

The Unconstitutional Compact to Nullify the Electoral College

The NPVIC violates the basic principles and simple text of the US Constitution.

◆ BY PAUL E. GODEK

Virginia recently joined several other states in the so-called National Popular Vote Interstate Compact (NPVIC). These states have pledged to assign all their electoral votes to the presidential candidate with the highest share of the national popular vote. The agreement is supposed to go into effect if enough states join to account for 270 electoral votes, the number needed to win the election. The purpose of the NPVIC, therefore, is to elect the winner of the national popular vote, regardless of the outcome of individual states' votes.

Herein I review the history and structure of the electoral process and demonstrate that the NPVIC violates the basic principles as well as the simple text of the US Constitution.

IN THE BEGINNING

The method for electing the president is described in the country's founding document, the Constitution. The president is chosen by a vote of electors, who are appointed and instructed how to vote by the individual states. The Constitution directs 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" (Article II, Section 1). Over time, the collective group of electors, as well as the process itself, came to be known as the electoral college.

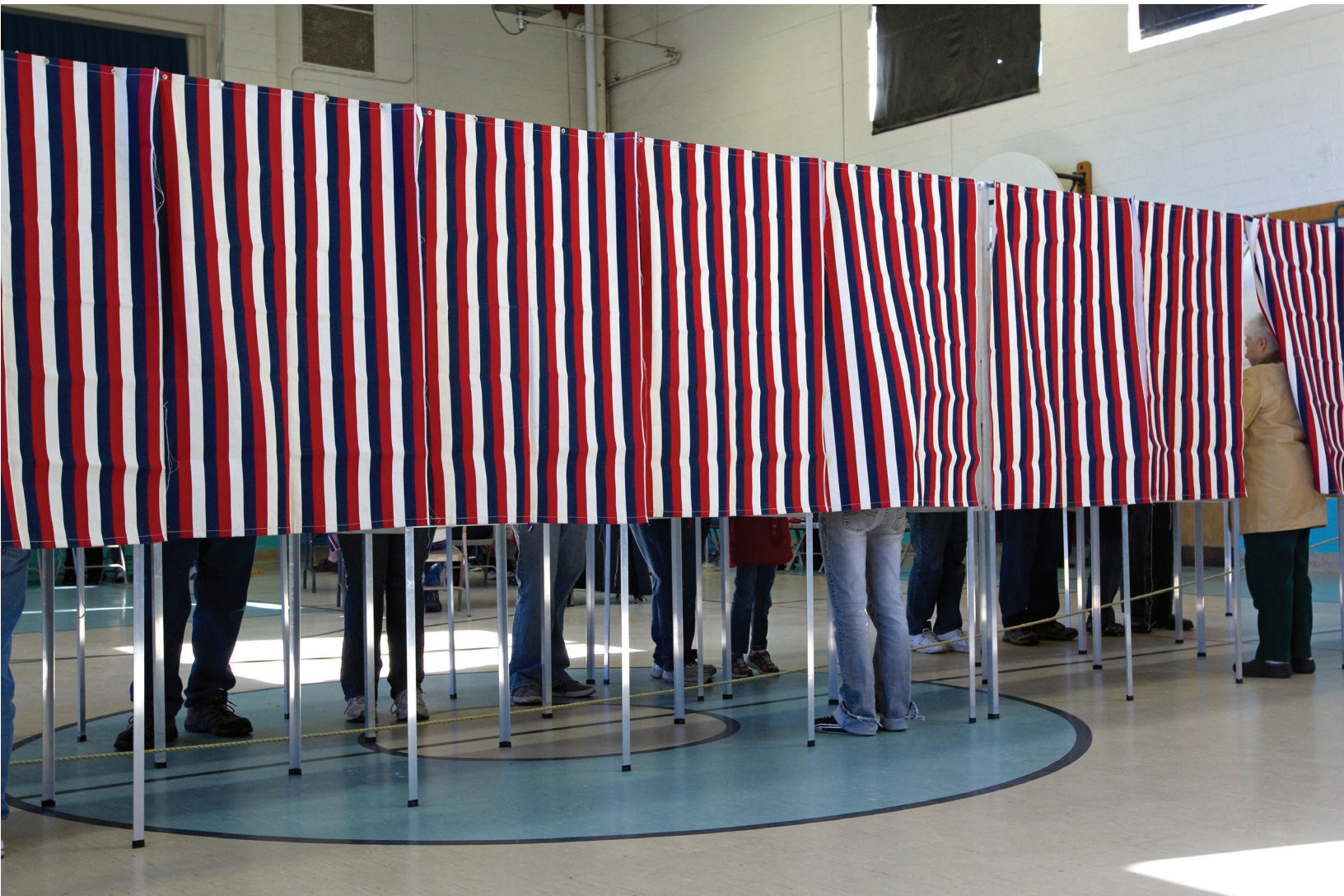
The first US presidential election was held in 1788, soon

after the necessary nine states had ratified the Constitution (in accordance with Article VII). Ten states participated in that first election, accounting for 20 senators, 49 representatives, and thus 69 electors. George Washington received all 69 electoral votes for president. In that election, only three states used a popular vote to appoint electors. In the other seven participating states, the state legislatures appointed the electors.

The transition to popular voting proceeded steadily. By 1824, all states except one had adopted some form of popular vote to assign electors. The exception, South Carolina, held out through 1860 and even more so in 1864 when it was in secession. South Carolina would use the popular vote to decide its electors in 1868, the first election after the Civil War, consistent with the 14th Amendment (more about which below). Hence, it was not until 1864, the 20th presidential election, that every participating state used some form of popular vote to appoint electors. Even then, there would be one more exception: In 1876, Colorado submitted legislature-appointed electors, but only because the newly adopted state did not have time to hold an election.

States have almost always directed their electors to vote unanimously, either for the candidate chosen by the state legislature or for the winner of the popular vote in the state, winner take all. The dominance of a winner-take-all allocation is not surprising. Each state would want to maximize its influence on the election. Two states, Maine and Nebraska, do it differently, however: They assign an elector to the winner of the popular vote in each congressional district; the two remaining electors are assigned to the winner of the popular vote in the

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state. As a consequence, Maine and Nebraska sometimes split their electoral votes. Curious, but so be it.

While all the states now use a popular vote to assign electors, the Constitution does not ascribe any relevance to the national popular vote, and no amendment has changed that. The electoral process is federalist; the overall outcome depends on the discrete outcomes within each state. By setting the number of electors at the number of senators and representatives accorded each state, the electoral process specifies exactly how much influence each state can have on the election of the president, regardless of the extent to which any given state's voters favor one candidate over another.

The electoral process remains a unique and viable solution for the election of a chief executive in a federal republic, created by states with widely varying populations. In the *Federalist Papers*, Alexander Hamilton concluded regarding the electoral process:

The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, 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. (Federalist 68)

Whether one agrees with Hamilton's description of the system as excellent, it has certainly been durable, though not immutable. The electoral process has been modified by the 12th, 14th, and 23rd Amendments:

- The 12th Amendment, ratified in 1804, declared that electors would vote separately for the offices of president and vice president, thus setting the stage for candidates for those two offices to run together on the same "ticket." Before the 12th Amendment, electors chose two candi-

dates for president. The candidate with the most votes (assuming a majority) became president, and the candidate with the second most votes (assuming a majority) became vice president. Under that system, the president and vice president could be in opposition, which was recognized as something that needed fixing. (The 12th Amendment also revised the process for selecting the president when no candidate receives a majority of the electoral votes.)

- The 14th Amendment, ratified in 1868, codified what had become standard practice by the time the amendment was ratified: States would use a popular vote, with universal male suffrage, to assign electors. The 14th Amendment also addresses several non-electoral issues; its relevance to the constitutional infirmities of the NPVIC is discussed below.
- The 23rd Amendment, ratified in 1961, assigned electoral votes to the District of Columbia equal to the number allocated to the least populous state—in other words, three.

None of these amendments altered the fundamental electoral process, which has remained unchanged since the adoption of the Constitution.

One other electoral event bears mentioning. Following the events of January 6, 2021, Congress passed the Electoral Count Reform Act (2022), which limits how members of Congress can object to the electoral vote submitted by an individual state. The act further delineates Congress's largely procedural task of tabulating and certifying the electoral vote.

IT WORKS AS INTENDED

As noted, the Constitution specifies that the number of a state's electors equals the number of its US senators and representatives. Each state has two senators, accounting for 100 electoral votes. The total number of US House members grew steadily along with the number of states, until it was fixed at 435 by the Apportionment Act of 1911 (effective in 1913) and affirmed by the Permanent Apportionment Act of 1929. (Another curious exception: In 1959 the number of representatives was increased temporarily to 437 to accommodate the entry of Alaska and Hawaii into the union. The extra two seats were eliminated in 1963, following the decennial reapportionment.) And, as noted, the 23rd Amendment assigns three electoral votes to the District of Columbia. Unless a new state is added to the realm or Congress revises the number of representatives—something it has not done in over 100 years—the current total of 538 electoral votes will prevail. A simple majority, 270 votes, is required to win the election.

The number of representatives allocated to a state is based on its population: one for the smallest states (currently there are six states with one representative); 52 for the largest state, California. As specified in the Constitution, the apportion-

ment process occurs every 10 years, based on state populations as determined by the official decennial census. The current apportionment method, in place since 1941, is credited to the mathematician Edward Huntington and to Joseph Hill, chief statistician of the US Census Bureau. The Huntington–Hill method applies a straightforward mathematical weighting formula to determine how many representatives each state shall have. (See Godek 2018 for details.) Adoption of the Huntington–Hill method does not appear to have been controversial; it simply made formulaic the ad hoc methods that had been applied over the preceding decades. Congress retains the authority to revise both the total number of representatives and the method for apportioning them among the states.

As demonstrated in Godek (2018), the method for apportioning representatives among the states, and thereby determining the number of electoral votes, ensures that small states will have shares of the electoral vote that are greater than their population shares, and population shares are a good proxy for the potential shares of the national popular vote. Conversely, large states have electoral vote shares that are less than their population shares, and thus less than their potential shares of the national popular vote. For example (from the 2024 election and the 2020 census), the least populous state, Wyoming, with one congressional representative, has 0.6 percent of the electoral vote and 0.2 percent of the US population, while California, with 52 representatives, has 10.0 percent of the electoral vote and 11.9 percent of the US population. In 2024, 32 states and the District of Columbia had an electoral vote share greater than their population share. Those states have a greater influence on the electoral vote than they would likely have on the national popular vote. This is not a new pattern. Throughout US history, the majority of states—the smaller ones—have had electoral shares greater than their population shares.

Compared to a national popular vote, a small state is likely to prefer the electoral college system because of the relative advantage conferred. Any state, large or small, may well prefer the system that is not dominated by a handful of the largest states. (When considering what system a state “prefers,” I am referring to what the voters of the state are likely to prefer in general, without consideration of the outcome in any particular election.) Because most of the states are likely to prefer the electoral college, it is not susceptible to removal by constitutional amendment, which would require the assent of three-fourths of the states.

None of this was happenstance. The current number of representatives (and consequently of electors) assigned to each state resulted from purposeful compromises among the states in consideration of the wide variation in state populations. The Constitution and subsequent laws embody several such accommodations to prevent a small number of large states from dominating political outcomes. In any case, the electoral

process does not correlate perfectly with the national popular vote. The electoral vote winner may not be the national popular vote winner. That is how the system works.

And such outcomes are nothing new. The 2016 election was the fourth time the winner of the electoral vote came in second in the popular vote—unusual but hardly unprecedented. Electoral vote winners defeated popular vote winners in 1876 when Rutherford B. Hayes defeated Samuel Tilden, in 1888 when Benjamin Harrison defeated Grover Cleveland, in 2000 when George W. Bush defeated Al Gore, and in 2016 when Donald Trump defeated Hillary Clinton.

There have been two understandably famous elections in

the highest share of the national popular vote. As of now, the NPVIC includes 18 states and the District of Columbia. Those entities account for 222 electoral votes, and the compact is supposed to become operational when that number reaches 270. So now might be a good time to consider the fundamental constitutional impediments to the NPVIC.

As noted, the Constitution declares, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” Accordingly, it is for the states to direct how their electors will vote. Also as noted, 48 states and the District of Columbia assign all their electors to the winner of the state’s popular vote, while Maine and Nebraska assign electors based

in part on voting in each congressional district. Since the Constitution gives each state the right to assign its electors as it sees fit, joining the NPVIC could be seen as just another way for a state to assign its electors. But it isn’t. There would appear to be three fundamental constitutional problems with the NPVIC.

First, joining the NPVIC means that the assignment of a state’s electoral

votes in a future election will not be in accordance with the will of the majority of the state’s voters. That outcome is, indeed, the explicit method of the NPVIC. If the winner of a state’s popular vote is the loser of the national popular vote, then the electors will be allocated contrary to the majority of that state’s voters. By joining the NPVIC, therefore, a state commits itself to disenfranchising its own voters, nullifying their votes in some future election. Disenfranchisement would seem to violate the plain text of the Constitution, which guarantees the vote to all eligible citizens. See in particular Section 2 of the 14th Amendment, which states in part:

[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States ... 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, ... 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.

(Let us first note that the vote was extended to female citizens by the 19th Amendment, ratified in 1920, and the voting age was lowered to 18 years by the 26th Amendment, ratified in 1971.)

The 14th Amendment, ratified in 1868, is one of the three “Reconstruction amendments” proposed and ratified following the Civil War. The 13th Amendment abolished slavery; the 14th Amendment guaranteed citizenship, all attendant “privileges or immunities,” and “equal protection of the laws” to all citizens, former slaves in particular; and the 15th Amendment established

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which no candidate won an electoral vote majority; those elections were turned over to the House of Representatives as specified in the Constitution. In 1800 the House of Representatives elected Thomas Jefferson over Aaron Burr; in 1824 the House elected John Quincy Adams over Andrew Jackson. Some historians credit Jefferson as the popular vote winner in 1800 and Andrew Jackson as the popular vote winner in 1824, but those elections occurred before every state relied on a popular vote to assign electors and before voter eligibility was standardized per the 14th Amendment. While Jefferson and Jackson received more popular votes in those states using the popular vote to assign electors, it is unknowable which candidate would have won a plurality of a hypothetical national popular vote with all states participating and with standardized voter eligibility.

To review, as of 2024 there have been 60 presidential elections, 40 of them with all participating states relying on a popular vote to assign electors (not counting 1876 when the newly adopted state of Colorado did not have time to arrange for a popular vote). In three of those 40 (and in 1876 when Tilden won the popular vote by more than the entire male population of Colorado), the second-place finisher in the national popular vote won the presidency by virtue of the electoral process described in the Constitution. Like it or not—and the volume of literature on each side of that divide is substantial, though the worthwhile portion is manageable—that is our system.

AN UNCONSTITUTIONAL ALLIANCE

Now an alliance of states wants to subvert that process. As noted, the NPVIC is an agreement among the states that join to award all their electoral votes to the candidate with

that the right to vote could not be abridged because of “race, color, or previous condition of servitude.” States were no longer allowed to usurp the fundamental rights of any of their citizens. Regarding the Reconstruction amendments, we can be thankful for them and thankful there was a country left to reconstruct.

The portion of the 14th Amendment quoted above describes an enforcement mechanism guaranteeing the voting rights for all citizens. Given its history, it would be more than a stretch to say the 14th Amendment had anticipated the

be the national popular vote. The electoral college would be nullified without constitutional amendment because of an agreement among a minority of states, far fewer than the three-quarters of the states necessary to approve an amendment. The valid methods for amending the Constitution are specified therein, in Article V, and an agreement among a minority of states is not one of them.

Three strikes, yes, but to this non-lawyer any one of the strikes would seem to be sufficient to find the NPVIC in violation of the Constitution. I will leave it to legal scholars and eminent historians to debate the merits of these problems should they care to. While I cannot see any coherent arguments contrary to those offered here, there will no doubt be legal and historical authority claimed for each side. What cannot be denied, however, is that the NPVIC is on its face an effort to overturn a crucial aspect of the Constitution without a constitutional amendment.

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NPVIC, but the text of Section 2 is clear: If a state denies or in any way abridges the “right to vote ... for the choice of electors,” that state will lose its representation in Congress to the extent of the disenfranchisement. Since the NPVIC *guarantees* that a state will deny its citizens the right to choose electors, that state would presumably lose all its representation in the House should the NPVIC become operational. Such an outcome implies a contradiction: A state that loses its representatives would also lose the associated electors. Let’s just say that the NPVIC cannot be made consistent with the rights of the voters to choose their electors, as required by the 14th Amendment.

The second problem is that Article I, Section 10 of the Constitution declares in part, “No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State.” It seems clear, therefore, that the NPVIC would require congressional approval to become operational. If Congress must approve the NPVIC, however, then any subsequent Congress can rescind that approval. The NPVIC would grant the electoral authority in the first instance to neither the electoral college nor the national popular vote, but rather to Congress to decide which process will prevail.

As noted, the Constitution provides that the House of Representatives shall determine the presidential election when no candidate wins a majority of the electoral votes. The NPVIC has nothing to do with that eventuality. Rather, the NPVIC depends on Congress to decide which system will be in effect. Under no stretch of anyone’s imagination does the Constitution grant Congress the authority to determine the process for electing the president and, thereby, who will be elected. In other words, the NPVIC is invalid, with or without congressional approval.

The third problem is that if the NPVIC becomes operational, then the only vote tabulation of consequence would

UNDOING THE COMPACT

The debates over the merits of the electoral process mandated in the Constitution are as old as the Constitution itself. Opponents of the process are free to work toward a constitutional amendment replacing it, abiding by the constitutional procedures for doing so.

The NPVIC, on the other hand, is a promise to disenfranchise voters of the joining states, and the congressional approval necessary would appoint Congress as the determiner of the method for electing the president and thereby of who is elected. Even if one somehow overlooks those problems, the NPVIC amends the Constitution without abiding by the process for doing so. In sum, the NPVIC states have declared their intention to subvert the Constitution.

Perhaps the tally of NPVIC electors will remain well below 270 and this idea will wither away; perhaps not. Unless the joining states reconsider—as they should—the Supreme Court may have to nullify this unconstitutional compact. R

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