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The Case For Reforming Presidential Elections By Subconstitutional Means: The Electoral College, The National Popular Vote Compact, And Congressional Power

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The Case For Reforming Presidential Elections By Subconstitutional Means: The Electoral College, The National Popular Vote Compact, And Congressional Power

VIKRAM DAVID AMAR*

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It is particularly fitting that my exchange with Professor Norman Williams, concerning national popular election of presidents, should take place in the 100th Anniversary Volume of *The Georgetown Law Journal*. The *Journal* published its first pages precisely at a time when federal legislators across town on Capitol Hill—and reformers throughout the rest of the nation—were in the thick of a contentious national movement to bring about popular election of United States senators. And quite instructively, that movement (although it culminated in a formal constitutional amendment, introduced in Congress almost exactly a century ago, in 1912) was driven and accomplished largely at the subconstitutional level by creative and energetic people acting first in state, and only later in national, arenas.

Every law student learns that the original Constitution assigned the power and duty to select U.S. senators to the state legislatures, and that the Seventeenth Amendment—codifying direct election of senators—was a product of the Progressive Era. But the story of the Seventeenth Amendment is one primarily about state-level innovation. Beginning in the mid-1800s, state-level political parties and organizations sought ways to involve the people more directly in selecting electors. The famous Lincoln-Douglas debates were designed to allow voters to consider whom state legislators would, if elected, likely select for the U.S. Senate.[1] But because voters must consider many different issues—not just Senate selection—when they elect state legislatures, more focused mechanisms were needed. Perhaps the most important step in this journey was the advent of a statewide preference poll to be conducted in connection with the statewide election. Oregon was a pioneer in this regard in the early 1900s; under the "Oregon Plan" (as it came to be known), state voters participated in, as part of the regular election, a

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[1] *See, e.g.*, David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1496–97 (2001).

preference poll that would not legally elect senators but rather inform the choice to be made by state legislators.[2] "[I]ndividual state lawmakers could, if they chose, officially pledge to support the winner" of the poll.[3] Later versions of the Plan featured a state initiative that *bound* (as a matter of state law) state legislators to elect as senator the person who gained the greatest electoral support from the State's general electorate.[4] "By 1909, Nebraska and Nevada had copied this design,"[5] and "[b]y 1911, . . . over half the states had adopted the Oregon system or something like it."[6]

As I have previously written, "[i]n reality then, the Seventeenth Amendment was a formalizing final step in an evolutionary process. To be sure, the amendment's acknowledgment of an already-existing condition has made that condition more impervious to alteration, and has symbolic meaning as well."[7] But it would be a mistake to minimize the force and effect of state-law innovations, innovations that were, to use Professor Williams's term, subconstitutional.

Before finishing my brief account of the Seventeenth Amendment, I need mention that as the Amendment was being considered in Congress, the process of constitutional change was complicated by disputes over the proper scope of congressional power under Article I, Section 4, which expressly gives state legislatures the power and the duty, in the first instance, to set the time, place, and manner of congressional elections, but then also gives the federal government the power to override such state decisions.[8] Southern senators attempted, during the latter-stage debates over the Amendment, to insert language that would have freed popular elections of senators in the several states from Article I, Section 4 congressional control.[9] These attempts ultimately failed; proponents of the Seventeenth Amendment successfully argued for the continued need for federal oversight over the manner of picking senators. Interestingly enough, that undisturbed and robust Article I, Section 4 power over all facets of congressional elections may very well turn out to be, as I will explain below,[10] quite important in the process of moving towards a workable direct popular election system for the Presidency.

Before we get there, we must make our way through Professor Williams's arguments in favor of the current electoral system and against the National Popular Vote Compact (NPVC) plan that is being considered (and adopted) by many states.[11] Given limited space, I cannot engage every

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[2] *See* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1354 (1996).
[3] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 411 (2006).
[4] *See id.*
[5] Amar, *supra* note 2.
[6] Strauss, *supra* note 1.
[7] Amar, *supra* note 2, at 1355 (footnote omitted).
[8] U.S. CONST. art. I, § 4.
[9] The Southerners' proposal for the wording of the Seventeenth Amendment would have explicitly given state legislatures power over the time, place, and manner of Senate elections, replicating the first part of Article I, Section 4, but pointedly would *not* have repeated the second part of Article I, Section 4, giving Congress override power. Proponents of this language were open about their intentions; they made clear that they were trying to remove federal Article I, Section 4 power from Senate elections. *See generally A Constitutional Amendment Concerning Senate Vacancies: Hearing on S.J. Res. 7 and H.J. Res. 21: Before the Subcomm. on the Constitution of the Sen. Judiciary Comm.*, 111th Cong. (2009) (testimony of Vikram Amar, Assoc. Dean for Academic Affairs & Professor of Law, Univ. of Cal., Davis School of Law), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1451af6&wit_id=e655f9e2809e5476862f735da1451af6-2-1.
[10] *See infra* notes 96–99 and accompanying text.
[11] *See* Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Sub-Constitutional Change*, 100 GEO. L.J. ___ (2011).

one of Professor Williams's interesting and provocative contentions,[12] so instead I shall focus on what I take to be his main points: (1) that the current system is preferable because it promotes a healthy balance between federalism and majoritarianism; (2) that institutions like the Senate, as it is currently constituted, pose a greater threat to majoritarian values than does the Electoral College; (3) that movement towards direct national election will generate more plurality-winner presidents and also more third-party activity; and (4) that the NPVC is deeply flawed, and indeed unconstitutional, because it lacks a true national election with uniform voter qualifications and voter mechanics and will, given incentives states might have to obstruct or manipulate vote counts, likely produce unacceptable crises.

As explained more fully below, I find Professor Williams's arguments in favor of the current system, most of which have been kicking around in some form for a while, less than persuasive. His concerns about the nonuniform way the NPVC, in its present design, would operate are, in some respects, significantly overstated, but they do echo worries that I have personally expressed about the perils of too much variation in the administration of a national popular vote for President. But unlike Professor Williams, I do not view these concerns as reasons to abandon the enterprise, but rather as starting points for plausible and creative solutions to improve the NPVC plan.

At the outset, let me make clear the premises from which I proceed. Professor Williams distinguishes "democracy" from "majoritarianism" and argues that the main complaint folks have with the current system is not that it is undemocratic, but rather that it is insufficiently majoritarian.[13] Perhaps that is right. But it should be emphasized that a commitment to majoritarianism in this setting derives from a commitment to equality—to the one-voter, one-vote idea; an obsession with majoritarianism may be easier to understand when it is reduced to and explained by its egalitarian essence. We majoritarians believe that in a nation where the President owes his allegiance to "We the People of the United States," the system of selection should be, in its basic contours, one in which all voting members of that People are weighted equally, whether we live in a small state or a large state, whether we reside in a state that is solidly Blue, perennially Red, or frequently in the middle.

In his discussion of majoritarianism, Professor Williams does not focus on equality values, although he does mention two respects in which voters under the current regime are not treated equally. He acknowledges that "[b]ecause of indivisible population variances among the states, the number of Representatives allocated to each state does not map perfectly with the population of the states."[14] And he observes that "[b]ecause each state receives two senatorial electors regardless of its population, less populous states receive more electors than a strict, population-based allocation would produce."[15] Later in his essay, Professor Williams alludes to, but does not dwell on, a third kind of inequality built into the current system—the fact that a "few, select

[12] I do note, though, that most of Professor Williams's arguments against any move to a national popular election scheme are addressed in substance in the voluminous book published by the backers of the NPVC movement, JOHN R. KOZA, BARRY FADEM, MARK GRUESKIN, MICHAEL S. MANDELL, ROBERT RICHIE & JOSEPH F. ZIMMERMAN, EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (3d ed. 2011) [hereinafter EVE]. Of particular interest is Chapter 10, which attempts (in my opinion, with great success) to rebut many asserted advantages of the current Electoral College system, including almost all of the advantages Professor Williams asserts.

[13] Williams, *supra* note 11, at [12–13] ("[T]he principal charge against the Electoral College is that it is *anti-majoritarian* [rather than anti-democratic].").

[14] *Id.* at [13].

[15] *Id.*

swing states (such as Ohio, Pennsylvania, and Florida) currently receive too much attention from presidential candidates" to the detriment of voters in the other states.[16] These three kinds of inequality lie at the core of the desire many of us have for a majoritarian form of selection.[17]

How strong a majoritarian do I consider myself in this context? Professor Williams uses the term "strict" majoritarians[18] to describe persons who cannot not accept any deviation from the one-voter, one-vote idea. He calls persons who are willing to balance their desire for majoritarianism in a selection method against other values "modest" majoritarians.[19] I consider myself an adherent of what I might call "Missouri majoritarianism"; my starting point is a strong commitment to equality that characterizes the rest of our constitutional voting jurisprudence (one-voter, one-vote), and any significant departure from this principle will require someone to "show me" good reasons to deviate.[20] The burden on those who wish to defend the current, substantially unequal, regime is particularly high because, as I and others have written, the Framers' decision to create the current regime was driven largely by technological and communication limitations, the difficulty of a national election in the 1700s without an extensive national government infrastructure, and the facilitation of slavery—three rationales that, happily, are not present or accepted today.[21] I now turn to why Professor Williams has not, for me at least, made an adequate showing.

I. ARGUMENTS ABOUT FEDERALISM/REGIONALISM

Professor Williams's first big argument is that "the deviation from population apportionment of the Electoral College is justified in order to serve federalism."[22] For starters, let us be clear on what Professor Williams must mean when he refers to federalism. He cannot mean what most often is meant modernly by federalism—the relationship and distribution of powers between the federal and state levels of government, and the related desire to have state governments operate as a counterweight to federal governmental hegemony.[23] Professor Williams does describe as

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[16] *Id.* at [17].

[17] This concern for equality helps explain why I am not moved by suggestions, like those of John McGinnis, *Rebuttal to Levinson: Two Cheers for the Electoral College(and Two Cheers Is All That Can Be Expected for an Electoral System)*, 155 U. PENN. L. REV. PENNumbra. 16, 16–17 (2007), http://www.pennumbra.com/debates/debate.php?did=8, that in close elections we never know which candidate has more support because "in those cases the margin of error is greater than any measure of stable popular support." The dates on which elections are held, like the dates on which athletic championships are played, are always arbitrary in the sense that the outcomes might be different if the dates were moved a few days or weeks. But on any given day, the people who vote—or play—should be counted and counted equally, because speculation about what might (or would likely) have happened on another day focuses on giving weight to people who did not in fact register their preferences to be counted. Similarly, if we are trying to encourage individual people to vote, how can we justify ignoring even small margins of victory, provided those small margins reflect our best efforts at counting each person who took the time to participate?

[18] Williams, *supra* note 11, at [25].

[19] *Id.* at [26].

[20] Missouri's unofficial nickname is the "Show Me" state.

[21] Akhil Reed Amar & Vikram David Amar, *History, Slavery, Sexism, the South and the Electoral College*, FINDLAW (Nov. 30, 2001), http://writ.news.findlaw.com/amar/20011130.html; Amar, *supra* note 3, at 148–59.

[22] Williams, *supra* note 11, at [23].

[23] *See, e.g.*, THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("The different governments [state and federal] will control each other . . . ."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the

part of "federalism" that "the Senate is apportioned on the basis of equal representation for each state,"[24] but this equal representation among the states concerns the relationship between the states, and not the relationship between the states on the one hand and the federal government on the other. (To see this, ask yourself whether, after the move to direct election for U.S. senators, the Senate as a body can be expected to be any more protective of state sovereignty from federal incursion than is the House of Representatives.)[25]

Nor is Professor Williams using "federalism" to connote another commonly asserted reason for the existence of state governments—the value states add as laboratories of policy experimentation.[26] With or without the NPVC, states remain free over time to tinker with the methods of selecting electors, and the NPVC is itself born out of state governmental creativity and experimentation. Indeed, the NPVC would give state governments a bigger laboratory role than they now enjoy in presidential selection by creating an incentive for each state to make voting easier—say, by making Election Day a holiday or by providing paid time off—because the more state voters who turn out, the bigger the state's overall share in the national tally. Direct national election would thus encourage states to innovate and compete to increase turnout and improve democracy. As I will explain later, national oversight would be appropriate to keep the innovation and competition within proper bounds; for example, states ought not permit toddler voters. Moving away from the current system would thus maintain a mix of federal and state laws, and respect proper state innovation within a federal framework—in short, federalism experimentation at its best.

So when Professor Williams refers to federalism, he means neither state freedom from federal government domination nor state latitude to experiment; he means instead the protection of distinct interests of regional voters who might happen to live in one state or a group of neighboring states. Professor Williams contends that a candidate who wins big in some parts of the country and wins the national vote count but who "does poorly in other sections of the country" may generate a "distribution of votes [that] is problematic for a candidate who aspires to lead a federal union such as the United States."[27] Professor Williams is not alone in raising this specter. As my brother and sometimes co-author Akhil Amar and I wrote a decade ago, opponents of a national election "contend that the electoral college prevents purely regional candidates from winning by requiring the winner to put together a continental coalition popular in many different regions."[28] There are many problems with this argument. First, as Professor Williams acknowledges,[29] the current system does not prevent candidates with much stronger support in some regions than others from winning the Presidency. Abraham Lincoln won without winning a single southern state or even being on the ballot south of Virginia.[30] And the

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accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

[24] Williams, *supra* note 11, at [23].

[25] Justice Blackmun, for whom I worked and have tremendous respect, made this mistake in his famous opinion in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985). *See* Vikram David Amar, *Some Questions and Answers Concerning Justice Blackmun in Federalism and Separation of Powers Cases*, 26 HASTINGS CONST. L.Q. 153, 156 (1998).

[26] Justice Louis Brandeis is, rightly or wrongly, often credited for the laboratory metaphor. *Cf.* New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

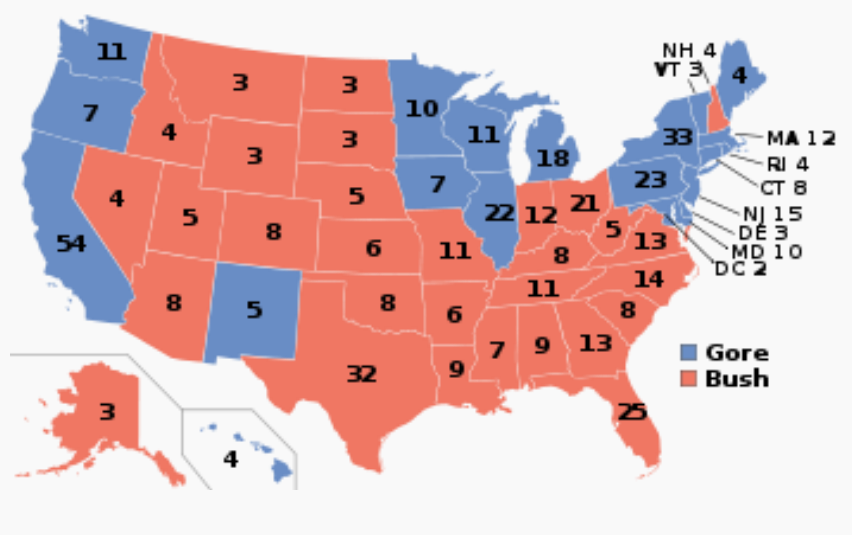
[27] Williams, *supra* note 11, at ___.

[28] Akhil Reed Amar & Vikram David Amar, *A Critique of the Top Ten Modern Arguments for the Electoral College*, FINDLAW (Dec. 14, 2001), http://writ.news.findlaw.com/amar/20011214.html.

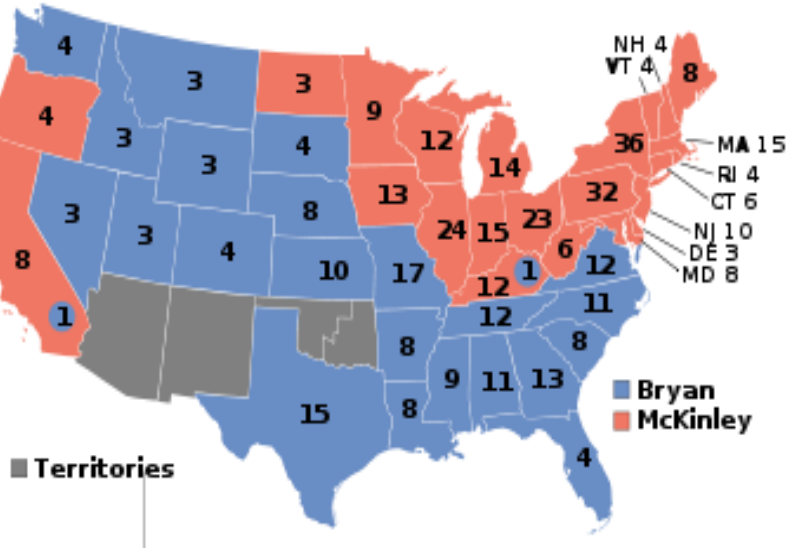
[29] Williams, *supra* note 11, at ___.

[30] Amar & Amar, *supra* note 28.

elections of 1796 and 1800 also featured sharp sectional divisions between north and south.[31] Nor have elections since the Civil War been characterized by hodgepodge, noncontiguous patchworks of states supporting the winning candidate. Consider the election of Republican George Bush in 2000. Here is the map of states he won (in red) and those that his Democratic opponent Al Gore won (in blue):



Note the regional quality to the voting blocs; New Mexico, New Hampshire and Maine are the only three states in the continental United States that do not border another state that went for the same candidate. And things were not much different in this regard a century earlier. Consider the following map from the election of 1896, again with the Republican winner in red and the Democratic opponent in blue:



[31] *Id.*

The map is almost identical (showing a bit more regional division, perhaps), except that the regions in which each party is stronger are inverted.

Second—and this is why the regional patterns we often observe under the current Electoral College system and possibly under the NPVC as well are not particularly troubling—geography is not a principled or enduring basis of political cleavage in the modern United States; political party is. Put differently, even in those regions where each candidate lost, his party is not terribly unpopular, because the two major parties are, and will continue to be, national parties in their scope and appeal. Although there may be a plausible case to make for requiring a leader of a sharply divided society (if the United States even be considered one) to establish some minimum acceptability vis-à-vis the principal factions, the way to do so would be to look at something such as how many people outside of a candidate's party find him at least minimally acceptable. (Neither the current system nor the NPVC does that.) And if geography were the salient feature (which it is not), we should do no more than ask for a showing of minimum acceptability across regions of the country (for example, the South, the West, the Northeast, and the Midwest), which is quite different from simply requiring the President to "win" a large number of states. Indeed, if we required the kind of broad acceptability that is required in Indonesia and Nigeria—the two key examples Professor Williams adduces of democracies that eschew direct election for the sake of avoiding regional winners[32]—prevailing Republican and Democratic candidates would virtually always satisfy that test in the United States. There does not seem to be any modern presidential election in which the winning candidate (or a close national vote loser, for that matter) did not get "at least 20% of the vote in a majority [or even two-thirds] of the [states]."[33] In the 2008 Obama/McCain election, for instance, each candidate failed to get 35% of the vote in only three states.[34] Moreover, if geographic spread were a good argument for a continental Electoral College, why would it not be an equally good argument for an intrastate Electoral College for vast and populous states like California and Texas? No state uses—or would dream of using—anything like an Electoral College model to elect its statewide Chief Executive.[35] The reality is that, under direct election, presidential candidates would continue to wage broad national campaigns appealing to voters in different states and regions: a candidate simply cannot reach 50% or anything close to it without getting a lot of votes in a lot of places.[36]

Professor Williams adds an inventive and novel twist on his regionalism argument by focusing on the President's need to work with Congress: "the geographically limited scope of [a

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[32] Williams, *supra* note 11, at [24 & n.91].

[33] *Id*. at [n.91].

[34]

[35] As the orchestrators of the NPVC movement observe:

> "If an electoral college type of arrangement were essential for avoiding [regional campaigns], we should see evidence of regional parties and regional candidates in elections that do not employ an electoral college. However, when elections for governor are conducted in which the winner is the candidate who receives the most popular votes, we do not see a Philadelphia Party and a Pittsburgh Party nominating regional candidates for governor in Pennsylvania. . . . We do not see . . . a Northern California Party in California. Similarly, we do not see regional parties or candidates running for the U.S. Senate."

EVE, *supra* note 12, at 485-486.

[36] This is one reason why I disagree with Professor Williams's statement that proponents of the NPVC think it will "fundamentally transform" elections. *See* Williams, *supra* note 11, at [16]. My view—and that of many other proponents—is that an NPVC system will improve elections and make them more symbolically and theoretically coherent. And because democracy and equality are themselves foundational ideas, conceptual and symbolic improvements are important.

regional President's] support would likely undermine her ability to work with Congress [because] the Senate [may be] composed of a majority of Senators from states that the President lost."[37] Professor Williams's argument here might have had some force when U.S. senators and presidential electors were both selected by state legislatures; those legislatures might have picked electors and senators who favored the same policies. But given the popular election of U.S. senators for the last 100-plus years, the popular elections held in all states for presidential electors for the last 150-plus years, and the prevalence of ticket-splitting—both between presidential and senatorial candidates and between the two senators from a state—Professor Williams's point here has little empirical bite. Between 1968 and the early 1990s, 40% or more of the states had a split-party U.S. Senate delegation (and in some years fully half the states had a split-party Senate delegation), which means that whoever the President was, he was in the same party of at least one of the senators from these 20 to 25 states.[38] If one looks at the 2008 presidential election, one sees a large number of states (seven or more out of the 34 that had Senate elections) that voted for Obama but that elected a Republican senator, or that voted for McCain but elected a Democratic senator.[39] Again, the big problem with Professor Williams's regionalism arguments is that party and personal—not regional and certainly not state—identity is the most significant aspect of political division in the United States.

II. THE SENATE ANXIETY

Professor Williams, like others before him, points out that the Senate is more malapportioned than the Electoral College. This argument raises a fair point. The equality idea that favors the abolition of the Electoral College does raise questions about Senate malapportionment—"why should the more than [30 million citizens] living in California get no more Senators than the half million [citizens] living in Wyoming?"[40] But Professor Williams draws the wrong conclusion here: He states that "[t]he enduring existence of [the Senate as constituted] suggests that few Americans are drawn to strict majoritarianism."[41] This is a non sequitur. Many Americans, myself included, would be happy to change the makeup of the Senate to make it more egalitarian, and the Senate structure's "enduring existence" in no way connotes my approval.[42] Instead, the enduring existence owes to the difficulty of change in that setting. The problem, of course, is that Article V of the Constitution explicitly says that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[43] Read one way, this would prevent any change in the way the Senate is constituted without the assent of each and every state. As Lynn

[37] Williams, *supra* note 11, at [30].
[38] MORRIS P. FIORINA, DIVIDED GOVERNMENT 42 (2d ed. 1996).
[39]
[40] Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 474 (2007).
[41] Williams, *supra* note 11, at [26].
[42] In separate books written in the last few years, Professors Sanford Levinson of the University of Texas and Larry Sabato of the University of Virginia both demonstrate how small states make out like bandits under the current system of equal state representation in the Senate. And both authors argue quite compellingly that this democratic anomaly—dictated by political exigencies over 200 years ago—is a bitter pill for fair-minded modern Americans to swallow. Although they disagree in the details, both Professors advocate reducing or eliminating the exaggerated voice small states enjoy in the upper legislative chamber (if such a chamber is to be kept at all). *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2008); LARRY J. SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY (2008).
[43] U.S. CONST. art. V.

Baker and Samuel Dinkin wrote a decade ago, there is nothing in the text of the Constitution, Article V or elsewhere, that spells out what powers the Senate must always enjoy.[44] So although under Article V, the makeup of the Senate can be changed only with assent of all states, the powers of the body—in particular, the Senate's involvement in legislation, appointment, impeachment, and amendment—perhaps can be reshaped through Article V's ordinary threshold of three-fourths of the States. Yet getting even thirty-eight of the fifty states (through their legislatures or even through specially chosen ratifying conventions, as allowed by the terms of Article V) would seem an impossible task, given the large number of small states that benefit from the current system. So, changing the Senate's malapportionment seems impossible.

But the Electoral College issue is distinguishable, both as a theoretical and a practical matter. As a matter of theory, on Election Day, Americans vote in thirty-three (or thirty-four) separate Senate races, each featuring a different candidate matchup. These votes cannot simply be added together. As my brother once noted,

> To try to add them up—x% for "the Democrat" and y% for "the Republican"—[would be] artificial in the extreme, given that [thirty-three] different Democrats are running against [thirty-three] different Republicans in [thirty-three] different races.
>
> In contrast, presidential votes can be aggregated across America—indeed, it is artificial *not* to add them together, and the violation of equality is much more flagrant when a person who plainly got fewer votes is nevertheless named the winner.[45]

As a matter of practicality, the NPVC shows that nonconstitutional change that might overcome political obstacles is possible with respect to the Electoral College, even if it is not for the Senate.[46]

III. The Plurality Winner and Third Party Candidate Problems

Another of Professor Williams's arguments is also often-raised: "Direct election could either lead to a low plurality winner (say, [35%]) in a three- or four-way race, or would require a high cutoff (say, [45%]) that would require a runoff. Allowing runoffs would encourage third party spoilers."[47] But the very same things should be true for states, "which manage to elect governors just fine,"[48] without any problem of low-plurality winners or third-party spoilers. Indeed, if you compare presidential elections over the past fifty years with gubernatorial elections from the nation's largest state, California, you see no significantly different pattern of low-plurality winners or third-party spoilers. In four presidential elections during the last half-century (1968, 1992, 1996, and 2000), the winner got less than 50% of the national vote, and in two of those elections, the winner got less than 45% of the vote.[49] Compare that with California since 1961.

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[44] *See* Lynn A. Baker & Samuel Dinkin,
[45] Amar, *supra* note 40.
[46] Professor Williams also discusses the interesting malapportionment issues presented by the processes used by the two major political parties to nominate presidential candidates. Williams, *supra* note 11, at ___. I might very well be in favor of fixing such malapportionment if a congressional fix turns out to be constitutional. For a discussion of Congress's powers here, see Richard L. Hasen, "*Too Plain for Argument?" The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 Nw. U. L. Rev. 2009 (2008).
[47] Amar, *supra* note 40.
[48] *Id.*
[49] [

Four times, a governor has won office with less than 50%, but in three of those four elections, he got 49% (and one of those was a special recall election in 2003), and in the fourth, he received 47%.[50] No governor of California has received less than 47% of the vote for 50 years. And like the Presidency, California's governorship has been occupied by a number of both Democrats and Republicans over the last half century.[51] Even when we broaden the comparison to include small states (and including small states in the analysis really is not fair to NPVC proponents because a small state is much more susceptible to a third-party movement than would be a large state or the United States), Professor Williams's hypothesis is debunked. A study of 918 elections for governor between 1948 and 2009 showed the winner getting "more than 50% of the vote in 91% of the elections," "more than 45% of the vote in 98% of the elections," and "more than 40% of the vote in 99% of the elections." No winner ever got less than 35%.[52]

The foreign counterexamples that Professor Williams adduces, from the recent and limited experience in Mexico and South Korea,[53] involve systems where third parties thrive because the legislatures in those countries are elected not on a district-by-district plurality-winner basis (as in the United States) but rather on a basis that makes use of some kind of proportional representation—where political parties are awarded legislative seats correlated to the percentage of people nationally who support the party, regardless of whether the party ever succeeds anywhere in the country as the most popular party for any particular seat.[54] It is not surprising that in countries that make use of proportional representation systems, third parties are more entrenched and thus more prominent in all elections. The experience of the American states—which closely mirror the United States's political, cultural, and economic electoral dynamics—is the relevant data set for comparative analysis.

Finally, any problems of low-plurality winners and third-party spoilers could easily be solved in a direct national election by a system called single transferable voting, in which voters list their second and third choices on the ballot—in effect combining the first heat and runoff elections into a single "instant runoff" transaction. My brother and I suggested just such an element of a possible nationwide presidential vote,[55] and as I explain below it could, if Congress wanted, be incorporated into the implementation of the NPVC. Professor Williams dismisses this commonsense solution by saying voters may find it confusing, analogizing to the infamous butterfly ballot in Florida.[56] But surely this quick response should not carry the day; a nonconfusing ballot that asks voters to rank their preferences among three or four plausible candidates cannot be that hard to design and implement if the will exists.

IV. PROBLEMS WITH THE CURRENT NPVC DESIGN

Some of the last parts of Professor Williams's article—in which he discusses potential problems with the implementation of the NPVC plan—have for me more heft. He argues that

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[51] And the track records of New York and Texas—the other two largest states—are similar in this regard.

[52] EVE, *supra* note 12, at 479–80. The short of it is that Duverger's law (in political science) asserts that a plurality-rule, single-winner election system tends to favor stable two-party systems.

[53] Williams, *supra* note 11, at [41–42].

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[55] Akhil Reed Amar & Vikram David Amar, *The Fatal Flaw in France's—and America's—Voting System, and How an "Instant Runoff" System Might Remedy It*, FINDLAW, (May 3, 2002), http://writ.news.findlaw.com/amar/20020503.html.

[56] Williams, *supra* note 11, at [39 n.90].

nonparticipating states might try to obstruct the NPVC by declining to hold elections for electors, or by not fully counting the votes of any such elections.[57] My brother and I raised the extreme possibility of a state deciding not to hold an election to thwart an NPV plan ten years ago,[58] although even at that time we might have thought such radical subversions pretty unlikely to occur. Putting aside federal statutory requirements that votes be counted, is it really politically plausible to think a state legislature could try, in the twenty-first century, to eliminate the statewide vote for presidential electors? And if it is, why are we not worried about the equally troubling possibilities for similar subversion under the current regime? A Secretary of State of a state could currently decline or delay the certification of vote totals when those totals favor Candidate A if Party B (her party) controls the state legislature, to give the legislature an excuse to name its own competing slate of electors. Or a state legislature could claim the "plenary" power that Professor Williams discusses to override a state popular vote. The reason these things do not happen is not that the current system lacks loopholes, but rather that the legitimacy of majority rule is so entrenched that any politician who blatantly tried to subvert the vote would be pilloried. And given the national polling data in support of a move towards direct national election, it is almost certain that the nonlegal "democracy norm" would prevent the most blatant of the shenanigans that Professor Williams fears.

But the subtle perversions that are possible due to the new incentives states would have under an NPV plan to maximize the number of people whose votes count, and the nonuniformity among the various states as to voter eligibility, voting machinery, and vote-count and vote-recount rules, present a different set of challenges, and they are serious. Perhaps Professor Williams's best observation overall in his essay is that a partial national recount—conducted in some but not all the states—in the event of a close national race would generate a true crisis, perhaps even bigger than the one that occurred in 2000.[59] The point here is not that a nationwide recount under uniform standards could not be done; big states do statewide recounts effectively. The point is that having some but not all of the fifty states doing recounts, with no coordination or governing uniform rules, would be very subobtimal.

I do not necessarily concur with Professor Williams's suggestion that such nonuniformity and the "illusory" nature of a truly national popular vote under the NPVC as currently designed would generate an unconstitutional situation. Professor Williams writes that

> [o]nce the relevant voting community is expanded to include the entire nation, however—as the NPVC seeks to do—it is hard to see how the disparate voting qualifications and systems in each state would be constitutionally tolerable.
>
> Take the suffrage disparities. Surely it would be unconstitutional for a state to agree to treat as valid the votes of individuals in other states who would not be entitled to vote in the original state if they lived there.[60]

[57] Williams, *supra* note 11, at ___.

[58] Akhil Reed Amar & Vikram David Amar, *A Critique of the Top Ten Modern Arguments for the Electoral College*, FINDLAW (Dec. 14, 2001), http://writ.news.findlaw.com/amar/20011214.html.

[59] To his credit, Professor Williams forthrightly concedes that in some respects recounts can be more problematic under the current system, since a crooked recount in just one state can right now tip the election even when the nationwide popular vote is not in doubt. Williams, *supra* note 11, at [73]. But I agree with him that a nationwide recount done under different rules in each state would—if and when it occurs—run a huge risk of becoming an historic debacle.

[60] Williams, *supra* note 11, at [64–65].

This seems much too quick. For starters, courts would likely be reluctant to strike down a scheme that would, by hypothesis, have been adopted by a large number of states and that may be approved by Congress.[61] True, *Bush v. Gore*[62] reminds us that it is very hard to count on judicial circumspection and restraint, but the Supreme Court's perceptions of the manipulation taking place in Florida after the 2000 election would not inform any pre-election resolution of the broader question of nonuniformity between the states presented by the NPVC. Indeed, *Bush v. Gore* (which itself crafted newfangled equal protection doctrine)[63] was concerned with intrastate—not interstate—nonuniformity. Under the NPVC, it is hard to see how variation among states result in any one state denying equal protection of the laws "to any person within its jurisdiction,"[64] insofar as all persons within each state's jurisdiction (i.e., voters in the state) are being dealt with similarly. No single state is treating any people who reside in any state differently than the other folks who live in that state. Even if Congress approves the compact—more on that soon—it is hard to see how Congress would be violating the equal protection component of the Fifth Amendment[65] by blessing a nonuniformity that is less pronounced than that which exists under the current Electoral College system. Put more generally, it would be very odd for the Constitution to say: (1) each state may do what it wants to allocate electors so long as it treats all persons within the state equally; (2) the resulting nonuniformity among the states can be quite pronounced but is unproblematic because it is built into the system; but (3) if some states choose to take a step in the direction of less interstate nonuniformity than currently exists by considering the wishes of people in other parts of the country, then virtually all interstate nonuniformity becomes unconstitutional. Such an interpretation of equal protection would go well beyond even the (hypercontroversial) reasoning of *Bush v. Gore* and would essentially embrace a view that the current state of nonuniformity among the states offends constitutional equality values, such that the equal protection idea and the Electoral College are in reality parts of the Constitution that are essentially at war with each other. Indeed, under Professor Williams's reasoning, no single state could ever take account of the vote tally in any other state as any kind of meaningful factor in the process for allocating its electors. This seems deeply inconsistent with the "plenary" power Professor Williams maintains that state legislatures have to determine the manner of selecting electors.[66]

But to suggest that the NPVC, as currently conceived, would be constitutionally permissible is not at all to say it is desirable. As I noted above, substantial nonuniformity among the states in the national vote count on the questions of who votes, how the votes are cast, and how they are counted and recounted undermines the normative appeal of the move to a national popular vote, and it raises the specter of electoral crises that can and should be avoided. My brother and I noted—indeed highlighted—this problem when we first floated the idea of state-level

[61] As I explain below, *see infra* notes 68–81 and accompanying text, I think congressional approval—and indeed congressional improvement—is the wisest course by far.
[62] 531 U.S. 98 (2000).
[63] *See, e.g.*, Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 961–62 (2009) (pointing out, among other things, that the nonuniformity in the original Florida statewide ballot count—that was reinstated by the U.S. Supreme Court—was likely greater than in the recount process to which the Justices in Washington put a halt).
[64] U.S. CONST. amend. XIV, § 1.
[65] *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (imposing, through the Fifth Amendment's Due Process Clause, a parallel equal protection responsibility on the federal government).
[66] Williams, *supra* note 11, at [54].

nonconstitutional movement towards direct election almost ten years ago. Here is what we wrote:

> Of course, any coordinated state-law effort would require specifying key issues: Majority rule or plurality rule? Runoff or no? How should recounts and challenges be handled?
>
> It would be hard to rely completely on the laws and courts of each state, many of which might not be part of the cooperating 270 group. . . . What if some state let [seventeen-year-olds] vote in an effort to count for more than its fair share of the national total? And what about Americans who live abroad or in the federal territories?
>
> These questions suggest an even more mind-boggling prospect: our national-vote system need not piggyback on the laws and machinery of noncooperating states at all! Let these noncooperating states hold their own elections, but so long as they amount to less than 270 electors, these elections would be sideshows. The cooperating states could define their own rules for a uniform "National Presidential Vote" system. In that case, our law would read something like this:
>
> > Section 1. This state shall choose a slate of electors loyal to the Presidential candidate who wins the "National Presidential Vote," if and only if other states, whose electors taken together with this state's electors total at least 270, also enact laws guaranteeing that they will choose electors loyal to the Presidential candidate who wins the "National Presidential Vote."
> >
> > Section 2. The "National Presidential Vote" shall be administered as follows. . . .
>
> Section 2 of this model law would proceed to specify the precise rules of this "National Presidential Vote." For example, Section 2 could provide that Americans everywhere who want to be counted must register in a system to be administered by a nongovernmental election commission . . . . Section 2 could also specify uniform rules of voting eligibility, uniform presidential ballots, and an election dispute procedure . . . . Alternatively, Section 2 might contemplate that the "National Presidential Vote" should be administered by a new interstate election council or directly by the federal government; and Congress could then pass a statute blessing this more elaborate interstate agreement.[67]

The drafters of the NPVC plan already adopted by many states did not take our advice in this respect; they did not build into the plan "uniform rules of voting eligibility, uniform presidential ballots, and an election dispute procedure." Nor did they delegate authority to do so to a nongovernmental commission. Nor did they affirmatively invite Congress to step in. To my mind, the most important issue surrounding the entire NPVC movement as it approaches critical mass in the states and builds some support on Capitol Hill—and the issue on which thoughtful analysts ought to be focused—is how Congress, in the course of approving the Compact or in adopting a freestanding statute, might fill in the dangerous gaps in the NPVC design. If and

[67] Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), http://writ.news.findlaw.com/amar/20011228.html.

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.[68]

The key questions then become: (1) how could Congress do this?; (2) where does Congress get the power to do it?; and (3) can Congress compel the states to administer the uniform rules? Professor Williams, without discussing any of these questions, says definitively: "Only a federal constitutional amendment abolishing the Electoral College can provide for such a uniform, federal electoral system."[69] My tentative sense is that a constitutional amendment is not necessarily required, and that congressional action could suffice. In the space that remains, I shall begin to lay the foundation and build the framework for an argument in favor of a congressional solution, but I acknowledge that the doctrinal edifice cannot be completed entirely in these pages.

On the question of how, logistically, Congress could set up a uniform system to come into effect if and when the NPVC magic number is reached, the answer is that Congress could—in the best tradition of the "Oregon Plan" I described above—require a "presidential preference poll" to be held in every state on the same day that congressional elections are held. The federal government could specify which persons—by age, ex-felon status, foreign residence, etc.—would receive this presidential preference poll form, and also design the form itself so as to make it very easy to accurately record a person's preferences among qualifying presidential/vice-presidential candidate pairs. Congress could—if it wanted to—include on the form a ranking mechanism to allow the user to register a first, second, third, and fourth (and so forth) choice. The congressional statute would also prescribe how the forms would be read and tallied, and also how they would be re-evaluated in the case of a genuine controversy over the nationwide count. Crucially, the statute would make clear that the results of this preference poll conducted in every state would be employed to pick electors only by those states (comprising a majority of the Electoral College if the NPVC is up and running) that have signed onto the NPVC or have otherwise chosen to make use of the poll. The statute would also make clear that those states that are not part of the NPVC could continue to select electors any way that is constitutionally permissible, including by a statewide vote for electors. But any such statewide vote for electors would have to take place at least one week after the presidential preference poll/congressional election date, so as to avoid confusion among participants in both events. Finally, the statute would make clear that states that join the Compact cannot withdraw after the July 20 date provided for in the Compact, so that the candidates and the American people can plan accordingly during the post-party-convention campaigning.

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[68] In our earlier writings, my brother and I suggested that it might be possible that the NPVC idea could be implemented without congressional approval as an interstate compact. *See id.* But (1) the failure of the NPVC folks to specify and implement any uniform voting and counting procedures, (2) the involvement of the District of Columbia—which is under Congress's jurisdiction and whose involvement without congressional approval perhaps should not count towards the magic 270 number, (3) the helpfulness of Congress and the Supremacy Clause in reinforcing any prohibition on late withdrawal by states, and (4) the notion that some have raised that the NPVC might in some states violate the Voting Rights Act, combined with murkiness in Supreme Court cases about precisely what constitutes a Compact between states that requires approval, lead me today to argue strongly in favor of congressional involvement. Whether congressional approval under the Compact Clause is required or not, Congress should adopt uniform rules of tallying the national popular sentiment , and rules for the timing and consequences of withdrawal from the Compact, to be used by the NPVC states if the NPVC is likely to come into being.

[69] Williams, *supra* note 11, at [73]; *see also id.* at [7] ("Only a federal constitutional amendment can bind all the states and therefore bring about a direct, nationwide popular election in a way that is both workable and consistent with our commitment to political equality.").

The next question is the location of Congress's power to create such a national uniform poll to be held in all states and used by the NPVC states. Let us canvass some possibilities. First might be Section 5 of the Fourteenth Amendment; Congress might adopt a uniform system so that states participating in the NPVC do not violate the equality rights announced in *Bush v. Gore*.[70] If Professor Williams is correct that the NPVC would violate the Equal Protection Clause if implemented in its current form, then Congress could make use of Section 5 to prevent and remedy such violations; Congress's actions here would be "congruen[t] and proportional[]"[71] to redressing Fourteenth Amendment harms. As I have already observed, however, I do not agree with Professor Williams that a *Bush v. Gore* problem exists (and remember, the *Bush v. Gore* opinion itself counseled a narrow reading),[72] so I do not find Section 5 to be an attractive basis. I do note, however, that Professor Williams needs an explanation for why he believes Congress could not invoke Section 5—an explanation for his stated view that constitutional amendment is the only option here given his view of the *Bush v. Gore* problem.

A second possible source of congressional power is the Spending Clause; Congress could condition funding for elections on states' willingness to administer the preference poll. Surely it is in the country's "general Welfare"[73] to develop uniform and reliable voter sentiment information that states that have committed to using a national vote count may employ in allocating their electors. But this route might be expensive for Congress, and it would not permit Congress to force unwilling states (and there may be some) to participate in the preference poll so long as the states were willing to forego federal funding for elections.

A third avenue, with some initial promise, is Congress's power to approve interstate compacts (assuming the NPVC qualifies) and its sweeping power to adopt laws "necessary and proper" to put into effect its other powers, including its compact approval power.[74] Surely Congress enjoys (an implied) power to approve compacts, otherwise the requirement that states get approval for compacts would instead be a ban on compacts. Provided that states can compact in the area of elector selection (and there does not seem an obvious reason why they cannot),[75] might Congress's implementation of the NPVC fly under the "necessary and proper" banner? After some thought, I entertain serious doubts about whether this authority should be recognized to bless all the aspects of the law I envision. Unless Congress has independent authority to create and compel a presidential preference poll to be administered in the states, the fact that some group of compacting states (which could be as few as two) might agree to something should not give Congress power that otherwise falls beyond its enumerated authority to impose on unwilling states. Two states could compact for virtually anything, and surely that cannot be a means by which Congress can circumvent the Tenth Amendment's federalism limits that protect the other states from federal overreach. The Compact Clause combined with the Necessary and

[70] *Cf.* Oregon v. Mitchell, 400 U.S. 112, 280–81 (1970) (upholding Congress's power to permit eighteen-year-olds to vote in presidential elections, relying on Section 5).
[71] City of Boerne v. Flores, 521 U.S. 507, 508–09 (1997).
[72] *See* 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").
[73] U.S. CONST. art. I, § 8, cl. 1.
[74] U.S. CONST. art. I, §10, cl. 3; *id.* § 8, cl. 18.
[75] In conversation, Daniel Lowenstein, (now an emeritus Professor) from UCLA, once indicated to me a possible belief that states could not delegate to persons outside the state the power of picking electors. But the NPVC involves no such delegation. Each state is making a policy choice—with intelligible principles—about the criteria (i.e., national popularity) it wants to use to make its selection of electors. Moreover, any nondelegation problem is cured by the power each state has to change its mind about the manner of selecting electors in later presidential elections.

Proper Clause does, however, provide Congress a solid basis on which to codify the withdrawal rules for members to the Compact—making the rules for withdrawal supreme federal law imposes only on those states that have chosen to join and thus does not implicate the federalism limitations I just mentioned.[76]

Returning to the question of congressional power to mandate that the preference polls be conducted in all states, I think a fourth (and most promising so far) possibility exists under federal power to safeguard elections of federal officers. While the constitutional text gives Congress clear power over the times, places, and manners of congressional elections, with respect to presidential contests, it grants explicit power only to control the timing of the electors' selection and voting. The Supreme Court, however, in the seminal *Burroughs v. United States* case,[77] has recognized a much broader federal authority to ensure the integrity of presidential elections. In *Burroughs*, where the Court upheld a federal criminal law prohibiting corruption of elections for presidential electors held in the states, the Court reasoned:

> The only point of the constitutional objection [raised by the defendant] necessary to be considered is that the power of appointment of presidential electors and the manner of their appointment are expressly committed by section 1, art. 2, of the Constitution to the states, and that the congressional authority is thereby limited to determining 'the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.' So narrow a view of the powers of Congress in respect of the matter is without warrant.
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> The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. . . . Its operation . . . is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. . . .
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> While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. . . . The importance of [the President's] election and the vital character of its relationship to and effect upon the welfare . . . of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of [force or corruption] to influence the result is to deny to the nation in a vital particular the power of self-protection. . . .
>
> . . . .
>
> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they

[76] Nor do congressionally enforced limitations on state withdrawal violate each state legislature's Article II power to "direct the manner" by which electors from that state are selected. Once a state has selected a manner (by joining the Compact), Congress can make reasonable rules to implement that manner. *Cf.* Amar, *supra* note 63, at 958. Congress is, after all, given power to structure the timing of the Electoral College dynamics. *See* U.S. CONST. art. II, § 1, cl. 3. And there is nothing disrespectful to state autonomy to require states to lock into their manner before the campaign season unfolds in a way that might induce other states to change their decisions about manner in a result-oriented way. More generally, a state may not choose a manner that violates a statute that Congress enjoys the power to enact under one of its delegated powers (in this case the Compact power and the Necessary and Proper power).

[77] 290 U.S. 534 (1934).

> conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone.[78]

Two generations later, in *Buckley v. Valeo*,[79] the Court, en route to upholding Congress's power to limit the extent and mandate the disclosure of contributions to presidential candidates, cited *Burroughs* for the proposition: "This Court has also held that [Congress] has very broad authority to prevent corruption in national Presidential elections."[80] Indeed, lower courts have interpreted *Burroughs* to mean that Congress's "power over Presidential elections [is] coextensive with that which Article I section 4 grants it over congressional elections."[81]

Under this authority, a strong case can be made for my proposed presidential preference poll statute. The reasoning would be as follows: Once the NPVC comes into being, the national tally becomes the most important aspect of the presidential contest. At that point, there emerges a federal interest, recognized in *Burroughs*, in making sure that this tally is free from corruption and confusion about who and what counts—making sure, that is, that the tally on which the national presidential outcome hinges has integrity. And to the extent that anyone believes that Congress's (and my and Professor Williams's) concerns about potential manipulation by states, and the possible undermining of confidence on the part of the national electorate that might follow from fears of manipulation, are exaggerated, that is where the deference to Congress that *Burroughs* so clearly and forcefully recognized comes in. So, I think Congress could pass a law like the one I propose, either as a condition of approving the Compact or independent of the Compact's approval but triggered by the Compact's coming into effect.

But would the compacting states themselves abide by such a uniform system? In other words, would the kind of uniform congressional preference poll scheme I envision be consistent with the terms of the NPVC itself? I think the answer is: quite possibly. To begin with, note that the NPVC agreement's text is silent on the question of congressional involvement.[82] Moreover, the plan does not define the "national popular vote total" to be used by signatory states except to say that it is the aggregate of the votes cast in a "statewide popular election" for each "presidential slate."[83] "[S]tatewide popular election" is, in turn, defined as a "general election in which votes are cast for presidential slates by individual voters."[84] And a "presidential slate" is defined as "a slate of two persons" for President and Vice President.[85] So, under the terms of the NPVC itself, Congress need simply declare that the presidential preference polls it is requiring constitute the "statewide popular elections" for President within the meaning of the NPVC, even though voters in no state are actually casting ballots for a President and Vice President because only presidential electors can do this. (Indeed, the NPVC's reference to "popular elections" for "slates of two persons" might be technically inaccurate, because the "elections" that states currently hold may not actually be to select a slate of two persons, but rather to select a slate of the entire group of electors allocated to that state.) And remember, the congressional law under consideration here (like the statute upheld in *Burroughs*) in no way prevents states from

[78] *Id*. at 544–45, 547–48 (citation omitted).
[79] 424 U.S. 1 (1976).
[80] *Id*. at 132.
[81] *E.g.*, Assoc. of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995).
[82] *See Agreement Among the States to Elect the President by National Popular Vote*, NATIONALPOPULARVOTE.COM, http://www.nationalpopularvote.com/pages/misc/888wordcompact.php (last visited July 12, 2011).
[83] *Id.*
[84] *Id*.
[85] *Id*.

conducting their own processes under Article II (using different rules) if they do not embrace the NPVC.

Although the text of the NPVC agreement can thus be harmonized with the proposed congressional statute, the Every Vote Equal (EVE) explanatory book does indicate that the NPVC plan being proposed will not impose any new procedures or costs on states.[86] The book's explanation says that one big reason why no new uniform state procedures are mandated under the plan is that any particular set of uniform procedures might be partisan in favor of Democrats or Republicans.[87] But, again, the agreement's text does not foreclose use of new uniform procedures. Moreover, the EVE book observes that "[t]he enactment of [the Compact by states] would provide an excellent opportunity for Congress to review existing federal laws concerning presidential elections" and that the task of obtaining the popular vote count from all the states could be done by a "clearinghouse [that] might be established by federal law."[88] Finally, if signatory states do not want to incur the costs of new uniform procedures, do not like the particular uniform rules Congress adopts, or do not like imposing either the costs or the rules on other states, they can withdraw from the Compact because each state's Article II power to withdraw in a timely manner is unimpaired. To facilitate such withdrawal, Congress should give ample time when it adopts the uniform procedures, so that signatory states can exit before the next election if they desire. Indeed, Congress would be wise to delay implementation of the plan for at least a full four-year presidential election cycle. Only if, a few years after congressional action, states representing a majority of Electoral College votes are still committed to the plan will the plan—and the congressional imposition of costs and uniformity upon the states—go into effect. Only then does the national vote tally matter such that Americans nationwide will need confidence in it.

My repeated mention of costs raises a final question: 'Can Congress require the states to administer the new system and pick up the tab for it? This is important because if the federal government has to set up an entirely new and independent apparatus to enforce the uniform preference poll scheme, some of the political will in support of the plan may evaporate. Happily, I think there is a powerful argument that, although generally speaking the federal government cannot commandeer states into administering federal programs,[89] this situation would fall under an exception to the anti-conscription rule.

In *New York* and *Printz*, the Court, even as it struck down laws passed by Congress under the Commerce Clause that commandeered state institutions, made mention of the fact that certain provisions of the Constitution authorize commandeering.[90] Lower courts and scholars have forcefully argued that Article I, Section 4—the clause that requires every state to administer congressional elections pursuant to federal rules—is just such a provision.[91] Indeed, while the

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[86] EVE, *supra* note 12, at 525–26.
[87] *Id*. at 490–91.
[88] *Id*. at 268.
[89] *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").
[90] *Printz*, 521 U.S. at 899 [; *New York*, 505 U.S. at 177–78.
[91] *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199; Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller, 129 F.3d 833 (6th Cir. 1997); Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coal. v. Wilson, 60 F.3d 1411 (9th Cir. 1995), *cert. denied* 116 S. Ct. 815 (1996).

Printz case was working its way to the Supreme Court, three separate Courts of Appeals, in rejecting challenges by states to the so-called "motor voter" registration law adopted by Congress in 1993,[92] held that commandeering of states was permitted under Article I, Section 4.

A "motor voter" law is a statute that requires states to make registration for all federal elections—congressional and presidential—easier by, among other things, requiring states to include on every driver's license application an additional application to register to vote in federal elections. When various states balked at implementing this new voter registration regime on the ground that Congress was violating *New York v. United States* and its ban on commandeering of state governments, all three federal appellate courts to rule on the question rebuffed the challenge.[93] Judge Posner's opinion for the Seventh Circuit in *ACORN v. Edgar* is instructive:

> As emphasized in *New York v. United States*, . . . the provisions of the Constitution that relate to the states mostly tell them not what they must do but what they can or cannot do. Article I section 4 . . . is an exception. The first sentence tells the states that they, not Congress, must regulate the times, places, and manner of holding federal elections, implicitly at their own expense. A state cannot say to Congress, "We are not interested in elections for federal office. If you want to conduct such elections in our state you must do so yourself—establish your own system of registration, hire your own registrars, find your own places for voting." The state is obligated to do these things. . . . [S]ection 4 goes on to provide that Congress can if it wants step in and . . . make its own regulations . . . *and* force the state to bear the expense of the regulation.[94]

This reasoning is impeccable as far as it goes.[95] But there is an incomplete quality about the three cases that reject the *New York v. U.S.*-based challenges to motor voter. Each case essentially holds: (1) Congress can regulate all procedural aspects of congressional elections under Article I, Section 4; (2) *Burroughs* extends that power to presidential elections; and (3) *New York v. United States* does not apply because Article I, Section 4 is a specific authorization of commandeering.

But the question that Judge Posner's analysis (and that of the other opinions as well) does not quite answer is: why does Article I, Section 4's specific authorization of commandeering extend to the commandeering of states with respect to presidential elections not mentioned in Article I, Section 4? Perhaps Article II's requirement that each state "shall" select presidential electors could be considered a mandate on states that justifies commandeering. But that reasoning is problematic because the hypothetical presidential preference poll statute is imposing requirements on even those states that do not want to make use of it in any way. Recall that states do not have to have elections for presidential electors the way Article I, Section 4 requires them to have congressional elections. So, commandeering states that do not want to hold

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[92] National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg-1 to 1973gg-10 (2006).
[93] *Miller*, 129 F.3d at 836–38; *Wilson*, 60 F.3d at 1415–16; *Edgar*, 56 F.3d 791 at 794–96.
[94] 56 F.3d at 794 (citation omitted).
[95] The states' duty to conduct federal elections is similar to the states' duties to keep their courts open to process federal claims. *Cf.* Howlett v. Rose, 496 U.S. 356, 369–74 (1990) (holding that a state court cannot refuse to entertain a § 1983 claim against a school district when the state court entertained similar state-law actions against state defendants); Testa v. Katt, 330 U.S. 386, 390–94 (1947) (holding that state courts could not decline jurisdiction over the federal Emergency Price Control Act). Interestingly, even Jay Printz in his *cert* petition seemed to recognize that Article I, Section 4 posed a different question than his Brady gun law background check case. **[**

preference polls simply because they are required to select electors—a duty that they are already fulfilling some other way—seems to bootstrap the duty rather than enforce it.

But even if Article II, standing alone, does not permit commandeering states to conduct the preference polls, Article I, Section 4, interestingly enough, very well could. The key point here is that Congress has, under Article I, Section 4, an undeniable interest in promoting turnout for congressional elections.[96] And voters historically turn out for congressional elections when those elections are also held at a time and place where voters can count for purposes of selecting the President.[97] That, after all, is why Congress has (permissibly) required that states hold congressional and presidential elections on the same day.[98] And once the NPVC comes online, voters are much more likely to vote in congressional elections if they can also register their preferences for President in a smooth, reliable, trustworthy way that will be counted toward the NPVC total. Because the NPVC operation would be new and, to some voters, scary and unreliable for the reasons Professor Williams discusses, it would be necessary and proper to Congress's goal of promoting strong congressional voter turnout under Article I, Section 4 for Congress to ensure that the NPVC operates smoothly and consistently. And Congress reasonably (and sincerely) accomplishes this goal by imposing on states the burden of administering the preference poll as part of the states' obligation under Article I, Section 4 to implement Congress's vision of an effective and robust congressional election.[99]

I close by observing that while much of this essay has been devoted to explaining how subconstitutional change can be made to work—why Professor Williams is not, to my mind,

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[96] Indeed, that was the interest credited as important underlying the motor voter law.

[97] Federal voter turnout in presidential elections can be almost twice of that in so-called "off year" congressional elections.

[98] Cite federal statute mandating that Presidential elector selection take place on Congressional election day.

[99] Professors Dan Coenen and Edward Larson have argued that Article I, Section 4 and the Necessary and Proper power justify congressional authority to impose a uniform presidential ballot on states even under the current system, without regard to the NPVC. *See* Dan T. Coenen and Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43WM. & MARY L. REV. 851, 916–20 (2002). They make powerful arguments, similar in many respects to the ones I advance here. But the case they must establish is harder than mine, because the ballots they envision mandating would be imposed on states as part of the way those states actually pick their electors, implicating state latitude to decide on "manner of selection" under Article II. Because the preference poll I envision is not imposed on any state as a basis for that state picking its electors, Article II concerns are more easily avoided. Moreover, the need for a uniform set of rules to increase congressional voter turnout is much greater if a new national system—NPVC—comes into operation than it is now, given the incentives states might have to exploit nonuniformity and the resulting voter skepticism about a national vote tally that is not conducted under national rules. Thus, my linking of presidential vote tallying uniformity to congressional elections is more "necessary and proper" than is theirs. Let me be clear: I may agree with Professors Coenen and Larson, but one could disagree with them and still have no quarrel with my proposal and the authority underlying it. *Cf.* 42 U.S.C. § 1973aa-1(c) (2006) (abolishing durational residency requirements for presidential elections); 42 U.S.C. §§1973ff-1 to 1973ff-6 (2006) (permitting foreign resident U.S. citizens to vote in presidential elections under some circumstances). Section 1973aa was upheld in *Oregon v. Mitchell*, 400 U.S. 112 (1970), although no single rationale accounted for the result. One could argue that this provision deals not with who may vote but rather the procedures for voting registration. One might also argue that it impairs the rights of the states to decide who gets to vote in federal elections. Because that statute in effect determined whose vote would count in an actual election in each state for that state's electors, it presents a different—and more difficult—question than that posed by my hypothetical statute requiring preference polls. Since each state is free to disregard those polls (and use another means) in selecting its electors, each state's autonomy under Article II is not impaired the way it arguably is under section 1973aa, or under section 1973ff, which Professor Robert Bennett has characterized as being of "dubious constitutionality." Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241, 242 (2001).

correct in arguing that only a constitutional amendment can provide the uniformity that the best NPV design should seek—there is an affirmative case to be made that subconstitutional experimentation is superior to a constitutional amendment drive. If any of the downsides of national popular election that Professor Williams and others fear come to pass, it is much easier to undo a compact than to undo a constitutional amendment. On the other hand, if (as I would expect) experience with national popular election proves after a decade or so to improve but not transform American presidential contests, then a formal constitutional amendment can be more readily sold, as was true for direct election of senators.