

# Legal Memorandum



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

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**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

### 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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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.



particular 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.