

Kopel & Hovenga on the National Popular Vote & the Colorado Constitution

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David B. Kopel and Hunter Hovenga have posted [The National Popular Vote Violates the Colorado Constitution](#) (Denver Law Review Forum, 2020) on SSRN. Here is the abstract:

According to the Colorado Constitution: “The general assembly shall provide that after the year eighteen hundred and seventy-six the electors of the electoral college shall be chosen by direct vote of the people.” The Colorado Constitution is the only state constitution that guarantees the right to the people to direct election of presidential electors.

In 2019, the general assembly enacted a statute to violate that right. Under the statute, Colorado’s presidential electors would not be directly elected by the people of the Colorado. Instead, they would be appointed by a state official. The state official would make the appointment based on votes in other states, rather than on the direct vote of Coloradans.

In other words, even if the majority of the Colorado voters voted for electors pledged to candidate A, the Secretary of State would nevertheless appoint electors pledged to candidate B if candidate B had a plurality of votes nationwide.

Part I of this Article describes constitutional rules for choosing presidential electors, as provided by the U.S. Constitution and the Colorado Constitution.

The Colorado Constitutional rules for electors are contained in the Constitution’s Schedule. Part II explains that the Schedule is and always has been a legally enforceable element of the Colorado Constitution. The Schedule’s text says so, and so has the Colorado Supreme Court.

Part III examines whether the National Popular Vote Interstate Compact (by which Colorado electors would be appointed by a state official) violates the Colorado Constitution guarantee of direct election of the presidential electors. This Article argues the National Popular Vote Compact plainly violates the text of the Colorado Constitution.