



## Don't let legislatures override the will of voters

December 9, 2020

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Can state legislatures choose presidential electors — effectively overriding the will of the voters?

Yes, says our president, who wants to replace electors pledged to Joe Biden with electors pledged to President Donald Trump, notwithstanding a state's popular vote outcome.

Yes, say proponents of the National Popular Vote Interstate Compact (NPVIC), who want to circumvent the electoral college. They would do so — supposedly without a constitutional amendment — by annulling the popular vote whenever voters in states that sign the compact prefer an outcome other than the winner of the national popular vote. Assuming the signatory states control a majority of electoral votes, their legislatures would choose electors who would vote for the candidate having the most popular support nationwide.

How ironic that both the right-wing Trumpists and the left-wing NPVIC supporters propose to redress their grievances by unseating the voters in selected states. Fortunately, the Constitution imposes major roadblocks.

Consider, for example, the Compacts Clause of Article I, Section 10: "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State." That clause mandates congressional consent, perhaps not for every interstate compact, but at least for those that compromise the federalist scheme envisioned by the Framers. Most likely, senators from non-signatory states would withhold consent — especially senators from less populated states with significantly diminished electoral clout if the NPVIC were to become operative.

Equally important, there's Section 2 of the 14th Amendment, which provides in relevant part: "[W]hen the right to vote at any election for the choice of electors for President and Vice-President of the United States ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation [in Congress] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

That provision suggests that any state repudiating the right of its 21-year-old male citizens to vote for presidential electors would be denied congressional representation — not just partial, but 100%. Even if a legislature were to choose the same electors as, say, 45% of the voters, all of the

voters would have been disenfranchised. The franchise is, after all, about the right to choose, not about the choice itself.

If so construed, no state would dare select electors by any process other than individual ballots. To be sure, the intent of Section 2 was to encourage (without forcing) states to enfranchise black Americans. Two years later, that intent was obviated by the 15th Amendment, which guaranteed all races the right to vote. And the 19th Amendment has since enfranchised women. Nonetheless, Section 2 of the 14th Amendment was not repealed.

True enough, Article II of the Constitution declares that “Each State shall appoint [electors] in such Manner as the Legislature thereof may direct.” And Section 2 of the 14th Amendment does not explicitly command that electors be chosen by popular vote. Nor, as a practical matter, was Section 2 ever invoked against those states that denied black Americans the right to vote. Still, on a literal reading of Section 2, negating the popular vote for presidential electors — as advocated by both Trump and NPVIC supporters — might well have disabling unintended consequences in loss of congressional representation.

Finally, Trump’s master plan to transfer suffrage from voters to legislators would have to surmount statutory hurdles. If the electors chosen by popular vote weren’t certified by Dec. 8 and the legislature selects an opposing slate, both slates could cast ballots when the electoral college meets on Dec. 14. Then, on Jan. 6, when Congress officially counts the votes, both chambers would have to agree in choosing among the competing slates.

The Democratic-controlled House would no doubt pick the Biden slate. The choice in the Senate is less certain. There, the composition is yet to be finalized. Although the Republicans are favored to have a small majority, several Republican senators — Mitt Romney, Susan Collins, Lisa Murkowski and Ben Sasse — have already congratulated Biden and might therefore select his slate of electors instead of Trump’s.

Currently, the electoral count is Biden 306 and Trump 232. To produce a 269-269 tie, 37 electoral votes must switch from Biden to Trump. Frankly, the prospects of that happening are bleak. Undoubtedly, Trump’s ardent backers will be indignant. The good news, however, is that our electoral structure will not have been transformed without constitutional foundation in the heat of the political moment.

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