

Elections

Chapter 188: Forget College, You're Popular! A Review of the National Popular Vote Interstate Compact

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Codes Sections Affected

Elections Code §§ 6290, 6291 (new).

I. INTRODUCTION

In his inaugural address, President John Quincy Adams asserted that “the will of the people is the source and the happiness of the people the end of all legitimate government upon earth.”¹ This declaration is somewhat ironic in light of the fact that the will of the people was against Adams’ presidency; he gained only thirty-one and a half percent of the popular vote, compared to Andrew Jackson’s forty-two and a half percent.² Mr. Adams is not alone; three other United States Presidents won their elections despite failing to win the popular vote.³ The Electoral College makes this situation possible.⁴

The Electoral College determines the winner of an election by having citizens vote for presidential electors, electors who then vote for a presidential slate.⁵ Today, most states use an indirect popular vote system, whereby they allot their electoral votes to the statewide popular vote winner.⁶ Under this system, presidential campaigns often do not focus on candidates’ national performance, but instead focus on performances in key “battleground” states.⁷ “Battleground

1. *Inaugural Address of John Quincy Adams*, AVALON PROJECT, http://avalon.law.yale.edu/19th_century/qadams.asp (last visited June 9, 2011) (on file with the *McGeorge Law Review*).

2. *See 1824 Disputed Election*, HISTORYCENTRAL.COM, <http://www.historycentral.com/ant/disputed.html> (last visited June 8, 2011) (on file with the *McGeorge Law Review*) (listing indicating that not one of the election’s four candidates received an Electoral College majority, leaving the House of Representatives to decide the presidency).

3. *Presidents of the United States*, IPL2.ORG, www.ipl.org/div/farq/POTUSFARQ.html (last visited June 8, 2011) (on file with the *McGeorge Law Review*) (listing presidents who won the electoral vote without winning the popular vote).

4. *Id.* (noting Rutherford B. Hayes ascension to the presidency without winning the popular vote was made possible by the Electoral College).

5. Elizabeth D. Lauzon, Annotation, *Challenges to Presidential Electoral College and Electors*, 20 A.L.R. FED. 2d 183 (2007).

6. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 160 (1996).

7. Press Release, Comm. for the Study of the Am. Electorate, President Bush, Mobilization Drives Propel Turnout to Post-1968 High Kerry, Democratic Weakness Shown 7–8 (Nov. 4, 2004), *available at*

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states are those where the state's popular vote—and the allotment of that state's electoral votes—is not decidedly in favor of one of the presidential slates.⁸ Generally, fewer than twenty states qualify as “battleground” states that receive attention from the presidential candidates.⁹ Candidates largely ignore the remaining thirty or so states.¹⁰ One non-battleground state is California.¹¹ Despite the fact that California has over ten percent of the nation's population, the 2008 Democratic presidential candidate, Barack Obama, spent less than \$6 million on advertising in California—less than two percent of his total advertising budget.¹² John McCain, the Republican candidate, spent less than \$60,000—less than four hundredths of a percent of his total advertising budget.¹³ By comparison, Obama and McCain spent roughly forty million dollars and twenty-two million dollars respectively to campaign in Pennsylvania, a state with a population less than half that of California.¹⁴

Recently, California enacted Chapter 188.¹⁵ Under the bill, California enters into the National Popular Vote Interstate Compact (Compact), which, when enough states join it, will allow the popular vote to determine the outcome of presidential elections.¹⁶ The Compact achieves this outcome by requiring that each member state cast its electoral votes for the popular vote winner, regardless of how that candidate performed within each individual member state.¹⁷

II. LEGAL BACKGROUND

A. Electoral College Orientation

The United States Constitution provides for an Electoral College to elect the

www.american.edu/spa/cdem/upload/csae041104.pdf (on file with the *McGeorge Law Review*)

8. *Id.*

9. *See id.* (explaining that candidates will favor states where the electorate is less dedicated to a single candidate, as they will have a chance of getting those votes for themselves).

10. *Id.*

11. Jessica Levinson, *When it Comes to Presidential Politics, Does California Even Matter?*, KCET.ORG (May 9, 2011), http://kcet.org/updaily/social_focus/commentary/33302-when-it-comes-to-presidential-politics-does-california-even-matter.html (on file with the *McGeorge Law Review*).

12. *See Election Tracker: Ad Spending*, CNNPOLITICS.COM, <http://www.cnn.com/ELECTION/2008/map/ad.spending/> (last visited June 3, 2011) (on file with the *McGeorge Law Review*) (indicating that Barack Obama spent \$310,144,318 on advertising; John McCain spent \$134,792,298 on advertising).

13. *See id.* (indicating that John McCain spent \$134,792,298 on advertising nationally).

14. *Id.*

15. CAL. ELEC. CODE §§ 6920, 6921 (enacted by Chapter 188).

16. *Id.*; *see also 49% of the Way to Activating the National Popular Vote Bill*, NATIONALPOPULARVOTE.COM, <http://www.nationalpopularvote.com/pages/misc/status.php> (last visited June 15, 2011) (on file with *McGeorge Law Review*) (noting that eight states—California, Vermont, Maryland, Washington, Illinois, New Jersey, Massachusetts and Hawaii—and the District of Columbia have joined the compact. Cumulatively, these states possess 132 electoral votes, forty-nine percent of the total needed for the compact to come into force).

17. ELEC. §§ 6920, 6921.

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President and Vice President of the United States.¹⁸ The Electoral College consists of several slates of electors, with a slate of electors in each state of the union and one in the District of Columbia.¹⁹

Pursuant to Article II, Section One, Clause One of the Constitution and the Twelfth and Twenty-Third Amendments of the Constitution, the states and the District of Columbia determine the process for selecting the members of their respective Electoral Colleges.²⁰ Each state's number of electors is equal to its respective number of Senators and Representatives.²¹ The District of Columbia is allotted the same number of electors as the least populated state.²²

When allotting electoral votes to a presidential slate, forty-eight states and the District of Columbia use the "unit rule," under which the presidential slate that wins the popular vote of an individual state receives all of that state's electoral votes.²³ The two remaining states—Maine and Nebraska—cast two electoral votes for the winner of their respective state's popular votes and distribute the remaining votes to the popular vote winner within each state's congressional districts.²⁴ In making these decisions, the states enjoy wide authority to determine how to award their electors.²⁵

B. A Quick Note on the Compact Clause

Because of its important role in this bill, the Compact Clause warrants a moment of discussion. The Compact Clause prohibits states from entering into certain agreements with other states without Congressional approval.²⁶ One type of agreement requiring approval is one that would affect the political power of the states.²⁷ The Supreme Court has interpreted this political power limitation to mean that compacts that potentially threaten federal supremacy require congressional approval.²⁸

18. U.S. CONST. amend. XII.

19. U.S. CONST. amend. XII; *id.* amend. XXIII.

20. 91 C.J.S. *United States* § 46 (2011).

21. 3 U.S.C. § 3 (2005).

22. U.S. CONST. amend. XXIII.

23. Josephson & Ross, *supra* note 6, at 160.

24. *Id.* at 161.

25. *The State of Delaware and 11 Predominantly Small States Sued the State of New York In 1966 Arguing that Small States Are Damaged By New York's Use of the Winner-Take-All Rule*, NAT'L POPULAR VOTE, http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php (last visited Sept. 10, 2011) (on file with the *McGeorge Law Review*) (discussing a suit brought by twelve states in 1966 to enjoin New York's use of a winner-take-all voting system. The article notes that the courts refused to hear the case, "presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision.")

26. U.S. CONST. art. I, § 10, cl. 3.

27. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). See *infra* Part IV.E.2 (examining the Compact Clause).

28. *U.S. Steel Corp.*, 434 U.S. at 471.

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III. CHAPTER 188

Under Chapter 188, California enters into the Compact, which any other state or the District of Columbia may join.²⁹ In a presidential election, Chapter 188 requires California to conduct a popular vote election.³⁰ After the election, California's Chief Election Official must certify the number of popular votes won by each presidential slate nationally.³¹ The State must make this determination six or more days before the federally-set election date.³² The Compact requires California to share its findings with other member states, which will do the same with California.³³ The findings of any one state as to their final state popular count will bind the others.³⁴ Additionally, California's presidential elector certifying official must validate the appointment of electors that will allot their votes to the presidential slate winning the national popular vote.³⁵

Chapter 188 does not take effect (and bind) California until the cumulative number of electoral votes between the states who have joined the compact, including California, reaches 270.³⁶ However, Chapter 188 does not bind California to the Compact in those election years where the member states fail to meet the 270-vote threshold before July 20th.³⁷ Thereafter, California may release itself from the Compact; however, the Compact will still bind California if Chapter 188 is repealed within the last six months of the then-President's term.³⁸

Chapter 188 also empowers the presidential slate that wins the national popular vote to nominate electors in any member state that casts less than all of its electoral votes to that slate.³⁹ If the national popular vote ends in a tie, Chapter 188 requires California to cast its electoral votes to the slate that wins the most votes within California.⁴⁰ Chapter 188 also provides that if a court finds a provision of the bill to be unlawful, the remaining provisions will nonetheless continue to bind the other member states.⁴¹ Finally, Chapter 188 will become

29. CAL. ELEC. CODE §§ 6920, 6921 (enacted by Chapter 188).

30. *Id.* § 6920 (enacted by chapter 188).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; see also Robert Longley, *The Electoral College System: Who Really Elects the President of the United States?*, ABOUT.COM, <http://usgovinfo.about.com/od/thepoliticalsystem/a/electcollege.htm> (last visited Sept. 3, 2011) (on file with the *McGeorge Law Review*) (noting that 270 electoral votes are needed to win the presidency); see also *49% of the Way to Activating the National Popular Vote Bill*, *supra* note 16.

37. ELEC. § 6921 (enacted by Chapter 188).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

completely invalid if the people or the states abolish the Electoral College through a constitutional amendment.⁴²

IV. ANALYSIS

A. *Campus Tour: Information About the Electoral College*

1. *Elections Aren't a Popularity Contest: A Historical Perspective on Why We Have an Electoral College*

The Founders had several concerns regarding the use of a direct popular vote system.⁴³ They felt it would be unlikely for a candidate to have a nationwide presence among the general public.⁴⁴ Even if a candidate did, the Founders still questioned a candidate's ability to disseminate information about their qualities and platform to the electorate due to the technological limitations at the time.⁴⁵ In contrast, an Electoral College system would permit candidates to appeal to only a select and identifiable groups of persons.⁴⁶ Alexander Hamilton noted that this situation would still encompass the views and concerns of the voters because it enables voters to choose the electors of their state.⁴⁷ Additionally, the Founders were concerned that a popular vote system could lead to a single President—who had national name recognition (and was thus unfazed by the difficulties of gaining a national presence thought to affect most candidates)—to become perpetually elected.⁴⁸ Finally, implementing an Electoral College system alleviated Founders' fears that a state could augment its influence on presidential elections by enfranchising populations—i.e., blacks and women—generally perceived as unfit to vote.⁴⁹ The Electoral College avoided this tactic by setting electoral votes by population, not voter eligibility and turnout, thus depriving states of the incentive to enfranchise such populations.⁵⁰

2. *Everyone's a Critic: The Electoral College in Modern Times*

While the aforementioned concerns were persuasive at the formation of the Constitution, subsequent developments have brought their relevance into

42. *Id.* §§ 6920, 6921.

43. Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENT. 143, 143–44 (1995).

44. *Id.* at 143.

45. *Id.*

46. THE FEDERALIST NO. 68 (Alexander Hamilton).

47. *Id.*

48. Amar, *supra* note 43, at 143–44.

49. *Id.* at 144.

50. *Id.*

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question.⁵¹ Developments in technology and political campaigning techniques have made it easier for candidates to create a national presence and communicate with the electorate.⁵² Furthermore, the twenty-second Amendment of the Constitution imposes term limits on the presidency.⁵³ Finally, changing social views have diminished the relevance of the disenfranchised voter base argument, because women and African Americans are rightful participants in the election process.⁵⁴ As the Founders' concerns wither, some question whether the Electoral College should continue to exist.⁵⁵

B. Elections Under Chapter 188⁵⁶

Once enough states enact the Compact, it will render the Electoral College irrelevant (although to prevent this from happening in the midst of the election, Chapter 188 includes a provision which does not allow it to come into effect for an election year where the Compact threshold was not met by July 20th of that year).⁵⁷ By guaranteeing that the member states will vote for the national popular vote winner, performance in individual states becomes irrelevant; national performance determines the winner of the election.⁵⁸

The Compact will significantly change how presidential elections proceed.⁵⁹ Former “battleground” states may lose some or all of their appeal because winning a majority of the votes in those states will no longer result in an electoral benefit.⁶⁰ Instead, the overall national vote total will matter, and proponents of the Compact believe that this will lead politicians to more equally value votes across all fifty states.⁶¹ On the other hand, a national popular vote system could lead presidential candidates to focus on states or cities that are highly populated because those areas would have the most possible votes.⁶²

51. *Id.*

52. *Id.*

53. U.S. CONST. amend. XXII.

54. Amar, *supra* note 43, at 144.

55. *Id.* 144–45.

56. Please note that while this article refers to both “Chapter 188” and the “Compact”, the terms can be viewed somewhat interchangeably because every state which uses the compact uses the same legislative language. ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING, COMMITTEE ANALYSIS OF AB 459, at 6 (April 12, 2011).

57. *Explanation of the National Popular Vote Bill*, NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com/pages/explanation.php> (last visited June 15, 2011) (on file with *McGeorge Law Review*); CAL. ELEC. CODE § 6921 (enacted by Chapter 188).

58. *Explanation of the National Popular Vote Bill*, *supra* note 57.

59. J. Caleb Jones, *Fair and Unfair in Electing a President*, TIMES (Shreveport), June 17, 2011, available <http://pqasb.pqarchiver.com/shreveporttimes/access/2371782881.html?FMT=ABS&date=Jun+11%2C+2011> (on file with the *McGeorge Law Review*). at

60. *Id.*

61. *Id.*

62. Jones, *supra* note 59.

*McGeorge Law Review / Vol. 43**C. Once You're Popular You'll Forget All Of Us Little People*

Chapter 188 will decrease the influence of small states in presidential elections. Presently, California has fifty-three times the number of people as Wyoming, but only eighteen times the share of the electoral vote.⁶³ This inflation occurs because, under the Constitution, states receive one elector for each Representative and United States Senator the state has.⁶⁴ Because the Constitution apportions the number of congressional districts in each state based on the state's population, the number of Representatives from each state roughly correlates to the difference between each state's population size.⁶⁵ However, this ratio is not reflected under the Electoral College system because the system adds electors for each state's U.S. Senators.⁶⁶ Since each state has two U. S. Senators, regardless of the state's population, their addition inflates the impact that smaller states have on the overall percentage of electors.⁶⁷ This changes, however, under a national popular vote system because the number of electors in any given state becomes irrelevant.⁶⁸

D. Faith-Based Politics

A "faithless" elector is an elector who does not vote for the candidate that he or she is supposed to vote for.⁶⁹ For example, in 2004, an unknown Minnesota elector cast a vote for president for John Edwards, the Democratic Party's nominee for Vice President.⁷⁰ This has happened only nine times, and 'faithless voters' have never changed the outcome of a presidential election.⁷¹ However, a large enough block of faithless electors could change the outcome of an election.⁷²

Chapter 188 addresses this issue by empowering the presidential slate that wins the national popular vote to "nominate the presidential electors" of a state where "the number of presidential electors nominated in a member state in

63. 2010 Census Data, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/data/> (last visited June 12, 2011) (on file with the *McGeorge Law Review*) (showing that California has 37,253,956 residents and that the state of Wyoming has 563,626 residents).

64. U.S. CONST. art. II, § 1, cl. 2.

65. U.S. CONST. amend. XIV.

66. J. Gordon Hylton, *How Much Difference Does the Small State Advantage in the Electoral College Really Make?*, MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG (Mar. 8, 2010), <http://law.marquette.edu/facultyblog/2010/03/08/how-much-difference-does-the-small-state-advantage-in-the-electoral-college-really-make/> (on file with the *McGeorge Law Review*).

67. *Id.*

68. *Explanation of the National Popular Vote Bill*, *supra* note 57.

69. Vasani Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 124 (2001).

70. *The "Faithless Nine:" Presidential Electors Who Have Defected in the Past*, GREEN PAPERS, <http://www.thegreenpapers.com/Hx/FaithlessElectors.html> (last visited June 15, 2011) (on file with the *McGeorge Law Review*).

71. *Id.*

72. Kesavan, *supra* note 69, at 124.

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association with the national popular vote winner is less than . . . that state's number of electoral votes."⁷³ This ensures that each member state's presidential electors vote for the national popular vote winner by allowing the winning presidential slate to choose loyal electors.⁷⁴ While the courts have not yet examined whether a state may empower a presidential slate to do this, the Supreme Court, in *Ray v. Blair*, found state laws that confer such powers to political parties to be constitutional, making a challenge to Chapter 188 on these grounds unlikely to succeed.⁷⁵

E. Constitutional Questions

Chapter 188 attempts to avoid the Electoral College requirements by utilizing the wide power allotted to states in making determinations about how to award their electors to presidential candidates.⁷⁶ Other provisions within the Constitution may limit these state rights.⁷⁷ This article will consider two such potentially conflicting provisions.

1. Can You "Guarantee" Constitutionality?

The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."⁷⁸ Comment author Kristen Feeley argues that the Guarantee Clause prohibits the Compact because the Compact undermines process federalism in presidential elections.⁷⁹ Ms. Feeley reasons that, by mandating that member states allot their electoral votes for the national popular vote winner, the Compact not only silences the voice of the nonmember states, but also prohibits member states from making their own decisions.⁸⁰ The Supreme Court would thus have to find Chapter 188 unconstitutional because the federal government must "guarantee" a form of republican government.⁸¹

This interpretation, however, may be flawed. Student commentator Rami Fakhouri argues that a plain-text reading of the Guarantee Clause operates only to ensure republican governments for individual states—not a national republican

73. CAL. ELEC. CODE §§ 6920, 6921 (enacted by Chapter 188).

74. *Id.* § 6921.

75. 343 U.S. 214, 231 (1952); *U.S. Electoral College: Frequently Asked Questions*, NAT'L ARCHIVES AND RECORDS ADMIN., <http://www.archives.gov/federal-register/electoral-college/faq.html> (last visited June 15, 2011) (on file with the *McGeorge Law Review*).

76. *Question of Congressional Consent for the National Popular Vote Bill*, NATIONAL POPULAR VOTE (Mar. 7, 2010), <http://www.nationalpopularvote.com/resources/Consent-V13-2010-3-7.pdf> (on file with *McGeorge Law Review*).

77. Kristin Feeley, *Guaranteeing A Federally Elected President*, 103 NW. U. L. REV. 1427, 1433 (2009).

78. U.S. CONST. art. IV, § 4.

79. Feeley, *supra* note 77, at 1448–49.

80. *Id.*

81. *Id.* at 1449, 1457.

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government.⁸² This would limit the reach of the Guarantee Clause; thus, an argument that the Compact violates the Guarantee Clause would likely fail, as courts would have to read the Clause very broadly for it to apply to the Compact.⁸³ In *Baker v. Carr*, the Supreme Court noted that it had not invoked the Guarantee Clause to invalidate a state action since 1849, and held that such issues are nonjusticiable political questions.⁸⁴

2. *Can We Agree That We Can Agree? Does Chapter 188 Trigger a Political Power Limitation of the Compact Clause?*⁸⁵

Chapter 188 is likely to affect the power of states in terms of their influence on a presidential election.⁸⁶ This factor seems unlikely to trigger a political-power limitation, however, as it relates to the power among the states, not to the federal government's power over any given state.⁸⁷ As such, the Compact does not seem to "encroach upon or interfere with the just supremacy of the United States," and thus would fall outside the scope of the political power limitation.⁸⁸

V. CONCLUSION

Chapter 188 enters California into the National Popular Vote Interstate Compact.⁸⁹ If enough states enter into the Compact to reach the 270-vote threshold for the Compact to take effect, the national popular vote will thereafter determine the outcome of presidential elections.⁹⁰ Those who supported Chapter 188 did so due to concerns of fairness over the current electoral system, which emphasizes performance in some states more than it does in others.⁹¹ The Compact, which California joins in enacting Chapter 188, may itself diminish the influence of small states and other sparsely populated areas.⁹² The Compact may

82. Rami Fakhouri, *The Most Dangerous Blot in Our Constitution: Retiring the Flawed Electoral College "Contingent Procedure,"* 104 NW. U. L. REV. 705, 733–34 (2010).

83. *Id.* at 734–35.

84. *See* 369 U.S. 186, 223 (1962) ("The Court has since [*Luther v. Borden*, 48 U.S. 1 (7 How.) (1849)] refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action."); Edward A. Stelzer, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. REV. 870, 870 (1993) ("[T]he United States Supreme Court has held that issues arising under the guarantee clause are nonjusticiable political questions. The categorical refusal by the Court to adjudicate claims based on this provision has left interpretation and enforcement of the guarantee clause almost entirely to Congress and the President.").

85. *See supra* Part II.B for a discussion of the Compact Clause and the political power limitation.

86. *See supra* Part IV.B.

87. *See supra* Part IV.B.

88. *United States Steel Corp. v. Multistate Tax. Comm'n.*, 434 U.S. 452, 468 (1978) (quoting *Com. of Va. v. Tenn.*, 148 U.S. 503, 517 (1893)).

89. CAL. ELEC. CODE § 6920 (enacted by Chapter 188).

90. *Explanation of the National Popular Vote Bill*, *supra* note 57.

91. *Id.*

92. Jones, *supra* note 59.

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also implicate the Guarantee Clause and the Compact Clause, and, if so, the Supreme Court may ultimately review it.⁹³ The Court will have to consider issues of justiciability and the implications, if any, the bill will have on the federal government and its powers.⁹⁴

93. See *supra* Part IV.E.1–2.

94. Feeley, *supra* note 77, at 1448–49; see *supra* Part IV.E.1–2.