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Presidential Elections, Equal Protection and the Electoral College

This article examines Supreme Court pronouncements about how states may, and may not, use their constitutional powers to determine their respective electoral regimes, then looks at the National Popular Vote Initiative and an argument that it is unconstitutional.

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Recent history has reminded us that the Electoral College, not individual voters, elects the president of the United States. But who decides how presidential electors are selected? With the exception of Maine and Nebraska, each state designates its electors on a winner-take-all basis. The states, however, are not required to follow this process or any other. In fact, the states are not constitutionally mandated to permit their own citizens to vote for president of the United States. Imagine a presidential election in which you had no right or opportunity to vote.

In light of popular concern about the potential for the Electoral College to subvert the "will of the people,"

the National Popular Vote Initiative gave rise to the National Popular Vote Interstate Compact (NPVIC) among a number of states. This article examines Supreme Court pronouncements about how states may, and may not, use their constitutional powers to determine their respective electoral regimes, then looks at the NVIC and an argument that it is unconstitutional.

Article II Sec. 1 of the Constitution provides in relevant part that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representative to which the State may be entitled in the Congress." This provision thus establishes a system for the election of the office of president that does *not* require or guarantee that the citizenry at large will vote. Rather, through their respective legislatures, the states are free to determine the composition of the Electoral College. No state is required to put the vote for president to its electorate. See *Bush v. Gore,* 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college" (citing U.S. Const., art. II §1)).

The States Select Their Presidential Electors

In *McPherson v. Blacker,* 146 U.S. 1, 35 (1892), the Supreme Court upheld Michigan's method for selecting its presidential electors. Michigan divided the state into separate congressional districts, awarding one of the state's electoral votes to the winner of each district. The challengers of the Michigan law argued that Article II, §1 of the Constitution required the state, as a body politic, to act as a unit in selecting presidential electors, and that the creation of political subdivisions (i.e., districts) for such purpose was unconstitutional. Id. at 24-25 ("It is argued that the appointment of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors"). The court rejected the challenge, citing the constitutional power of the states to select their presidential electors "'in such manner as the legislature[s] thereof may direct.'" Id. at 25 (quoting U.S. Const. art II, §1). With the plenary power of the states in mind, the court concluded that selection of electors by separate districts within a state is "none the less the act of the state in its entirety," because the combined result of the various election districts "is the act of political agencies duly authorized to speak for the state." Id. at 25-26. The court thus confirmed that constitutionally, the "the vote of [states'] electors may be divided." Id. at 27. To drive home the point, the court observed that "[t]he constitution does not provide that the appointment of electors shall be by popular vote." Id. By the same token, the Constitution does not prescribe that "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." Id. Rather, the Framers "reconciled contrary views" about the selection of presidential electors by leaving it to state legislatures "to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." Id. at 28.

Bush, Gore and Equal Protection

As subsequent precedent has taught, the plenary power of the states to select their presidential electors is neither absolute nor without limits. The Supreme Court revisited *McPherson* in the aftermath of the 2000 presidential election, when a five-to-four majority ordered the cessation of further vote recounts in Florida under the guise of the Equal Protection Clause. The court reminded us that "the state legislature's power to select the manner for appointing electors is plenary," *Bush v. Gore*, 531 U.S. 98, 104 (2000), and a state may "select the electors itself," which was "the manner used by state legislatures in several States for many years after the framing of our Constitution." Id. But, the court observed, when states put the selection of presidential electors to the people, "the right to vote as the legislature has prescribed is fundamental." Id. In practice, this means that each vote must be accorded equal weight, and each voter is owed "equal dignity." Id. A state may retract the franchise granted to its voters to select the state's

presidential electors. But once the vote for electors is granted, the constitutional guarantee of equal protection applies. Stated differently, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Id. at 104-05.

Under an equal protection analysis, the court ordered a halt to Florida's vote recounts, although the "Florida Supreme Court [had] ordered that the intent of the voter be discerned" from the various contested ballots. Id. at 105. While divining voter intent seemingly would be the paramount objective, the question was whether "the recount procedures the Florida Supreme Court ... adopted [were] consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." Id. During oral argument, the Gore team "acknowledged [that] ... the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." Id. at 106.

The Florida Supreme Court had allowed for inclusion of an incomplete recount from Miami-Dade, which indisputably would not have concluded its recount by the final deadline mandated by federal law. Reacting to this inevitability, the court wrote that "[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." Id. at 108. And beyond the lack of objective recount standards loomed the separate concern that the Florida court did not specify who would recount the ballots. The county canvassing boards were forced to "pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots." Id. at 109. While others were permitted to observe, they were prohibited from objecting during the recount. The recount procedures thus were "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer." Id. The recount therefore could not "be conducted in compliance with the requirements of equal protection and due process without substantial additional work," including adoption of adequate statewide standards for determining what constitutes a legal vote, as well as "practicable procedures to implement them," and an orderly judicial review process to handle any disputed matters. Id. at 110. Because it was evident that any recount seeking to meet the mandated recount deadline date would be unconstitutional, the court reversed the Florida court's recount directive, thereby making George W. Bush the victor by 537 votes out of approximately six million cast in Florida's vote for presidential electors.

Bush v. Gore teaches that while states have plenary power to select their presidential electors, they may not violate the constitutional guarantee of equal protection. Discontent among many with the presidential election of 2000 gave rise to the National Popular Vote Initiative, which produced the National Popular Vote Interstate Compact (NPVIC), a binding agreement among several states.

The National Popular Vote Interstate Compact

The NPVIC is designed to ensure that the presidential candidate who wins the popular vote nationwide will be elected president by the Electoral College. Presently, 15 states and the District of Columbia, with an aggregate of 196 electoral votes, are signatories to the compact. Each signatory state has pledged to award all of its presidential electors to the winner of the nationwide popular vote, regardless which candidate wins the popular vote in that signatory state. By its terms, the compact will take effect when enacted by states contributing an additional 74 electoral votes to ensure a victory with at least 270 electoral votes, constituting a majority of the Electoral College. If it takes effect, the NPVIC would modify the way participating states implement Article II, §1, Clause 2 of the U.S. Constitution in their selection of presidential electors.

The NPVIC is not without constitutional concern. The Compact Clause of Article I, §10, Clause 3 of the

Constitution prohibits a state from entering into any agreement or compact with another state, without the consent of Congress. Despite that facially plain and unambiguous proscription, in 1893 the Supreme Court read the Compact Clause more narrowly, as "directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893). In 1981, the Supreme Court observed that by making interstate compacts subject to congressional consent, "the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams,* 449 U.S. 433, 439-40 (1981).

In *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), the court considered whether an interstate tax compact that had not received congressional approval violated the Compact Clause. The compact in question had established a multistate tax commission to facilitate the proper determination of state and local tax liability of multistate business taxpayers, including the equitable apportionment of tax bases and procedures for the settlement of apportionment disputes. On its face, the Multistate Tax Compact contained "no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States." Id. at 472. The court understood that the compact might provide the member states with some incremental bargaining power over the corporations subject to their taxing jurisdiction, but, wrote the court, "the test is whether the Compact enhances state power quoad the National Government," id. at 473, which, the court concluded, it did not. Under the compact, the member states could not "exercise any powers they could not exercise in its absence," id., and each member state retained complete freedom to adopt or reject the rules and regulations of the multistate tax commission (established by the compact), and to withdraw from the compact at any time. The court thus found no threat to federal supremacy.

U.S. Steel might suggest that collective action by signatory states to the NPVIC would not threaten federal supremacy, in the same way that collective state action that created the Multistate Tax Compact does not threaten federal supremacy. Signatory states to the NPVIC would do no more collectively than they are permitted to do individually, exercising their plenary powers to select their presidential electors.

At least one commentator, however, does not subscribe to this analysis, and instead contends that the NPVIC is unconstitutional. In his article, "Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact," published in *Publius: The Journal of Federalism* (vol. 44, no. 4, pp. 681-701), Montclair State University Professor Ian J. Drake contends that the NPVIC is unconstitutional because applicable Compact Clause analysis requires congressional approval for the NPVIC, which, he maintains, Congress *cannot* constitutionally grant. Professor Drake posits that *U.S. Steel* does not govern the determination of constitutionality of the NPVIC for several reasons. Among them, he notes, while the Multistate Tax Compact allows member states to withdraw at any time, the NPVIC does not. Signatory states to the NPVIC may not withdraw within six months from the end of a presidential term. Furthermore, the tax compact was concerned with the collection of state-based taxes, without implicating the federal structure. In contrast, Drake concludes, the NPVIC "is clearly a threat to federal supremacy since it would replace a federal institution established by the Constitution with a popular vote system." Drake, "Federal Roadblocks," at 689.

Drake points out (at 691-92) that "congressional consent transforms an interstate compact within [the Compact Clause] into a law of the United States." *Cuyler*, 449 U.S. at 438. Congressional approval of the NPVIC, therefore, would thrust Congress into the unconstitutional position of making federal law that replaces the Electoral College with a popular vote system. If Drake is correct—and his argument has much appeal—then a combination of states pledging to use their individual plenary powers in combination to select their presidential electors according to the *nationwide* popular vote would pose an irreconcilable constitutional conflict. The Electoral College would lose its ability to function as the Framers intended and

effectively be neutered for eternity. While this outcome might be favored by many, its implications might be the subject of Supreme Court review in the coming years.

Conclusion

The states have plenary power to select their presidential electors, subject to equal protection concerns. The result of states' individual selection processes put George W. Bush in the White House after the election of 2000, despite his loss of the popular vote. Ensuing frustration and discontent led to the NPVIC among a number of states. If the multistate voting compact takes effect with a sufficient number of signatory states, applicable Supreme Court precedent demonstrates that congressional approval likely would be required. But if Congress were to approve the NPVIC, the Electoral College effectively would be replaced by a popular vote system for the office of president. And since congressional approval is tantamount to congressional law-making, further consideration will be necessary to determine if congressional approval of the NPVIC would pass constitutional muster.

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