

Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact

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INTRODUCTION

Nothing captures the nation’s attention like the contest for President. With a dwindling number of “swing states,” two of the last six presidential elections resulting in an Electoral College victory for the popular vote loser, and fourteen states in 2016 awarding all of their electoral votes to candidates earning less than half of their statewide vote, it is no surprise that calls to reform the way the United States chooses its chief executive are increasing.

The National Popular Vote Interstate Compact (NPVIC) and ranked choice voting (RCV) have gained significant momentum since the controversial 2000 election between George W. Bush and Al Gore. Widely adopted by jurisdictions across the United States, they are the most promising reforms to make every vote count equally and give voters more voice and choice in presidential elections. To date, both reforms have been advanced separately, with the NPVIC based on electing the presidential candidate who wins a *plurality* of the *national* popular vote and RCV based on seeking to have states award their electoral votes to the candidate who wins the *majority* of the *statewide* popular vote. Moving forward, the challenge for supporters of both changes is to ensure that they can be integrated harmoniously.

This Article proposes two new statutory options to integrate RCV with the NPVIC, the pre-existing, active movement led by National Popular Vote to guarantee the presidency to the candidate who receives the most popular votes across all fifty states and the District of Columbia. Relying on the NPVIC taking effect before they would be activated, the two proposals are:

- (1) the “RCV in Presidential Elections Act,” a congressional bill that relies on Congress’s authority to regulate Presidential elections in order to establish uniform standards for a national RCV Presidential ranked choice ballot that would be used to determine the national popular vote winner; and
- (2) the “Interstate RCV Compact” that specifies how states can conduct an interstate RCV election to run the RCV tally down to two candidates and have the results integrated with the NPVIC.

The first option, the RCV in Presidential Elections Act, is a preferable policy because it would enable a national RCV election in Presidential elec-

tions. The second option, the Interstate RCV Compact, is one that states can act on immediately. It would allow a minimum of five states to jointly conduct an RCV election for the purposes of generating vote totals for the NPVIC. While this second Interstate RCV Compact option is less sweeping and, therefore, less ideal than the congressional statute option, it nonetheless could serve as a helpful incremental measure grounded in actions by state policymakers.

The NPVIC and RCV both affect very real, but different problems with elections for our nation's most powerful office. The number of swing states has declined and become much more rigid over time, with clear impacts on federal policies affecting states and voter turnout across states—inequities solved by the NPVIC. The high degree of partisan polarization means that, without RCV, the entry of a third party or independent candidate can change who wins the White House when states give all their electoral votes to candidates with less than a majority, as likely has changed presidential outcomes numerous times, including potentially in 2000, 2016, and 2020.

Given the growing popularity of RCV and the obvious inequity among states with the current Electoral College rules, more states are likely to act in order to have one or both proposals in place, raising the question: How might the NPVIC and RCV work together? To answer this question, this Article seeks to outline and advocate for how the RCV in Presidential Elections Act and Interstate RCV Compact approaches might work in practice. First, we provide an overview of the current presidential election system, the NPVIC, and the use of RCV in the United States. We then explain why it is necessary to prepare to integrate RCV with the NPVIC and provide detailed explanations of the RCV in Presidential Elections Act and the Interstate RCV Compact. Finally, we explore how these two proposed options would work in practice through the lens of the 1912 presidential election.

I. THE CURRENT PRESIDENTIAL ELECTION PROCESS AND THE NATIONAL POPULAR VOTE INTERSTATE COMPACT (NPVIC)

Contrary to what most Americans support, voters do not directly elect the President. The Electoral College does.¹ The Electoral College is composed of electors allocated to each state, equal to the combined total of its U.S. Senate and House of Representative delegations.² The sole purpose of these electors is to elect the President and Vice President,³ and the Constitu-

¹ See Andrew Daniller, *A Majority of Americans Continue to Favor Replacing Electoral College with a Nationwide Popular Vote*, PEW RES. CTR. (Mar. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/03/13/a-majority-of-americans-continue-to-favor-replacing-electoral-college-with-a-nationwide-popular-vote/> [https://perma.cc/DZ8Q-9PYZ].

² See U.S. CONST. art. II, § 1.

³ See THOMAS H. NEALE & ANDREW NOLAN, CONG. RESEARCH SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 2–3 (2019).

tion grants states the power to appoint their electors in any manner the state legislature directs.⁴ Today, in a major shift from the early decades of the Electoral College, almost all states award their Electoral College votes through a “winner-take-all” system where the winner of the state’s popular vote is awarded all of that state’s electoral votes.⁵ Maine and Nebraska are the exceptions. These states employ a district-based system.⁶

Although individual electors may be independent, members of the Electoral College cast their votes in accordance with the popular vote of their state. This is because the electors casting these votes will always be associated with the candidate who has earned them according to a state’s rules.⁷ Despite the role envisioned by the Framers,⁸ historically electors have not acted as an independent body that shields the Presidential election from popular will. The Supreme Court recognized as much in 1892 in *McPherson v. Blacker*⁹:

Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were chosen simply to register the will of the appointing power in respect of a particular candidate.¹⁰

In practice the United States does not elect its President by entrusting only a few individual electors with the choice of who should govern. The choice is instead determined by the popular will of eligible voters of each state.¹¹ This does not always align with the will of the nation. Five times

⁴ See U.S. CONST. art. II, § 1.

⁵ See NEALE & NOLAN, *supra* note 3, at 3.

⁶ See *id.* at 3 n.16.

⁷ This is how the Electoral College functions most of the time. Sometimes an elector will cast a vote for a candidate who did not win a state’s popular vote. These electors are often referred to as “faithless electors.” See generally *Faithless Electors*, FAIRVOTE, https://www.fairvote.org/faithless_electors [<https://perma.cc/FLD7-8BN8>]. These electors have never changed the outcome of a presidential election. See *id.*

⁸ The *Federalist Papers* suggest that the Electoral College should select the President, independent of popular will. In *Federalist No. 68*, Hamilton wrote: “It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture. It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.” THE FEDERALIST NO. 68, at 189 (Alexander Hamilton) (Michael A. Genovese ed., 2009).

⁹ 146 U.S. 1 (1892)

¹⁰ *Id.* at 36.

¹¹ See NEALE & NOLAN, *supra* note 3, at 3.

throughout history the Electoral College has elected a President who did not also win the national popular vote.

The United States does not have to rely on this system. This Article supports a change: that the President be elected by the popular will of the entire people of the United States. Once this is accomplished through the NPVIC, we believe a congressional act would help effectuate and protect the new system that will elect the candidate winning the popular vote in all fifty states and the District of Columbia.

The debate over the best method to elect the President dates back to the Constitutional Convention,¹² with the Framers ultimately agreeing to the Electoral College as part of a delicate balance between small and large states meant to both quell fears about uneducated voters and appease states with a large enslaved population.¹³ In recent decades there have been numerous constitutional amendments proposed to change the Presidential election to a national popular vote.¹⁴ Reform proposals, however, are not limited to constitutional amendments.

The NPVIC is a sensible, constitutional option for securing the presidential election by national popular vote winner. It is grounded in two powers that states have under the Constitution: establishing the rules for allocating electoral votes and being able to participate in interstate compacts. While previously discussed in academic papers,¹⁵ John Koza and his co-authors developed and popularized a specific NPVIC plan in their book *Every Vote Equal*.¹⁶ The plan is overseen by the non-profit National Popular Vote.¹⁷ Under the plan, individual states enter a compact whereby their legislatures vote to allocate their Electoral College votes to the winner of the national popular vote in all fifty states and the District of Columbia.¹⁸ The NPVIC goes into effect only when enough states have entered into the com-

¹² See generally Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35 (1986).

¹³ See *id.*; Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1151–56 (2002).

¹⁴ See, e.g., H.R.J. Res. 7, 116th Cong. (2019) (proposing an amendment to the Constitution of the United States to abolish the Electoral College and to provide for the direct election of the President and Vice President of the United States); H.R.J. Res. 681, 91st Cong. (1969) (proposing an amendment to the Constitution relating to the election of the President and Vice President).

¹⁵ See, e.g., Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 241, 243–44 (2001).

¹⁶ See JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 248–53 (2011).

¹⁷ See generally NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/> [<https://perma.cc/S42X-LLEB>].

¹⁸ In the highly unlikely instance of an exact tie for the national popular vote winner, the state's electoral votes will be allocated to the winner of the popular vote in that specific state. *Text of the National Popular Vote Compact Bill*, art. III, NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/bill-text> [<https://perma.cc/7LFE-9LAZ>]; see also KOZA ET AL., *supra* note 16, at 269.

pact such that they collectively control a majority (currently 270) of electoral votes and can guarantee election of the national popular vote winner.¹⁹

Underpinning the NPVIC is the fact that states control the rules that decide how to appoint their electors, which in most cases direct how the electors will cast their votes.²⁰ A state is not constrained to a certain method of appointment such as winner-take-all general ticket or district-based elections.²¹ A state's legislature acts as the state's voice in the presidential election, deciding how electoral votes should be cast.²² If a state chooses to enter the NPVIC, then its voice is clear—it decides to have the state's electoral votes cast for the candidate who wins the national popular vote. As of the writing of this Article, fifteen states and the District of Columbia have joined the NPVIC.²³ This amounts to 196 electoral votes, which is 72.6% of the 270 votes needed before the compact takes legal force.²⁴

A recent survey found that 55% of Americans support replacing the Electoral College with a national popular vote, reflecting a partisan split that widened sharply after the 2016 election,²⁵ with 75% of self-reported Democrats supporting this change, compared with 32% of self-reported Republicans.²⁶ While large, this split has been small or even reversed in recent decades, and there is no inherent advantage for either party in the current system, demonstrated by simulations showing that Democrats would likely have won presidential elections in 2004, 2008, and 2012 even if losing the popular vote by less than a half million votes.²⁷ As recently as 2016, the number of state legislative sponsors of the National Popular Vote plan were

¹⁹ See *id.*; *Status of National Popular Vote in Each State*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/state-status> [<https://perma.cc/5MFM-A3CY>].

²⁰ See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319–20, 2323–24 (2020).

²¹ See *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (“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, 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 effectuating the object.”).

²² See U.S. CONST. art. II, § 1.

²³ These states are Maryland, New Jersey, Illinois, Hawaii, Washington, Massachusetts, D.C., Vermont, California, Rhode Island, New York, Connecticut, Colorado, Delaware, New Mexico, and Oregon. See *Status of National Popular Vote in Each State*, *supra* note 19. On November 3, 2020, Colorado held a referendum on whether to overturn the 2019 law that entered Colorado into the Compact. Colorado's participation in the Compact was upheld in the referendum. See *Colorado Proposition 113, National Popular Vote Interstate Compact Referendum (2020)*, BALLOTPEdia, [https://ballotpedia.org/Colorado_Proposition_113_National_Popular_Vote_Interstate_Compact_Referendum_\(2020\)](https://ballotpedia.org/Colorado_Proposition_113_National_Popular_Vote_Interstate_Compact_Referendum_(2020)) [<https://perma.cc/B4ER-S93B>].

²⁴ See *id.*

²⁵ See PEW RESEARCH CTR., *THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY* 55 (2018).

²⁶ See *id.* For historical views, see GALLUP POLLS: CONSISTENT SUPER-MAJORITY SUPPORT FOR A NATIONAL POPULAR VOTE 6, http://archive.fairvote.org/electoral_college/Gallup_Polls.pdf [<https://perma.cc/AUA7-WUB6>].

²⁷ See Andrea Levien, *Electoral College Rules Don't Help Either Party, but Do Harm American Democracy*, FAIRVOTE (Oct. 12, 2012), <https://www.fairvote.org/election-simulations-from-1960-2008-show-that-electoral-college-rules-don-t-help-either-party-but-do-harm-american-democracy#.UQBqkx7IY> [<https://perma.cc/P4X3-TS5Q>].

roughly equal between parties,²⁸ and several state wins for NPVIC in 2018 and 2019 drew the support of Republican state legislators.²⁹

Proponents of the NPVIC argue that it will address significant shortcomings of the current presidential election process that stem from state “winner-take-all” laws that award all of a state’s electoral votes to the candidate receiving the most popular votes in each state. The first problem solved by NPVIC is that the current system has enabled five of our forty-six Presidents to come into office without winning the most popular votes nationwide.³⁰ Most recently this has led to two highly divisive outcomes in 2000 and 2016 and to bitterness and potential chaos when comfortable national popular vote victories could have reversed by a switch of fewer than 60,000 votes in 2004 and fewer than 22,000 votes in 2020.³¹ The second problem the NPVIC would solve is the disproportionate focus on “swing states.”³² Under current rules, presidential candidates ignore “safe” states where they are safely ahead or hopelessly behind because no degree of campaigning will affect a single electoral vote, denying citizens an equal voice in electing the highest office in the land.³³ In 2012, for example, only 11 states had general election campaign events with rallies featuring major party presidential and vice-presidential nominees targeting voters in that state, demonstrating how

²⁸ See Austin Plier, *18 States (and Counting) Introduce National Popular Vote Bills*, FAIRVOTE (Jan. 27, 2017), https://www.fairvote.org/15_states_and_counting_introduce_national_popular_vote_bills [<https://perma.cc/RA3F-6JM8>].

²⁹ These wins include those in Connecticut and Delaware. See *Connecticut*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/state/ct> [<https://perma.cc/BXG7-6FUQ>]; *Delaware*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/state/de> [<https://perma.cc/LUH5-5HC4>].

³⁰ The election in questions took place in 1824, 1876, 1888, 2000, and 2016. The 1824 and 1876 elections were controversial in how and where votes were counted in states. See generally D’Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG (Dec. 23, 2016), <https://www.factcheck.org/2008/03/presidents-winning-without-popular-vote/>; *1876 (Tilden – Hayees)*, FAIRVOTE, http://archive.fairvote.org/e_college/controversial.htm#1876 [<https://perma.cc/4NC4-SBYG>].

³¹ George W. Bush won the 2004 election victory by more than three million votes, but he would have lost in the Electoral College if fewer than 60,000 votes for Bush in Ohio had gone to John Kerry. See *United States Presidential Election Results*, DAVE LEIP’S ATLAS OF U.S. PRESIDENTIAL ELECTIONS ELECTION ATLAS, <https://uselectionatlas.org/RESULTS/> [<https://perma.cc/NQV4-PYF5>] (select “2004” from the “General by Year” dropdown menu). In 2020, Joe Biden won the popular vote by more than six million votes, but he would have lost in the Electoral College with a switch of fewer than 22,000 votes in Arizona, Georgia and Wisconsin. See *id.* (select “2020” from the “General by Year” dropdown menu).

³² See, e.g., KOZA ET AL., *supra* note 16, at 43–47, 434–41; David Hill & Seth C. McKee, *The Electoral College, Mobilization, and Turnout in the 2000 Presidential Election*, 33 AM. POL. RES. 700, 700 (2005) (finding that, in the 2000 election, battleground states received significantly more media expenditures and candidate visits from the two major party campaigns than non-battleground states and that “state battleground status indirectly impacted state-level turnout through its effect on media spending and candidate visits”); see also Justine Coleman, *Push for National Popular Vote Gets Push from Conservatives*, HILL (Feb. 26, 2020, 7:43 PM), <https://thehill.com/homenews/campaign/484843-push-for-national-popular-vote-movement-gets-boost-from-conservatives> [<https://perma.cc/NSA5-3YJU>] (quoting Dennis Lennox, campaign manager for Conservatives for Yes on National Popular Vote, ast stating, “Let’s be honest, we don’t elect a President of the United States. We elect a President of the battleground states under the current method.”).

³³ See *id.*

voters in “swing states” are unfairly granted more power to elect the President than voters in “safe states.”³⁴ In both 2016 and 2020, more than 94% percent of such campaign events were in a dozen states.³⁵

The NPVIC may also help increase voter turnout. A study of the 2016 election found that the campaigns focused 99% of their ad spend and 99% of their visits on fourteen battleground states, despite the fact that only 35% of eligible voters live in these states.³⁶ Over 50% of candidate ad spend and visits went to Florida, North Carolina, Ohio, and Pennsylvania alone.³⁷ Perhaps not surprisingly, battleground states had some of the highest voter turnout in the nation.³⁸ In fact, “[v]oter turnout in contested battleground states has been five to eight percentage points higher than in non-battleground states in each of the last five presidential elections.”³⁹ Consequently, moving to a national popular vote could increase voter turnout by ensuring each voter was part of a meaningfully contested election.⁴⁰ Candidates would no longer be able to presume victory in a historically left or right leaning state, causing them to spread the ad spend and attention normally devoted to swing states more proportionately across the country. Voters in those previously neglected states would be assured that their individual votes would count rather than be a “meaningless” drop in the bucket for either the majority or minority candidate in their state. Every state party would matter in

³⁴ See Robert Richie & Andrea Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, 43 PRESIDENTIAL STUD. Q. 353, 353–76 (2013); Theodore Landsman, *Tracking the Candidates Through the Final Campaign Push: Lots of Stops but Few States*, FAIRVOTE (Nov. 2, 2016), https://www.fairvote.org/tracking_the_candidates_through_the_final_campaign_push_lots_of_stops_but_few_states [<https://perma.cc/4RNV-H6K6>]; *The Only States That Received Any Attention in the 2012 General-Election Campaign For President Were States Within 3% of the National Outcome*, NAT'L POPULAR VOTE, <http://nationalpopularvote.com/sites/default/files/2012-campaign-events-and-results-chart.pdf> [<https://perma.cc/4WD6-QKXU>].

³⁵ See *94% of 2016 Presidential Campaign Was in Just 12 Closely Divided States*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016> [<https://perma.cc/4YVQ-WKG8>]; *Map of General Election Campaign Events and TV Ad Spending by 2020 Presidential Candidates*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/map-general-election-campaign-events-and-tv-ad-spending-2020-presidential-candidates> [<https://perma.cc/9SSJ-66A9>].

³⁶ See GEORGE PILLSBURY & JULIAN JOHANNESSEN, *AMERICA GOES TO THE POLLS 2016*, at 12 (2016), <https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf> [<https://perma.cc/L3C2>].

³⁷ See *id.*

³⁸ See *id.* at 7 (“Five of the six highest-turnout states, and 12 of the top 20, were battleground states.”); Danielle Kurtzleben, *CHARTS: Is The Electoral College Dragging Down Voter Turnout In Your State?*, NPR (Nov. 26, 2016, 5:00 AM), <https://www.npr.org/2016/11/26/503170280/charts-is-the-electoral-college-dragging-down-voter-turnout-in-your-state> [<https://perma.cc/HG5T-BDBY>] (“Of 15 states that NPR labeled as battlegrounds or leaning states in its final battleground map, 12 had turnout rates above the national rate—58.4 percent of the voting-eligible population.”).

³⁹ PILLSBURY & JOHANNESSEN, *supra* note 35, at 7.

⁴⁰ See, e.g., Burdett A. Loomis et al., *Electoral Reform, the Presidency, and Congress, in CHOOSING A PRESIDENT: THE ELECTORAL COLLEGE AND BEYOND* 74, 78 (Paul D. Schumaker & Burdett A. Loomis eds., 2002).

every election, promoting ongoing support for party-building work generating participation between and during elections.

Opponents, however, believe that the NPVIC could negatively impact rural communities and states with small populations because it might incentivize candidates to focus on urban areas and those states with the largest majority of electoral votes, leading to a geographical divide in elections.⁴¹ This idea has been disputed, with many scholars pointing to the geographical divide already present in the current Electoral College system and to the realities of how candidates campaign for popular vote elections for Governor and U.S. Senator.⁴² Within the current division of swing state and spectator states, rural voters are disproportionately concentrated in states that are taken for granted by campaigns.⁴³ Proponents of the NPVIC argue that “under direct election, presidential candidates would continue to wage broad national campaigns appealing to voters in different states and regions: a candidate simply cannot reach 50% or anything close to it without getting a lot of votes in a lot of places.”⁴⁴

Beyond political concerns, some have pointed out that the NPVIC might be hampered by a lack of uniform rules for administering elections and reporting the results.⁴⁵ As Vikram Amar has written, “Congress could set up a uniform system to come into effect if and when the NPVIC magic number is reached.”⁴⁶ Congress has a compelling reason to provide valuable uniformity for the presidential election. As the NPVIC will be a new system, it is important that voters trust the process and its outcome. Because presidential elections frequently attract minor party and independent candidates who can split the vote, a congressional act providing for ranked choice voting and uniform tabulation procedures will ensure that the results of the NPVIC are the most representative of the national popular will and that counting and reporting is uniform. We argue this can be done without infringing on the states’ constitutional right to appoint electors.

Indeed, Congress’s action would improve the compact. By establishing uniform RCV ballots and a process for conducting a presidential election with RCV across all states, Congress would ensure that the NPVIC truly reflects a national vote and avoid potential pitfalls from dispute resolutions and a nationwide recount in close elections. As we discuss further in this

⁴¹ See, e.g., TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 81 (2004).

⁴² See Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Sub-constitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 242–45 (2011).

⁴³ See *Rural States Are Almost Entirely Ignored Under Current State-by-State System*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/rural-states-are-almost-entirely-ignored-under-current-state-state-system> [https://perma.cc/WWQ8-336H]; Andrea Levien, *The Role of Cities in National Popular Vote Elections*, FAIRVOTE (June 13, 2014), <https://www.fairvote.org/the-role-of-cities-in-national-popular-vote-elections> [https://perma.cc/4B98-FNRN].

⁴⁴ See Amar, *supra* note 41, at 244–45.

⁴⁵ See *id.* at 253.

⁴⁶ *Id.*

paper, using RCV as part of this uniform ballot process will help achieve both of these goals. RCV helps prevent vote splitting, saves money on recounts and runoffs, helps ensure the candidate with a broad majority of support is elected, and allows voters to truly express their preferences rather than compromise on one candidate.

NPVIC is far better than the status quo on major dimensions like political equality, respect for all states, and representative outcomes, and it is equal or superior on a range of particulars like addressing recounts, non-majority outcomes, and faithless electors. But the NPVIC does not address all potential problems. In the spirit of seeking a more perfect union, there is merit to exploring how we might keep improving presidential elections in the wake of the passage of NPVIC.

II. RANKED CHOICE VOTING (RCV) IN THE UNITED STATES

This Article proposes two ways to integrate ranked choice voting (RCV) with the NPVIC. RCV is a simple but powerful electoral reform that upholds the right of voters to have fair outcomes and a stronger voice in their democracy. A third of our presidential elections have been won by candidates earning less than half the popular vote, and notably only a single state in the 1992 presidential election was won with at least 50% of the vote.⁴⁷ If RCV were adopted for presidential elections in a state, winners would always earn a majority of the final “instant runoff” pairing of the two strongest candidates head-to-head.

As noted in a *New York Times* news headline in February 2020, RCV is “having a moment.”⁴⁸ In order to understand why RCV has gained significant momentum as a reform and is worthy of incorporating into the presidential election process, it is important to understand how RCV works, what problems it seeks to solve, the benefits it provides for voters and candidates, and where it is used.

For single-winner elections, RCV allows voters to rank candidates in order of choice, with the option to pick only one. If one candidate receives an outright majority of first choices, he or she wins. If not, the candidate with the fewest first choices is eliminated and votes for that candidate are added to the totals of the candidate ranked next on the ballot. This process of eliminating last-place candidates and adding their votes to next ranked

⁴⁷ See The Editors of Encyclopaedia Britannica, *United States Presidential Election Results*, BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> [<https://perma.cc/73XR-5UNU>]; *End Majority Rule*, FAIRVOTE, http://archive.fairvote.org/irv/end_majority_rule.htm [<https://perma.cc/ZD4F-9VQD>].

⁴⁸ Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html> [<https://perma.cc/FS4N-Y9LK>].

choices repeats until two candidates remain. The winner always earns a majority of this final “instant runoff.”⁴⁹

There are several problems afflicting American elections that RCV can help solve: unrepresentative outcomes, toxic partisanship, lack of choice, the need for “strategic voting,” and low turnout. The most common way of voting in the United States—single-choice, plurality voting—contributes to all of these problems.

Under the current system, American elections frequently do not represent or reflect the will of voters. In both crowded primaries and general elections with minor parties and independents, a single-choice voting system fails to handle voters having more than two choices by distancing representatives from voters and disrupting fair outcomes with “split votes” and “spoilers.” Winners do not need a majority of the vote to be nominated and elected. For example, in Maine, nine of the state’s last twelve gubernatorial elections were won with less than 50% of votes—including three consecutive governors winning with less than 39%—a key factor in Maine’s adoption of RCV in 2016.⁵⁰

Presidential general elections—arguably the highest stakes contests in the United States—are at risk of interference if a well-funded or well-known candidate launches an independent bid to distort the outcome. As law professor Edward Foley argues, by addressing the “spoiler problem,” RCV in key swing states is more likely to ensure nationally representative outcomes than having national popular vote elections that do not without addressing the problem of majorities splitting the vote.⁵¹ In 2016, fourteen states were won with less than 50% of the votes, indicating that third-party candidates like Gary Johnson and Jill Stein may have impacted the final result. In 2020, Libertarian Party nominee Jo Jorgensen won more votes than the victory margin in four states, and there were controversies over potential manipulation of third party candidates in the presidential race and key U.S. Senate elections.⁵² Independent and third-party candidates can offer important per-

⁴⁹ Under the RCV Interstate Compact described later in this Article, we propose states always run the tally down to two candidates before reporting out those vote totals for the purposes of NPVIC—and to do so in coordination with enough states that these two finalists are nearly certain to be the two candidates nationally.

⁵⁰ See Katharine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/us/maine-ranked-choice-voting.html> [<https://perma.cc/PU8K-S3DV>].

⁵¹ EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 175 (2019); Edward B. Foley, *A Different Billionaire May Decide Who Wins Next November*, CNN (Dec. 16, 2019), <https://www.cnn.com/2019/12/16/opinions/election-2020-third-party-candidates-foley/index.html> [<https://perma.cc/HV3D-MH8Q>].

⁵² See Rick Hasen, *Rob Richie: “How to Stop Consultants from Weaponizing Voter Choice” [Corrected]*, ELECTION LAW BLOG (Nov. 2, 2020, 4:38 PM), <https://electionlawblog.org/?p=118085> [<https://perma.cc/D74S-JE4Q>]; *United States Presidential Election Results*, *supra* note 30 (select “2020” from the “General by Year” dropdown menu).

spectives, but the single-choice, plurality system is not set up to include those perspectives in a productive way.

Plurality voting also fuels hyperpolarization and toxic partisanship. Strong parties with clear and distinct platforms help democracy function, but if parties become so polarized that they question the legitimacy of opposing parties' victories or refuse to ever make needed compromises, the American system will be prone to gridlock and crisis.⁵³ Plurality voting incentivizes candidates to attack or marginalize their opponents rather than reaching out to their opponents' supporters in order to seek common ground. This incentive contributes to excessively negative campaigning in elections and ineffective governance. In the 2012 presidential election, for example, well over 90% of independent expenditures by the five largest spenders in the presidential race was spent on ads attacking either Barack Obama or Mitt Romney.⁵⁴ RCV creates electoral incentives for candidates and their backers to run more positive campaigns.⁵⁵

Another problem that can result from the current system is a lack of voter choice. Public opinion polling regularly indicates that Americans—especially younger voters who represent the nation's future—are increasingly frustrated with both major parties and would like more than two choices offered in elections.⁵⁶ But the current system incentivizes voters and interest groups to form into two parties—and those parties in turn have passed state laws ensuring that they remain the only viable parties of choice.⁵⁷

When there is more choice on plurality voting ballots, voters are forced into “strategic voting” that limits their voice and ability to freely express themselves. Despite the superficial simplicity of an election with two major-party candidates, the current system can be quite taxing, as it adds pressure on voters to follow opinion polls and horse race coverage to determine when, if ever, they can vote for the candidate they like the most without helping the candidate they like the least. Voters should be able to vote for candidates they support, not just vote against candidates they most oppose. With RCV,

⁵³ See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2016).

⁵⁴ See Kevin Quealy & Derek Willis, *Independent Spending Totals*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/campaign-finance/independent-expenditures/totals.html> [<https://perma.cc/K584-CZ6F>].

⁵⁵ See Todd Donovan, Caroline Tolbert & Kellen Gracey, *Campaign Civility Under Preferential and Plurality Voting*, 42 ELECTORAL STUD. 157, 157–63 (2016).

⁵⁶ See Lee Drutman, *How Much Longer Can the Two-Party System Hold?*, VOX (Sept. 17, 2018, 2:40 PM), <https://www.vox.com/polyarchy/2018/9/17/17870478/two-party-system-electoral-reform> [<https://perma.cc/SAG7-5S8W>]; Hannah Hartig & Stephanie Perry, *Millennial Poll: Strong Majority Want a Third Political Party*, NBC NEWS (Nov. 29, 2017, 1:43 AM), <https://www.nbcnews.com/politics/politics-news/millennial-poll-strong-majority-want-third-political-party-n824526> [<https://perma.cc/G5D4-Z3N7>].

⁵⁷ See Barry C. Burden, *Ballot Regulations and Multiparty Politics in the States*, 40 PS: POL. SCI. & POL. 669, 669–73 (2007); Theodore J. Lowi, *Deregulate the Duopoly*, NATION (Nov. 16, 2000), <https://www.thenation.com/article/archive/deregulate-duopoly/> [<https://perma.cc/G84A-VAM2>].

voters can honestly rank candidates in order of choice knowing that if their first choice does not win, their vote automatically counts for their next choice instead. This frees voters from worrying about how others will vote and which candidates are more or less likely to win.

Finally, the United States suffers from low turnout, especially when compared to other advanced democracies. The percentage of the voter eligible population voting in U.S. presidential elections has hovered between approximately 50–60% for the last century.⁵⁸ In most other established democracies, voters have rules designed to handle more than two choices, such as runoff elections, ranked choice voting and proportional representation; voter-eligible-population turnout routinely exceeds 70% and sometimes far higher.⁵⁹ Keeping voter choice limited will make it harder to draw voters in who are already disaffected by their choices. Notably, cities with RCV have seen turnout increase in recent mayoral elections across a variety of contexts.⁶⁰

A. *Where RCV Is Used*

RCV has been used for a century to elect the national legislatures in Ireland and Australia.⁶¹ In the United States, RCV has gone from use in one city in 2000 to being used statewide in Maine and in more than twenty American cities, with more adopting it every year. At least five more jurisdictions are expected to use RCV for the first time by 2022, and no city has stopped using it for over a decade. The recent sustainability of RCV suggests that, with modern voting equipment, voters in jurisdictions with RCV want to continue using it.⁶²

Maine voted in a 2016 initiative and 2018 referendum to adopt RCV in its primary and congressional elections, and the legislature passed a bill in 2019 to use RCV for general elections for President starting in November

⁵⁸ See *Measuring Voter Turnout*, FAIRVOTE, https://www.fairvote.org/voter_turnout#measuring_voter_turnout [<https://perma.cc/MC9Z-4EGV>].

⁵⁹ See Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 21, 2018), <https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/> [<https://perma.cc/XVA7-V9P6>].

⁶⁰ See David C. Kimball & Joseph Anthony, *Voter Participation with Ranked Choice Voting in the United States*, 11-22 (Oct. 2016) (unpublished manuscript), <https://www.unsl.edu/~kimballd/KimballRCV.pdf> [<https://perma.cc/2Y5W-AF8H>]; *Voter Turnout and Participation*, FAIRVOTE, https://www.fairvote.org/research_rcvvoterturnout [<https://perma.cc/4WA8-UQL4>].

⁶¹ See *Where Is Ranked Choice Voting Used?*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used [<https://perma.cc/QS2K-XLNR>]; Dan Diorio & Wendy Underhill, *Ranked-Choice Voting*, NAT'L CONF. OF ST. LEGISLATURES (June 2017), <https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting.aspx> [<https://perma.cc/H4FF-CMU2>].

⁶² See *FAQ*, FAIRVOTE, https://www.fairvote.org/rcv#rcv_faq [<https://perma.cc/8VQ2-QGB6>].

2020.⁶³ As a result of the Maine implementations, RCV could have played a critical role in determining the national balance of power in the 2000 federal elections, with the state featuring hotly contested, multi-candidate elections for President and U.S. Senate.⁶⁴ New York City voters approved RCV for their local elections through a ballot measure in November 2019,⁶⁵ a reform that positions the city's 2021 elections to handle a potential influx of candidates as several candidates are expected to contest an open seat for mayor⁶⁶ and as many as 500 may compete in city council races.⁶⁷ As momentum for RCV continues and the evidence for its benefits accumulates, more reformers are likely to turn to the question of how to integrate RCV into presidential elections.

III. THE VALUE OF PREPARING TO INTEGRATE RCV WITH THE NPVIC

The NPVIC and ranked choice voting address different problems with presidential elections and ideally would work together to ensure majority rule and political equality. When integrated, they would reinforce each other. The NPVIC would eliminate the risk inherent in the current presidential election system of a popular-vote/electoral-vote split and ensure the presidential candidate who wins the most votes is elected President—i.e. guaranteeing at least “plurality rule.” Using RCV in a presidential election determined by the national popular vote would generate yet more progress by replacing a plurality rule with majority rule; RCV ensures majority rule by correcting the “vote-splitting” dynamic that occurs when there are more than two candidates for President.

⁶³ See *Ranked Choice Voting in Maine*, ME. ST. LEGISLATURE (Apr. 17, 2020), <https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509> [<https://perma.cc/JJ9V-C7C5>].

⁶⁴ See Steve Collins, *Experts: Maine's 2nd District Races Most Competitive, and Potentially Crucial, in 2020*, WGME (Nov. 24, 2019), <https://wgme.com/news/local/experts-maines-2nd-district-races-most-competitive-and-potentially-crucial-in-2020> [<https://perma.cc/8E6H-DKQA>]; Siobhan Hughes, *Susan Collins Faces Tough Re-Election Race in Maine, Poll Suggests*, WALL ST. J. (Feb. 18, 2020), <https://www.wsj.com/articles/susan-collins-faces-tough-re-election-race-in-maine-poll-suggests-11582058400> [<https://perma.cc/E8BA-GQ8T>]; Charlie Mahtesian, *How Trump Rewired the Electoral Map*, POLITICO (Feb. 7, 2020), <https://www.politico.com/news/magazine/2020/02/07/election-2020-new-electoral-map-110496> [<https://perma.cc/ZD5Z-MNFT>].

⁶⁵ See Erin Durkin, *Ranked-choice Voting Adopted in New York City, Along with Other Ballot Measures*, POLITICO (Nov. 5, 2019), <https://www.politico.com/states/new-york/albany/story/2019/11/05/ranked-choice-voting-adopted-in-new-york-city-along-with-other-ballot-measures-1226390> [<https://perma.cc/V4Q4-NJV5>].

⁶⁶ See Nicole Brown, *Who's Running for NYC Mayor? A Rundown of Possible 2021 Candidates*, AMNY (Aug. 12, 2019), <https://www.amny.com/news/nyc-mayoral-race-1-27751191/> [<https://perma.cc/C3GB-Y6XU>].

⁶⁷ See Ethan Geringer-Sameth, *With 500 Candidates Expected for 2021 Election Cycle, Campaign Finance Board Starts Early Outreach*, GOTHAM GAZETTE (May 28, 2019), <https://www.gothamgazette.com/city/8550-with-500-candidates-expected-for-2021-election-cycle-campaign-finance-board-starts-early-outreach> [<https://perma.cc/H2AQ-W38T>].

Both the NPVIC and RCV also improve political equality. When the NPVIC takes effect, voters in “safe states” will finally be treated equally to voters in “swing states.” Presidential candidates will have incentives to campaign all across the country, not just in the usual five to ten swing states we see today. Similarly, RCV ensures political equality by giving voters across the political spectrum an equal opportunity to express themselves. With RCV, voters can vote with both their “heart” and their “head” by indicating their sincere first-choice candidate—even if that candidate is not perceived as a frontrunner—while having the option to indicate backup choices.

Nevertheless, as currently drafted, the NPVIC seems to assume a plurality system—that is, the candidate with the most popular votes is to be elected President, regardless of how low their percentage of the vote. While this potential of non-majority winners is not worse with NPVIC than in the status quo, it allows a candidate to win despite the opposition of most voters due to vote-splitting between two or more candidates. On the other hand, using RCV for Presidential elections in states might seem incompatible with NPVIC. Most fundamentally, which votes should be reported out for the purpose of NPVIC? Would it be the first choices among all the candidates? Or would it be the final “instant runoff” totals after the RCV tallies are completed? If the latter choice were made, what if one of the two strongest national candidates was eliminated during the RCV tally in a given state? While not an NPVIC deal breaker, it is an ambiguity worth seeking to resolve.

Not only do the NPVIC and RCV reinforce each other to advance fundamental principles of democracy, they are also both on-the-ground realities as policies. The Maine state legislature passed a law to implement RCV in its Presidential election in November of 2020,⁶⁸ so the need to consider how RCV will interact with the NPVIC is potentially approaching. If enough states passed the NPVIC for it to take effect, what would happen to the use of RCV for Presidential elections in Maine? While Maine might well only report the “first-choice” totals as its presidential election results for purposes of the “national popular vote count,” that would essentially undo the benefits of having an RCV election.

The NPVIC is an excellent reform, and state legislatures should pass it whether RCV ends up being integrated with it or not. But states like Maine should not have to choose between granting their voters political equality with voters in other states via adoption of the NPVIC and empowering their voters with RCV. This unnecessary conflict between the NPVIC and RCV in presidential elections is already being demonstrated by some political thought leaders and candidates. Law professor Edward Foley penned an article in *Politico Magazine* arguing that the use of RCV in swing states is

⁶⁸ See *Ranked Choice Voting in Maine*, *supra* note 62.

more practical than the NPVIC.⁶⁹ In another case, an *Axios* April 2019 roundup of 2020 Democratic presidential candidates' views cited former tech executive Andrew Yang's campaign opposition to the NPVIC while noting his support for RCV in presidential elections and implying the two reforms are in tension.⁷⁰ While these examples are relatively minor, reformers can expect these perceived small tensions to grow if more state legislatures begin seriously considering passing the NPVIC and RCV for presidential elections without clear guidance on how to integrate the two reforms.

While the idea of combining ranked choice voting and a popular vote has been proposed for years, it typically has assumed the need for a constitutional amendment to establish direct election of the President in tandem with ranked choice voting.⁷¹ In contrast, the Interstate RCV Compact offers an immediate reform option for state legislatures. A non-NPVIC state like Maine could join the Interstate RCV Compact, allowing states to express their preference for meaningful use of RCV with or without the NPVIC. Once the NPVIC is in effect, this state-based approach to making RCV part of national popular vote elections could help gradually build support for a national RCV presidential election—what Congress could effectively enable by passing the RCV in Presidential Elections Act, the preferred, more comprehensive approach. The Interstate RCV Compact specifies that it would be suspended should an act like the RCV in Presidential Elections Act be adopted, allowing these two different prospective options to play a complementary role in advancing the cause of a majority-rule presidential election that gives voters more than two choices.

A. *The Logistics of National RCV Elections*

Ranked choice voting requires election data to be analyzed at a central location in order to proceed with RCV tallies that eliminate last-place candidates and reallocate their supporters' ballots to their next choice. In countries, such as Australia and Ireland, that tally RCV ballots by hand, this involves either collecting all ballots together or having a central agency col-

⁶⁹ See Edward B. Foley, *Want to Fix Presidential Elections? Here's the Quickest Way*, POLITICO (May 4, 2019), <https://www.politico.com/magazine/story/2019/05/04/electoral-college-reform-2020-226792> [<https://perma.cc/RK6K-4S2V>].

⁷⁰ See Orion Rummeler, *Where Each 2020 Democrat Stands on Abolishing the Electoral College*, AXIOS (Apr. 7, 2019), <https://www.axios.com/electoral-college-2020-presidential-election-candidates-94d89ca6-b402-4de3-ae8e-06139592408e.html> [<https://perma.cc/E3TA-HK7X>].

⁷¹ See, e.g., Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO NORTHERN U.L. REV. 467, 476 (2007); John B. Anderson, *Flunk the Electoral College, Pass Instant Runoffs*, FAIRVOTE (Jan. 2001), http://archive.fairvote.org/e_college/anderson.htm [<https://perma.cc/8DF5-DDMX>]; Lee Drutman, *If We're Abolishing the Electoral College, Let's Also Have Ranked-Choice Voting for President*, VOX (Mar. 21, 2019), <https://www.vox.com/polyarchy/2019/3/21/18275785/electoral-college-ranked-choice-voting-President-democracy> [<https://perma.cc/7ZNF-DVZ8>]; Rob Richie & Steven Hill, *Change Elections to Instant Runoff Voting*, BALT. SUN (Jan. 2, 2001), <https://www.baltimoresun.com/news/bs-xpm-2001-01-02-0101020140-story.html> [<https://perma.cc/UR7D-M46S>].

lect information and report back to local tally centers which candidates should next be eliminated. Where voting machines are used, as in nearly all American elections, this transmission of information can be done in different, more efficient ways depending on state election laws and technological capacities.

As RCV is used in more statewide elections, the need for secure and auditable processes for voters to rank candidates, “normalize” RCV ballot data for central analysis, and transmit RCV data is essential, with transparent practices that enable easy public confirmation of each state step of the RCV tally. Election officials and election administration experts have developed and begun to implement such processes, including risk-limiting audits and open source RCV tallying software.⁷² For presidential elections, an additional element of a prospective RCV election is coordination of these processes across state lines—something that would be straightforward when established in federal law or an interstate compact.

B. Addressing Partisan Considerations of RCV and NPVIC Implementation

It is also important to address any apparent partisan motivation for these reforms—both perceived and real. To be sure, partisans often put their own interests ahead of those of voters, but there is no certainty in how these changes will affect election outcomes. When arguing which major political party benefits from electoral-vote/popular-vote splits in presidential elections, for example, many observers have succumbed to “recency bias”; just because the Republican nominee benefited from the winner-take-all Electoral College rules in 2000 and 2016, that does not mean that same party would benefit from the current system in the next election. Key demographic groups can often shift their support and affect the partisan balance in swing states—sometimes surprisingly so, as the shift from Barack Obama’s 2012 Electoral College advantage⁷³ (often referred to as “the Blue Wall”) to Donald Trump’s 2016 Electoral College advantage demonstrates.⁷⁴ The long-run data show that the winner-take-all system has benefited both major parties

⁷² For a number of associated materials, see generally RANKED CHOICE VOTING RESOURCE CTR., <https://www.rankedchoicevoting.org/> [<https://perma.cc/E4GW-N2YV>]. Specifically, see *Universal RCV Tabulator*, RANKED CHOICE VOTING RESOURCE CTR., https://www.rankedchoicevoting.org/universal_rcv_tabulator [<https://perma.cc/Z74R-WSYQ>].

⁷³ See Eugene Daniels & Beatrice Jin, *Three Reasons Why the Democrats’ Blue Wall Crumbled*, POLITICO (Dec. 16 2019), <https://www.politico.com/interactives/2019/democrats-blue-wall-swing-states-pennsylvania-wisconsin-michigan/> [<https://perma.cc/9KE9-CL5J>].

⁷⁴ See Richie & Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, PRESIDENTIAL STUDIES QUARTERLY (May 2, 2013), *supra* note 33, at 354; Nate Cohn, *Why Trump Had an Edge in the Electoral College*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html> [<https://perma.cc/F67V-NXAS>].

roughly equally over the course of its existence and any partisan bias is fleeting.⁷⁵

Similarly, the impact of minor-party and independent candidates without RCV is based entirely on the vagaries of where on the spectrum such a presidential candidate seems to fall. In 2000, when Ralph Nader was the Green Party nominee and clearly to the left of Al Gore, his votes in Florida were seen as having cost Gore the election.⁷⁶ Yet in 1992, Ross Perot's 19% of the vote was seen by some as cutting into George Bush's support and helping to boost Bill Clinton.⁷⁷ In 2016, for every Democrat upset with Green Party nominee Jill Stein, there was a Republican unhappy with former Republican governor Gary Johnson running as the Libertarian Party nominee.

Of course, partisans may feel they are relatively confident in projecting the beneficiary of the current rules in the next election and not feel inclined to give up their anticipated benefit. The question to these partisans is: Would they rather gamble on their uncertain projections in the service of a flawed system and, at-best, short-term benefit, or would they rather have a stable system that gives them a fair opportunity to win in every election? If they choose the latter, it would be wise to consider integrating RCV with the NPVIC and enjoy the benefits of a win-win solution that makes politics feel more rewarding and productive for voters and elected leaders alike.

IV. FIRST OPTION: "THE RANKED CHOICE VOTING (RCV) IN PRESIDENTIAL ELECTIONS ACT"

To harmonize the benefits of both the NPVIC and ranked choice voting, we propose Congress pass legislation (see Appendix Two) to establish a uniform RCV ballot and tabulation rules once NPVIC is enacted.⁷⁸ The ballot would allow eligible voters to rank presidential candidates in order of preference and would be administered by all states on the day of the presidential election.⁷⁹ After counting ballots with RCV, the results would estab-

⁷⁵ See Richie & Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, PRESIDENTIAL STUDIES QUARTERLY (May 2, 2013), *supra* note 69; Andrea Levien, *Election Simulations From 1960–2008 Show that Electoral College Rules Don't Help Either Party, but Do Harm American Democracy*, FAIRVOTE (Oct. 12, 2012), <https://www.fairvote.org/election-simulations-from-1960-2008-show-that-electoral-college-rules-don-t-help-either-party-but-do-harm-american-democracy> [https://perma.cc/8J8W-59XR].

⁷⁶ See Bill Scher, *Nader Elected Bush: Why We Shouldn't Forget*, REALCLEARPOLITICS (May 31, 2016), https://www.realclearpolitics.com/articles/2016/05/31/nader_elected_bush_why_we_shouldnt_forget_130715.html [https://perma.cc/Y89B-ZJQ8].

⁷⁷ See Eliza Collins, *Did Perot Spoil 1992 Election for Bush? It's Complicated.*, WALL ST. J. (July 10, 2019), <https://www.wsj.com/articles/did-perot-spoil-1992-election-for-bush-its-complicated-11562714375> [https://perma.cc/G6B3-BD9E].

⁷⁸ Congress could also establish other rules in this Act, such as standard ballot access for candidates so that all voters would be able to rank the same candidates.

⁷⁹ Credit for the idea of using a ranked-choice-voting ballot in a congressional bill regulating NPVIC states belongs to Vikram Amar. See Amar, *supra* note 41, at 253.

lish which candidate received the greatest popular support. With standardized RCV ballots across states and tabulation of consistently presented RCV ballot data by the Election Assistance Commission, results could be reliably reported to determine the winner of the national popular vote for President.

Determining the winner of the popular vote separately from the winner of the presidential election is, on some level, already done by states because they report out state popular vote numbers, but their citizens do not cast votes for President, the Electoral College does.⁸⁰ Thus, the real changes made by this legislation are to standardize the RCV ballot and centralize the counting and reporting of the national popular vote winner according to RCV rules. Just as popular-vote totals take weeks to complete, the RCV tally would take time—but interim RCV tallies could regularly be released to help clarify the likely outcome.

This new RCV ballot does not alter the Electoral College; it ensures that the national popular vote total is standardized, leading to greater trust by citizens. Trust in the results (and a potential recount) is of utmost importance to ensuring voters maintain trust in the NPVIC, which is designed to guarantee the candidate receiving the greatest number of popular votes wins the presidency. Consequently, this proposal is also about maintaining trust that our government represents the will of the people.

States that are party to the NPVIC would use the results of the RCV presidential ballot to decide which candidate receives their electoral votes. As noted earlier, most states currently cast their electoral votes for the candidate who wins the popular vote at the state level.⁸¹ Importantly, the legislation does not require states that are not a party to the NPVIC to alter the manner in which those states decide to appoint their electors. Non-NPVIC states can still award electoral votes through a winner-take-all vote, a district-based system, or any other manner they choose. These states, however, must still conduct their presidential election with RCV ballots in accordance with the statute.

Voters in non-NPVIC states and voters in NPVIC states would see effectively the same ballot. Each voter would rank their preferences. The difference between states lies not within the presidential ranked choice ballot, but whether the state has independently chosen to join the compact that promises that the state will award its electoral votes to the winner of the national popular vote. Whether a state awards its electoral votes to the winner of the national popular vote or not, it is critical that *all* states use an RCV ballot and share their data in a consistent fashion in order to have a uniform and reliable measure for determining the candidate receiving the greatest number of votes *nationally*, according to an RCV tally. This is im-

⁸⁰ See *id.* at 257.

⁸¹ See NEALE & NOLAN, *supra* note 3, at 2–3.

portant, because once the NPVIC comes into force, the candidate receiving the highest national-popular-vote total will be elected President.

National uniformity in the counting, reporting, and potential recounting of votes for President would help maintain trust in the electoral system. Ensuring all states use the same ballot and unifying the tabulation procedures would likely reduce a number of complicating variables in the current system. Congress can advance the effectiveness of the NPVIC by requiring a RCV ballot and providing uniform standards for its administration and results reporting.

A. Congress's Power to Create Uniform Ranked Choice Voting Ballots and Tabulation Rule

Congress has the constitutional authority to pass legislation establishing the use of uniform presidential ranked choice voting ballots. While Congress could rely on constitutional powers derived from the Fourteenth Amendment, the Commerce Clause, or the Compacts Clause,⁸² these are not the strongest arguments. And the requirements for reliance on the Spending Clause may not be easily implemented. Instead, constitutional provisions laying out the presidential election system, along with subsequent Supreme Court cases, establish that Congress has the independent authority to pass legislation like that proposed in Appendix Two. But before turning to Congress's independent authority, let's first address the other potential sources of authority.

The Fourteenth Amendment, while promising, ultimately proves to be too limited at this time. Under Section 5 of the Fourteenth Amendment, Congress has the "power to enforce [Section 1 of the Amendment] by appropriate legislation."⁸³ Section 1 provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁸⁴ Congress's power to ensure the rights provided therein is somewhat limited; Congress may enact "remedial and preventive measures," but those must be "congruen[t] and proportional[]" to violations of Section 1 of the Amendment.⁸⁵

Some have argued that potential disparities in voting regulations across NPVIC states might violate equal protection under the Fourteenth Amendment as announced in *Bush v. Gore*.⁸⁶ If this were true, it could allow Con-

⁸² See Amar, *supra* note 41, at 253–55; Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 879–87 (2002).

⁸³ U.S. CONST. amend. XIV, § 5.

⁸⁴ *Id.* § 1.

⁸⁵ *City of Boerne v. Flores*, 521 U.S. 507, 519–26 (1997).

⁸⁶ See Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 226–27 (2011).

gress to regulate the administration of the NPVIC. But the Supreme Court's holding in *Bush v. Gore* was explicitly narrow, which could present problems for relying on the case to say that Congress can statutorily prescribe uniform standards.⁸⁷ As other commenters have noted, expansive laws regulating presidential elections that are grounded in Section 5 would likely violate the proportionality requirement.⁸⁸ Thus, Congress may be quite limited in what it can do to regulate presidential elections under Section 5 at this time.

Those limitations may diminish, however, when and if more states adopt RCV for presidential elections. At that time, Congress could pass uniform regulations, implementing RCV for presidential elections, to protect ballot access for presidential candidates. The idea is that RCV will allow a greater number of minor-party candidates on the ballot,⁸⁹ but that those candidates may only be able to access the ballot in states that have adopted RCV. That number of states may be insufficient to permit a minor party candidate from actually being considered for the presidency; thus, minor party candidates would be structurally blocked from obtaining a sufficient number of electoral votes based on an inability to access the ballot in non-RCV states. Because the Fourteenth Amendment protects the right of candidates to be considered for public office,⁹⁰ Congress could enforce that right, under its Section 5 authority, by passing uniform RCV standards for presidential elections. Congress may indeed be able to rely on this power as states continue to adopt RCV for presidential elections, but given the developing nature of state adoption of RCV, we focus on other potential sources of authority for Congress to pass uniform standards.

The Commerce Clause also offers limited authority. There are two major issues.⁹¹ First, Congress would likely need to aggregate regulations addressing the presidential election (like NPVIC legislation passed by states) to justify reliance on the Commerce Power.⁹² As a general matter, under the Commerce Clause, Congress has “the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”⁹³ Thus, there could be an argument that the election of the President, an individual who holds major influence over the national economy,⁹⁴ is something Congress can regulate pursuant to

⁸⁷ See Amar, *supra* note 41, at 253–54 (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

⁸⁸ See Coenen & Larson, *supra* note 81, at 882–86 (“Section 5 would not support a congressional mandate that all states use specified voting equipment.”).

⁸⁹ See, e.g., *Correcting the Spoiler Effect*, FAIRVOTE, <http://archive3.fairvote.org/reforms/instant-runoff-voting/irv-and-the-status-quo/spoiler-effect/> [<https://perma.cc/PF6B-REFV>] (“RCV affords voters more choices and promotes broader participation by accommodating multiple candidates in single seat races.”).

⁹⁰ See *Storer v. Brown*, 415 U.S. 724, 728–29, 746 (1974) (citing *Williams v. Rhodes*, 393 U.S. 23 (1968)); *Bullock v. Carter*, 405 U.S. 134, 141 (1972).

⁹¹ These issues were identified by Dan T. Coenen and Edward J. Larson. See Coenen & Larson, *supra* note 81, at 879–81.

⁹² See *id.* at 879–80.

⁹³ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citations omitted).

⁹⁴ See, e.g., Ben Casselman, *A President's Economic Decisions Matter . . . Eventually*, FIVETHIRTYEIGHT (July 29, 2016, 7:00 AM), <https://fivethirtyeight.com/features/a-Presi->

its Commerce Clause power.⁹⁵ That argument is likely foreclosed by Supreme Court decisions that prohibit aggregation in non-commercial activities.⁹⁶ Second, a statute may run afoul of anti-commandeering principles that prohibit the federal government from forcing state governments to administer and enforce federal programs.⁹⁷ Both issues create major hurdles for reliance on Commerce Clause power.

Conversely, Congress could rely on its power to approve state compacts under the Compacts Clause, along with its power to implement laws necessary and proper to carrying out its constitutional functions.⁹⁸ Congressional regulation, such as the uniform standards and ranked choice voting ballot proposed herein, would be necessary and proper to approval of the NPVIC as a compact. While this route is potentially constitutional, it does have some discernible potential downfalls. For instance, it has been noted that this reasoning could be extended to compacts between as few as two states, which could then permit Congress to evade federalism limits under the cloak of legislation that is necessary and proper to its approval of state compact.⁹⁹ This may be true, though perhaps certain standards could be set by Congress or the courts to prevent this slippery slope.¹⁰⁰

In contrast to many of the sources of authority discussed above, the Spending Clause offers fairly clear constitutional authority for Congress to rely on to pass uniform standards. Congress could offer funding to states to assist with election administration, but condition the receipt of those funds on the adoption of uniform standards.¹⁰¹ It also wouldn't be the first time Congress relied on the spending power to ensure some uniformity in election administration. In 2002, Congress provided funding to states to implement a number of election system reforms spelled out in the Help America Vote Act.¹⁰² That said, two practical considerations leave us searching for other potential paths for Congress to pass uniform standards. First, it may be difficult for Congress to agree on providing funding, and what amount to provide. Second, the potential, however unlikely, that one or more states decide

dents-economic-decisions-matter-eventually/ [https://perma.cc/ZC73-MSLS]; Duncan Rolph, *How Presidential Elections Affect The Markets*, FORBES (Oct. 26, 2016, 7:35 AM), <https://www.forbes.com/sites/duncanrolph/2016/10/26/how-President-elections-affect-the-markets/#6fac09d2fb40> [https://perma.cc/4LYC-WW6G]; Mark Thoma, *How Much Impact Can a President Have on the Economy?*, CBS NEWS (Aug. 31, 2016, 5:30 AM), <https://www.cbsnews.com/news/how-much-impact-can-a-President-have-on-the-economy/> [https://perma.cc/CA7P-VPLY].

⁹⁵ See Coenen & Larson, *supra* note 81, at 879.

⁹⁶ See *Lopez*, 514 U.S. at 559–61; Coenen & Larson, *supra* note 81, at 880.

⁹⁷ See *Printz v. United States*, 521 U.S. 898, 935 (1997); Coenen & Larson, *supra* note 81, at 880.

⁹⁸ See Amar, *supra* note 41, at 254.

⁹⁹ See *id.* at 254–55.

¹⁰⁰ Doing so here is outside the scope of this Article.

¹⁰¹ See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). If Congress chose this route to pass uniform standards after the NPVIC goes into force, it must ensure that the financial inducement offered is no “so coercive as to pass the point at which ‘pressure turns into compulsion.’” *NFIB v. Sebelius*, 567 U.S. 519, 580–85 (2012) (citation omitted).

¹⁰² See KENNETH R. THOMAS, CONG. RESEARCH SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 15 n.74 (2014).

to reject the funding and not implement the uniform standards could undermine the entire purpose of having uniform standards. This leads us to ask if there is a power Congress can rely on to pass the uniform standards, thereby ensuring that they will apply to all states. We think that Congress can pass these regulations under its independent authority to regulate presidential elections.

Congress derives its independent authority from Article II, Section 1 and the Twelfth Amendment. The Supreme Court, and the lower courts, have read a broad scope of authority for Congress under these constitutional provisions. Though no court has addressed whether Congress can pass legislation requiring states to conduct a uniform election poll of any kind, we argue that the language of the Constitution, as interpreted by the courts, supports Congress's authority to legislate the use of a presidential RCV ballot as we have described.

B. Constitutional Backing for Congressional Control over Presidential Elections

Congress derives the power to regulate federal elections directly from the Constitution. The various provisions discussed below offer the strongest authority to create a presidential RCV ballot and regulate the administration of the NPVIC. In three different places, the Constitution lays out Congress's authority with respect to the election of senators and representatives, and the President. Article I, Section 4—the Elections Clause—governs Congress's role in the election of senators and representatives.¹⁰³ Article II, Section 1 and the Twelfth Amendment govern Congress's role with respect to presidential elections.¹⁰⁴

The Elections Clause gives Congress power over congressional elections and provides that: “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the places of choosing Senators.”¹⁰⁵ The Constitution first gives the power to regulate and administer federal elections to the states and then gives Congress the power to oversee and alter those regulations, as well as to put in place its own.

Congress's power is controlling. While states may get the first crack at regulating federal elections of senators and representatives, “[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules.”¹⁰⁶ The Framers baked into the text of the Constitution the principle that Congress ought to be able to safeguard the election of individuals tasked with carrying out federal policy.

¹⁰³ See U.S. CONST. art. I, § 4, cl. 1.

¹⁰⁴ See *id.* art. II, § 1; *id.* amend. XII.

¹⁰⁵ *Id.* art. I, § 4, cl. 1.

¹⁰⁶ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814–15 (2015).

The Constitution separately addresses the presidential election. There are three relevant clauses, two in Article II, and one in the Twelfth Amendment, which speak to the authority to regulate the presidential election. Like the Elections Clause, these provisions divide authority between the states and Congress. First, Article II, Section 1 provides, in relevant part, that: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”¹⁰⁷ Second, Article II provides that: “Congress may determine the Time of choosing the Electors, and the Day on which they Shall give their Votes; which Day shall be the same throughout the United States.”¹⁰⁸ Third, the Twelfth Amendment provides that: “The President of the Senate shall, in the presence of the Senate and House or Representatives, open all the certificates and the votes shall be then counted.”¹⁰⁹

How does each of these authorities provide Congress with the power to institute the proposed legislation? Despite the differences in wording between the relevant provisions in Article I and Article II, court opinions and commentary suggest that Congress has a high degree of authority to regulate the administration of the Presidential election. We believe this includes instituting a presidential RCV ballot and related standards for the administration of the presidential election.

C. Congress Already Regulates Presidential Elections

Congressional control over the Electoral College and presidential elections is not new. Congress has done it before, through the Electoral Count Act of 1887,¹¹⁰ the National Voter Registration Act,¹¹¹ and the Help America Vote Act.¹¹² Each of these pieces of legislation regulates in some manner either the Electoral College or presidential elections. These have never been successfully challenged on the grounds that the laws offend the provisions in Article II, Section 1 that, upon a superficial reading, seem to limit Congress’s role in presidential elections to choosing the time electors cast their votes.¹¹³ This is because Congress is not so limited in its power.

¹⁰⁷ *Id.* art. II, § 1, cl. 2.

¹⁰⁸ *Id.* art. II, § 1, cl. 4.

¹⁰⁹ *Id.* amend. XII.

¹¹⁰ See 3 U.S.C. § 5 (2012).

¹¹¹ 52 U.S.C. §§ 20501–20511 (2018). While not discussed in depth in this Article, this Act is another example of Congress regulating federal elections in an area where states traditionally exerted power. It “establish[ed] procedures that [sought to] increase the number of eligible citizens who register to vote in elections for Federal office” and “to ensure that accurate and current voter registrations rolls are maintained.” *Id.* § 20501. With this Act, Congress directly regulated state power in federal elections.

¹¹² 52 U.S.C. §§ 20901–21145 (2018).

¹¹³ See, e.g., *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (supporting the idea that Article II, Section 1 has been interpreted broadly); Coenen & Larson, *supra* note 81, at 887–900.

In the Electoral Count Act of 1887, Congress directly regulated which electoral votes would be counted.¹¹⁴ The Act requires that states fix their procedures for counting and awarding electoral votes at least six days before the national count to elect the President.¹¹⁵ Whatever method exists at the six-day mark “shall be conclusive, and shall govern in the counting of the electoral votes.”¹¹⁶

Congress passed this Act to preserve the public trust in the outcome of the presidential election. The seeds of this Act were planted in 1876. It was a presidential election year, and the contest was between Samuel J. Tilden and Rutherford B. Hayes.¹¹⁷ The race was so close—within three percentage points of the Electoral College vote—that any contested votes would decide the election.¹¹⁸ Ultimately, contested votes did tip the scales.¹¹⁹ This type of contested presidential election can, and did, erode the public’s trust in the fairness of the process and in the results.¹²⁰

So, Congress stepped in. While Congress created an election commission to deal with the 1876 debacle, the debate over a more permanent fix continued for nearly a decade.¹²¹ Finally, with “the imminent prospect of a repeat of the 1876 deadlock in the 1888 election,” Congress passed the Electoral Count Act.¹²² In order to safeguard federal elections, Congress “assert[ed] final congressional authority in counting electoral votes” and established that a statute could “set the precise parameters for state and federal control of the electoral-vote process.”¹²³

The nation faced another election crisis in 2000. This time the electoral count came down to one state. Whichever candidate won the popular vote in Florida would receive the state’s twenty-five electoral votes and become the next President of the United States.¹²⁴ Yet voting procedures in the state made determining the winner difficult and contentious. Some Florida citizens argued that confusing ballots in a single county tipped the election.¹²⁵ Voters were apparently so thrown off by the ballot layout that individuals

¹¹⁴ See 3 U.S.C. § 5 (2018) (this includes provisions from the Electoral Count Act of 1887, which was repealed).

¹¹⁵ See *id.*

¹¹⁶ *Id.*

¹¹⁷ See Coenen & Larson, *supra* note 81, at 862–63.

¹¹⁸ See *id.* at 861–66.

¹¹⁹ See *id.* at 862–63.

¹²⁰ See *id.* at 862–63 (referring to this episode in U.S. history as “spark[ing] a national crisis”).

¹²¹ Coenen and Larson provide a detailed account of this episode of U.S. history. See *id.* at 861–66.

¹²² *Id.* at 866.

¹²³ *Id.* at 867.

¹²⁴ See Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<https://perma.cc/TLL5-WNVW>].

¹²⁵ See Don van Natta Jr. & Dana Canedy, *The 2000 Elections: The Palm Beach Ballot; Florida Democrats Say Ballot’s Design Hurt Gore*, N.Y. TIMES (Nov. 9, 2000), <https://www.nytimes.com/2000/11/09/us/2000-elections-palm-beach-ballot-florida-democrats-say-ballot-s-design-hurt-gore.html> [<https://perma.cc/9NZ8-DMDV>].

mistakenly voted for candidates they did not intend to support.¹²⁶ Other voters were not successful in removing perforated sections of paper ballots—the only way to indicate which candidate they were voting for.¹²⁷ So began a legal battle that eventually wound up at the Supreme Court. Ultimately, without the recount procedures sought by Democrats, George W. Bush received Florida’s electoral votes and won the presidency. But the winner of the popular vote? Al Gore.¹²⁸

Congress felt the pressure to act. It regulated state administration of presidential elections with the Help America Vote Act of 2002.¹²⁹ Congress passed the Act “[t]o establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.”¹³⁰ Importantly, it *required* states that accepted this federal funding to implement programs and procedures for the following: provisional voting, voting information, updated and upgraded voting equipment, statewide voter registration databases, voter identification procedures, and administrative complaint procedures¹³¹—all seeds of uniform standards.

As readers are likely well aware, the nation faced yet another election related crisis of confidence with the discrepancy between the results of the Electoral College and the popular vote in 2016. But Congress may not be the only player to respond this time. States could step in and bring the NPVIC into force. That, however, does not mean Congress is without a role. Congress can help fix the electoral system and restore people’s trust in its process and outcomes, by providing guidance and uniformity for the operation of a presidential election under the NPVIC.

Questions may remain, though, about Congress’s authority to enact legislation that regulates the presidential election. The text of the Constitution is admittedly unclear on its face. We believe our examination of relevant judicial decisions establishes that Congress does have the authority to institute a presidential RCV ballot because it will help ensure the public’s faith and trust in the electoral process and results.

¹²⁶ See *id.*

¹²⁷ See Elving, *supra* note 123.

¹²⁸ See *2000 Presidential Popular Vote Summary for All Candidates Listed on at Least One State Ballot*, FED. ELECTION COMM’N, <https://transition.fec.gov/pubrec/fe2000/prespop.htm> [<https://perma.cc/AZ8A-YRRX>] (last updated Dec. 2001).

¹²⁹ 52 U.S.C. §§ 20901–21145 (2018).

¹³⁰ Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666, 1666 (2002). States accepted these reforms. Help America Vote Act “funds and updates were accepted by all fifty states, the District of Columbia, American Samoa, Guam, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.” Sarah Milkovich, *Electoral Due Process*, 68 DUKE L.J. 595, 596 (2018).

¹³¹ See *Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about/help-america-vote-act> [<https://perma.cc/H3QR-ZZ9G>].

D. Courts Back Congress's Assertion of Control over Presidential Elections

The Supreme Court has previously embraced congressional regulation of presidential elections. In *Burroughs v. United States*,¹³² the Court rejected a superficial reading of Article II, Section 1. In this case the Court examined the Federal Corrupt Practices Act.¹³³ In upholding its application, the Court announced a broad, animating principle of congressional control over Presidential elections: preservation of “the purity of presidential and vice presidential elections.”¹³⁴ Despite the seemingly narrow text of Article II, Section 1, the Supreme Court confirmed that Congress has a substantive role in regulating presidential elections. It is not left entirely to the states. Congress has the authority to ensure the “purity” of presidential elections.

What does it mean to ensure the “purity” of presidential elections? The Federal Corrupt Practices Act, as examined in *Burroughs*, targeted “the improper use of money to influence the result” of presidential elections so as to prevent fraud and corruption.¹³⁵ But a “pure” election is not limited to the idea that it should be free from fraud and corruption. When there is fraud and corruption in elections, people lose their trust in the electoral process and its outcomes. That trust is essential to a functioning electoral system, and thus a democracy. The broader principle at work is the right for Congress to protect elections as the central pillar of the country’s democracy. Congress’s authority to ensure the purity of the presidential election is its power to protect the system from any pressures that tend to erode public participation and trust in the process and results.

The Court suggested a similar view on the importance of presidential elections and Congress’s position as a protector of the election:

While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.¹³⁶

¹³² 290 U.S. 534 (1934).

¹³³ *See id.* at 540, 544–48.

¹³⁴ *Id.* at 544.

¹³⁵ *Id.*

¹³⁶ *Id.* at 545 (citation omitted).

The Supreme Court was unambiguous in announcing that Congress has the power to pass legislation regulating presidential elections. The Court stressed the importance of the presidential “election and the vital character of [the office’s] relationship to and effect upon the welfare and safety of the whole people.”¹³⁷ As the representative branch of the federal government, Congress is the key protectorate of the general welfare.¹³⁸ This is eminently true when it comes to the election of federal officers.

To the Court, the “power of self-protection”—protection of U.S. elections and U.S. democracy—rests with Congress.¹³⁹ Self-protection in the *Burroughs* context meant prevention of fraud, corruption, or violence in the electoral system.¹⁴⁰ But if Congress truly has the authority to protect our presidential election system, then it must be able to guard against anything that threatens “the departments and institutions of the general government.” And the Court appeared to recognize this. It endorsed congressional legislation that “preserve[s] the purity of presidential and vice presidential elections”¹⁴¹—a broader principle than protection against only fraud and corruption.

The logical next question may be: What is it exactly that Congress can preserve with legislation and how far does its power extend? Congress’s role in presidential elections is really about ensuring that voters have trust in our electoral system. Voter trust in electoral integrity is essential to preserving legitimacy of democratic institutions.¹⁴² That trust is informed by whether people believe that votes are counted as they were cast and that opportunities to participate in the election are fair and open.¹⁴³ Congress has the power to enact legislation that furthers these ends. These ends are not new and are no secret. They are directly in line with a core animating principle of the United States: The power to govern ultimately flows from the people.¹⁴⁴ It is Congress’s prerogative to protect this.

¹³⁷ *Id.*

¹³⁸ See U.S. CONST. art. I, § 8 (“The Congress shall have Power to . . . provide for the . . . general Welfare of the United States.”).

¹³⁹ *Burroughs*, 290 U.S. at 545.

¹⁴⁰ See *id.* at 545–46.

¹⁴¹ *Id.* at 544.

¹⁴² See, e.g., Pippa Norris, Holly Ann Garnett, & Max Grömping, *Why Don’t More Americans Vote? Maybe Because They Don’t Trust U.S. Elections.*, WASH. POST (Dec. 26, 2016, 5:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/26/why-dont-more-americans-vote-maybe-because-they-dont-trust-u-s-elections/> [<https://perma.cc/RD3P-VQR3>]; Nicol Turner Lee, *Congress in 2019: The Need for Bipartisan Action on Voting Rights and Election Integrity*, BROOKINGS (Dec. 30, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/30/congress-in-2019-the-need-for-bipartisan-action-on-voting-rights-and-election-integrity/> [<https://perma.cc/J9HY-ACPF>].

¹⁴³ Cf. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”); *Bush v. Gore*, 531 U.S. 98, 109 (2000) (recognizing the importance of “the confidence that all citizens must have in the outcome of elections”).

¹⁴⁴ See U.S. CONST. pmb. (“We the People of the United States”); *id.* amends. I to X.; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2674 (2015) (calling popular referenda, where the people act as the “Legislature” under the Elections

The Supreme Court's broad reading of congressional power in presidential elections was confirmed by Judge Posner. In *Association of Community Organizations for Reform Now (ACORN) v. Edgar*,¹⁴⁵ he examined the constitutionality of the National Voter Registration Act. Judge Posner started his analysis of the Act's constitutionality by addressing the Elections Clause. He highlighted that the Elections Clause specifically provides for the power of Congress to step in and change or mandate regulations of federal elections held in states.¹⁴⁶

As we have seen, Article I lays out Congress's power with regard to congressional elections. So, what of presidential elections? Judge Posner, referencing the Supreme Court in *Burroughs*, concluded of Article II, Section 1: "This provision has been interpreted to grant Congress power over [p]residential elections coextensive with that which Article I [S]ection 4 grants it over congressional elections."¹⁴⁷ Other courts that have addressed the issue of congressional power over presidential elections conclude that Congress has a direct and substantial role to play.¹⁴⁸

There are two immediate counterarguments that might be apparent from the discussion above.¹⁴⁹ The first is that the Supreme Court in *Burroughs* addressed only Congress's power to combat fraud or corruption in

Clause, "in full harmony with the Constitution's conception of the people as the font of governmental power").

¹⁴⁵ 56 F.3d 791 (7th Cir. 1995).

¹⁴⁶ See *id.* at 794.

¹⁴⁷ *Id.* at 793 (citing *Burroughs v. United States*, 290 U.S. 534 (1934)).

¹⁴⁸ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976) ("The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); *Fish v. Kobach*, 840 F.3d 710, 719 n.7 (10th Cir. 2016) ("We recognize that, by its literal terms, the Elections Clause only addresses congressional elections. But both the Supreme Court and our sister courts have rejected the proposition that Congress has no power to regulate presidential elections."); *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997) ("While Article I section 4 mentions only the election of Senators and Representatives, Congress has been granted authority to regulate presidential elections."); *Edgar*, 56 F.3d at 793.

¹⁴⁹ For a thorough review of potential counterarguments to an expansion of congressional control over presidential elections and analysis showing that a broader reading of congressional power should still prevail, see Coenen & Larson, *supra* note 81, at 890–907. Coenen and Larson make their arguments relative to proposed national ballots and national voting equipment. The counterarguments they identify, however, are likely also to be ones asserted against the proposed congressional act regulating elections in NPVIC states. One of the stronger counterarguments may be that Congress's reliance on its Article II, Section 1 power to pass uniform standards for the administration of presidential elections violates the anti-commandeering doctrine. Should that win the day, Congress could always pass the uniform standards under its Spending Clause power, as discussed in Section IV.A, *supra*. There is also another potential counterargument: that the FCPA, examined in *Burroughs*, regulated third-party actors in elections, not states; therefore, the holding of *Burroughs* should not extend to regulation of states. See THOMAS, *supra* note 101, at 5–6. That said, no lower court that has touched on the issue of congressional regulations of presidential elections has identified this as a counterargument to the law and principles announced in *Burroughs*. See, e.g., *Fish*, 840 F.3d at 719 n.7; *Edgar*, 56 F.3d at 791; *Miller*, 129 F.3d at 833; see also Coenen & Larson, *supra* note 81, at 891–92; THOMAS, *supra* note 101, at 5–6; cf. *Buckley*, 424 U.S. at 14 n.16 ("The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970) ("[T]he Federal Government . . . [has] the final control of the election of its own officers.").

presidential elections. Accordingly, the Court's opinion should be read narrowly to only apply to those circumstances. The second is that Judge Posner made too far reaching of a proposition when he announced that the Elections Clause power is coextensive with Congress's Article II, Section 1 power.

For reasons discussed above, the first is unpersuasive. The *Burroughs* Court announced principles that govern congressional control over presidential elections that are broader than the prevention of fraud and corruption. And lower courts and scholars have agreed.¹⁵⁰ For instance, the Tenth Circuit noted, in a challenge to Kansas law as preempted by the National Voter Registration Act, that "both the Supreme Court and our sister courts have rejected the proposition that Congress has no power to regulate presidential elections."¹⁵¹ We agree with Coenen and Larson that "*Burroughs* by its terms suggests that federal legislation should stand if it genuinely 'seeks to preserve the purity of presidential and vice presidential elections.'¹⁵² That is, Congress can regulate the presidential election if it preserves or enhances voters' trust in the electoral process and its outcomes. It is not just *Burroughs*. In *Oregon v. Mitchell*, albeit a case dealing with a state challenge to Voting Rights Act Amendments, the Supreme Court said, "[T]he Federal Government . . . [has] the final control of the election of its own officers."¹⁵³

The other counterargument is that Congress's power to regulate presidential elections may not be coextensive with its power over congressional elections. That said, the principles in *Burroughs*, such as national "self protection," "safeguard[ing]" the presidential election, and protecting the "purity" of presidential elections.¹⁵⁴ It is true that the boundaries of Congress's power over congressional and presidential elections may not exactly align, but its power over presidential elections, read in light of *Burroughs*, is certainly broad enough to protect voter trust in the process and outcomes.

In any event, Congress's Article II, Section 1 power need not be coextensive with its Article I, Section 4 power for it to pass the proposed legislation. The proposed legislation still allows states, consistent with their Article II power, to adopt the manner of appointing its electors.¹⁵⁵ As previously discussed, a state could adopt a winner-take-all or district-based system, or award its electoral votes to the winner of the national popular vote. Each of these systems tells the states' electors how to cast their votes for the President and Vice President.¹⁵⁶

¹⁵⁰ See *Fish*, 840 F.3d at 719 n.7; *Miller*, 129 F.3d at 836 n.1; *Edgar*, 56 F.3d at 793; Coenen & Larson, *supra* note 81, at 894; THOMAS, *supra* note 101 ("Congress's regulatory authority over presidential elections does seem to be more extensive than it might appear based on the text of the Constitution.")

¹⁵¹ *Fish*, 840 F.3d at 719 n.7.

¹⁵² Coenen & Larson, *supra* note 81, at 894 (citing *Burroughs*, 290 U.S. at 544).

¹⁵³ *Mitchell*, 400 U.S. at 134.

¹⁵⁴ *Burroughs*, 290 U.S. at 544–45.

¹⁵⁵ See Amar, *supra* note 41, at 257–58, 260 n.103; Coenen & Larson, *supra* note 81, at 899–901, 900 n.256.

¹⁵⁶ See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319–20, 2321 n.1 (2020).

State power over electors and presidential elections ends there if Congress decides to step in and regulate. The only thing Congress cannot do is interfere with the right of states to “appoint [its electors] in such a Manner as the Legislature thereof may direct.”¹⁵⁷ Opponents of this viewpoint may point to the Court’s decision in *McPherson* to suggest otherwise, but the context of that case, as well as later cases like *Burroughs*, suggests that the Supreme Court endorses the view that state power is limited and Congress has power to regulate presidential elections.

McPherson discussed a state’s power to use a district-based system to award its electoral votes.¹⁵⁸ The Court’s statements that “the appointment and mode of appointment of electors belong exclusively to the states” and “Congress is empowered to determine the time of choosing the electors and the day on which they are to give their vote . . . but otherwise the power and jurisdiction of the state is exclusive” must be put in the context of the issue of the case.¹⁵⁹ The Court was addressing the power of the state to “appoint” its electors. It was not addressing the power of Congress to otherwise regulate presidential elections.

Any doubt that the Supreme Court meant those statements within the context of a state choosing how to direct its electors to vote should be cast aside by the Court’s pronouncements in *Burroughs*. In that case, as already discussed, the Supreme Court unequivocally endorsed congressional regulation of presidential elections by upholding provisions of the Federal Corrupt Practices Act that regulated political committees that exist “for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors.”¹⁶⁰ This is congressional regulation of presidential elections that extends beyond simply “determin[ing] the time of choosing the electors and the day on which they are to give their vote.”¹⁶¹ Thus, the division of power between the states and Congress in Article II, Section 1 is closer to that of Article I, Section 4 (even if not coextensive).¹⁶²

The presidential ranked choice ballot will help ensure that voters trust the process and results of an election under the NPVIC. Because the NPVIC goes into force once the compacting states are able to ensure the

¹⁵⁷ U.S. CONST. art. II, § 1.

¹⁵⁸ See *McPherson v. Blacker*, 146 U.S. 1, 24–25 (1892).

¹⁵⁹ *Id.* at 35; see also Coenen & Larson, *supra* note 81, at 900 n.256.

¹⁶⁰ *Burroughs v. United States*, 290 U.S. 534, 541–44 (1934) (citing 2 U.S.C. § 241).

¹⁶¹ *McPherson*, 146 U.S. at 35; see also Coenen & Larson, *supra* note 81, at 900 n.256; *supra* notes 123–32 and accompanying text.

¹⁶² “[T]he import of *McPherson* is clarified by the Court’s later decisions in *Burroughs* and *Buckley*, which unmistakably held that Congress does have power to regulate aspects of presidential elections that extend well beyond the time-related questions expressly mentioned in Article II, Section 1.” Coenen & Larson, *supra* note 81, at 900 n.256. What Congress cannot do is infringe on the state’s power to control the rules by which it appoints its electors. A uniform standard would not infringe on that right because states would still be able to write the rules of elector appointment and insist on electors casting their vote for how the state would like them to do so. Indeed, Congress in 2019 considered new uniform standards for the November 2020 election. See For the People Act of 2019, H.R.1, 116th Cong. (2019). With the disruption of the coronavirus in Americans elections in 2020, Congress sensibly considered new standards for casting absentee ballots for electing the President and other offices.

candidate receiving the greatest number of votes wins the presidency, it will be an entirely new system under which the President is elected. The system will need to rely on the national popular vote, but currently each state tabulates and reports its own popular vote under its own regulations. The importance of the popular vote under the NPVIC is such that voters will need to fully trust the system, especially under a recount scenario. Instead of each state operating under its own procedures, Congress can step in. Legislation, like what we propose, will help standardize the national popular vote counting. This way voters know the entire system is equal across the states. The legislation would help ensure voter trust in the process and its outcomes. That is within the power of Congress to regulate presidential elections.

Congress's power to enact this legislation may be reinforced by its power over congressional elections. Because presidential elections are held on the same day as congressional elections, and Congress has "an undeniable interest in promoting turnout for congressional elections," the presidential RCV ballot and the accompanying uniform standards may further Congress's interest.¹⁶³ If one assumes that the new system may turn some voters away because of its perceived complexity or unreliability, then Congress would have an interest in passing uniform standards to ensure voter trust in the system so that voters would continue to turn out for the congressional elections as well.¹⁶⁴ This buttresses Congress's power to pass legislation like that proposed herein.

Importantly, the presidential RCV ballot does not interfere with states' rights to choose the manner in which it appoints its electors. States choose whether or not to enter into the NPVIC. In entering the compact, states are choosing the manner in which to cast their electoral votes—to cast them to the winner of the national popular vote. The proposed legislation for a presidential RCV ballot merely standardizes how a national popular vote is tallied and reported. The legislation does not direct a state to enter, stay out of, or leave the NPVIC. It does not interfere with the state's power of appointment. Instead, it ensures clarity and consistency in the election of the President.

Congress has the power to enact this legislation under its inherent authority to regulate presidential elections. In *Burroughs*, the Supreme Court announced that it is Congress's role to ensure the "purity" of the presidential election. The presidential RCV ballot would help do just that—by providing uniform standards for determining the national popular vote totals, which in turn will be used by NPVIC states to award their electoral votes. The NPVIC comes into effect only once those states can guarantee that the candidate receiving the most popular votes nationally becomes the President, so it becomes eminently important that the rules and procedures for determining the national popular vote are comprehensive and uniform. Congress must protect the purity of the presidential election. It should—and constitu-

¹⁶³ Amar, *supra* note 41, at 260.

¹⁶⁴ See *id.*

tionally can—enact legislation like that proposed in this Article to ensure voters trust the new system and its outcome.

V. SECOND OPTION: AN INTERSTATE RCV COMPACT

The National Popular Vote Interstate Compact has shown there is a path to a national popular vote without the need for a constitutional amendment. Grounded in state power over how to allocate electoral votes, the Interstate RCV Compact option would allow states to act on their own, setting their own terms for conducting elections by RCV rather than having those terms set by Congress. A compact would preserve the spirit of federalism as currently practiced in presidential elections, which are largely governed by state law. It would also recognize states' roles as the laboratories of democracy, enabling interested states to join (or leave) the compact depending on what they determine the best interests of their voters to be. On the other hand, the compact option would lead to greater inconsistency in how presidential elections are operated across the country as some states would use RCV and others continue to use plurality voting. A compact would offer only a partial solution to the problem of spoilers and unrepresentative outcomes until all states have adopted it. The compact option also comes with some significant logistical and political concerns as well, as explained below. Nevertheless, it is a viable option worth consideration.

Following the NPVIC model, states interested in using RCV for presidential elections could also adopt an interstate compact ("RCV Compact"), but in this case to use RCV before reporting out vote totals for NPVIC, with the eventual goal of expanding that compact to all states in the event the NPVIC is enacted. The RCV Compact would thus be a separate compact for states passing RCV. States joining the RCV Compact would still hold RCV elections in their state (and if not in the NPVIC, determine their state's own electoral votes with RCV), but agree to report out only their first choice totals for the purpose of the NPVIC until the RCV Compact is triggered by adoption in at least five states.¹⁶⁵ After the RCV Compact's enactment, compacting states would agree to change what votes they report out for the purposes of the NPVIC. The RCV Compact states would agree to pool their votes, run a single RCV tally down to the top two candidates, and report out their vote totals as their popular vote totals.

A compact for states to adopt RCV for President in conjunction with the NPVIC would need several basic elements that are similar to what would be needed to run a national RCV tally according to the RCV in Presidential Elections Act: all compacting states would need to share their full ranked

¹⁶⁵ We propose *five* states as sufficient to have confidence that the two final candidates at *the end of* the RCV tally are the two strongest candidates nationally, but this *minimum* number of states could be greater. Regardless the more states in the RCV *compact*, the more certain its final two candidates are the ones *deserving* of votes for the purposes of *determining* the NPVIC winner.

choice voting ballot data with each other (and the public) as soon as it becomes available; all compacting states would need to recognize and use the ballots from compacting states when tabulating votes; and all compacting states would need to have the same ballot access and tabulation rules.

The process could work as follows: First, voters would vote by ranking their ballots, as in any other RCV election. Second, states would run RCV tallies within their states to show who wins their state with RCV; states not part of the NPVIC would award their electoral votes to the statewide RCV winners. Third, after compacting states process the ballots within their state as usual, they would release and share the cast vote record (“CVR”) of those ballots that records each ballot’s rankings in a consistent format.¹⁶⁶ Fourth, the pooled CVRs from all compacting states would be tabulated as in any other RCV election—eliminating the candidate with the fewest votes within the RCV Compact states and distributing those votes to the next-highest ranked candidate on each ballot—until only two candidates remain. Finally, compacting states would certify the vote totals of the two remaining candidates as the popular vote totals of those states collectively, which would be used to determine the winner of the popular vote and therefore the winner of the election, as that candidate would receive the Electoral College votes of the members of the NPVIC.¹⁶⁷

The requirement that compacting states eliminate all but two candidates and report both their totals—rather than reporting only the total of the top vote-getter—recognizes that the RCV Compact would not (initially, at least) include every state.¹⁶⁸ States outside of the RCV Compact that continue to vote for presidential candidates using the plurality method would continue to report the vote totals of every candidate—not just the candidate who received the most votes. The reason for this is obvious: the candidate receiving the most votes in any one state will not necessarily win the most votes nationwide. Similarly, the votes for the candidate who ultimately finishes second in RCV Compact states (called the “multi-state second place presidential slate” in the proposed language) could end up contributing to that candidate’s national victory. Reporting the votes of the top two per-

¹⁶⁶ “Cast vote records” are electronic records of all the information contained in a ballot, including, in the case of RCV elections, candidate rankings. Modern voting software is able to read the information contained in a CVR in the same way that a voting machine is able to read the information contained on a ballot. As with individual ballots, a CVR does not contain any information about a voter’s identity. See VVSGTerm Glossary, GITHUB, https://github.com/HiltonRoscoe/GlossaryMD/blob/master/vvsg_living_glossary.md#cast-vote-record [<https://perma.cc/R259-K9VX>] (“Archival tabulatable record of a set of contest selections produced by a single voter as interpreted by the voting system.”).

¹⁶⁷ Proposed text for an RCV Compact as well as the text of the NPVIC are included at the end of this Article for reference.

¹⁶⁸ This aspect of the RCV Compact could have some negative consequences for parties whose candidates do not finish in first or second place, particularly in states that link ballot access to performance in previous presidential elections. This should be mitigated by using first round vote totals when determining ballot access and federal matching funds in future elections.

forming candidates gives every candidate an incentive to campaign in the compact states even if it is unlikely they will win a majority of votes there. Even if the states in the RCV Compact lean Democratic, for example, Republican candidates would still have reason to reach out to voters in that state. Voters would be able to vote for their favorite candidate as their first choice without fear of “wasting” their vote.

The collective vote pooling among the states is also a crucial element of the RCV Compact.¹⁶⁹ There would be no need for an interstate compact if member states were to each use RCV to determine their own individual popular vote winners—they are already able to do so.¹⁷⁰ If individual states were to conduct an RCV tabulation of only those votes cast within each state and report out the top two vote winners as their popular vote totals then it creates the possibility that one of the top two national candidates might finish third in an RCV state, as would have happened in some states in presidential elections in 1912, 1968 and 1992.¹⁷¹ If several states did this it would increase the possibility of the national popular votes being split among several candidates with a winner receiving a low plurality, undermining one of the primary aims of RCV: producing a majority winner.¹⁷²

Like the NPVIC, the proposed RCV Compact language requires membership to reach a set threshold before going into effect. While the NPVIC’s threshold—the combined electoral votes of its member states are enough to elect the President—is crucial to its operation, there is no particular threshold inherently necessary for the RCV Compact to take effect. For the purposes of this discussion, the proposed RCV Compact language goes into effect after five states join. Regardless of the threshold of states ultimately agreed upon, the practice of pooling the votes of all states in the RCV Compact would also create an avenue for the eventual nationwide adoption of RCV using the national popular vote in a scenario where every state joins the RCV Compact.

Ballot access for candidates is another important consideration. Voters in all compacting states should be able to rank the same candidates. A compacting state with stricter ballot access laws than the others could effectively end a candidate’s chances of qualifying for the first or second place presidential slate by keeping that candidate off the ballot. The entire RCV Compact

¹⁶⁹ The “pooling” is not literal. The ballots themselves will remain and be processed in the states in which they are cast. Only the data contained in the CVRs would be shared and used for tabulation.

¹⁷⁰ For example, Maine has already adopted RCV for presidential elections. See *An Act To Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine*, S.P. 315, 129th Leg., 1st Sess. (Me. 2020).

¹⁷¹ For example, in 1992 George H.W. Bush finished in second place nationally but third in Maine, falling just behind Reform Party candidate Ross Perot. If Maine had run the election by RCV and only reported the results of the final two candidates then it is possible that Bush would not have received any votes at all from the state. See *United States Presidential Election Results*, *supra* note 30 (select “1992” from the “General by Year” dropdown menu).

¹⁷² As we will discuss below, a similar outcome occurred in 1912.

is meant to function like a single election, so every voter in the compacting states should have equal ability to rank the same candidates. Allowing states to include or exclude different candidates would be analogous to a gubernatorial election where a candidate was not on the ballot in every county. As a result, compacting states must have rules ensuring any ballot-qualified candidate in one state is qualified in all other compacting states

Finally, the question of timing is a significant concern. While over two months separate Election Day and Inauguration Day, there is a hard deadline compacting states must meet: the federal “safe harbor deadline.”¹⁷³ The safe harbor deadline requires that all states determine their presidential electors by six days before the date the electors are required to meet and vote.¹⁷⁴ Compacting states will need to release CVR data with enough time for the results to be tabulated and certified before the safe harbor deadline, ideally leaving enough time to resolve any contests of results.¹⁷⁵ The proposed language gives compacting states up to ten days after the election to provide CVR data.¹⁷⁶

A. Tabulation

The primary consideration regarding the CVR data is the question of *who* tabulates it. The first possibility is that each state would be responsible for doing that itself. This possibility is initially appealing because it would require fewer changes to how states currently administer elections. It would, however, create a set of logistical hurdles that would become more acute as more states join the compact. The other possibility is to create an interstate commission run by the chief election officials of the member states. Each state would continue to run their own elections, but this commission would create uniform regulations for RCV presidential ballots and would be responsible for aggregating the state-level results from the various member states and releasing the full results for the compact. While this possibility may encounter more initial resistance, it presents the best way to avoid the logistical obstacles posed by the alternative.

¹⁷³ See 3 U.S.C. § 5 (2018).

¹⁷⁴ See *id.* Federal law sets the date for the federal electors’ meeting at “the first Monday after the second Wednesday in December next following their appointment.” *Id.* § 7 (2012).

¹⁷⁵ The Supreme Court has made clear that the safe harbor deadline may not be delayed to accommodate a recount in a presidential election. See *Bush v. Gore*, 531 U.S. 98, 113 (2000) (“If we are to respect the legislature’s Article II powers, therefore, we must ensure that post election state-court actions do not frustrate the legislative desire to attain the “safe harbor” provided by § 5.”).

¹⁷⁶ To use the example of 2020, Election Day is November 3. The deadline for compacting states to provide CVRs would be November 13. The safe harbor deadline for 2020 is on December 8 and the presidential electors are scheduled to meet on December 14, which would give compacting states 25 days to tabulate results and resolve any election contests. Congress does have the power to extend these deadlines by statute, which would be a sensible change under current rules as well.

B. *The Simultaneous Independent Tabulation Approach*

Under this approach, states in the compact would use CVR data to each independently calculate the collective RCV result for the entire RCV Compact. Since all the states are using the same data and same counting rules, they should (in theory) all reach the same result. This approach would create significant redundancies, since all of the RCV Compact states would be performing the same tabulation process with the intention of each reaching the same result. It would also create the possibility that, through human or computer error, different states reach and announce different results. Without a single, central arbiter to review and confirm results, any discrepancies in results across the compacting states could lead to delays as each state tries to identify where the errors occurred and which total is correct. The resulting delays, along with the confusion and uncertainty over which results are valid, could have a corrosive effect on public confidence in elections generally and the RCV Compact specifically.¹⁷⁷

Alternatively, each compacting state could tabulate and report their own individual vote totals, while using the combined CVR data to determine the order in which candidates should be eliminated.¹⁷⁸ Ranked choice voting functions by eliminating the candidate with the fewest votes and transferring those votes to each voter's next-ranked candidate. A candidate in last place in a single compact state may not be the candidate in last place overall among the RCV Compact states (which is why it is necessary for compacting states to share their CVRs rather than for each to tabulate their own results wholly independently, eliminating and transferring the votes until two candidates in each state remain *before* reporting their result).¹⁷⁹

Under this approach, each compacting state would still scan all of its presidential ballots, convert them into CVRs, and publicly share the CVRs with the other members of the RCV Compact. While compacting states would not need to use the same voting equipment, it would need to create the same CVR and make it a public record. Each compacting state then would combine the CVR data reported by the other compacting states with its own and use that combined data to determine the last place candidate overall. The state would then eliminate that candidate from its tabulation (regardless of how that candidate performed within that state) and transfer the votes for that candidate to the voters' next choice. Using the combined CVR data, the state would then determine the next candidate to eliminate

¹⁷⁷ Delays are especially troublesome in presidential elections since, as discussed in *supra* note 174, the process happens within an inflexible timeline.

¹⁷⁸ To succinctly summarize the difference between these methods, under the former every state tabulates and reports the results for all of the compacting states. Under the latter, every state uses the full results to determine and report what its individual contribution to the final results would be. In either case, every state would still need to use CVR data from every other compacting state to conduct a full tabulation and reach the same results as every other state.

¹⁷⁹ If that method were followed, it could result in the compacting states collectively reporting more than two candidates as receiving votes and would undermine the purpose of having a separate compact altogether.

and continue the process until only two candidates remain. It would then report the votes for those candidates as its statewide popular vote total. Each compacting state would treat the certified results of every other compacting state as conclusive (as is already required by the NPVIC). In effect, this would mean that each state conducts two parallel tabulations: first using the combined CVR data to determine each candidate's vote totals across all the RCV Compact states and then using that information to guide its own state-specific tabulation.¹⁸⁰

This approach would not solve all the problems that could arise with several states attempting to independently work in unison. Compacting states would still need to pass and maintain uniform laws on matters such as ballot access, number of rankings permitted, and the release of CVR data. In the absence of a single entity issuing rules and overseeing vote tabulation, the most effective way to achieve this uniformity would be for the RCV Compact to contain legislative language that each compacting state adopts into its own legal code.

This presents another problem. While plurality voting only needs to address ties when two or more candidates are tied for first place, RCV laws must also address situations when multiple candidates are tied for last place and a tiebreaker is necessary to determine which candidate should be eliminated. The most common method used in American jurisdictions using RCV is to break the tie by lot to select a candidate at random. Compacting states would not be able to each do this independently, however, because five or more states using randomized tie-breaking methods are not guaranteed to reach the same result. Compacting states eliminating different candidates would result in those states would have different vote totals since the next-choice votes from one eliminated candidate's voters would not necessarily be transferred to the same candidates as they would be if another candidate had been eliminated instead.

Finally, the simultaneous independent tabulation approach would ossify the tabulation process into terms of an interstate compact that would be extremely difficult to change. If the compacting states wanted to make adjustments to the process contained in the compact, they would all need to agree to the changes and then update their implementing legislation accordingly, a process that could potentially take years.¹⁸¹ This is not a concern for a compact like the NPVIC, which is solely concerned with the process of appointing presidential electors. An RCV Compact that takes the simultaneous independent tabulation approach, on the other hand, would need to

¹⁸⁰ This process would not necessarily be as time-consuming as it may sound. Software can read CVR data to tabulate results relatively quickly. There would be no need for a lengthy hand count (although states would still retain original ballots for recounts and post-election audits).

¹⁸¹ See FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 122 (1979) ("The history of uniform laws is replete with examples of amendments by State Legislatures or interpretations by state courts that made them nonuniform. A compact, however, cannot be amended by any party without the consent of all of them.").

create a uniform and comprehensive approach to issues like tabulation procedure, ballot design, and candidate qualification that member states may wish to revisit as time goes on.

C. *Interstate Agency*

The issues discussed above could be resolved if the RCV Compact were to create an interstate agency to collect CVR data and tabulate the full results for the compacting states.¹⁸² This would provide the RCV Compact with a single, centralized arbiter to review and confirm results. While the individual states would still run their own elections, the interstate agency would centralize the CVR data and use it to tabulate results, which the compacting states would then certify and report in accordance with the NPVIC. The interstate agency could also be empowered to create rules for issues like tabulation and ballot access in order to maintain consistency across the compact. As noted above, to be successful the compacting states would need uniformity on issues like ballot access requirements and counting rules. A single agency representing all the compacting states with the power to regulate those issues—or issue uniform guidelines for compacting states to adopt—would be the most efficient and effective way to achieve that uniformity.

This agency would not run elections. That responsibility would remain with the compacting states. The states would still maintain voter registries, print ballots, operate polling stations, scan ballots, and the vast majority of the day-to-day work and implementation that comprises running an election. This work will still be done by the same state and county employees that performed it before the RCV Compact went into effect. States would continue to be responsible for their own election security.¹⁸³

Since the agency's primary responsibilities are promulgating regulations and then collecting and running data through a computer program every four years, it will likely be quite small. It is possible that it would not need to

¹⁸² This is not an unusual feature of interstate compact agreements. The Washington Metropolitan Area Transit Authority, which operates the Washington, D.C.-area subway system, is the product of an interstate compact. *See* D.C. CODE § 9-1107.01 (West, Westlaw through Dec. 8, 2020).

¹⁸³ The interstate agency option would require additional security measures to cover the collection of member states' CVR data to the agency and during the agency's tabulation of results. The proposed compact in Appendix 3 requires the agency to develop security procedures for the collection and tabulation process. The commission could decide to use an encrypted process to transmit the CVRs electronically. Another option would be for states to physically transport the CVRs in data storage devices like Maine did in 2018, when precincts sent thumb drives to Augusta for centralized tabulation. As a practical matter, since each compacting state would be making its CVR data public, member states, the media, watchdog groups, and concerned citizens could all use that data to run the tabulation themselves and determine if there had been any tampering with the results released by the agency. In this way, the RCV Compact's commitment to transparency would bolster election security and promote public faith in the process.

have any employees of its own but instead be staffed by civil servants detailed from the election administration agencies of the compacting states.¹⁸⁴

Considering the amount of coordination and organization necessary to ensure the RCV Compact would function smoothly, creating an interstate agency would be the most effective and reliable option. It in fact is similar to what must happen in most statewide elections, where the chief election official of a state (typically the Secretary of State) collects election data from separately administered counties and establishes the winners of elections for offices representing more than one county. It is also analogous to having the Election Assistance Commission oversee administration of the Ranked Choice Voting in Presidential Elections Act.

There may be political obstacles to this approach, however. First, while the direct administration of elections would remain in the hands of each compacting state, states may be reluctant to cede any degree of their authority over presidential elections to an external agency (albeit one in which the state plays a governing role). Second, while the agency itself would likely not need to be very large, it would certainly incur some expenses, and compacting states would have to commit to funding it. These concerns, while hardly insurmountable, add an additional layer of complications to the RCV Compact that might deter states otherwise interested in joining. Nevertheless, in light of the organization and coordination necessary for the RCV Compact to successfully operate using the tabulation process described above, some sort of central agency (jointly operated and controlled by compacting states) to oversee reporting and tabulation is probably necessary.

D. *Constitutionality of the Interstate RCV Compact*

The authority of states to enter into interstate compacts with one another is well-established. The Constitution acknowledges this authority in the Compacts Clause.¹⁸⁵ The Supreme Court has recognized that interstate compacts may create regulatory bodies.¹⁸⁶ Also embedded in the Constitution is the power of state legislatures to appoint presidential electors.¹⁸⁷

¹⁸⁴ This would have the added benefit of keeping the interstate agency's costs down, making it more appealing to states considering joining the compact.

¹⁸⁵ See U.S. CONST. art. I, § 10, cl. 3. ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."). The Supreme Court has read the requirement for congressional approval to apply only if the compact would "encroach . . . upon the full and free exercise of federal authority." *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893).

¹⁸⁶ See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30–31 (1951) ("That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government . . . What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact.")

¹⁸⁷ See U.S. CONST. art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or

States are free to appoint electors however they wish, limited only by the Constitution's authorization of Congress to select the time and date of choosing the electors and the day on which they vote.¹⁸⁸

A state may, therefore, award its electoral votes however it chooses. It may do so on the basis of who wins that vote in that state, as all states currently do now. It may do so on the basis of who wins the national popular vote, as states in the NPVIC would do once it goes into effect. A state may spread its electoral votes among several candidates, as Nebraska and Maine do when awarding votes to the winner of each congressional district, or it may award them all to a single candidate, like the other forty-eight states and the District of Columbia. A state may award electors to the winner of an election conducted by ranked choice voting, as Maine does, or to the winner of a plurality election, as all other states and the District of Columbia currently do. A state does not even need to hold an election at all. There have been many presidential elections in which state legislatures voted on which candidate would receive their states' electoral votes without any public vote.¹⁸⁹ The Constitution places no limitation on the method a state may use when deciding how its electoral votes will be apportioned and states are therefore free to award them on the basis of election results reported from every state or even on the basis of results compiled and reported by an interstate agency that state has chosen to join.¹⁹⁰

Candidates who do not finish as either the multi-state first- or second-place presidential slate because they were eliminated in the tabulation process may object to being excluded from the national popular vote total. However, there is no constitutional requirement that states look to a particular round of vote-counting when awarding electoral votes. As discussed earlier, there is no constitutional requirement that states count popular votes at all. Others may object to states surrendering their constitutionally-delegated role in selecting the President to an interstate agency but this would misrepresent that agency's role in the process. The interstate agency would not assign electoral votes. It would simply use the popular vote totals reported by member states to conduct the RCV tabulation and then report that final result to be used as the compacting states' contribution to the national popu-

Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

¹⁸⁸ See *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (“In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.”).

¹⁸⁹ See *id.* at 32–33 (noting that Delaware, Georgia, Louisiana, New York, South Carolina, Vermont, Colorado, and Florida all selected electors by vote of the legislature rather than popular vote at various points in the 19th century).

¹⁹⁰ There is considerable overlap between the case for the constitutionality of the RCV Compact and the case for the constitutionality of the NPVIC. For a detailed discussion of the latter, see KOZA ET AL., *supra* note 16, at 283–358.

lar vote. It remains up to the states to decide whether to join the NPVIC and award their electoral votes to the national popular vote winner and they are free to leave the NPVIC under its terms if they wish.

A change to presidential elections as consequential as what this Article proposes will undoubtedly invite legal challenges. Nevertheless, the RCV Compact rests on firm legal foundation, consistent with the roles the constitution created for the states in national elections.

E. Final Considerations for an Interstate RCV Compact

An interstate compact for RCV in presidential elections is an appealing option for several reasons. It leaves overall control of presidential elections with the states. It can start small, with a handful of states, allowing other states to see how it works in practice before deciding whether to join. There are some significant complications that must be considered, however, and the details of the compact will matter a great deal. A poorly designed compact risks creating delays and undermining the operation of the NPVIC. There are several possible ways to address these risks but the most secure would be the creation of an interstate agency to oversee the RCV Compact. Given the RCV Compact's need for uniform rules and procedures, a single interstate agency would be the best option to bring the benefits of RCV to presidential elections.

VI. IN PRACTICE: THE 1912 ELECTION

Let us consider how these two options to establish RCV in NPVIC elections—the RCV in Presidential Elections Act and the Interstate RCV Compact—would work in the context of the 1912 presidential election, imagining for the purposes of this thought experiment that states have modern optical scanning voting equipment that can produce cast vote record files. The 1912 election presents an excellent example for the use of RCV. It is unusual among American presidential elections as there were more than two viable candidates. Four major candidates are running for President: Democrat Woodrow Wilson, Progressive Teddy Roosevelt, Republican William Howard Taft, and Socialist Eugene Debs, with former Republican President Roosevelt having broken away to form his new “Bull Moose” Progressive Party. The Republican-Progressive schism and the presence of multiple candidates claiming the mantle of progressivism made the election particularly susceptible to vote splitting.

Contemporary readers may also feel less invested in the outcome of this 1912 election hypothetical than the controversial 2000 and 2016 presidential elections, making it easier to observe the merits of RCV in presidential elections without inflaming contemporary partisan divides. Indeed, it is not possible to say which candidate “would have won” the 2000 or 2016 elections under the RCV in Presidential Elections Act or the Interstate RCV Com-

pact, because if either of these proposals were in effect, they would have changed how candidates and parties approached the campaigns. RCV does not benefit any candidate or party; it empowers voters to more fully express themselves and incentivizes candidates to reach out beyond narrow bases of support.

The results of the 1912 election demonstrate the relevance of the Republican-Progressive schism of the time. Wilson won the election, receiving a plurality of the popular vote at 41.83%—the lowest vote share of any winning presidential candidate since the Civil War.¹⁹¹ Wilson won a landslide in the Electoral College, receiving 435 out of 531 (or 81.82%) Electoral College votes but this number obscures the fact that many of his electoral votes came from states he won by a plurality. Wilson won a majority of the vote in only eleven states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia), which together represented 126 votes in the Electoral College.¹⁹² Of the other twenty-nine states Wilson carried, the combined votes of Roosevelt and Taft surpassed Wilson in twenty-six of them, which represented 281 votes in the Electoral College, raising the possibility that a Republican ticket could have won the election had the party not split.¹⁹³

Of course, there is another way the 1912 election could have played out without seeing the effects of widespread vote splitting: if the election had been conducted using RCV.¹⁹⁴ To explore how such an election would un-

¹⁹¹ See *1912 Presidential General Election Data*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/national.php?year=1912> [<https://perma.cc/N3EJ-VTAK>]. The only presidential elections where the winner received a lower share of the popular vote are 1824 and 1860. See *1824 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/national.php?year=1824&f=0&off=0&elect=0> [<https://perma.cc/5APT-YABG>] ("*1824 Results*"); See *1860 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <https://uselectionatlas.org/RESULTS/national.php?year=1860&f=0&off=0&elect=0> [<https://perma.cc/D8L8-JRM5>] ("*1860 Results*"). In 1824, John Quincy Adams received 30.92% of the popular vote, although he received fewer votes than his opponent Andrew Jackson, who received 41.36%. See *1824 Results*. Any comparison with the popular vote in 1824 should be qualified since six states (SC, GA, NY, VT, DE, and LA) appointed their presidential electors through their legislatures rather than holding an election. See *id.* In 1860, Abraham Lincoln received 39.65% of the popular vote, although a majority of the vote in the number of states necessary for him to earn an Electoral College majority. See *1860 Results*. As in 1824, South Carolina appointed its electors through its legislature rather than by a popular election, but it was the only state to do so. See *id.* By 1912, all states were using popular elections to award electoral votes. See *1912 Presidential General Election Data*.

¹⁹² See *1912 Presidential General Election Data*, *supra* note 190.

¹⁹³ The states are Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, West Virginia, Wisconsin, and Wyoming. See *1912 Presidential General Election Data*, *supra* note 190. Roosevelt received eighty-eight electoral votes from the states he won, and Taft had received eight. At the time, 266 votes were necessary to win a majority of the Electoral College. See *id.*

¹⁹⁴ This aspect of our thought experiment is not anachronistic. Ranked choice voting has existed since the 19th century. Denmark adopted a proportional, multi-winner version of RCV to elect the upper house of its legislature in 1855. See JOHN H. HUMPHREYS, PROPORTIONAL

fold we will have to use some simplistic assumptions. First, we will assume that every vote actually cast in 1912 would also be a voter's first choice if the election had been conducted by RCV.¹⁹⁵ Next we will assume that vote transfers from each candidate would go as follows if that candidate is defeated. If Wilson is defeated, we will assume his voters would be evenly split between Taft and Roosevelt and less inclined to support Debs, with 45% of Wilson's votes going to Roosevelt, 45% going to Taft, 5% going to Debs, and 5% of ballots not ranking any other candidate and becoming inactive.¹⁹⁶ We will assume that Roosevelt and Taft's voters are more likely to favor the other candidate but not exclusively so, and that if either Roosevelt or Taft is eliminated his votes will go 80% to Taft or Roosevelt (as the case may be), 10% to Wilson, 5% to Debs, and 5% will become inactive. We will assume that a substantial number of Debs voters, heeding their candidate's denunciation of all the other candidates as being representatives of the capitalist system, would not rank anyone else and those that do will be split evenly among the three, with 40% of becoming inactive, 20% going to Wilson, 20% going to Taft, and 20% going to Roosevelt.¹⁹⁷ Finally, for the sake of simplicity, we will assume that only the candidates already discussed (Wilson, Taft, Roosevelt, and Debs) are in the race and ignore all other minor parties and write-in candidates.¹⁹⁸ This will mean that for the purposes of determining the total number of votes cast in the election, we will only use the total number of votes cast for those four candidates.¹⁹⁹

REPRESENTATION: A STUDY IN METHODS OF ELECTION 112 (1911). Other variants of RCV, both single- and multi-winner, have been used in Australia since 1892. See Benjamin Reilly, *The Global Spread of Preferential Voting: Australian Institutional Imperialism?*, 39 *AUSTL. J. POL. SCI.* 253, 255 (2004). The single-winner version of RCV that this paper is proposing for presidential elections, and which is currently in use throughout the United States, was created by Massachusetts Institute of Technology Professor William Ware in 1871. See *id.* at 259.

¹⁹⁵ In reality, many of the votes cast in 1912 were likely strategic votes cast for the candidate a voter judged to be more likely to win rather than the candidate the voter liked the most. The use of RCV would change that calculus for voters, who would not have to settle for "the lesser evil."

¹⁹⁶ An "inactive" ballot is one where every candidate ranked on it has been eliminated in the tabulation process and therefore no longer counts for any candidate. A ballot that only ranks a single candidate, for example, would become inactive if that candidate is eliminated.

¹⁹⁷ As noted above, these numbers are based solely on a desire to keep the exercise simple. If any scholar of the era has a more educated take on voters' preferences and hypothetical rankings of the candidates, we would be very interested to hear it. Since candidates may only be ranked once, votes transferred to a candidate who has already been eliminated will immediately transfer again following the transfer rules of that defeated candidate. This is consistent with the tabulation rules in every American jurisdiction currently using RCV, which, upon reaching a ranking for a candidate who was eliminated in an earlier round, will skip that ranking and go to the next-highest ranked candidate on the ballot who is still in the race. To simplify the process and avoid creating a loop, we will not transfer votes from one eliminated candidate to another eliminated candidate but instead treat such votes as inactive.

¹⁹⁸ We apologize to Prohibition Party candidate Eugene W. Chafin and offer our assurances that his party's greatest triumph was yet to come.

¹⁹⁹ This means that for the purpose of this exercise we will consider the total number of votes cast in the election to be 14,804,675. In reality, the total number of votes cast for President in 1912 was 15,046,540. See *1912 Presidential General Election Data*, *supra* note 190.

A. Under the RCV in Presidential Elections Act

With our priors established, we will first consider how the 1912 election would unfold under the federal statute contained in Appendix Two. The NPVIC is in effect and Congress has passed the “The Ranked Choice Voting in Presidential Elections Act” (“the Act”). The date is November 5, 1912. In practice, Election Day itself operates much as it has in previous elections. The states are still responsible for administering the election. Voters go to polling precincts operated by state or county officials, and their ballots are still collected, scanned, and initially processed in the state where they were cast by whichever state or county agency designated by state law. Now, however, the ballots allow voters to rank the candidates, as required by the Act. Each state will make public the full CVR of all the ballots cast.²⁰⁰ The Election Assistance Commission will use the aggregated CVR data from all states to determine the national popular vote winner. NPVIC states will award their Electoral College votes accordingly. States not in the NPVIC will still conduct their election with the ranked choice presidential ballot but will award their electoral votes however they wish.²⁰¹

In the first round, Wilson leads the count with 6,294,384 votes (42.52%), followed by Roosevelt with 4,121,609 vote (27.84%), then Taft with 3,487,939 votes (23.56%), and finally Debs with 900,743 (6.08%). Since Debs has the fewest votes, he is eliminated and votes for him are transferred to his voters’ next-ranked candidate, if any. The transfers from Debs do not affect the relative position of the remaining candidates and Wilson again leads in the second round, followed by Roosevelt and then Taft. Since Taft is now last, he is eliminated and his votes are transferred to his voters’ next choices. This time, however, Taft voters overwhelmingly favor Roosevelt, putting the Progressive Party candidate ahead of Wilson. This final result is reported as the national popular vote and the member states of the NPVIC award their Electoral College votes to Roosevelt, sending him back to the White House—that same result as almost certainly would have occurred if Wilson and Roosevelt had faced off in a head-to-head runoff that year.

²⁰⁰ To speed the process along, we will, anachronistically, provide each state with technology to scan ballots and electronically record, transmit, and tabulate CVR data. While this process could conceivably be done by hand using paper spreadsheets, it would be extraordinarily laborious and time-consuming.

²⁰¹ For example, a state may use the rankings to determine the RCV winner of that particular state and award that candidate its electoral votes, or a state could decide to count only the voter’s first choices and ignore the rest of the rankings, effectively holding a plurality election. In any case, it would not alter the outcome of the election since a majority of the Electoral College votes will be pledged to the winner of the national count, as established by the NPVIC.

TABLE 1: ROUND-BY-ROUND COUNT OF NATIONAL RCV ELECTION²⁰²

	First Round	Second Round	Third Round
Debs	900,743	<i>Eliminated</i>	<i>Eliminated</i>
Roosevelt	4,121,609	4,301,758	7,272,909
Taft	3,487,939	3,668,088	<i>Eliminated</i>
Wilson	6,294,384	6,474,533	6,878,022
Inactive Ballots	<i>n/a</i>	360,297	653,744
Total votes ²⁰³	14,804,675	14,444,378	14,150,931

B. Under the Interstate RCV Compact

Under the next scenario, there has been no congressional action. The NPVIC is in effect, and five states—Illinois, Michigan, Minnesota, Utah and Wisconsin—have joined the RCV Compact. They have created an interstate agency (“The RCV Compact Commission” or “Commission”) to tabulate votes using the CVR data.

As in the previous scenario, voters would still vote in polling places administered by their state or local election administrators but only voters in states that are members of RCV Compact would use ranked ballots. Like in the previous scenario, election administrators will have converted the information contained in the ballots into CVRs and make that information public, but now the CVR data will be used by the RCV Compact Commission to determine the RCV winner of the compacting states. After the polls close and the ballots are scanned, each state transmits its ballot report containing the CVRs of all ballots cast to the commission currently located in Madison, Wisconsin in offices provided by the Wisconsin Secretary of State.²⁰⁴ Election officials from each member state have travelled to Madison to assist and monitor the tabulation.

The individual results from each state in the RCV Compact show Wilson leading in Wisconsin and Illinois, Roosevelt leading in Michigan and Wisconsin, and Taft leading in Utah. After the Commission aggregates the states’ CVR data and tabulates the first round of votes, Wilson leads overall with 863,034 votes (34.61% of the votes cast in the compacting states), Roosevelt is in second with 813,540 (32.62%), Taft is in third with 642,867 votes (25.78%), and Debs trails in fourth with 174,493 (7%).

²⁰² See 1912 Presidential General Election Data, *supra* note 190.

²⁰³ “Total votes” is the sum of all ballots counting for candidates who have not been eliminated. It does not include inactive ballots since those do not count for any candidate.

²⁰⁴ In an attempt to reduce costs and prevent any appearance of the commission unduly favoring or neglecting any particular states, the commission of this timeline has decided to rotate its headquarters among its member states every presidential election cycle, using facilities donated by the hosting state. This election happens to be Wisconsin’s turn.

TABLE 2: FIRST ROUND VOTES BY STATE²⁰⁵

	Ill.	Mich.	Minn.	Utah	Wisc.	1st Round Total
Debs	81,278	23,211	27,505	9,023	33,476	174,493
Roosevelt	386,478	214,584	125,856	24,174	62,448	813,540
Taft	253,593	152,244	64,334	42,100	130,596	642,867
Wilson	405,048	150,751	106,426	36,579	164,230	863,034
Total votes	1,126,397	540,790	324,121	111,876	390,750	2,493,934

TABLE 3: ROUND-BY-ROUND COUNT OF RCV COMPACT STATES

	First Round	Second Round	Third Round
Debs	174,493	<i>Eliminated</i>	<i>Eliminated</i>
Roosevelt	813,540	848,439	1,397,429
Taft	642,867	677,766	<i>Eliminated</i>
Wilson	863,034	897,933	972,487
Inactive Ballots	<i>n/a</i>	69,797	124,018
Total votes	2,493,934	2,424,137	2,369,916

Since Debs has the fewest votes, he is eliminated. The commission then uses the CVRs to conduct a second round of tabulation, revealing Wilson to still be in the lead, followed by Roosevelt and then Taft. As the candidate with the fewest votes, Taft is the next to be eliminated. While he held a plurality lead in Utah and was second place in Michigan and Wisconsin, he trails overall and so under the RCV Compact he is eliminated and his ballots go to his voters' next choices.

Taft voters overwhelmingly prefer Roosevelt, a former Republican President and himself a contender for the Republican nomination just five months earlier, to Wilson.²⁰⁶ With the transfers from Taft voters putting Roosevelt over the top, the compacting states certify him and his running mate, California governor Hiram Johnson, as the multi-state first place presidential slate and Wilson and his running mate, Indiana governor Thomas R. Marshall, as the multi-state second place presidential slate.²⁰⁷ The

²⁰⁵ See 1912 Presidential General Election Data, *supra* note 190.

²⁰⁶ See Lewis L. Gould, 1912 Republican Convention: Return of the Rough Rider, SMITHSONIAN MAG., Aug. 2008, <https://www.smithsonianmag.com/history/1912-republican-convention-855607/> [<https://perma.cc/MV3P-ZT2C>].

²⁰⁷ Let's suppose Illinois was in the RCV Compact, but not in the NPVIC. Based on the RCV tally only in Illinois, it likely would have given its electoral votes to Roosevelt instead of Wilson, as Roosevelt would likely have overcome the "spoiler" impact of Taft. But this would never affect who wins the White House under the terms of the NPVIC.

NPVIC adds these popular vote totals to the vote totals from the rest of the country, and all states in the NPVIC (including those in the RCV Compact) award their votes to the popular vote winner.

As was the case with the nationwide use of RCV under the federal statute option, RCV was able to negate most of the Republican-Progressive vote-splitting *in the RCV Compact states* and elevating Roosevelt over Wilson. Unlike the federal statute option, however, it would *not* have changed the result of the election. The five states were unable to cover the difference between Wilson and Roosevelt nationwide, and Wilson was elected twenty-eighth President of the United States, defeating Roosevelt 6,403,837 to 4,705,498.²⁰⁸ The addition of more states might make the RCV Compact a decisive factor in subsequent elections, potentially spurring other states to join. Voters in the RCV Compact member states would have been able to vote more honestly than their fellow citizens elsewhere in the country. Rather than agonizing between Roosevelt and Taft, trying to determine which candidate was more likely to defeat Wilson, voters conflicted by the Republican Party split could simply rank one candidate first and the other second.

CONCLUSION

The two options discussed in this Article, the RCV in Presidential Elections Act and the Interstate RCV Compact, both seek to accomplish the same goal: integrating ranked choice voting into the NPVIC. The RCV in Presidential Elections Act would do this through Congress, creating a uniform national process for the entire country. Nationwide use of RCV would have a direct and immediate impact on presidential elections. The spoiler effect would be neutralized on a national level. Every voter would be able to rank candidates without worrying about splitting the vote and inadvertently contributing to the election of their least-preferred candidate. Short of a constitutional amendment, a federal statute would be the most effective way of accomplishing the outcome sought by both options.

However, the federal statute would likely face considerable skepticism and opposition. Many will resist increased federal involvement in state-run elections. There will likely be significant reluctance to introduce a sweeping, nationwide change to presidential elections that has been used only once in Maine in 2020 and adopted in one other state: Alaska.²⁰⁹ Although enact-

²⁰⁸ In reality, Wilson received 6,294,384 votes, 863,034 of which came from the five states discussed here. Roosevelt finished second with 4,121,609 votes, putting him 2,172,775 votes behind Wilson. See *1912 Presidential General Election Data*, *supra* note 190. The 1,397,429 votes Roosevelt would receive in this hypothetical would narrow Wilson's lead considerably but not overcome it. See *id.*

²⁰⁹ At the time of writing, Maine and Alaska are the only American jurisdictions that have adopted ranked choice voting for presidential general elections. Maine used RCV in its 2020 presidential election, and voters in Alaska enacted it when approving Measure 2 on November 3, 2020. See Jon Kamp, *Maine Becomes First State to Use Ranked-Choice Voting in a Presidential Election*, WALL ST. J. (Oct. 30 2020), <https://www.wsj.com/articles/maine-becomes-first->

ment of the NPVIC and potential concerns about minor-party and independent candidates might change political calculations, any congressional action likely faces short-term challenges.

The Interstate RCV Compact option represents a more incremental approach that could be initiated before enactment of NPVIC. States could choose to join, allowing the reform to spread gradually and develop legitimacy and support as the public becomes more familiar with it. Those with valid federalism concerns would be reassured that states remain in control of presidential elections. This approach also carries risks, however. The public may not see the full benefit of RCV if membership in the interstate compact remains too small to meaningfully influence election outcomes. There also remains a possibility that no matter how successful and appealing the compact becomes, growth will stall as some states steadfastly refuse to join.

These differing approaches are not necessarily at odds with one another. An interstate compact is likely a more realistic option initially. As it grows and is able to operate successfully, Congress and the public may come to see RCV as an increasingly pragmatic and desirable way to elect the President. Legislators who were reluctant to support nationwide implementation of a practice followed by a handful of states may be willing to support it once it is used by dozens, with several election cycles of successful use behind it.

In either case, RCV would be integrated with the election of Presidents by popular vote, an idea that already enjoys broad public support.²¹⁰ As discussed above, a few states independently using RCV to determine their individual popular vote totals could create unexpected results on the national level. These proposals would avoid such outcomes and allow the two reforms to be used harmoniously.

Neither the RCV in Presidential Elections Act nor the Interstate RCV Compact are perfect options, but that is nearly always the case for advances in voting rights and electoral rules. The perfect should never be the enemy of the good when seeking a better, fairer democracy. There is every reason to believe that both the proposed congressional act and Interstate RCV Compact are achievable and constitutional. To be sure, as these reforms continue to gain traction, it will increase talk of a constitutional amendment expressly enabling or requiring the use of RCV presidential elections with a national popular vote. But at a time of widespread disillusionment with American democracy, creative thinking is needed to improve the process of electing our President.

state-to-use-ranked-choice-voting-in-a-presidential-election-11604062812 [https://perma.cc/8EPH-QHXJ]; *Alaska Ballot Measure 2, Top-Four Ranked-Choice Voting and Campaign Finance Laws Initiative (2020)*, BALLOTPEDIA, [https://perma.cc/G6RV-H4WA](https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020))]. Internationally, both Ireland and Sri Lanka use forms of RCV to elect their Presidents. See BENJAMIN REILLY, GOVERNMENT STRUCTURE AND ELECTORAL SYSTEMS, IN AFGHANISTAN: TOWARDS A NEW CONSTITUTION 87–93 (2003).

²¹⁰ See Daniller, *supra* note 1.

The National Popular Vote Interstate Compact and ranked choice voting are examples of innovations that promote the core American principle of establishing a “more perfect union” that is “of, by, and for the people.” As a Union, we do not always strengthen our democracy quickly, and we are far from finished. But over time, we manage to improve political equality and conduct more inclusive, freer, and fairer elections. We expanded suffrage to women, began directly electing U.S. senators, ended Jim Crow, and lowered the voting age to eighteen to name just a few important reforms.

Change to the way the United States elects its President is coming—it is a matter of when and how, not if. We should not accept that something as broken as the current Electoral College system cannot be changed. Rather than assume the NPVIC compact and RCV are in conflict with each other, reformers should lay the groundwork for a future where these reforms will coexist and reinforce each other. A national popular vote with ranked choice voting will ensure that every voter matters in every election.

APPENDIX 1: EXISTING COMPACT ADOPTED BY 15 STATES AND DC -
“THE AGREEMENT AMONG THE STATES TO ELECT THE
PRESIDENT BY NATIONAL POPULAR VOTE”²¹¹

Article I—Membership

Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.

Article II—Right of the People in Member States to Vote for President and Vice President

Each member state shall conduct a statewide popular election for President and Vice President of the United States.

Article III—Manner of Appointing Presidential Electors in Member States

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.

The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official’s own state.

If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less

²¹¹ *Text of the National Popular Vote Compact Bill*, NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/bill-text> [<https://perma.cc/7LFE-9LAZ>].

than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees.

The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.

This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.

Article IV—Other Provisions

This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.

Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.

This agreement shall terminate if the electoral college is abolished.

If any provision of this agreement is held invalid, the remaining provisions shall not be affected.

Article V—Definitions

For purposes of this agreement,

“chief executive” shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;

“elector slate” shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

“chief election official” shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;

“Presidential elector” shall mean an elector for President and Vice President of the United States;

“Presidential elector certifying official” shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors;

“Presidential slate” shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;

“state” shall mean a State of the United States and the District of Columbia; and

“statewide popular election” shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

APPENDIX 2: NEWLY PROPOSED LEGISLATION BY THIS ARTICLE'S
AUTHORS - "THE RANKED CHOICE VOTING IN
PRESIDENTIAL ELECTIONS ACT"²¹²

Section 1. SHORT TITLE

This Act may be cited as the "RCV in Presidential Elections Act".

Section 2. Requiring Ranked Choice Voting in All States to Determine the National Popular Vote

- (a) **Ranked Choice Voting Presidential Ballot**—Each State shall provide a ranked choice voting ballot in accordance with this act to determine the national popular vote for President.
- (b) **Measuring National Popular Vote**—The results of the ranked choice voting tabulation shall constitute a national popular vote for each candidate for the offices of President and vice President of the United States.

Section 3. THE RANKED CHOICE VOTING PRESIDENTIAL BALLOT AND THE NATIONAL POPULAR VOTE COMPACT

- (a) **USE OF THE RANKED CHOICE VOTING PRESIDENTIAL BALLOT IN STATES THAT HAVE ADOPTED THE NATIONAL POPULAR VOTE COMPACT**—Each State having adopted the National Popular Vote Compact shall use the aggregate results of the ranked choice voting presidential ballot across all states and the District of Columbia to measure the national popular vote for the President and vice President of the United States. These results shall be used in accordance with the provisions set out in the National Popular Vote compact, except that the Election Assistance Commission will have the authority and responsibility of tabulating all votes cast pursuant to this Act and reporting out the national popular vote winner.
- (b) **RANKED CHOICE VOTING PRESIDENTIAL BALLOT IN STATES THAT HAVE NOT ADOPTED THE NATIONAL POPULAR VOTE COMPACT**—Each State not a party to the National Popular Vote

²¹² Language has been modeled on proposed and existing legislation. *See* Ranked Choice Voting Act, H.R. 4464, 116th Cong. (2019); An Act to Establish Ranked-Choice Voting (Maine 2016). This proposed Act does not necessarily address all uniform standards that would help improve the RCV presidential election. For instance, Congress should also consider provisions defining ballot access requirements.

Separately, we believe that proposed ranked choice voting provisions and the accompanying uniform standards in this legislation could survive constitutional scrutiny as independent (from the NPVIC) federal legislation. But given the benefits, discussed above, of tying the NPVIC to ranked choice voting, this Article proposes that these uniform standards be implemented under the NPVIC umbrella.

Compact shall conduct the ranked choice voting ballot and tabulation procedures in accordance with this act.

- (1) The results of the tabulation in States not party to the National Popular Vote Compact shall only be used in determining the national popular vote totals.
 - (2) The results of the tabulation of the national popular vote in States not party to the National Popular Vote Compact in no way directs non-party States to appoint or cast its electoral votes in any particular manner; each State is free to appoint its electors in any manner it so chooses.
- (c) **NO EFFECT ON STATE POWER TO DETERMINE MANNER OF APPOINTING ELECTORS**—This Act shall not interfere with a State’s choice to determine the manner in which it appoints its electors; accordingly, this title shall not prevent any State that is party to the National Popular Vote Compact from withdrawing from the National Popular Vote Compact, but such withdrawing States will remain obligated to use the ranked choice voting presidential ballot and tabulation procedures in accordance with this title.

Section 4. THE RANKED CHOICE VOTING BALLOT AND TABULATION PROCEDURES

- (a) **BALLOT DESIGN**—The Election Assistance Commission shall promulgate ballots in accordance with the following, and each State shall ensure that the ballot used to tabulate the ranked choice vote for the President and vice President in their state meets the following requirements:
- (1) The ballot shall have the same candidates listed.
 - (2) The ballot shall have an option for a single write-in candidate.
 - (3) The ballot shall limit the number of rankings available to 5.
 - (4) The ballot shall include instructions, as determined necessary by the Election Assistance Commission, to enable the voter to rank candidates and successfully cast the ballot.²¹³
- (b) **BALLOT USAGE** - States may choose to use the model ballot provided by the Election Assistance commission on its own or to integrate the ranked choice voting ballot with another ballot used on the national Election Day.
- (c) **Tabulation Process**—
- (1) **AUTHORITY TO CONDUCT TABULATION PROCESS**—The Election Assistance Commission shall have the authority to

²¹³ While this Article does not propose instructions, the authors believe that a uniform set of instructions would be necessary to ensure the effectiveness of the legislation and the administration of the ranked choice voting presidential ballots and tabulation procedures.

tabulate the votes from each state and determine the candidate receiving the greatest number of votes nationally.

- (2) DETERMINATION OF CANDIDATE'S NUMBER OF VOTES—The number of votes received by a candidate in either the initial tabulation or in an additional round of tabulation shall be equal to the number of ballots on which the candidate is the highest ranked continuing candidate
- (A) THE PROCESS—Each ballot shall count as one vote for the highest-ranked continuing candidate on that ballot. If two or fewer continuing candidates remain, the candidate with the fewest votes is defeated, the candidate with the greatest number of votes is elected and tabulation is complete. But if more than two continuing candidates remain, the continuing candidate with the fewest votes is defeated, and a new round begins.
- (3) CRITERIA FOR NATIONAL PREFERRED PRESIDENTIAL CANDIDATE—A candidate shall be the national preferred presidential candidate if—
- (A) the candidate receives a number of votes greater than 50 percent of the number of ballots cast in the election; or
- (B) in the event that no candidate receives greater than 50 percent of the number of ballots in the first round of tabulation, the candidate receiving the greatest number of votes of the remaining continuing candidates.
- (d) SKIPPED RANKINGS—In the event that a voter has left an available ranking position blank and ranks a candidate in a lower position, then the subsequently ranked candidates shall be moved to the highest available ranking(s).
- (e) INCOMPLETE BALLOT—In the event that a voter does not rank candidates for the total allotted number of rankings, then the ballot shall be set aside as inactive after the last ranked position is reached.
- (f) OVERVOTES—In the event that a voter has ranked more than one candidate at the same ranking, then the ballot shall be set aside as inactive if and when the overvoted ranking is reached in a round of tabulation.
- (g) TIES—In the event of a tie:
- (1) in the final round, the presidential elector certifying official of each state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.
- (2) between last-place candidates in any round must be decided by lot, and the candidate chosen by lot is defeated. The result of the tie resolution must be recorded and reused in the event of a recount.
- (h) REPORTING RESULTS—The Election Assistance Commission shall communicate a ballot report for the presidential race that lists, for each ballot, the presidential slate indicated at each ranking order on a state-by-state basis. The ballot report shall conform, to the extent possible, to the cast vote

record common data format standards promulgated by the National Institute for Standards and Technology (NIST).

Section 5. RECOUNT PROCEDURES

- (a) PROCEDURE—This section describes the process and procedures that must be used in the event of a recount of the ranked choice voting presidential ballots. The Election Assistance Commission shall be responsible for promulgating regulations necessary to carry out the provisions in this Section.²¹⁴
- (b) TRIGGERING EVENT—This recount process shall occur when a candidate for President or vice President of the United States requests a recount of the votes cast using the ranked choice voting presidential ballots and the tally of the votes in the first count are within 0.1%.
- (c) RECOUNTS INVOLVING TWO CANDIDATES IN THE FINAL ROUND OF RANKED CHOICE VOTING—When the candidate finishing second requests a recount of the final two continuing candidates from the last round of tabulation, the recount shall proceed as follows:
 - (1) All ballots shall be divided into the following categories:
 - (A) LEADING CANDIDATE BALLOTS—Ballots that rank the leading candidate first or ahead of the second candidate;
 - (B) Secondary Candidate Ballots—Ballots that rank the second candidate first or ahead of the leading candidate;
 - (C) DISPUTED BALLOTS—Ballots for which it cannot be immediately determined which candidate was selected by the voter; and
 - (D) DISCARDED BALLOTS—Ballots that do not rank either of the two final continuing candidates or which have been exhausted.
 - (2) Leading candidate and secondary candidate ballots shall be tallied and counted.
 - (3) Disputed ballots shall be verified and counted toward the leading candidate or secondary candidate if it can be determined that one candidate ranked ahead of the other on a specific ballot. Any ballots which cannot be resolved shall be added to the discarded ballots category.
 - (4) The sum of resolved disputed ballots with either the leading candidate or secondary candidate ballot shall be used as the final result.

²¹⁴ A recount could be carried out on a state-by-state basis, depending on the results in each state or on a national basis. This Article does not argue for one choice over the other.

- (5) Discarded ballots and disputed ballots not counted in any candidates tally shall be added to the total count to obtain the total votes counted.
 - (6) If the requesting candidate concedes the recount before all ballots have been counted, the original ranked choice vote count will be used as the final result.
- (d) RECOUNTS INVOLVING THREE CANDIDATES IN THE PENULTIMATE ROUND OF RANKED CHOICE VOTING—When a candidate finishing third requests a recount of the top three continuing candidates from the penultimate round of tabulation, the recount shall proceed as follows:
- (1) All ballots shall be divided into the following categories:
 - (A) LEADING CANDIDATE BALLOTS—Ballots that rank the leading candidate first or ahead of the second and third place candidates;
 - (B) SECONDARY CANDIDATE BALLOTS—Ballots that rank the second candidate first or ahead of the first and third place candidates;
 - (C) THIRD CANDIDATE BALLOTS—Ballots that rank the third candidate first or ahead of the first and second place candidate;
 - (D) DISPUTED BALLOTS—Ballots for which it cannot be immediately determined which candidate was selected by the voter; and
 - (E) DISCARDED BALLOTS—Ballots that do not rank any of the top three continuing candidates or which have been exhausted.
 - (2) Leading candidate, secondary candidate, and third candidate ballots shall be tallied and counted.
 - (A) While counting the secondary candidate ballots, additional tallies should be made and noted of:
 - 1. Those that rank the leading candidate above the third-place candidate;
 - 2. Those that rank the third-place candidate above the leading candidate;
 - 3. Those that ranked neither.
 - (3) Disputed ballots shall be verified and counted toward the leading candidate, secondary candidate, or third candidate if it can be determined that one candidate ranked ahead of the others on a specific ballot. Any ballots which cannot be resolved shall be added to the discarded ballots category.
 - (4) The sum of resolved disputed ballots with either the leading candidate, second candidate, or third candidate ballot shall be used as the final result.
 - (A) If the third candidate who requested the recount still has the fewest votes after the recount, then the recount ends

because that candidate is eliminated, and the rest of the tally is unaffected.

- (B) If, after the initial recount of the leading candidate, secondary candidate, third candidate ballot, and disputed ballots, the third candidate takes the place of the second candidate, the sub-group tallies from (d)(2)(A) of this Section shall be used to allocate the second candidate's ballots to the leading candidate, the third candidate, and the discarded ballot tally.
- (5) Discarded ballots and disputed ballots not counted in any candidates tally shall be added to the total count to obtain the total votes counted.
- (6) If the requesting candidate concedes the recount before all ballots have been counted, the original ranked choice vote count will be used as the final result.

Section 6. NO EFFECT ON ELECTIONS FOR STATE AND LOCAL OFFICE

Nothing in this Act or in any amendment made by this Act may be construed to affect the manner in which a State carries out elections for State or local office.

APPENDIX 3: NEWLY PROPOSED COMPACT BY THIS ARTICLE'S
AUTHORS—"INTERSTATE COMPACT FOR RANKED CHOICE
VOTING IN NATIONAL POPULAR VOTE
ELECTIONS FOR PRESIDENT"²¹⁵

The Interstate Compact for Multi-State Ranked Choice Voting in Presidential Elections is enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows.

Interstate Compact for Multi-State Ranked Choice Voting in Presidential Elections

Article I—Purpose

The purpose of this interstate compact is to facilitate the implementation by multiple states of ranked choice voting in presidential elections when The Agreement Among the States to Elect the President by National Popular Vote governs the appointment of presidential electors.

Article II—Membership

Any state may become a member of this compact.

(1) recognizes the authority of the Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections over the matters addressed by this Compact that in the event of a conflict the Commission's rules and regulations supersede its own law in matters addressed by this Compact;

(2) specifies that that state will include on its ballot any presidential slate that has met the requirements for ballot access of any member state by September 1 of any presidential election year, provided that the presidential slate has provided to the chief elections official of each member state the names of candidates for the position of presidential electors nominated in accordance with that state's law;

(3) specifies that its chief elections official will, no later than 10 days after the day established by Congress for appointing presidential electors, communicate a certified statement of the vote count in containing the cast vote records of all ballots cast in its state in electronic form to the Commission and make such statement freely available to the public. This certified statement of the vote count shall communicate a ballot report for the presidential race that lists, for each ballot, the presidential slate indicated at each ranking order. The ballot report shall conform, to the extent possible, to the cast vote record common data format standards promulgated by the National Institute for Standards and Technology (NIST).

²¹⁵ The authors developed this language of what an RCV Compact might look like in conjunction with John Koza of National Popular Vote Inc.

Article III—Procedure for Identifying First and Second Place Presidential Slates

This article shall govern the appointment of presidential electors in each member state in any year in which this compact is in effect in five or more states on July 20 of any year when presidential electors are to be appointed and in which The Agreement Among the States to Elect the President by National Popular Vote governs the appointment of presidential electors.

The Commission shall designate as the “multi-state first-place presidential slate” the presidential slate with the largest number of votes after the final round of tabulation and shall designate as the “multi-state second place presidential slate” with the second largest number of votes after the final round of tabulation.

The chief election official of each member state shall treat as conclusive the certification of votes made by the Commission.

The Commission shall immediately release to the public all statements of vote counts as they are determined or obtained.

Article IV—Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections

The Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections (“Commission”) is hereby created as a body politic and corporate, with succession for the duration of this Compact, as an agency and instrumentality of the governments of the respective Parties.

The Commission shall consist of the chief election official of each Party, ex officio, or the chief election official’s designee.

Each member of the Commission is entitled to vote on all matters before the Commission. Matters before the Commission shall be decided by a simple majority unless otherwise provided.

The Commission shall provide for its own organization and procedure, and may adopt rules and regulations governing its meetings and transactions.

The Commission shall organize, annually, by the election of a Chair and Vice Chair from among its members. A majority Commission members shall constitute a quorum for the transaction of business at any meeting of the Commission.

The Commission shall annually adopt a budget for each fiscal year and the amount required to balance the budget shall be apportioned equitably among the Parties by unanimous vote of the Commission. The appropriation of such amounts shall be subject to such review and approval as may be required by the budgetary processes of the respective Parties.

The Commission shall promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this Compact. Each Party, in accordance with its respective statutory authorities and applicable procedures, shall adopt and enforce rules and regulations to

implement and enforce this Compact and the programs adopted by such Party to carry out the programs contemplated by this Compact.

The Commission shall promulgate rules and regulations concerning the content of ranked choice voting ballots in presidential elections, the content, the collection, and tabulation of ballot reports, and the security of the collection and tabulation process.

The Commission shall collect ballot reports from each of the member states and tabulate them in accordance with this Compact and its rules and regulations. The Commission shall, as soon as feasible, certify the results of its tabulation and release them to the chief election official of each Party. The Commission shall include with the results of its tabulation the combined results from all Parties and individual statewide results from each Party.

Article V—Other Provisions

This compact shall take effect when any five states have enacted this compact in substantially the same form and each of these enactments have taken effect and The Agreement Among the States to Elect the President by National Popular Vote (“NPVIC”) has taken effect.

Any member state may withdraw from this compact, except that a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

When the NPVIC is in effect and fewer than five states have adopted the RCV Compact, member states agree to report out their first choice totals as the popular vote totals from their state.

When the RCV Compact is in effect and a member state is not a member of the NPVIC, it will award its electoral votes to the winner of the ranked choice voting tally or tallies in its state as defined in its state law.

The chief executive of each member state shall promptly notify the Commission of when this compact has been enacted and has taken effect in that official’s state, when that official’s state has withdrawn from this compact, and when that official deems that this compact has taken effect generally.

If any provision of this compact is held invalid, the remaining provisions shall not be affected.

Article VI—Definitions

For purposes of this compact,

“cast vote record” means an archival tabulatable record of all votes produced by a single voter from a given ballot containing the presidential slate indicated at each ranking.

“chief executive” means the Governor of a State of the United States, the Mayor of the District of Columbia, or the chief executive officer of any other jurisdiction entitled by law to appoint presidential electors;

“elector slate” means a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

“chief election official” means the state official or body that is authorized to certify the number of votes cast for each presidential slate in the state;

“Commission” means the Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections created in Article IV of this Compact.

“Presidential elector” means an elector for President and Vice President of the United States;

“Presidential elector certifying official” means the state official or body that is authorized to certify the appointment of the state’s presidential electors;

“Presidential slate” means a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;

“ranked choice voting” means a voting method where voters rank presidential slates in order of preference, with each ballot counting as a single vote for its highest-ranked presidential slate, and votes are tabulated in rounds in which the presidential slate with the fewest votes is eliminated and those votes transferred to the next-highest vote on each ballot, continuing until two presidential slates remain.

“state” means any jurisdiction entitled by law to appoint presidential electors, including, but not limited to, a state of the United States and the District of Columbia.

