National Popular Election of the President

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Constitutionality of the National Popular Vote Bill

This document discusses the constitutionality of the proposed interstate compact entitled the "Agreement Among the States to Elect the President by National Popular Vote."

We first explain why the National Popular Vote bill is constitutional (section 1). Then, in section 2, we discuss the related question of whether it is appropriate and historically precedented for states to take the initiative in changing the method of electing the President. Finally, we discuss the advantages of an interstate compact over a federal constitutional amendment for changing the method of electing the President (section 3).

1. The National Popular Vote Bill is Constitutional

It is important to recognize what the U.S. Constitution says, and does not say, about the method of electing the President. The Founding Fathers never reached a conclusion at the Constitutional Convention of 1789 as to how the President would be elected. Instead, the U.S. Constitution granted the states exclusive and plenary (i.e., complete) control over the manner of awarding their electoral votes.

Article II of the U.S. Constitution says:

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

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

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

The wording "as the Legislature … may direct" in Article II of the U.S. Constitution is an unqualified grant of plenary and exclusive power to the states. This constitutional provision does

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

not encourage, discourage, require, or prohibit the use of any particular method for awarding the state's electoral votes. This wording certainly does not require the use of the winner-take-all rule. States may exercise this grant of power in any way they see fit, provided only that they do not violate other specific provisions of the U.S. Constitution. As the U.S. Supreme Court stated in the 1892 case of *McPherson v. Blacker*:

> ""The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and **leaves it to the legislature exclusively to define the method** of effecting the object. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text."[2] [Emphasis added]
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> "In short, the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States."[3] [Emphasis added]

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

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

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

Massachusetts has exercised its power to change its system of awarding its electoral votes on 10 different occasions. In 1789, the Massachusetts legislature, in effect, chose the state's presidential electors. In 1792, the voters were allowed to elect presidential electors in four multi-member regional districts. Then, the voters picked electors by congressional districts (with the legislature choosing the state's remaining two electors). Shortly thereafter, the legislature took back the power to pick all the presidential electors (excluding the voters entirely). Later, the voters picked electors on a statewide basis using the winner-take-all rule. Then, the legislature again decided to pick the electors itself, followed by the voters using districts, followed by another return to legislative choice, followed again by the voters using districts, and, finally, the present-day statewide winner-take-all rule. None of these 10 changes required an amendment to the U.S. Constitution because the Founding Fathers and U.S. Constitution gave Massachusetts (and all the other states) exclusive and plenary power to award their electoral votes.

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

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

In short, there is nothing in the U.S. Constitution that needs to be amended in order for states to change from the current system of awarding all of a state's electoral votes to the candidate who receives the most popular votes in each individual state (the winner-take-all rule) to a system in which the states award their electoral votes to the candidate who receives the most popular votes in all 50 states and the District of Columbia. The states already have the power, under the U.S. Constitution, to make this change. As a result, a federal constitutional amendment is not required.

Control over elections is intentionally, not accidentally, a state power under the U.S. Constitution. The Founding Fathers had good reason to give the states the power to control the conduct of presidential elections. They specifically wanted to thwart the possibility that an over-reaching President, in conjunction with a possibly compliant Congress, could manipulate the manner of conducting presidential elections in a politically advantageous way. For similar reasons, the U.S. Constitution gives the states primary power over the manner of conducting congressional elections.[4]

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

First, as already mentioned, the U.S. Supreme Court has repeatedly characterized the authority of the states over the manner of awarding their electoral votes as "plenary" and "exclusive." In *Bush v. Gore* in 2000, the Court called article II, section 1, clause 2:

> "The source for the statement in *McPherson* v. *Blacker* … that the State legislature's power to select the manner for appointing electors is **plenary.**"[5] [Emphasis added]

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

Third, we are not aware of any case in which the courts have invalidated an interstate compact.[6] Over the years, the states have employed interstate compacts for more and more purposes (as discussed in chapter 5 of our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*). Given the recent tendencies of the courts to accord even greater deference to states' rights and even freer use of interstate compacts by the states, it is unlikely that the courts would invalidate the National Popular Vote compact. The National Popular Vote compact is an example of states' rights in action.

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

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

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

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

2. It is Appropriate and Historically Precedented for the States to Take the Initiative in Changing the Method of Electing the President

Nearly all the major changes in the method of electing the President have been initiated by action at the state level—not by action at the federal level.

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

Permitting the People to Vote for President

Let's start by discussing the most significant change that has ever been made in the way the President of the United States is elected, namely allowing the people to vote for President. There is nothing in the U.S. Constitution that gives the people the right to vote for President. The Founding Fathers gave the states plenary and exclusive power to specify the manner of conducting presidential elections. In the nation's first presidential election in 1789, only five states permitted the people to vote for their state's presidential electors. In the remaining states, the state legislatures (or, in New Jersey, the governor and his council) appointed the electors. The people acquired the vote for President by the enactment by state legislatures of state laws. The states exercised their role, under the U.S. Constitution, as the "laboratories of democracy."[7]

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

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

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

Elimination of Property and Wealth Qualifications for Voting

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

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

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

The decision by 30 separate states to permit women to vote in the 50-year period between 1869 and 1919 was not an "end run" around the U.S. Constitution. We have not encountered a single person who argues that state legislatures did anything improper, inappropriate, or unconstitutional when they made this very substantial 2-to-1 expansion of their electorates. This major change was simply another example of the state legislatures using a power that the U.S. Constitution explicitly granted to the states concerning the conduct of elections.

It should be remembered that the only effect of the 19th Amendment was to extend women's suffrage to the minority of states (18) that had not already acted at the state level to permit women to vote. Women's suffrage was achieved because 30 states exercised their power as the "laboratories of democracy" to change the manner of conducting their own elections. Indeed, the 19th Amendment only passed Congress in 1919 because women already constituted half the electorate in 30 states (and because the members of Congress from the remaining states knew that it was only a matter of time before women would obtain the right to vote in the remaining states, with or without the federal constitutional amendment).

Direct Election of U.S. Senators

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

Black Suffrage

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

18-Year-Old Vote

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

3. Advantages of an Interstate Compact over a Federal Constitutional Amendment for Changing the Method of Electing the President

State action offers several advantages over a federal constitutional amendment.

First, it is far easier to amend state legislation than to repeal a constitutional amendment. It should be noted that only two states elected their governors in 1789. Now 100% of the states do so. After over 5,000 popular elections for governor, we are not aware of any buyer's remorse in terms of the switch to popular election of governors. However, if some "unintended consequence" were to materialize or some adjustment were to become advisable in the National Popular Vote interstate compact, the states can amend the compact (and even withdraw) in the same way that they passed it (that is, by enactment of a bill in the legislature).

Second, the National Popular Vote compact leaves untouched the states' existing power to control presidential elections. Most of the constitutional amendments that have been debated in Congress over the years have taken away state control over presidential elections and given it to Congress. An example is Florida U.S. Senator Bill Nelson's recently introduced constitutional amendment for direct popular election of the President. (Senator Nelson has also publicly endorsed the National Popular Vote bill).

The Founders were suspicious of an over-reaching President who might, in conjunction with a compliant legislative branch, try to alter the method of conducting presidential elections in a politically advantageous manner. As a "check and balance" on the central government, the Founders dispersed the power to control federal elections among the states, knowing that no single "faction" would simultaneously be in power in all the states.

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