April 7, 2017

Questions about Congressional Consent and the National Popular Vote Compact

Representative Matt Claman
Attn: Elizabeth.Kubitz (Elizabeth.Kubitz@akleg.gov)
Alaska House of Representatives
Juneau, Alaska

Dear Representative Claman,

As you know, there is no dispute that the Compact Clause of the United States Constitution[1] requires Congress to consent to ***certain*** interstate compacts among the states. The U.S. Supreme Court has interpreted the Compact Clause to require congressional consent to an interstate compact ***if*** the compact encroaches on federal supremacy by ruling:

> "the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[2]

This letter discusses whether the National Popular Vote bill requires congressional consent.

SHORT ANSWER:

- Congressional consent is not required prior to a state legislature's consideration of a proposed interstate compact. If a particular compact requires congressional consent, Congress generally considers that question only after the compact has been approved by the requisite combination of states specified in the compact. In fact, advance consent by Congress is rare.
- Most interstate compacts do not mention congressional consent in their text—even when the sponsors believe that the compact requires congressional consent.
- The U.S. Supreme Court has ruled that congressional consent is only necessary for interstate compacts that "encroach upon or interfere with the just supremacy of the United States." Because the Supreme Court has repeatedly ruled that the choice of method of appointing presidential electors is an "exclusive" and "plenary" state power, there is no encroachment on federal authority.
- The U.S. Supreme Court has also ruled, "Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant." In fact, the courts have required encroachment to be significant before requiring congressional consent.
- If the U.S. Supreme Court rules that the National Popular Vote compact requires congressional consent, the compact would, of course, not go into effect until such consent is obtained.

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[1] U.S. Constitution. Article II, section 1, sub-section10.

[2] *U.S. Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 468 (1978) quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

1. Timing of Congressional Consent

The U.S. Supreme Court ruled in the 1893 case of *Virginia v. Tennessee*:

> "The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."[3]

Thus, congressional consent is ***not*** required prior to a state legislature's consideration of an interstate compact. Moreover, if congressional consent is required, Congress generally considers the matter only ***after*** the compact has been approved by the requisite combination of states specified in the compact.

The rare occasions when Congress has consented to a compact prior to state legislative action fall into three groups:

(1) Congress has consented to a certain specific category of compacts in advance. Examples include the Crime Control Consent Act of 1934 (which granted advance consent to certain types of interstate crime control compacts) and the Weeks Act of 1911 (which granted advance consent to certain types of forest and water supply compacts).

(2) Congress has occasionally used the occasion of consenting to one compact to invite a second group of states with similar problems to adopt a similar compact. For example, in 1921, Congress granted its consent to a Minnesota–South Dakota compact relating to criminal jurisdiction over boundary waters and granted advance consent for a similar compact among Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin.

(3) Congress took the initiative in 1921 in creating an interstate compact to resolve a long-standing problem among scrabbling states involving water rights. The federal legislation called on the seven western states in the Colorado River basin to enter negotiations to resolve their ongoing dispute. The negotiations (held with great fanfare) were headed by Secretary of Commerce Herbert Hoover and led to the Colorado River Compact of 1922.

2. The U.S. Supreme Court (Not the Compact's Sponsors or States Involved) Determine Whether Congressional Consent is Needed

Most compacts do not mention the issue of Congressional consent in their text—even if the states involved intend to seek congressional consent.

For example, the 1921 Port Authority of New York Compact was silent as to congressional consent because the two states involved did *not* intend to seek congressional consent at the time that they entered into the compact. Later, the states involved decided to seek congressional consent (and received it).

Conversely, the states involved in the Multistate Tax Compact (which was silent in its text as to the role of Congress) originally sought congressional consent. However, after realizing that they could not obtain it, the states proceeded to implement the compact without congressional consent. Opponents initiated litigation. The U.S. Supreme Court ruled in favor of the states in the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*[4]—the leading recent case on the issue of congressional consent of interstate compacts.

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[3] *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

[4] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. 1978.

3. Congressional Consent is Necessary Only for Interstates Compacts that Encroach Upon Federal Supremacy

The U.S. Constitution provides:

> "No state shall, without the consent of Congress,… enter into any agreement or compact with another state…."[5]

The U.S. Supreme Court has ruled, in 1893 and in 1978, that the Compacts Clause can

> "not be read literally"

in deciding the question of whether congressional consent is necessary for a particular interstate compact.

The 1893 case of *Virginia v. Tennessee* involved an interstate compact that had not received congressional consent. The U.S. Supreme Court upheld the constitutionality of the compact, saying:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that **the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.**"[6] [Emphasis added]

The Court continued:

> "**the test is whether the Compact enhances state power *quaod*** [with regard to] **the National Government**."[7] [Emphasis added]

The 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission* reinforced the Court's 1893 decision as to the criteria for determining whether a particular interstate compact requires congressional consent.

The Multistate Tax Compact was formulated by state tax administrators to stave off federal encroachment on the power of the states to tax multi-state businesses.[8] The compact created a commission empowered to conduct audits of businesses operating in multiple states and gave multistate businesses a choice of formulas for calculating their state taxes.

The Multistate Tax Compact provided that it would come into force when any seven or more states enacted it. By 1967, the requisite number of states had approved the compact.

The Multistate Tax Compact was submitted to Congress for its consent. After encountering fierce political opposition in Congress aroused by various business interests concerned about the more stringent tax audits anticipated under the compact, the compacting states proceeded to implement the compact without congressional consent. U.S. Steel and other companies challenged the states' action.

In upholding the constitutionality of the states' implementation of the compact without congressional consent, the U.S. Supreme Court ruled in 1978 in *U.S. Steel Corporation v. Multistate Tax Commission*:

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[5] U.S. Constitution. Article I, section 10, clause 3.

[6] *Virginia v. Tennessee*. 148 U.S. 503 at 519. 1893.

[7] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[8] *The Gillette Company et al. v. Franchise Tax Board*. Court of Appeal of the State of California, First Appellate District, Division Four. July 24, 2012. Page 4. Appendix GG contains the full opinion.

> "**Read literally, the Compact Clause would require the States to obtain congressional approval** before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.
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> "**The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in [the 1893 case] *Virginia v. Tennessee*.[9] His conclusion [was] that the Clause could not be read literally** [and the Supreme Court's 1893 decision has been] approved in subsequent dicta, but this Court did not have occasion expressly to apply it in a holding until our recent [1976] decision in *New Hampshire v. Maine*,[10] supra."
>
> "Appellants urge us to abandon *Virginia v. Tennessee* and *New Hampshire v. Maine*, but provide no effective alternative other than a literal reading of the Compact Clause. At this late date, **we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.**"[11] [Emphasis added]

State power over the manner of awarding electoral votes is specified in 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…."[12]

In the 1892 case of *McPherson v. Blacker* (the preeminent case involving presidential electors), the U.S. Supreme Court ruled:

> "The appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States"[13] [Emphasis added]

The National Popular Vote compact would not be a "combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States" because the choice of manner of appointing presidential electors is an "exclusively" state—not federal—power.

In the 1991 case of *McComb v. Wambaugh*, the U.S. Court of Appeals for the Third Circuit held that no encroachment occurs where the subject of the compact concerns

> "areas of jurisdiction historically retained by the states."[14]

The absence of federal power—much less federal supremacy—over the awarding of electoral votes is made especially clear by comparing the constitutional provision (section 1 of Article I) dealing with presidential elections with the constitutional provision (section 4 of Article II) dealing with congressional elections.

Section 4 of Article II states:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but**

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[9] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[10] *New Hampshire v. Maine*, 426 U.S. 363. 1976.

[11] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452. at 459–460. 1978.

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

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

[14] 934 F.2d at 479 (3rd Cir. 1991).

> **the Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators." [Emphasis added]

As can be seen, section 4 of Article I gives states *primary*—but not *exclusive*—control over congressional elections. In contrast, section 1 of Article II gives the states *exclusive* control over the manner of appointing presidential electors.

The National Popular Vote compact would not encroach on the "just supremacy of the United States," because the states have the *exclusive* power to choose the method of appointing their presidential electors.

In upholding the constitutionality of the states' implementation of the Multistate Tax Compact without congressional consent, the U.S. Supreme Court applied the interpretation of the Compact Clause from its 1893 holding in *Virginia v. Tennessee*, writing that:

> "**the test is whether the Compact enhances state power *quaod*** [with regard to] **the National Government**."[15] [Emphasis added]

The Court also noted that the compact did not

> "authorize the member states to exercise any powers they could not exercise in its absence."[16]

In discussing whether the National Popular Vote compact requires congressional consent, Tara Ross, an opponent of the National Popular Vote compact, has argued that the federal government has an "interest" in the compact.

> "**The federal government has at least one important interest at stake**. As Professor Judith Best has noted, **the federal government has a vested interest in protecting its constitutional amendment process**. If the NPV compact goes into effect, its proponents will have effectively changed the presidential election procedure described in the Constitution, without the bother of obtaining a constitutional amendment."[17] [Emphasis added]

Of course, the National Popular Vote compact would not change any "presidential election procedure described in the Constitution" because the method by which states appoint their presidential electors is not specified in the U.S. Constitution. Obviously, no state law or interstate compact can change anything in the U.S. Constitution. Instead, the National Popular Vote compact would change *state* winner-take-all statutes. None of these *state* winner-take-all statutes was originally adopted by means of a federal constitutional amendment. None of these state statutes has constitutional status. The winner-take-all rule was not debated by the Constitutional Convention or mentioned in the *Federalist Papers*. It was used by only three states in the nation's first presidential election in 1789, and all three states (Maryland, New Hampshire, and Pennsylvania) abandoned it by 1800. It was not until the 11th presidential election (1828) that the winner-take-all rule was used by even a majority of the states. The winner-take-all rule did not become predominant until the 1880 presidential election—almost a century after the Constitutional Convention in 1787.

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[15] *Virginia v. Tennessee*. 148 U.S. 503. 1893.

[16] *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452 at 473. 1978. Justice Powell wrote the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist, and Stevens.

[17] Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

All of these *state* winner-take-all statutes may be changed in the same manner as they were adopted, namely by passage by the state legislature of a different state law changing the state's method of appointing its presidential electors. Thus, the National Popular Vote compact should not arouse federal "interest" in protecting the constitutional amendment process.

4. The Existence of a "Federal Interest is Irrelevant in Determining Whether Congressional Consent is Required for a Particular Interstate Compact Absent a Threat of Encroachment

There is another fallacy in Tara Ross's argument that the federal government has an "interest" in the National Popular Vote compact.

The U.S. Supreme Court specifically addressed the question of whether the mere existence of a federal "interest" is sufficient to require that a compact obtain congressional consent by the majority decision in *U.S. Steel Corporation v. Multistate Tax Commission*. The U.S. Supreme Court stated (in footnote 33):

> "**The dissent appears to confuse potential impact on 'federal interests' with threats to 'federal supremacy.'** It dwells at some length on the unsuccessful efforts to obtain express congressional approval of this Compact, relying on the introduction of bills that never reached the floor of either House. This history of congressional inaction is viewed as 'demonstrat[ing] … a federal interest in the rules for apportioning multistate and multinational income,' and as showing 'a potential impact on federal concerns.' Post, at 488, 489. **That there is a federal interest no one denies**.
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> "The dissent's focus on the existence of federal concerns misreads *Virginia v. Tennessee* and *New Hampshire v. Maine*. **The relevant inquiry under those decisions is whether a compact tends to increase the political power of the States in a way that 'may encroach upon or interfere with the just supremacy of the United States.'** *Virginia v. Tennessee*, 148 U.S., at 519. **Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant**. **Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval.**
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> "In this case, the Multistate Tax Compact is concerned with a number of state activities that affect interstate and foreign commerce. But as we have indicated at some length in this opinion, the terms of the Compact do not enhance the power of the member States to affect federal supremacy in those areas.
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> "The dissent appears to argue that the political influence of the member States is enhanced by this Compact, making it more difficult—in terms of the political process—to enact pre-emptive legislation. We may assume that there is strength in numbers and organization. But enhanced capacity to lobby within the federal legislative process falls far short of threatened 'encroach[ment] upon or interfer[ence] with the just supremacy of the United States.' Federal power in the relevant areas remains plenary; no action authorized by the Constitution is 'foreclosed,' see post, at 491, to the Federal Government acting through Congress or the treaty-making power.

> "The dissent also offers several aspects of the Compact that are thought to confer 'synergistic' powers upon the member States. Post, at 491-493**. We perceive no threat to federal supremacy in any of those provisions.** See, e.g., *Virginia v. Tennessee*, supra, at 520."[18] [Emphasis added]

It should also be noted that an interstate compact among certain states may potentially affect non-member states.

In a *dissenting* opinion in *U.S. Steel Corporation v. Multistate Tax Commission,* U.S. Supreme Court Justices Byron White and Harry Blackmun suggested that courts could consider the possible adverse effects of a compact on non-compacting states in deciding whether congressional consent is necessary for a particular compact.

> "A proper understanding of what would encroach upon federal authority, however, must also incorporate encroachments on the authority and power of non-Compact States."[19]

The U.S. Supreme Court addressed this argument in *U.S. Steel Corp. v. Multistate Tax Commission* by saying:

> "Appellants' final Compact Clause argument charges that the Compact impairs the sovereign rights of nonmember States. Appellants declare, without explanation, that if the use of the unitary business and combination methods continues to spread among the Western States, unfairness in taxation—presumably the risks of multiple taxation—will be avoidable only through the efforts of some coordinating body. Appellants cite the belief of the Commission's Executive Director that the Commission represents the only available vehicle for effective coordination, and conclude that **the Compact exerts undue pressure to join upon nonmember States in violation of their 'sovereign right' to refuse**.
>
> "We find no support for this conclusion. It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods **will redound to the benefit of any particular group of States or to the harm of others. Even if the existence of such a situation were demonstrated, it could not be ascribed to the existence of the Compact. Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist**. Risks of unfairness and double taxation, then, are independent of the Compact.
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> "Moreover, it is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States. **Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause** of Art. IV, 2, see, e.g., *Austin v. New Hampshire*, 420 U.S. 656 (1975), **it is not clear how our federal structure is implicated**. Appellants do not argue that an individual State's decision to apportion nonbusiness income—or to define business income broadly, as the regulations of the

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[18] *U.S. Steel Corporation v. Multistate Tax Commission.* 434 U.S. 452 at 479. 1978.

[19] *U.S. Steel Corp. v. Multistate Tax Commission*. 434 U.S. at 494. 1978.

> Commission actually do—touches upon constitutional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission's recommendation."[20] [Emphasis added]

In the 1985 case of *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the U.S. Supreme Court again considered (and again rejected) arguments that an interstate compact impaired the sovereign rights of non-member states or enhanced the political power of the member states at the expense of other states. The Court wrote that it:

> "do[es] not see how the statutes in question … enhance the political power of the New England states at the expense of other States…."[21]

The courts have required encroachment to be significant before requiring congressional consent. Even where encroachment on federal authority arguably occurs, congressional consent might not be required. For example, an encroachment on federal powers arguably occurred in the compact involved in the 2002 case of *Star Scientific, Inc. v. Beales*[22] that resolved the lawsuit between states and major tobacco companies concerning the regulation of national cigarette advertising. Yet, this compact was held to be valid despite not receiving Congressional consent.

Tara Ross has taken note of the dissenting opinion in *U.S. Steel Corporation v. Multistate Tax Commission* and has argued that

> "non-compacting states have … important interests."[23]

In particular, Ross has identified three potential "interests" of non-compacting states in the National Popular Vote compact.

> "NPV deprives these states of their opportunity, under the Constitution's amendment process, to participate in any decision made about changing the nation's presidential election system.
>
> "They are also deprived of the protections provided by the supermajority requirements of Article V.…
>
> "The voting power of states relative to other states is changed. NPV is the first to bemoan the fact that 'every vote is not equal' in the presidential election and that the weight of a voters' ballot depends on the state in which he lives. **In equalizing voting power, NPV is by definition increasing the political power of some states and decreasing the political power of other states.**"[24] [Emphasis added]

Concerning Ross' first point, the National Popular Vote bill has been introduced into all 50 state legislatures and the Council of the District of Columbia, thus providing all states with the "opportunity … to participate."

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[20] *Id*. at 477–478.

[21] *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System.* 472 U.S. 159 at 176. 1985.

[22] 278 F.3d 339 (4th Cir. 2002).

[23] Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

[24] Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Page 40.

Concerning Ross' second point, Article V is the part of the U.S. Constitution that deals with constitutional amendments. The National Popular Vote compact would not change the Constitution. It is an exercise of an exclusive power already granted to the states under section 1 of Article II of the Constitution, namely the power of each state to appoint its own presidential electors in the manner it chooses. The compact would change *state* winner-take-all statutes that came into widespread use more than four decades after the Constitution was ratified. None of these state winner-take-all statutes was originally adopted by means of a federal constitutional amendment, and none has constitutional status. All of these state statutes may be changed in the same manner as they were adopted, namely by passage of a new state law changing the state's method of appointing its presidential electors.

Ross' third point concerns the potential effect on the *political value* of a vote cast by voters in some non-compacting states.

The National Popular Vote compact would treat votes cast in all 50 states and the District of Columbia equally. A vote cast in a compacting state would be, in every way, equal to a vote cast in a non-compacting state. The National Popular Vote compact would not confer any advantage on states belonging to the compact as compared to non-compacting states.

Ross is, in effect, arguing that certain battleground states might have a *constitutional* right to maintain the *excess* political value of votes cast in their states, but that disadvantaged or altruistic states have no right or ability to create equality in the political value of everyone's votes by exercising their *independent* constitutional power over the method of awarding their own electoral votes.

Of course, it has always been the case that one state's choice of the manner of appointing its presidential electors has affected the *political value* of a vote cast in other states. For example, the use of the winner-take-all rule by a closely divided battleground state plainly diminishes the political value of the votes cast by citizens in the non-battleground states.

It is inherent in the grant by the U.S. Constitution, to *each* state, of the power to choose the method of appointing its presidential electors that one state's decision can enhance the political value of its vote and thereby impact (diminish) the political value of the vote in other states. This is a direct consequence of federalism and the fact that the Constitution gave each individual state the power to decide the method of appointing its own presidential electors.

A present-day battleground state could, of course, eliminate the political effect of its winner-take-all rule on other states by changing its method of appointing its presidential electors. For example, if a battleground state were to change its winner-take-all statute to a proportional method for awarding electoral votes, presidential candidates would pay less attention to that state because only one electoral vote would probably be at stake in the state. However, we are not aware of anyone who currently argues that any present-day battleground state has a constitutional obligation to make such a change in order to reduce its impact on the political value of a vote in the non-battleground states.

If the Constitution gives a closely divided battleground state the power to choose a method of awarding its electoral votes that increases the political value of votes cast in its state, it also gives the power to non-battleground states to choose a method for awarding their electoral votes to counter-balance the political effect of the decision made by the battleground state (and, arguably, create a better overall system in the process).

In any case, the electoral votes of the non-compacting states would continue to be cast in the manner specified by the laws of those states. The electoral votes of the non-compacting states would continue to be cast, and continue to be counted, in the Electoral College in the manner

provided by the Constitution. This means that the non-compacting states would continue to cast their votes for the winner of the statewide popular vote (or district-wide popular vote in Maine and Nebraska) after the National Popular Vote compact is implemented. No non-compacting state would be compelled to cast its electoral votes for the winner of the national popular vote.

The political impact of the winner-take-all rule on other states has long been recognized as a political reality. It is not Alaska's winner-take-all law or California's winner-take-all law that makes a vote in non-battleground states such as Alaska and California politically irrelevant in presidential elections. Indeed, a vote in California and a vote in Alaska are equal today, and both are equally worthless in presidential elections. Instead, it is the use of the winner-take-all rule in closely divided battleground states (such as Ohio and New Hampshire) that has extinguished the political value of votes cast in the 38 non-battleground states (such as Alaska and California).

The Founding Fathers intended, as part of the political compromise that led to the Constitution, to confer a certain amount of extra influence on the less populous states by giving every state a bonus of two electoral votes corresponding to its two U.S. Senators. The Founders also intended that the Constitution's formula for allocating electoral votes would give the bigger states a larger amount of influence in presidential elections. Their goals with respect to *both* small states and big states were never achieved because of the emergence of political parties in the 1796 presidential election and the subsequent widespread adoption by the states of state winner-take-all laws (mostly in the 1820s and 1830s). The winner-take-all rule drastically altered the political value of votes cast in both small and big states throughout the country.

Interstate comparisons of the *political value* of a vote are not, according to past judicial rulings, a legal basis for contesting any state's decision to adopt a certain method of appointing its own presidential electors under Article II, section 1, clause 2 of the Constitution.

In 1966, the U.S. Supreme Court declined to act in response to a complaint concerning the political impact of one state's choice of the manner of appointing its presidential electors on another state. In *State of Delaware v. State of New York*, Delaware led a group of 12 predominantly small states (including North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, and Pennsylvania) in suing New York in the U.S. Supreme Court. At the time of this lawsuit, New York was not only a closely divided battleground but also the state possessing the largest number of electoral votes (43). Delaware argued that New York's decision to use the winner-take-all rule effectively disenfranchised voters in the 12 plaintiff states. New York's (defendant) brief is especially pertinent.[25] Despite the fact that the case was brought under the Court's original jurisdiction, the U.S. Supreme Court declined to hear the case (presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision).[26]

In 1968, the constitutionality of the winner-take-all rule was challenged in *Williams v. Virginia State Board of Elections*.[27] A federal court in Virginia upheld the winner-take-all rule. The U.S. Supreme Court affirmed this decision in a *per curiam* decision in 1969.[28]

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[25] Delaware's brief, New York's brief, and Delaware's argument in its request for a re-hearing in the 1966 case of *State of Delaware v. State of New York* may be found at http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php.

[26] *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

[27] *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 - Dist. Court, ED Virginia 1968.

[28] *Williams v. Virginia State Board of Elections*. 393 U.S. 320 (1969) (per curiam).

There is an additional independent argument that the potential political impact on non-compacting states should not be a consideration in evaluating a compact concerned with how states choose to appoint their presidential electors.

Article II, section 1, clause 2 of the U.S. Constitution provides:

> "**Each State** shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."[29] [Emphasis added]

Article I, section 4, clause 1 provides

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but **the Congress may at any time by Law make or alter such Regulations**, except as to the Places of chusing Senators." [Emphasis added]

Article I confers on "each state" the power to choose the manner of electing its members of Congress; however, it subjects those state decisions to being overridden at the national level. Congress has, on occasion, overridden state choices that it deemed to not be in the national interest (e.g., electing members of the U.S. House of Representatives at-large, instead of from single-member districts).

Article II is different in that state decisions are not subjected to such congressional scrutiny. "Each state" is empowered to choose the manner of appointing its presidential electors, irrespective of Congress' opinion of the method.

5. If the U.S. Supreme Court Rules that the National Popular Vote Compact Requires Congressional Consent, the Compact Would Not Go into Effect Until such Consent is Obtained

Of course, there is always the possibility that the U.S. Supreme Court might change the legal standards concerning congressional consent contained in its 1893 and 1978 precedents.

Because Congress typically considers a compact only after the compact has been approved by the combination of states required to bring the compact into effect, one would expect that any action in Congress would occur after the compact had been approved by the 25 (or so) states possessing the requisite majority of the electoral votes (i.e., 270 of 538).

The effect of a court decision changing the standards for requiring congressional consent for the National Popular Vote compact would be to add an approval step (namely Congress) above and beyond the approval by states possessing a majority of the electoral votes (270 of 538).

Because there could be litigation about congressional consent, National Popular Vote is working to obtain support for the compact in Congress.

Yours truly,

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