

1-1-11

Committee Members,

Thank you for the opportunity to testify today. I am representing myself, a small business owner, and I am also representing some thousands of citizens across the state who can not be here in person as the organizer of Grassroots in Michigan Tea Party. **I am and we are opposed to the National Popular Vote Compact**

The NPVC proposal is a complex issue as evidenced by the 464 pages of their book

~~However, in a nutshell the NPVC is: A state compact to elect the president of the United States by popular votes as~~ opposed to the Electoral College system. These bills will take effect only when states with a majority of the electoral votes have passed similar legislation. States with electoral votes totaling 270 of the 538 electoral votes would have to pass NPV bills before the compact kicks in and any state's bill could take effect.

**To date as August 9, 2011 from the National Conference of State Legislatures**

<http://www.ncsl.org/default.aspx?tabid=20944>

### **State Action on National Popular Vote**

Between 2006 and 2011, every state legislature in the nation considered a National Popular Vote bill. Eight states, Maryland, New Jersey, Hawaii, Illinois, Washington, Massachusetts, California, Vermont and D.C. in 2010 have enacted NPV bills, and governors in four have vetoed NPV bills. In 12 states, including Michigan where a 2008 Bill died in Committee) an NPV bill has passed one chamber of the legislature.

### ***Passed One Chamber 12 States Including MI but the 2008 Bill died in Committee***

States where NPV legislation has passed one chamber of the legislature are: Arkansas (2009) Colorado (2009) Connecticut (2009) Delaware (2009 and 2011) **Michigan (2008) Died in Committee** Nevada (2009) New Mexico (2009) New York (2010 & 2011) North Carolina (2007) Oregon (2009) Rhode Island (2009 and 2011) Vermont (2009)

### **Rescinding Participation 3 States**

**Maryland considered bills in 2009 and 2010 to rescind its participation in the compact; both bills failed to pass. New Jersey also considered withdrawing in 2008 and 2009, but that bill failed to pass. Both states have bills pending in 2011 to rescind their participation, as does Washington.**

I am not a policy or Constitutional expert however I am a researcher. Therefore, I based my research and testimony on renowned policy and Constitutional experts who have made available their reports based on their own painstaking research of the facts.

Those include but not limited to The Heritage Foundation, Cato Institute, *Dr. John Fortier*, Director of the Democracy Project at the Bipartisan Policy Center. Michigan Law Review. *Morton C. Blackwell*, President of the Leadership Institute All agree that the NPVC is bad policy.

### **From The Heritage Foundation**

**No. 73 October 26, 2011 A Legal Memorandum**

The National Popular Vote (NPV) plan is the latest in a long line of schemes designed to replace the Electoral College. Imbued with the ideals of this nation's Founders, the Electoral College has proved itself to be both effective in providing orderly elections for President and resilient in allowing a stable transfer of power of the leadership of the world's greatest democracy. Therefore, while it would be a mistake to replace the Electoral College, replacing this system with the NPV would be a disaster. The NPV would devalue the minority interests that the Founders sought to protect, create electoral administrative problems, encourage voter fraud, and radicalize the U.S. political system. It also would likely violate the U.S. Constitution's Compact Clause while directly contravening the Founders' view of federalism and a representative republic. In an age of perceived political dysfunction, effective policies already in place—especially successful policies established by this nation's Founders, such as the Electoral College—should be preserved.

**From: Cato Institute A Policy Analysis**

**No. 622 October 13, 2008**

The National Popular Vote plan (NPV), ...proposes an interstate compact to bring about direct election of the president of the United States. The proposal eliminates states as electoral districts in presidential elections by creating a national electoral district for the presidential election, thereby advancing a national political identity for the United States. States with small populations and states that are competitive may benefit from the Electoral College. Few states clearly benefit from direct election of the president. NPV brings about this change without amending the Constitution, thereby undermining the legitimacy of presidential elections. It also weakens federalism by eliminating the role of the states in presidential contests. NPV nationalizes disputed out-comes and cannot offer any certainty that states will not withdraw from the compact when the results of an election become known. ~~NPV will encourage presidential campaigns to focus their efforts in dense media markets where costs per vote are lowest; many states now ignored by candidates will continue to be ignored under NPV. For these reasons, states should not join the National Popular Vote compact.~~

**August, 2011** "Republican National Committee Chairman Reince Priebus and other officials said their aim was to send a message to state legislatures around the country that that the GOP is dead set against switching to a national popular vote to elect the president and unalterably opposed to ditching the Constitution's mandate for an electoral college vote count to decide presidential elections."

**From: The Michigan Law Review** " As a creative, unorthodox attempt at Electoral College reform, the NPV deserves the attention it has garnered. But, as this Comment demonstrates, the NPV fails on both legal and sociological grounds. From a legal perspective, the NPV overlooks significant constitutional and practical-institutional obstacles. From a sociological perspective, the NPV is structurally incapable of dis-embedding the federalist theory underlying the Electoral College. ... <http://www.michiganlawreview.org/articles/ideological-endowment-the-staying-power-of-the-electoral-college-and-the-weaknesses-of-the-national-popular-vote-interstate-compact>

*Morton C. Blackwell, President of the Leadership Institute  
Issue 183 – July 13, 2011*

State legislators should consider carefully the disruption NPV would bring to the Electoral College system, which was a part of the grand compromise enacted at the 1789 Constitutional Convention to protect states' rights and balance the power of the small states against the larger states...The Founders never intended that the states should become merely administrative appendages of the federal government, much less that the United States become a unitary, centralized, plebiscitary democracy. NPV would push America along that dangerous and originally unintended path. Beyond preserving federalism, there are other powerful reasons to oppose the NPV plan, ...For example, NPV would greatly incentivize vote-stealing because big-city political machines would realize that massive numbers of fraudulent votes they could engender could swing the electoral votes beyond their states and be counted toward a national popular vote plurality victory for their presidential candidate.

Because of the complexity of issues and the time constraints involved to represent a comprehensive view I have made copies of both Policy Analysis by the Cato Institute and the A Legal Memorandum publish by The Heritage Foundation for each Committee Member

So I will conclude by saying, the National Popular Vote Compact is wrong for Michigan and for our Country and I urge you to reject any NPVC Bill

**AT THE CLOSE OF THE 1789 CONSTITUTIONAL CONVENTION,  
a woman asked Benjamin Franklin what type of government  
the Constitution was bringing into existence.  
Franklin replied, "A (representative) republic, if you can keep it."**

**I intend on keeping it!**

Thank you  
Joan Fabiano  
Grassroots in Michigan Tea Party  
Small business owner  
4965 Deer Run Ln Holt, MI

# Legal Memorandum

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No. 73  
October 26, 2011



## Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme

*Hans A. von Spakovsky*

**Abstract:** *The National Popular Vote (NPV) plan is the latest in a long line of schemes designed to replace the Electoral College. Imbued with the ideals of this nation's Founders, the Electoral College has proved itself to be both effective in providing orderly elections for President and resilient in allowing a stable transfer of power of the leadership of the world's greatest democracy. Therefore, while it would be a mistake to replace the Electoral College, replacing this system with the NPV would be a disaster. The NPV would devalue the minority interests that the Founders sought to protect, create electoral administrative problems, encourage voter fraud, and radicalize the U.S. political system. It also would likely violate the U.S. Constitution's Compact Clause while directly contravening the Founders' view of federalism and a representative republic. In an age of perceived political dysfunction, effective policies already in place—especially successful policies established by this nation's Founders, such as the Electoral College—should be preserved.*

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Our system for electing a president has worked pretty well. There is no real case being made that it will work better if changed—only that it will look nicer if one subscribes to one particular vision of how democracies should work.... We are so accustomed to stable, generally good government that we sometimes forget that failure of government structures is historically

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### Talking Points

- The National Popular Vote scheme is an unconstitutional attempt to eliminate the Electoral College, because the proposed state compact would require congressional approval.
- The NPV scheme would elevate the importance of urban centers and diminish the influence of small states and rural areas.
- It would lead to closer elections, more recounts, increased litigation over provisional and other ballots, and conflicts over the results of presidential elections.
- It would allow the election of individuals with unprecedented small pluralities, raising grave issues about the legitimacy of a winner and any actions he took as President.
- It would encourage voter fraud since fraudulent votes cast anywhere (especially in one-party states) could change the outcome of a national race.
- The NPV scheme strikes directly at the Founders' view of federalism and a representative republic that balances popular sovereignty with structural protections for state governments and minority interests.

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This paper, in its entirety, can be found at:  
<http://report.heritage.org/lm0073>

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much more common than success.... [W]e tinker with our success at our peril.

Bradley A. Smith, former Chairman, Federal Election Commission<sup>1</sup>

Since the 2000 U.S. presidential election, there have been many ill-informed calls to abolish the Electoral College. Even before that contentious election, there had been more than 700 proposals introduced in Congress to amend the Constitution to change the Electoral College—more than on any other topic.<sup>2</sup>

The latest scheme, the National Popular Vote (NPV) plan, is bad public policy. The NPV plan would:

- Diminish the influence of smaller states and rural areas of the country;
- Lead to more recounts and contentious conflicts about the results of presidential elections; and
- Encourage voter fraud.

The NPV plan also strikes at the Founders' view of federalism and a representative republic—one in which popular sovereignty is balanced by structural protections for state governments and minority interests.

### The Electoral College and the NPV

The Constitution provides that “Each State shall appoint, in such Manner as the Legislature there-

of 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.”<sup>3</sup> Although electors were initially appointed directly by state legislatures, some states like Pennsylvania and Virginia allowed popular election even in the first presidential election.<sup>4</sup>

By 1836, only South Carolina did not provide for the direct election of electors, and “since the Civil War, electors have been popularly chosen in all states.”<sup>5</sup> The slate of electors chosen by voters then cast their votes for President and Vice President in their respective states on the first Monday after the second Wednesday in December.<sup>6</sup> Forty-eight states have a winner-take-all system that allocates all of their electoral votes to whatever presidential candidate wins the popular vote in that state.<sup>7</sup>

Changing or eliminating the Electoral College can be accomplished only by an amendment to the Constitution, which requires the consent of two-thirds of Congress and three-fourths of the states.<sup>8</sup> From a political standpoint, there is almost no probability that such an amendment will be approved in the near future.

Consequently, the NPV<sup>9</sup> scheme proposes an interstate compact in which participating states agree in advance to automatically allocate their electoral votes to the winner of the national popular vote, disregarding the popular vote results in their states or what the relevant legislatures might then

1. Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 3, 217 (2008).
2. *Frequently Asked Questions*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/faq.html> (last visited Oct. 17, 2001). From 1889 to 2004, 595 amendments were introduced in Congress to amend the Electoral College. CONG. RESEARCH SERV., THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 17 (2004).
3. U.S. CONST. art. II, § 1, cl. 2.
4. *McPherson v. Blacker*, 146 U.S. 1, 29 (1892).
5. CONG. RESEARCH SERV., THE ELECTORAL COLLEGE: 1–2.
6. U.S. CONST. amend. XII; 3 U.S.C. §§ 1–21. Congress meets in joint session to count the electoral votes in January. If no candidate wins a majority of the electoral votes, the House selects the President and the Senate selects the Vice President, with each state delegation in the House having only one vote. U.S. CONST. amend. XII.
7. Nebraska and Maine provide for allocation of their electoral vote by congressional districts with two electors awarded to the state-wide winner.
8. U.S. CONST., art. V.
9. See NATIONAL POPULAR VOTE, [www.nationalpopularvote.com](http://www.nationalpopularvote.com) (last visited Oct. 11, 2011). For a justification for this change in extensive detail, see also JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 2011.

desire. The NPV would “put the fate of every presidential election in the hands of the voters in as few as 11 states and thus...give a handful of populous states a controlling majority of the Electoral College,”<sup>10</sup> undermining the protections of the Electoral College.

This agreement would go into effect only after “states cumulatively possessing a majority of the electoral votes” needed to win an election (270 votes) join the purported compact. Because it is far easier politically to get a smaller number of states with the required electoral votes to join the compact than it is to get two-thirds of Congress and three-fourths of the states to pass an amendment, the compact is an expedient way for proponents of the NPV to circumvent the Electoral College without formally amending the Constitution.

So far, eight states representing a combined 132 electoral votes (Illinois, Washington, New Jersey, Hawaii, Maryland, Vermont, California, and Massachusetts) and the District of Columbia have approved the proposed scheme. The NPV is therefore 49 percent of the way to the goal of 270 votes—and to the activation of this unconstitutional, politically dubious, and dangerous cartel.

### The Electoral College: Compromise and the U.S. Constitution

In creating the basic architecture of the American government, the Founders struggled to satisfy each state’s demand for greater representation while attempting to balance popular sovereignty against the risk posed to the minority from majoritarian rule.<sup>11</sup> Smaller states in particular worried that a system that apportioned representatives on the basis of population would underrepresent their interests in the federal structure.

Out of this concern arose a compromise proposed by the Committee of Eleven at the Constitutional Convention,<sup>12</sup> which helped to balance the competing interests of large states with those of smaller states. By allocating electors on the basis of a state’s cumulative representation in the House and Senate, the Electoral College system avoids purely population-based representation but still gives larger states greater electoral weight.

Furthermore, the arrangement prevents candidates from winning an election by focusing solely on high-population urban centers and forces them to seek the support of a larger cross section of the American electorate. This aspect of the U.S. election system addresses the Founders’ fears of a “tyranny of the majority,” a topic frequently discussed in the *Federalist Papers*. In the eyes of the Founders, this tyranny was as dangerous as the risks posed by despots like King George and had the potential to marginalize sizeable portions of the population, particularly in rural and more remote areas of the country. The Electoral College was devised as a response to these fears as a means of “ensuring the participation of a broad regional diversity in the outcome of elections.”<sup>13</sup>

Aside from shaping the electoral system, this fear of marginalizing large portions of the population is also the reason that the Constitution calls for a representative republic and not a direct democracy. Under the NPV, this electoral benefit to states would disappear, and presidential candidates could win elections by catering to high-density population centers and ignoring the rest of the country. As John Samples argues, the NPV would “encourage presidential campaigns to focus their efforts in dense media markets where costs per vote are lowest,” and states that are sometimes ignored now will “continue to be ignored under NPV.”<sup>14</sup> There is no ques-

10. Letter from John Boehner, House of Rep. Speaker, Mitch McConnell, Senate Republican Leader, and Rick Perry, Governor of Texas, to Governors of the Fifty States (June 29, 2011) (hereinafter Boehner Letter), available at <http://www.flashreport.org/blog/wp-content/uploads/2011/08/Letter-Boehner.McConnell.Perry-1.pdf>.
11. See Tara Ross, *The Electoral College: Enlightened Democracy*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 15 (Nov. 1, 2004), available at <http://www.heritage.org/research/reports/2004/11/the-electoral-college-enlightened-democracy>.
12. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 573–575 (W.W. Norton & Co. 1987).
13. Boehner Letter.
14. John Samples, *A Critique of the National Popular Vote Plan for Electing the President*, CATO INSTITUTE POLICY ANALYSIS NO. 622 (Oct. 13, 2008), available at <http://www.cato.org/pubs/pas/pa-622.pdf>.

tion that smaller states receive less attention than larger states, but any national direct election system “would magnify, not improve, this problem.”<sup>15</sup>

Despite these facts, both large and small states have joined the National Popular Vote movement. The NPV, at face value, may appeal to traditionally democratic notions of “every vote being equal.” Yet its supporters seemingly have no concern for the many other non-majoritarian aspects of the governmental structure established by the Constitution, such as:

- Every state having two Senators regardless of its size or population;
- A President’s ability to veto legislation passed by a majority of the people’s popularly elected representatives;
- The lifetime appointment of federal judges whose power is inherently undemocratic;
- The unequal representation in the U.S. House of Representatives due to widely varying populations in congressional districts between different states, such as Delaware (with a population of almost 900,000) and Wyoming (with a population of only 600,000); and
- The unequal apportionment among the states of House districts caused by the inclusion of large numbers of ineligible voters (such as non-citizens) in the census count.

As former Federal Election Commission (FEC) Chairman Bradley Smith says, “If such direct checks on popular majorities can be reasonable and acceptable in a democracy, then it is difficult to argue that indirect checks on popular majority such as the Electoral College, are inherently illegitimate.”<sup>16</sup>

We should also not forget that one of the major purposes of the Bill of Rights is to protect us from majoritarian rule—otherwise, popular democracy could abolish freedom of religion, limit political speech, or restrict the ability to assemble and asso-

ciate with disfavored minorities. The NPV movement seeks to create an unfair and unconstitutional system that diminishes the voting rights of citizens throughout the country and raises the prospect of increased voter fraud and post-election litigation contests over the outcome.

### **The Unconstitutionality of the NPV: Compact Clause**

Supporters of the NPV claim that because the Constitution gives state legislatures the power to determine how electors are chosen, the NPV is constitutional and requires no approval by Congress. Such claims, however, are specious. The NPV is unconstitutional because it would give a group of states with a majority of electoral votes “the power to overturn the explicit decision of the Framers against direct election. Since that power does not conform to the constitutional means of changing the original decisions of the framers, NPV could not be a legitimate innovation.”<sup>17</sup>

The Constitution’s Compact Clause provides that “No State shall, without the Consent of Congress... enter into any Agreement or Compact with another State.”<sup>18</sup> The Founders created the Compact Clause because they feared that compacting states would threaten the supremacy of the federal government in matters of foreign affairs and relations among the states.<sup>19</sup> If states could make agreements among themselves, they could damage the nation’s federalist structure. Populist states, for example, cannot agree to have their U.S. Senators vote to seat only one Senator from a less populous state.

The very purpose of this clause was to prevent a handful of states from combining to overturn an essential part of the constitutional design. The plain text makes it clear that all such state compacts must be approved by Congress.

By circumventing the checks and balances of Congress, the NPV would risk setting a prec-

15. Ross, *supra* note 11, at 6.

16. Smith, *supra* note 1, at 198–199.

17. Samples, *supra* note 14, at 9.

18. U.S. CONST. art. I, § 10, cl. 3.

19. THE HERITAGE GUIDE TO THE CONSTITUTION 178 (Edwin Meese III et al. eds., 2005).

edent that states can validate non-congressionally approved compacts as a substitute for a constitutional amendment. Undoubtedly, many liberal activist groups would like to create their own compacts or to lobby states individually to join compacts. Such compacts could then create de facto constitutional amendments regarding many different public policy issues—including purely federal matters.

Even though the plain text of the Constitution makes it clear that no compact shall be made by states without the consent of Congress, courts have recognized certain narrow agreements as exceptions to the limitations of the Compact Clause.<sup>20</sup> Interstate compacts that governed boundary disputes between states were almost always upheld as valid.<sup>21</sup> Although states sometimes did submit their compacts to Congress for ratification, there has been an implied understanding that interstate agreements were legitimate as long as they had a limited, specifically local impact and did not affect national prerogatives.

In the 1920s, interstate compacts expanded their scope and began to establish regulatory agencies.<sup>22</sup> As the 20th century progressed, compacts were increasingly used to tackle broader issues facing the states. Modern interstate compacts can govern everything from environmental issues to water conservation, waste disposal, education, child welfare, crime control, and others—if approved by Congress.<sup>23</sup>

Although some of the interstate compacts have expanded to include more national issues, none would affect the federal government or non-participating states to the extent that the NPV does. The NPV addresses an area of national concern by effectively abolishing the Electoral College and chang-

ing the method of choosing the President. However, unlike other agreements that are exempt from the requirement of congressional approval, the NPV aims to control the behavior of compacting and non-compacting states alike and “harms those states whose citizens benefit from the current system of election.”<sup>24</sup>

Should the NPV movement reach its target of 270 electoral votes, states not involved in the compact will have been co-opted into an electoral regime despite having never consented to the compact. This distinction delineates this compact from others, which have dealt with even arguably national issues.

### **The Unconstitutionality of the NPV: *U.S. Steel Corp.***

In *U.S. Steel Corp. v. Multistate Tax Commission*,<sup>25</sup> the Supreme Court of the United States held that the Compact Clause prohibited compacts that “encroach upon the supremacy of the United States.”<sup>26</sup> The Court emphasized that the real test of constitutionality is whether the compact “enhances state power *quoad* the National Government.”<sup>27</sup> To determine this qualification, the Court questioned whether:

1. The compact authorizes the member states to exercise any powers they could not exercise in its absence;
2. The compact delegates sovereign power to the commission that it created; or
3. The compacting states cannot withdraw from the agreement at any time.<sup>28</sup>

Unless approved by Congress, a violation of any one of these three prongs is sufficient to strike down a compact as unconstitutional; the NPV plan

20. Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?* 42 COLUM. J.L. & SOC. PROBS. 511, 516 (2009).

21. *Id.*

22. *Id.* at 518.

23. *Id.* at 519.

24. Samples, *supra* note 14, at 9.

25. 434 U.S. 452 (U.S. 1978); *see also* *Virginia v. Tennessee*, 148 U.S. 503 (1893).

26. THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 19.

27. *U.S. Steel Corp.*, 434 U.S. at 473.

28. *Id.*

violates two. Of course, congressional approval of a compact that attempts to change a provision of the Constitution without following the amendment requirement of Article V would also be invalid.

By eliminating the requirement that Congress approve a virtual constitutional amendment, the NPV would enhance the power of certain states at the expense of the national government—a result that would conflict with the first prong of the *U.S. Steel Corp.* test. Without question, the NPV deprives non-participating states of their right under Article V to participate in deciding whether the Twelfth Amendment, which governs the Electoral College, should be changed.

From a constitutional standpoint, one could argue that while states are given the power to decide how electors will be chosen, that power is not completely unrestricted. As Tara Ross has pointed out, the Constitution “presupposes that the electors belong to each individual state and the state may not delegate this responsibility outside of state borders.”<sup>29</sup> For example, in *Clinton v. New York*, the Supreme Court struck down the presidential line-item veto because it disrupted “the ‘finely wrought’ procedure that the Framers designed” in the Constitution for the enactment of statutes—a procedure that was “the product of the great debates and compromises that produced the Constitution itself.”<sup>30</sup>

Similarly, in *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court threw out state-imposed term limits on Members of Congress.<sup>31</sup> A state-imposed qualification that was intended to evade the requirements of the Qualifications Clauses of the Constitution could not stand: “To argue otherwise is to suggest that the Framers spent significant time and energy

in debating and crafting Clauses that could be easily evaded.”<sup>32</sup> Such an argument would trivialize the principles behind the Qualifications Clauses and treat them as an “empty formalism” rather than “the embodiment of a grand principle.... ‘It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.’”<sup>33</sup>

The NPV would obviously disrupt the “finely wrought procedure” that the Framers designed into our presidential election process with the Electoral College that was a product of the great debates and compromises that produced the Constitution. It would trivialize the federalism principles behind the Electoral College. The supporters of NPV are not hiding their goal: trying to manipulate the Electoral College out of existence, an objective that cannot be achieved by state compact, especially without congressional approval.

There is another component of the NPV that most likely would also violate the first prong of the *U.S. Steel* test: the plan’s guarantee that “electors would no longer be accountable to the voters in the states they are from.”<sup>34</sup> As a result, voters in other states who are ineligible to vote in a particular state—such as felons—could control that state’s electoral votes. Furthermore, “candidates could end up being elected with the electoral votes of a state in which they weren’t even qualified to be on the ballot.”<sup>35</sup>

Even more disconcerting, the NPV provides that if the “number of presidential electors nominated in a member state” is less than what the winner of the national popular vote is entitled to, that winner “shall have the power to nominate the presidential electors for that state.”<sup>36</sup> In other words, a winning

29. Tara Ross, *Federalism & Separation of Powers—Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 ENGAGE 2, 40 (Sept. 2010).

30. 524 U.S. 417, 439–440 (1998).

31. 514 U.S. 779 (1995).

32. *Id.* at 831.

33. *Id.* at 831 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), quoting *Frost & Frost Trucking Co. v. Railroad Comm’n of Cal.*, 271 U.S. 583, 594 (1926)).

34. Boehner Letter.

35. *Id.*

36. National Popular Vote, *Agreement Among the States to Elect the President by National Popular Vote*, Art. III, available at <http://www.nationalpopularvote.com/resources/43-Compact-TAATS-V43.pdf> (last visited October 19, 2011).

candidate (say a governor from another state like Texas or Massachusetts) could appoint the electors for New York even if the candidate never qualified to get on the ballot in New York; he or she could even designate as electors individuals who are not residents or qualified voters in New York.

Under the third prong of the test delineated in *U.S. Steel Corp.*, the compact must allow states to withdraw at any time. The NPV, however, places withdrawal limitations on compacting states. The plan states 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.”<sup>37</sup> This provision is in direct conflict with the *U.S. Steel Corp.* test and therefore alone renders the compact unconstitutional without congressional approval.<sup>38</sup> It could also cause an irresolvable election crisis if a state withdrew in violation of the provision and thus threw into doubt the results of a presidential election. There is no provision in the NPV for enforcing this limitation or compliance with any of the provisions of the compact.

Moreover, this withdrawal limitation is in explicit violation of the Article II provision that gives to the legislatures of each state the power to select the manner in which electors are chosen. A legislature can delegate to the people of its state the ability to choose electors, but the legislature also retains the power to withdraw that delegation. The NPV scheme would temporarily suspend that legislative power—an act that would violate the Constitution.

### The NPV Is Bad Public Policy

Outside of the question of constitutionality, however, there are also a number of public policy rea-

sons that such an amendment would be detrimental to America’s unique democratic system.

### Swing States and Political Influence

Although the point has been argued that under the current system, swing states garner the majority of candidates’ attention, swing states can change from election to election, and many states that are today considered to be reliably “blue” or “red” in the presidential race were recently unpredictable. For example, “California was competitive for decades, only becoming a Democratic presidential bastion in the last 15 years. Florida was considered a safe Republican seat as late as 1996.”<sup>39</sup> With rare exceptions, however, established urban centers like Houston, Chicago, New York City, and Los Angeles will always have high populations that vote in a predictable fashion. While the Electoral College assures that minority interests in a variety of geographic regions are protected, the NPV will help to protect only select urban interests. The Electoral College “embodies the balance [the Founders] aimed to achieve through deference to states with smaller populations and by ensuring that the interests of these states be reflected in national decision-making.”<sup>40</sup>

Although some legislators have embraced the NPV, such support appears to be rather shortsighted: Under the NPV, a majority of states will see their influence over the presidential election decrease. As John Samples of the Cato Institute has determined, the influence of a state under the Electoral College can be measured by dividing the state’s electoral votes by the total electoral votes; the measure under the NPV is the number of a state’s eligible voters divided by the total eligible voters in the country.

37. *Id.* at Art. IV.

38. Some might argue that the NPV compact has no formal enforcement mechanism and that states therefore maintain their right to withdraw as they see fit. See James Taranto, *Faithless Lawmakers*, WALL ST. J. (July 29, 2010), available at [http://online.wsj.com/article/SB10001424052748703578104575397100729241576.html?mod=WSJ\\_Opinion\\_MIDDLETopOpinion](http://online.wsj.com/article/SB10001424052748703578104575397100729241576.html?mod=WSJ_Opinion_MIDDLETopOpinion). Nevertheless, this scenario creates a constitutional Catch-22: Either the states have created an unconstitutional compact that can be enforced or the compact could cause an electoral crisis if a state should withdraw from the compact during or immediately before an election.

39. Smith, *supra* note 1, at 210.

40. Boehner Letter.

When these measurements are compared, states such as California, Hawaii, and Vermont, as well as the District of Columbia, lose influence by switching to the NPV. While California's loss is relatively small (1 percent), Hawaii would lose 42 percent of its influence, Vermont 58 percent, and the District of Columbia a stunning 62 percent. Under Samples' analysis, 29 states and the District of Columbia would lose influence under the NPV.<sup>41</sup> Based on the 2006 elections, "59 percent of voters...lived in states that would either lose influence under direct election or would be indifferent about moving away from the Electoral College."<sup>42</sup>

### Recounts

Under the NPV, recounts would be both more prevalent and more problematic. The basic principles of federalism—the principles upon which this nation was founded—were used to design the U.S. electoral process. As a result, federal elections are decentralized affairs; each of the 50 states and the District of Columbia run their own elections on the first Tuesday of November every four years or for a varying period before then in early voting states. Every state has different procedural rules for the administration of elections, from the definition of what constitutes a vote to how recounts are triggered and conducted.

The presidential election of 2000 saw an unprecedented vote recount in Florida. This recount was a belabored, emotional, costly process even though it was limited to only one state. For the most part, only one set of state laws was applicable in that recount. Under the NPV, however, any suspicions necessitating a recount in even a single district would be an incentive for a national recount. And

why not? Every additional vote a losing candidate could obtain anywhere in the country could make the difference in winning or losing the national election—even if the extra vote would not change the results of the electoral vote in that particular state under the current system.

The winner-take-all system for electoral votes reduces the possibility of a recount since popular vote totals are often much closer than the Electoral College totals. In fact, former FEC chairman Bradley Smith points out that "recounts may have been necessary in as many as six presidential elections since 1880, if a national popular vote system had been in place. That's nearly one out of every six elections"<sup>43</sup>

The prospect of a candidate challenging "every precinct, in every county, in every state of the Union," should be abhorrent to anyone who witnessed the drama, cost, delay, and undue litigation sparked by the Florida recount of 2000.<sup>44</sup> Worse still, there is little chance that the ballots would be recounted in a consistent manner across the nation or that there would be a national, as opposed to piecemeal, recount.

Election laws vary by state, which means that 50 different standards (plus the District of Columbia's) would be applied to a recount,<sup>45</sup> and no state or group of states that wanted a national recount could force other states to participate. Ironically the NPV, which is supposed to make each vote count equally, would likely result in varied and even conflicting decisions among the states as to the validity of each vote.<sup>46</sup> Moreover, while the total of the national popular vote may be close, the vote totals in particular states may not be close at all—certainly not close enough to trigger a recount under that par-

41. Samples, *supra* note 14, at 3–4.

42. *Id.* at 6. The states that lose influence under the NPV (ranked from the smallest loss of influence to the largest) are California, Oklahoma, Minnesota, Louisiana, Oregon, Mississippi, Connecticut, Colorado, Arizona, Kansas, Arkansas, Iowa, Utah, West Virginia, Nevada, New Mexico, Nebraska, Maine, Montana, New Hampshire, Idaho, Hawaii, Rhode Island, Delaware, South Dakota, North Dakota, Vermont, Alaska, D.C., and Wyoming. *Id.* at 4, Table 1.

43. Ross, *supra* note 29, at 38, citing Smith, *supra* note 1, at 207.

44. Gary Gregg, *Electoral College Watch*, NATIONAL REVIEW ONLINE (Oct. 25, 2004, 9:39 a.m.), <http://old.nationalreview.com/gregg/gregg200410270939.asp>.

45. *Enacting the Agreement Among the States to Elect the President by National Popular Vote, Hearing on SB 344 Before the S. Comm. on Legislative Operations and Elections*, 2011 Leg., 76th Sess. (Nv. 2011) (testimony of Tara Ross).

46. Smith, *supra* note 1, at 207.

ticular state's recount laws even if a losing candidate believes a national recount is warranted.

Thus, the 2000 Florida recount madness could be replicated on a national level, with new complexities added by certain states refusing to participate in the recount or even devising their own recount rules. A national recount could result in 51 potential lawsuits heading to the Supreme Court (or more if lawsuits are filed in each relevant state and federal court). The margin of victory in the popular vote could be enough to warrant a recount in the eyes of some yet not large enough to trigger a recount in specific states with large vote margins. The votes for the presidential ticket could get recounted in selected jurisdictions across the country but not in others, leading to virtually the same type of equal protection problems the Supreme Court found in *Bush v. Gore*<sup>47</sup> because of the unequal treatment of ballots by election officials in separate Florida counties.

A national recount would result in protracted litigation and confusion, thus weakening public faith in the election process, delaying the final resolution of a presidential election, and exacerbating the exact "problem" that NPV claims to be solving. Just as important, however, is the fact that the 2000 election crisis was only a temporary one—a testament to the strength and reliability of this nation's electoral system. Indeed, the current electoral system has consistently produced Presidents without a constitutional crisis. Therefore, the burden is on the NPV's supporters to justify changing a system that has functioned well for over 200 years, not those who are defending that system.<sup>48</sup>

### Closer Elections and More Crises

In addition, the NPV could destabilize America's two-party system, leading to a higher incidence of close elections. The NPV awards the presidential election to whichever candidate receives the "largest" national vote, not the majority of the national popular vote. In an electoral system defined by the NPV, numerous fringe parties and radical can-

didates, appealing solely to the largest population centers, would likely emerge. Consequently:

Presidential campaigns would devolve into European-style, multi-candidate races. As more candidates enter the field, individual votes will necessarily be divided among an ever-increasing number of candidates. The result will be lower vote totals per candidate and an increased likelihood that two or more candidates will have close popular vote totals.<sup>49</sup>

The winner-take-all allocation of electoral votes within 48 states necessitates that a candidate be popular enough to appeal to a broad electorate, including moderate voters, and provides the winner of the presidential race with both finality and a mandate even if his popular vote total is slightly below 50 percent. With its plurality requirement, however, the NPV could lead to the election of presidential candidates by unprecedented, small margins. These smaller victory margins, combined with the overall decrease in popular support for a single candidate, could trigger chaotic and contentious elections. Furthermore, a President elected by only 25 or 35 percent of the American people would not have a mandate to govern, and questions about his legitimacy could pose grave consequences both for the nation and for any actions he took as President.

The Electoral College requires a presidential candidate to win simultaneous elections across 50 states and the District of Columbia; the idea of concurrent majorities means that "the president gains a popular legitimacy that a single, narrow, national" election does not provide and emphasizes "the breadth of popular support for the winner."<sup>50</sup>

### Provisional Ballots

Under the NPV, provisional ballots could also lead to an extensive, widespread, and complex battle that could further delay and confuse the results of a presidential election. Federal law requires provisional ballots for all voters whose eligibility

47. 531 U.S. 98 (2000).

48. Gregg, *supra* note 44.

49. Ross, *supra* note 29, at 38.

50. Smith, *supra* note 1, at 203.

is called into question or who are unable to cast a regular ballot at the polling place because they are not on the list of registered voters.<sup>51</sup>

Provisional ballots are counted by local election officials only if they are able to verify that the voter was entitled to vote, which happens after the election and after an investigation of the circumstances by election officials. Provisional ballots may not affect the outcome of the majority vote within a state under the current system because the number of provisional ballots is less than the margin of victory. However, if the total number of provisional ballots issued in all of the states is greater than the margin of victory, a national battle over provisional ballots could ensue.

Losing candidates would then have the incentive to hire lawyers to monitor (and litigate) the decision process of local election officials in every corner of the nation. This process would make the isolated fights over the chads in punch-card ballots in Florida in 2000 look almost insubstantial by comparison. Furthermore, lawyers contesting the legitimacy of the decisions made by local election officials on provisional ballots nationwide could significantly delay the outcome of a national election.

### Voter Fraud

Another unforeseen consequence of the NPV is that the plan would encourage vote fraud. Currently, a fraudulent vote is counted only in the district in which it was cast and therefore can affect the electoral votes only in that particular state. Under the NPV, however, vote fraud in any state would affect the aggregate national vote.

To a would-be wrongdoer, this is a drastic increase in the potential benefit obtained from casting fraudulent ballots. Fraudsters would be encouraged to engage in fraud to obtain further votes for their national candidate or to deny votes for the opposition candidate. Under the current system, there are some states where such fraud would make

no difference, but with the NPV, every fraudulent vote obtained anywhere could make the difference in changing the outcome of the national race.

~~This prospect is even more worrisome when one~~ considers how much easier it is to cast fraudulent votes in strongly partisan neighborhoods and one-party districts where there are no (or few) members of the opposition party to work as election officials or poll watchers. There is little incentive to engage in such partisan fraud where it is most possible now, since the dominant party is likely to win anyway, but under the NPV scheme, there is an increased incentive to engage in fraud in such states that are the most corrupt and one-sided even if others have relatively clean elections. Thus, this scheme makes all states—especially one-party states and those with a history of tolerating fraud—targets for fraud, likely increasing this type of misbehavior nationwide.

It should be noted that “[t]he popular vote winner has triumphed in 42 of 45 elections.”<sup>52</sup> Supporters of NPV point to those elections (1876, 1888, and 2000) where the popular vote winner did not prevail.

But Bradley Smith concludes that “the Electoral College clearly played a democratizing and equalizing role” in the 1876 and 1888 elections that “almost certainly better corresponded to true popular sentiment than did reported popular vote totals.” Why? Because in the 1876 election, for example, where Samuel Tilden defeated Rutherford B. Hayes in the popular vote, there was “rampant vote fraud and suppression in the southern states [that] make the actual vote totals from that election unknowable.” Similarly, in the 1888 election, Southern states voted overwhelmingly for Cleveland, the national popular vote winner, while Republican Benjamin Harrison carried the rest of the nation, winning 20 of 25 states. If blacks had not had their votes suppressed, there is little doubt that Harrison, as a Republican, would have received almost the entire

51. Provisional ballots are required by the Help America Vote Act, 42 U.S.C. § 15482 (2002).

52. Smith, *supra* note 1, at 213. Some NPV supporters also point erroneously to the election of 1824 in which the House of Representatives selected John Quincy Adams over Andrew Jackson; however, since some state legislatures still selected electors, there was no actual popular vote total.

black vote and would have won the national popular vote, which he lost by less than 100,000 votes.<sup>53</sup>

### Conclusion

The NPV is both unconstitutional and bad public policy. It would devalue the minority interests that the Founders sought to protect, create electoral administrative problems, and radicalize the U.S. political system. If the proponents of the NPV believe that this change is necessary, they should convince Congress and the American people and use the proper method for amending the Constitution.

The U.S. should maintain the Electoral College, which has successfully elected Presidents throughout this nation's history in a way that best represents the diverse and various interests of America. As wisely stated by Tara Ross:

America's election systems have operated smoothly for more than 200 years because the Electoral College accomplishes its intend-

ed purposes.... [It] preserves federalism, prevents chaos, grants definitive electoral outcomes, and prevents tyrannical or unreasonable rule. The Founding Fathers created a stable, well-planned and carefully designed system—and it works.<sup>54</sup>

In an age of perceived political dysfunction, effective policies already in place—especially successful policies established by this nation's Founders, such as the Electoral College—should be preserved.

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53. *Id.* at 213. Smith also points out that the national popular vote margin of 540,000 votes between Gore and Bush in 2000 was within the margin of error, so “one cannot say with any confidence that Gore (or Bush) clearly represented the popular majority.”

54. Ross, *supra* note 11, at 13.



# Policy Analysis

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Routing

## *A Critique of the National Popular Vote Plan for Electing the President*

by John Samples

### **Executive Summary**

The National Popular Vote plan (NPV), introduced in more than 40 states, and adopted by 4, proposes an interstate compact to bring about direct election of the president of the United States. The proposal eliminates states as electoral districts in presidential elections by creating a national electoral district for the presidential election, thereby advancing a national political identity for the United States. States with small populations and states that are competitive may benefit from the electoral college. Few states clearly benefit from direct election of the president. NPV brings about this change without amending the

Constitution, thereby undermining the legitimacy of presidential elections. It also weakens federalism by eliminating the role of the states in presidential contests. NPV nationalizes disputed outcomes and cannot offer any certainty that states will not withdraw from the compact when the results of an election become known. NPV will encourage presidential campaigns to focus their efforts in dense media markets where costs per vote are lowest; many states now ignored by candidates will continue to be ignored under NPV. For these reasons, states should not join the National Popular Vote compact.

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**NPV proposes to change the way Americans elect a president by eliminating the states as election districts in favor of the nation.**

## Introduction

The U.S. Constitution provides for the election of the president of the United States in Article II, section 1 and in the Twelfth Amendment. Article II states: "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." The Twelfth Amendment provides for the casting of electoral ballots, a majority of which suffice for election. For well over a century, almost all states have elected to cast their votes by the unit rule in which the winner in a state receives all of that state's electoral votes.

The National Popular Vote (hereinafter NPV) plan proposes an interstate compact to bring about direct election of the president of the United States.<sup>1</sup> States that join the compact would agree to cast their electoral votes for the winner of the national popular vote for president. The compact would become valid once states with a majority of presidential electors sign on.<sup>2</sup> Congress must approve of the compact before states can agree to it.<sup>3</sup> By July 1, 2008, four states—Hawaii, Illinois, New Jersey and Maryland—had passed NPV; the four together control 50 electoral votes. Supporters also say the proposal has been introduced in 42 states. They hope NPV will govern the 2012 presidential election.

I begin this analysis by examining the differences between NPV's plan for electing the president and Constitution's method for doing so. I then turn to NPV's effects on the relative influence of the states in presidential elections. Although the NPV seeks to equalize the power of voters, it is Congress and state legislators that will decide the fate of this proposal. The latter will wish to know if the NPV enhances or depreciates the influences of their constituents on a presidential election. Finally, I will evaluate the costs and benefits of NPV.

## NPV and the Status Quo

NPV sets as its goal implementing a nationwide popular election of the president and vice president,<sup>4</sup> a significant change from the constitutional status quo. Under NPV, presidential electors "would reflect the nationwide will of the voters—not the voters' separate statewide wills." The states that are parties to the compact would award all their electoral votes to "the presidential slate receiving the most popular votes in all 50 States and the District of Columbia." Taken together, those votes would number at least 270 electoral votes, i.e. the necessary majority for election.<sup>5</sup> NPV does not necessarily impose election by a majority. If a plurality suffices for election, a majority of voters may have chosen someone other than the winner. Under NPV, the nation is the electoral district. In the current way of electing the president, the states are important. States qua states are represented in a presidential election because electors are allocated on the basis of both population and states. State legislatures also decide how to allocate their electors. Each state constitutes an electoral district for purposes of allocating a state's electors. NPV thus proposes to change the way Americans elect a president by eliminating the states as election districts in favor of the nation.

The current system allows states more choices in how to allocate electors. As noted, NPV proposes a winner-take-all system that follows the national popular vote; each state in the compact allocates all its electors to the candidates with the most popular votes nationwide. The Constitution empowers state legislatures to decide how to allocate electors. In practice, almost all states have selected a winner-take-all rule for allocating their electoral votes. A few states have chosen other methods of allocation, now and in the past.<sup>6</sup>

All votes would be equally weighted under NPV. As we shall later learn, there are several ways of measuring the influence of individual votes under the Electoral College. Clearly the framers did not intend to create a means to elect presidents that depended on equal weighting of individual votes. The representa-

tion given states qua states precluded such equality from the start.<sup>7</sup> This move toward equal weighting of votes also suggests how different NPV would be from the constitutional status quo.

We may summarize the differences between the two ways of electing a president. The Constitution assigns importance to the states in electing the president. NPV recognizes only a national electoral district in which individuals cast equally-weighted votes. The states matter only as contractors to the NPV compact; the agreement itself makes the allocation of state electors a function of a plurality of voters in the national district. The constitutional plan does not restrict how states may allocate their electors although almost all have chosen a winner-take-all system. NPV requires the states to have a winner-take-all system that follows the votes of a national plurality or majority. The actual majority or plurality vote for president in a state has no influence on the election of the president. In general, NPV proposes two changes to the current means of electing the U.S. president. It eliminates states as electoral districts in presidential elections. It creates through a state compact a national electoral district for the presidential election. In that way, the NPV advances a national political identity for the United States.

## The Interests of the States

The U.S. Constitution allocates electors to the states on the basis of their population (each gets one per House seat) and their equality (because each gets two electors regardless of size) (Article II, section 1). The most populous states would be less influential in electing the president than they would be under a direct election proposal. This difference is not large.<sup>8</sup> The constitutional plan (known as the electoral college) reflects population by allocating electors according to House membership, which is four times greater than the Senate membership. Moreover, a state's influence in an actual presidential election may depend on more than its relative population. A state

whose electoral votes are crucial to determining the winner of an election enjoys more influence than a state whose votes do not affect the outcome of the election.

State legislatures will likely decide the fate of the NPV.<sup>9</sup> Although many factors will affect these decisions, each legislature is likely to consider whether NPV increases or decreases the influence of their state over the presidential election. There are two ways to look at the question of which states would win and which would lose by moving to direct elections. First, I will examine the question on the basis of state's share of the total electors and its eligible voters (*the relative measure*). Next, I will turn to some estimates of the relative influence of each state in determining the winner of the presidency (*the power measure*).

### The Relative Measure

Under the current system, a particular state's influence over a presidential election may be measured by dividing a state's electoral votes by the total electoral votes for the nation. The influence of a state under direct election is measured by dividing the number of eligible voters in a state in 2000 by the total number of eligible voters in the nation in 2000.<sup>10</sup> The absolute gain or loss of a state from moving to direct election equals the difference between this measure of its influence under the electoral college and the same number under direct election. This absolute measure of state influence is difficult to interpret. I have thus constructed a relative measure of how much each state wins or loses from direct election. The relative gain or loss of a state equals its absolute gain or loss divided by the measure of its influence under the electoral college.

NPV would move us from the presidential status quo to direct election. Table 1 shows which states would gain and which would lose from this change according to the relative measure.<sup>11</sup> The first 20 states in the table may expect to gain from moving to direct election. Most of these gains are quite small. Six states may expect to gain more than 10 percent in influence according to this measure. In con-

**This move toward equal weighting of votes also suggests how different NPV would be from the constitutional status quo.**

**Table 1**  
**Relative Gains and Losses of Moving to Direct Election of the President (by State)**

State	Relative Gain or Loss from Direct Election (%)	State	Relative Gain or Loss from Direct Election (%)
Pennsylvania	20	Oregon	- 6
Michigan	15	Mississippi	- 7
Ohio	15	Connecticut	- 7
Indiana	11	Colorado	- 7
Illinois	11	Arizona	- 7
New York	11	Kansas	- 11
Florida	9	Arkansas	- 11
Virginia	8	Iowa	- 18
Wisconsin	6	Utah	- 21
Texas	6	West Virginia	- 23
North Carolina	6	Nevada	- 25
Tennessee	5	New Mexico	- 32
Massachusetts	4	Nebraska	- 32
Georgia	4	Maine	- 33
New Jersey	3	Montana	- 38
Washington	3	New Hampshire	- 38
Kentucky	2	Idaho	- 39
Missouri	2	Hawaii	- 42
South Carolina	2	Rhode Island	- 48
Maryland	1	Delaware	- 49
Alabama	0	South Dakota	- 49
California	- 1	North Dakota	- 56
Oklahoma	- 2	Vermont	- 58
Minnesota	- 3	Alaska	- 61
Louisiana	- 4	District of Columbia	- 62
		Wyoming	- 67

Source: U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, Table PL1; 1990 Census of Population, General; for eligible voters, Michael McDonald, [http://elections.gmu.edu/voter\\_turnout.htm](http://elections.gmu.edu/voter_turnout.htm).

**Twenty-nine states and the District of Columbia lose influence from the move to direct election.**

trast, 29 states and the District of Columbia lose influence from the move to direct election. Of those, 20 states and the District of Columbia may be expected to lose more than 10 percent of their influence over the presidential election by the change. A large part of this group would lose about half their current influence over the presidential election.

**Power Measures**

In practice, the influence of a state in selecting a president depends on how likely it is that the state will cast the pivotal vote that constitutes a majority in the electoral college for a candidate. States that are more likely to cast

the deciding vote have more influence over the selection. If the deciding vote were distributed randomly, larger states would tend to be more powerful in presidential elections simply because they have more electoral votes, the Senate bonus notwithstanding. Of course, the deciding vote in the electoral college has not been distributed randomly. States that are more competitive are more likely to cast the deciding vote.<sup>12</sup> In other words, battleground states will have the most actual influence over the presidential outcome.

State officials who wish to determine whether their state benefits from the electoral college face the daunting task of determining

whether their state is likely to be competitive (i.e. likely to cast a deciding vote for president). We might reasonably assume that the NPV would enact direct election of the president for the foreseeable future. A state legislator thus would like to know whether their state will be competitive in the future. No study has offered that knowledge. A study by George Rabinowitz and Stuart Elaine Macdonald has estimated which states have the most influence under the current electoral college plan, taking into account their likely competitiveness. We can also examine in a less systematic way which states have been competitive in recent elections.

Rabinowitz and Macdonald collected data about the partisan and ideological leanings of the states in presidential elections from 1944 to 1980. They then simulated a large

number of elections to determine how often a state occupies the pivotal position in a presidential election.<sup>13</sup> The results of that simulation are interesting (see Table 2). Once again, the most powerful state comes first in the list, the least influential at the bottom. The power of a state in the electoral college is highly correlated to its size.<sup>14</sup> California is by far the most influential state followed by Texas, New York, Illinois, and Ohio.<sup>15</sup> States with small populations also tend to have less influence by the Rabinowitz-Macdonald measure.<sup>16</sup> That is not surprising. Large states are less likely to be politically or otherwise homogeneous, which may be related to more competition in presidential elections. In contrast to the earlier ranking of states, the Rabinowitz-Macdonald measures suggests that large states have the most influ-

**The power of a state in the electoral college is highly correlated to its size.**

**Table 2**  
**Relative Difference in U.S. Presidential Elections 1944–1980 (by state)**

1 California	26 South Carolina
2 Texas	27 Alabama
3 New York	28 Arkansas
4 Illinois	29 New Mexico
5 Ohio	30 Oklahoma
6 Pennsylvania	31 West Virginia
7 Michigan	32 New Hampshire
8 New Jersey	33 Montana
9 Florida	34 Mississippi
10 North Carolina	35 Nevada
11 Missouri	36 Maine
12 Wisconsin	37 Delaware
13 Washington	38 Kansas
14 Tennessee	39 Alaska
15 Indiana	40 Arizona
16 Maryland	41 South Dakota
17 Kentucky	42 Hawaii
18 Virginia	43 Vermont
19 Louisiana	44 North Dakota
20 Connecticut	45 Massachusetts
21 Iowa	46 Utah
22 Oregon	47 Wyoming
23 Colorado	48 Nebraska
24 Georgia	49 Idaho
25 Minnesota	50 Rhode Island

Source: George Rabinowitz and Stuart Elaine Macdonald, "The Power of the States in U.S. Presidential Elections," *American Political Science Review* 80 (March 1986): 76.

**Fifty-nine percent of eligible voters in 2006 lived in states that would either lose influence under direct election or would be indifferent about moving away from the electoral college.**

ence in the selecting a president. Where the voting measure suggests that large states would benefit by moving to direct election, the Rabinowitz-Macdonald study suggests they dominate the current system.

Another study found that voters in large states have more influence over presidential elections than voters from small states. Lawrence Longley and James Dana examined the relative influence of voters within states in the 1990s. They did not attempt to estimate how likely it was a state would be competitive as part of their investigation. Instead, they calculated both the likelihood that a state would cast the pivotal vote in the electoral college and that a voter could change the way his state's electoral votes were cast by changing his vote.<sup>17</sup> Longley and Dana found that citizens in all but six of the states have lower than average voting power in presidential elections. Voters in the six most populous states have greater than average influence.<sup>18</sup> The study concluded, "the electoral college in the 1990s contains partially countervailing biases which result in a net advantage to large states as much as 2.663 to one, and a net *dis-advantage* to states with from 3 to 21 electoral votes." [emphasis in original]<sup>19</sup>

Two recent studies offer new insights about the power of voters and states under the electoral college and under the direct vote. Jonathan Katz, Andrew Gelman, and Gary King examined whether the relative power of a vote under the electoral college and a direct vote system. Looking at presidential elections since 1960, they found minimal difference between the two systems in the estimated average probability of a voter being decisive.<sup>20</sup> The method of voting did not affect the actual power of voters in these presidential elections.<sup>21</sup>

The most recently published study of the electoral college uses a different measure of power: candidate attention to a state as measured by the number of visits.<sup>22</sup> This measure of power fits well with the concerns of the NPV proposers who criticize the current system because only a few states receive attention from candidates under the electoral col-

lege.<sup>23</sup> David Strömberg examines the actual number of visits to all states in the presidential elections from 1948 to 2000. He then constructs a model to predict the number of visits each state would receive under direct election of the president. He calculates which states will gain and lose visits under each voting system.<sup>24</sup> (See Table 3) Strömberg also concludes that small states do not benefit from the electoral college on balance.<sup>25</sup>

Twenty states that control 221 electoral votes would receive more visits under a direct vote for president; twenty states that control 210 electoral votes receive more visits under the electoral college. Ten states and the District of Columbia (107 electoral votes) neither gain nor lose visits by moving to a direct vote. Looked at this way, the states that would benefit from a direct vote are 49 electoral votes short of the majority needed to pass NPV. The states that would gain comprised 41 percent of eligible voters in the 2006 elections; the states that would lose under direct election comprised 38 percent which implies that 21 percent of the nation's eligible voters lives in states that would neither gain nor lose by moving to direct election.<sup>26</sup> In sum, the same number of states would lose from a direct vote as would gain, and the losers control almost as many electoral votes as the gainers. Finally, if we add the states that have reason to be indifferent since they neither gain nor lose from a direct vote to the states that would lose visits, we discover a coalition of states who have no reason to move to a direct vote and control a majority of 317 electoral votes. The number of eligible voters tells a similar story. 59 percent of eligible voters in 2006 lived in states that would either lose influence under direct election or would be indifferent about moving away from the electoral college.

### **Implications**

It is often said that the electoral college benefits small states who block efforts to amend the Constitution to institute direct election of the president. This assumption implies most states would benefit from mov-

**Table 3**  
**The Effects of Imposing a Direct Vote for President on Candidate**  
**Attention to the States**

States that Gain Visits	Electors	States that Lose Visits	Electors	Indifferent States	Electors
Alabama	9	Alaska	3	Colorado	9
Arizona	10	California	55	District of Columbia	3
Arkansas	6	Delaware	3	Florida	27
Connecticut	7	Illinois	21	Idaho	4
Georgia	15	Iowa	7	Kentucky	8
Hawaii	4	Maryland	10	Louisiana	9
Indiana	11	Montana	3	Michigan	17
Kansas	6	Nevada	5	Minnesota	10
Maine	4	New Hampshire	4	Mississippi	6
Massachusetts	12	New Mexico	5	North Dakota	3
Nebraska	5	Oregon	7	Tennessee	11
New Jersey	15	Pennsylvania	21		
New York	31	South Dakota	3		
North Carolina	15	Vermont	3		
Oklahoma	7	Wisconsin	10		
Rhode Island	4	Wyoming	3		
South Carolina	8	Missouri	11		
Texas	34	Ohio	20		
Utah	5	Washington	11		
Virginia	13	West Virginia	5		
total electors	221		210		107

Source: Author's calculations based upon David Strömberg, "How the Electoral College Influences Campaigns and Policy: The Probability of Being Florida," *American Economic Review* 98, no. 3 (June 2008): p. 795, Figure 6.

ing to direct election but are stymied by the supermajority requirements of amending the basic law and the determination of small states to hold on to their privileges. In fact, these matters are much more complicated than most people assume.

In practice, actual influence under the electoral college depends on the likelihood a state and its voters will have a competitive election and be decisive in determining the outcome of the presidential election. Some studies indicate some more populous states are more likely to decide an election under the electoral college and thus have more power. More recent studies, however, indicate either the power of a vote is about the same under the electoral college and the direct vote or that state size has little relationship to actual influence under either system. It is far

from clear that most states would enjoy more influence over the presidential election in a direct vote system.

Moving away from the electoral college involves transaction costs and risks. To justify those costs and risks, a state legislator should have clear evidence that its voters will enjoy more influence under direct election than they do under the electoral college. We have seen that more than a few states will do worse under direct election. Several other states by various measures can expect to wield about as much influence under direct election as under the electoral college. Given the costs of moving away from the status quo, these indifferent states have little reason to support NPV. Adding the indifferent states to those who lose from the change may well form a coalition of states who control a

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**Some supporters of NPV concede that their proposal seeks to circumvent the amendment process.**

majority of electoral votes. The electoral college, not NPV, may be the preference of a majority of states.

~~Legislators in most states should find it~~ difficult to determine whether their constituents will gain or lose influence over presidential elections by moving away from the electoral college toward direct election. Given that uncertainty, the costs of trying to change the status quo, and the relative apathy of constituents about the way the nation selects the president, it is not surprising that the electoral college has not been seriously challenged within memory.

NPV poses other problems beyond calculations of political advantage. It raises deep questions of legitimacy and institutional change. In this regard, the benefits of the proposal also seem doubtful.

## **Costs of the NPV Proposal**

### **Legitimacy**

The Oxford English Dictionary defines legitimate as “conformable to law or rule; sanctioned or authorized by law or right; lawful; proper.” Similarly, the same dictionary defines the noun legitimacy as “the condition of being in accordance with law or principle.” The word itself can be traced to a Latin root that means “to be declared lawful.” A legitimate government action should conform to the law and ultimately to the fundamental law, the U.S. Constitution. The idea of legitimacy is particularly important for actions that changed the law and especially the fundamental law. If *any* action changing a law could be considered legitimate, the fundamental law would be irrelevant for practical purposes. A second, related meaning of legitimacy may be found in the social sciences: “to ask whether a political system is legitimate or not is to ask whether the state, or government, is entitled to be obeyed.”<sup>27</sup> The idea of legitimacy thus links “being in accordance with law” with being worthy of being obeyed.

Article V of the U.S. Constitution provides a procedure for amending the fundamental

law. It depends on demanding supermajorities; typically, an amendment requires approval by two-thirds of Congress and three-fourths of the states. The supermajority requirement tends to inhibit amendments but does not preclude them. It favors amendments that have broad support. The amendment process thus protects significant (but not quite small) minorities.

Some supporters of NPV concede that their proposal seeks to circumvent the amendment process. The prominent journalist, E.J. Dionne wrote of the NPV plan: “this is an effort to circumvent the cumbersome process of amending the Constitution. That’s the only practical way of moving toward a more democratic system. Because three-quarters of the states have to approve an amendment to the Constitution, only 13 sparsely populated states—overrepresented in the electoral college—could block popular election.”<sup>28</sup> Some who believe the constitutional method of electing the president should be changed agree that the NPV plan circumvents the Constitution. The editorial board of *The Milwaukee Journal Sentinel* concluded, “The U.S. Constitution, when it comes to the Electoral College, is flawed. However, rather than take the direct route to fix that, amending the Constitution, this proposal simply subverts it. This method complies with the letter of the Constitution but violates the spirit.”<sup>29</sup>

NPV advocates argue that their proposal comports with the Constitution and no amendment is necessary. They argue that the states are empowered by the Constitution to appoint electors “in such Manner as the Legislature may direct” which arguably includes assigning electors with regard to the outcome of the national popular vote.<sup>30</sup> They suggest that the power to appoint electors is unconstrained by the Constitution. It is accurate that the Constitution does not explicitly constrain the power of state legislatures in allocating electors. But a brief consideration of the history of the drafting of this part of the Constitution suggests some implicit constraints on state choices.

The Framers considered several ways of electing a president. The three major ways were the current system, direct election by the people, and selection by Congress. On July 17, 1787, the delegates from nine states voted against direct election of the president; the representatives of one state, Pennsylvania, voted for it.<sup>31</sup> The Framers chose an alternative to direct election which is described in Article II, section 1 of the Constitution. Of course, that decision by the framers need not bind Americans for all time. The Constitution also permits overturning the decisions of the framers through amendments to the Constitution. In contrast, NPV proposes that a group of states with a majority of electoral votes should have the power to overturn the explicit decision of the Framers against direct election. Since that power does not conform to the constitutional means of changing the original decisions of the framers, NPV could not be a legitimate innovation.

The authors of NPV strongly suggest that congressional consent to the proposed interstate compact is not necessary.<sup>32</sup> Robert Bennett argues the Supreme Court might not require a compact be approved by Congress if the agreement did not “enhance the political power of the [agreeing] States at the expense of other States or have an ‘impact on the federal structure.’”<sup>33</sup> But NPV does not meet these conditions. It harms those states whose citizens benefit from the current system of election. NPV also eliminates all states as electoral districts. Those states that adopt the NPV may see that elimination as a boon; others outside the compact may find the change to be a cost. The elimination of the states as electoral districts surely has “an impact on the federal structure” of presidential elections. For all practical purposes, NPV eliminates the federal character of presidential elections. For these reasons, Congress should have the chance to consent to NPV or to reject it.

E.J. Dionne’s comment suggests that the demands of democracy should take precedence over constitutional constraints on the will of the people. The current means of electing the president may slightly reduce the influence of states that comprise a large

majority of the eligible voters in the United States. Democracy in this regard may be taken to mean: the majority shall rule. Here again we have a question of legitimacy. The United States was designed to be a republic, “a government which derives all its power directly or indirectly from the great body of the people.”<sup>34</sup> It was not designed to be a government ruled by unconstrained majorities. Would E.J. Dionne agree that the wishes of a majority should trump the Constitution’s guarantee that Congress shall make no law abridging freedom of the press? The number of constraints against majority rule could be extended, but the point has been made. Circumvention of the Constitution in the name of majority rule cannot be legitimate in the United States.

In sum, the NPV group poses the question whether we wish to have legitimate presidential elections and a constitutional government. If NPV succeeds, we will have less of both, at the margins.

#### **Nationalization**

The U.S. Constitution allocates presidential electors according to the federalist principle.<sup>35</sup> Anti-federalists feared the new Constitution would centralize power and threaten liberty as well as subordinate the smaller states to the larger. The founders sought to fashion institutional compromises that responded to the concerns of the states and yet created a more workable government than had existed under the Articles of Confederation. With regard to presidential elections, they pursued a middle course that rejected both election by state legislatures and election by a national popular vote. The constitutional plan instead offers a compound means of election in which the states are considered as both co-equals in an association and as unequal members.<sup>36</sup> This same balancing of state and national elements may be found elsewhere in the Constitution. This general preference for federalism signaled that the new Constitution would not be wholly national in character and that the national government would part of a larger design of checks and balances that would temper and restrain political

**For all practical purposes, NPV eliminates the federal character of presidential elections.**

power, a major concern of both the Founders and their Anti-Federalist critics.

These expectations for federalism have not been realized. In the past fifty years, the national government has increasingly treated the states as administrative units for larger national undertakings. Looked at historically, the role of the states in electing a president would be a likely target for elimination as part of these nationalizing trends. The nationalization of the political parties has also vitiated the selection of electors as state representatives; they now are chosen for their loyalty to national parties rather than as citizens of a state.<sup>37</sup>

The realization of the NPV plan would continue this trend toward nationalization and centralized power. The president is the most important elected official in the nation. Under the NPV proposal, he or she will be elected by the nation acting as an electorate. Inevitably, this change will foster the creation of a national consciousness among Americans, a unified and centralized political identity. The president will thus be empowered as the choice of this national electoral district; he or she will speak for a plurality of that nation. As the renowned constitutional scholar Martin Diamond said, direct election of the president will not "increase the democracy of the election or the directness of the election but the pure nationalness of the election. The sole practical effect of [direct election] will be to eliminate the States from their share in the political process."<sup>38</sup> A president so elected may be more likely to pursue national interests at a cost to state or regional concerns because state identities and considerations will no longer matter at all since the states will no longer exist so far as presidential elections go. Such a president "might also be likely to pursue policies that enhance or enlarge the scope and power of the federal government."<sup>39</sup> While direct election may not have strong partisan effects, the further empowering of the federal government and a subsequent increase in its ambit would run counter to the founding aspirations for limited government and individual liberty. It

would be fully in line with the Progressive emphasis on the national community, a purely national electorate, and the empowered executive.<sup>40</sup> In other words, if people create institutions, institutions also create people, and the NPV will lead to a more nationalized and progressive electorate.

Skeptics might object that the United States has already developed a centralized, national political identity. Few people are said to think of themselves as citizens of a particular state. The same skeptics might also note that the integration of the states into a unified national Leviathan has been a natural development fostered by the preferences of voters. Yet in our lifetime the hope for limited government has proven politically popular, and the states have enjoyed a renaissance based on policy achievements. The possibility of a renewed decentralization of power remains open.

The NPV plan also mistakenly assumes that the people living in the United States are a unified nation that should act as one in selecting their leader. But the United States today is deeply polarized along partisan, ideological, and other dimensions. These differences relate strongly to territorial and regional differences. Rather than forcing all these differences into a single national electoral district, the nation would do better to foster institutions that allow people who deeply disagree to live at some distance from one another in fact and in politics. Instead of further fostering a national identity, we should hold open the possibility of a more decentralized government in which people who profoundly disagree about things can live separately in peace. The NPV proposal would make that decentralization of identity marginally more difficult.

### **Disputed Outcomes**

As in 2000, it is possible that one state will experience an election dispute that could affect the outcome of the presidential race. The struggles associated with such a dispute will be relatively confined. The same would not be true of the NPV alternative. Rational

**The NPV will lead to a more nationalized and progressive electorate.**

candidates or party leaders would have reason to dispute results throughout the nation to overturn close outcomes. Indeed, what constitutes a close election would become broader since the necessary votes to overturn the result could be found nationwide. That would be more difficult and more contentious than the current system. As political scientist David Lublin has noted, the parties and the media would have difficulty supervising recounts and litigation around the country. As Lublin argues, "We might not even be able to have a national recount. All existing recount laws were designed to address elections within states. Compact states cannot compel other states to participate."<sup>41</sup> NPV's supporters say it tends toward a clear result. But in a close election, the scope of its electoral district might well preclude a settled outcome in a close presidential contest.

## Putative Benefits of the NPV Plan

### Ignored States

The authors of NPV note that under the current system candidates write off many uncompetitive states, which means those states are ignored by the campaigns. Several political scientists recently wrote that "Presidential campaigns have a clear tendency to concentrate their resources on a relatively small number of competitive states—states that both candidates have some legitimate prospect of carrying—while ignoring states that appear solidly to favor one camp or the other." This is not a new story. Scholars found that candidates in both the 1960 and 1976 campaign concentrated their resources in this manner.<sup>42</sup> In contrast, the NPV advocates argue, a direct popular election would value all votes equally. Candidates would presumably seek votes in all states since they would all count equally toward victory.

The states, and not the Constitution, create the problem complained of by the NPV authors. Currently 48 states allocate their electors according to the winner-take-all standard;

the District of Columbia also employs this method. This has been true for some time. By 1824 only six of twenty-four states selected electors by state legislatures. By 1832, all but one chose by popular election. After 1832, selecting electors by popular vote meant popular vote by general ticket which meant "winner take all."<sup>43</sup> This rule offers the dominant party in the state legislature (and thus probably in the presidential contest) more electors than under say, a division of electors along the lines of the popular vote.

Of course, state legislatures need not choose a "winner take all" rule for selecting electors. They could divide electors according to the popular vote if they believed it would attract attention from presidential candidates thereby benefitting their state. But few states do so. That suggests most legislators believe "winner take all" benefits their state more than the candidate attention that might come from a division according to the popular vote. Since these legislators are elected by the people, we have to reason to think the "winner take all" system reflects the popular will.

This judgment by legislators raises another issue. Why should citizens in a state be concerned about being ignored because of a lack of competition? Voters can easily gather sufficient information from the national media to cast their ballot. Businesses in a neglected state may miss the tax receipts generated by the candidate, her entourage, and the media, but such losses do not seem relevant. After all, the nation does not hold presidential elections to foster local economic development. Neglected states may be concerned that if a candidate can take a state for granted during the campaign, he or she will do less for the state once in office, at least compared to what they might have done if the state had been competitive.<sup>44</sup> NPV thus appeals to the material and thus political interests of voters in neglected states.

As a political tactic, the appeal to neglected states seems likely to fail. Imagine that a presidential candidate has the same sum to spend on votes under NPV as he does under the Electoral College. Imagine also, as pre-

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**The political appeal of NVP may rely on exploiting an inequality of voting power between the current generation and future voters.**

dicted, the candidate decides to spend more under NPV on formerly neglected states (for example, by budgeting more public works for them once in office). Where would the president find the money for this spending with a fixed budget? It would have to come from states that were competitive under the Electoral College. With a fixed budget, NPV would impose losses on battleground states to benefit previously neglected states. However, individuals and groups tend to value losses more than identical benefits.<sup>45</sup> All things being equal, the voters who lose by moving to NPV would care more than voters who gain from it which suggests the appeal to the material interests of neglected states would fail as a political tactic.

The "neglected state" argument also raises budgetary and moral questions. If a president under NPV simply spends more public money to reward voters in formerly neglected states, competitive states will not face losses, but the federal deficit will rise and will be financed by public borrowing. Future voters will pay higher taxes because of this increased debt. Such voters, however, will have no say about the decision to incur the debt; many of them are either too young to vote or do not exist. NPV aspires to an equality of votes for the current generation. Its political appeal, however, may rely on exploiting an inequality of voting power between the current generation and future voters.

Even if all votes are weighed equally in an election, the cost of attracting a marginal vote for president would vary. For example, it would be less expensive per voter to attract votes in populous states because of the structure of media markets.<sup>46</sup> As noted earlier, there is a relationship between population size and competitiveness in presidential elections. In that respect, the marginal effect of the NPV plan would be to draw candidates toward large, competitive states. The cost of votes also depends on the efficiency of a campaign and party organization. The least costly votes are thus likely to be found in large, competitive states where the organizations have become efficient through competition and in large,

non-competitive states where party organizations may have unique advantages in "running up the score." In that way, the NPV plan might bring some candidate attention to states that are now non-competitive and ignored. But running up the score in party strongholds may also increase the regionalization of presidential politics. In general, because of the relative costs of attracting votes, the NPV proposal seems likely at the margin to attract candidate attention to populous states. Many voters outside low-cost media markets may be as ignored under NPV as they are under the status quo.

### **Certainty of Election**

NPV advocates have argued that their compact will create a clear, nationwide winner of the presidential election. Direct election of the president by a plurality or majority would almost certainly lead to a clear winner. But NPV seeks to attain direct election through an interstate compact. The question of certainty turns on whether the interstate compact will work as NPV advocates hope.

State legislatures might have strong incentives withdraw from the compact if their commitment elects a president opposed by a majority in the legislature. Indeed, the voters who elected the legislature might demand they withdraw from the compact or face the consequences at the next election. The backers of the NPV plan outline a model compact that prevents a state from withdrawing until a president is qualified for office.<sup>47</sup> NPV supporters argue the U.S. Supreme Court would enforce the agreement against a state wishing to withdraw from it; they rely on the Court's decision in *West Virginia ex rel. Dyer v. Sims*, a 1950 case involving the Ohio River Valley Water Sanitation Compact.<sup>48</sup> They also cite the influence of public opinion and "safe harbor" provisions in federal law that give preference to election returns that are accord with laws enacted prior to election day.<sup>49</sup>

The Constitution empowers states to select presidential electors within the constraints implicit in work of the Constitutional Convention. It does not say a legislature can-

not change its manner of selection or that its choice must be made prior to election day. The significance of this grant of power should not be underestimated; it is one aspect of how the Founders included the states in the new government. The Constitution includes other clauses, of course, including one forbidding states to impair contracts. The Supreme Court might force a state legislature to hold to the terms of the NPV compact, but the issue would certainly be litigated, perhaps between election day and the day when electoral votes are cast. In any case, the compact has no back-up provision if a state withdraws. That state's electoral votes would remain in limbo. If a legislature has withdrawn from the compact, we may presume public opinion approves or perhaps even demands a withdrawal. To be sure, a majority outside of a state may disapprove of the withdrawal, but no legislator in the withdrawing state will face those disapproving voters unless he or she runs for president. The "safe harbor" provision, if effective, will simply mean that a state withdraws prior to election day. Modern polling often enables legislators to guess the outcome of a state's presidential election.

The NPV compact may work as advertised in practice. But in a close election legislators will be under tremendous pressure, and many voters may see their states casting electoral votes for a candidate who finished second in their state. It is not clear that outcomes under the NPV compact will be any more certain than under current arrangements.

## Incentives for Higher Turnout

NPV advocates argue that the current system depresses voter turnout because voters in non-battleground states doubt their participation matters. If all votes counted equally, so the argument implies, more people would feel their votes mattered and would turn out on election day. Others have suggested that direct election would increase the incentives for a state to increase turnout.<sup>50</sup> It seems

unlikely that switching to direct election would actually increase turnout. Several experts on voting behavior have noted:

We would expect voter participation among the most informed segments of the electorate to respond positively to the popular election of the president. This effect is probably small if not trivial. The most informed and attentive voters are already predisposed to vote. Replacing the Electoral College with the popular election of the president is not likely to be perceived by inattentive and less informed voters and will have only a trivial influence on the likelihood of voting among the most informed voters.<sup>51</sup>

Should increasing voter turnout be an important goal of the nation? Current levels of turnout do not seriously bias election results; the sample of voters reasonably well represents the partisan and ideological views of the entire population of voters.<sup>52</sup> Voting turnout is highly correlated to education which in turn is the best predictor of economic literacy. As the economist Bryan Caplan discovered, increasing turnout to 100 percent would mean candidates "have to compete for the affection of noticeably more biased voters than they do today."<sup>53</sup> Even lesser increases would be expected, all things being equal, to increase the number of biased (i.e. ill-informed) voters compared to the status quo. Insofar as candidates follow the wishes of voters, increased turnout would mean worse (i.e. more irrational) economic policies.

Increasing voting turnout should not be a high priority for American policymakers and even if it were, moving to direct election, perhaps especially in such a complicated way as NPV, would not bring out more voters.

## Conclusion

NPV offers a way to institute a means of electing the president that was rejected by the Framers of the Constitution. It does so while

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**Both small and large states have reasons to support the status quo in electing a president.**

circumventing the Constitution's amendment procedures. Implicitly, NPV advocates believe that direct election of the president by the greater number of voters weighs so heavily on the normative scales that bypassing constitutional propriety should be accepted. Yet the U.S. Constitution establishes a liberal republic not a majoritarian democracy. The NPV plan appears unlikely to deliver its promised benefits and likely to impose other costs, not least by throwing into question the legitimacy of our presidential contests. NPV gives the supporters of a losing presidential candidate little reason to accept the outcome. Legitimacy and political obligation are rooted in law, and the NPV plan circumvents our legal procedure for changing presidential elections. That alone should be enough to convince legislators in the various states that this proposal should not be adopted.

The fate of NPV will also depend on the play of political interests. Would states controlling a majority of electoral votes benefit from joining NPV? Many people believe small states benefit from the electoral college. Certainly, many small states would do relatively poorly by moving to the NPV. That result does not mean, however, that large states would benefit from direct election of the president. Populous states tend to hold the most actual power over the election of the president under the current system since they tend to be the most competitive and more likely to decide an election. Medium-size states may expect few gains from NPV and losses from the change if they are competitive. It is often assumed that the electoral college persists because of the difficulty of amending the Constitution. But it appears that both small and large states have reasons to support the status quo in electing a president, and other states have good reason to be indifferent toward a change to direct election. The electoral college, though much maligned, may satisfy the interests of more states and voters than any other alternative means of electing the president including NPV.

## Notes

1. National Popular Vote Inc. sponsored the plan. National Popular Vote Inc. is "a 501(c)(4) non-profit corporation whose specific purpose is to study, analyze and educate the public regarding its proposal to implement a nationwide popular election of the President of the United States." See <http://www.nationalpopularvote.com/pages/about.php>.

2. John R. Koza et al., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (Los Altos, CA: National Popular Vote Press, 2006).

3. "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another state ..." U.S. Constitution, Art. I, sec. 10.

4. Koza et al., p. 255.

5. Ibid.

6. The current exceptions to winner-take-all are Maine and Nebraska. Both divide themselves into districts and allocate an electoral vote to each district; the remaining two votes are given to the winner of the popular vote in the state. The winner of the overall vote, however, need not win all the electoral votes.

7. Unless all states had equal populations, an unlikely scenario absent continual redistricting under a "one person-one vote" standard such as the House of Representatives operates under today.

8. "The advantage that the 'Connecticut compromise' (for Senate seat allocation) gives to small states within the Electoral College is now fairly minimal. Giving all states two electors regardless of size gives small states more influence than they would have if the allocation of electors were based only on size of population. But the enhanced power that the Electoral College gives to small states (e.g., North and South Dakota, Vermont, Wyoming, and Montana) is not very large." Donald Haider-Markel et al., "The Role of Federalism in Presidential Elections," in *Choosing a President: The Electoral College and Beyond*, ed. Paul Schumaker and Burdett A. Loomis (New York: Chatham House, 2002), p. 57.

9. It is doubtful that electoral votes may be awarded by a popular initiative in a state. See Robert W. Bennett, *Taming the Electoral College* (Stanford, CA: Stanford University Press, 2006), pp. 51-52.

10. The year 2000 was chosen since the electors are allocated on the basis of the annual census,

which was last carried out in 2000.

11. An earlier measure of the differences did not seek a single measure of gains and losses. See Haider-Markel et al., p. 58. The data are also taken from a different year. However, the conclusion and methods seems similar to the one used here.

12. A large political literature has examined the influence of states by using the Shapley value, a game theoretic concept. "The Shapley value defines the power of actor A as the number of permutations (orderings) in which A occupies the pivotal position (that is, orderings in which A can cast the deciding vote) divided by the total number of possible permutations." See George Rabinowitz and Stuart Elaine Macdonald, "The Power of the States in U.S. Presidential Elections," *American Political Science Review* 80 (March 1986): 66-67.

13. For details about the simulation, see Rabinowitz and Macdonald, p. 74.

14. The correlation coefficient between the 1980 population of a state and the Rabinowitz-Macdonald measure of its influence in the electoral college is +.96.

15. Former California congressman Tom Campbell, a supporter of the NPV, appears to believe that his state loses influence on a presidential election because of population differences and the minimal representation of small states. See Koza et al., p. xxv. However, California may well benefit the most from the current system. Rabinowitz and MacDonald estimate that a California voter is 20.2 times more powerful than a voter in the least influential state, Rhode Island. See Rabinowitz and MacDonald, p. 77. David Strömberg also finds that California would do worse under direct election. See David Strömberg, "How the Electoral College Influences Campaigns and Policy: The Probability of Being Florida," *American Economic Review* 98, no. 3 (June 2008), p. 795. Fig. 6.

16. See the table at Rabinowitz and MacDonald, p. 76.

17. Lawrence D. Longley and James D. Dana Jr., "The Biases of the Electoral College in the 1990s," *Polity* 25 (Autumn, 1992): 128.

18. Ibid., pp. 130-31.

19. Ibid., p. 145.

20. Andrew Gelman, Jonathan H. Katz, and Gary King, "Empirically Evaluating the Electoral College," in *Rethinking the Vote: The Politics and Prospects of American Election Reform*, ed. Ann N. Crigler, Marion R. Just, and Edward J. McCaffery

(New York: Oxford University Press, 2004): 75-88.

21. It should be noted that a move to a direct vote might change other factors (like voting turnout) that could affect this conclusion.

22. Strömberg, p. 794.

23. Koza et al., pp. 9-15.

24. Strömberg presents this result in p. 795, Figure 6.

25. Ibid., p. 796.

26. Author's calculations based upon the number of eligible voters reported by Michael McDonald of George Mason University. See "2006 Voting-Age and Voting-Eligible Population Estimates" at [http://elections.gmu.edu/Voter\\_Turnout\\_2006.htm](http://elections.gmu.edu/Voter_Turnout_2006.htm)

27. "Legitimacy," *A Dictionary of Modern Politics*, 3rd ed. David Robertson. Europa, 2002. Routedge Reference Resources online. Taylor & Francis Publishing Group. Johns Hopkins University. 09 October 2007 <[http://www.reference.routledge.com/subscriber/entry?entry=w007\\_w007b303](http://www.reference.routledge.com/subscriber/entry?entry=w007_w007b303)>

28. E. J. Dionne Jr., "Bypassing the Electoral College," *Washington Post*, April 2, 2007, p. A15.

29. "End Run: The Wrong Play to Call," *Milwaukee Journal Sentinel*, July 30, 2006.

30. Koza et al., pp. 3-4.

31. The debate may be found in *The Founders' Constitution*, Volume 3, Article 2, Section 1, Clauses 2 and 3, Document 2 at [http://presspubs.uchicago.edu/founders/documents/a2\\_1\\_2-3s2.html](http://presspubs.uchicago.edu/founders/documents/a2_1_2-3s2.html), The University of Chicago Press.

32. See Koza et al., pp. 219-23.

33. See *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 176 (1985), quoted in Bennett, p. 171.

34. James Madison, "Federalist no. 39," in *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), p. 251.

35. Haider-Markel et al., pp. 55-56.

36. Madison, p. 255.

37. See Haider-Markel et al., p. 61.

38. Martin Diamond and Birch Bayh, "The Electoral College and the Idea of Federal Democracy," *Publius* 8 (Winter 1978): 68.

39. Haider-Markel et al., p. 68. "One potential effect of a popular vote election . . . might be that presidents would be more likely to pursue a truly "national" interest, without focusing on the particularized concerns of states. Under this system, presidents, regardless of their ideological orientations, might also be likely to pursue policies that enhance or enlarge the scope and power of the federal government."
40. "Progressive" attempts to end the Electoral College go back as far as the years after World War I. See Jerome M. Mileur, "The Legacy of Reform: Progressive Government, Regressive Politics," in *Progressivism and the New Democracy*, ed. Sidney Milkis (Amherst: University of Massachusetts Press, 1999), p. 268.
41. David Lublin, "Popular Vote? Not Yet. Problems With a Plan to Kill the Electoral College," *Washington Post*, July 16, 2007, A15.
42. William G. Mayer et al., "The Electoral College and Campaign Strategy," in *Choosing a President: The Electoral College and Beyond*, eds. Paul Schumaker and Burdett A. Loomis (New York: Chatham House, 2002), p. 103.
43. See Michael Nelson, ed., *Guide to the Presidency* (Washington: Congressional Quarterly, 1989) p., 156. Nelson notes that since 1860 only Colorado has used legislative appointment to select electors.
44. See Mayer et al., p. 105.
45. This precept has been observed in efforts to cut back government programs. See Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment* (New York: Cambridge University Press, 1994), p. 165.
46. Haider-Markel et al., p. 68.
47. Koza et al., p. 344ff.
48. *West Virginia ex rel. Dyer v. Sims*, 341 US 22 (1951). See Koza et al., pp. 352-56.
49. Koza et al, p. 15.
50. Haider-Markel et al., "The Role of Federalism in Presidential Elections," p. 61.
51. Robert M. Stein et al., "Citizen Participation in Electoral College Reform" in *Choosing a President: The Electoral College and Beyond*, eds. Paul Schumaker and Burdett A. Loomis (New York: Chatham House, 2002), p. 129.
52. Ibid. 139.
53. Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton: Princeton University Press, 2007), p. 306. Caplan recommends reducing or eliminating efforts to increase turnout.