A Not-So-Calamitous Compact: A Response to DeWitt and Schwartz

John R. Koza, *National Popular Vote*

ABSTRACT This paper answers 24 criticisms of the National Popular Vote interstate compact in Darin DeWitt and Thomas Schwartz's paper entitled "A Calamitous Compact" (found elsewhere in this issue).

The National Popular Vote interstate compact would replace the current state-by-state winner-take-all method of awarding electoral votes with a system in which the president would be the candidate receiving the most popular votes in all 50 states and the District of Columbia.

The compact would take effect when enacted by states possessing a majority of the electoral votes—that is, enough to elect a president (270 of 538). After becoming effective, the compact would award all of the electoral votes of the enacting states to the presidential candidate receiving a plurality of the popular votes from all 50 states and the District of Columbia. Thus, when the Electoral College meets in mid-December, the candidate who received the most popular votes nationwide on Election Day would have enough electoral votes to be elected president.

A total of 2,794 state legislators have sponsored or cast a recorded vote in favor of the National Popular Vote compact. The compact has been enacted into law by 11 jurisdictions possessing 165 electoral votes (Hawaii, Washington state, California, Illinois, Vermont, Massachusetts, Rhode Island, New Jersey, New York, Maryland, and the District of Columbia), and it will take effect when enacted by states with 96 more electoral votes. The compact has been approved by at least one state legislative chamber in a dozen additional states with 103 electoral votes (Arizona, Arkansas, Colorado, Connecticut, Delaware, Maine, Michigan, Nevada, New Mexico, North Carolina, Oklahoma, and Oregon).

Because current state "winner-take-all" statutes award all of a state's electoral votes to the presidential candidate receiving a plurality of the state's popular votes,[1] presidential nominees have no reason to pay attention to the concerns of voters in states where they are safely ahead or hopelessly behind. As Wisconsin Governor Scott Walker bluntly acknowledged in 2015: "The nation as a whole is not going to elect the next president. Twelve states are."[2]

In fact, the only states that received any post-convention campaign events[3] in 2012 from the major-party presidential and vice-presidential nominees were the 12 closely divided "battleground" states where their support was within three percentage points of their eventual nationwide percentage.

Two-thirds (176 of 253) of the 2012 general-election campaign events and a similar fraction of campaign expenditures were concentrated in just four states—Ohio, Florida, Virginia, and Iowa. President Obama campaigned in only eight states (the four already mentioned plus Colorado, Wisconsin, Nevada, New Hampshire), and these eight states accounted for 96% of all events. Four additional states (Pennsylvania, North Carolina, Michigan, and Minnesota) received the remaining 4% of the events (with only Congressman Ryan appearing in the latter two). Meanwhile, the voters of 38 states and the District of Columbia were totally ignored.

State winner-take-all laws affect more than whether babies remain unkissed in three-fourths of the states. John Hudak's *Presidential Pork* (2014) documents how battleground states receive 7% more presidentially controlled grants, twice as many disaster declarations, and considerably more Superfund and No Child Left Behind exemptions. *The Particularistic President* (Kriner and Reeves 2015) details how the interests of battleground states shape innumerable government policies, including, for example, steel quotas imposed by the free-trade president, George W. Bush, from the free-trade party. *Presidential Swing States: Why Only Ten Matter* (Hecht and Schultz 2015) and *Going Red: The Two Million Voters Who Will Elect the Next President* (Morrissey 2016) discuss the parochial local considerations that preoccupy presidential candidates as well as sitting presidents (contemplating their own reelection or the ascension of their preferred successor). *The Rise of the President's Permanent Campaign* (Doherty 2011) shows that even travel by sitting presidents and cabinet members in non-election years is skewed to battleground states.

DEWITT AND SCHWARTZ'S SIX KINDS OF MISCHIEF ARE NOT-SO-MISCHIEVOUS

Legal Instability

DeWitt and Schwartz say:

> "Champions brag that the compact requires no Constitutional amendment, but for that very reason it would give us a political system wanting in durability and predictability."

They assert that a state could withdraw from the compact "during a presidential election campaign" or "after the popular votes are counted but before the Electoral College meets."

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In fact, no state—whether operating under either a state winner-take-all statute or the National Popular Vote compact—may, after Election Day, change its method of appointing presidential electors and then appoint different presidential electors. The Constitution (Art. II, §1, Cl 4) gives Congress the power to "determine the Time of choosing the Electors" and Congress (3 *USC* §1) has designated one specific day ("the Tuesday after the first Monday in November") as *the* day for appointing presidential electors. Federal law (3 *USC* §5) provides an additional backstop by treating a state's appointment of its presidential electors as "conclusive" only if based on "laws enacted *prior* to" Election Day. Additionally, the notion of a state legislature enthroning the second-place candidate as president by changing the "rules of the game" after Election Day is not only politically preposterous, but contrary to law.

Note that the compact's six-month blackout period provides an additional independent constitutional impediment to DeWitt and Schwartz's conjectured *post-election* repeal.

Uncooperative Electors

DeWitt and Schwartz's statement that legislative support for the compact has been almost wholly Democratic describes a majority (but not all) of the early adopters of the compact. However, because the emotions associated with the 2000 election have now largely subsided, the most recent legislative floor votes were a bipartisan 40–16 vote in the Republican-controlled Arizona House, a bipartisan 28–18 vote in the Republican-controlled Oklahoma Senate, a bipartisan 57–4 vote in the Republican-controlled New York Senate, and a bipartisan 37–21 vote in the Democratic-controlled Oregon House. The most recent state legislative committee actions in 2016 were unanimous favorable votes by Republican-controlled committees in Missouri and Georgia. Polls in numerous states and nationally typically show about three-quarters of voters (including about two-thirds of Republicans) believe that the president should be the candidate who receives the most popular votes nationwide.[6]

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The compact actually provides *more* "durability" than the current system prior to Election Day because existing state winner-take-all laws are ordinary state statutes that a state has the power to repeal right up to Election Day.

In contrast, the compact does not allow its repeal to become effective during a six-month "blackout" period starting July 20 of a presidential election year and ending with the Inauguration on January 20. This six-month period includes the nominating conventions, the campaign, Election Day, the Electoral College meeting in mid-December, counting of votes by Congress in early January, and Inauguration Day.

DeWitt and Schwartz incorrectly assert that an interstate compact is not really binding and there is no sanction but the consciences of its founders. In fact, an interstate compact is not only a legally binding contract between states, but is one of the few ways by which a state legislature may bind future legislatures. The Constitution's Impairments Clause (Art. I, §10, Cl 1) provides "No State shall … pass any … Law impairing the Obligation of Contracts."

Once a state voluntarily enters into *any* interstate compact, a state cannot withdraw from the compact except in the manner permitted by the compact itself. As the US Supreme Court succinctly ruled, "A compact, is after all, a contract."[4]

The courts have never allowed *any* state to withdraw from *any* interstate compact without following the procedure for withdrawal specified by the compact itself. Federal and state courts have routinely and consistently enforced the US Supreme Court's interpretation of the Impairments Clause as applied to compacts.[5]

DeWitt and Schwartz incorrectly assert that an interstate compact is only enforceable by federal courts if it has received congressional consent. In the 1991 case of McComb v. Wambaugh (934 F. 2d 474), federal courts enforced a compact that did not require (and had not received) congressional consent (and that had a two-year delay on withdrawal) saying, "Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states." Additionally, state courts have independent power to invalidate a state's attempted withdrawal contrary to a compact's withdrawal procedure.

However, even if Republicans unanimously opposed the concept of the compact, no Republican presidential elector would, in the real world, vote against the Republican Party's presidential nominee (who has won the national popular vote) because of a "principled preference for discrediting the compact."

DeWitt and Schwartz incorrectly claim that a mere "handful of electors opposed to the compact could block its effect." However, the compact is considerably less susceptible to disruption by faithless electors than the current system. The compact gives the national popular vote winner at least 270 electoral votes from the compacting states. In practice, the national popular vote winner would also receive a substantial cushion of electoral votes from *non-compacting* states that he or she won (on average, about half of the remaining electoral votes).

Finally, DeWitt and Schwartz incorrectly say there is no way to guarantee faithfulness of presidential electors. In fact, a state may simply follow the recommendation of the Uniform Law Commission and enact the Uniform Faithful Presidential Electors Act[7] (which automatically cancels a faithless elector's vote, removes that elector from office, and replaces the faithless elector with a loyal elector). Alternatively, a state could enact Pennsylvania's existing law empowering each party's presidential nominee to directly appoint his or her own presidential electors.

Manipulation of Vote Counts

DeWitt and Schwartz say:

> "The compact would magnify the incentive politicians have to manipulate vote counts. They do that already, but their incentive is limited by the fact that few states are swing states. By *making every vote count, regardless of location*, the compact would lift that limit and

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encourage officials everywhere to play partisan accordion with the recorded vote." [Emphasis added]

In fact, the current state-by-state winner-take-all system greatly magnifies the payoff for vote manipulation in swing states—and hence the incentive to manipulate. A mere 537 popular votes in Florida in 2000 flipped enough electoral votes to decide the presidency in an election with a nationwide 537,179-vote margin. Astonishingly, while arguing that the current state-by-state system minimizes the incentive to manipulate votes, DeWitt and Schwartz cite a paper (Kosuke and King 2004) in their own paper making a strong case that this 537-vote margin was the result of Florida's illegal counting of 680 late absentee ballots.

DeWitt and Schwartz's statement that the current system quarantines ... manipulation of vote counts ... within a small number of states offers little comfort, given the reality that this "small number of states" are the battleground states that actually decide who wins the presidency.

As former Senator Birch Bayh (D–Indiana) said,

> "One of the things we can do to limit fraud is to limit the benefits to be gained by fraud. Under a direct popular vote system, one fraudulent vote wins one vote in the return. In the electoral college [winner-take-all] system, one fraudulent vote could mean 45 electoral votes, 28 electoral votes."[8]

DeWitt and Schwartz's assurance that "partisan majorities ... are not strong enough in closely divided states" is at variance with the fact that, as recently as 2012, one party controlled the law-making process in battleground states with over two-thirds of the general-election campaign events.[9]

The actual observed behavior of presidential candidates (advised by the nation's most astute political strategists) *inside* battleground states indicates that they campaign broadly throughout the jurisdiction involved when the winner is the candidate receiving the most popular votes.

When real-world presidential candidates campaign in a state such as Ohio (which alone accounted for over a quarter of the nation's general-election campaign events in 2012), they do not appeal to narrow interests; they do not concentrate on heavily populated urban areas; and it would be inconceivable that they would neglect three-quarters of the electorate. Instead, they campaign broadly throughout the state precisely because "every vote counts, regardless of location."

Table 1 shows the four metropolitan statistical areas (MSAs) centered on Ohio's biggest cities, the seven MSAs centered on the state's medium-sized cities, and the 53 rural counties outside the MSAs. The third column of the table shows the number of campaign events (out of Ohio's 73 events) that each part of the state would have received if the candidates conducted campaign events based strictly on the basis of the area's share of the state's population. The fourth column shows the actual number of campaign events for each part of the state. As can be seen, each part of Ohio received campaign events almost exactly in line with its share of the state's population in 2012 (the tiny differences being the result only of rounding errors).

Similarly, campaigning inside Ohio is also distributed almost uniformly over the state's 16 (equal-population) congressional districts.[10]

Candidates campaigned similarly in the three other major battleground states (Florida, Virginia, and Iowa) which, along with Ohio, accounted for over two-thirds of all general-election campaign events.[11]

The current system has generated five litigated state counts in our nation's 57 presidential elections.

Narrowed Support

Critics of a National Popular Vote frequently offer hyperbolic predictions that presidential candidates would concentrate their campaigns on narrow segments of the population (particularly the big cities).

Even after acknowledging that the compact would make "every vote count, regardless of location," DeWitt and Schwartz puzzlingly assert that it would "encourage candidates to appeal to narrower, less diverse interests" and encourage candidates to campaign in "fewer states."

Given that every 2012 general-election campaign event was in just 12 states (and over two-thirds were in just four states), one wonders just how many "fewer states" DeWitt and Schwartz think would receive attention in a national popular vote for president.

Close Votes and Recounts

DeWittt and Schwartz claim the current system quarantines ... recounts of close votes ...within a small number of states.

Table 1

Each part of Ohio received attention in proportion to its share of the population in 2012

Part of Ohio	Population	Number of campaign events if based strictly on population	Actual number of campaign events
Cleveland-Elyria MSA	2,077,240	13	12
Columbus MSA	1,901,974	12	13
Cincinnati MSA	1,625,406	10	9
Toledo MSA	610,001	4	4
7 medium-sized city MSAs	2,725,128	17	17
53 rural counties outside MSAs	2,596,755	18	18
Total	**11,536,504**	**74**	**73**

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In fact, the current state-by-state winner-take-all system does precisely the opposite. It has repeatedly created artificial crises that would not have occurred if the winner were simply the national popular vote winner.

The current system has generated five litigated state counts in our nation's 57 presidential elections. It created an artificial crisis in 2000 because of the tiny state-level margin of 537 popular votes in Florida in an election with a nationwide popular-vote margin of 537,179. Similarly, it created an artificial crisis in 1876 because of small state-level margins (889, 922, and 4,807) in an election with a nationwide margin of 254,694. In Hawaii in 1960, there was litigation over a 115-vote state-level margin in an election with a nationwide margin of 118,574. Were it not for state winner-take-all laws, all five of these trivially small state-level margins would have been irrelevant almanac footnotes in elections with decisive *six-digit* nationwide margins. Far from being a quarantine, the current state-by-state system produces unnecessary infections.

Recounts are very rare occurrences in ordinary elections when the winner is the candidate receiving the most votes from a single pool of votes.

Among the 4,691 statewide general elections between 2000 and 2015, there were only 27 recounts—that is, a probability of 1-in-174.[12]

This historically observed probability of statewide recounts can be used to estimate the probability of a national recount. One should expect a recount of a single-pool plurality-vote national election once in every 174 presidential elections—that is, once in every 696 years. In fact, a national recount is even less likely, because the probability of a recount diminishes with the size of the voting pool.

The reason why the current system gratuitously generates so many unnecessary disputes (5 litigated state counts in a mere 57 presidential elections) is that the nation's 57 presidential elections were really 2,237 separate state-level elections—each a separate opportunity for a razor-thin state-level margin. Under the current state-by-state system, Russian Roulette is played 51 times every four years, whereas it would be played only once every four years under a national popular vote.

DeWitt and Schwartz also suggest that the appropriate trigger for a nationwide recount should be a 1% margin. "Popular votes with margins of less than one percent have occurred surprisingly often: in 1880, 1884, 1888, 1960, 1968, and 2000." But a 1% nationwide margin corresponds to 1,300,000 votes in a present-day presidential election.

In reality, recounts shift very few votes. The average shift in the 27 statewide recounts conducted between 2000 and 2015 was only 282 votes. The distribution of these observed shifts has a standard deviation of 336.[13]

Table 2

Percent of elections in which the winning candidate received various winning pluralities

	Gubernatorial winning pluralities	Presidential winning pluralities
Over 50%	88%	60%
Over 45%	97%	90%
Over 40%	99%	98%
Over 35%	100%	100%

Applying the Central Limit Theorem to the historically observed distribution of shifts resulting from statewide recounts, the average shift resulting from 51 statewide recounts (that is, a national recount) would be 14,382 votes (51 times 282). The standard deviation of the distribution of the shifts resulting from 51 statewide recounts is 2,400 (336 times the square root of 51). The mean (14,382) plus three times the standard deviation (three-sigma) is 21,582. The probability is 99.85% that the original apparent loser would not gain more than 21,582 votes in a national recount.

To put in perspective the inability of a shift of 21,582 to affect the outcome of a national election, recall that the closest nationwide margin (1960) in a presidential election in the past century was 118,574; the next three closest nationwide margins (1916, 1968, and 2000) were about a half million votes each; and all the remaining margins were in the millions. DeWitt and Schwartz's claim that a 1,300,000-vote nationwide margin would warrant a national recount is therefore unrealistic.

Oblivious to the reality that the 537,179-vote nationwide margin in 2000 was far too large to warrant a recount if the compact had been in effect, DeWitt and Schwartz go on to paint an apocalyptic legal scenario of a national recount meandering for eight months after Inauguration Day in 2001. "Acting President Hastert would have presided over an agonizing nation-wide recount, a temporary administration, a recession, and maybe 9/11." Unlike DeWitt and Schwartz, the courts and both parties to the litigation in 2000 were well aware of the *constitutional imperative* (Art. II, §1, Cl 4) that the electoral votes of *all* states must be finalized and cast on the "same [day] throughout the United States," namely on December 18, 2000—regardless of whether *desired* or *desirable* recounts had been completed.

Both the courts and the 2000 litigants were also aware of the related statutory "safe harbor" deadline of December 12, 2000, for each state's conclusive "final determination" of its canvas (as provided in the Electoral Count Act of 1887—now 3 *USC* §5).

Astonishingly, DeWitt and Schwartz go on to assert that, even if the 537,179-vote nationwide margin had survived a recount in 2000,

> "we cannot be sure who really won even a plurality: the influence of counting errors, ballot-marking errors, and uneven election administration dwarf any perceived margin of victory."

In other words, DeWitt and Schwartz claim that the public should not trust a 537,179-vote nationwide margin *that survived a recount*, while arguing that it should trust the *un-recounted* 537-vote state-level margin that actually decided the Presidency in 2000.

We agree with DeWitt and Schwartz that existing state recount laws are inadequate. However, these inadequacies are far more likely to cause trouble under the current dispute-prone state-by-state winner-take-all system than under a national popular vote. Because of the statutory schedule adopted after ratification of the 20th Amendment in 1934, there are only five weeks between Election Day in November and the meeting of the Electoral College in mid-December. Because there cannot be a recount until there has been a count (that is, an initial *official* count), the on-the-ground reality is that no presidential recount has ever been completed on a timely basis prior to the meeting of the Electoral College. The only full presidential recount that was ever completed (Hawaii in 1960) was not completed until after the Electoral College met. Vice President Nixon, the loser of that recount (which reversed the original result), presided over the counting of the electoral votes in

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Congress and graciously allowed Hawaii to be credited to Kennedy, while simultaneously ruling that accepting the manifestly untimely recount did not set any precedent. Moreover, no presidential recount is ever likely to be completed on a timely basis because existing laws enable the leading candidate to simply "run out the clock" until the mid-December deadlines—exactly what happened in 2000.[14]

Adoption of the National Popular Vote compact could well provide sufficient impetus for the states to upgrade their laws to guarantee a timely recount in a presidential election. Alternatively, Congress could (and should) exercise its existing power over the count in presidential elections (under the 12th Amendment) and establish a national procedure for timely recounts along the lines of the draft law in *Every Vote Equal* (section 9.15.7 of Koza et al. 2013). Contrary to what DeWitt and Schwartz say, no overall federal "takeover" of elections (requiring a constitutional amendment) is required for Congress to exercise its existing power over the count. Because the current state-by-state winner-take-all system creates so many disputes, improving presidential recount laws is something that is more urgently needed by the dispute-prone current system than under a national popular vote (where a recount can be expected about once in 174 elections).

CONSTITUTIONAL CHALLENGES THAT ARE NOT-SO-CHALLENGING

Implicit Restrictions Argument

Although the U.S. Constitution (Art. II, §1, Cl 1) provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors...." DeWitt and Schwartz argue that the National Popular Vote compact might be unconstitutional because "The states themselves must still choose their electors ... and they cannot devolve the choice on the other states."

This attempt to read restrictions into Article II's grant of power echoes the argument made by the losing attorney in *McPherson v. Blacker*—the preeminent case governing the power of a state to choose the method for appointing its presidential electors.

> "The crown in England is hereditary, the succession being regulated by act of parliament. Would it be competent for a State legislature to pass a similar act, and provide that A. B. and his heirs at law forever, or some one or more of them, should appoint the presidential electors of that State?"[15]

In its unanimous ruling in *McPherson v. Blacker*, the U.S. Supreme Court answered the arguments raised by the losing attorney as well as DeWitt and Schwartz.

> "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 [winner-take-all], *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.*"[16] [Emphasis added]

In addition, the 10th Amendment provides a rule for interpreting the Constitution when it comes to reading in limitations on the states' exercise of their powers.

> "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."

Small States Argument

DeWitt and Schwartz's second constitutional argument is

> "The federal element in presidential elections is a short movement in a long symphony, but it is a movement, scored in the Constitution, that the compact would silence: ... small states are supposed to wield disproportionate weight in the election of the President."

Because the current state-by-state winner-take-all system creates so many disputes, improving presidential recount laws is something that is more urgently needed by the dispute-prone current system than under a national popular vote (where a recount can be expected about once in 174 elections).

In fact, state winner-take-all laws have already extinguished the political relevance of the small states in presidential elections. The closely divided battleground state of New Hampshire is the only one of the 13 smallest states (those with three or four electoral votes) that received any general-election campaign events in 2012. The irrelevance of the 12 other smallest states is highlighted if you notice that these states together have the same population (12 million) as battleground Ohio. These 12 smallest states together have 40 electoral votes—more than twice Ohio's 18. Nonetheless, Ohio received 73 of the 253 campaign events, while these 12 smallest states received *none*. These 12 smallest states are totally ignored because they are all safe one-party states in presidential elections (six reliably Republican and six reliably Democratic). Under the state-by-state winner-take-all system, closeness—not size—matters in determining whether a state "wields disproportionate weight in the election of the President."

Accordingly, in 1966, Delaware Attorney General David Buckson (R) led a group of 12 predominantly small states in suing New York (then a battleground state) in the U.S. Supreme Court in an unsuccessful effort to declare state winner-take-all statutes unconstitutional.

> "The state unit-vote system [winner-take-all] debases the national voting rights and political status of Plaintiff's citizens and those of other small states by discriminating against them in favor of citizens of the larger states."[17]

If making sure that "small states ... wield disproportionate weight" were actually a criterion for declaring an election law unconstitutional, current state winner-take-all statutes would have been struck down by the courts long ago.

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"Unconstitutional Vagueness in Violation of Due Process" Argument

DeWitt and Schwartz's third argument as to why the compact might be unconstitutional is

> "More fundamental even than federalism is the principle of governance by a written constitution and the rule of law. When fully realized, that principle blocks any ambiguity over who is in charge of what, especially when government changes hands. … By generating more close elections and making it harder to tell who has won, the compact would create a republican analogue of those disputes. If courts were troubled by this they might cite 'unconstitutional vagueness' in violation of 'due process.'"

If "generating more close elections and making it harder to tell who has won" were actually the criteria in American constitutional jurisprudence for declaring an election law unconstitutional, state winner-take-all laws would have long ago been struck down by the courts as unconstitutional (given their history of creating five litigated state counts in a mere 57 presidential elections—compared to the low 1-in-174 probability of a recount in an ordinary single-pool plurality-vote election).

Procedural Question as to Whether Congressional Consent Is Needed

Except for the relatively few compacts to which Congress has given advance consent, Congress does not consider interstate compacts until they have been enacted by the requisite combination of states.

Therefore, like virtually all interstate compacts, the text of the National Popular Vote compact is silent as to whether congressional consent is required in order for the compact to take effect. Thus, DeWitt and Schwartz's claim that the National Popular Vote compact is ineligible to receive congressional consent because "the compact itself does not make it a condition of implementation" is simply incorrect.

After the National Popular Vote compact is enacted by states possessing a majority of the electoral votes, the compact provides that the governors of enacting states shall proclaim that the compact has taken effect. At that moment, opponents undoubtedly will initiate a lawsuit (likely by the attorney general of a non-compacting state under the Supreme Court's original jurisdiction) contending that the gubernatorial proclamations were premature because the additional step of congressional consent is still required.

Although DeWitt and Schwartz suggest that the legal test for answering this procedural question depends on whether the compact is "minor" versus "sweeping" or whether it "affects … other states," the actual legal test is provided in the U.S. Supreme Court's ruling in *U.S. Steel Corporation v. Multistate Tax Commission*—the preeminent case governing whether a particular interstate compact requires congressional consent.

> "The relevant inquiry … is whether a compact tends to increase the political power of the States in a way that 'may encroach upon or interfere with the just supremacy of the United States.'"[18]

In *McPherson v. Blacker*, the U.S. Supreme Court answered the question of whether *federal* supremacy is threatened by a *state's* choice of method of awarding its electoral votes.

> "In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States."[19]

Manifestly, when a state exercises one of its exclusive powers, it does not encroach upon or interfere with federal supremacy.

Moreover, even if there were some arguable second-order effect on federal power, the U.S. Supreme Court has specifically cautioned in *U.S. Steel* against

> "confus[ing] potential impact on 'federal interests' with threats to 'federal supremacy.' Absent a threat of encroachment or interference through enhanced state power, *the existence of a federal interest is irrelevant*. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval."[20] [Emphasis added]

If the Supreme Court were to modify its existing precedents and require congressional approval, the compact could not take effect until subsequently approved by Congress. Such consideration by Congress would occur at a time when states representing a majority of the Electoral College had already enacted the compact.

DeWitt and Schwartz suggest that "standing" issues or timing problems would preclude the courts from deciding whether the compact was operative until after some future election in which some candidate lost because of the compact. In fact, the court system routinely settles election-law disputes on a *pre-election* basis (e.g., districting, ballot access, voting hours, voter identification).

DRAWBACKS THAT ARE NOT DRAWBACKS

DeWitt and Schwartz incorrectly say,

> "The compact assumes that every major candidate is on the ballot in every state."

In fact, the compact would not be hobbled if some candidate were not on some state's ballot. Like the current system, the compact simply adds up whatever votes (popular or electoral) are available from a given state. Lincoln was not on the ballot in nine states; however, he won both the national popular vote and the Electoral-College vote under the current system, and he would also have won both under the compact.

DeWitt and Schwartz incorrectly say

> "The compact assumes a popular vote in every state."

In fact, the compact makes no such assumption, but simply adds up the popular vote counts from all states that conduct a "statewide popular election" as that term is defined in the compact. In the politically preposterous scenario in which a modern-day state legislature told its own voters that they could no longer vote for President, the only effect on the compact would be that this state had voluntarily opted not to contribute to the national popular vote count (section 9.24 of Koza et al. 2013).

All states currently use the so-called "short presidential ballot" (conveniently allowing voters to cast a single vote for their preferred presidential candidate, instead of casting separate votes for each of the state's numerous presidential electors). However, in 1960, the Alabama ballot did not mention Kennedy or Nixon. Moreover, only five of the 11 winning Democratic elector candidates supported Kennedy, while six supported segregationist Harry Byrd. DeWitt and Schwartz incorrectly assert that the compact would have been at the mercy of "how state election officials interpreted

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the vote tally from Alabama." In fact, Alabama failed to conduct a "statewide popular election" in 1960 (as that term is defined in the compact) because voters could not vote directly for Kennedy or Nixon by name—thus eliminating any need for interpretation.

DeWitt and Schwartz incorrectly say "The compact assumes uncontested state results." In fact, both the current winner-take-all laws and the compact leave dispute resolution to higher authorities. In 1876, Congress established a special Electoral Commission to settle the disputed presidential election. In 2000, the U.S. Supreme Court intervened.

UNWINDING THE PRISONER'S DILEMMA CREATED BY STATE WINNER-TAKE-ALL LAWS

DeWitt and Schwartz ask

> Why have states joined a compact instead of passing simple statutes to appoint electors pledged to the nationwide plurality favorite?

Only three states chose to use the winner-take-all method of awarding electoral votes in the nation's first presidential election in 1789.

Winner-take-all got its second wind in 1796 when Thomas Jefferson lost the nation's first competitive presidential election by only three electoral votes—one each from three Jeffersonian states (including Virginia and North Carolina which awarded electoral votes by district).

In January 1800, Thomas Jefferson wrote James Monroe (then a Virginia legislator):

> "while 10 states chuse either by their legislatures or by a general ticket [winner-take-all], it is folly & worse than folly for the other 6 not to do it."[21]

Virginia's legislature promptly remedied this "folly" by passing a winner-take-all law, thereby guaranteeing Jefferson all the state's electoral votes in 1800. Meanwhile, the Massachusetts legislature repealed its district-election system, thereby assuring Federalist John Adams 100% of his home state's electoral votes. In the resulting "race to the bottom," each state's dominant political machine realized the advantage of maximizing its clout by passing a winner-take-all law. As Missouri Senator Thomas Hart Benton said in 1824:

> "The general ticket system [winner-take-all], now existing in 10 States was … not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States, to enable them to consolidate the vote of the State."[22]

Today, three-fourths of the states are politically irrelevant in presidential elections because of state winner-take-all laws. The states face a classic prisoner's dilemma. If a state unilaterally adopts DeWitt and Schwartz's suggestion, it would be giving voters in other states a voice in awarding its electoral votes without receiving the reciprocal benefit of guaranteeing the election of the national popular vote winner.

The US Constitution provides the precise surgical instrument needed to unwind this prisoner's dilemma—namely the interstate compact. A compact gives a state a benefit that can only be obtained by mutually-agreed coordinated action by a certain critical mass of sister states.

In the terminology of contract law, the states that have already enacted the "Agreement among the States to Elect the President by National Popular Vote" (the official name of the National Popular Vote compact) are making an "offer" to the remaining states. These states are now awaiting "acceptance" of their offer by sufficient additional states to achieve a desired common objective which no state can achieve alone—namely making *every* voter in *every* state politically relevant in *every* presidential election.

The "consideration" is each state's commitment to appoint presidential electors supporting the national popular vote winner. The "contract" becomes effective only when the offer is accepted by a combination of states (in this case, states possessing a majority of the electoral votes) sufficient to deliver the desired benefit. The Constitution's Impairments Clause guarantees that all states can rely on the fact that all compacting states will act in the agreed way.

CONCLUSION

None of the arguments in Darin DeWitt and Thomas Schwartz's paper support the conclusion that the National Popular Vote interstate compact would be "A Calamitous Compact." ■

NOTES

1. Maine and Nebraska award one electoral vote to the presidential candidate winning a plurality in each of the state's congressional districts and two additional electoral votes to the candidate winning a plurality of the statewide vote.
2. *National Popular Vote—What It Is—Why It's Needed.* Video at https://www.youtube.com/watch?v=qorOKo9BWEU.
3. "Campaign events" are counted by FairVote (using CNN's "On the Trail" database) based on *public* events in which a candidate is soliciting a state's voters (e.g., rallies, speeches, town hall meetings). This count does not include visiting a state for the sole purpose of participating in a televised national debate, visiting a state for the sole purpose of conducting a private fund-raising event, visiting a state for the sole purpose of giving a speech to a group's national convention, non-campaign meetings (e.g., the Al Smith Dinner in New York City), or private meetings. Additional details are available at http://www.fairvote.org/presidential-tracker and Richie, Robert and Andrea Levien (2013).
4. *Petty v. Tennessee-Missouri Bridge Commission.* 359 U.S. 275 at 285. 79 S.Ct. 785 at 792. 1952.
5. *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority* (414 F.Supp. 408 at 409). 1976. *Aveline v. Pennsylvania Board of Probation and Parole* (729 A.2d. 1254 at 1257, note 10). *McComb v. Wambaugh*, 934 F.2d 474 at 479 (3d Cir. 1991). *West Virginia ex rel. Dyer v. Sims.* 341 U.S. 22 at 28. 1950.
6. Average support in 35 statewide polls over the last 10 years was 74% (66% among Republican registered voters, 82% among Democrats, and 71% among independents). See table 9.26 in Koza et al. 2013 and http://www.nationalpopularvote.com/polls.
7. The UFPEA is already law in four states. http://www.uniformlaws.org/ActSummary.aspx?title=Faithful%20Presidential%20Electors%20Act.
8. *Congressional Record.* March 14, 1979. Page 5000.
9. Ohio, Florida, Virginia, Pennsylvania, Michigan, and Wisconsin. In 2016, one party control also exists in six battleground states, namely Ohio, Florida, Michigan, and Wisconsin, North Carolina and Nevada.
10. Maps showing campaigning by congressional district in Ohio (and similar maps for Florida, Virginia, and Iowa) may be found in the *Myths about Big Cities* video at https://www.youtube.com/watch?v=_gbwv5hf2Ps.
11. Tables and maps for these three states will appear in 2017 in the upcoming fifth edition of *Every Vote Equal* (Koza et. al.).
12. Richie, Rob and Haley Smith. 2016. *Recounts.* http://www.fairvote.org/recounts.
13. Three standard deviations for this historically observed distribution of shifts is 1,008. Accordingly, the recently enacted trigger for a statewide recount in California was established at 1,000 votes or 0.00015 of the number of all votes cast for the office involved (Chapter 723, Statutes of 2015).
14. See the video *Myths About Recounts* at https://www.youtube.com/watch?v=z8FwrXRmGA4 and section 9.15 of Koza et al. 2013.
15. *Brief of F.A. Baker for Plaintiffs in Error* in *McPherson v. Blacker.* 1892. Page 73.
16. *McPherson v. Blacker.* 146 U.S. 1 at 27. 1892.
17. *State of Delaware v. State of New York*, 385 U.S. 895, 87 S.Ct. 198, 17 L.Ed.2d 129 (1966).

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18. *US Steel Corporation v. Multistate Tax Commission*. 1978. 434 *U.S.* 452.
19. *McPherson v. Blacker*. 146 *U.S.* 1.
20. *U.S. Steel Corporation v. Multistate Tax Commission*. 1978. 434 *U.S.* 452.
21. Ford, Paul Leicester. 1905. *The Works of Thomas Jefferson*. New York, NY: G. P. Putnam's Sons. 9:90.
22. 41 *Annals of Congress* 169–170. 1824.
23. Average support in 35 statewide polls over the last 10 years was 74% (66% among Republican registered voters, 82% among Democrats, and 71% among independents). See table 9.26 in Koza et al. 2013 and http://www.nationalpopularvote.com/polls.

REFERENCES

DeWitt, Darin and Thomas Schwartz. 2016. "A Calamitous Compact." *PS: Political Science & Politics* 49 (4): this issue.

Doherty, Brendan J. 2012. *The Rise of the President's Permanent Campaign*. Lawrence, KS: University Press of Kansas.

Foley, Edward B. 2016. *Ballot Battles: The History of Dispute Elections in the United States*. New York, NY: Oxford University Press.

FairVote. 2015. *Plurality in Gubernatorial Elections*. http://www.fairvote.org/plurality-in-gubernatorial-elections.

Hecht, Stacey Hunter and David Schultz. 2015. *Presidential Swing States: Why Only Ten Matter*. Lanham, MD: Rowman & Littlefield Publishing.

Hudak, John Joseph. 2014. *Presidential Pork: White House Influence over the Distribution of Federal Grants*. Washington, DC: Brookings Institution Press.

Imai, Kosuke and Gary King. 2004. "Did Illegal Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?" *Perspectives on Politics* 2 (3): 537–49.

Koza, John R., Barry F. Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie, and Joseph F. Zimmerman. 2013. *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*. Los Altos, CA: National Popular Vote Press.

Kriner, Douglas L. and Andrew Reeves. 2015. *The Particularistic President: Executive Branch Politics and Political Equality*. New York, NY: Cambridge University Press.

Morrissey, Ed. 2016. *Going Red: The Two Million Voters Who Will Elect the Next President—And How Conservatives Can Win Them*. New York, NY: Crown Forum.

Richie, Robert and Andrea Levien. 2013. "The Contemporary Presidency: How The 2012 Presidential Election Has Strengthened the Movement For The National Popular Vote Plan." *Presidential Studies Quarterly* 43 (2): 353–76.

https://doi.org/10.1017/S1049096516001402 Published online by Cambridge University Press