

# The Electoral College and the Federal Popular Vote

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*The notion of holding a popular vote for the President of the United States is an intuitively simple idea. We hold popular elections for the governor of each state. We hold popular direct elections for basically every other office, from United States Senator to local dog catcher. We even elect judges in many states.*

*The National Popular Vote, or NPV, would change our existing system, in which the winner of the Electoral College wins the presidency, to a system that more closely resembles these other elections. The NPV turns the Electoral College into a mechanism by which the winner of the aggregate total of the popular vote in the fifty states and the District of Columbia becomes the winner of a majority of the electors in the Electoral College. States individually pledge to award their electoral votes to the candidate who receives the most aggregated votes in the fifty states and the District of Columbia. When at least 270 electoral votes' worth of states join the pledge, the compact takes effect.*

*The NPV shifts our system to that of a popular presidential election without the need to go through the onerous constitutional amendment process, which requires two-thirds of both houses of Congress plus legislative approval in thirty-eight states. The NPV Compact allows us to skip all that, for proponents of the NPV have a shortcut—just get 270 electoral votes' worth of states to sign on.*

*But any talk of a "national" popular vote is a misnomer at best, and an outright lie at worst. The only existing mechanism we have to compile voting preferences is federal, not national, in nature. In contrast, the only way to create a national popular vote is through nationwide regulation at the congressional level, which the Constitution does not now authorize. While piecemeal efforts might bring about some greater uniformity, a federal constitutional amendment is the only means to determine a national popular vote.*

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## I. PARTLY NATIONAL, PARTLY FEDERAL

The NPV would turn the existing decentralized presidential election system into a single aggregate popular vote total. But the NPV's framework does not adequately consider how deeply this decentralization is embedded in our constitutional structure. Consider the framing in Federalist 39.

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In Federalist 39, Publius argues that the new Constitution is republican in character.<sup>1</sup> For the election of the President, Publius notes that it is mixed in character. He writes:

The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.<sup>2</sup>

Publius rebuts the contention of the anti-federalists, who claimed that a republican government must be exclusively “federal” in form—that is, a confederacy of sovereign states. The anti-federalist complained that the Constitution would create a government too “national” in character. Publius walks through various provisions of the Constitution to identify how in some forms it is national in character, and in others it is federal.

This allocation of authority between federal and state power is not an accidental choice. Concerns arose at the Constitutional Convention that the executive would be too beholden to the legislature if the legislature had too much power over the selection of the executive. The legislature was excluded from the selection process of the executive—at least, excluded until the Electoral College failed to choose a President by a majority vote and winnowed the field for the House to choose among a set of candidates.<sup>3</sup>

Instead of giving Congress the power to choose the Presidents, the state legislatures have plenary authority to choose how to direct the appointment of presidential electors, who then vote for the President—this is what Publius describes as the “political characters” of the states. And that is a process

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<sup>1</sup> See THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob E. E. Cooke ed., 2010).

<sup>2</sup> *Id.*

<sup>3</sup> While many in the Constitutional Convention endorsed selection by the legislature, its opponents carried the day, some defending independence of the executive. See, e.g., JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 306 (Adrienne Koch ed., 1987) (noting that Gouverneur Morris opposed selection of the executive by the legislature as the executive would be “the mere creature of the Legislature: if appointed & impeachable by that body”); *id.* at 311 (James Madison commenting that “[t]he Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a reappointment”). Late in the convention, it appeared that the legislature would have the power to choose the executive, over the opposition of Morris and others. See JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 524 (Adrienne Koch ed., 1967). But the Electoral College developed, as Roger Sherman explained from the Committee of Eleven designed to solve some intractable dilemmas, “to render the Executive independent of the Legislature.” *Id.* at 576.

that varies state by state. Today, all fifty states and the District of Columbia direct the appointment by a popular vote.

Our presidential elections system is partly national, partly federal. And as we begin to examine the compiled vote totals in the United States, the federal elements begin to appear. Professor Norman Williams calls this the “myth of the national election.”<sup>4</sup> Professor Michael Morley identifies the “national” popular vote as an “aggregation” of election results across the several states.<sup>5</sup> I have written about this as “invisible federalism,” the hallmarks of elections from each state and the hidden distinctions between them that make them distinctive contests.<sup>6</sup> It is tempting to look at these common parallel actions of all fifty states and think there is a national popular vote. True, we can compile a nationwide total of the popular vote. But it is not a national popular vote.

## II. ARTIFICIAL NATIONAL POPULAR VOTE TOTALS

There is nothing particularly novel about adding up presidential votes like the NPV proposes. Pundits<sup>7</sup> and academics<sup>8</sup> commonly add up the popular vote received by presidential candidates in each of the fifty states and the District of Columbia, then arrive at a popular vote total for each candidate.

Indeed, we even create a popular vote tally under existing federal law. Every four years, the Federal Election Commission compiles the vote totals of each presidential candidate in all fifty states and the District of Columbia.<sup>9</sup> Under the Federal Election Campaign Act and its amendments, presidential candidates are eligible for public financing of elections. “Major party” candidates are those who are nominees of a party that received at least “25 percent or more of the total number of popular votes received by all candidates for such office” in the preceding presidential election.<sup>10</sup> They are eligible for the maximum amount of federal funding provided by statute.<sup>11</sup> “Minor party” candidates are those whose party received at least five percent but less than twenty-five percent of the popular vote in the preceding elec-

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<sup>4</sup> Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 222 (2011).

<sup>5</sup> Michael T. Morley, *The Framers’ Inadvertent Gift: The Electoral College and the Constitutional Infirmary of the National Popular Vote*, 15 HARV. L. & POL’Y REV. XX, XX (2020).

<sup>6</sup> Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1265–78(2012).

<sup>7</sup> See, e.g., David Leonhardt, *Clinton’s Substantial Popular-Vote Win*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/11/opinion/clintons-substantial-popular-vote-win.html> [<https://perma.cc/N6AJ-7EVM>].

<sup>8</sup> See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1086, 1086 n.169 (2001) (noting that George W. Bush did not win “a majority of the popular vote”).

<sup>9</sup> See generally *The Election and Voting Information*, FED. ELECTION COMM’N, <https://transition.fec.gov/pubrec/fe2016/federalelections2016.pdf> [<https://perma.cc/GZ44-A3R3>].

<sup>10</sup> 26 U.S.C. § 9002(6) (2018).

<sup>11</sup> See *id.* § 9004.

tion.<sup>12</sup> They receive a reduced amount of public funding depending on their share of the vote.<sup>13</sup> Congress decided to award public funding in rough measure to popular support, choosing popular vote totals over alternatives, like a nationwide petition drive or public opinion polling.<sup>14</sup>

Congress's judgment is not wrong. If Congress wants to provide public funding for serious campaigns and only serious campaigns, it needs a rough idea of national support. A popular vote total is a good, but rough, measure of national support.

But elections are not about rough measures of public support, as if they were public opinion polls. They aggregate the preferences of individual voters to determine a winner. And aggregating those preferences across state borders yields disparate results.

### III. STATE DIFFERENCES IN HOLDING ELECTIONS

While the NPV adds up the vote totals across the states, it fails to recognize that voting differs from state to state. Imagine a gubernatorial election in Massachusetts. Imagine that the Democratic candidate was on the ballot in Barnstable County but not in Essex County. Imagine that incarcerated felons could vote in Middlesex County, but no one ever convicted of a felony could ever vote in Suffolk County. Imagine the polls were open until 6 pm in Worcester County but 9 pm in Norfolk County.

Such a system seems unbelievable because we could not fathom such disparities when we are all voting for the same office. If it is a single constituency election—that is, we are all as a nation voting for the President—then we should have *some* uniformity of rules. I am hardly alone in critiquing this—proponents of turning the Electoral College into a national popular vote have recognized that voting rules uniformity is essential to any reform effort.<sup>15</sup>

<sup>12</sup> *Id.* § 9002(7).

<sup>13</sup> *See id.* § 9004.

<sup>14</sup> *See* Buckley v. Valeo, 424 U.S. 1, 99–100 (1976).

<sup>15</sup> *See, e.g.,* ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 176 (2006) (“[A]ny full move to a nationwide popular vote would have to take seriously the definition of eligibility to vote for president.”); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 571 (1968) (“In short, a natural next step in our developing ‘one-man-one vote’ theory would be a constitutional amendment setting up a uniform and nationally policed system for presidential elections.”); JAMES A. MICHENER, PRESIDENTIAL LOTTERY 127 (1969) (“To stop this kind of basement bargaining, federal laws would pretty surely be required, and they would dictate such things as voting age, registration procedures, and polling practices. Opponents of federal control hold that this is too high a price to pay for the admitted advantages that otherwise flow from direct popular voting.”); NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE’S PRESIDENT 233 (1981) (“Senator Bayh stated the case in less formal language: ‘If we see some mad scramble by the states to lower voter qualifications willy-nilly, then Congress can step in and establish uniform standards.’”); WALLACE S. SAYRE & JUDITH H. PARRIS, VOTING FOR PRESIDENT: THE ELECTORAL COLLEGE AND THE AMERICAN POLITICAL SYSTEM 87, 145 (1970) (“What is far more important is that the national government would intervene directly in the administration of presi-

Let us start with a few of the more obvious differences. Each state fixes voter eligibility, and voter eligibility varies among the states. Incarcerated felons can vote in Vermont and Maine, but nowhere else in the country. In states like Iowa and Kentucky, felons are permanently disenfranchised, even after completing terms of parole and probation.<sup>16</sup> Mental capacity provisions vary from state to state.<sup>17</sup> While no state authorizes children under the age of 18 to vote in presidential elections, there is nothing that prevents them from doing so in the future—indeed, some states experiment with youth voting in local elections.<sup>18</sup> Non-citizens have the right to vote in some local elections, too.<sup>19</sup> Adding vote totals, then, is not reflective of a single popular vote. It reflects a series of independent vote totals, state by state, with varying voting-eligible populations casting votes.

Residency restrictions may differ from state to state. Suppose you vote early in Colorado, then move to Arizona and cast another vote there on Election Day. Under many state laws, that is perfectly legal—the choice of

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dential elections, which is now a state function. . . . National administration of presidential elections would probably be necessary.”); Robert W. Bennett, *Current Electoral College Reform Efforts Among the States*, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 187, 193 (Gary Bugh ed., 2010) (“Making the nationwide popular vote decisive also highlights state variations in who is eligible to vote, and might put pressure on states to expand that eligibility—for instance by lowering the voting age below eighteen. State variations in registration and other procedural requirements might also come under scrutiny.”); Brian J. Gaines, *Compact Risk: Some Downsides to Establishing National Plurality Presidential Elections by Contingent Legislation*, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES, *supra*, at 113, 119 (“If the national vote total suddenly matters, however, expect a string of legal battles over efforts to impose uniform rules on a system never meant to be uniform.”); Paul D. Schumaker, *The Good, the Better, the Best: Improving on the “Acceptable” Electoral College*, in ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES, *supra*, at 203, 207 (“The compact allows somewhat more complexity than the popular plurality systems used to elect state officials, because states could set different rules regarding voter eligibility (such as voting rights of former felons) and adopt different procedures for casting votes (such as the extensive use of the mail ballot in Oregon).”); Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 252 (2011) (“If and when the NPVC comes into being, I would forcefully urge Congress to supplement it with a system of uniform rules for tallying sentiment in all fifty states.”); see generally Muller, *supra* note 7, at 1279–80 n.265.

<sup>16</sup> See Muller, *supra* note 7, at 1273–75.

<sup>17</sup> See Williams, *supra* note 5, at 223–24.

<sup>18</sup> See, e.g., Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 63–64 (2017); Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1473–74 (2012); Daniel Hart & Robert Atkins, *American Sixteen- and Seventeen-Year-Olds Are Ready to Vote*, 633 ANNALS AM. ACAD. POL. & SOC., 201, 202 (2011); Carrie Seleman, *Around the World: Children’s Suffrage: Giving 16 Year Olds the Right to Vote*, 38 CHILD. LEGAL RTS. J. 174, 174–75 (2018); cf. Muller, *supra* note 7, at 1270–73.

<sup>19</sup> See Muller, *supra* note 7, at 1275–77. But see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 216, 18 U.S.C. § 611(a) (2012) (prohibiting non-citizen voting in certain federal elections); Derek T. Muller, *Is a Federal Ban on Alien Voting Unconstitutional?*, EXCESS DEMOCRACY (June 21, 2013), <https://excessofdemocracy.com/blog/2013/6/is-a-federal-ban-on-alien-voting-unconstitutional> [https://perma.cc/3538-EQFT]; Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 469 (2017).

presidential electors in Colorado is a distinct contest from the choice of presidential electors in Arizona, even though it appears you voted “twice” for President.<sup>20</sup>

Voting procedures can vary wildly from state to state, too. Some states have strict photo voter identification laws, others have no identification requirement at all.<sup>21</sup> Some open polling at different hours—including West Coast polling locations that are open far later than certain East Coast jurisdictions, in which millions of votes could be publicly reported as the polls remain open elsewhere.<sup>22</sup> Some have extensive early voting and some have little absentee voting at all.<sup>23</sup> Voters might well be discouraged from voting in later jurisdictions once results from earlier jurisdictions pour in, or might have more opportunities to participate in some jurisdictions over others.

Ballot access standards vary from state to state. In 2016, Green Party nominee Jill Stein and independent candidate Evan McMullin, among others, appeared on the ballot in only some states.<sup>24</sup> States like Texas have extremely early ballot access deadlines and prevent late entrants from joining the race.<sup>25</sup> There was an effort to keep Donald Trump off the ballot in 2016 in Minnesota for a filing error;<sup>26</sup> there are efforts to keep him off the ballot in 2020 for failing to disclose his tax returns.<sup>27</sup> In a “national” contest, it

<sup>20</sup> See, e.g., *State v. Hannah*, 355 P.3d 607, 609 (Ariz. Ct. App. 2015) (recognizing that federal elections in Arizona and Colorado, though held on the same day, are “separate and discrete elections,” precluding application of a criminal statute forbidding a state resident from voting “more than once in any election”). *But compare* 52 U.S.C. § 10307(e)(1) (2012) (“Whoever votes more than once in an election [for the office of President, Vice President, presidential elector] shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”) *with id.* § 10307(e)(3) (“the term ‘votes more than once’ does not include . . . the voting in two jurisdictions [in certain presidential elections], to the extent two ballots are not cast for an election to the same candidacy or office”).

<sup>21</sup> See *Voter Identification Requirements*, NAT’L CONF. ST. LEGISLATURES (Feb. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/W955-CD82>].

<sup>22</sup> See Muller, *supra* note 7, at 1266 n.177.

<sup>23</sup> See *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT’L CONF. ST. LEGISLATURES (Apr. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/UW2V-45RP>].

<sup>24</sup> See Richard E. Berg-Andersson, *The Green Candidate Ballot Access by State*, GREEN PAPERS (Jan. 18, 2020), <https://www.thegreenpapers.com/G16/President-BallotAccessByState.phtml> [<https://perma.cc/E8KE-UR2U>].

<sup>25</sup> See TEX. ELEC. CODE ANN. §§ 146.023, 146.025, 172.002, 181.005, 181.006, 192.003, 192.031, 192.032, 192.033 (West, Westlaw through the end of the 2019 Regular Session of the 86th Legislature) (requiring independent candidates to petition “no later than the second Monday in May,” *id.* § 192.032(c), while authorizing political parties to nominate “before the later of . . . the 71st day before the presidential election; or . . . the first business day after the date of final adjournment of a party’s national nominating convention,” *id.* § 192.031(a)(3)).

<sup>26</sup> See Rachel E. Stassen-Berger, *Donald Trump Will Stay on Minnesota Ballots, Court Rules*, TWIN CITIES PIONEER PRESS (Sept. 13, 2016), <https://www.twincities.com/2016/09/12/donald-trump-will-stay-on-minnesota-ballots-court-rules/> [<https://perma.cc/5MWE-VVFK>].

<sup>27</sup> See, e.g., *Griffin v. Padilla*, 417 F. Supp. 3d 1291, 1293–94 (E.D. Cal. 2019); *Patterson v. Padilla*, 451 P.3d 1171, 1178 (Cal. 2019). I argue such proposals are unconstitutional in that they exceed state power to regulate the “manner” of directing the appointment of presidential

seems unusual to compile the votes across jurisdictions when candidates differ across them.

Methods for counting ballots, from stray marks to signature matching, can vary. Ranked choice voting might alter how popular vote totals are reported from those jurisdictions as opposed to others.<sup>28</sup>

Recount laws vary from state to state—and none authorize recounts in close *national* elections. Most states have automatic recount provisions if the election is particularly close in the state, say within a quarter of a percentage point of votes cast separating the winner and loser. Others allow a candidate to file for—and maybe pay for—a recount if the election is a little less close. But many states do not allow a recount if the margin of victory is particularly large. Imagine we had our nationwide popular vote total, and the vote is close. We would want to recount everywhere. Practical problems, certainly. But legally, in many states, there would be no legal authority to recount unless states updated their statutes. Why? Because the race inside the state may not be particularly close, even if the nationwide margin is close. Again, state laws refer to state election results, not to nationwide vote tallies.<sup>29</sup>

Admittedly, we *do* see some variations from county to county in single constituency elections. A particular statewide election, like a governor or a United States Senator, on the ballot might affect voter behavior or turnout for other races.<sup>30</sup> Ballot formats may differ from across jurisdictions—think Florida in 2000 and how only some parts of the state used punch card ballots.<sup>31</sup> Today's early voting means some counties prepay postage for absentee ballots and other counties require you to supply your own postage.<sup>32</sup> Signature verification among absentee ballots could differ from jurisdiction to jurisdiction.<sup>33</sup> And even the most uniform of standards are subject to human error that may vary from the humans staffing a particular polling place.

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elections. See generally Derek T. Muller, *Weaponizing the Ballot*, FLA. ST. U. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3450649](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450649) [<https://perma.cc/2BGC-A8GV>]. Even so, incentives for states to exclude disfavored parties or candidates from the ballot in ways that vary from state to state are longstanding. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983).

<sup>28</sup> See Derek T. Muller, *Maine, Ranked Choice Voting, and the National Popular Vote Compact*, EXCESS DEMOCRACY (July 10, 2019), <https://excessofdemocracy.com/blog/2019/7/maine-ranked-choice-voting-and-the-national-popular-vote-compact> [<https://perma.cc/HH4T-MRBG>].

<sup>29</sup> See Williams, *supra* note 5, at 232–34.

<sup>30</sup> See, e.g., Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700, 700 (2001).

<sup>31</sup> See Ford Fessenden, *No-Vote Rates Higher in Punch-Card Counts*, N.Y. TIMES, Dec. 1, 2000, at A29, <https://www.nytimes.com/2000/12/01/us/contesting-vote-voting-machines-no-vote-rates-higher-punch-card-counts.html> [<https://perma.cc/4XYC-RVUR>].

<sup>32</sup> See, e.g., Susie Armitage, *Mail-In Ballot Postage Becomes a Surprising (and Unnecessary) Cause of Voter Anxiety*, PROPUBLICA (Nov. 1, 2018), <https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety> [<https://perma.cc/DZN8-QPHD>].

<sup>33</sup> See, e.g., Susie Armitage, *Handwriting Disputes Cause Headaches for Some Absentee Voters*, PROPUBLICA (Nov. 5, 2018), <https://www.propublica.org/article/handwriting-disputes-cause-headaches-for-some-absentee-voters> [<https://perma.cc/H5ML-VGHU>].

So how much uniformity ought we have in a “national” presidential election? I would submit that we ought to have more than the NPV requires—none. And I submit that we ought to have more uniformity than currently exists in federal popular vote tallies.

It is not simply the lack of existing legislation that presents a practical problem that states ought to rush to repair. *Bush v. Gore*,<sup>34</sup> if we can talk about that case seriously and not as a one-ride ticket, emphasized that similarly situated voters must be treated similarly or risk violating the Equal Protection Clause.<sup>35</sup>

True, *Bush v. Gore* occurred in a single-constituency election—the state of Florida was electing presidential electors, and it needed to have some uniformity in its statewide election. But the decision to enact the NPV converts the state’s choice of electors into an aggregation of the vote totals of the fifty states and the District of Columbia—in effect, a new single constituency. It would not pass “one person, one vote” as explained in *Gray v. Sanders*<sup>36</sup> to argue that Florida was aggregating the votes from its sixty-seven counties. Instead, single constituency elections require some minimal uniformity of treatment of voters.

But let us put aside whether some conception of the Equal Protection Clause—*Bush v. Gore*, “one person, one vote,” or otherwise—constitutionally *compels* a particular degree of uniformity.<sup>37</sup> Instead, once we determine that we *ought* to have some level of uniformity, how might we go about achieving it? Creating uniformity presents its own challenges without a constitutional amendment.

#### IV. CHALLENGES TO ESTABLISHING UNIFORMITY

Although the NPV adds up the votes across the country to come up with a popular vote total, it lacks a mechanism to bring uniformity to those different jurisdictions. Before shifting to a national popular vote, existing state practices must be aligned. Some existing uniformity in presidential elections is assuredly accidental. States may be aware of how other states handle elections, but many happily run elections with their own state-specific idiosyncrasies.

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<sup>34</sup> 531 U.S. 98 (2000) (per curiam).

<sup>35</sup> See *id.* at 106 (“[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”); *id.* at 109 (“The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.”); *id.* at 126 (Stevens, J., dissenting) (“Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.”).

<sup>36</sup> 372 U.S. 368 (1963).

<sup>37</sup> See Morley, *supra* note 6; Derek T. Muller, *Perpetuating “One Person, One Vote” Errors*, 39 HARV. J.L. & PUB. POL’Y 371, 371–73 (2016).



A greater priority would be to prevent gamesmanship in the states for a nationwide election. We would expect states to start behaving differently if their election laws no longer had only intrastate influence but interstate influence—consider disenfranchising ex-felons, enfranchising children, or making it more difficult for some candidates to obtain ballot access. We do not need to identify any given change as good or bad—the mere difference from other states is sufficient for concern. Before the NPV can be implemented, then, mechanisms for uniformity to prevent gamesmanship must be implemented.

At a theoretical level, then, we need to consider how much uniformity and equality we want in elections, a consensus to implement across jurisdiction. And on top of that, we need not only a definition, but also to ensure that we can unify those standards so that similarly situated voters are treated similarly. The NPV is silent on this issue by design, because its proponents emphasize that states are free to continue to engage in their elections as they have done in the past and that the NPV is no dramatic change to the status quo. The NPV places exceedingly few conditions on state behavior—compacting states must recognize the results in other states and cannot withdraw from the compact six months before Inauguration Day.

And perhaps even more challenging, once we agree on how much uniformity we need, we then need to figure out how to implement it.

### *A. Uniform State Legislation*

One option might be uniform state legislation. States could simultaneously adopt the same election rules in all presidential elections, obviating the need for federal legislation and consistent with the spirit of the NPV.

Such proposals seem unrealistic. If fifty states agree on uniform election rules, amending the Constitution seems the more attractive option, which tends to highlight the unlikelihood of uniform legislation. Most states, out of convenience, hold presidential elections alongside many other state and local election contests. Rules regulating presidential elections invariably affect other contests, unless the state chooses to separate them at increased cost.<sup>38</sup>

But any increase in uniformity would be better, even if not all fifty states join. Indeed, increased uniformity ought to have been a part of the draft NPV, or at least best practices should have been developed beforehand. Granted, such practices would only bind or advise the compacting states, but it would bring a greater degree of uniformity.

Uniform legislation also assumes states would not race to the bottom to manipulate their election rules to provide outsized effect on a national race. One state's decision to exclude a major party candidate from the ballot or alter enfranchisement rules could easily tilt an election.

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<sup>38</sup> See *infra* Section IV.B.

### B. Existing Federal Constitutional Authority

If disparities exist across jurisdictions and states are reluctant to coordinate behavior, could Congress provide that uniformity? The original Constitution provides little federal power over presidential elections. Congress may determine the “time of choosing electors,” and the “day on which they shall give their votes.”<sup>39</sup>

That is it.<sup>40</sup> Congress has no power to regulate the “manner” of holding elections, unlike congressional elections.<sup>41</sup> There is no power to dictate the rules of voter eligibility or rules for uniformity.

Constitutional amendments offer some additional federal power. Congress has enforcement authority if the right to vote is “denied or abridged” “on account of race, color, or previous condition of servitude,”<sup>42</sup> “on account of sex,”<sup>43</sup> “by reason of failure to pay any poll tax or other tax,”<sup>44</sup> or “on account of age” for those “18 years of age or older.”<sup>45</sup>

The Supreme Court recognized the authority of Congress to regulate the manner of elections, including some presidential election regulations. And stringing together Supreme Court precedents and past exertions of congressional authority may get advocates part of the way toward providing uniformity.

In *Ex parte Yarbrough*,<sup>46</sup> the Court upheld the scope of one of the Enforcement Acts, which criminalized conspiracy to prevent “any citizen who is lawfully entitled to vote” from supporting an “elector for President or Vice President” or a “member of Congress.”<sup>47</sup> At particular issue in *Yarbrough* was a conspiracy to physically assault an African-American citizen attempting to cast a vote for a member of Congress.

Seemingly relying on the scope of the Elections Clause and the Necessary and Proper Clause, the Court explained “Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function?”<sup>48</sup> Then, turning to the power of Congress under

<sup>39</sup> U.S. CONST. art. II, § 1, cl. 4. For a robust defense of the federal scope of authority of the Elections Clause, see Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019).

<sup>40</sup> See James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Electors*, 27 L. & CONTEMP. PROBS. 495, 497 (1962).

<sup>41</sup> *Cf. id.*; U.S. CONST. art. I, § 4, cl. 1.

<sup>42</sup> U.S. CONST. amend. XV.

<sup>43</sup> *Id.* amend. XIX.

<sup>44</sup> *Id.* amend. XXIV.

<sup>45</sup> *Id.* amend. XXVI.

<sup>46</sup> 110 U.S. 651 (1884)

<sup>47</sup> *Id.* at 655, 667.

<sup>48</sup> *Id.* at 661.

the Fifteenth Amendment, “Congress has the power to protect and enforce that right.”<sup>49</sup>

The Supreme Court would later broaden its interpretation of the scope of congressional power, ostensibly relying on *Yarborough*. Consider *Burroughs v. United States*,<sup>50</sup> which concerned congressional regulation through the Federal Corrupt Practices Act (“FCPA”) of political committee activities, including those organizations that sought to “influence the election of presidential and vice presidential electors.”<sup>51</sup> The Court acknowledged that Congress lacked a “manner” power for presidential elections, unlike congressional elections. But it emphasized that *Yarborough* “made no distinction” between congressional and presidential elections (without noting the Fifteenth Amendment authority that *Yarborough* heavily relied on and that the FCPA could not rest on).

The *Burroughs* Court emphasized that anti-corruption rules did not “interfere with the power of a state to appoint electors *or the manner* in which their appointment shall be made,” and it did not invade “any exclusive state power.”<sup>52</sup> Instead, federal law tacked penalties onto conduct surrounding existing state election rules: “Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections.”<sup>53</sup> *Burroughs* stood for the power to preserve existing elections, not to alter state election rules.

The same principle extended to the Federal Election Campaign Act and the Supreme Court’s decision in *Buckley v. Valeo*.<sup>54</sup> There the Court relied on *Burroughs* for the power to regulate campaign financing, but it also approved of publicly financed presidential elections to promote the “general welfare” and that public financing was “necessary and proper” to that end.<sup>55</sup>

Consistent with *Buckley*, Congress might exert its power over the purse to condition election-related spending in the states if states comply with certain federal mandates<sup>56</sup>—at the risk of unconstitutionally coercing states.<sup>57</sup>

<sup>49</sup> *Id.* at 665.

<sup>50</sup> 290 U.S. 534 (1934).

<sup>51</sup> *Id.* at 541.

<sup>52</sup> *Id.* at 544–45 (emphasis added). This is a reason, I think, that Professor Vik Amar may overread the scope of *Burroughs* in describing the “federal power to safeguard elections of federal officers” that might authorize Congress to institute a nationwide presidential preference poll. Amar *supra* note 16, at 255–57; *see also*, Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 908 (2002) (construing *Burroughs* as “wide enough reach to embrace national-ballot and voting-equipment legislation”).

<sup>53</sup> 290 U.S. at 548.

<sup>54</sup> 424 U.S. 1 (1976).

<sup>55</sup> *See id.* at 90–91 (“Congress has power to regulate Presidential elections and primaries, . . . *Burroughs*; and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power.”).

<sup>56</sup> *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted) (“[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”).

And, of course, Congress has the power to regulate the “manner” of federal congressional elections. If Congress provided extensive rules for congressional elections, it might simultaneously exert pressure on the states to align their presidential elections in the same manner.

Would that work? Maybe. Because Congress has broader authority to regulate congressional elections than presidential elections, it could dictate specific election rules—including ballot access rules and early voting requirements—under the Elections Clause. It already requires federal congressional elections and presidential elections to be held on the same day. As a result, there would be pressure on the states to have presidential election rules that match the congressional election rules.

That said, indirect federal pressure in elections has occasionally been unsuccessful. States are often reluctant to submit to indirect pressure. After the Twenty-Fourth Amendment prohibited poll taxes in federal elections, states with poll taxes largely continued to require them in state elections.<sup>57</sup> After Arizona and Kansas were forbidden from enforcing proof of citizenship requirements in federal elections after a Supreme Court ruling in 2013, they began to develop a separate registration system for state elections.<sup>59</sup> Federal congressional election rules might introduce some greater degree of uniformity, but it is far from assured.

Congress has certainly *legislated* as if it has broader powers than the Presidential Electors Clause and the enforcement authority of the constitutional amendments. The Voting Rights Act Amendments of 1970,<sup>60</sup> the Uniformed and Overseas Citizens Absentee Voting Act,<sup>61</sup> the National Voter Registration Act of 1993,<sup>62</sup> and the Help America Vote Act of 2002<sup>63</sup> each regulated presidential elections on “manner”-related topics. Perhaps states have largely acquiesced given the complexity of holding a separate election for congress from all other contests, or perhaps because the intrusions are (mostly) minor.<sup>64</sup>

<sup>57</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–82 (2012).

<sup>58</sup> See Harper v. Va. Bd. of Elections, 383 U.S. 663, 664 (1966).

<sup>59</sup> See, e.g., Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES (Oct. 11, 2013), <https://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html> [<https://perma.cc/Q862-JGTV>].

<sup>60</sup> Pub. L. 91-285, § 6, 84 Stat. 314, 316 (defining durational residency for “voting for the offices of President and Vice President”); *id.* § 6, 84 Stat. at 316 (declaring that the right to vote “in any primary or in any election” shall not be “denied” “on account of age” for anyone “eighteen years of age or older”).

<sup>61</sup> Pub. L. 99-410, § 107(3), 100 Stat. 924, 927 (codified at 52 U.S.C. § 20310(3)) (“Federal office” means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.”).

<sup>62</sup> Pub. L. 103-31, § 3(2), 107 Stat. 77, 77 (defining “Federal office” as defined by the Federal Election Campaign Act of 1971, or “the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress,” 52 U.S.C. § 30101(3) (2018)).

<sup>63</sup> Pub. L. 107-252, 116 Stat. 1666 (referring throughout to “Federal office”).

<sup>64</sup> *But see* Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 35 n.2 (Thomas, J., dissenting) (“Constitutional avoidance is especially appropriate in this area because the NVRA purports to regulate presidential elections, an area over which the Constitution gives Congress no authority whatsoever.”).

Of note, the Voting Rights Act Amendments of 1970 offered two notable expansions of federal power. First, it tried to enfranchise eighteen-year-olds in federal and state elections. A fractured Supreme Court with no majority opinion concluded Congress could do so for federal elections<sup>65</sup>—but not state elections, which led to the Twenty-Sixth Amendment.

A seven-justice majority of the Supreme Court later questioned the precedential value of *Mitchell*.<sup>66</sup> In *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court held that—at least for congressional elections—“[p]rescribing voting qualifications, therefore, ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause, which is ‘expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.’”<sup>67</sup> The Court likewise emphasized that a five-justice majority in *Mitchell* rejected the Fourteenth Amendment as a source of congressional authority to establish voter qualifications.<sup>68</sup>

Second, the Voting Rights Act Amendments of 1970 established minimum residency requirements in presidential elections.<sup>69</sup> The Court, in various opinions, upheld that authority on a variety of grounds—Congress’s enforcement authority under the Privilege or Immunities Clause, the Privileges and Immunities Clause, the right to travel across state lines, or an inherent power to regulate presidential elections.<sup>70</sup>

In short, judicial precedents that affirm Congress’s power to regulate presidential elections are typically untethered to textual grants of authority to Congress. When Congress’s power is ratified by the Supreme Court, it often comes through plurality opinions that are later called into question or in generic language that emphasizes how state prerogatives in running presidential elections remain intact. Power over voter qualifications remains the least likely area of federal power. But exertions of authority through the Spending Clause or in parallel elections held pursuant to federal mandates under the Elections Clause might increase some uniformity.

### C. Federal Constitutional Amendment

There is no viable state or federal mechanism to create uniform presidential election rules for a national popular vote. And while the NPV is

<sup>65</sup> See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>66</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 n.8 (2013) (opinion of Scalia, J.) (“That result, which lacked a majority rationale, is of minimal precedential value here. Five Justices took the position that the Elections Clause did *not* confer upon Congress the power to regulate voter qualifications in federal elections. This last view, which commanded a majority in *Mitchell*, underlies our analysis here. Five Justices also agreed that the Fourteenth Amendment did not empower Congress to impose the 18-year-old-voting mandate.”) (citations omitted).

<sup>67</sup> *Id.* at 17 (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (C. Rossiter ed., 1961)) (citing THE FEDERALIST NO. 52, at 326 (James Madison) (C. Rossiter ed., 1961)).

<sup>68</sup> See *id.* at 16 n.8.

<sup>69</sup> See *Mitchell*, 400 U.S. at 134.

<sup>70</sup> See *id.*

designed to take effect without a constitutional amendment, the only way to create this uniformity is with a constitutional amendment. It is worth considering the last serious federal constitutional amendment to abolish the Electoral College in 1969 to 1970. Congress was vigorously engaged in amending the Constitution on election law matters in that decade—consider the Twenty-Third Amendment giving presidential electors to the District of Columbia, passed by Congress in 1960; the Twenty-Fourth Amendment prohibiting poll taxes in federal elections in 1962; and the Twenty-Fifth Amendment dealing with presidential disability and succession in 1965. Its understanding of existing constitutional authority to regulate federal elections is instructive.

In the Bayh-Celler amendment's draft language, the voters in presidential elections were defined like those for the House, fixed to the qualifications for voters for the most numerous branch of the state legislature. The amendment empowered Congress to establish uniform residency requirements. While states could establish the times, places, and manner of holding elections, Congress could override those rules, including the "manner" of holding elections, which would extend to matters from ballot access rules to poll hours, much like the Elections Clause for Congress:

The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice President, the legislature of any State may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications.

The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations.<sup>71</sup>

The proposed presidential election amendment reflected a recognition that Congress needed a *new* "manner" power, consistent with the Constitution's text and structure as outlined above.<sup>72</sup> The proposed amendment likewise included a specific ballot access power. This crucial new federal power for uniform regulation of elections is absent uniform parallel legislation in all fifty states and the District of Columbia.

## CONCLUSION

Questions about what level of uniformity we ought to have in elections and how to go about enacting them ought to be answered before the NPV

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<sup>71</sup> H.R.J. Res. 681, 91st Cong. (1969).

<sup>72</sup> See *id.*

takes effect—and not simply become a reaction upon its taking effect. Laws providing uniformity need to be considered now. They ought to be enacted immediately, or at least put in place to take effect when the NPV reaches its threshold total (which assumes its constitutionality).<sup>73</sup>

Maybe state and federal elected officials can bargain through a series of rules to tradeoffs regarding qualifications, ballot access, and election rules. Maybe recount provisions can be swiftly amended. Maybe. But these questions remain unanswered, and legislative solutions remain a low priority.

The lack of such efforts may simply reflect a lack of belief that the NPV will ever take effect. Or it may be that the questions are too hard to answer, a good reason to pause NPV efforts and to pursue holistic legislation. The Constitution, by design, makes it difficult for the federal government to exercise control over presidential elections.<sup>74</sup> A constitutional amendment would compel legislators to answer these questions and bring about a true national popular vote. Without it, there cannot be a national popular vote—only a federal popular vote.

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<sup>73</sup> See, e.g., Derek T. Muller, *The Compact Clause and the National Popular Vote Compact*, 6 ELECTION L.J. 372, 389–93 (2007) (arguing that the Compact requires congressional consent before it may constitutionally take effect); Derek T. Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 ELECTION L.J. 227, 228–29 (2008) (arguing the same); Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1574–81 (describing limited scope of delegation of power to states to choose presidential electors).

<sup>74</sup> See U.S. CONST. art. V.

