# 6 The Agreement Among the States to Elect the President by National Popular Vote

This chapter

- summarizes the motivation for the authors' proposal to employ an interstate compact to change the system for electing the President and Vice President of the United States (section 6.1),
- presents the text of the authors' proposed National Popular Vote compact—called the "Agreement Among the States to Elect the President by National Popular Vote" (section 6.2),
- explains the proposed National Popular Vote compact on a line-by-line basis (section 6.3),
- mentions federal legislation that might be enacted by Congress in connection with the proposed National Popular Vote compact (section 6.4), and
- discusses previous proposals for multi-state electoral legislation (section 6.5).

## 6.1 MOTIVATION FOR THE NATIONAL POPULAR VOTE INTERSTATE COMPACT

Chapter 1 of this book made the following points:

- Under state winner-take-all statutes, all of a state's electoral votes are controlled by a plurality of the popular votes in each separate state. Because of these state statutes (that are in use in nearly every state), a person's vote is politically irrelevant unless the voter happens to live in a closely divided battleground state.
- Voters in four-fifths of the states are ignored in presidential elections.
- The existing winner-take-all system divides the nation's 130,000,000 popular votes into 51 separate pools, thereby regularly manufacturing artificial electoral crises even when the nationwide popular vote is not particularly close. In the past six decades, there have been six presidential elections in which a shift of a small number of votes in one or two states would have elected (and in 2000, did elect) a presidential candidate who lost the popular vote nationwide. There have been five litigated state counts among the nation's 56 presidential elections. This frequency of disputes is far higher than the rate for ordinary elections in which the winner is the candidate who receives the most popular votes.

- The existing system has elected a candidate to the Presidency who did not win the nationwide popular vote in four of the nation's 56 presidential elections— a failure rate of one in 14.
- State winner-take-all statutes are the reason why presidential voting does not matter in four-fifths of the states, artificial crises are regularly manufactured, and second-place candidates are sometimes elected to the presidency.

Chapter 2 established the following facts:

- The statewide winner-take-all system is established by state law—not the U.S. Constitution or federal law.
- The U.S. Constitution gives each state the exclusive power to choose the manner of choosing its presidential electors. Unlike the states' power to choose the manner of electing U.S. Representatives and Senators, the states' power to choose the manner of allocating its electoral votes is not subject to congressional oversight. The U.S. Supreme Court has repeatedly ruled that the power of each state to award its electoral votes is an "exclusive" and "plenary" state power.
- The Founding Fathers did not design or advocate the current system of electing the President. Instead, the current system evolved over a period of decades as a result of political considerations. The statewide winner-take-all rule was used by only three states in the nation's first presidential election (1789). Because each state realized that it diminished its voice by dividing its electoral votes, the statewide winner-take-all rule for the popular election of presidential electors gradually became the norm in the first five decades after the Constitution's ratification.
- Because the power to allocate electoral votes is exclusively a state power and the statewide winner-take-all rule is contained only in state statutes, a federal constitutional amendment is not necessary to change existing state winner-take-all statutes. The states already have the constitutional power to change the current system.

Chapter 3 analyzed the three most prominent approaches to presidential election reform that have been proposed in the form of a federal constitutional amendment, namely the fractional proportional allocation of electoral votes, allocation of electoral votes by congressional district, and direct nationwide popular election. Each of these three approaches was analyzed in terms of three criteria:

- **Accuracy**: Would it ensure the election to the presidency of the candidate with the most popular votes nationwide?
- **Competitiveness**: Would it improve upon the current situation in which voters in four-fifths of the states are ignored because they live in noncompetitive states?
- **Equality**: Would every vote be equal?

Chapter 4 analyzed the two most prominent approaches to presidential election reform that can be unilaterally enacted by the states without a federal constitutional amendment and without action by Congress, namely the whole-number proportional approach and the congressional-district approach.

Chapters 3 and 4 reached the conclusion that nationwide popular election of the President is the only approach that satisfies the criteria of accuracy, competitiveness, and equality.

Chapter 5 provided background on interstate compacts and made the following points:

- Interstate compacts are specifically authorized by the U.S. Constitution as a means by which the states may act in concert to address a problem.
- There are several hundred interstate compacts in existence, covering a wide variety of topics.
- An interstate compact may be enacted in the same manner as a state law—that is, by a legislative bill receiving gubernatorial approval (or sufficient legislative support to override a gubernatorial veto) or by the citizen-initiative process (in states having this process).
- Interstate compacts typically address problems that cannot be solved unilaterally, but that can be solved by coordinated action. Accordingly, a compact almost always takes effect on a contingent basis—that is, the compact does not take effect until it is enacted by a specified number or combination of states that are sufficient to achieve the compact's goals.
- There are no constitutional restrictions on the subject matter of interstate compacts (other than the implicit limitation that the compact's subject matter must be among the powers that the states are permitted to exercise).
- An interstate compact has the force and effect of statutory law in the states belonging to the compact. The provisions of an interstate compact bind all state officials with the same force as all other state laws. The provisions of a compact are enforceable in court in the same way that any other state law is enforceable—that is, a court may compel a state official to execute the provisions of a compact (by mandamus), and a court may enjoin a state official from violating a compact's provisions (by injunction).
- An interstate compact is a binding contractual arrangement among states involved. The Impairments Clause of the U.S. Constitution prohibits states from impairing the obligations of any contract, including interstate compacts. Thus, each state belonging to an interstate compact is assured that its sister states will perform their obligations under the compact.
- Because a compact is a contract, the provisions of an interstate compact take precedence over any conflicting law of any state belonging to the compact. As long as a state remains a party to a compact, it may not enact a law in conflict

with its obligations under the compact. That is, the provisions of an interstate compact take precedence over a conflicting law—even if the conflicting law is enacted after the state enters into the compact.

- A state may withdraw from an interstate compact in accordance with the provisions for withdrawal contained in the compact. In fact, a state may withdraw from an interstate compact only under the terms provided for in the compact.

The authors' proposal, namely an interstate compact entitled the "Agreement Among the States to Elect the President by National Popular Vote," would not become effective in any state until it is enacted by states collectively possessing a majority of the electoral votes (that is, 270 of the 538 electoral votes).

The National Popular Vote compact would not change a state's internal procedures for operating a presidential election. After the 50 states and the District of Columbia certify their popular vote counts for President in the usual way, a grand total of popular votes would be calculated by adding up the popular vote count from all 51 jurisdictions.

The Electoral College would remain intact under the National Popular Vote compact. The compact would simply change the Electoral College from an institution that reflects the voters' state-by-state choices (or, in the case of Maine and Nebraska, district-by-district choices) into a body that reflects the voters' nationwide choice. Specifically, the National Popular Vote compact would require that each member state award its electoral votes to the presidential candidate who received the largest number of popular votes in all 50 states and the District of Columbia. Because the compact would become effective only when it encompasses states collectively possessing a majority of the electoral votes, the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia would be guaranteed enough electoral votes in the Electoral College to be elected to the Presidency.

The National Popular Vote compact would reform the Electoral College while retaining our federalist system of state control over elections.

Note that every state's popular vote would be included in the nationwide total regardless of whether it is a member of the compact. Membership in the compact is not required for the popular votes of a state to count. That is, every vote in every state would be equal under the compact.

Note also that the political complexion of the particular states belonging to the compact would not affect the outcome—that is, 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.

## 6.2 TEXT OF THE NATIONAL POPULAR VOTE COMPACT

This section presents the entire text (888 words) of the proposed "Agreement Among the States to Elect the President by National Popular Vote."

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| | **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. |
| 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** |
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| 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. |

## 6.3 SECTION-BY-SECTION EXPLANATION OF THE NATIONAL POPULAR VOTE COMPACT

### 6.3.1 EXPLANATION OF ARTICLE I—MEMBERSHIP

Article I of the compact identifies the compact's prospective parties, namely the 51 jurisdictions that are currently entitled to appoint presidential electors under the U.S. Constitution. These 51 jurisdictions include the 50 states and the District of Columbia (which acquired the right to appoint presidential electors under terms of the 23rd Amendment). Elsewhere in the compact, the uncapitalized word "state" (defined in article V of the compact) refers to any of these 51 jurisdictions. The term "member state" refers to a jurisdiction where the compact has been enacted into law and is in effect.

### 6.3.2 EXPLANATION OF ARTICLE II—RIGHT OF THE PEOPLE IN MEMBER STATES TO VOTE FOR PRESIDENT AND VICE PRESIDENT

Article II of the compact mandates 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."

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."

From the perspective of the operation of the compact, this clause guarantees that there will be popular votes for President and Vice President to count in each member state. It fortifies the practice of the states (universal since the 1880 election) to permit

the people to vote for President. As discussed in detail in section 2.2, the people of the United States have no federal constitutional right to vote for President and Vice President. The people have acquired the privilege to vote for President and Vice President as a consequence of legislative action by 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 be withdrawn at any time merely by passage of a state law. Indeed, the voters chose the presidential electors in only six states in the nation's first presidential election (1789). Moreover, state legislatures have occasionally changed the rules for voting for President for purely political reasons. For example, just prior to the 1800 presidential election, the Federalist-controlled legislatures of Massachusetts and New Hampshire—fearing Jeffersonian victories in the popular votes in their states—repealed existing state statutes allowing the people to vote for presidential electors and vested that power in themselves.

Because an 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.[1] Thus, once a state enters into an interstate compact and the compact takes effect, the state is bound by the terms of the compact as long as the state remains in the compact. Because a compact is a contract, a state must remain in an interstate compact until the state withdraws from the compact in accordance with the compact's terms for withdrawal. Thus, in reading each provision of a compact, the reader may find it useful to imagine that every section of the compact is preceded by the words

> "Notwithstanding any other provision of law in the member state, whether enacted before or after the effective date of this compact, . . . "

Thus, as long as a state remains in the compact, Article II of the compact establishes the right of the people in each member state to vote for President and Vice President.

In addition, the wording of Article II of the compact 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." Under the short presidential ballot (described in detail in section 2.2.6), the voter is presented with a choice among "presidential slates" containing a specifically named presidential nominee and a specifically named vice-presidential nominee.[2] This clause does not prevent states from

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

[2] This clause does not prevent a presidential candidate from running with more than one vice-presidential nominee. In 2004, for example, there were two different Nader "presidential slates" in New York. Ralph Nader appeared on the ballot in New York as the presidential nominee of the Independence Party with Jan D. Pierce as his vice-presidential nominee. He simultaneously appeared on the New York ballot as the presidential nominee of the Peace and Justice Party with Peter Miguel Camejo as his vice-presidential nominee. There were, necessarily, two different lists of 31 nominees for presidential elector associated with each

displaying the names of candidates for presidential elector on the ballot (as a small number of states currently do). It simply 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 (say, as they did in 1964 as shown by the Vermont ballot in figure 2.1 and discussed in section 2.2.6 or as they did in 1960 as shown by the Alabama ballot in figure 2.13 and discussed in section 2.11), the winning presidential electors from that state would each inevitably receive a (slightly) different number of votes. Thus, there would not be any single number available to add into the nationwide tally being accumulated by the presidential slates running in the remainder of the country.

### 6.3.3 EXPLANATION OF ARTICLE III—MANNER OF APPOINTING PRESIDENTIAL ELECTORS IN MEMBER STATES

Article III of the compact is the heart of the compact. It establishes the mechanics of a nationwide popular election by prescribing the "manner of appointing presidential electors in member states."

The National Popular Vote compact is state legislation that exercises existing state 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."[3] [Emphasis added]

The first three clauses of Article III are the main clauses for implementing nationwide popular election of the President and Vice President.

The first clause of Article III of the compact provides:

> "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

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of the two Nader "presidential slates" in New York in 2004. Existing New York law treated and counted Nader's Independence Party votes separately from Nader's Peace and Justice Party votes.

[3] U.S. Constitution. Article II, section 1, clauses 1 and 2.

> 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 the federal law (Title 3, chapter 1, section 7 of the United States Code) providing:

> "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct."

For example, the federally designated day for the meeting of the Electoral College in 2012 was Monday, December 17, 2012.

The term "chief election official" used throughout the compact is defined in Article V of the compact as

> "the state official or body that is authorized to certify the total number of popular votes cast for each presidential slate."

In most states, the "chief election official" is the Secretary of State or the state canvassing board. In Alaska, the Lieutenant Governor is the "chief election official."

The first clause of Article III of the compact requires that the chief election official obtain statements showing the number of popular votes cast for each presidential slate in each state. Then, this clause requires that the popular votes for each presidential slate from all the states be added together to yield a "national popular vote total" for each presidential slate.

Because the purpose of the compact is to achieve a nationwide popular vote for President and Vice President, 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 member states on an equal footing with those from non-member states. Votes from *all* states and the District of Columbia are treated equally in calculating the "national popular vote total."

Popular votes can, however, only be counted from non-member states if there are popular votes available to count. As previously mentioned, Article II of the compact guarantees that each member state will produce a popular vote count because it requires member states to permit their voters to vote for President and Vice President in a "statewide popular election." 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

a non-member state were to take the presidential vote away from its own people, there would be no popular vote count available from such a state.

Similarly, in the unlikely event that a non-member state were to remove the names of the presidential nominees and vice-presidential nominees from the ballot and present the voters only with names of candidates for presidential elector (as was the case in 1960 in Alabama as shown by the ballot in figure 2.13 and discussed in section 2.11), there would be no way to associate the vote counts of the various presidential electors with the nationwide tally being accumulated by any regular "presidential slate" running in the rest of the country.

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]

In this way, the first clause of Article III of the compact deals with the unlikely possibility of a "one-state veto" preventing the orderly operation of the compact.

The word "determine" is discussed below in connection with the fourth and fifth clauses of Article III of the compact.

The purpose of the second clause of Article III of the compact is to identify the winner of the presidential election:

> "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.'"

The third clause of Article III of the compact guarantees that the "national popular vote winner" will end up with a majority of the electoral votes in the Electoral College.

> "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 third clause of Article III of the compact refers to the "presidential elector certifying official" (defined in Article V of the compact) rather than the "chief election official" because these two officials are not necessarily the same in every state.

Because the purpose of the compact is to implement a nationwide popular election of the President and Vice President, it is the *national* vote total—not each state's separate statewide vote count—that would determine the national winner. Under the compact, the Electoral College would reflect the *nationwide* will of the voters—not the voters' separate statewide choices. Thus, if, for example, the Republican presidential slate is the national popular vote winner, the presidential electors nominated

by the Republican Party in *all* states belonging to the compact would win election as members of the Electoral College in those states.

For purposes of illustration, suppose that the compact had been in effect in 2004, and that California had been a member of the compact in 2004, and that the Republican Bush–Cheney presidential slate received the most popular votes in all 50 states and the District of Columbia (as indeed was the case in the 2004 presidential election). In that event, the California Secretary of State would have declared the 55 presidential electors who had been nominated by the California Republican Party to be elected as California's members of the Electoral College. Those 55 Republican presidential electors would have gone to Sacramento in mid-December and cast their votes for their own party's nominees, namely George W. Bush and Dick Cheney.

In fact, 55% of California voters favored the Kerry–Edwards slate in 2004. Nonetheless, all 55 Republican candidates for presidential elector (not the 55 Democrats) would have won election as members of the Electoral College in California in 2004 because the specific purpose of the compact is to guarantee the presidency to the presidential slate (Bush–Cheney in the case of 2004) with the most votes nationwide.

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 mid-December. Given the fact that the Bush–Cheney presidential slate received 3,012,171 more popular votes in the 50 States and the District of Columbia in 2004 than the Kerry–Edwards slate, the compact would have guaranteed the Bush–Cheney slate a majority of the electoral votes in the Electoral College. Under the compact, the Bush–Cheney slate would have received a majority of the electoral votes even if 59,393 Bush–Cheney voters in Ohio had shifted to the Kerry–Edwards slate in 2004, thereby giving Kerry–Edwards the most popular votes in Ohio. In contrast, under the current system, if the Kerry–Edwards slate had carried Ohio, the Democrats would have received all of the state's 20 electoral votes and the Kerry–Edwards slate would have been elected to office with 272 electoral votes (to Bush's 266).

The first three clauses of Article III of the compact are the main clauses for implementing nationwide popular election of the President and Vice President. The remaining clauses of Article III of the compact deal with administrative matters, various contingencies, and technical issues.

The fourth clause of Article III of the compact requires the timely issuance by each of the compact's member states of an "official statement" of the state's "final determination" of its presidential vote.

> "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 particular deadline in this clause corresponds to the deadline contained in the "safe harbor" provision of federal law (section 5 of Title 3, chapter 1 of the United States Code). The phrase "final determination" in this clause corresponds to the term used in the "safe harbor" provision. Section 5 provides:

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

The federally established "safe harbor" date for the November 6, 2012, presidential election was Monday December 10, 2012.

The fourth clause of Article III of the compact, in effect, mandates each member state to comply with the "safe harbor" deadline. As a practical matter, this clause is merely a backstop because most states already have specific state statutory deadlines for certifying the results of presidential elections, and these existing statutory deadlines generally come considerably earlier than the federal "safe harbor" date (appendix T).

The word "communicated" in the fourth clause of Article III of the compact is intended to permit transmission of the "official statement" by secure electronic means that may become available in the future (rather than, say, physical delivery of the official statement by an overnight courier service).

The fourth clause of Article III of the compact is a backstop for section 5 of Title 3, chapter 1 of the United States Code. The U.S. Supreme Court in *Bush v. Gore* effectively treated the "safe harbor" date as a deadline for a state's "final determination" of its presidential election results.[4]

As to the non-compacting states, existing federal law (section 6 of Title 3 of the United States Code) requires that an official count of the popular vote for President from each state be certified and sent to various federal officials in the form of a "certificate of ascertainment."

> "It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the

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

> final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States **a certificate of such ascertainment** of the electors appointed, setting forth the names of such electors and **the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast**. . . . " [Emphasis added]

Figure 6.1 shows Vermont's 2008 Certificate of Ascertainment. The Certificate reads:

> "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 office of ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES. These votes were cast at the election held on Tuesday November 4, 2008."

Vermont's 2008 Certificate of Ascertainment contains the election results for eight political parties and scattered write-ins. The candidates receiving the most votes (219,262) are listed first on the certificate, and they were:

"For President and Vice President of the United States"

"Barack Obama and Joe Biden, Democratic

"Electors of President and Vice President of the United States

"Claire Ayer, Weybridge

"Euan Bear, Bakersfield

"Kevin B. Christie, Hartford

"219,262"

Vermont's 2008 Certificate of Ascertainment similarly presents the number of popular votes received by each of the other candidates.

Appendices E, F, G, H, and I show examples of certificates of ascertainment from Minnesota, Maine, Nebraska, New York, and Mississippi, respectively (each of which has specific features of interest discussed in chapter 2). Figure 9.5 shows Oregon's 2012 certificate of ascertainment. The certificates of ascertainment from all 50 states and the District of Columbia are available online for the 2000, 2004, and 2008 presidential elections.[5]

The certificate of ascertainment is not, of course, the only official document exist-

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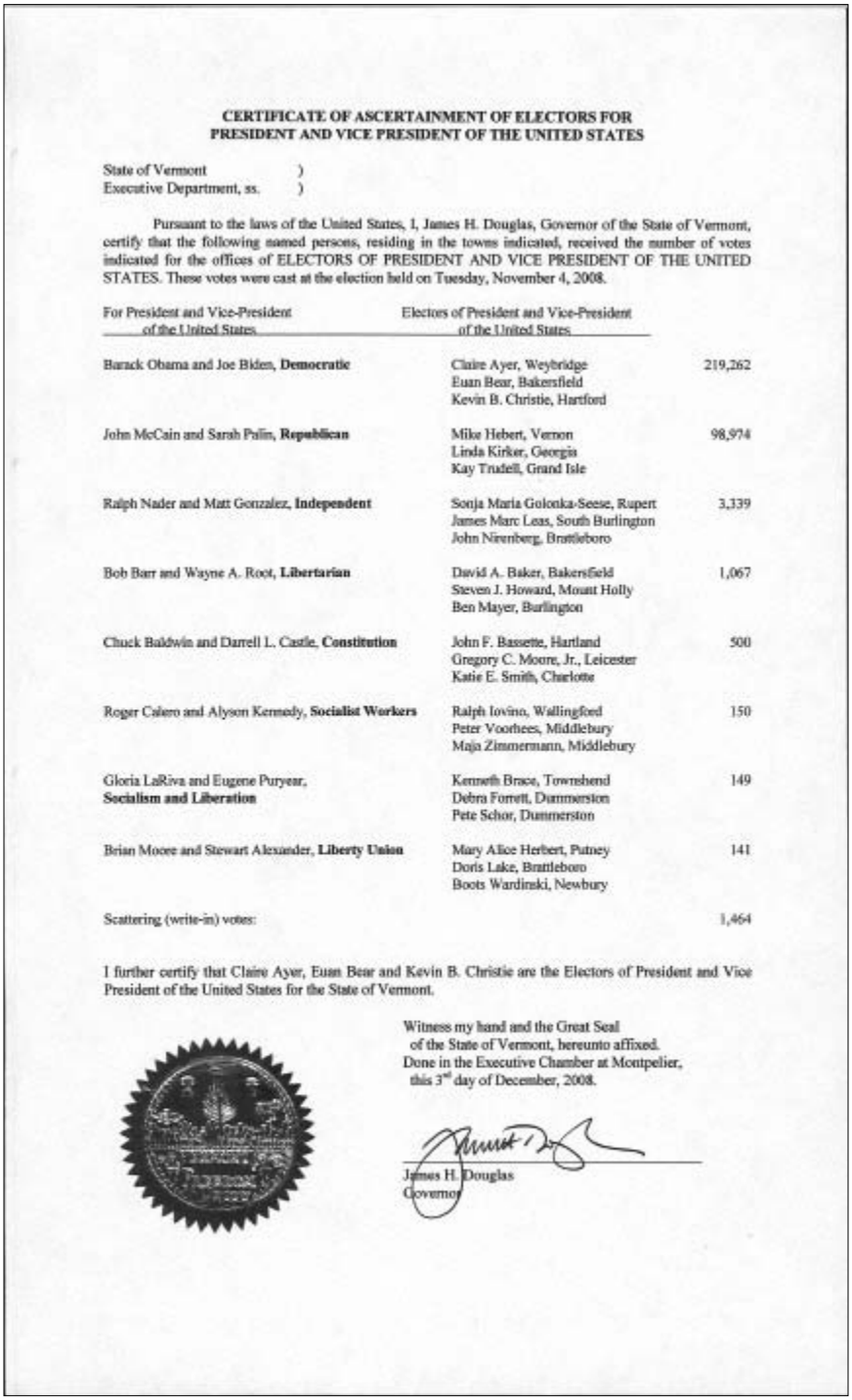
[5] For the 2004 presidential election, see http://www.archives.gov/federal-register/electoral-college/2004/certificates_of_ascertainment.html.



**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<br>Euan Bear, Bakersfield<br>Kevin B. Christie, Hartford | 219,262 |
| John McCain and Sarah Palin, **Republican** | Mike Hebert, Vernon<br>Linda Kirker, Georgia<br>Kay Trudell, Grand Isle | 98,974 |
| Ralph Nader and Matt Gonzalez, **Independent** | Sonja Maria Golonka-Seese, Rupert<br>James Marc Leas, South Burlington<br>John Nirenberg, Brattleboro | 3,339 |
| Bob Barr and Wayne A. Root, **Libertarian** | David A. Baker, Bakersfield<br>Steven J. Howard, Mount Holly<br>Ben Mayer, Burlington | 1,067 |
| Chuck Baldwin and Darrell L. Castle, **Constitution** | John F. Bassette, Hartland<br>Gregory C. Moore, Jr., Leicester<br>Katie E. Smith, Charlotte | 500 |
| Roger Calero and Alyson Kennedy, **Socialist Workers** | Ralph Iovino, Wallingford<br>Peter Voorhees, Middlebury<br>Maja Zimmermann, Middlebury | 150 |
| Gloria LaRiva and Eugene Puryear, **Socialism and Liberation** | Kenneth Brace, Townshend<br>Debra Forrett, Dummerston<br>Pete Schor, Dummerston | 149 |
| Brian Moore and Stewart Alexander, **Liberty Union** | Mary Alice Herbert, Putney<br>Doris Lake, Brattleboro<br>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 6.1** Vermont's 2008 Certificate of Ascertainment

ing in a state from which the vote count for presidential elections may be determined. As discussed in chapter 2, the vote counts for all elective offices (including the votes for presidential slates) are already officially recorded and contained in certificates that are created at the local level and then transmitted to the state official or body that is authorized to certify the total number of popular votes for each elective office in the state. Thus, the same information as contained in the Certificate of Ascertainment is available from other sources in the state.

The fifth clause of Article III of the compact provides:

> "The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress."

When the joint session of Congress counts the electoral votes on January 6 as provided in Title 3, chapter 1, section 15 of the United States Code, each state's own "final determination" of its vote is considered "conclusive" as to the counting of electoral votes by Congress if it was finalized by the date established in the "safe harbor" provision of federal law (Title 3, chapter 1, section 5). This section makes each state's (and, in particular, each *non-member* state's) final determination of its popular vote similarly "conclusive" when the chief election officials of the compact's member states add up the national popular vote under the terms of the compact. In other words, the chief election officials of the compact's member states are bound to honor each state's "final determination" in the same way that the joint session of Congress is currently bound to honor each state's "final determination."

The sixth clause of Article III of the compact 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."

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—namely, 100% of the electoral votes of each member state.

> "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 at least six potential situations that might prevent the national popular vote winner from receiving all of the electoral votes from a member state. These situations arise because of gaps and ambiguities in the widely varying language of state election laws concerning presidential elections.

First, the winning presidential slate might not be on the ballot in a particular member state. Generally, serious candidates for President qualify for the ballot in all 50 states. Ross Perot was on the ballot in all 50 states in both 1992 and 1996. John Anderson was on the ballot in all 50 states in 1980. Ralph Nader (who received only about 1/2% of the national popular vote in 2008) was on the ballot in 45 states. As of early July 2012, it was clear that the 2012 nominee of the Green Party (presumptively Jill Stein) will have a place on the ballot in at least 45 states.[6] However, third-party presidential candidates sometimes fail to get on the ballot in a particular state because they fail to comply with the state's ballot-access requirements. In the unlikely event that a third-party presidential candidate were to win the popular vote nationally without having qualified to be on the ballot in a particular state belonging to the compact, there would be no official slate of presidential electors "nominated in association with" the "national popular vote winner" in that particular state. The remedy for this situation (and each of the other situations described below) is to employ the concept behind Pennsylvania's current law for nominating presidential electors (described in section 2.12). Under current Pennsylvania law, each presidential nominee directly nominates the presidential electors who will run in association with the nominee's presidential slate in Pennsylvania.[7] The seventh clause of Article III of the compact gives the unrepresented presidential candidate the power to nominate the presidential electors for the state involved. The state's presidential elector certifying official would then certify the appointment of the candidate's choices for presidential elector.

Second, no presidential electors may be "nominated in association with" the winning presidential slate in a particular member state because of some unforeseen situation that might arise under the language of state election codes. The Republican National Committee scheduled the 2004 Republican National Convention to be held after Alabama's statutory deadline for each political party to provide the name of its presidential and vice-presidential nominees to state officials. The scheduling of the convention created the possibility that there would be no Republican presidential slate

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[6] Saulny, Susan. Green Party, still the outsider looking in, has a new face this campaign. *New York Times*. July 13, 2012.

[7] The method of direct appointment of presidential electors by the presidential nominee is regularly used in Pennsylvania. Section 2878 of the Pennsylvania election code 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 office of presidential elector as the State is then entitled to."

on the Alabama ballot in 2004. The problem was satisfactorily resolved when the Alabama legislature agreed to pass special legislation in early 2004 to change the state law. Because the 2012 Republican National Convention is in late August and the 2012 Democratic Convention is in early September, similar special legislation will be required in 2012 in several states. In the unlikely event that a problem of this type could not be satisfactorily addressed by emergency state legislation, the seventh clause of Article III of the compact provides the means to ensure that the presidential candidate who received the most popular votes nationwide receives the electoral votes from all compacting states.

Third, a full slate of eligible presidential electors might not be nominated in association with the winning presidential slate in a particular member state. For example, in 2004, then-Congressman Sherrod Brown was nominated as a Democratic presidential elector in Ohio. Brown was ineligible to be a presidential elector because 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."[8]

Although Congressman Brown resigned his nomination as presidential elector and the Ohio Democratic Party nominated a replacement, some contended that Ohio's procedure for filling a vacancy among the list of nominees for presidential elector did not permit naming a replacement in this situation because there had been no legal nomination for the position in the first place, and hence no vacancy to fill. This contention arose because of ambiguous language in Ohio law. This contention remained unresolved because Kerry did not carry Ohio in 2004.

Fourth, 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 2.10) creates the possibility that two or more competing slates of presidential electors could be nominated in association with the same presidential slate.

At the present time, fusion voting is routinely and widely used in only one state—New York. Because fusion voting is so routinely used in New York, the procedures for handling fusion voting in connection with presidential elector slates are a settled issue. In 2004, for example, voters in New York had the opportunity to vote for the Bush–Cheney presidential slate on either the Republican Party line or the Conservative Party line (as shown by the voting machine face in figure 2.11). The political parties sharing a presidential nominee in New York nominate a common slate of 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

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

votes for all 31 Republican-Conservative candidates for the position of presidential elector. The popular votes cast for Kerry–Edwards on the Democratic Party line and the Working Families Party line were similarly 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 therefore became entitled to all of New York's 31 electoral votes. The common Kerry–Edwards slate of 31 presidential electors was therefore declared to be elected to the Electoral College in New York. New York's 2004 Certificate of Ascertainment (appendix H) shows this aggregation.

Fusion voting is permissible at the present time under the laws of numerous other states under various circumstances (e.g., Vermont). The laws of states where fusion is not routinely used could lead to situations in which two competing elector slates are nominated under the banner of the same presidential slate.

Fifth, 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 presidential write-ins (section 2.8), it is possible that 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 to pare down his group of presidential electors in that state.

Sixth, 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 2.8). In fact, it requires advance filing of the name of only one presidential elector, even though Minnesota has 10 electoral votes.[9] Moreover, voters in Minnesota may cast write-in votes for President without advance filing.

The eighth clause of Article III of the compact enables the public, the press, and political parties to closely monitor the implementation of the compact within each member state:

> "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 "statements" is intended to refer to both "official statements" of a state's "final determination" of its presidential vote (the fourth clause of Article III of the compact) and any intermediate statements that the chief election official may obtain or consider 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 that may arise under the various practices and procedures of the states for officially recording and reporting presidential votes. The Certificate of

[9] Minnesota election law. Section 204B.09, subdivision 3.

Ascertainment issued by the state in accordance with federal law,[10] for example, would be considered to be a "statement." However, the Certificate of Ascertainment is not the only "statement" from which a state's presidential vote might be determined.

Because time is severely limited prior to the constitutionally mandated meeting of the Electoral College 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.

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."

This "governing" clause operates in conjunction with the first clause of Article IV of the compact relating to the date when the 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—the "governing" clause—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,[11]
- the fall general election campaign period,
- Election Day on the Tuesday after the first Monday in November,
- the meeting of the Electoral College on the first Monday after the second Wednesday in December,
- the counting of the electoral votes by Congress on January 6, and
- the scheduled inauguration of the President and Vice President for the new term on January 20.

The ninth clause of Article III of the compact 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. The importance of this distinction is that it is theoretically possible that the compact could come into effect by virtue of enactment by states possessing a majority of the votes in the Electoral College (i.e., 270 or more of the 538 electoral votes), but

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[10] 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 for the provisions of the U.S. Constitution and appendix B for provisions of federal law relating to presidential elections.

[11] All recent national nominating conventions of the major parties have met after July 20.

that, at some future time, the compacting states might no longer possess a majority of the electoral votes. The situation could arise in any of four ways.

First, a future federal census might reduce the number of electoral votes possessed by the compacting states so that they no longer account for a majority of the electoral votes. This could occur if the compacting states happened to lose population relative to the remainder of the country. In that event, the compact provides that the compact as a whole would remain in effect (because the compact would have come into initial effect under the first clause of Article IV of the compact); however, Article III (the operative article in the compact) would then not "govern" the next presidential election. If additional state(s) subsequently enacted the compact— thereby raising the number of electoral votes possessed by the compacting states above 270 by July 20 of a subsequent presidential election year—Article III of the compact would then again govern presidential elections.[12]

As a second example, if one or more states withdrew from the compact and thereby reduced the number of electoral votes possessed by the remaining compacting states below 270 by July 20 of a presidential election year, the compact as a whole would remain in effect, but Article III (the operative article in the compact) would not govern the next presidential election.

As a third 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 permanently or temporarily adjusted upwards, it is conceivable that the compacting states might no longer possess a majority of the new number of electoral votes. If the newly admitted state and/or some combination of pre-existing state(s) subsequently enacted the compact—thereby raising the number of electoral votes possessed by the compacting states above a majority of the new number of electoral votes—Article III of the compact would again govern.

As a fourth 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, Article III of 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. For example, in 2005, Representative Tom Davis (R–Virginia) proposed increasing the number of Representatives from 435 to 437 on a temporary basis in connection with his bill to give the District of Columbia voting representation in Congress.[13]

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[12] As a practical matter, the scenario can only arise if the number of electoral votes possessed by states belonging to the compact hovers close to 270.

[13] Under the D.C. Fairness in Representation Act (H.R. 2043) introduced May 3, 2005, the size of the House of Representatives would have been increased from 435 to 437 until the 2010 census. Utah is the state that would have become entitled to one of the two additional congressional seats under the 2000 census and 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 be expected to divide equally among the Democrats and Republicans. The Davis bill provided that the number of seats in the House would revert to 435 after the 2010 census.

As long as the compacting states possess a majority of the electoral votes on July 20 of a presidential election year, Article III of the compact would govern the presidential election. In practice, the question as to whether the compact would govern a particular presidential election would be known long before July 20 of the presidential election year. Changes resulting from the census are no surprise because the census does not affect congressional reapportionment until two years after the census.[14] A new state enters the Union only after a time-consuming process. Enactment of a state law withdrawing from an interstate compact is a time-consuming, multi-step legislative process involving the introduction of a bill, action on the bill in a committee in 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.[15] In addition, new state laws generally do not take immediate effect, but instead take effect at a particular future time specified by the state constitution.[16] Moreover, a withdrawal from the compact cannot take effect during the six-month period between July 20 of a presidential election year and the subsequent January 20 inauguration date (as discussed below). Finally, enactment of any federal statutory change in the number of U.S. Representatives is a time-consuming, multi-step legislative process.

### 6.3.4 EXPLANATION OF ARTICLE IV—ADDITIONAL PROVISIONS

The first clause of Article IV of the compact 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 same version of a compact must, of course, be enacted by each member state. 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, or inconsequential typographical errors) that sometimes occur when the same law is enacted by various states.

The second clause of Article IV of the compact permits a state to withdraw from

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[14] For example, the 2000 federal census did not affect the 2000 presidential election. The results of the 2000 census affected the 2002 congressional election and the 2004 presidential election.

[15] Similarly, the citizen-initiative process is 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 a November general election).

[16] In most states, a super-majority vote is necessary to give immediate effect to a legislative bill. The details vary from state to state.

the compact but provides for a "blackout" period (of approximately six months) restricting withdrawals:

> "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 or in the period between the popular voting in early November and the meeting of the Electoral College in mid-December. This restriction on withdrawals is warranted in light of the subject matter of the compact.[17] 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 came into effect in the midst of the presidential election process, that state's withdrawal from the compact would not take effect until completion of the entire current presidential election cycle. The language used in the compact tracks the wording of the 20th Amendment. The date for the end of the present President's term is fixed by the 20th Amendment as January 20; however, the 20th Amendment recognizes the possibility that a new President might, under certain circumstances, not have been "qualified" by that date. 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 of the compact concerns the process by which each state notifies all the other states of the status of the compact. Notices are required on three occasions—namely, when the compact has taken effect in a particular state, when the compact has taken effect generally (that is, when it has been enacted and taken effect in states cumulatively possessing a majority of the electoral votes), and when 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.

### 6.3.5 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 may refer to a different official or body.

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[17] Delays in the effective date of withdrawals are commonplace in interstate compacts (and, indeed, in contracts in general). See section 5.15.3 for additional discussion on withdrawals from interstate compacts in general and chapter 9 for additional discussion on withdrawals from the National Popular Vote compact in particular.

The definition of "presidential slate" in Article V of the compact is important because voters cast votes for a team consisting of a presidential and vice-presidential candidate and because the votes for each distinct team are aggregated separately in the national count under the terms of the compact. "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 died during the presidential election cycle,[18] resigned from a slate,[19] or became disqualified.[20]

Because ballots in North Dakota and Arizona list only the name of the presidential candidate (see figure 2.3), the definition of "presidential slate" in the compact contains a savings clause for North Dakota and Arizona.

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 2.10 and shown in figure 2.11, 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 a different slate of 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 Certificate of Ascertainment in appendix H). There was no fusion of votes between the Independence Party and the Peace and Justice Party in this situation because there were two distinct presidential slates and two distinct slates of presidential electors.

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 withdraw from its voters the power to vote for President (as Massachusetts and New Hampshire did in the 1800 presidential election, as described in section 2.2.3), there would be no popular votes available to count from that state. If there were no popular vote to count from a particular state, the "national popular vote total" would necessarily not include that state.

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[18] Horace Greeley, the (losing) Democratic presidential nominee in 1872, died between the time of the November voting and the counting of the electoral votes.

[19] Senator Thomas F. Eagleton of Missouri resigned from the 1972 Democratic presidential slate.

[20] A presidential candidate must be a natural-born citizen.

## 6.4 POSSIBLE FEDERAL LEGISLATION

The enactment of the "Agreement among the States to Elect the President by National Popular Vote" would provide an excellent opportunity for Congress to review existing federal laws concerning presidential elections.

The proposed "Agreement among the States to Elect the President by National Popular Vote" is intended to be entirely self-executing. To this end, the compact identifies officials in each member state to perform the necessary tasks of obtaining the popular vote counts from all the states, adding up the votes from all the states to yield the "national popular vote total," and designating the "national popular vote winner." These tasks could be simplified by the establishment of an administrative clearinghouse for these functions. The officials of the compacting states might themselves establish such a clearinghouse. Alternatively, such a clearinghouse might be established by federal law.

Numerous problems have been identified concerning the existing schedule of events involving the November general election, the "safe harbor" date, the timing of the meeting of the Electoral College in mid-December, the counting of the votes by Congress in early January, and the presidential inauguration scheduled for January 20.

Leonard M. Shambon, an assistant to the co-chairman of the Ford-Carter Commission on Election Reform in 2001 and a member of the advisory board to the Carter-Baker Commission in 2005, described some of the problems associated with the current schedule in a 2004 article entitled "Electoral-College Reform Requires Change of Timing."[21] Solutions to several of the problems identified in the Shambon article were incorporated in H.R. 1579, introduced by Representative David Price (D–North Carolina) on April 12, 2005.[22] They are discussed further by Suzanne Nelson in an article entitled "Three-Month Period Imperils Presidency."[23]

In addition, Norman Ornstein, a resident scholar at the American Enterprise Institute, described additional potential problems concerning presidential elections in a 2004 article entitled "Want a Scary Scenario for Presidential Chaos? Here Are a Few."[24]

Additional issues have been raised by John C. Fortier, a resident fellow of the American Enterprise Institute, and Norman Ornstein in a 2004 article entitled "If Terrorists Attack Our Presidential Elections"[25] and by Jerry H. Goldfeder, an elections law

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[21] Shambon, Leonard M. 2004. Electoral-College reform requires change of timing. *Roll Call*. June 15, 2004.

[22] H.R. 1579— To amend Title 3, United States Code, to extend the date provided for the meeting of electors of the President and Vice President in the States and the date provided for the joint session of Congress held for the counting of electoral votes, and for other purposes. Introduced April 12, 2005.

[23] Nelson, Suzanne. Three-month period imperils presidency. *Roll Call*. November 2, 2004.

[24] Ornstein, Norman. 2004. Want a scary scenario for presidential chaos? Here are a few. *Roll Call*. October 21, 2004.

[25] Fortier, John C., and Ornstein, Norman. 2004. If terrorists attack our presidential elections. 3 *Election Law Journal* 4. Pages 597–612.

attorney in New York and Adjunct Professor at Fordham University School of Law, in an article entitled "Could Terrorists Derail a Presidential Election?"[26]

A possible new federal law concerning recounts is contained the discussion of recounts in section 9.15.7.

The enactment of the National Popular Vote compact would provide an excellent opportunity for Congress to address these issues.

## 6.5 PREVIOUS PROPOSALS FOR MULTI-STATE ELECTORAL LEGISLATION

The "Agreement among the States to Elect the President by National Popular Vote" described in this chapter is a combination of numerous ideas and previous proposals for multi-state electoral legislation.

In *Oregon v. Mitchell*, U.S. Supreme Court Justice Potter Stewart pointed out in 1970 that an interstate compact could be employed by the states for electoral purposes. *Oregon v. Mitchell* concerned congressional legislation establishing uniformity among the states for 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 enacted federal legislation concerning residency requirements, the states could have adopted an interstate compact to accomplish the same objective.[27]

In the 1990s, U.S. Senator Charles Schumer (D–New York) proposed a bi-state compact in which New York and Texas would pool their electoral votes in presidential elections. Both states were then (and still are) noncompetitive in presidential politics and receive little attention in presidential campaigns except for fund-raising. 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)[28] and the two states regularly produced majorities of approximately the same magnitude in favor of each state's dominant political party. The Democrats typically carry New York by about 60%, and the Republicans typically carry Texas by about 60%. The purpose of Schumer's proposed bi-state compact was to create a presidentially competitive super-state (slightly larger than California) that would attract the attention of the presidential candidates during presidential campaigns.

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.

The earliest (currently known) published discussion along those lines was from Brent White of Seattle on December 30, 2000. In a web posting entitled "Direct Prez Election W/O Amendment," White wrote:

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[26] Goldfeder, Jerry H. 2005. Could terrorists derail a presidential election? 32 *Fordham Urban Law Journal* 3. May 2005. Pages 523–566.

[27] *Oregon v. Mitchell*. 400 U.S. 112 at 286–287. 1970.

[28] In the 2004 presidential election, New York had 31 electoral votes, and Texas had 34.

> "**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. . . .
>
> "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**."[29] [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.**[30] [Emphasis added]

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[29] The list was the full-representation@igc.topica.com list. This December 30, 2000, posting is archived at http://lists.topica.com/lists/full-representation@igc.topica.com/read/message.html?mid=702433464&sort=d&start=800. 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 this book was first published in 2006.

[30] See http://lists.topica.com/lists/full-representation@igc.topica.com/read/message.html?mid=702436082&sort=d&start=800. The authors are grateful to Steve Chessin, President of Californians for Electoral Reform, who remembered and located Solgard's December 31, 2000, web posting after this book was first published in 2006. Chessin notes that this posting was made using the e-mail address of Tony Solgard's wife (Karen L. Solgard).

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, made the observation 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.[31]

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 nationwide winner of the popular vote.[32,33]

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 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 (politically implausible) assumption that carefully selected pairs of states of equal size and opposite political leanings could be found to enact the proposal.

Initially, it was argued the resulting multi-state arrangement would not constitute an interstate compact, and, as a result, the proposed arrangement would not require congressional consent.[34] 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.[35,36]

The authors of this book started developing the National Popular Vote compact

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[31] 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).

[32] 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. http://writ.news.findlaw.com/amar/20011228.html.

[33] Amar, Akhil Reed, and Amar, Vikram David. 2001. Rethinking the electoral college debate: The Framers, federalism, and one person, one vote. 114 *Harvard Law Review* 2526 at 2549, n. 112.

[34] The question of whether a given arrangement is an interstate compact is separate from the question of whether the arrangement requires 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. However, as discussed in section 5.12, many interstate compacts do not require congressional consent.

[35] 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.

[36] 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.

in 2004 and released the first edition of this book (which contained the compact) at a press conference at the National Press Club in Washington, DC, on February 23, 2006.[37]

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.[38]

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.

Moreover, the earlier proposals do not work in an even-handed and nonpartisan 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

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[37] 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 2000 web publications by Brent White of Seattle and Tony Anderson Solgard of Minneapolis after the compact was written and after the first edition of this book was released on February 23, 2006. The authors became aware of the 2001 web publications of Professor Bennett and the Amar brothers after the 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 the 2001 web publications by Professor Bennett and the Amar brothers. The earlier 2000 web postings by Brent White and Tony Anderson Solgard are now recognized as the earliest (now known) publications on this topic. 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.

[38] 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.

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 nonpartisan 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, 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).[39] 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. As of mid-2012, 2,110 state legislators have either sponsored the National Popular Vote compact in their state legislatures or cast a recorded vote in favor of it.

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[39] 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.