National Popular Election of the President

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Constitutionality of the National Popular Vote Interstate Compact (SB870)

May 18, 2019

Article II, section 1, clause 2 of the U.S. Constitution empowers each state to choose the method of selecting its presidential electors.

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…"

Opponents of the National Popular Vote interstate compact sometimes argue that the compact is unconstitutional because a proposal for direct election of the President was rejected by the 1787 Constitutional Convention, because of implicit limitations on the states in choosing the method of selecting their presidential electors, or because the compact's method has not been used in the past.

For example, John Samples of the Cato Institute has stated, in referring to supporters of the National Popular Vote compact:

> "They suggest that the power to appoint electors is unconstrained by the Constitution. It is accurate that the Constitution does not explicitly constrain the power of state legislatures in allocating electors. But **a brief consideration of the history of the drafting of this part of the Constitution suggests some implicit constraints on state choices**.

> "The Framers considered several ways of electing a president. … On July 17, 1787, the delegates from nine states voted against direct election of the president; the representatives of one state, Pennsylvania, voted for it."[1] …
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> "**NPV offers a way to institute a means of electing the president that was rejected by the Framers of the Constitution**."[2] [Emphasis added]

Here are the facts. Prior to arriving at the eventual wording of section 1 of Article II, the 1787 Constitutional Convention debated the method of choosing the President on 22 separate days and took 30 votes on the topic.[3] The methods that were rejected by the Constitutional Convention included:

- electing presidential electors by districts,
- having state legislatures choose the President,
- having Governors choose the President,
- nationwide direct election, and
- having Congress choose the President.

If John Samples were correct in asserting that it is unconstitutional for a state to use a method of choosing presidential electors that was rejected by the Constitutional Convention, then George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe were all elected unconstitutionally. Indeed, a *majority* of the presidential electors in the nation's *first nine presidential elections* (1789–1820) were

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[1] Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 8.

[2] Samples, John. *A Critique of the National Popular Vote Plan for Electing the President*. Cato Institute Policy Analysis No. 622. October 13, 2008. Page 13.

[3] Edwards, George C., III. 2004. *Why the Electoral College Is Bad for America*. New Haven, CT: Yale University Press.

chosen using methods specifically rejected by the Constitutional Convention.

Selection by Districts

On June 2, 1787, the Convention voted against a motion by James Wilson of Pennsylvania specifying that the voters would elect presidential electors by district.[4] James Madison (often referred to as the "father of the Constitution") recorded in his notes:

> "Mr. Wilson made the following motion, to be substituted for the mode proposed by Mr. Randolph's resolution,
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> > 'that the Executive Magistracy shall be elected in the following manner: **That the States be divided into ___ districts: & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect ___ members for their respective districts to be electors of the Executive magistracy**, that the said Electors of the Executive magistracy meet at ___ and they or any ___ of them so met shall proceed to elect by ballot, but not out of their own body [the] person in whom the Executive authority of the national Government shall be vested.'" [Emphasis added]

Despite the Constitutional Convention's rejection of the district system, the states of Virginia, Delaware, and

[4] *Madison Debates*. Yale Law School. *The Avalon Project: Documents in Law, History, and Diplomacy*. On June 2, 1787, http://avalon.law.yale.edu/18th_century/debates_602.asp.

Massachusetts authorized their voters to elect their state's presidential electors by district in the nation's first presidential election in 1789.

Moreover, in the nine presidential elections between 1789 and 1820 (when James Monroe was elected), the voters in a total of eight states (Virginia, Delaware, Massachusetts, Maryland, North Carolina, Kentucky, Illinois, and Maine) elected presidential electors by district on one or more occasions.

Moreover, if John Samples were correct in asserting that section 1 of Article II precludes states from using a method of choosing presidential electors that was rejected by the Constitutional Convention, Maine and Nebraska's use today of the district method would be unconstitutional. Moreover, Michigan's use of the district method in the 1892 election would also be unconstitutional if John Samples were correct. The U.S. Supreme Court upheld Michigan's 1892 law specifying that the voters elect the state's presidential electors by congressional district in *McPherson v. Blacker*.[5]

Selection by state legislatures

On July 24, 1787, the Constitutional Convention rejected selection of the President by state legislatures. Nonetheless, in 1789, Connecticut, South Carolina, and Georgia chose to appoint their presidential electors in the state legislature. In the nine presidential elections between 1789 and 1820, the legislatures of a total of 15 states (including New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, South Carolina, Kentucky, Louisiana, Indiana, Alabama, and

[5] *McPherson v. Blacker*, 146 U.S. 1. 1892.

Missouri) appointed their state's presidential electors on one or more occasions.[6]

Selection by governors

On June 15, 1787, the Constitutional Convention voted against selection of the President by state Governors. Nonetheless, New Jersey's presidential electors were appointed by the Governor and his Council in the nation's first presidential election in 1789.[7] In 1792, Vermont combined two methods that were rejected by the Constitutional Convention. Its presidential electors were appointed by a "Grand Committee" consisting of the Governor and his Council along with the Vermont House of Representatives.[8]

The wording that actually ended up in Article II, section 1 of the Constitution does not prohibit the use of any of the methods that were debated and rejected, as evidenced by the fact that three of the methods rejected by the Constitutional Convention were used in the nation's first presidential election in 1789, namely election of presidential electors by district, appointment by legislatures, and by gubernatorial appointment.

In summary, the course of conduct of the Founding Generation immediately after ratification of the Constitution indicates that no

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[6] In *Bush v. Gore* in 2000, the U.S. Supreme Court agreed that state legislators could appoint presidential electors. 531 U.S. 98.

[7] An Act for carrying into effect, on the part of the state of New Jersey, the Constitution of the United States. November 21, 1788. *Acts of the General Assembly of the State of New Jersey*. Page 481. See also DenBoer, Gordon; Brown, Lucy Trumbull; and Hagermann, Charles D. (editors). 1986. *The Documentary History of the First Federal Elections 1788–1790*. Madison, WI: University of Wisconsin Press. Volume III. Page 29. Interestingly, the U.S. Supreme Court's opinion in the 1892 case of *McPherson v. Blacker* contains an error concerning New Jersey. In its historical review of methods used to appoint presidential electors in 1789, the Court (incorrectly) stated, "At the first presidential election, the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina." 146 U.S. 1 at 29. The source of this misinformation about New Jersey appears to be page 19 of the plaintiff's brief in the 1892 case. *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892.

[8] An Act Directing the Mode of Appointing Electors to Elect a President and Vice President of the United States. Passed November 3, 1791. *Laws of 1791*. Page 43.

one interpreted section 1 of Article II as precluding the states from using methods of choosing presidential electors that were rejected at some point during the Constitutional Convention.

Tara Ross, an opponent of the National Popular Vote compact has stated:

> "The [U.S. Supreme] Court has held that 'the State legislature's power to select the manner for appointing electors is plenary.' …
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> "**Is this power of state legislators completely unrestricted?** If it is, then Rhode Island could decide to allocate its electors to the winner of the Vermont election. In a more extreme move, New York could allocate its electors to the United Nations. **Florida could decide that Fidel Castro always appoints its electors**.…
>
> "**NPV is the opposite of what the Founders wanted, but failure of imagination prevented the Founders from explicitly prohibiting this particular manner of allocating electors**."[9] [Emphasis added]

Ross' argument echoes the argument made in 1892 before the U.S. Supreme Court by the ***losing*** attorney in *McPherson v. Blacker*. Referring to Great Britain (the villainous 1890's analog of Fidel Castro), attorney F.A. Baker argued:

> "The crown in England is hereditary, the succession being regulated by act of parliament.
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> "Would it be competent for a State legislature to pass a similar act, and provide that A. B. and his heirs at

[9] Ross, Tara. 2010. Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan. *Engage*. Volume 11. Number 2. September 2010. Pages 37–44.

> law forever, or some one or more of them, should appoint the presidential electors of that State?"[10]

In its unanimous ruling in *McPherson v. Blacker*, the U.S. Supreme Court answered Baker's argument about unstated constitutional restrictions on the power of the states to award their electoral votes:

> "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, **nor that the majority of those who exercise the elective franchise can alone choose the electors**. It recognizes that the people act through their representatives in the legislature, and **leaves it to the legislature exclusively to define the method** of effecting the object. The framers of the constitution employed words in their natural sense; and, where they are plain and clear, **resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text.**"[11] [Emphasis added]

The U.S. Supreme Court recognized in *McPherson v. Blacker* that there are limitations on a state's power under section 1 of Article II. For example, a state's constitution may constrain a state's power to choose the method of appointing presidential electors.

> "The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative

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[10] *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892. Page 73.

[11] *McPherson v. Blacker*. 146 U.S. 1 at 27. 1892.

> power is the supreme authority, **except as limited by the constitution of the state**, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. **What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist.** The clause under consideration does not read that the people or the citizens shall appoint, but that "each state shall;" and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned **in the absence of any provision in the state constitution in that regard**. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."[12] [Emphasis added]

The Court continued:

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

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[12] *McPherson v. Blacker*. 146 U.S. 1 at 25. 1892.

[13] *Id.* at 29.

In deciding *McPherson v. Blacker*, the U.S. Supreme Court rejected the urging of the losing attorney (F.A. Baker) in *McPherson v. Blacker* that the Court ignore the wording of section 1 of Article II and judicially manufacture restrictions on the power of the states to choose the manner of appointing their presidential electors. Baker urged the Court to judicially manufacture restrictions that do not actually appear in the Constitution and to adopt a "more elastic system of government."

> "There is no rule of constitutional interpretation, or of judicial duty, which requires the court … to adhere to the obsolete design of the constitution."[14]

In his plea to the U.S. Supreme Court to engage in judicial activism, Baker bemoaned his client's earlier loss at the Michigan Supreme Court:

> "There can be no such thing as an absolutely rigid constitution. It is an impossibility, although the supreme court in Michigan in its wisdom most solemnly declares, that it will recognize no other.[15]"

In deciding *McPherson v. Blacker*, the U.S. Supreme Court also rejected Baker's argument that the widespread use of the winner-take-all rule, over an extended period of time, extinguished the power of the states to adopt different methods of appointing their presidential electors (that is, the "non-use" argument). Baker argued:

> "There is no rule of constitutional interpretation, or of judicial duty, which requires the court **…** to **disregard the plan of the electoral college as it**

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[14] *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892. Page 80.

[15] *Id.* At 80.

> **actually exists, after a century of practical experience and development**."[16] [Emphasis added]

The U.S. Supreme Court rejected the non-use argument in its ruling in *McPherson v. Blacker*:

> "The question before us is not one of policy, but of power …. **The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way**."[17] [Emphasis added]

If it were the case that the states were precluded from using any method of awarding electoral votes that was not specifically "imagined" by the Founders, then the winner-take-all method would itself be unconstitutional. No historian, or anyone else of whom we are aware, has ever argued that the Founders expected, or wanted, 100% of a state's presidential electors to vote slavishly, in lockstep, for a choice for President made by an extra-constitutional meeting (namely, a political party's national nominating caucus or convention).

The winner-take-all rule was never debated or voted upon by the 1787 Constitutional Convention.

It is not mentioned in the *Federalist Papers*.

It was used by only three states in the nation's first presidential election in 1789 (and was abandoned by all three by 1800).

The Founders were dead for decades by the time the winner-take-all rule came into widespread use.

It was not until the 11th presidential election (1828) that the winner-take-all rule was used by a majority of the states.

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[16] *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892. Page 80.

[17] *McPherson v. Blacker*. 146 U.S. 1 at 36. 1892.

There is virtually unanimous agreement among historians that the Founding Fathers intended that the Electoral College would operate as a deliberative body and did not anticipate the emergence of political parties.

The Constitutional Convention never agreed on any particular method for choosing the President. On August 31, 1787, the Convention assigned the question of electing the President to a special Committee of Eleven. On September 4, the Committee of Eleven returned with a recommendation that the President be chosen by presidential electors (an element of Wilson's rejected motion of June 2, 1787); however, the Committee could not agree on any particular method for choosing the presidential electors. The result was that section 1 of Article II empowered the states to decide how to choose their presidential electors.

> "Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors…."[18] [Emphasis added]

Section 1 of Article II of the U.S. Constitution does not prohibit, require, encourage, or discourage the use of any particular method for awarding a state's electoral votes. The wording "as the Legislature … may direct" permits the states to exercise their power to choose the manner of appointing their presidential electors in any way they see fit—subject only to the implicit limitation on all grants of power in the Constitution, namely that the states not violate any specific restriction on state action contained elsewhere in the Constitution.[19]

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

[19] Among the specific restrictions on the states concerning the manner of appointing their presidential electors are those contained in the 14th Amendment (equal protection), 15th Amendment (prohibiting denial of the vote on account of "race, color, or previous condition of servitude"), the 19th Amendment (woman's suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote). The Constitution's explicit prohibition against *ex post facto* laws and the Impairments Clause also operate as restraints on section 1 of Article II.

The report of the U.S. Senate Committee on Privileges and Elections in 1876 reviewed the history of the appointment of presidential electors by state legislatures and Governors:

> "The appointment of these electors is thus placed absolutely and wholly with the Legislatures of the several states. **They may be chosen by the Legislature**, or the Legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States, and **it is no doubt competent for the Legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors."**[20] [Emphasis added]

The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it and, therefore, the question of whether there are implicit restrictions on the allowable methods for appointing presidential electors.

> **"The powers** not delegated to the United States by the Constitution, **nor prohibited by it to the States, are reserved to the States** respectively, or to the people." [Emphasis added]

Article II, section 1 of the Constitution contains only one restriction on state choices on the manner of appointing their

[20] Senate Report 395. Forty-Third Congress.

presidential electors, namely that no state may appoint a member of Congress or federal appointees as presidential elector.[21]

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: **but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.**" [Emphasis added]

The 10th Amendment was ratified in 1791 (that is, *after* ratification of the original 1787 Constitution) and thus takes precedence over the original Constitution. Even if there were enforceable implicit restrictions in the original Constitution on state choices on the manner of appointing their presidential electors (perhaps in the form of penumbral emanations from section 1 of Article II), such implicit restrictions would have been extinguished in 1791 by the 10th Amendment.

Finally, as just noted, Article II, section 1 of the Constitution contains a restriction on the power of the states to appoint presidential electors. Moreover, Article II, section 1 contains *no other restriction* on the manner by which the states exercise this power. *Expressio unius est exclusio alterius* is a standard rule of

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[21] The original Constitution contains few specific restrictions on state action that bear on the appointment of presidential electors. Thus, under Article II, section 1, clause 1, a state legislature may, for example, pass a law making it a crime to commit fraud in a presidential election. However, a state legislature certainly may not pass an *ex post facto* (retroactive) law making it a crime to commit fraud in a presidential election. Similarly, a state legislature may not pass a law imposing criminal penalties on specifically named persons who may have committed fraudulent acts in connection with a presidential election (that is, a bill of attainder). Also, the Constitution's explicit prohibition against a "law impairing the obligation of contract" operates as a restraint on the delegation of power contained in section 1 of Article II. Of course, various later amendments restrict state choices, including the 14th Amendment (equal protection), 15th Amendment (prohibiting denial of the vote on account of "race, color, or previous condition of servitude"), the 19th Amendment (woman's suffrage), the 24th amendment (prohibiting poll taxes), and the 26th Amendment (18-year-old vote).

constitutional and statutory interpretation—"the express mention of one thing excludes all others". Given that there is one explicit restriction in the Constitution on the power of the states to appoint presidential electors, this express restriction excludes all others.