the current system.

As a result of the 2010 elections, Republicans controlled both houses of the legislature and the Governor's office in Pennsylvania and several other closely divided states that were likely to decide the outcome of the 2012 presidential election.

In June 2012, Pennsylvania state House Republican Leader Mike Turzai told a Republican State Committee meeting:

> "Pro-Second Amendment? The Castle Doctrine, it's done. First pro-life legislation—abortion facility regulations—in 22 years, done. **Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done."**[1030] [Emphasis added]

Voter ID laws have been enacted in other presidential battleground states, such as Ohio, Wisconsin, Michigan, North Carolina, Florida, and Georgia.

Problems with the child-voting proposal

There are several problems with Parnell's claim that child-voting provides a way by which the National Popular Vote Compact can be "easily gamed."

A state law that gives certain voters extra votes based on their number of underage children would violate the Equal Protection Clause of the 14th Amendment.

Plaintiffs in a lawsuit challenging child-voting would include:

- married couples with no children (and particularly infertile couples);
- married couples with only one child (who would be less influential than those with two or more children);

[1028] Downen, Robert and Downey, Renzo. 2024. Proposed Texas GOP platform calls for the Bible in schools, electoral changes that would lock Democrats out of statewide office. *Texas Tribune*. May 25, 2024. https://www.texastribune.org/2024/05/25/texas-republican-party-convention-platform/

[1029] *Gray v. Sanders*. 372 U.S. 368. 1963.

[1030] Weinger, Mackenzie. 2012. Pa. pol: Voter ID helps GOP win state. *Politico*. June 25, 2012. https://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811

- married couples with only two children (who would be less influential than those with three children), and so forth;
- single parents (whose children would be less influential than children in households with two parents);
- divorcees who do not have child custody;
- single persons; and
- members of the United Society of Believers in Christ's Second Appearing (commonly known as Shakers), who believe in celibacy and would therefore add religious discrimination to the proposal's constitutional vulnerability.

Religious favoritism would be argued in addition to religious discrimination, because of the greater voting advantage that would be conferred upon adherents of religions that oppose birth control.

In addition, the child-voting proposal presents numerous operational difficulties, such as verifying the current accuracy of the number of additional votes that a particular adult is to receive.

Federalism ameliorates the effect of partisan manipulation.

As just mentioned, the courts can provide some protection against some politically motivated state laws.

For the sake of argument, suppose it were constitutional to give extra votes to parents with minor children (advantaging Republicans) or extra votes to better-educated adults (advantaging Democrats).

In that case, our nation's federal system would reduce the *net national political impact* of such partisan manipulation, because no one political party is ever in control of every state government. For example, as of July 2024, there were 23 states in which the Republicans control both houses of the legislature and Governor's office (a so-called "trifecta") and 17 such Democratic states.[1031]

Admittedly, federalism cannot guarantee a perfect balance between competing political parties. However, it can reduce the net national impact of state-level partisanship.

After each census, congressional districts are typically gerrymandered in states where one party controls the legislature and Governor's office. Although one party usually controls more state governments at any particular moment then the other, federalism reduces the net national impact of state-level partisanship.

[1031] *Ballotpedia*. 2024. Trifecta vulnerability in the 2024 elections. Accessed July 27, 2024. https://ballotpedia.org/Trifecta_vulnerability_in_the_2024_elections

9.40. MYTHS ABOUT SLAVERY

9.40.1. MYTH: There would have been no Emancipation Proclamation without the Electoral College.

QUICK ANSWER:

- Lincoln's election in 1860 and 1864 did not depend on the state-by-state winner-take-all method of awarding electoral votes. He won both the Electoral College and the national popular vote in both elections.

MORE DETAILED ANSWER:

Save Our States, the leading group that lobbies against the National Popular Vote Compact, is a project of the Oklahoma Council on Public Affairs (OCPA).

Jonathan Small, President of OCPA, tweeted in 2023:

> "There is no Emancipation Proclamation without the Electoral College."[1032]

[1032] Save Our States. March 31, 2023. *Twitter*. https://twitter.com/SaveOurStates/status/1641798951744438272?s=20

Charlie Kirk, the founder and president of Turning Point USA, made a similar claim about the Electoral College:

> "One of its minor accomplishments over a couple of centuries was that of making possible the election of Abraham Lincoln."[1033]

President Lincoln issued the Emancipation Proclamation as an executive order on January 1, 1863.

In the four-way race of 1860, Lincoln won both the Electoral College and the national popular vote. Lincoln led his nearest competitor (Stephen A. Douglas) by a significant margin in the popular vote—more than 10% (485,706 out of 4,680,727), as shown in table 1.5.

Similarly, Lincoln won both the Electoral College and the national popular vote in 1864. Lincoln again led his nearest competitor (George B. McClellan) by a significant margin in the popular vote—more than 10% (411,401 out of 4,030,291), as shown in table 9.56.

Table 9.56 1864 election results

Candidate	Party	Popular votes	Electoral votes
Abraham Lincoln	Republican	2,220,846	212
George B. McClellan	Democratic	1,809,445	21
Total		**4,030,291**	**233**

9.40.2. MYTH: The Electoral College prevented a pro-slavery candidate from being elected in one case.

QUICK ANSWER:

- If the Electoral College is to be credited with success in preventing Andrew Jackson from winning the presidency in 1824, it should also be criticized for electing him in 1828 and 1832. This myth is based on selective presentation of data.

MORE DETAILED ANSWER:

Save Our States—the leading group opposed to the National Popular Vote Compact—credits the Electoral College for preventing the election of at least one pro-slavery candidate, namely Andrew Jackson in 1824.

In a memo entitled "The Three-Fifths Compromise and the Electoral College," Save Our States wrote:

> "In one clear case, the Electoral College prevented a pro-slavery candidate from winning."

[1033] Kirk, Charlie. 2019. Beware Democrat Efforts to Abolish the Electoral College. January 14, 2019. https://www.breitbart.com/politics/2019/01/14/charlie-kirk-beware-democrat-efforts-to-abolish-the-electoral-college/

> "In 1824 the Electoral College prevented the election of pro-slavery candidate Andrew Jackson."[1034]

Save Our States selectively credits the Electoral College with success in preventing Jackson from winning the presidency in 1824 but fails to criticize it for electing this same slaveholder in 1828 and 1832.

In fact, Save Our States also turns a blind eye to the fact that eight of the first 12 Presidents owned slaves while in office, namely George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, John Tyler, James K. Polk, and Zachary Taylor.

Moreover, two additional Presidents from among the first 12 owned slaves at some point during their lives, namely Martin Van Buren and William Henry Harrison.

Two additional pre-Civil-War Presidents (Franklin Pierce and James Buchanan) were considered to be "dough-faced" on the issue of slavery in the sense that they were northerners with southern principles.

The historical reality is that the Three-Fifths Clause of the Constitution amplified the political power of southern slave states in both the U.S. House of Representatives and the Electoral College in the period before the Civil War.

9.41. MYTHS ABOUT THE VOTING RIGHTS ACT

9.41.1. MYTH: The Compact violates the Voting Rights Act.

QUICK ANSWER:

- The National Popular Vote Compact received preclearance under section 5 of the Voting Rights Act from the Department of Justice in 2012.
- The National Popular Vote Compact would not deny or abridge the right to vote—of minorities or anyone else. On the contrary, it would make every person's vote equal—consistent with the goal of the Voting Rights Act.

MORE DETAILED ANSWER:

Professor Robert M. Hardaway of the Sturm College of Law at the University of Denver and five other opponents of the National Popular Vote Compact issued a written statement at a Colorado legislative committee hearing in 2007, arguing that the Compact would:

> "diminish the political influence of racial and ethnic minorities in the United States in presidential elections."[1035]

In 2008, David Gringer argued that the National Popular Vote Compact would:

> "run afoul of sections 2 and 5 of the Voting Rights Act—as either minority vote

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[1034] Save Our States. 2021. The Three-Fifths Compromise and the Electoral College. https://saveourstates.com/uploads/The-Three-Fifths-Compromise-and-the-Electoral-College.pdf Accessed May 22, 2021.

[1035] The statement was signed by Robert M. Hardaway, Robert D. Loevy, Danial Clayton, Edward Roche, Jim L. Riley, and Dennis Steele.

> dilution or retrogression in the ability of minority voters to elect the candidate of their choice."[1036]

In his 2016 book, Mark Weston warned:

> "Lawsuits claiming that the National Popular Vote system violates the 1965 Voting Rights Act would also be likely. In California, for example, about 30% of the voters are Latino."[1037]

In 2024, the Maine Policy Institute (a conservative think tank) claimed:

> "The National Popular Vote Compact could potentially be a civil rights violation. The Voting Rights Act of 1965's second section has been interpreted by the Supreme Court to mean that states cannot create an electoral system that reduces the electoral impact of the state's minority voters (*Shaw v. Reno*)."[1038]

The National Popular Vote Compact would not deny or abridge the right to vote—of minorities or anyone else.

On the contrary, it would make every person's vote equal—consistent with the goal of the Voting Rights Act.

The National Popular Vote Compact received pre-clearance from the U.S. Department of Justice under section 5 of the Voting Rights Act on January 13, 2012. The pre-clearance was issued while the California legislature was considering the Compact.[1039]

The National Popular Vote Compact has been sponsored by hundreds of minority state legislators and endorsed by organizations such as:

- the National Black Caucus of State Legislators in 2006[1040]
- the National Latino Congreso in 2006[1041]
- the NAACP in 2008[1042]
- Mi Familia Vota in 2020.[1043]

[1036] Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. *Columbia Law Review*. Volume 108. January 2008. Pages 182–230.

[1037] Weston, Mark. 2016. *The Runner-Up Presidency: The Elections That Defied American's Popular Will (and How Our Democracy Remains in Danger)*. Guilford, CT: Lyons Press. Page 131.

[1038] Van Pate, Harris. 2024. Five Legal Problems with the National Popular Vote bill. *Pine Tree Beat*. April 8, 2024. https://mainepolicy.org/five-legal-problems-with-the-national-popular-vote-bill/

[1039] Letter dated January 13, 2012, concerning Assembly Bill 459 (the National Popular Vote Compact) from T. Christian Herren of the Civil Rights Division of the U.S. Department of Justice to Robbie Anderson, Senior Elections Counsel of the state of California.

[1040] The National Black Caucus of State Legislators adopted a resolution (https://fairvote.app.box.com/v/NBCSL-NPV-resolution) at its 2006 annual meeting in Jackson, Mississippi.

[1041] The National Latino Congreso passed a resolution (https://fairvote.app.box.com/v/NLC-NPV-resolution) at its September 2006 conference.

[1042] At its 2008 annual convention in Cincinnati, Ohio, the NAACP adopted a resolution (https://fairvote.app.box.com/v/NAACP-NPV-resolution) in support of the proposition of a national popular vote for president in general, and the National Popular Vote Compact in particular. It won final approval of the NAACP board on October 17, 2008. See https://fairvote.app.box.com/v/NAACP-NPV-resolution

[1043] Mi Familia Vota endorsed a "yes" vote in the November 2020 statewide referendum in Colorado (Proposition 113) on the National Popular Vote law that was passed in 2019 by the Colorado legislature and signed by the Governor. https://progressivevotersguide.com/colorado/2020/general/about/vota

In endorsing the National Popular Vote Compact, the NAACP cited the fact that it supported "the ideal of one person, one vote."

The purpose of the Voting Rights Act is to guarantee voting equality (particularly in relation to racial minorities who historically suffered discrimination in certain states or parts of states).

Section 2 of the Act prohibits the denial or abridgment of the right to vote.

Section 5 requires certain states (that historically violated the right to vote) to obtain advance approval for proposed changes in their state election laws to ensure that they would not have a discriminatory purpose or effect.

The advance approval can be obtained in two ways:

- a favorable declaratory judgment from the U.S. District Court for the District of Columbia, or
- pre-clearance by the U.S. Department of Justice (the more common path).

Opponents of the National Popular Vote Compact, such as Gringer, often quote from various court cases involving disputed changes in voting methods for *multi-member* legislative bodies, such as city councils and county governing boards.[1044] However, these cases do not bear on elections to fill a *single office* such as the presidency.

In *Butts v. City of New York Dept. of Housing Preservation and Development*, the U.S. Court of Appeals for the Second Circuit considered whether the Voting Rights Act applies to a run-off election for the single office of Mayor, Council President, or City Comptroller in a New York City primary election. The court opined:

> "We cannot … take the concept of a class's impaired opportunity for equal representation and **uncritically transfer it from the context of elections for multi-member bodies to that of elections for single-member officers**."[1045] [Emphasis added]

The court also stated:

> "**There is no such thing as a 'share' of a single member office**." [Emphasis added]

It then added:

> "It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act."

In *Dillard v. Crenshaw County*, the U.S. Court of Appeals for the Eleventh Circuit considered whether the at-large, elected chair of the Crenshaw County Commission in Alabama is a single-member office. The office's duties are primarily administrative and executive, but also include presiding over meetings of the Commissioners and voting to break a tie. The court stated that it was unsatisfied that:

[1044] Gringer, David. 2008. Why the National Popular Vote plan is the wrong way to abolish the Electoral College. 108 *Columbia Law Review* 182. January 2008. Pages 182–230.

[1045] *Butts v. City of New York Dept. of Housing Preservation and Development*, 779 F.2d 141 at 148 (1985).

> "The chairperson will be sufficiently uninfluential in the activities initiated and in the decisions made by the commission proper to be evaluated as a single-member office."[1046]

The case was remanded to the U.S. District Court for either "a reaffirmation of the rotating chairperson system" or approval of an alternative proposal preserving "the elected integrity of the body of associate commissioners."

In 1989, in *Southern Leadership Conference v. Siegelman*,[1047] the U.S. District Court for the Middle District of Alabama distinguished between election of a single judge to a one-judge court and the election of multiple judges to a circuit court or judicial court. Preclearance was required when more than one judge was to be elected, but not when only one judge was to be elected.

Although the National Popular Vote Compact received preclearance from the U.S. Department of Justice in 2012 under section 5 of the Voting Rights Act, the requirement that states obtain preclearance was significantly modified by the decision of the U.S. Supreme Court in 2013 in *Shelby County v. Holder*.[1048]

The U.S. Department of Justice described the effect of the Court's decision in this case as follows:

> "The United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The Supreme Court did not rule on the constitutionality of Section 5 itself. The effect of the Shelby County decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance for the new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the Voting Rights Act."[1049]

9.42. MYTH ABOUT THE WORLD SERIES

9.42.1. MYTH: The World Series teaches us something about how presidential elections should be run.

QUICK ANSWER:

- Inequality in the value of a vote requires substantially more justification than an analogy with the way a particular sport conducts its national championship.

[1046] *Dillard v. Crenshaw County*, 831 F.2d 246 at 253 (11th Cir. 1987).

[1047] *Southern Leadership Conference v. Siegelman*, 714 F. Supp. 511 at 518 (M.D. Ala. 1989).

[1048] *Shelby County v. Holder*. 570 U.S. 529. (2013).

[1049] U.S. Department of Justice. 2013. The *Shelby County* Decision. https://www.justice.gov/crt/about-section-5-voting-rights-act

MORE DETAILED ANSWER:

Opponents of the National Popular Vote Compact often use an analogy to the World Series to justify the current method of electing the President.

Tara Ross, a lobbyist against the National Popular Vote Compact who works closely with Save Our States, has written:

> "**The Series teaches us something about our Constitution**."
>
> "**The team that scores the most runs can still lose the World Series**. As any baseball fan knows, that's simply how it works. Teams earn the championship by winning the most games during the Series, not by scoring the most runs over the course of several games. Rules could be established to change this situation, but such rules would not **accomplish the stated objective of the games: Awarding the championship to the best overall team**."[1050] [Emphasis added]

Michael C. Maibach, a Distinguished Fellow of Save Our States wrote:

> "Those who disfavor the Electoral College say that the majority should always rule. … **The sports world can teach us something**. … The winner of the Series—the rules tell us—is the team that wins four out of seven games."[1051] [Emphasis added]

There is indeed a similarity between the state-by-state winner-take-all method for awarding electoral votes and the fact that the team that wins four games in the World Series is deemed to be the national champion—regardless of which team scores more runs during the Series.

In 1960, the Pittsburgh Pirates scored 27 runs, while the New York Yankees scored 55 runs. However, the World Series' scoring procedure awarded the championship to the Pirates.

One would think that a team that scored 55 runs, compared to the opponent's 27, would, by any rational standard, be considered, to use Ross' words, "the best overall team."

Can anyone say that less sports prowess is demonstrated by a run simply because it was scored on a day when many other runs were scored?[1052]

If particular runs are to be devalued merely because they occur in proximity to other runs, would it not be equally appropriate to base the outcome of each individual baseball game (throughout the season) on the number of innings in which a team scored more runs?

While inequality in the value of a run in the World Series may be a harmless oddity

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[1050] Ross, Tara. 2021. The World Series imitates the Electoral College. October 13, 2021. https://www.taraross.com/post/tdih-world-series-electoral-college?utm_campaign=67ea345b-959b-476d-a73b-f1eddf1a6b33&utm_source=so&utm_medium=mail&cid=bc1b93af-da39-4787-92de-a4acf7547077

[1051] Maibach, Michael C. 2022. How the World Series can explain the Electoral College. November 28, 2022. https://saveourstates.com/blog/how-the-world-series-can-help-explain-the-electoral-college

[1052] The World Series' scoring procedure similarly awarded the championship in 2022, when the Anaheim Angels scored 41 runs, while the San Francisco Giants scored 44 runs. Similarly, in 1997, the Florida Marlins scored 37 runs, while the Cleveland Indians scored 44 runs. In 1992, the Minnesota Twins scored 24 runs, while the Atlanta Braves scored 29 runs.

from the world of sports entertainment, inequality in the value of a person's vote requires more justification than it is simply what "the [current] rules tell us."

9.43. MYTH ABOUT ORIGINS OF THE NATIONAL POPULAR VOTE CAMPAIGN

9.43.1. MYTH: The National Popular Vote effort is funded by left-wingers.

QUICK ANSWER:

- Over 80% of the contributions supporting the National Popular Vote effort over the years have come from a pro-life, anti-Buffett-rule, registered Republican businessman and a pro-choice, pro-Buffett-rule, registered Democratic businessman.
- The National Popular Vote effort has also been supported by thousands of additional contributors.

MORE DETAILED ANSWER:

Hans von Spakovsky of the Heritage Foundation has stated:

> "National Popular Vote Inc. is one of California's lesser-known advocacy organizations. Its chairman, John Koza, is best known as the co-founder of Scientific Games Inc., the company that invented the instant lottery ticket.
>
> "Now Mr. Koza **and his fellow liberal activists** want to 'scratch off' the Electoral College."[1053] [Emphasis added]

The facts are that over 80% of the contributions supporting the National Popular Vote effort over the years have come—in about equal total amounts—from

- Tom Golisano (a pro-life, anti-Buffett-rule, registered Republican businessman currently residing in Florida) and
- John R. Koza (a pro-choice, pro-Buffett-rule, registered Democratic businessman residing in California).

John R. Koza's contributions have largely been spent by National Popular Vote, a 501(c)4 non-profit corporation.

Tom Golisano's contributions have largely been spent by Support Popular Vote, a 501(c)(4) non-profit corporation (originally called "National Popular Vote Initiative").

9.43.2. MYTH: The Compact originated with three law professors.

QUICK ANSWER:

- The ideas underlying the National Popular Vote Compact go back to Dale Read's 105-page research paper at Duke University in 1971 and his 1976 article in the *Washington Law Review*.

[1053] Von Spakovsky, Hans. Protecting Electoral College from popular vote. *Washington Times*. October 26, 2011.

- Charles Schumer discussed the idea of a two-state interstate compact for presidential elections involving New York and Texas in the 1990s.
- Key ideas were posted on the internet in December 2000 by Brent White of Seattle and Tony Anderson Solgard of Minneapolis.
- Subsequently, in January 2001, Law Professor Robert W. Bennett discussed some of the ideas about which Read, White, and Solgard had previously written.
- In December 2001, Law Professors Akhil Reed Amar and Vikram David Amar subsequently made comments about Professor Bennett's writings.

MORE DETAILED ANSWER:

Save Our States (the leading group that lobbies against the National Popular Vote Compact) claims:

> "The idea behind National Popular Vote was developed by three law professors."[1054]

The facts show otherwise.

In 1971, Dale Read Jr., then a student at Duke University Law School and later a practicing attorney in the Seattle area, wrote the first known written discussion of the ideas underlying the National Popular Vote Compact.

Read's work was contained in a 105-page research paper entitled "Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment."[1055]

In 1976, Read published a shortened version of his 1971 paper in the *Washington Law Review*.[1056] Read said:

> "The states, without federal action, possess the capability of implementing the direct popular election of the President."

Read's 1976 article in the *Washington Law Review* described what he called "The National Vote Plan" as follows:

> "The states possess the power to institute direct popular vote and they can do so more readily than the Constitution can be amended. Reform can be accomplished if the states change their election laws to require electors to support the national popular-vote winner, rather than the individual state winners."
>
> "This National Vote Plan would eliminate the winner-take-all system and its resulting inequities just as effectively as would a constitutional amendment implementing direct popular vote. Technically, an indirect electoral system would

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[1054] Save Our States. 2024. Who came up with the idea for a National Popular Vote. Flyer distributed at the National Conference of State Legislatures in Louisville, Kentucky on August 5–7, 2024.

[1055] Read, Dale Jr. 1971. *Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment.* Independent Research Paper. Duke University Law School. https://www.nationalpopularvote.com/1971dalereadpaper

[1056] Read, Dale Jr. 1976. Direct election of the president without a constitutional amendment: A call for state action. *Washington Law Review*. Volume 51. Number 2. Pages 321–349. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2109&context=wlr

> remain, but the faults presently attributable to such a system would be substantially eliminated, because the electors would vote for the national winner."[1057]

Read's proposal envisioned states separately passing similar laws—what we today call the "single-state" approach (discussed in section 9.44.1 in connection with a different proposal made in 2019). Read estimated that the plan would work if adopted by states possessing perhaps 108–135 electoral votes:

> "The plan can work even if fewer than one-half of the electoral votes are committed to the national winner, because the winner will undoubtedly receive electoral votes from states that retain the existing system. Indeed, states that hold 20-25 percent of the total electoral college votes (108–135 electoral votes) can effectively implement the system."[1058]

In the 1990s, Congressman (and later U.S. Senator) Charles Schumer of New York proposed a bi-state compact in which New York and Texas would pool their electoral votes in presidential elections. Both states were, at the time, noncompetitive in presidential politics and therefore received little attention in presidential campaigns except for as a source of donations. Schumer observed that the two states had almost the same number of electoral votes (at the time, 33 for New York and 32 for Texas)[1059] and that the two states regularly produced majorities of approximately the same magnitude in favor of each state's dominant political party (at the time, about 60% for the Democrats in New York, and about 60% for the Republicans in Texas). The purpose of Schumer's proposed bi-state compact was to create a presidentially competitive super-state (which would have had more electoral votes than California had at the time) that would attract the attention of the presidential candidates during presidential campaigns. Schumer attempted to interest Texas Republicans in the proposal, but no action ever occurred.

The 2000 election stimulated discussion by a number of people of ideas about how direct election of the President might be achieved by state-level action.

On December 30, 2000, Brent White of Seattle wrote the following on the "Full Representation" mail server entitled "Direct Prez Election W/O Amendment."

> "**If the goal is to eventually have the president elected directly, then there is a straighter path to get there—one that does not require an amendment to the US Constitution.**
>
> "Article II of the Constitution grants each state legislature the power to determine how that state's presidential electors will be allotted. **A state legislature could, if it so chose, award that state's electors to the winner of the national popular vote.**
>
> "If even one state gives its electoral votes to the national popular winner, the voters of every other noncompetitive state would be instantly re-enfranchised, causing an immediate bump in the presidential turnout."

[1057] *Ibid.* Page 333.

[1058] *Ibid.* Page 336.

[1059] In the 2004 presidential election, New York had 31 electoral votes, and Texas had 34.

> "If several Democratic-leaning and several Republican-leaning states give their electoral votes to the national popular winner, they would form a block that virtually assures victory to the popular winner.
>
> "**If states carrying a majority of the Electoral College do this, they will make the popular winner the automatic electoral winner**."[1060] [Emphasis added]

On December 31, 2000, Tony Anderson Solgard of Minneapolis commented on White's web posting and wrote:

> "Brent's proposal … would provide a result consistent with the national popular vote. And that is precisely the point: the presidency is a single-winner office without a need for proportionality in an electoral college.
>
> "The political problem would be the criticism that it gives away the decision of each state's voters to the nation as a whole. And unless all the other states went along with it, you couldn't convince one state to disenfranchise its voters.
>
> "To get around this, **a variation on Brent's idea would be to put a multi-state compact clause into the proposal: when X number of states agree to adopt the same allocation plan, then the law goes into effect**."[1061] [Emphasis added]

At a January 11–12, 2001, conference and in an April 19, 2001, web posting, Professor Robert W. Bennett, former Dean of the Northwestern University School of Law, observed that a federal constitutional amendment was not necessary to achieve the goal of nationwide popular election of the President, because the states could use their power under Article II of the U.S. Constitution to allocate their electoral votes based on the nationwide popular vote.[1062,1063]

[1060] This December 30, 2000, posting by Brent White was at the (now expired) link of http://lists.topica.com/lists/full-representation@igc.topica.com/read/message.html?mid=702433464&sort=d&start=800 The list was the "full-representation@igc.topica.com" list. The authors are grateful to Steve Chessin, President of Californians for Electoral Reform, who remembered and located White's December 30, 2000, web posting after the first edition of this book was published on February 23, 2006.

[1061] The authors of the National Popular Vote Compact became aware (thanks to the research efforts of Steve Chessin, President of Californians for Electoral Reform) of the December 31, 2000, web publications by Tony Anderson Solgard of Minneapolis after the compact was written and after the first edition of this book was released on February 23, 2006. Chessin notes that the Solgard posting was made using the e-mail address of Tony Solgard's wife (Karen L. Solgard). This posting was made on the (now expired) link of http://lists.topica.com/lists/full-representation@igc.topica.com/read/message.html?mid=702436082&sort=d&start=800

[1062] Bennett, Robert W. 2001. Popular election of the president without a constitutional amendment. 4 *Green Bag*. Spring 2001. Posted on April 19, 2001. The January 11–12, 2001, presentation was contained in *Conference Report*, *Election 2000: The Role of the Courts*, *The Role of the Media; The Roll of the Dice* (Northwestern University).

[1063] The authors became aware of the 2001 web publications of Professor Bennett in early 2001 and the Amar brothers in December 2001 after the National Popular Vote Compact was written but just before the first edition of this book in 2006 went to the printer. Accordingly, the first edition of this book in 2006 referenced and discussed only these 2001 web publications but did not mention the earlier December 2000 web

In June 2001, the *Harvard Law Review* published an article on the Electoral College.[1064]

In December 2001, law Professors Akhil Reed Amar and Vikram David Amar cited Professor Bennett's earlier 2001 posting and continued the discussion about the fact that the states could allocate their electoral votes to the national winner of the popular vote.[1065]

One variation of the proposals made by Professors Robert W. Bennett, Akhil Reed Amar, and Vikram David Amar was based on the politically implausible premise (discussed in section 9.44.1) that single states would unilaterally enact laws awarding their electoral votes to the nationwide winner without regard to whether other states had enacted similar legislation.

Another variation was based on the impractical assumption (discussed in section 9.44.1) that carefully selected pairs of states of equal size and opposite political leanings could be found to enact the proposal.

Initially, these writers argued the resulting multi-state arrangement would not constitute an interstate compact, and, as a result, the proposed arrangement would not require congressional consent.[1066] Later, the use of an interstate compact was suggested.

In 2002, Bennett expanded his thoughts in subsequent publications suggesting several variations on his basic idea.[1067, 1068]

In September 2004, the authors of this book started developing the National Popular Vote Compact.

National Popular Vote held its initial press conference in Washington, D.C., and released its book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*. The press conference featured former Congressmen John Anderson

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publications by Brent White of Seattle and Tony Anderson Solgard of Minneapolis. John Koza and Barry Fadem had discussed the possibility of state legislation being used to award a state's electoral votes to the national popular vote winner at the time of the 1992 Perot candidacy; however, they had not, at that time, combined that general idea with either the mechanism of an interstate compact or the concept of a compact taking effect when enacted by states possessing a majority of the Electoral College. The authors became aware of Dale Read's pioneering earlier papers after publication of the 4th edition of this book in 2013.

[1064] Rethinking the electoral college debate: The Framers, federalism, and one person, one vote. *Harvard Law Review*. June 2001. Volume 114. Number 8. Pages 2526–2549. See note 112 on page 2549. https://www.jstor.org/stable/1342519?origin=crossref

[1065] Amar, Akhil Reed, and Amar, Vikram David. 2001. How to achieve direct national election of the president without amending the constitution: Part three of a three-part series on the 2000 election and the electoral college. *Findlaw's Writ*. December 28, 2001. https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html

[1066] The question of whether a given arrangement is an interstate compact is separate from the question of whether the arrangement requires congressional consent. As discussed in section 9.23.3, many interstate compacts do not require congressional consent. A multi-state arrangement (1) that takes effect in response to an "offer" made by one or more states, (2) that does not take effect without assurance of complementary action by other states (through acceptance of the offer), and (3) that then commits the states to act in concert would almost certainly be regarded by the courts as a contract, and hence an "agreement or compact" as that phrase is used in the U.S. Constitution.

[1067] Bennett, Robert W. 2002. Popular election of the president without a constitutional amendment. In Jacobson, Arthur J., and Rosenfeld, Michel (editors). *The Longest Night: Polemics and Perspectives on Election 2000*. Berkeley, CA: University of California Press. Pages 391–396.

[1068] Bennett, Robert W. 2002. Popular election of the president II: State coordination in popular election of the president without a constitutional amendment. *Green Bag*. Winter 2002.

(R–Illinois and Independent presidential candidate) and John Buchanan (R–Alabama), former Senator Birch Bayh (D–Indiana), Common Cause President Chellie Pingree, FairVote Executive Director Rob Richie, National Popular Vote President Barry Fadem, and Dr. John R. Koza, originator of the plan.

Later in 2006, Jennings "Jay" Wilson analyzed the numerous variations proposed by Professors Robert W. Bennett, Akhil Reed Amar, and Vikram David Amar in 2001 and 2002. Wilson's analysis points out the political impracticality of the various proposals made in 2001 and 2002.[1069]

These earlier proposals differ from the authors' proposed "Agreement Among the States to Elect the President by National Popular Vote" in several respects.

None of the earlier proposals contained a provision making the effective date of the system contingent on the enactment of identical laws in states that collectively possess a majority of the electoral votes (i.e., 270 of the 538 electoral votes). No single state would ever be likely to unilaterally enact a law awarding its electoral votes to the nationwide winner. For one thing, such an action would give the voters of all the other states a voice in the selection of the state's own presidential electors, while not giving the enacting state the benefit of a voice in the selection of presidential electors in other states. Moreover, enactment of such a law in a single state would encourage the presidential candidates to ignore the enacting state. Such unilateral action would not guarantee achievement of the goal of nationwide popular election of the President. These issues are discussed in detail in section 9.44.1 in connection with a different 2019 proposal.

Moreover, the earlier proposals do not work in an even-handed and non-partisan way if enacted by states possessing less than a majority of the electoral votes. Suppose, for example, that a group of states that consistently voted Democratic in presidential elections were to participate in an arrangement—without the electoral-majority threshold—to award their electoral votes to the nationwide popular vote winner. Then, if the Republican presidential candidate won the most popular votes nationwide (but did not carry states with a majority of the electoral votes), the participating (Democratic) states would award their electoral votes to the Republican candidate—thereby achieving the desired result of electing the presidential candidate with the most popular votes nationwide. On the other hand, if the Democratic presidential candidate won the most popular votes nationwide (but did not carry states with a majority of the electoral votes), the similarly situated Democratic presidential candidate would not receive a symmetric benefit. Instead, the Republican candidate would be elected, because the Democratic candidate could not receive any additional electoral votes from the group of states involved, because the Democratic candidate would already be getting all of the electoral votes from that group of states. In short, a Republican presidential nominee would be the only beneficiary if only Democratic states participated in such an arrangement, and vice versa. In fact, an arrangement without an electoral majority threshold would operate in an even-handed and non-partisan way only in the unlikely event that the participating states were equally divided (in terms of electoral votes) among reliably Republican and reliably Democratic states. In contrast,

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[1069] Wilson, Jennings Jay. 2006. Bloc voting in the Electoral College: How the ignored states can become relevant and implement popular election along the way. 5 *Election Law Journal* 384.

if the states participating in the arrangement possess a majority of the electoral votes, the system operates in an even-handed and nonpartisan way without regard to the political complexion of the enacting states. With an electoral majority threshold, the political complexion of the enacting states becomes irrelevant.

In his 2006 article, Wilson proposed his own "bloc voting" variation (in which only the popular votes of *only* the enacting states would decide which candidate received the electoral votes of the enacting states).[1070] The obvious flaw of this variation is illustrated if one considers a scenario in which one or more Republican-leaning states were to enact the "bloc voting" proposal. If, subsequently, a group of Democratic-leaning states that together generated a larger popular-vote margin than the existing Republican group were to enact Wilson's "bloc voting" proposal, all the electoral votes of the less-muscular Republican group would be go to the Democrats. In other words, the Democratic group of states would have commandeered the electoral votes of the Republican states. More important, this would occur irrespective of whether the Democratic presidential candidate received the most popular votes nationwide.

The authors submit that the proposed "Agreement Among the States to Elect the President by National Popular Vote" does not have the above problems of any of the other variations that have been previously discussed.

In any event, specific legislative language was never created for any of the other proposals, and none of the other proposals has ever been introduced in any state legislature. Soon after National Popular Vote's initial press conference on February 23, 2006, the National Popular Vote Compact had been introduced in all 50 state legislatures.

9.44. MYTHS ABOUT PROPOSALS THAT ARE ENACTED BY A SINGLE STATE OR ONLY A FEW STATES

9.44.1. MYTH: The benefits of a national popular vote can be achieved if one state or only a few states adopt the Voter Choice Ballot.

QUICK ANSWER:

- The Voter Choice Ballot (VCB) is proposed state legislation by which a state would award its electoral votes to the national popular vote winner—without the requirement (contained in the National Popular Vote Compact) that states possessing a majority of the electoral votes (270 of 538) have agreed to award their electoral votes in that manner.
- Enactment of the single-state version of the Voter Choice Ballot in any state that usually votes Republican in presidential elections would be politically preposterous (and vice versa for Democratic states).

[1070] *Ibid.*

MORE DETAILED ANSWER:

Starting with Dale Read's 1971 research paper at Duke University[1071] and his 1976 law review article entitled "Direct election of the president without a constitutional amendment,"[1072] there have been repeated suggestions that the benefits of a nationwide vote for President can be achieved through the action of a bloc of states possessing considerably less than a majority of the electoral votes.

This idea achieved a brief second life after the 2000 presidential election in the writings of several law professors (section 9.43.2).

A version of this idea resurfaced in 2019 under the name "Voter Choice Ballot" from an organization called "Making Every Vote Count" (MEVC).

Description of the Voter Choice Ballot

The Voter Choice Ballot (VCB) is proposed state legislation in which a state would award its electoral votes to the national popular vote winner—without the requirement (contained in the National Popular Vote Compact) that states possessing a majority of the electoral votes (270 of 538) must have agreed to award their electoral votes to the national popular vote winner.

Making Every Vote Count has proposed two distinct versions of the Voter Choice Ballot:

- **Single state version**: The Voter Choice Ballot legislation takes effect immediately after enactment by a single state.
- **Paired state version**: The Voter Choice Ballot legislation takes effect only after being enacted by two states with an equal number of electoral votes and with equal, but opposite, political orientation.

In both versions, voters would first vote for President in the usual way, and then vote on the following question:

> "Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES."

The effect of voting "Yes" would be printed on each ballot:

> "The state will count the votes for all those who filled in the YES oval as cast for the winner of the national popular vote for the purpose of appointing electors as otherwise provided by this state's law."

Figure 9.29 shows the Voter Choice Ballot.

In other words, if a voter were to vote "Yes," then the vote that the voter just cast for President would—for purposes of awarding the state's electoral votes—be transferred

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[1071] Read, Dale Jr. 1971. *Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment.* Independent Research Paper. Duke University Law School. https://www.nationalpopularvote.com/1971dalereadpaper

[1072] Read, Dale Jr. 1976. Direct election of the president without a constitutional amendment: A call for state action. *Washington Law Review*. Volume 51. Number 2. Pages 321–349. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2109&context=wlr

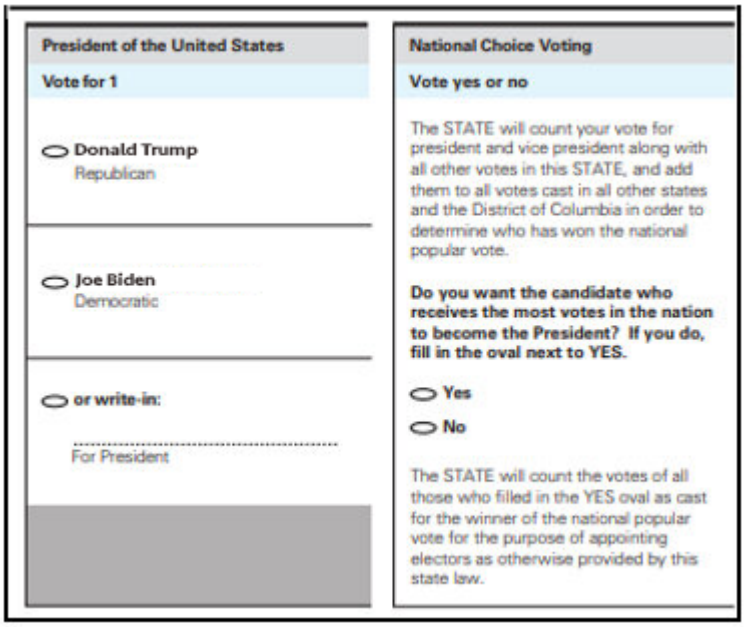

Figure 9.29 The Voter Choice Ballot

from the voter's preferred presidential candidate and added to the tally of the candidate who won the national popular vote. Then, after those transfers, the presidential candidate who has the most popular votes in the state would win all of the state's electoral votes.

As an example, consider Michigan in 2020 when Democrat Joe Biden got 2,804,040 (51%) of the state's popular votes, and the Republican Donald Trump got 2,649,852 (49%).

For the sake of argument, suppose that Trump had won the national popular vote and that 77,095 of Michigan's 2,804,040 Biden voters (1.4% of the state's voters) voted "Yes" on the Yes-No question.

Under the assumption that Trump won the national popular vote, 77,095 Democratic votes would then be subtracted from Biden—leaving Biden with only 2,726,945. Those 77,095 Biden votes would then be added to Trump's tally—thus putting Trump in the lead in Michigan with 2,726,946 votes. The result would be that Trump (the assumed national popular vote winner) would receive all of Michigan's electoral votes.

The Yes-No question on the Voter Choice Ballot is unusual in that it will appear to many voters to be a typical referendum question that requires a statewide majority of "Yes" votes in order to take effect. However, this is not the case. Instead, a voter may express support for the concept of a national popular vote for President *only* if the voter is willing to have the vote he or she just cast for President to be transferred from the voter's preferred candidate to the national popular vote winner.

No ordinary referendum question requires a voter to surrender his or her vote for their chosen candidate in order to cast a vote on the referendum question.

In other words, a "Yes" vote is an authorization by an individual voter to transfer their vote from one candidate to another under the specified circumstances (specifically, that a certain candidate won the national popular vote).

Thus, a very modest percentage of a state's voters (1.4% in the example above) would be sufficient to trigger the shift of a state's electoral votes from one presidential candidate to another.

Speaking in favor of VCB at an August 13, 2020, conference, Mark Bohnhorst (a director of Making Every Vote Count at the time) said:

> "The percentage of the 'Yes' votes that you would need in order to assure that one of the major-party candidates that won the national popular vote will win the state's electors … **are not particularly high, and in some cases, they are vanishingly small**."[1073] [Emphasis added]

Table 9.57 shows the percentage of voters voting "Yes" on VCB's Yes-No question that would have been required in 2020 to shift a state's electoral votes from one candidate to another:

- Columns 2 through 4 of this table show the 2020 presidential vote for each state.
- Column 6 shows the number of voters voting "Yes" on the Yes-No question that would have been needed in 2020 to switch the state's electoral votes to the national popular vote winner.
- Column 7 expresses the number of voters in column 6 as a percentage of the state's total popular vote for President. The table is sorted by the percentages in column 7.

As can be seen from the table, less than 10% of the voters in two-thirds of the states would be sufficient to trigger the shift of the state's electoral votes from one presidential candidate to another.

Less than 2% of the voters in eight states would be sufficient to trigger the shift of the state's electoral votes from one presidential candidate to another.

The two versions of the Voter Choice Ballot have very different characteristics.

A considerable amount of confusion can arise when justifications that support one version of a proposal are used to justify the other version.

In an article entitled "Ten Advantages of the Voter Choice Ballot Proposal to Achieve Urgently Needed Presidential Election Reform," Making Every Vote Count intermixes the justifications for the two versions of VCB.

The "Ten Advantages" article states that one key advantage of VCB is:

> "The reform can **go into effect immediately without any other state taking action.**"[1074] [Emphasis added]

This feature is particularly appealing to supporters of VCB, because the National Pop-

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[1073] Bohnhorst, Mark. 2020 Presidential Election Reform 2020 & Beyond Conference. August 13, 2020. Slide 2 at timestamp 2:07 of video. https://www.crowdcast.io/e/electoralcollegereform2020

[1074] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal to Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

Table 9.57 Percentage of voters needed to switch a state's electoral votes under VCB in 2020

State	Biden	Trump	Others	Total Vote	"Yes" votes needed to switch the state's electoral votes	Percent of voters needed to switch the state's electoral votes
Georgia	2,473,633	2,461,854	62,229	4,997,716	5,890	0.1%
Arizona	1,672,143	1,661,686	53,497	3,387,326	5,229	0.2%
Wisconsin	1,630,866	1,610,184	56,991	3,298,041	10,342	0.3%
Pennsylvania	3,458,229	3,377,674	79,380	6,915,283	40,278	0.6%
North Carolina	2,684,292	2,758,775	68,422	5,511,489	37,242	0.7%
Nevada	703,486	669,890	17,921	1,391,297	16,799	1.2%
Michigan	2,804,040	2,649,852	85,392	5,539,284	77,095	1.4%
Florida	5,297,045	5,668,731	101,680	11,067,456	185,844	1.7%
Texas	5,259,126	5,890,347	165,583	11,315,056	315,611	2.8%
Minnesota	1,717,077	1,484,065	67,308	3,268,450	116,507	3.6%
New Hampshire	424,937	365,660	13,236	803,833	29,639	3.7%
Ohio	2,679,165	3,154,834	88,203	5,922,202	237,835	4.0%
Iowa	759,061	897,672	29,801	1,686,534	69,306	4.1%
Maine	435,072	360,737	23,565	819,374	37,168	4.5%
Alaska	153,778	189,951	13,840	357,569	18,087	5.1%
Virginia	2,413,568	1,962,430	64,761	4,440,759	225,570	5.1%
New Mexico	501,614	401,894	20,457	923,965	49,861	5.4%
South Carolina	1,091,541	1,385,103	36,685	2,513,329	146,782	5.8%
Colorado	1,804,352	1,364,607	88,021	3,256,980	219,873	6.8%
Kansas	570,323	771,406	30,574	1,372,303	100,542	7.3%
Missouri	1,253,014	1,718,736	54,212	3,025,962	232,862	7.7%
New Jersey	2,608,335	1,883,274	57,744	4,549,353	362,531	8.0%
Indiana	1,242,413	1,729,516	61,183	3,033,112	243,552	8.0%
Oregon	1,340,383	958,448	58,401	2,357,232	190,968	8.1%
Montana	244,786	343,602	15,252	603,640	49,409	8.2%
Mississippi	539,398	756,764	17,597	1,313,759	108,684	8.3%
Illinois	3,471,915	2,446,891	114,632	6,033,438	512,513	8.5%
Louisiana	856,034	1,255,776	36,252	2,148,062	199,872	9.3%
Delaware	295,933	200,327	7,421	503,681	47,804	9.5%
Nebraska	374,583	556,846	20,283	951,712	91,132	9.6%
Washington	2,369,612	1,584,651	106,116	4,060,379	392,481	9.7%
Connecticut	1,080,831	714,717	28,309	1,823,857	183,058	10.0%
Utah	560,282	865,140	62,867	1,488,289	152,430	10.2%
Rhode Island	307,486	199,922	10,349	517,757	53,783	10.4%
New York	5,230,985	3,244,798	115,574	8,591,357	993,094	11.6%
Tennessee	1,143,711	1,852,475	57,665	3,053,851	354,383	11.6%
Alabama	849,624	1,441,170	32,488	2,323,282	295,774	12.7%
Kentucky	772,474	1,326,646	37,608	2,136,728	277,087	13.0%
South Dakota	150,471	261,043	11,095	422,609	55,287	13.1%
Arkansas	423,932	760,647	34,490	1,219,069	168,358	13.8%
California	11,110,250	6,006,429	384,192	17,500,871	2,551,911	14.6%
Hawaii	366,130	196,864	11,475	574,469	84,634	14.7%
Idaho	287,021	554,119	26,091	867,231	133,550	15.4%
Oklahoma	503,890	1,020,280	36,529	1,560,699	258,196	16.5%
North Dakota	114,902	235,595	11,322	361,819	60,347	16.7%
Maryland	1,985,023	976,414	56,482	3,017,919	504,305	16.7%
Massachusetts	2,382,202	1,167,202	65,671	3,615,075	607,501	16.8%
Vermont	242,820	112,704	11,904	367,428	65,059	17.7%
West Virginia	235,984	545,382	13,365	794,731	154,700	19.5%
Wyoming	73,491	193,559	7,976	275,026	60,035	21.8%
D.C.	317,323	18,586	8,447	344,356	149,369	43.4%
Total	**81,268,586**	**74,215,875**	**2,740,538**	**158,224,999**		

ular Vote Compact does not offer this immediacy. Instead, the Compact will not take effect until states possessing a majority of the electoral votes (270 of 538) agree to award their electoral votes to the national popular vote winner.

Immediacy is an attractive feature for the single-state version of VCB. However, as discussed shortly below, it is politically unsaleable, because enactment of the "single-state" version of VCB by a Democratic state would give the Republican candidate a one-sided partisan advantage, while not giving the Democrat an equivalent benefit (and vice versa for a Republican state). That is, this characteristic of the single-state version of VCB makes it unsaleable in both Democratic and Republican states.

To counter this criticism of the "single-state" version of VCB, the "Ten Advantages" article shifts to discussing the paired-state version:

> "States can also adopt the voter choice ballot in contingent legislation, which would **go into effect when another state that voted for the candidate of a different party in the previous election** adopts reciprocal legislation (the "paired" approach)."[1075] [Emphasis added]

In discussing an "urgently needed presidential election reform," Reed Hundt, the CEO of Making Every Vote Count, predicted in December 2020 that no Republican state would be receptive to the National Popular Vote Compact before 2024.[1076]

This prediction turned out to be accurate.

However, this prediction provides no justification for VCB. If no Republican state was going to be receptive to the concept of a national popular vote for President between 2020 and 2024, no Republican state was going to be available to create the politically balanced pair of states required to enact the paired-state version of VCB before 2024. Indeed, if a state does not favor the concept of a nationwide vote for President, it is certainly not going to favor accelerating its adoption.

In other words, the only version of VCB that could possibly be seriously considered (namely, the paired-state version) could not go into effect by 2024.

Enactment of the single-state version of the Voter Choice Ballot in any state that usually votes Republican in presidential elections would be politically preposterous (and vice versa for Democratic states).

It also would be politically preposterous for Republicans to support the single-state version of VCB in any state that regularly votes Republican in presidential elections.

For example, consider the reliably red state of South Carolina. As shown in table 9.57, if more than 6% of those who voted Republican for President were to vote "Yes" on the Yes-No question in South Carolina, and the Democratic candidate were to win the national popular vote, the Democrat would get all nine of South Carolina's electoral votes. That is,

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[1075] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal To Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

[1076] Hundt, Reed. 2020. Reaction to the Critique of the Voter Choice Ballot. December 5, 2020. https://www.makingeveryvotecount.com/research-whitepapers-library Accessed December 28, 2020.

the Democratic candidate winning the national popular vote would get nine electoral votes worth of protection against losing the Electoral College while winning the nationwide vote.

This would be a desirable and virtuous outcome, provided that the single-state version of VCB were to confer an equivalent benefit on the Republican presidential nominee.

However, it does not.

Instead, the Republican presidential nominee who wins the national popular vote would get zero electoral votes of protection against losing the Electoral College while winning the nationwide vote, because the Republican candidate *was destined to win South Carolina's electoral votes anyway.*

That is, enactment of the single-state version of VCB would boomerang against the party (i.e., the Republican Party) that usually wins presidential elections in South Carolina and that controls both houses of the state legislature and the governorship.

That is, the single-state version of VCB would punish the party that has the power to enact it.

Similarly, unilateral enactment of the single-state version of VCB in any state that usually votes Democratic in presidential elections would put Democratic electoral votes at risk, while putting no Republican electoral votes at risk. It would give the Republican candidate a one-sided partisan advantage while not giving the Democrat an equivalent benefit.

As shown in table 1.28, 36 states voted for the same party in the six presidential elections between 2000 and 2020. An additional nine states voted for the same party in all but one of those elections. Unilateral enactment of VCB makes no sense in any state that reliably votes for the same party in presidential elections.

Note the difference between VCB and the National Popular Vote Compact. An essential feature of the Compact is that it gives both parties *equal* protection against the possibility of losing the presidency if they win the national popular vote.

In other words, the Compact does not punish the party that has the power to enact it.

The National Popular Vote Compact operates in this bipartisan fashion because it contains the vital condition that it will not take effect until it is enacted by states possessing a majority of the electoral votes—that is, 270 out of 538. When the Compact takes effect, it will result in the appointment of at least 270 presidential electors nominated by the party whose presidential candidate won the most popular votes in all 50 states and the District of Columbia. That is, the Compact guarantees the national popular vote winner enough electoral votes to become President. Moreover, the Compact treats both parties equally. Both parties receive equal protection against the possibility of losing the Electoral College if they win the national popular vote.

Enactment of the paired state version of the Voter Choice Ballot would be exquisitely difficult to execute in practice.

In the previous section, we showed that the percentage of voters who would have to vote "Yes" on the Yes-No question in order to switch a state's electoral votes is so small that the Yes-No question is superfluous. That is, enactment of the single-state version of VCB is essentially equivalent to a state just unilaterally awarding its electoral votes to the national popular vote winner.

We also showed above that it would be politically preposterous for Democrats in a state that usually votes Democratic in presidential elections (or for Republicans in a state that usually votes Republican) to unilaterally enact the "single-state" version of VCB, because it would perversely punish the party that enacts it.

Supporters of VCB respond to these valid criticisms of the single state version of VCB by advocating that it be simultaneously enacted by a politically balanced pair of states.

Pairing of states would be exquisitely difficult to execute in practice because of the difficulty of finding appropriate partners, and then finding legislative and gubernatorial support simultaneously in those particular states.

Each of the following five considerations severely reduces the chance of finding suitable pairs of states.

First, pairing only makes sense between states with an *equal* number of electoral votes. For any given number of electoral votes, there are only a few states (and sometimes no states) with the same number of electoral votes. For example, Maryland, Missouri, and Minnesota are the only states with 10 electoral votes. Virginia is also a singleton, because it is the only state with 13 electoral votes.

Second, "pairing" only makes sense between states whose partisanship is opposite. Ignoring the fact that Pennsylvania has 19 electoral votes, while Minnesota has only 10, Making Every Vote Count suggests:

> "If only Minnesota and Pennsylvania, for example, paired up in adopting the ballot, both parties would be forced to campaign to win the national popular vote."[1077]

However, this combination makes no sense, because both states voted Democratic in eight or nine of the nine presidential elections between 1992 and 2020. The net effect of a Minnesota–Pennsylvania partnership would be, in almost all elections, to put 29 Democratic electoral votes at risk, while putting no Republican electoral votes at risk.

Similarly, it would make no sense for Maryland and Minnesota to enter into a "pairing" arrangement, because both regularly vote Democratic in presidential elections. That pairing would put 20 almost certain Democratic electoral votes at risk, while putting no Republican electoral votes at risk.

Third, pairing only makes sense between states whose partisanship is not merely opposite but *of equal intensity*. For example, it would also make no sense for Michigan and Georgia to enter into a "pairing" arrangement (even if they had the same number of electoral votes), because Republicans hold a 7.9% edge in base party strength in Georgia, compared to a Democratic edge of 1.8% in Michigan.[1078]

Fourth, pairing only makes sense between states whose equal and opposite partisan-

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[1077] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal To Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

[1078] Ballenger, Bill. 2021. Georgia is still way more Republican than most states. *The Ballenger Report*. January 20, 2021. https://www.theballengerreport.com/georgia-republicans-never-should-have-lost-those-two-u-s-senate-seats-georgiais-still-way-more-republican-than-most-states/

ship is *stable*. Unless VCB were enacted on a temporary basis for just the immediately upcoming election, it would make no sense for a state with relatively stable demographics and politics (e.g., Michigan) to pair itself with a state with rapidly changing demographics and politics (e.g., Georgia).

Fifth, Making Every Vote Count claims that the character of a presidential campaign would be changed if only one state, or a few states, adopt VCB. However, this could only happen if VCB were adopted by a large number of states together possessing a hefty number of electoral votes.

In 1971, Dale Read (the attorney who originated the idea of states unilaterally passing legislation tying their electoral votes to the national popular vote in his Duke University paper[1079] and in a 1976 *Washington Law Review* article)[1080] estimated that between 108 and 135 electoral votes would be needed to make his idea work.

Northwestern University Law School Dean Robert Bennett made a similar behavioral prediction in his 2006 book:

> "If states with 100 to 125 electoral votes—**more or less evenly balanced in partisan terms**—were to bind themselves initially, the dynamics of campaigning would shift dramatically toward concern with the nationwide vote."[1081,1082,1083] [Emphasis added]

Neither Bennett nor Read provided any justification for their estimates (100, 108, 126, or 135). There is no way to know exactly what number of carefully paired states would be sufficient to change the behavior of presidential candidates.

The important point is that neither Read nor Bennett is talking about one state, or a few states, changing the character of a presidential campaign. They are talking about a substantial bloc of electoral votes.

In 2019, Making Every Vote Count introduced a bill in the Maryland Senate that would have potentially paired Maryland (with 10 electoral votes) to either Minnesota (10) or Missouri (10). This bill did not include VCB.[1084]

Making Every Vote Count's 2019 Maryland bill was nowhere near as complex as VCB.

[1079] Read, Dale Jr. 1971. *Electoral College Reform: Direct Popular Vote Without a Constitutional Amendment.* Independent Research Paper. Duke University Law School. https://www.nationalpopularvote.com/1971dalereadpaper

[1080] Read, Dale Jr. 1976. Direct election of the president without a constitutional amendment: A call for state action. *Washington Law Review*. Volume 51. Number 2. Pages 321–349. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=2109&context=wlr

[1081] Bennett, Robert W. 2006. Electoral College Reform Is Heating Up and Posing Some Tough Choices. *Northwestern University School of Law Public Law and Legal Theory Papers*. Paper No. 45. Page 15. http://law.bepress.com/nwwps/plltp/art45

[1082] Bennett, Robert W. 2001. Popular election of the president without a constitutional amendment. *Green Bag*. Volume 4. Number 2. Posted on April 19, 2001. Pages 241–245. http://www.greenbag.org/v4n3/v4n3_articles_bennett.pdf

[1083] Bennett, Robert W. 2006. *Taming the Electoral College*. Stanford, CA: Stanford University Press.

[1084] For additional details on Making Every Vote Count's 2019 Maryland bill, see https://www.nationalpopularvote.com/state/md

MEVC first announced VCB in 2020.[1085] However, MEVC has yet to present actual statutory language for VCB. Additional analysis of VCB will remain impossible until MEVC provides actual proposed statutory language.

The Voter Choice Ballot would fizzle in any election (such as 2016 and 2020) in which one candidate adopts a strategy aimed only at winning the Electoral College.

The Voter Choice Ballot is based on the unsupported behavioral prediction that presidential candidates feel compelled to conduct a 50-state campaign because of enactment of VCB by a few states with a modest number of electoral votes.

In 2018, Reed Hundt, the President of Making Every Vote Count, wrote:

> "If even a few states allocated even a few electors to the national winner, then both campaigns would seek national pluralities."[1086]

Hundt also wrote in December 2018:

> "What **our great lawyers and statisticians discovered is that if only a few states enact** laws allocating some or all electors to the winner of the national vote, then **the campaigns would be impelled to seek a national victory. Both parties would send their nominees everywhere, asking everyone for their vote**. Both parties would listen to all Americans when drafting their platform, selecting their nominees down ballot, shaping their agendas. The true center of American opinion would call for the candidates to act in accordance with the wishes of most Americans."[1087,1088][Emphasis added]

To see why Hundt's prediction is too good to be true, let's start by clarifying what VCB actually does, and does not do.

If VCB were enacted in a single state (say, Michigan with 15 electoral votes), it would *not* instantly and automatically create a nationwide popular election for President.

Instead, its immediate political effect would be to replace the state of Michigan (which has 10 million people) with a new "electoral district" with 330 million people and 15 electoral votes.

Winning the 15 electoral votes belonging to this new "electoral district" would be based on the number of votes cast nationwide for President (which was 158,224,999 in 2020).

The presidential campaigns would carefully evaluate the costs and benefits of trying to win these particular 15 electoral votes in comparison to the costs and benefits of winning electoral votes elsewhere.

[1085] Cohen, Thea. 2020. New MEVC Poll: Americans Want the National Choice Ballot. March 6, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2019/11/21/listen-to-mevc-board-member-james-glassman-discuss-the-national-popular-vote-bmxkd-smmyt-59jcw-zxcc2

[1086] Hundt, Reed. 2018. Making Every Vote Count Blog. December 27, 2018.

[1087] Hundt, Reed. 2018. Making Every Vote Count press release. December 13, 2018.

[1088] There is a substantial amount of additional discussion of the Voter Choice Ballot at https://www.makingeveryvotecount.com/mevc—particularly in 2020.

Specifically, the campaign strategists would compare this new opportunity to their chances of winning the electoral votes of the existing closely divided battleground states.

In 2020, there were 11 battleground states (other than Michigan) with a total of 145 electoral votes in which the presidential candidates campaigned extensively (table 1.6).

In 2020, neither the Trump campaign nor the Biden campaign thought, for a minute, that Trump could win, would win, or was even trying to win, the national popular vote.

Trump conducted his 2020 presidential campaign patterned after the way he had won in 2016—that is, his campaign was aimed only at winning the Electoral College. Polls throughout the year showed Biden leading in the national popular vote (which he eventually won by over seven million votes).

Thus, both campaigns would have quickly concluded that the new "electoral district" created by Michigan's enactment of VCB was just another place in which one candidate (Biden, in this case) was safely ahead, and the other (Trump) was hopelessly behind.

Presidential candidates do not campaign in such places, for the simple reason that they have nothing to gain or lose by doing so. Thus, both campaigns would have ignored the new "electoral district" created by Michigan's enactment of VCB. Biden would have won these 15 electoral votes without bothering to campaign—just like he won New York, California, Illinois, Massachusetts, and numerous other spectator states.

That is, VCB would have totally fizzled in 2020 in terms of motivating candidates to run a 50-state campaign.[1089]

In short, VCB can lead a horse to water, but it can't make him drink.

As will be seen in the next section, even when the national popular vote is closely divided, VCB would not be successful in making the horse drink.

The most efficient way for a candidate to win electoral votes under VCB is to redouble efforts to win *popular* votes in *existing* battleground states—not to campaign nationwide.

VCB is based on the unsupported behavioral prediction that presidential candidates will be compelled to conduct a 50-state campaign merely because of its enactment by one state, or a few states, with a modest number of electoral votes.

The major reason why VCB would not motivate presidential candidates to campaign outside of the usual dozen-or-so battleground states is that it is simply not necessary—or advantageous—to campaign in 38 spectator states (and the District of Columbia) in order to increase a candidate's national popular vote total.

Instead of bothering to campaign in the 38 spectator states (and the District of Columbia), candidates could far more efficiently increase their national popular vote total simply by winning additional popular votes in the dozen-or-so battleground states.

Spending money and campaign time trying to win additional popular votes in the ex-

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[1089] Trump's 2020 goal of winning a majority in the Electoral College, while losing the national popular vote, almost worked. If 21,847 voters had changed their minds (5,229 in Arizona, 5,890 in Georgia, and 10,342 in Wisconsin), Trump would have won the 37 electoral votes from these states, and there would have been a 269-269 tie in the Electoral College. Trump would have been re-elected, because, when there is a tie in the Electoral College, the newly elected U.S. House of Representatives picks the President on a one-state-one-vote basis, and the Republicans had a majority of the *delegations* in the 2021 House of Representatives.

isting closely divided battleground states would give a candidate a bite at two apples. Winning additional popular votes in a battleground state would count toward winning *both* the battleground state's electoral votes (under that state's existing winner-take-all rule) and would *simultaneously* count toward winning the electoral votes tethered to the national popular vote by VCB.

In contrast, campaigning among the 215,000,000 people in the 38 spectator states (and the District of Columbia) would give a candidate a bite at only one apple, namely the possibility of winning the relatively small number of electoral votes tethered to the national popular vote by VCB.[1090]

In fact, the perverse political effect of VCB would be to increase the already outsized political importance of the dozen-or-so closely divided battleground states. Each battleground state would retain 100% control over its own electoral votes—while acquiring partial control over the electoral votes of the state(s) enacting VCB. This transfer of political power would be a one-way street, because voters in the VCB state(s) would not acquire any compensating influence over the electoral votes of battleground states.

Note the critical difference between VCB and the National Popular Vote Compact. The Compact contains the vital condition that it will only go into effect when enacted by states with a majority of the electoral votes (270 of 538). As a result, the National Popular Vote Compact does not have VCB's undesirable asymmetric transfer of power in favor of the battleground states. Under the Compact, no state is asked to unilaterally become a selfless donor that gets nothing in return.

Even under generous hypothetical assumptions, VCB would not create a meaningful nationwide campaign.

As just explained, VCB would not create any motivation for presidential candidates to expand their campaigns into the spectator states.

However, purely for the sake of argument, let us assume that VCB actually motivated presidential candidates to conduct a 50-state campaign. That is, suppose that presidential candidates were to make the illogical decision to expand their campaign into the spectator states rather than the rational decision to simply redouble efforts to win *popular* votes in the battleground states.

[1090] The argument for ignoring the spectator states is especially clear in the special case of a sitting President seeking re-election (or a retiring President desiring to aid his preferred successor). Sitting Presidents have unique additional tools at their disposal, such as the ability to award vote-getting government contracts, highway improvements, waivers, exemptions, or distribution of medical supplies to particular states. Under VCB, a sitting president would continue to focus this "presidential pork" on battleground states, because every vote gained in those states would help him win their electoral votes and simultaneously help him win the electoral votes tethered to the national popular vote by VCB. Given a choice between awarding a job-creating and vote-getting tank production contract to a factory in Lima, Ohio, versus a factory in a spectator state such as Democratic Illinois or Republican Indiana, then-President Trump awarded the contract to the factory in Ohio (which was then a battleground state). He would have no reason to give that contract to Illinois, because a few additional popular votes in Illinois would not get him the safely Democratic electoral votes of Illinois, and failing to get a few more popular votes in Indiana would not cause him to lose the safely Republican electoral votes of Indiana. Indeed, campaigning in spectator states cannot help any candidate win any additional electoral votes.

Under that assumption, the obvious question would be: *How much effort should a candidate make to win the electoral votes of the new "electoral district" created by VCB?*

For this discussion, let's suppose that Michigan had enacted VCB in time for the 2016 election.[1091]

Table 9.58 shows the 12 battleground states of 2016 (including Michigan), with their combined 153 electoral votes and 95 million people.

- Column 1 shows the Republican percentage of the two-party vote.
- Column 2 shows the number of general-election campaign events.
- Column 10 shows the state's population.

Clearly, candidates are not going to drop everything in order to win the 16 electoral votes that Michigan possessed in 2016.

The opportunity to win the 16 electoral votes from the new nationwide "electoral district" with 310 million people would be evaluated along with the opportunity to win the 137 electoral votes available from the 11 remaining battleground states of 2016.

It is a fact that Michigan received 22 general-election campaign events in 2016 (out of 399 events nationally).

Thus, 22 campaign events (and the customary millions of dollars of accompanying advertising and the customary supporting ground game and other activity) are a reasonable estimate of what it is worth to win the new nationwide "electoral district" created by Michigan's enactment of VCB.

There is plenty of evidence of how presidential candidates conduct their campaigns when they encounter a situation in which every vote is equal, and the candidate receiving the most votes wins. Candidates distribute their campaign events closely in proportion to population (as discussed in detail in chapter 8 and section 9.7).

So, let's see how the presidential candidates would likely distribute these 22 events.

Table 9.58 The 12 battleground states of 2016

Trump %	Events	State	Trump	Clinton	R-Margin	D-Margin	R-EV	D-EV	Population
55%	21	Iowa	800,983	653,669	147,314		6		3,053,787
54%	48	Ohio	2,841,006	2,394,169	446,837		18		11,568,495
52%	55	North Carolina	2,362,631	2,189,316	173,315		15		9,565,781
52%	10	Arizona	1,252,401	1,161,167	91,234		11		6,412,700
51%	71	Florida	4,617,886	4,504,975	112,911		29		18,900,773
50%	14	Wisconsin	1,405,284	1,382,536	22,748		10		5,698,230
50%	54	Pennsylvania	2,970,733	2,926,441	44,292		20		12,734,905
50%	22	Michigan	2,279,543	2,268,839	10,704		16		9,911,626
49.8%	21	New Hampshire	345,790	348,526		2,736		4	1,321,445
49%	17	Nevada	512,058	539,260		27,202		6	2,709,432
47%	19	Colorado	1,202,484	1,338,870		136,386		9	5,044,930
47%	23	Virginia	1,769,443	1,981,473		212,030		13	8,037,736
51%	**375**		**22,360,242**	**21,689,241**			**125**	**32**	**94,959,840**

[1091] In this section concerning the 2016 election, we use data from the applicable 2010 census, namely a nationwide population of 310 million people, and 95 million people living in the 12 battleground states of 2016.

A 22-event campaign distributed among 310,000,000 people means one campaign event for every 14,090,000 people.

Thus, the campaign in the 38 spectator states would look something like the following:

- California (population 37 million) would probably get three of the 22 events.
- Texas (population 25 million) would probably get two events.
- New York (population 19 million) would probably get one event.
- Illinois (population 13 million) would probably get one event.
- Louisiana (population five million), Alabama (population five million) and Mississippi (population three million) might get one event among them.
- The remaining 14 campaign events would be distributed in a similar manner among the remaining spectator states.

In short, the 22-event VCB-induced campaign would be barely noticeable in the context of a general-election campaign involving 399 campaign events.

The 377 events concentrated in the 11 remaining battleground states (with 137-or-so electoral votes) would still constitute the bulk of the campaign.

Thus, the above calculation—as well as common sense—suggests that the real-world effect of a small number of electoral votes on the overall campaign would, well, be small.

VCB is based on magical thinking that asserts that a tiny number of electoral votes will somehow cause presidential candidates to drop everything in pursuit of the tiny number of electoral votes tethered to the nationwide popular vote.

The bottom line is that there is no quick shortcut, involving state(s) with a tiny number of electoral votes that can create a nationwide presidential campaign in which every vote is equal, and in which every voter in every state is politically relevant in every presidential election. Candidates will campaign nationally only if winning the national popular vote actually yields the White House.

If a battleground state enacted VCB, it would be exchanging its current high level of attention for considerably less attention than its population warrants.

MEVC claims that closely divided battleground states will find VCB attractive.

Let's consider Michigan—a state that had 16 electoral votes in 2016.[1092]

What, specifically, would have happen if it had enacted VCB in 2016?

The effect of enacting VCB would be that Michigan would have become a very small part—just 3%—of a new nationwide electoral district with 310,000,000 people and 16 electoral votes.

As previously discussed, we know the value of 16 electoral votes in the 2016 presidential campaign. Michigan received 22 general-election campaign events in 2016 (out of a nationwide total of 399).[1093]

A 22-event campaign in this new virtual nationwide electoral district with 310,000,000 people would mean one campaign event for every 14,090,000 people.

[1092] Michigan was a closely divided battleground state in 2016 and 2020 (although it was almost totally ignored in the 2012 general-election campaign and 2008 campaign).

[1093] In 2020, Michigan received 21 general-election campaign events in the COVID-constrained 2020 campaign (out of a smaller-than-usual total of 212 events).

With 10,000,000 people, Michigan does not have sufficient population to be absolutely guaranteed that it would receive even one campaign event. However, for the sake of argument, let's say that Michigan would receive one.

Thus, if Michigan enacted VCB, it would be exchanging its current outsized amount of attention (22 events) for a very small amount of attention (one event).[1094]

One campaign event out of 399 is far less than the amount of attention that Michigan's population warrants.

In a nationwide campaign in which every vote is equal, 399 events would correspond to one event for every 777,000 people. That means that Michigan would warrant about 13 campaign events in a nationwide campaign in which every voter in the country is treated equally. Thirteen events are almost exactly one event for each of the 14 congressional districts that Michigan had in 2016.

Thus, if Michigan had enacted VCB in 2016, it would have been exchanging more attention than its population warrants (22 events) for considerably less attention than its population warrants (one event).

Therefore, no battleground state is likely to enact VCB.[1095]

VCB would not come close to making every vote equal.

VCB is based on the claim that its enactment by a few states, with a small number of electoral votes, will somehow make every vote equal throughout the country.

The fourth advantage in MEVC's list of "10 Advantages of the Voter Choice Ballot Proposal" is:

> "By becoming effective in only a few states by 2024, **every vote across the country would count and count equally."**[1096] [Emphasis added]

[1094] The calculation that Michigan would receive one campaign event under VCB is overly generous. In practice, candidates would double down on their efforts to win the non-VCB battleground states. Winning popular votes in a non-VCB battleground state would count toward winning both that state's electoral votes and simultaneously count toward winning the electoral votes of states tethered to the national popular vote by VCB. Thus, spending money and campaign time trying to win additional popular votes in a non-VCB battleground state would give a candidate a bite at two apples. Thus, if Michigan had enacted VCB, it would be all but pointless for a presidential candidate to spend any time, money, or effort in Michigan.

[1095] Battleground states admittedly have not been early adopters of changes in the winner-take-all method of awarding electoral votes. However, experience shows that battleground states can be receptive to the idea of National Popular Vote based on the fairness principle and (to be a little more political) because battleground status is fleeting and fickle. The fleeting nature of battleground status is demonstrated by Michigan and Pennsylvania, which were both almost totally ignored in 2012 (when they only received one and five general-election campaign events, respectively). Neither President Obama nor Vice President Biden campaigned there after being nominated in 2012. In contrast, under the National Popular Vote Compact, each state can rely on always getting the attention that its population warrants—regardless of whether candidate support in the state is in the narrow 46%–54% to 47%–53% range that makes a state worthwhile. The National Popular Vote Compact guarantees that every voter in every state will be politically relevant in every presidential election.

[1096] Making Every Vote Count blog. 2020. Ten Advantages of the Voter Choice Ballot Proposal To Achieve Urgently Needed Presidential Election Reform. August 31, 2020. https://www.makingeveryvotecount.com/mevc/2020/8/31/ten-advantages-of-the-voter-choice-ballot-proposal-to-achieve-urgently-needed-presidential-election-reform

This statement is totally misleading.

Enactment of VCB in 2016 in a state (say, Michigan with 16 electoral votes), would make every vote equal in terms of deciding that particular bloc of 16 electoral votes, but it certainly would not make every vote equal in the overall presidential election.

Earlier in this sub-section, we did a hypothetical calculation of the maximum amount of effort that presidential candidates might make to win Michigan's electoral votes if Michigan had enacted VCB, and candidates made the illogical decision to expand their campaign into the spectator states—as opposed to the rational decision to double down on the battleground states. That maximum effort was one general-election campaign event for every 14,090,000 people in the country.

We also previously noted that, under the National Popular Vote Compact, there would be one general-election campaign event for every 777,000 people (chapter 8).

In other words, enactment of VCB would not even come close to achieving one of the most important benefits guaranteed by the National Popular Vote Compact—that every vote throughout the United States would be equally important in presidential elections.

The reason why the National Popular Vote Compact can deliver the benefit of making every vote equal is that it contains the vital condition that it will only go into effect when enacted by states with a majority of the electoral votes (270 of 538). Once candidates know that the national popular vote will determine which candidate becomes President, then every voter throughout the United States becomes equally valuable. The National Popular Vote Compact would make every voter in every state equally valuable in every presidential election. VCB cannot accomplish this.

VCB would not come close to guaranteeing the presidency to the national popular vote winner.

Another example of the flawed thinking on which VCB is based concerns its ability to prevent the election of a President who did not win the national popular vote.

Biden's margin of victory in the Electoral College in 2020 was 74 electoral votes (specifically, 302 to 232).

Trump's margin in 2016 was, by coincidence, 74 electoral votes.

Obama's margin in 2012 was 126 electoral votes.

The average margin of victory in the Electoral College in the nine presidential elections from 1988 to 2020 was 138 electoral votes.

Manifestly, enactment of VCB (say, by Michigan with 16 electoral votes in 2016) would not have come close to accomplishing the goal of protecting against the possibility of electing a President who lost the national popular vote.

This goal can be achieved by the National Popular Vote Compact, because it contains the vital condition that it will not take effect until it is enacted by states possessing a majority of the electoral votes—that is, 270 out of 538.

There simply is no shortcut, involving one state or a few states, that can achieve the goal of guaranteeing the presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

The polling supporting VCB was not constructed so as to accurately measure voter sentiment.

"Americans Want the National Choice Ballot" is the title of Making Every Vote Count's description of its poll on VCB.[1097]

However, an examination of the poll indicates that it was not constructed so as to accurately measure what "Americans want."

The key question in Making Every Vote Count's poll was:

> "Some people want the person who wins the **national popular vote** to become president. One way to make that likely is to be able to cast your vote as you normally would and then **choose**, if you select this **option**, to have the **national vote winner** counted as your **choice** for president in your state. Do you want to have that **choice** on the ballot?" [Emphasis added]

As can be seen, this poll question is loaded with:

- three occurrences of the word "choice" or "choose,"
- one occurrence of the word "option," and
- two references to "national popular vote."

Of course, most people are in favor of "choice." Most people are in favor of "options." Most people are in favor of a national popular vote for President.

This question was not the only loaded question that was shown to poll respondents. The following Yes-No question appeared on the Voter Choice Ballot that was shown to poll respondents:

> "Do you want the candidate who receives the most votes in the nation to become the President? If you do, fill in the oval next to YES."[1098]

The consequences of voting "Yes" on this appealingly worded question are only hinted at by the opaque wording "for the purpose of appointing electors as otherwise provided by this state's law" that appears after the voter has voted on the Yes-No question:

> "The state will count the votes for all those who filled in the YES oval as cast for the winner of the national popular vote **for the purpose of appointing electors as otherwise provided by this state's law**."[1099] [Emphasis added]

It is likely that many participants in the poll failed to realize that if the voter were to

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[1097] Cohen, Thea. 2020. New MEVC Poll: Americans Want the National Choice Ballot. March 6, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2019/11/21/listen-to-mevc-board-member-james-glassman-discuss-the-national-popular-vote-bmxkd-smmyt-59jcw-zxcc2

[1098] Making Every Vote Count. *Voter Choice Ballot: Summary And Coordinated Strategy To Achieve National Popular Vote For President Reform*. July 1, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2020/7/1/voter-choice-ballot-summary-and-coordinated-strategy-to-achieve-national-popular-vote-for-president-reform

[1099] Making Every Vote Count's web site. See *Voter Choice Ballot: Summary And Coordinated Strategy To Achieve National Popular Vote For President Reform*. July 1, 2020. Accessed July 21, 2020. https://www.makingeveryvotecount.com/mevc/2020/7/1/voter-choice-ballot-summary-and-coordinated-strategy-to-achieve-national-popular-vote-for-president-reform

vote "Yes," their vote for President would be subtracted from their preferred presidential candidate and added to the opposing candidate—if (1) the voter's preferred choice for President is ahead in the voter's own state, and (2) the opposing candidate is ahead nationally.

This Yes-No question appears to be a referendum on a general question of public policy that would take effect if it were to receive a majority vote. Thus, it is also likely that many participants in the poll failed to realize that a "Yes" vote could immediately authorize the state to count the vote that they just cast for President in favor of the candidate that individual voter just voted against.

In summary, Making Every Vote Count's poll provided no convincing evidence that "Americans want the National Choice Ballot."

9.44.2. MYTH: The benefits of a national popular vote for President can be achieved by the Constant Two Plan.

QUICK ANSWER:

- The Constant Two Plan is state legislation that would award two of a state's electoral votes to the national popular vote winner. This state legislation would go into effect as soon as a single state enacts it, regardless of whether any other state enacts a similar law.
- Even if all 50 states and the District of Columbia enacted the Constant Two Plan, awarding 102 electoral votes (out of 538) to the national popular vote winner would not guarantee the presidency to the candidate receiving the most popular votes nationwide under various politically plausible scenarios.
- Because 81% of the electoral votes under the Constant Two Plan (that is, 436 of 538) would continue to be awarded on a state-by-state winner-take-all basis, presidential candidates would continue to concentrate on the small number of closely divided battleground states. Moreover, a small number of votes in a small number of states would continue to regularly decide the presidency—thereby fueling post-election controversies that threaten democracy.
- Because the Constant Two Plan retains all existing features of the current Electoral College, all five of the current system's sources of inequality would remain.

MORE DETAILED ANSWER:

Jay Wendland describes a novel system for electing the President in his 2024 book, *The Constant Two Plan: Reforming the Electoral College to Account for the National Popular Vote.*[1100]

The Constant Two Plan is state legislation that would award two of the state's electoral votes to the national popular vote winner. It would not require a federal constitutional amendment. It would go into effect in a state as soon as a state enacts it, regardless of whether any other state enacts a similar law.

[1100] Wendland, Jay 2024. *The Constant Two Plan: Reforming the Electoral College to Account for the National Popular Vote.* Lanham, MD: Lexington Books.

If all 50 states and the District of Columbia were to enact the Constant Two Plan, the national popular vote winner would receive 102 electoral votes (out of 538).

In that respect, the Constant Two Plan bears some similarity to the National Bonus Plan, a proposed federal constitution amendment that would award a bonus of 102 at-large electoral votes to the national popular vote winner (section 4.5).

Even if all 50 states and the District of Columbia enacted the Constant Two Plan, it would:

- not guarantee the presidency to the candidate receiving the most popular votes in all 50 states and the District of Columbia under various politically plausible scenarios (as described in section 4.5.4 in connection with the National Bonus Plan);
- not make every vote equal, because all five of the current system's sources of inequality (section 1.4) would remain with respect to the remaining 436 electoral votes (as described in section 4.5.5 in connection with the National Bonus Plan); and
- not give presidential candidates a reason to campaign in all 50 states (section 1.2), because 81% of the electoral votes under the Constant Two Plan (that is, 436 of 538) would continue to be awarded on a state-by-state winner-take-all basis (as described in section 4.5.5 in connection with the National Bonus Plan).

The Constant Two Plan resembles the single-state version of the Voter Choice Ballot in that it would go into effect as soon as a single state enacts it, regardless of whether any other state enacts a similar law. The discussion in section 9.44.1 shows that it would be very difficult to find a state willing to unilaterally enact it.

9.45. MYTH ABOUT UNINTENDED CONSEQUENCES

9.45.1. MYTH: There could be unintended consequences of a nationwide vote for President.

QUICK ANSWER:

- Change can have unintended or unexpected *desirable* consequences just as easily as it can have undesirable consequences.
- In the case of the current system of electing the President, the consequences of inaction are known and highly *undesirable*.
- When the states switched to direct popular election of Governors in the late 18th and early 19th centuries, there were no significant unintended or unexpected undesirable consequences.
- If some unintended undesirable consequence materializes, or some adjustment becomes advisable in the National Popular Vote Compact, state legislation may be amended or repealed more easily than, say, a federal constitutional amendment.

MORE DETAILED ANSWER:

One of the generic arguments against *any* proposed change of *any* kind is that there could possibly be unintended consequences.

The attractiveness of this intellectually lazy argument is that opponents need not identify any specific consequence or engage in thoughtful discussion about whether the possible consequence is either likely or substantial.

Change can have unintended and unexpected *desirable* consequences—just as easily as it can have unintended and unexpected undesirable consequences. Merely saying that change might have unintended and unexpected consequences does not provide enough information to determine whether the consequence is negative or positive—much less whether the consequence is likely or substantial.

There are several generic answers to the generic argument about unintended or unexpected consequences:

(1) No significant unexpected undesirable consequences surfaced when an analogous action was taken in a closely related situation.

(2) Reversing the proposed action would be relatively easy if there were significant unexpected undesirable consequences.

(3) The consequence of inaction is that the known shortcomings of the existing system will not be corrected.

Concerning item (1), there certainly were no significant unexpected undesirable consequences when the states switched to direct popular election of their chief executives. In 1787, only Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont conducted popular elections for the office of Governor.[1101] During the late 18th and early 19th centuries, the states switched, one-by-one, to direct popular election of Governors. Today, 100% of the states elect their Governors by direct popular vote. After over 5,000 direct popular elections for Governor over two centuries, no state has ever decided to eliminate its direct popular election for Governor. Moreover, there is virtually no editorial, academic, legislative, or public criticism of direct election of Governors.

Concerning item (2), the National Popular Vote Compact is state legislation. If some undesirable unexpected consequence materializes, or some adjustment becomes advisable, an interstate compact may be repealed or amended more easily than, say, a federal constitutional amendment.

Concerning item (3), the consequences of inaction are known and undesirable, including the shortcomings of the current system of electing the President that are itemized in chapter 1.

[1101] Dubin, Michael J. 2003. *United States Gubernatorial Elections 1776–1860*. Jefferson, NC: McFarland & Company. Page xx.

10 Epilogue

The epilogue to this book will be written by the people, the state legislatures, and the Congress as they consider the proposed "Agreement Among the States to Elect the President by National Popular Vote" described in this book.

APPENDIX A: CONSTITUTIONAL PROVISIONS ON PRESIDENTIAL ELECTIONS

Article II, Section 1, Clause 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Article II, Section 1, Clause 2

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Article II, Section 1, Clause 3

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

Article II, Section 1, Clause 4

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.

10th Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

12th Amendment

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with

themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

14th Amendment—Sections 2 and 3

Section 2. 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.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

15th Amendment—Section 1

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

19th Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

20th Amendment—Sections 1–5

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

22nd Amendment—Section 1

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

23rd Amendment

Section 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

24th Amendment

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

26th Amendment

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

APPENDIX B: ELECTORAL COUNT REFORM ACT OF 2022

United States Code Title 3, Chapter 1. Presidential Elections and Vacancies.[1]

Time of appointing electors

§1. The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.

Failure to make choice on prescribed day

§2. Repealed.

Number of electors

§3. The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

Vacancies in electoral college

§4. Each State may, by law enacted prior to election day, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.

Certificate of Ascertainment of appointment of electors

§5. (a) In General.—

(1) Certification.—Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

(2) Form of certificate.—Each certificate of ascertainment of appointment of electors shall—

(A) set forth the names of the electors appointed and the canvass or other determination under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast;

(B) bear the seal of the State; and

(C) contain at least one security feature, as determined by the State, for purposes of verifying the authenticity of such certificate.

(b) Transmission.—It shall be the duty of the executive of each State—

(1) to transmit to the Archivist of the United States, immediately after the issuance of a certificate of ascertainment of appointment of electors and by the most expeditious method available, such certificate of ascertainment of appointment of electors; and

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[1] The earlier Electoral Count Act of 1887 may be found in appendix B of the 4th edition of this book at https://www.every-vote-equal.com/4th-edition

(2) to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate.

(c) Treatment of Certificate as Conclusive.—For purposes of section 15:

(1) In general.—

(A) Certificate issued by executive.—Except as provided in subparagraph (B), a certificate of ascertainment of appointment of electors issued pursuant to subsection (a)(1) shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State.

(B) Certificates issued pursuant to court orders.—Any certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.

(2) Determination of federal questions.—The determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors shall be conclusive in Congress.

(d) Venue and Expedited Procedure.—

(1) In general.—Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to the following rules:

(A) Venue.—The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

(B) 3-judge panel.—Such action shall be heard by a district court of three judges, convened pursuant to section 2284 of title 28, United States Code, except that—

(i) the court shall be comprised of two judges of the Circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

(C) Expedited procedure.—It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, consistent with all other relevant deadlines established by this chapter and the laws of the United States.

(D) Appeals.—Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors.

(2) Rule of construction.—This subsection—

(A) shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States; and

(B) shall not be construed to preempt or displace any existing State or Federal cause of action.

Duties of the Archivist

§6. The certificates of ascertainment of appointment of electors received by the Archivist of the United States under section 5 shall—

(1) be preserved for one year;

(2) be a part of the public records of such office; and

(3) be open to public inspection.

Meeting and vote of electors

§7. The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day.

Manner of voting

§8. The electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution.

Certificates of votes for president and vice president

§9. The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates of votes one of the certificates of ascertainment of appointment of electors which shall have been furnished to them by direction of the executive of the State.

Sealing and endorsing certificates

§10. The electors shall seal up the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice President, are contained therein.

Transmission of certificates by electors

§11. The electors shall immediately transmit at the same time and by the most expeditious method available the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, as follows:

(1) One set shall be sent to the President of the Senate at the seat of government.

(2) Two sets shall be sent to the chief election officer of the State, one of which shall be held subject to the order of the President of the Senate, the other to be preserved by such official for one year and shall be a part of the public records of such office and shall be open to public inspection.

(3) Two sets shall be sent to the Archivist of the United States at the seat of government, one of which shall be held subject to the order of the President of the Senate and the other of which shall be preserved by the Archivist of the United States for one year and shall be a part of the public records of such office and shall be open to public inspection.

(4) One set shall be sent to the judge of the district in which the electors shall have assembled.

Failure of certificates of electors to reach President of the Senate or Archivist of the United States; demand on state for certificate

§12. When, after the meeting of the electors shall have been held, no certificate of vote mentioned in sections 9 and 11 of this title from any State shall have been received by the President of the Senate or by the Archivist of the United States by the fourth Wednesday in December, the President of the Senate or, if the President of the Senate be absent from the seat of government, the Archivist of the United States shall request, by the most expeditious method available, the chief election officer of the State to send up the certificate lodged with such officer by the electors of such State; and it shall be the duty of such chief election officer of the State upon receipt of such request immediately to transmit same by the most expeditious method available to the President of the Senate at the seat of government.

Same; demand on district judge for certificate

§13. When, after the meeting of the electors shall have been held, no certificates of votes from any State shall have been received at the seat of government on the fourth Wednesday in December, the President of the Senate or, if the President of the Senate be absent from the seat of government, the Archivist of the United States shall send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged, and such judge shall forthwith transmit that certificate by the hand of such messenger to the seat of government.

Forfeiture for messenger's neglect of duty

§14. Repealed.

Counting electoral votes in Congress

§15. (a) In General.—Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.

(b) Powers of the President of Senate.—

(1) Ministerial in nature.—Except as otherwise provided in this chapter, the role of the President of the Senate while presiding over the joint session shall be limited to performing solely ministerial duties.

(2) Powers explicitly denied.—The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors.

(c) Appointment of Tellers.—At the joint session of the Senate and House of Representatives described in subsection (a), there shall be present two tellers previously appointed

on the part of the Senate and two tellers previously appointed on the part of the House of Representatives by the presiding officers of the respective chambers.

(d) Procedure at Joint Session Generally.—

(1) In general.—The President of the Senate shall—

(A) open the certificates and papers purporting to be certificates of the votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors issued pursuant to section 5, in the alphabetical order of the States, beginning with the letter A; and

(B) upon opening any certificate, hand the certificate and any accompanying papers to the tellers, who shall read the same in the presence and hearing of the two Houses.

(2) Action on certificate.—

(A) In general.—Upon the reading of each certificate or paper, the President of the Senate shall call for objections, if any.

(B) Requirements for objections or questions.—

(i) Objections.—No objection or other question arising in the matter shall be in order unless the objection or question—

(I) is made in writing;

(II) is signed by at least one-fifth of the Senators duly chosen and sworn and one-fifth of the Members of the House of Representatives duly chosen and sworn; and

(III) in the case of an objection, states clearly and concisely, without argument, one of the grounds listed under clause (ii).

(ii) Grounds for objections.—The only grounds for objections shall be as follows:

(I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1).

(II) The vote of one or more electors has not been regularly given.

(C) Consideration of objections and questions.—

(i) In general.—When all objections so made to any vote or paper from a State, or other question arising in the matter, shall have been received and read, the Senate shall thereupon withdraw, and such objections and questions shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections and questions to the House of Representatives for its decision.

(ii) Determination.—No objection or any other question arising in the matter may be sustained unless such objection or question is sustained by separate concurring votes of each House.

(D) Reconvening.—When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No vote or paper from any other State shall be acted upon until the objections previously made to any vote or paper from any State, and other questions arising in the matter, shall have been finally disposed of.

(e) Rules for Tabulating Votes.—

(1) Counting of votes.—

(A) In general.—Except as provided in subparagraph (B)—

(i) only the votes of electors who have been appointed under a certificate of ascertainment of appointment of electors issued pursuant to section 5, or who have legally been appointed to fill a vacancy of any such elector pursuant to section 4, may be counted; and

(ii) no vote of an elector described in clause (i) which has been regularly given shall be rejected.

(B) Exception.—The vote of an elector who has been appointed under a certificate of ascertainment of appointment of electors issued pursuant to section 5 shall not be counted if—

(i) there is an objection which meets the requirements of subsection (d)(2)(B)(i); and

(ii) each House affirmatively sustains the objection as valid.

(2) Determination of majority.—If the number of electors lawfully appointed by any State pursuant to a certificate of ascertainment of appointment of electors that is issued under section 5 is fewer than the number of electors to which the State is entitled under section 3, or if an objection the grounds for which are described in subsection (d)(2)(B)(ii)(I) has been sustained, the total number of electors appointed for the purpose of determining a majority of the whole number of electors appointed as required by the Twelfth Amendment to the Constitution shall be reduced by the number of electors whom the State has failed to appoint or as to whom the objection was sustained.

(3) List of votes by tellers; declaration of winner.—The tellers shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

Same; seats for officers and members of two houses in joint meeting

§16. At such joint session of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint session shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first session of the two Houses, no further or other recess shall be taken by either House.

Same; limit of debate in each house

§17. When the two Houses separate to decide upon an objection pursuant to section 15(d)(2)(C)(i) that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter—

(1) all such objections and questions permitted with respect to such State shall be considered at such time;

(2) each Senator and Representative may speak to such objections or questions for up to five minutes, and not more than once;

(3) the total time for debate for all such objections and questions with respect to such State shall not exceed two hours in each House, equally divided and controlled by the Majority Leader and Minority Leader, or their respective designees; and

(4) at the close of such debate, it shall be the duty of the presiding officer of each House to put each of the objections and questions to a vote without further debate.

Same; parliamentary procedure at joint meeting

§18. While the two Houses shall be in session as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw under section 15(d)(2)(C)(i).

Vacancy in offices of both President and Vice President; officers eligible to act

§19. (a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban

Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

Resignation or refusal of office

§20. The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

Definitions

§21. As used in this chapter the term—

(1) "election day" means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, "election day" shall include the modified period of voting.

(2) "State" includes the District of Columbia.

(3) "executive" means, with respect to any State, the Governor of the State (or, in the case of the District of Columbia, the Mayor of the District of Columbia), except when the laws or constitution of a State in effect as of election day expressly require a different State executive to perform the duties identified under this chapter.

Severability

§22. If any provision of this chapter, or the application of a provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, and the application of the provisions to any person or circumstance, shall not be affected by the holding.

APPENDIX C: A VINDICATION OF THE GENERAL TICKET LAW PASSED BY VIRGINIA IN 1800

"A Vindication of the General Ticket Law Passed by the Legislature of Virginia on this 18th Day of January 1800."[2]

To the Freeholders of Shenandoah County:

When alterations are made in the laws of a free people, it is natural for them to have a desire to know (and it is proper that they should know) the nature of such alterations, and the reasons why they were made, and more especially in important cases, changing the mode by which the people elect any of their public officers.

This committee have therefore thought proper to inform you, that an alteration has been made in the law prescribing the mode of appointing electors to choose a President and Vice President of the United States—and as an explanation and vindication of the principles of such alteration present you the following extract from a late publication signed "Franklin."

A Vindication

At the last session, to wit, on the 20th day of January, 1800, the general assembly of this commonwealth, passed a law, changing the mode, which had been prescribed by the act of October, 1792, of appointing electors to choose a president and vice-president of the United States.

By the last mentioned act, the freeholders of each district, were required to convene on the first Monday in November, in every 4th year, at their respective county courthouses, and to vote for one person, a resident within the district, as an elector.

By the law now in force, every freeholder in the state, on the first Monday in November next, is to vote for one person, residing in each electoral district. Of course, he will vote for 21 persons; the state of Virginia being authorized under the federal constitution to appoint 21 electors. The vote is given in this way. The freeholder writes on a ticket the names of 21 persons for whom he means to vote, puts his own name on the back of the ticket, and delivers it, with his own hand, publicly at the courthouse to the commissioners, appointed by law to receive it. If any voter should put on his ticket, the names of two persons belonging to the same district, either his own, or any other, his vote for the person last named, will not be counted.

As it is easier for a man to pronounce one name, than to write 21, besides his own, and as he can more readily select from his own district one person qualified to be an elector, than 21 persons from the several districts in the state, it is admitted, that the mode of election, prescribed by the act of 1792, is more convenient, to the individual voter, than that now adopted, by the law under consideration.

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[2] Democratic Party of Shenandoah County and Franklin (pseudonym). 1800. *A Vindication of the General Ticket Law Passed by the Legislature of Virginia on this 18th Day of January 1800*. Staunton Publishing—John M. Thur Printers. Available at Library of Virginia Special Collections West Side. Call number JK528.V82.

Why then it has been asked, and may be asked again, was a change thought necessary or expedient? To this question, the answer shall be candid, and we hope satisfactory.

The federal constitution declares, (article 2d section 1st)

> "that each state shall appoint, in such manner as the legislature thereof may direct, a number [of] electors equal to the whole number of senators and representatives to which the state may be entitled in the congress."

Under this constitutional provision, no less than three different modes of election have been pursued in the several states forming the union. In some, the legislatures have themselves chosen the electors; in some, the electors have been chosen by the people, by a general ticket, which is the plan adopted; and in others they have been chosen by the people divided into districts, which was the plan marked out by the act of October 1792.

Let us examine the effects of these different systems.

If the legislature of a state choose the electors, the consequence inevitably is, that all the electors give their votes to the same persons; because it is obvious, that the legislature will take care to choose men, whose political principles agree with their own, and who, they know, will vote for the candidate whom they prefer.

But to this mode of election there are two objections, neither of which can be easily surmounted. The first is, that the constitution having declared, "that each state should appoint electors in such manner as the legislature thereof might direct," seems to have given to the legislature not the actual power of appointment, but only the power of prescribing the manner in which the appointment shall be made: that is to say, whether it shall be done by a general ticket or by districts, publicly or by ballot. Between those two things, the power of appointing electors, and the power of directing how they shall be appointed, there appears to be a substantial difference, which ought not to be disregarded by a legislature, the members of which have taken an oath to support the constitution of the United States. The force of this objection is irrefutable, if the constitution, in the recited clause, means by the word "state" the people in each state, in their highest sovereign capacity.

The other objection is founded on a principle of political science, which is not perhaps sufficiently regarded in the structure of the general government. The principle is, that in all cases whatever, those who are to act for the people, in other words their servants and agents, ought to be chosen by the people, unless the power of choosing cannot be conveniently and properly exercised. Now the constitution of the United States certainly not having excluded the people from the appointment of electors, and the power of appointment being one, which they can as experience proves, conveniently and properly exercise, the right of electing electors ought to remain unimpaired in their hands. If they exercise it, the majority will prevail, and the minority, unless destitute of principle, which cannot be supposed, will feel disposed to acquiesce; but if the legislature exercise it, they may appoint a set of electors, not one of whom would stand a chance to be chosen if the election depended on the people. It is said that in the state of New York, at the last presidential election, all the electors chosen by the legislature were not approved by the majority of the people.

It is believed that reasons, something like these, were deemed sufficient, even to prevent a proposition in the general assembly of this commonwealth, for a legislative appointment.

Under the second system of election by a general ticket, the majority of the people of a state, supposing them to act rationally and in concert as they have done in Pennsylvania, and no doubt will do here, fix on the persons to whom the whole number of electoral votes shall be given. For the election in November next; two tickets will be submitted to the consideration of the people; one containing the names of 21 persons, who will vote for Mr. Jefferson, or some other person whose political principles correspond with his; the other, the names of 21 persons, who will as certainly vote for Mr. Adams, or some man who thinks as he does. The question therefore will be, or rather is now fully before the people, and the majority by the choice of their thicket, will fairly determine to whom the 21 electoral votes belonging to Virginia shall be given.

The effect of the third or district plan of election, though equally obvious, is very different from the effect already stated to result from an appointment by the legislature or by the people collectively. In the latter cases all the electors voting for the same persons, the state to which they belong avails itself of the full extent of its electoral power. But in the former case, the influence of the largest state in the union, in the presidential election, may be reduced to a level with that of the smallest, and even below it. Virginia for instance has 21 electors, who constitute nearly one third of a majority, which is 70. If all her votes are given in the same way, her constitutional influence in the election is great; it is three times greater than that of New Jersey, which has seven votes, and seven times greater than that of Delaware which has three. But if the state were to vote by districts, ten votes might, under the law, be given for one candidate and eleven for the other, and thus the state of Virginia, instead of retaining a power in the election, which the constitution allows three times greater than that of New Jersey, and seven times greater than that of Delaware, would have only a seventh part of the influence of the former, and a third part of the influence of the latter; in other words, only one efficient vote.

In addition to this it may be observed that the states in the case of direct taxation, pay not in proportion to the number of their electors, but in proportion to the number of the representatives. Delaware, for instance, pays only the nineteenth part of the tax on lands and houses paid by Virginia—but in choosing a president, her power is not the nineteenth part only, but a seventh part of the power of Virginia. It is manifest, therefore, that the smaller states being allowed an elector for their two senators, as well as for each representative, have a very great advantage in the important national concern of choosing a president; and the advantage is greatly augmented by the inattention of some of the larger states, in adopting a plan, by which their own votes are divided.

Under this view of the subject, it becomes well worthy of consideration, whether if by general consent an amendment to the constitution shall prescribe a uniform mode of appointing electors throughout the United States, the plan of general ticket would not be the most equal, and the best calculated to preserve to every state in the union, the full extent of that power which the constitution intended to confer. In support of this idea it deserves farther to be remarked that there is less probability of a difference of sentiment in a small than in a large state, and of course, a small state would be less likely than a large state under the district system of election, to lose any part of its constitutional proportion of electoral influence. Until therefore, the constitution of the United States shall be so amended as to leave the decision of a question, in which the people alone are concerned, to a majority of the people themselves, or to electors chosen by a majority of the people,

an election by a general ticket is unquestionably, the only plan by which the larger states can in any degree counteract the effect arising from the present unequal and very unjust distribution of electoral power.

This short view of the effect of the different modes of election, which have pursued in the United States, furnishes at once an explanation of the motives, and a vindication of the conduct of the general assembly, in passing the law in question. Several of the states having adopted plans by which at the last election of president and vice-president, unanimity in their electoral assemblies was produced, and by which they exercised in its full extent the power constitutionally allowed to them, it is manifest that Virginia, unless she pursues the same policy stands on very unequal ground. If the majorities in the other states, or some of them, will not permit the votes of their minorities to be counted, and the minority in this state is added to these, it is clear that the state of Virginia not only surrenders the power which she may rightfully exercise, but she does worse: she permits a part of that power to be employed in a way which may disappoint the wishes of four fifths of her people, on a subject of the highest national importance.

To illustrate this position, let it be supposed that Mr. Adams had or rather was likely to have sixty-seven votes in the other states; fifty one votes of course would remain for Mr. Jefferson. In this state of things, it is obvious that the event of the election would depend on the votes given in Virginia. Let it also be supposed, as the fact really is, if we may deduce any inference either from the last election, or from the political principles of the legislature, that the great majority pf the people are disposed to give a decided preference to Mr. Jefferson. Under the plan now adopted, Mr. Jefferson would be elected: 21 votes added to 51 would give him 72: but under the former system, three districts by voting in favor of Mr. Adams, would carry his election in opposition to 18 districts: in other words the wishes of three men would be preferred to those of eighteen, the wishes of a seventh part would be consulted in preference to those of the whole.

There is no clause in the constitution, there is no principle in political or moral law, which imposes on the legislature of this state, the necessity of making a sacrifice so momentous. On the contrary, as the constitution has given to them the power of directing the mode of choosing electors, it appears to us to be their sacred duty to prescribe that mode of election which, without contravening the constitution, is most likely to accomplish the wishes of a majority of the people. If it be admitted as a general principle, that the voice of the majority shall prevail, surely it would be as absurd as it would be impolitic to except from its operation a case of the greatest magnitude and importance to which it can be applied.

It ought to be repeated, that it is the duty of the legislature of Virginia, at all times, and on all occasions, and on every subject, whether general or local, to consult the wishes as well as the interests of a majority of the free people of Virginia, and to adopt such measures, not incompatible with the constitution, as are best calculated to promote those wishes. If this great principle shall be abandoned by them on a question so important as the election of a president, the opponents of the present law are called upon to point out some other principle, equally pure, equally safe, and as universally admitted to be true, by which their conduct shall be governed. Are they to consult the voice of the people in any other state? This has never been suggested. Are they to consult the voice of the people of the United States? How are they to know it? How, in fact, is this voice to be known, even

on a point really determined by a majority of the people, until the majorities in the several states are ascertained?

If the foregoing remarks are correct, they prove that the plan of electing electors by a general ticket, ought, under the present constitutional arrangement of electoral power, to be uniformly adopted throughout the United States. It is proper however to observe, that this position was not maintained by the friends of the present law during the last assembly. The idea which they generally, perhaps universally entertained, was that the district system was to be preferred, provided all the states would agree to have recourse to it, but that until this agreement did take place, it was necessary that the policy pursued by many of them in making their elections either by the legislature or by the people collectively, should be counteracted by a similar policy on the part of Virginia.

Having stated with truth and in the plain language in which truth ought always to be spoken, the reasons which induce us to give to the principle of the law in question our unequivocal approbation.

Viewing the foregoing reasons as founded on truth and good sense, we submit the same to your consideration, with an earnest request that you will use your exertions in explaining the subject to your neighbors and give aid to the Republican Ticket.

SHENANDOAH COMMITTEE

The following persons are recommended as the most fit characters to be named at the ensuing Election of a President & Vice President of the United States on the Republican Ticket.

In District No. 1. William Newsum of Princess Ann
2. George Wythe of the city of Richmond
3. Edmund Pendleton of Caroline
4. William St. Cabell of Amherst
5. James Madison, Jr. of Orange
6. John Page of Gloucester
7. Thomas Newton, Jr. of Norfolk Borough
8. Carter B. Harrison of Prince George
9. Gen. Joseph Jones of Dinwiddie
10. William B. Giles of Amelia
11. Creed Taylor of Cumberland
12. Thomas Read Sen. of Charlotte
13. George Penn of Patrick
14. Walter Jones of Northumberland
15. Richard Brent of Prince William
16. William Ellzey of Loudon
17. Hugh Holmes of Frederick
18. Archibald Stuart of Augusta
19. Andrew Moore of Rockbridge
20. Gen. John Brown of Hardy
21. Gen. John Preston of Montgomery

APPENDIX D: STATE CANVASSING AUTHORITIES

State	Name	Composition	Date for certification of canvass (2024)
AL	State Canvassing Board	The Canvassing Board is the Governor, Secretary of State, and Attorney General; or two of them. The Governor must be present for the certification of presidential electors. AL Code §17-12-17; 17-14-34	20 days after the election. (Within 15 days of the time for making returns—which is 5 days.) AL Code §17-14-33; 17-14-34
AK	Director of Elections; State Ballot Counting Review Board	Members of the State Ballot Counting Review Board are named by the political parties in the state. AK Stat §15.15.420; 15.15.430; 15.15.440; 15.15.450	"Upon completion of the state ballot counting review," which is to begin no later than 16 days after the election, and continue "until completed." AK Stat §15.15.440
AZ	Secretary of State; Attorney General; Governor	The Secretary of State, in the presence of the Governor and the Attorney General, canvasses all statewide offices. A.R.S. §16-648	Third Monday following a general election. A.R.S. §16-648
AR	Constitutional Officers	The Governor, Secretary of State, and other constitutional officers work jointly to certify results. A.C.A. §7-8-304	Within 20 days of the election (and sooner if all returns are received by either the Governor or Secretary of State) A.C.A. §7-8-304; 7-8-305
CA	Secretary of State	Secretary of State CA ELEC §15505	Within 32 days of the election CA ELEC §15505
CO	Secretary of State	The Secretary of State prepares the Certificate. The Governor signs and affixes the seal. C.R.S. §1-10-105; 1-11-107	Within 27 days of the election, and after all mandatory recounts have been completed C.R.S. §1-10-103; 1-10-105
CT	State Canvassing Board	The Treasurer, the Secretary of State, and the Comptroller comprise the State Canvassing Board. The Secretary of State is the state executive under the ECRA requirement, responsible for issuing and transmitting the Certificate of Ascertainment. CGS §9-315	Last Wednesday of November CGS §9-315
DC	Board of Elections	A total of three members are appointed by the Mayor; no more than two members can be of the same political party. D.C. Code §1–1001.01; 1-1001.03; 1–1001.05	D.C. Code §1-1001.05; D.C. Mun. Regs. r. 3813

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State	Name	Composition	Date for certification of canvass (2024)
DE	Governor	Title 15 Del. C. §5709; 5711	Canvass begins at the county level within two days following general election. Title 15 Del. C. §5701
FL	Elections Canvassing Commission; Department of State	The Elections Canvassing Commission consists of the Governor and two members of the Cabinet selected by the Governor. Code specifies that the Department of State certifies results for electors. FL ST §102.111; 102.121; 103.011	Results canvassed by Elections Canvassing Commission on the 14th day after a general election and certificates recorded in the Department of State. FL ST §102.111; 102.121; 103.011
GA	Secretary of State and Governor	GA Code §21-2-499	No later than 17 days after the election. GA Code §21-2-499
HI	Chief election officer; Governor	The chief election officer is selected by the Hawaii Elections Commission, which consists of an equal number of Republicans and Democrats, and a nonpartisan tiebreaker agreed upon by the commission members. The commission members are appointed equally in groups of two by the President of the Senate, the Senate Minority Leader, the Speaker of the House, and the House Minority Leader. The chief election officer certifies the results to the Governor, the Governor produces/signs/issues the Certificate of Ascertainment, and the chief election officer issues the duplicate Certificates to the electors. H. R. S. §11-1.6; 14-24	No later than the last day of the month of the election, or as soon as the returns have been received from all counties in the State, if received before that time. H. R. S. §14-24
ID	State Board of Canvassers; Secretary of State; Governor	The State Board of Canvassers consists of the Secretary of State, the State Controller, and the State Treasurer. The Secretary of State is the chairman of the Board. The Secretary of State prepares the Certificates and the Governor signs and affixes the seal to the Certificate. ID ST §34-1211; 34-1501	Within 21 days after the general election. ID ST §34-1211

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State	Name	Composition	Date for certification of canvass (2024)
IL	State Board of Elections; Governor	The State Board of Elections is an eight-member bipartisan body appointed by the Governor. Four members must be from within Cook County, and four members must be from outside of Cook County. From each geographical area, two members must be from the same political party as the Governor, and two must be from the party that received the second-highest number of votes in the last gubernatorial election. The Board canvasses the result, and the Governor prepares the certificate. 10 ILCS §5/1A-2, 5/21-3	Within 31 days after the election, and sooner if all the returns are received by the State Board of Elections 10 ILCS §5/21-2
IN	Governor; Election Division of the Secretary of State	The Governor appoints the two co-directors of the Election Division; the co-directors cannot both be from the same political party. The Election Division tabulates the results; the Secretary of State certifies the results to the Governor; and the Governor issues the Certificate. IN ST §3-6-4.2-2; 3-6-4.2-3; 3-12-5-7; 3-10-5-6.5	Not later than noon on the last Tuesday in November following the election IN ST §3-12-5-7
IA	Board of Canvassers; Governor	The Board of Canvassers consists of the state executive council. The council's five members include the Governor, Secretary of State, Treasurer of State, Secretary of Agriculture, and Auditor of the State. The Secretary presents the abstracts to the Board of Canvassers, which canvasses and approves the results. The Governor then issues the Certificates. IA ST §50.37; 54.6	Not later than 27 days after the election IA ST §50.38
KS	State Board of Canvassers; Secretary of State; Governor	The Governor, Secretary of State, and Attorney General, or such officers' designee, constitute the State Board of Canvassers. Any two of such members may act as the Board. The Board canvasses the result, and the Secretary prepares the Certificate, procures the Governor's signature, and issues the Certificate. K.S.A. §25-3201; 25-801	No later than December 1 following the election, unless that day is a Sunday, in which case no later than the following day K.S.A. §25-3206

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State	Name	Composition	Date for certification of canvass (2024)
KY	State Board of Elections	The Board consists of the Secretary of State and several members appointed by the Governor from lists supplied by the two political parties in the Commonwealth and the Kentucky County Clerks Association. KY ST §117.015; 118.425	No later than the third Monday after the election KY ST §118.425
LA	Secretary of State; Governor	The Secretary of State ascertains the results. The Governor issues the certificate. LA R.S. §18:513; 18:1261	Certification within 30 days following the election. Promulgation of returns by the 14th day after the election (or the next business day), if no action has been filed contesting the election and if no interim deadlines are delayed for falling on a holiday or weekend. LA R.S. §18:513
ME	Secretary of State; Governor	The Secretary of State tabulates results. The Governor issues the certificate. M.R.S. 21-A §722; 803	Within 20 days after an election M.R.S. 21-A §722
MD	Board of State Canvassers; Governor	The Board of State Canvassers consists of the Attorney General, the Comptroller, the State Treasurer, the Secretary of State, and the Clerk of the Supreme Court of the state. The Board canvasses the results. The Governor issues the Certificate. Md. Code, EL §11-502; 11-601	The Board shall convene within 30 days of the election, with up to one day adjournment, and determine the candidates elected within one day of convening, and the State Administrator shall transmit the certified election results to the Governor within 3 days of receipt from the Board Md. Code, EL §11-503
MA	Governor, Secretary of the Commonwealth, Executive Council	MA ST §54:115-118	Localities have 15 days to transmit results to the Secretary, and the Governor, witnessed by members of the Council, has 10 days following the Secretary's receipt of the votes to proclaim the results MA ST §54:112, 54:118
MI	Board of State Canvassers; Governor	Board consists of two members from each major political party, with one member each being nominated by the Senate Majority Leader, Senate Minority Leader, Speaker of the House of Representatives, and House Minority Leader, and the members being selected by the Governor. The Governor issues the Certificate. MCL §168.22	On or before the 20th day following the election; the Secretary of State may appoint an earlier day. MCL §168.842

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State	Name	Composition	Date for certification of canvass (2024)
MN	State Canvassing Board; Governor	The State Canvassing Board consists of the Secretary of State, two judges of the Supreme Court, and two judges of the District Court selected by the Secretary of State. The Governor submits the state's Certificate of Ascertainment. MN Stat §204C.31; 208.44	The Board will meet on the 16th day following the election to conduct the canvass. Within three days after completing the canvass, the State Canvassing Board shall declare the result and declare the candidates duly elected who received the highest number of votes for each federal office. MN Stat §204C.33; 208.05
MS	Secretary of State, and State Board of Election Commissioners	The Board consists of the Governor, the Secretary of State, and the Attorney General. The Secretary of State transmits "a notice" to the persons elected. MS ST §23-15-211; 23-15-605; 23-15-787	Immediately after receiving the returns and not later than 30 days following the election MS ST §23-15-605
MO	Board of State Canvassers, Secretary of State	The Board of Canvassers consists of the Secretary of State and two disinterested judges appointed by the Secretary. MO ST §115.511	The Board shall complete the canvass not later than the second Tuesday in November following the general election. MO ST §115.511
MT	Board of State Canvassers; Secretary of State; Governor	The Board of State Canvassers consists of the State Auditor, Superintendent of public instruction, and Attorney General. The Secretary prepares the lists of electors, which are signed by the Governor and Secretary. MCA §13-15-502; 13-25-103	Within 27 days after the election, or sooner if the returns are all received MCA §13-15-502
NE	Board of State Canvassers; Secretary of State; Governor	The Board of State Canvassers consists of the Governor, the Secretary of State, the Auditor of Public Accounts, the State Treasurer, and the Attorney General. The Secretary prepares the Certificate, which is signed by the Governor. Neb. Rev. Stat. §32-1037; 32-1040	On the fourth Monday after the election Neb. Rev. Stat. §32-1037
NV	Supreme Court and Secretary of State; Governor	The justices of the Supreme Court (or a majority thereof) and the Secretary of State together canvass the votes. The Governor issues Certificates. N.R.S. §293.395	On the fourth Tuesday of November after the election N.R.S. §293.395

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State	Name	Composition	Date for certification of canvass (2024)
NH	Secretary of State; Governor	The Secretary of State tallies votes and declares the highest vote-getters; the Governor issues some certificates of election, including those for presidential and vice-presidential electors. NOTE: The NH Executive Council voted to certify the 2020 election results. RSA §659:81; 659:84	Canvass and declaration "when the Secretary of State has received the returns for an office from all towns or wards comprising the elective district for that office." Certificates of election provided when time for recounts/ appeals have expired. RSA §569:81; 659:84; 660:1; 660:4; 665:8 (II); 665:16
NJ	State Board of Canvassers; Secretary of State; Governor	The board is composed of the Governor, plus four members of the State Legislature selected by the Governor (equally representing the two parties). Note: The Secretary of State, an appointee of the Governor, may take the Governor's place if the Governor is not available. Otherwise, the Secretary serves a ministerial role. The Secretary prepares the Certificate, which is signed by the Governor and the Secretary. NJSA §19:6-27; 19:22-1; 19:22-3; 19:22-8	Board of State Canvassers shall meet as soon as practicable but no later than the 30th day after the day of election and proceed to canvass the election NJSA §19:21-1; 19:21-6
NM	State Canvassing Board	The Secretary of State, the Governor, and the Chief Justice of the New Mexico Supreme Court constitute the State Canvassing Board. NM Const. Art. V Sec. 2	Canvass occurs the third Tuesday after the election; Secretary must issue certificates upon approval of the state canvass, but no sooner than the 31st day after the election. State Canvassing Board is responsible for certificates of ascertainment. NMSA §1-13-15; 1-13-16; 1-15-4
NY	State Board of Canvassers; Governor	The State Board of Elections constitutes the State Board of Canvassers. The State Board of Elections consists of four commissioners appointed by the Governor. Each commissioner is selected by recommendations from the state chairman and from the legislative leaders of each of the major political parties. The Board prepares Certificates, which the Governor then signs. N.Y. Elec. Law §3-100; 12-102	The State Board of Canvassers shall meet on or before the first Monday after the first Wednesday, of December next after each general election. The Board may adjourn from day to day, not exceeding five days. N.Y. Elec. Law §9-216

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State	Name	Composition	Date for certification of canvass (2024)
NC	State Board of Elections; Secretary of State; Governor	State Board of Elections composition currently subject to litigation. As of 7/26/24, state law provides that the State Board of Elections is a bipartisan group of eight, with two members each being appointed by the President Pro Tempore of the Senate, the Senate Minority Leader, the Speaker of the House, and the House Minority Leader. However, this structure was successfully challenged (with appeal pending), so operative structure mirrors 2020 structure: 5 members, appointed by the Governor from lists provided by the parties, with no more than 3 members from the same party. The State Board certifies results to Secretary, who notifies the Governor. The Governor immediately issues a proclamation. N.C. Gen. Stat. §163-182.5, 163-19, 163-210	On the Tuesday three weeks after election day N.C. Gen. Stat. §163-182.5
ND	State Canvassing Board; Secretary of State; Governor	The clerk of the Supreme Court, the Secretary of State, the State Treasurer, and the Chairman, or Chairman's designee, of the state committee of the two political parties that cast the highest vote for Governor at the last general election at which a Governor was elected constitute the state canvassing board. The Secretary prepares the certificates, which are signed by the Governor and Secretary. N.D.C.C. §16.1-15-33; 16.1-14.02	Not later than 17 days following the election N.D.C.C. §16.1-15-35
OH	Secretary of State	O.R.C. §3505.35	County Boards of Elections must complete their canvasses within 21 days of the election, and the Secretary of State must complete the statewide canvass within 10 days of receiving the election returns from the Boards O.R.C. §3505.32; 3505.35

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State	Name	Composition	Date for certification of canvass (2024)
OK	State Election Board; Governor	The State Election Board is composed of three members and two alternate members (who may attend if a regular member is absent), each appointed by the Governor from nominations submitted by the two major political parties. Certificates are issued by the Board and transmitted to the electors by the Governor. Okla. Stat. tit. 26, §2-101, 2-101.1, 10-106	5PM on the Tuesday following the election Okla. Stat. tit. 26, §7-136
OR	Secretary of State	ORS §254.555	No later than 37 days after the election ORS §254.555
PA	Secretary of State; Governor	1937 Act 320 §1409, 1416; 25 P.S. §3159, 3166	"Upon receiving the certified returns of any primary or election from the various county boards." 1937 Act 320 §1409; 25 P.S.§3159
RI	State Board of Elections; Governor; Secretary of State	The State Board of Elections is made up of staggered gubernatorial appointees. The Secretary and Governor provide any certificates required by federal law. R.I. Gen. Laws §17-7-3; 17-4-12; 17-7-2; 17-7-5	Count begins at 8:00 PM on the day of any election in which mail ballots are used and continues until finished "with all reasonable expedition." R.I. Gen. Laws §17-22-1
SC	Board of State Canvassers; Governor	The State Election Commission constitutes the Board of State Canvassers. The Commission is made up of five members, at least one of whom is a member of the majority political party and at least one of whom is a member of the largest minority political party represented in the General Assembly. Members are appointed by the Governor for four-year terms. The governor issues the Certificate of Ascertainment. SC Code §7-3-10; 7-17-210; 7-19-70	The Board is set to meet for the canvass within 10 days after the election. The Board may adjourn for up to five days if the returns for presidential electors have not been received. SC Code §7-17-220; 7-17-230
SD	State Board of Canvassers; Governor	The State Board of Canvassers consists of the Governor, the Secretary of State, and the Chief Justice of the South Dakota Supreme Court. The governor delivers copies of certificates to electors. SDCL §12-20-46; 12-24-1	Within seven days of the election (though may be extended for a period not exceeding ten days for the purposes of obtaining the county returns). SDCL §12-20-47

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State	Name	Composition	Date for certification of canvass (2024)
TN	Secretary of State, Governor, and the Attorney General and Reporter.	T.C.A. §2-8-110	"As soon as the returns [from the counties] are received." The process of tallying and certification by the counties can begin no later than the third Monday after the election. T.C.A. §2-8-110; 2-8-101
TX	Governor; Secretary of State	The Secretary delivers county returns to Governor. The Governor conducts a canvass and certifies the tabulation. The Secretary prepares the Certificate of Ascertainment. Tex. Elec. Code §67.010; 67.013; 67.016	Tex. Elec. Code §67.012
UT	State Board of Canvassers; Lieutenant Governor	The State Board of Canvassers consists of the State Auditor, the State Treasurer, and the Attorney General. The Lieutenant Governor prepares and transmits the certificates. Utah Code Annotated §20A-4-306; 20A-13-302	Convenes at noon on the fourth Monday of November. No deadline specified, but presumed to be the same day. Utah Code Annotated §20A-4-306; 20A-13-302
VT	State Canvassing Committee	The Secretary of State and the chair of the state committee of each major political party (or their designee) constitute the canvassing committee. 17 V.S.A. §2592 (a)	Canvassing begins one week after the day of the election. The Committee can recess "from time to time" until it completes its work. 17 V.S.A. §2592 (g); 2731
VA	State Board of Elections	The Board has a majority of members reflecting the party of the Governor and is responsible for canvassing and certification at the state level. Members are appointed by the Governor and confirmed by the state Senate. VA Code §24.2-102; 24.2-679	Board is set to meet by the first Monday in December, but in the case the board is not able to meet, it can postpone no more than three days after. VA Code §24.2-679
WA	Secretary of State	RCW 29A.60.250	"As soon as the returns have been received from all the counties of the state, but not later than the thirtieth day after the election." RCW 29A.60.250
WV	Governor	WV Code §3-6-11	County canvassing authorities must submit certified results to the Governor by 30 days after the election (or after recount). The Governor "shall ascertain who [is] elected and make proclamation thereof." WV Code §3-6-11

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State	Name	Composition	Date for certification of canvass (2024)
WI	Chairperson of State Election Commission; Governor	The chairperson of the Wisconsin Election Commission, or a designee of the chairperson, certifies results. (The chairperson is an appointee of the six-member bipartisan commission, two members of which are appointed by the Governor, and one each by the President of the Senate, the Senate Minority Leader, the Speaker of the Assembly, and the Assembly Minority Leader). The Governor issues certificates. Wis. Stat. §7.70(3)(a)–(c)	No later than December 1st after general election and no later than 10 days after state canvass commences. Wis. Stat. §7.70(3)(a)-(c)
WY	State Canvassing Board; Governor	The Governor, the Secretary of State, the State Auditor, and the State Treasurer constitute the State Canvassing Board. The Governor issues certificates. Wyo. Stat. Ann. §22-16-115; 22-19-104	By the second Wednesday following the election. Wyo. Stat. Ann. §22-16-118

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