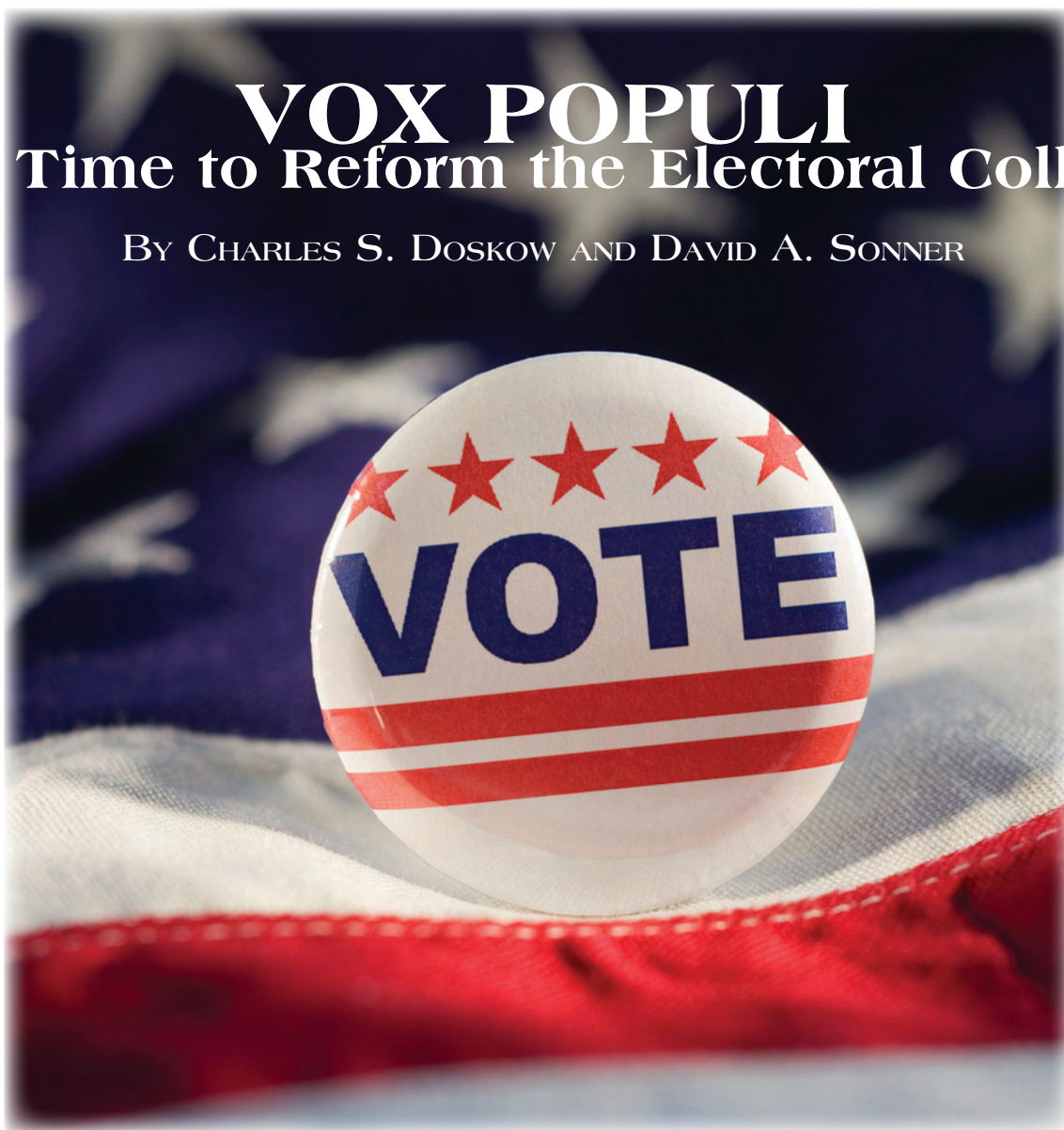


VOX POPULI

Is It Time to Reform the Electoral College?

BY CHARLES S. DOSKOW AND DAVID A. SONNER



Popular dissatisfaction with the present electoral college method of electing our presidents has increased since 2000, when the possibility of the winner of the presidency having lost the popular vote gave impetus to suggestions of reform. The National Popular Vote Plan, under which states would amend their laws to require that their electoral votes be cast in favor of the winner of the national popular vote, has attracted support. That plan raises serious constitutional issues: whether such state enactments are subject to gubernatorial veto, and whether, as interstate compacts, the consent of Congress would be required.

“In Gallup polls that stretch back more than fifty years, a majority of Americans have continually expressed support for the notion of an official amendment of the U.S. Constitution that would allow for the direct election of the president,” wrote Gallup in a 2001 report. Nevertheless, it has proved to be virtually impossible to pass an amendment to the U.S. Constitution to eliminate the Electoral College and to substitute the direct election of the President by popular vote. For more than 200 years, the only significant changes to the way we elect presidents have been made by way of the Twelfth Amendment, which arose after the disputed presidential election of 1800 as a way to eliminate an entirely unworkable system, and by way of the Electoral Count Act of 1887, which was passed after the disputed presidential election of 1876.

Now there is another move afoot to change the way the nation elects presidents—a result of the disputed presidential election of 2000. Unlike many previous unsuccessful efforts that began in Congress as proposed constitutional amendments, this effort is starting in the states. New Jersey and Maryland have recently passed laws pledging their electoral votes to the winner of the national popular vote, rather than to the winner of their state's popular vote. These laws take effect, though, only after enough states—totaling the requisite 270 electoral votes needed to elect a President—also commit to such a procedure. This coordinated effort is called the National Popular Vote Plan. Its supporters have proposed it as an interstate compact, because such an approach is less daunting than any attempt to amend the federal Constitution. But the plan does not lack opponents. Although the legislatures of California and Hawaii passed this plan, the governors of those two states vetoed that legislation.

In considering the National Popular Vote Plan, two constitutional questions stand out: (1) Should the legislatures of California and Hawaii have sent legislation dealing with the appointment of their presidential electors to their governors for signature or veto? (2) Is the National Popular Vote Plan the kind of interstate compact that requires congressional approval? This article analyzes both questions, emphasizing analysis of the issue of the gubernatorial veto, because the question of an interstate compact has been the subject of a recent scholarly article. Before delving into those questions, though, the discussion will briefly review the origins of the Electoral College and the proposed National Popular Vote Plan.

The Origins of the Electoral College

The Constitutional Convention of 1787 struggled mightily with the entire issue of the executive branch. There were lengthy debates: whether to have a single chief executive or a troika; whether the chief executive should be limited to a single term or eligible for re-election; and whether the presidential term should last four years or up to seven years.¹ No issue was thornier than the method of selecting the chief executive, however. Among the proposals debated and rejected were direct election by popular vote and election by Congress.

Direct election by popular vote failed to achieve a consensus for several reasons. One factor influencing the Constitutional Convention delegates was the belief that, in those days of limited communication, the bulk of the population would have no way of knowing enough about each of the candidates to cast an intelligent ballot. Some delegates simply did not trust the people to make that decision. Yet another reason lurking in the background was that the Northern states had proportionately more voters for their population than the Southern slave states had. As James Madison delicately put it, “The right of suffrage was much more diffusive in the Northern than in the Southern states.”

Foremost in the minds of the Founders at the Constitutional Convention was framing a Constitution that the states would ratify, and the slave states were the greatest challenge to this effort. Madison wrote that the “States

were divided into different interests not by their difference in size, but by other circumstances; the most material of which resulted partly from climate, but principally from their having or not having slaves.”

Population statistics demonstrate part of the problem. The 1790 federal census shows that South Carolina had a population of 249,073 people, but out of that number, 107,094 were slaves and 141,979 were free people. By comparison, New Hampshire, which was smaller than South Carolina, had a population of 141,899; but out of that number, 157 were slaves and 141,742 were free people. In other words, in terms of the free population out of which the pool of potential popular votes would come, South Carolina was about the same size as New Hampshire was.

However, for a Southern slave-holding state like South Carolina, which was seeking to gain enough political power to protect its peculiar institution of slavery, the problem was worse than that. The political systems of the slave-holding states were not designed to turn out a large vote, but rather to keep power in the hands of a select few. Strict qualifications that allowed only property owners to vote, combined with the fact that property often was tied up in huge plantations, meant that only a relatively small number of white male property owners could vote in the Southern slave-holding states.

At the Constitutional Convention, Charles Cotesworth Pinckney of South Carolina said that in his state “four or five thousand men cannot be brought together to vote.”² By contrast, Elbridge Gerry of Massachusetts thought his state had gone too far in the other direction, with too many having the right to vote, so that, according to Gerry, “The worst men get into the legislature.”³ In the 1796 election, for instance, even though Massachusetts had a population only about 50 percent greater than South Carolina's, Massachusetts' citizens would cast more than 35,000 votes.

Since the right to vote “was much more diffusive” in the Northern states, the Founders knew that the Southern slave states would never ratify a constitution that provided for direct popular election of the chief executive. Thus, the convention delegates debated other approaches, on four separate occasions approving and rejecting selection of the chief executive solely by the national legislature. The main reasons for this tentativeness were fear of intrigue, faction, and cabal. Alexander Hamilton feared that a chief executive might corrupt the national legislature in order to stay in office.

In the resulting compromise, the convention eventually accepted selection of the chief executive by the national legislature but limited that body to selecting the President from among the top five candidates proposed by a body of presidential electors, which would come to be called the Electoral College. As a safeguard against intrigue, the electors could not be federal officeholders; they would be chosen in a manner determined by their various state legislatures, and they would meet in their various states on the same day.

The Electoral College system, as adopted, gave each state an elector for each of its senators and representatives in Congress. The system built on the “Connecticut

compromise,” which organized the national legislature into two houses: the Senate, in which each state had equal representation of two senators, and the House of Representatives, in which representation was based on the state’s population, including the slave population at a three-fifths rate. For an outstanding candidate like George Washington or a good President seeking re-election, the Electoral College might elect the President directly, but only if a majority of electors voting in the various states on the same day voted for that candidate.

When no presidential candidate received a majority vote in the Electoral College, the ultimate constitutional provision gave the House of Representatives the right to make the final decision, but with each state casting one vote, thus eliminating the concern that the large states would dominate the final selection. Originally, the House was to elect the President from among the top five candidates chosen by the Electoral College. The Twelfth Amendment, ratified in 1804, changed that pool to the top three candidates. When no vice presidential candidate received a majority in the Electoral College, that amendment also gave the Senate the parallel job of electing a vice president from among the top two vice presidential candidates chosen by the Electoral College.

The Founders expected the need for elections in Congress to occur more frequently than has been the case. George Mason thought that 19 times out of 20 the House would elect the President from the top contenders named by the Electoral College. In *Federalist* 66, Hamilton wrote that the House “will sometimes, if not frequently” elect the President. Madison expected that the Electoral College often would serve to nominate a small group of good presidential candidates and the House would select the President from among that pool.

The selection of the President did not turn out the way the Founders expected, however. One overarching factor soon dominated the election process. Although the Constitution leaves no role for and makes no mention of political parties, after Washington took office in 1789, it took about five minutes for a division between the supporters of Hamilton and the supporters of Jefferson to coalesce into two political parties. Parties have dominated American politics since that day and have changed the role that the Electoral College had been expected to play. Because of the existence of political parties, the Electoral College usually has elected our Presidents.

In fact, we have had only three inconclusive elections in the Electoral College that have moved the final selection to Congress. After the 1800 election, Jefferson won the presidency in the House after 36 ballots.⁴ After the 1824 election, John Quincy Adams won the presidency in the House on the first ballot. And after the 1836 election, Richard Johnson won the vice presidency in the Senate on the first ballot. These elections in Congress have come to be called “contingent” elections, because they are contingent on the absence of a majority vote in the Electoral College.

There was an overriding factor leading to the acceptance of the Electoral College as invented by a Constitutional Convention determined to find consensus: Everyone in the room knew that the nation’s first President would

be George Washington. In that sense, this consensus gave the convention a pass. It would be at least one presidential term, and probably more, before George Washington would step down and the Electoral College system would be tested in practice.

The National Popular Vote Plan

The results of the presidential election in 2000 reminded citizens that it was possible for a candidate to win the popular vote but lose the electoral vote and therefore the presidency. In that election, the total popular vote throughout the nation resulted in Al Gore receiving more than a half-million votes more than George W. Bush garnered, but Bush eventually won the presidency in the Electoral College with 271 electoral votes to Gore’s 266.

It had been a long time since the winner of the popular vote had lost the electoral vote. The last time this clearly had happened was in the 1888 presidential election, which had a much smaller voting population than in the one in 2000. In 1888, Grover Cleveland beat Benjamin Harrison by about 100,000 popular votes, but Harrison won the presidency in the Electoral College with 233 electoral votes to Cleveland’s 168.

After the 2000 presidential election, voters were no longer complacent about the theoretical possibility of a presidential candidate winning the popular vote but losing the electoral vote. Some commentators also started looking at other potential problems with the nation’s system of electing the President, frequently mentioning problems that might arise with a contingent election in the House of Representatives.

Currently it is possible, for example, to trigger a contingent election in the House because of a tie in the electoral vote if the candidate of each major party receives 269 electoral votes. If that were to happen, according to the Constitution and the procedures set in our early contingent elections, California’s 53 representatives would cast ballots to see who gets California’s one presidential vote in the House. California’s 53 representatives then would cast the same one vote in the House as Wyoming’s one representative, even though, according to the 2000 federal census, California has 68 times the population of Wyoming. This unfairness—and the electorate’s possible reaction—has concerned some commentators.

Moreover, a tie is not the only way to trigger a contingent election in the House. Sometimes third parties win electoral votes. Strom Thurmond won 39 electoral votes in 1948 and George Wallace won 46 electoral votes in 1968. If the results of those elections had been closer between the candidates of the two major parties, Thurmond or Wallace might have turned out to be spoilers, leading to a contingent election in the House, where they would have had significant power to influence the decision.

After the 2000 presidential election, many citizens worried that in the 2004 presidential election the winner of the popular vote might again lose the electoral vote and therefore the presidency. In the end, George W. Bush clearly beat John Kerry in both the popular vote and the electoral vote. Commentators pointed out afterward, though, that if

just enough votes had shifted in Ohio for Kerry to win that state and nothing else had changed, Bush would have won the national popular vote by about three million votes but lost the electoral vote and the presidency to Kerry. To some commentators, reforming our way of electing the President seemed a less partisan act after the 2004 election than after 2000 election because it showed that the Electoral College could hurt the winner of the popular vote no matter which political party he represented.

Against this background, the National Popular Vote Plan emerged under the guidance of a bipartisan advisory board made up of prominent former elected officials. The idea behind the plan is for each state to adopt legislation, with specified identical language, giving each state's electoral votes to the winner of the national popular vote. The plan makes this legislation contingent on enough states—totaling the requisite 270 electoral votes needed to elect a President—also adopting the plan.⁵

At the time this article was written, the National Popular Vote Plan had been passed by one legislative chamber in the states of Arkansas, Colorado, North Carolina, and Washington; the plan had been passed by the Illinois legislature and was awaiting signature or veto by the governor. The legislatures of both Maryland and New Jersey had passed the plan and the governors of these states had signed the legislation into law. The legislatures of both California and Hawaii had passed the legislation adopting the plan, but the governors of those two states had vetoed the legislation.⁶ Whether these governors' vetoes are of legal effect is a serious question.

Can Governors Veto Legislation Related to Presidential Electors?

The actions taken by the legislatures of California and Hawaii are a bit complicated because the National Popular Vote Plan envisions an interstate compact, implicating Article I, Section 10, of the U.S. Constitution. Setting aside, for the moment, the issue of an interstate compact, it is interesting to think about the ramifications if those two legislatures had simply passed measures pledging their electoral votes to the winner of the national popular vote. In other words, if those measures did not contemplate an interstate compact explicitly or implicitly, such as through measures contingent on actions taken by other states, could the governors of those two states have vetoed that kind of legislation?

State legislatures are accustomed to passing laws under their own state constitutions, which typically allow their governors to veto a bill. But when it comes to appointing presidential electors, there is extensive and compelling history and law that point to state legislatures acting under a special grant of power under the U.S. Constitution, not under their state constitutions. In fact, the U.S. Constitution as drafted by the Founders delegated several duties specifically to the state legislatures. These duties include ratifying constitutional amendments, appointing senators (before the Seventeenth Amendment provided for their direct election), and appointing presidential electors.

In terms of ratifying constitutional amendments,

Article V of the U.S. Constitution states that constitutional amendments shall be valid “when ratified by the Legislatures of three fourths of the several States.” Interpreting this language, the U.S. Supreme Court wrote in *Leser v. Garnett* that “the function of the state Legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.”⁷

In the course of more than two centuries, 27 constitutional amendments have been ratified. Reflecting this history, the National Conference of State Legislatures' current guide, entitled *The Road to Ratification: Amending the U.S. Constitution*, includes the following language:

The affirmative action of a state legislature on legislation to ratify a proposed amendment to the U.S. Constitution is final. Just as the president has no formal role in proposing amendments, governors have no constitutional role in their ratification. Technically, a governor's signature on the bill or resolution is not necessary.

Of course, out of habit, a state legislature can send its ratification of a constitutional amendment to its governor for signature or veto, as if it were an ordinary piece of legislation, but that step does not make the governor's signature necessary.

Anyone can forget to re-read the precise language of the U.S. Constitution before taking action. For example, under its constitutional authority to count electoral votes under the Twelfth Amendment, Congress passed a law near the end of the Civil War saying that it would not count electoral votes from certain states that had been in rebellion. Out of habit, Congress then sent the measure to President Lincoln for signature or veto, as if the act were an ordinary piece of legislation. Perhaps to avoid the impression of a pocket veto, Lincoln signed the measure, but in a letter to Congress he made it clear that his signature was not necessary:

The Joint Resolution entitled, “Joint Resolution declaring certain States not entitled to representation in the Electoral College,” has been signed by the Executive, in deference to the view of Congress implied in its passage and presentation to him. In his own view, however, the two Houses of Congress, convened under the Twelfth Article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter.⁸

For our purposes, the most important duty that the federal Constitution delegated directly to the state legislatures is the appointment of presidential electors. As with ratifying a constitutional amendment, there is history that suggests that selecting electors is another area in which the

state legislatures act under the federal Constitution and not under their state constitutions. Article II of the U.S. Constitution provides the following: “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.”

In the nation’s first presidential election in 1789, many state legislatures interpreted the language of Article II to mean that they could appoint presidential electors without involving their governors or consulting their citizens in popular elections. In fact, many state legislatures appointed electors throughout the nation’s first 10 presidential elections. By the 10th presidential election in 1824, of the 24 states, the number of state legislatures appointing electors had decreased to six states. After that election, however, the vast majority of states moved from legislative appointment of electors to popular election of electors.

Nonetheless, legislative appointment of electors took a long time to disappear completely. South Carolina’s legislature kept its practice of appointing its electors for more than 70 years, using it in every presidential election through 1860. The last two state legislatures to appoint electors were the legislatures of Florida in 1868 and Colorado in 1876.⁹

In 1874, summarizing the law and the lessons learned from numerous presidential elections, the Senate Committee on Privileges and Elections wrote a seminal passage in a report dealing with the appointment of presidential electors:

The appointment of these electors is thus placed 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. This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.¹⁰

The first time the U.S. Supreme Court quoted this passage was in 1892 in *McPherson v. Blacker*.¹¹ In that case, the Democrats had gained temporary control of the Michigan legislature. Previously, as in other states, all of Michigan’s presidential electors were elected at-large; therefore, any voter in Michigan could vote for any elector. This system usually meant that the winning party won all the state’s electoral votes. These systems are referred to as “winner-take-all” systems. To prevent Michigan’s electoral vote from

going as a bloc to the Republican presidential candidate in the next election, Michigan’s legislature changed its system for awarding its electoral votes to a district system in which the winning party would not necessarily take all Michigan’s electoral votes.

The Republicans challenged that action in court. After reviewing the history of presidential elections, the U.S. Supreme Court wrote, “from the formation of the government until now, the practical construction of the clause [in Article II] has conceded plenary power to the state legislatures in the matter of the appointment of electors.” By using the word “plenary,” the Court essentially was saying that state legislatures had absolute and unqualified power in the selection of electors. Accordingly, the Court affirmed the power of the Michigan legislature to change its system for awarding its electoral votes.

That change worked just as Michigan’s Democrats had hoped it would, with the Republicans getting only nine of Michigan’s 14 electoral votes in the 1892 presidential election. The Democrats’ success was short-lived, however, because Michigan quickly returned to a winner-take-all system for appointing its electoral votes, and the Republicans won all 14 of Michigan’s electoral votes in the 1896 presidential election.

After *McPherson v. Blacker*, it was 108 years before another major decision involving presidential electors returned to the Supreme Court—the case was in *Bush v. Gore* in 2000.¹² In that case, a majority of the Court accepted and re-affirmed the long history of interpreting Article II of the U.S. Constitution as giving state legislatures “plenary” power over the appointment of presidential electors. In its per curiam opinion, the Court wrote the following:

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.

Justice Stevens took a contrary view in one paragraph in his dissent, arguing that Florida’s state constitution constrained the power of its state legislature, notwithstanding Article II of the federal Constitution. In effect, he argued that the states, not the state legislatures, had “plenary” power when it came to appointing presidential electors. To understand what was going on and why he did this, some history needs to be reviewed.

After the 1876 presidential election, in four states in which the final vote was disputed, the Democratic and Republican electors both decided to meet on the uniform national day in December set by Congress to cast electoral votes, and both groups sent their electoral votes to Con-

gress. To complicate things further, the Democrats in one of those four states convened their legislature after that December date and appointed another set of electors from that state, thereby sending a third set of electoral votes to Congress from that state. Of course, each state was entitled to only one set of electoral votes.

Under the Twelfth Amendment, Congress was required to count the electoral votes. In late 1876 and early 1877, intense political battles ensued over which sets of electoral votes to count and which sets not to count. The battles raged in both houses of Congress and in a specially created Electoral Commission. The presidency depended on the outcome of those political battles.

To avoid this kind of problem in the future, after tempers had cooled, Congress eventually passed the Electoral Count Act of 1887, which now is in Title 3 of the U.S. Code. Congress based Title 3 on two provisions in the federal Constitution. The Twelfth Amendment gave Congress the power and duty to count the electoral votes; and under Article II, “The Congress may determine the Time of Chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

In essence, in the Electoral Count Act Congress said that it would count a state’s electoral votes if three conditions were met. (1) The state legislation governing the counting of votes must be “enacted prior to the day fixed for the appointment of electors.” (2) The state legislation must provide for the state’s “final determination of any controversy or contest concerning the appointment of all or any of the electors.” (3) The state’s final determination must be finished “at least six days prior to the time of the meeting of the electors” in December.

In the 2000 presidential election, the formula in Title 3 set Dec. 18 as the day for electors to meet and set six days earlier, Dec. 12, as the day by which a state had to complete its final determination of any controversy or contest concerning the appointment its electors. Florida’s legislature had enacted election laws designed to allow it to comply with Title 3, including the Dec. 12 date set for final determination of the dispute.

The majority in *Bush v. Gore* relied on Title 3 to stop Florida’s state courts on Dec. 12. Dissenting, Justice Stevens would have given Florida’s state courts more time so that recounts could be conducted. Florida’s legislature had clearly passed a set of election laws that gave its state courts jurisdiction to hear election disputes, but those election laws contemplated short reviews in order to comply with the Dec. 12 date for final determination. Justice Stevens apparently wanted a way to say that Florida’s state courts had jurisdiction after Dec. 12; therefore, in one paragraph early in his dissent, he used a line of reasoning that did not depend on Florida’s election laws, relying instead on Florida’s state constitution.

In his dissent, Justice Stevens wrote that Article II of the federal Constitution “does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.” After some short quotations from other cases, he

concluded, “the legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it.”¹³

Without discussing the merits of the other arguments in Justice Stevens’ dissent, his one-paragraph argument related to Article II seems hastily written, which is not surprising in light of the speed with which the court decided *Bush v. Gore*, and this argument can be criticized. A state legislature may be a creature born of its state constitution. For instance, a state constitution may create its legislature, specifying how many people may sit in its legislature and how old someone must be to be elected to the legislature and, perhaps, putting term limits on its legislators. But that does not mean that the state legislature, once created, cannot have powers that are granted to it by the federal Constitution and are independent of its state constitution.

More important, Justice Stevens’ dissent did not address the long history of interpreting Article II, which is at odds with his interpretation. For more than a century after the nation’s founding, Article II was consistently interpreted as giving state legislatures plenary power to appoint presidential electors under the federal Constitution, independent of their state constitutions. Attention to Article II later waned only because the law was so well established. For Justice Stevens to try to overrule the long-established interpretation of Article II, without analyzing its history and thoroughly explaining the changed interpretation, is unusual.

How does the previous discussion relate to the problem with which this article began—if a state legislature passed a measure pledging its electoral votes to the winner of the national popular vote, could it avoid a possible gubernatorial veto because it was acting under Article II of the U.S. Constitution, not under its state constitution? Justice Stevens’ dissent in *Bush v. Gore* gives opponents of such a measure the opportunity to argue that state legislatures are subject to their state constitutions regarding the appointment of presidential electors, and, consequently, such measures should be subject to a gubernatorial veto under a state constitution. Perhaps the best rebuttal to this kind of argument, though, is that Justice Stevens’ opinion was not the majority opinion of the Supreme Court; it was a dissent. To overturn long-established historical precedent, his opinion would have to have been the opinion of the Court.

In *Bush v. Gore*, the majority of the Court, instead, cited and quoted the Court’s earlier opinion in *McPherson v. Blacker* and re-affirmed the long-established position that “the State legislature’s power to select the manner for appointing electors is plenary.” The ruling in 2000 even parenthetically cited and quoted a portion of the 1874 report of the Senate Committee on Privileges and Elections: “there is no doubt of the right of the legislature to resume the power [to appoint electors] at any time, for it can neither be taken away nor abdicated.”

What does all this mean for state legislatures seeking to change the way they appoint presidential electors? It means that, until the Supreme Court decides to change course, state legislatures operate under Article II of the

U.S. Constitution, not their state constitutions. Like their actions to ratify amendments to the U.S. Constitution under Article V, their actions under Article II are independent of their governors, and such actions are not subject to gubernatorial vetoes.

Interstate Compacts

As noted earlier in this article, the actions of the legislatures of California and Hawaii in sending their legislation on the National Popular Vote Plan to their governors for signature or veto is a bit complicated, because the plan expressly contemplates an interstate compact. This requirement raises a series of questions:

- Is the plan an interstate compact if there is only parallel legislation in several states?
- If the plan is an interstate compact, does this affect the role of the governors of the states, perhaps giving them veto power where they otherwise might not have it?
- To be effective, does the plan require the consent of Congress?

The first question that needs to be answered is whether or not the National Popular Vote Plan is an interstate compact. The plan expressly contemplates parallel legislation among states, and each state promises to bind itself to the plan conditionally, based on other states passing reciprocal measures. In the leading case interpreting interstate compacts, *Virginia v. Tennessee*, the Supreme Court indicated that states could create an interstate compact by parallel legislation and that “mutual declarations may then be reasonably treated as made upon mutual consideration.”¹⁴ However, the plan does not lack the traditional consideration. In contract law, a conditional promise is valid consideration and not illusory as long as the condition is not within the control of the party making the promise. The National Popular Vote Plan thus should be considered to be an interstate compact if adopted by the requisite number of states.

How does this conclusion affect the role of state governors? It does not appear that there is any rule that an interstate compact must be implemented by a state law, which would involve the possibility of a gubernatorial veto. The Supreme Court has analogized interstate compacts to contracts. State lottery commissions have adopted multistate lottery agreements on behalf of states, and governors have implemented a few interstate compacts by themselves based on their executive authority. These actions suggest that interstate compacts only have to be adopted by the state entity that has power over the subject of the compact. In the case of selecting presidential electors, that entity should be the state legislature acting by itself under Article II of the federal Constitution.

This brings us to perhaps the most important question about the National Popular Vote Plan. Is the plan the kind of interstate compact that requires congressional approval? Many supporters of the plan hope that it can be put into effect without congressional approval, which would remove one possible roadblock.

The interstate compact clause, which is found in Article I, Section 10, of the federal Constitution, states that “No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State.” Notwithstanding this language, many interstate compacts do not require the consent of Congress. In *Virginia v. Tennessee*, the Supreme Court noted that many compacts relate to subjects “to which the United States can have no possible objection or have any interest in interfering with.” The Supreme Court provided an example of an agreement that does not need congressional approval: an agreement by one state to ship merchandise over a canal owned by another state. Most interstate compacts have dealt with local issues, such as a bridge between two states. According to the Supreme Court, most of those interstate compacts do not need congressional approval.

However, as Derek Muller has recently written in a scholarly article, *The Compact Clause and the National Popular Vote Interstate Compact*, “In the history of the United States, no interstate compact has ever addressed elections.”¹⁵ Muller’s article includes an analysis of the history of the interstate compact clause:

The Compact Clause of the United States Constitution has a history that stretches back to the Articles of Confederation. ... The early drafters of the Articles were deeply concerned both with divisive interstate disputes and collusive interstate agreements, and the Articles of Confederation addressed both concerns. After the Founders modified the Articles and wrote the Constitution, the State Treaty Clause absolutely prohibited interstate treaties, and the Compact Clause was to prevent agreements detrimental both to the federal government and to non-compacting states.

Muller’s article summarizes the arguments about whether congressional approval is required to implement the National Popular Vote Plan. To summarize his conclusions, he writes that he “is doubtful that the federal interest” is enough to require congressional consent, but he concludes that “the non-compacting sister state interest” is sufficient.

We are less doubtful than Muller is that a court could conclude that a federal interest in the plan is sufficient to require congressional consent. The process of electing a President lies partly within the rightful sphere of federal interest. Article II and the Twelfth Amendment give Congress important roles in that process. And according to the Supreme Court in *Bush v. Gore*, the Equal Protection Clause of the Fourteenth Amendment applies to presidential elections. Granted, the U.S. Constitution places part of the process of electing a President—the method of selecting electors—within the power of each state legislature to choose. But the long history in this area suggests that any change in the method of selecting electors is also a matter of significant federal concern.¹⁶

On the other hand, we fully agree with Muller that the noncompacting sister state interest should require congressional consent. If any interstate compact ever needed congressional consent to protect the interests of the non-

compacting sister states it is a compact related to voting. The National Popular Vote Plan should not get a pass just because its goals seem beneficial. If a voting compact with at least 270 electoral votes allocated all its electoral votes to the winner of the popular vote in the compacting states, instead of the winner of the national popular vote, then the people in the noncompacting states would have no power to affect the outcome of the election. That kind of compact should require congressional consent. Just because the National Popular Vote Plan allocates a state's electoral votes to the winner of the national popular vote does not mean that it the plan should need congressional consent any less.

What's Next?

It is premature to expect a federal court to consider the National Popular Vote Plan. Under the Supreme Court's interpretation of Article III of the U.S. Constitution, federal courts can consider only suits that involve an actual case or controversy and cannot render advisory opinions. Under the ripeness doctrine, federal courts probably would not consider any suit involving the plan to be ready for adjudication until enough states have passed the plan for it to become effective. Congress could decide to get involved at any time and either approve or reject the plan. If Congress became involved, the federal courts would undoubtedly defer to the legislative branch.

The most likely way the National Popular Vote Plan might find its way into court would be if enough state legislatures passed the plan so that it became effective and Congress did not take it up. At that time, the plan would no doubt be challenged in court, with the parties contending that the National Popular Vote Plan is an ineffective interstate compact that does not have congressional consent.

Voters' idea of a nightmare is a contested presidential election after the plan has become effective under its own terms but before the courts have definitively ruled on its constitutionality without congressional consent.¹⁷ As a result, at the last minute, the Supreme Court might have to take up the issue, as it did after the disputed 2000 election, or Congress might have to take up the issue, as it did after the disputed 1876 election. Congress might do this on its own initiative or because of prodding by a Supreme Court ruling that the political question doctrine precludes judicial review. In any of these circumstances, the plan might cause the election to end in rancor.

Several changes to the plan might ameliorate some of these problems. In a forthcoming article, Professor Rick Hasen makes two suggestions for ensuring fairness in any change to the country's electoral system.¹⁸ First, he argues, the courts should be more receptive to pre-election challenges to changes in election procedures. Second, a constitutional amendment should be adopted providing that any change in election procedures cannot become effective until two years after adoption. As Professor Hasen states, this suggestion has the advantage of being politically neutral.

The prospects for the clear alternative to the National Popular Vote Plan—amending the Constitution to allow direct election of the President by a national vote—remain

dim. The nation's Founders deliberately made the amendment process extremely difficult by requiring two supermajorities for it to pass. Many of the amendments adopted during the 20th century simply codified ideas whose time had come or ideas that were no longer controversial. Such amendments include the popular election of senators, women's suffrage, elimination of poll taxes, and the lowering of the voting age to 18.

As noted initially, Gallup polls show that changing to direct election of the president is a popular idea, but history shows that a constitutional amendment will not succeed if either major party opposes it. Probably the biggest obstacle today is that neither major political party has yet decided that a changing the nation's electoral system to allow the direct election of the president by popular vote would be in the party's best interest. **TFL**

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Endnotes

¹See Max Farrand, ed., *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Yale University Press, 1966).

²See Catherine Drinker Bowen, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* at 76 (Atlantic-Little, Brown, 1966). Pinckney said that the reason South Carolina had so few voters was that it was sparsely populated, but statistics show that the state had a mid-sized population for the time. The real problem was that, like other Southern slave states, South Carolina severely restricted voting.

³*Id.* at 70 (quoting Gerry).

⁴The impasse that led to this marathon result derived from the fact that, as originally written, Article II required that each presidential elector cast votes for two candidates, with the winner becoming President (assuming the winner had a majority of electoral votes) and the runner-up becoming vice president. In 1804, the Twelfth Amendment, which separated the tallies for President and vice president, eliminated this anomaly.

⁵For a description how the plan works, see R. Koza, et al., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (National Popular Vote Press, 2006).

⁶For the status of the plan in the various states,

see www.nationalpopularvote.com.

⁷*Leser v. Garnett*, 258 U.S. 130 (1922). For a scholarly review of this subject, see also Howard H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. L. REV. 731 (2001).

⁸Letter from President Lincoln to the U.S. Senate and House of Representatives, Feb. 5, 1865, *Abraham Lincoln: Speeches and Writings 1859-1865*, THE LIBRARY OF AMERICA at 671-72 (1989).

⁹Florida's legislature also unsuccessfully attempted to appoint a set of electors in January 1877, after the December 1876 date set by Congress for the meeting of the Electoral College for the disputed election of 1876.

¹⁰Senate Rep. 1st Sess. 43rd Cong. No. 395 (1874).

¹¹*McPherson v. Blacker*, 146 U.S. 1 (1892).

¹²*Bush v. Gore*, 531 U.S. 98 (2000).

¹³In one footnote, Justice Stevens tried to distinguish appointing electors from ratifying constitutional amendments, arguing that appointing electors call upon legislatures "to act in a lawmaking capacity whereas Article V simply calls on the legislative body to make a binary decision." Justice Stevens did not want to overturn *Leser v. Garnett*, but his short argument is neither clear nor persuasive. It is particularly difficult to reconcile his idea of the state legislature's duty with another constitutional duty originally delegated to state legislatures: the selection of senators before passage of the 17th Amendment in 1913 gave that duty to the

"people" of the states. For more than a century before 1913, it was widely understood that state legislatures operated in this area under the federal Constitution and not their state constitutions. Even if there were a difference between legislative selection of electors as "lawmaking" and ratification of constitutional amendments as a "binary decision," it is much harder to see such a difference between legislative selection of electors and senators.

¹⁴*Virginia v. Tennessee*, 148 U.S. 503 (1893).

¹⁵Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L. J. at 372 (2007).

¹⁶See also Frederick L. Zimmerman and Mitchell Wendell, *THE LAW AND USE OF INTERSTATE COMPACTS* at 23 (Council of State Governments, 1976). According to the authors, "The real test of the need for Congressional consent is the degree to which an interstate agreement may conflict with federal law or federal interest."

¹⁷The plan provides that the last date for the plan to be effective in that election year is July 20, but that still might not be enough time for the courts to definitively rule on the plan in time to avoid a rancorous election.

¹⁸Rick Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, Legal Studies Paper No. 2007-48, HASTINGS CONST. L.Q. (forthcoming 2008).

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been successful in the past include the following:

- The fact that there was a restatement means someone did something wrong.
- The corporate executives did whatever they wanted to line their pockets and protect themselves at the expense of the investors and stockholders.
- Outside independent auditors are far from independent.
- Auditors have full access to the company's documents and employees and therefore either knew or should have known what was going on.

A few defense themes that have been successful include the following:

- Investors have a responsibility to do their own investigations into their investments.
- The plaintiffs are sophisticated investors who knew what they were doing.
- Investments are risks not guarantees.
- The government is desperate to blame somebody, so they're coming after us.
- The company hid information from us too.

Of course, the applicability and strength of these themes depend on the case at hand, and they are not successful in every case. Moreover, themes that are

not usually successful could work in a particular case if the facts and witnesses credibly support the idea. If a case looks like it will go to trial, parties must do their own due diligence and thoroughly examine the case to determine which themes and arguments work best with a specific fact pattern and in a specific venue.

In summary, securities cases often involve high stakes and high risk; therefore, such cases rarely go all the way to a trial. More commonly, securities cases are resolved through some type of settlement, mediation, or plea bargaining. Jury research can be a powerful tool in arriving at a successful resolution by identifying potential case themes prior to discovery so that counsel will know what to look for and ask in depositions and document requests. Once a good story is on the record, the story can be tested and tweaked through additional jury research to ensure that the strongest story possible is presented to opposing counsel, prosecutors, or mediators. Keep the destination in mind from the beginning, and the road won't be as bumpy. **TFL**

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