

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.¹ 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.² Congress must approve of the compact before states can agree to it.³ 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,⁴ 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.⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹ 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 2000.¹⁰ 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.¹¹ 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.

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.¹² 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.¹³ 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.¹⁴ California is by far the most influential state followed by Texas, New York, Illinois, and Ohio.¹⁵ States with small populations also tend to have less influence by the Rabinowitz-Macdonald measure.¹⁶ 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.¹⁷ 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.¹⁸ 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 *disadvantage* to states with from 3 to 21 electoral votes." [emphasis in original]¹⁹

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.²⁰ The method of voting did not affect the actual power of voters in these presidential elections.²¹

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.²² 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.²³ 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.²⁴ (See Table 3) Strömberg also concludes that small states do not benefit from the electoral college on balance.²⁵

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.²⁶ 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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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.”²⁷ 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.”²⁸ 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.”²⁹

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.³⁰ 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.³¹ 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.³² 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.’”³³ 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.”³⁴ 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.³⁵ 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.³⁶ 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

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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.³⁷

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.”³⁸ 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.”³⁹ 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.⁴⁰ 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

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.”⁴¹ 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.⁴² 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.”⁴³ 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.⁴⁴ 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-

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.

The political appeal of NPV 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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.⁵¹

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.⁵² 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."⁵³ 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

Insofar as candidates follow the wishes of voters, increased turnout would mean worse (i.e., more irrational) economic policies.

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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 MacDonal estimate that a California voter is 20.2 times more powerful than a voter in the least influential state, Rhode Island. See Rabinowitz and MacDonal, 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 MacDonal, 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

27. "Legitimacy," *A Dictionary of Modern Politics*, 3rd ed. David Robertson. Europa, 2002. Routledge Reference Resources online. Taylor & Francis Publishing Group. Johns Hopkins University. 09 October 2007 <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, 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.