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The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compact

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Summary

The National Popular Vote (NPV) initiative proposes an agreement among the states, an interstate compact that would effectively achieve direct popular election of the President and Vice President without a constitutional amendment. It relies on the Constitution's grant of authority to the states in Article II, Section 1 to appoint presidential electors "in such Manner as the Legislature thereof may direct...." Any state that joins the NPV compact pledges to award all its electoral votes to the presidential ticket that wins the most popular votes nationwide, regardless of who wins in that particular state. The number of electoral votes won by the national popular vote winners would depend on the number of electoral votes controlled by NPV member states. The compact would, however, come into effect only if its success has been assured; that is, only if states controlling a majority of electoral votes (270 or more) join the compact. Recent action by the Connecticut legislature to join the compact has generated renewed interest in the NPV initiative. At the time of this writing, 11 states and the District of Columbia, which jointly control 172 electoral votes, have joined the compact.

The NPV initiative emerged following the presidential election of 2000, in which one ticket gained an electoral vote majority, winning the presidency, but received fewer popular votes than its opponents. NPV grew out of subsequent discussions among scholars and activists about how to avoid similar outcomes in the future and to achieve direct popular election.

Proponents of NPV assert that it would guarantee the presidential candidates who win the most popular votes nationwide will always win the presidency; that it would end the inequities of the general ticket/winner-take-all system of awarding electoral votes; and that candidates would extend their focus beyond winning the "battleground states," campaigning more widely and devoting greater attention to issues of concern to other parts of the country. They further assert that NPV would accomplish this while avoiding the exacting standards set for the proposal and ratification of constitutional amendments. Opponents argue that NPV would undermine the authority of states under the Constitution and the Founders' intention that presidential elections should be both national and federal contests; that it is an admitted "end run" around the Constitution that would circumvent the amendment process; and that it might actually lead to more disputed presidential elections characterized by politically contentious state recounts.

The NPV has also been debated on legal grounds. Some observers maintain that it must be approved by Congress, because it is an interstate compact that would affect key provisions of constitutional presidential election procedures. NPV Inc., the organization managing the initiative's advocacy campaign, responds that congressional approval is not necessary because NPV concerns the appointment of electors, a subject that falls within state constitutional authority, and that the Supreme Court has previously rejected arguments that similar compacts would impair the rights of nonmember states. Other critics claim that NPV might violate the Voting Rights Act by diluting minority voter influence and avoiding the recently invalidated preclearance requirement for election procedure changes in covered jurisdictions. In response, NPV Inc. has asserted that the compact is "entirely consistent with the goal of the Voting Rights Act."

This report monitors the NPV's progress in the states and will identify and analyze further developments as warranted.

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Introduction[1]

Since its founding in 2006, the National Popular Vote (NPV) initiative has promoted an agreement among the states, an interstate compact that would effectively establish direct popular election of the President and Vice President without a constitutional amendment, while retaining the structure of the electoral college system.

The United States is unique among "presidential" republics by providing an indirect election to choose its chief executive.[2] The President and Vice President of the United States are selected not by registered voters, but by the electoral college, electors appointed in the states "in such Manner as the Legislature thereof may direct.... " Alexander Hamilton, who was "present at the creation" of the Constitution in 1787, commented favorably on the electoral college system in *The Federalist*:

> The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents.... I venture somewhat further, and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be wished for.[3]

Notwithstanding Hamilton's endorsement, the first proposal to change the electoral college system by constitutional amendment was introduced as early as 1800, and since that time more than 700 proposals to reform or eliminate the college have been introduced in Congress.[4] Reform advocates have long focused on the fact that it does not provide for direct democratic election, and that the winner-take-all system makes it possible for candidates to win an electoral college majority and the presidency, while gaining fewer votes than their principal opponents in the popular election.

Between 1949 and 1979, Congress considered amendments to reform the electoral college, or replace it with direct popular election, in committee and on the floor of both chambers. Proposed amendments must, however, meet the requirements of the Constitution's Article V, which calls for two-thirds approval by both houses of Congress, and ratification by three-fourths of the states;[5] to date, no electoral college reform proposal has met these requirements.

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[1] Thomas H. Neale is the author of this section.

[2] In "presidential" republics, the President customarily serves as chief executive, exercises considerable authority, and is generally elected by popular vote. Mexico, Brazil, and France are examples of presidential republics, although France also provides for a prime minister who is responsible to the legislature. In "parliamentary" republics, the President customarily serves as ceremonial head of state and is generally elected by indirect vote. Executive authority is usually vested in the office of the head of government, known variously as prime minister, premier, or chancellor. Germany, India, and Israel are examples of parliamentary republics.

[3] Alexander Hamilton, "The Method of Electing the President," in *The Federalist*, Number 68 (Cambridge, MA: The Belknap Press of the Harvard University Press, 1961), p. 440.

[4] "U.S. Electoral College, Frequently Asked Questions," National Archives website, at http://www.archives.gov/federal-register/electoral-college/faq.html#changes.

[5] Article V provides two avenues for amendment of the Constitution: proposal by Congress, as noted above, and proposal by a convention summoned by the applications of two-thirds of the states. For additional information on the Article V Convention alternative, please consult CRS Report R42589, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, by Thomas H. Neale; and CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale.

Proponents of the National Popular Vote initiative contend that their plan will achieve direct popular election while circumventing the requirements of Article V, and will guarantee that the popular vote winners will always be elected President and Vice President.

The Electoral College in Brief[6]

The fundamentals of the electoral college system were established by Article II, Section 1 of the U.S. Constitution, and subsequently revised by the Twelfth Amendment. The Constitution's minimal provisions have been complemented over the past two centuries by a range of federal and state laws, political party procedures, and enduring political traditions, leading to the system as it exists today. The salient features of the contemporary system are detailed below.

The electors are collectively known as the electoral college; although this phrase does not appear in the Constitution, it gained currency in the early days of the republic, and was recognized in federal law in 1845.[7] The electoral college has no continuing existence; its sole purpose is to elect the President and Vice President. Each state is allocated a number of electors equal to the combined total of its U.S. Senate and House of Representatives delegations.[8] The District of Columbia is also allocated three electors.[9] At present, the total is 538, reflecting the combined size of the Senate (100 Members), the House (435 Members), and the District of Columbia electors. Any person may serve as an elector, except Senators and Representatives, or any other person holding an office of "trust or profit" under the United States.[10]

Article II, Section 1 of the Constitution empowers the states to "appoint [electors], in such Manner as the Legislature thereof may direct.... " This grant of authority provides the constitutional basis claimed for the NPV initiative. In practice, all states currently provide for popular election of their electoral college delegations.[11] Candidates for the office of elector are nominated by political parties and other groups on the presidential ballot in each state. In most cases, the candidates for the office of elector are nominated by the state party committee or the party's statewide convention.[12] The winning presidential nominees must gain a national majority of 270 or more electoral votes, out of the 538 total, in order to be elected. If no ticket of candidates attains a majority, then the House of Representatives elects the President, and the Senate the Vice President, in a procedure known as contingent election.[13]

Candidates for the office of elector are selected by their respective political parties. They are expected to vote for the presidential and vice presidential candidates to whom they are pledged. Some states seek to require them to so vote by law or other means, but most constitutional scholars hold that the electors remain free agents under the Constitution, and that they may vote

[6] Thomas H. Neale is the author of this section.

[7] 3 U.S.C. §4.

[8] U.S. Constitution, Article II, §1.

[9] U.S. Constitution, 23rd Amendment.

[10] U.S. Constitution, Article II, §1.

[11] Neal Peirce and Lawrence Longley, *The People's President, The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven: Yale University Press, 1981), pp. 44-47.

[12] See U.S. Congress, Senate, *Nomination and Election of the President and Vice President of the United States, 2008*, "Part IV. State Laws Relating to the Nomination and Election of Presidential Electors," S. Doc. 111-15 (Washington: GPO, 2010), pp. 346-444.

[13] For more detailed information on the contingent election process, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

for any person they choose.[14] On rare occasions, an elector will vote for a different candidate, or abstain from casting a vote for any candidate; he or she is known as a "faithless elector."[15]

The goal of presidential campaigns under the existing system is to win by carrying states that collectively cast a majority of electoral votes. Political parties and presidential campaigns tend to focus on states that are closely contested (widely referred to as "battleground" states), or that have large delegations of electoral votes, or both. Winning a majority of the more populous and/or battleground states is considered crucial to obtaining the necessary electoral vote majority.

In 48 states and the District of Columbia, the presidential/vice presidential ticket winning the most popular votes (a plurality or more) in that state is awarded all its electoral votes. That is to say, the winning party's entire ticket of electors is elected. This is referred to as the "winner-take-all" or "general ticket" system.[16]

Presidential Election Day is set by law for Tuesday after the first Monday in November every fourth year succeeding the election of President and Vice President.[17] On Presidential Election Day, voters cast *one* vote for the candidates they support. They are, however, actually voting for the state political party "ticket" of electors supporting those presidential and vice presidential candidates.[18]

Presidential electors assemble on the first Monday after the second Wednesday in December following the general election.[19] They meet in their respective states, not collectively, and cast separate votes by ballot for the President and Vice President.[20] After the electors vote, the results are sent by the states to Congress and various other federal authorities. On January 6 of the year following a presidential election, Congress meets in a joint session to count the electoral votes and make a formal declaration of which candidates have been elected President and Vice President.[21]

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[14] See *U.S. Constitution, Analysis and Interpretation, "The Constitution Annotated,"* Article II Analysis, Article II, §1, clauses 2-4, "Election: Electors as Free Agents," available online to Members of Congress and staff at http://crs.gov/conan/default.aspx?mode=topic&doc=Article02.xml&t=1|4&s=1&c=2.

[15] For further information, see Peirce and Longley, *The People's President*, pp. 99-102.

[16] Maine and Nebraska use a different method of allocating electoral votes, the "district" system, under which votes are counted twice: on a statewide basis, and on a congressional district basis. The ticket receiving the most votes statewide receives two electoral votes for this total. The ticket winning the most votes in each congressional district receives a single electoral vote for each district it wins. In this way, a state's electoral vote may be divided to reflect geographical differences in support within the state for different candidates.

[17] 3 U.S.C. §1.

[18] For individual state provisions, see *Nomination and Election of the President and Vice President*, pp. 310-345.

[19] 3 U.S.C. §7.

[20] U.S. Constitution, Article II, §1; 12th Amendment. The words "by ballot" are interpreted to mean by paper ballot. With respect to the location of meetings of the electors, the Founders reasoned that if they met in their respective states, there would be less opportunity for political intrigue and chicanery than if they assembled in a single location. The difficulties inherent in long-distance travel at the time may also have influenced the Constitutional Convention's decision.

[21] 3 U.S.C. §15-18. The same sections of the *U.S. Code* provide for challenges to electoral votes, as occurred in 2001 and 2005.

The National Popular Vote Initiative: Background[22]

A range of factors contributed to the emergence of the National Popular Vote initiative in the first decade of the 21st century. A major source was frustration by reform advocates after three decades of failed attempts to secure congressional approval for a direct popular election amendment. Perhaps a more immediate spur was the contentious and disputed presidential election of 2000, which is regarded as having been a major factor contributing to the development of the NPV proposal.

Electoral College Reform, 1948-1979: Three Decades of Unsuccessful Efforts to Propose a Constitutional Amendment

One of the factors cited for the emergence of the NPV initiative has been the exacting requirements set by the Constitution for amendments, in this case, a direct popular election constitutional amendment. As noted previously, approval by two-thirds of Members present and voting is required in both houses when Congress proposes an amendment, followed by ratification by three-fourths of the states, 38 at present, usually within a seven-year period specified by Congress. Between 1948 and 1979, Congress debated electoral college reform at length; throughout this time, hundreds of reform proposals were introduced in both chambers. They generally centered on one of two courses: "end it" by eliminating the entire electoral college system and establishing direct popular election, or "mend it" by reforming its more controversial provisions.[23] Between 1948 and 1979, proposed amendments were the subject of hearings in the Senate and House Judiciary Committees on 17 different occasions, while electoral college reform was debated in the Senate on five occasions and twice in the House during this period. Proposals were approved by the necessary two-thirds majority twice in the Senate and once in the House, but never in the same Congress.[24]

Following the 1979 defeat of a direct popular election amendment on the Senate floor, and the retirement or defeat of prominent congressional advocates, the question of electoral college reform largely disappeared from public attention and Congress's legislative agenda. Although Senators and Representatives continued to introduce reform proposals, few received action beyond routine committee referral, and in time, the number of measures introduced dropped to zero. Even after the presidential elections of 2000 and 2016, in which the winner of the electoral vote won fewer popular votes than his opponent (a so-called "misfire"), there was little evidence that Congress was prepared to consider an electoral college reform amendment.

Proposals to replace the electoral college system with direct popular election continued to be introduced, but in dwindling numbers as the years passed. No proposal for direct popular election was introduced in the 113th Congress. By comparison, 41 direct popular election or electoral college reform amendments were proposed in the 95th Congress (1977-1978). Following the 2016 election, however, four constitutional amendments introduced late in the 114th Congress proposed

[22] Thomas H. Neale is the author of this section.

[23] The three principal reform proposals would all eliminate the office of elector and distribute electoral votes on the basis of different criteria. They were, and remain, (1) the automatic system, which would award electoral votes "automatically" in each state on a winner-take-all basis; (2) the district system, which would incorporate the system currently in place in Maine and Nebraska; and (3) the proportional system, which would award votes in each state in direct proportion to the percentage of popular votes won by competing tickets in that state.

[24] For a detailed examination and analysis of these efforts, see Peirce and Longley, *The People's President*, pp. 131-206.

eliminating the electoral college and replacing it with direct election. To date in the 115th Congress, two amendments to establish direct popular election by constitutional amendment have been introduced, but no further action has been taken on them.[25]

Survey Research: Trends in Public Support for Direct Popular Election

Until recently, survey research findings showed public support for presidential election reform through direct popular election by sizable margins.[26] As early as 1967, the Gallup Poll reported that 58% of respondents supported direct election, compared with 22% who favored retaining the electoral college. More recently, Gallup's 2013 survey recorded that 63% of respondents favored an amendment providing for direct election, while 29% favored retention of the electoral college.[27] Following the 2016 election, however, overall support for direct election was measured at 49% in favor to 47% opposed. It is arguable that the change in public attitudes was influenced by the 2016 election results, in which the Republican nominees won the election with a majority of electoral votes, but fewer popular votes than their Democratic opponents.[28] For instance, Gallup reported a shift to greater support for the electoral college system by respondents who identified themselves as "Republican" or "Lean Republican." Conversely, already high levels of support for direct popular election among respondents who identified themselves as "Democratic" or "Lean Democratic" rose still further in the post-2016 election Gallup Poll.[29]

National Popular Vote Inc., which tracked statewide surveys in 41 states between 2007 and 2015, reported that an average of 70% of respondents supported direct popular election.[30] It should be noted, however, that NPV has not reported results from any state surveys taken since the 2016 election that might reflect changes in support for popular election polls reported by Gallup. While these findings show the level of support for direct popular election, they do not measure public commitment to the NPV initiative per se. At the time of this writing, it appears that no major

[25] For additional information on recent proposals to establish direct popular election by constitutional amendment, please see CRS Report R44928, *The Electoral College: Reform Proposals in the 114th and 115th Congress*, by Thomas H. Neale.

[26] See, for example, Peirce and Longley, *The People's President*, pp. 2-9.

[27] Lydia Saad, "Americans Call for Term Limits, End to Electoral College," *The Gallup Poll*, January 18, 2013, at http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx.

[28] According to official state returns for the 2016 presidential election reported by the Federal Election Commission, Republican Party nominees Donald Trump and Mike Pence won 304 electoral votes, a majority of 56.5%, while Democratic Party nominees Hillary Clinton and Tim Kaine won 227 electoral votes, 42.2% of the total. Seven "faithless" electors cast votes for candidates other than those to whom they were pledged: five Clinton/Kaine electors and two Trump/Pence electors. They comprised 1.3% of the electoral vote total. In the popular vote, Clinton and Kaine won 65,853,516 popular votes, a plurality of 48.18% of the popular vote total, while Trump and Pence won 62,984,825 popular votes, 46.09% of the total. Other candidates gained 7,830,896 popular votes, 5.73% of the total. See U.S. Federal Election Commission, *Official 2016 Presidential Election Results*, January 30, 2017, at http://www.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

[29] Republican support for direct popular election fell from 54% in 2012 to 19% in December 2016, while Democratic support rose from 69% to 81%. Influenced by the change in opinion among Republican respondents, overall support for direct election fell from 62% in favor to 35% opposed in 2012 to 49% in favor to 47% opposed in 2016. Art Swift, "Americans' Support for Electoral College Rises Sharply," *The Gallup Poll*, December 2, 2016, at http://www.gallup.com/poll/198917/americans-support-electoral-college-rises-sharply.aspx.

[30] "Polls Show More Than 70% Support for a Nationwide Vote for President," National Popular Vote website, at https://www.nationalpopularvote.com/polls.

survey research organization has sampled public opinion on the NPV plan, as opposed to general support for direct election.

The Elections of 2000 and 2016 and Electoral College Reform

The disputed presidential election of 2000 was arguably a catalyst for new thinking on electoral college reform. Following a closely contested campaign, Republican candidates George W. Bush and Richard Cheney were elected over Democratic nominees Al Gore Jr. and Joseph Lieberman following a bitter dispute over election results in Florida that was ultimately decided by the Supreme Court.[31] The high court's decision left Bush and Cheney with a narrow plurality in Florida of 537 popular votes[32] and a similarly narrow electoral college majority of 30 states with 271 electoral votes, while their Democratic opponents took 20 states and the District of Columbia with 266 electoral votes (one District of Columbia elector cast a blank ballot in protest against the outcome). It was, moreover, the first election since 1888 in which the candidates elected uncontestably[33] won fewer popular votes than their principal opponents: the Gore/Lieberman Democratic ticket gained 50,992,335 popular votes to 50,455,156 for Bush/Cheney.[34]

These election results generated considerable discontent with the system. Some critics argued for a constitutional amendment, but the 107th Congress faced a heavy legislative workload throughout this period, which initially included enactment of President George W. Bush's legislative program and was later expanded to urgent responses to the terrorist attacks of September 11, 2001. Rather than focus on the lengthy process associated with consideration of a constitutional amendment, Congress focused on legislative remedies. The Help America Vote Act of 2002, passed in response to the numerous irregularities in voting systems and procedures revealed by the 2000 election, mandated election administration reforms and voting system technology enhancements (funded in part by federal grants to the states) intended to ensure accurate and timely voting and vote tabulation in future elections.[35]

In 2016, the presidential election was again won by nominees who gained a majority of electoral votes but fewer popular votes than their major party opponents.[36] Although proposals to amend the Constitution to provide direct popular election were introduced in response to this occurrence late in the 114th Congress, and again in the 115th Congress, the 2016 results have not resulted in the degree of controversy and activism that followed the electoral college "misfire" of 2000. The following factor may have contributed to this situation: in 2000, a shift in Florida's electoral votes from Bush/Cheney to Gore/Lieberman would have changed the election result; by comparison, in

[31] *Bush v. Gore*, 531 U.S. 98 (2000).

[32] Richard M. Scammon, Alice V. McGillivray, and Rhodes Cook, *America Votes 24: A Handbook of Contemporary American Politics* (Washington: CQ Press, 2001), p. 120.

[33] In 1960, a controversy arose over counting of votes for Democratic Party electors in Alabama. Some analysts maintained that vote totals for nominee John F. Kennedy were overstated, and that a more accurate accounting would have reduced his total in the state, giving Republican nominee Richard M. Nixon a slim nationwide popular vote plurality of 58,181 votes. See Peirce and Longley, *The People's President*, pp. 63-73.

[34] Scammon, McGillivray, and Cook, *America Votes 24*, p. 9.

[35] The Help America Vote Act, 116 Stat. 1666. For additional information, please consult CRS Report RS20898, *The Help America Vote Act and Election Administration: Overview and Selected Issues for the 2016 Election*, by Arthur L. Burris and Eric A. Fischer.

[36] For election results, see above at footnote 28.

2016, a shift in the state with the closest vote margin, Michigan, would not have altered the election.[37]

Bypassing Constitutional Amendment Procedures to Attain Direct Popular Election: Emergence of the National Popular Vote Concept

While the 2000 election's "misfire" did not result in consideration of a constitutional amendment, it did prompt considerable study and investigation into new approaches to electoral reform among scholars of the presidential election process and political activists. Law professors Robert W. Bennett of Northwestern University, Vikram Amar of the University of California-Davis, and Akhil Amar of Yale University School of Law are generally credited as the intellectual godparents of the concept that ultimately evolved into the National Popular Vote Interstate Compact,[38] which relies on the Constitution's broad grant of power to each state to "appoint, *in such Manner as the Legislature thereof may direct* [emphasis added], a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[39]

Project FairVote, an issue advocacy group self-described as a nonprofit, nonpartisan "501(c)(4)" organization, appears to have been an incubator of the NPV concept.[40] FairVote has supported NPV for "over a decade,"[41] and was an early supporter of National Popular Vote Inc., the plan's official advocacy group;[42] moreover, longtime FairVote board members Robert Richie and the late Representative John B. Anderson were early supporters of the National Popular Vote initiative and contributors to its manifesto, *Every Vote Equal*.[43]

[37] Comparative electoral vote returns for 2000 were Bush/Cheney: 271, Gore/Lieberman: 266, and 1 blank electoral vote ballot. For 2016, comparative electoral votes were Trump/Pence: 304, Clinton/Kaine: 227, and 7 electoral votes for others. In 2000, the closest popular vote state margin was in Florida, whose 25 electoral votes decided the election, where Bush/Cheney won by 537 votes. In 2016, the closest state margin was in Michigan, where Trump/Pence won by 10,704 votes. See U.S. Federal Election Commission, *2000 Official Presidential General Election Results*, December 2001, at https://transition.fec.gov/pubrec/2000presgeresults.htm; Federal Election Commission, *Official 2016 Presidential General Election Results*, at https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

[38] Robert W. Bennett, "Popular Election of the President Without a Constitutional Amendment," in *The Green Bag, An Entertaining Journal of Law*, 4 Green Bag 2d 241, available from the Social Science Research network by subscription, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=261057; Akhil Reed Amar and Vikram David Amar, "How to Achieve Direct National Election of the President without Amending the Constitution," *Findlaw's Writ*, December 28, 2001, at http://writ.news.findlaw.com/amar/20011228.html.

[39] U.S. Constitution, Article II, §1, clause 2.

[40] FairVote, founded in 1982 as Citizens for Proportional Representation, which later became the Center for Voting and Democracy, seeks to educate potential voters and enliven "discourse on how best to remove the structural barriers to democracy." FairVote's portfolio also includes such initiatives as "voter preregistration for young people, universal voter registration, a constitutional right to vote, and fair representation voting forms of proportional registration." FairVote.org, "Who We Are," at http://www.fairvote.org/who-we-are/who-we-are-2/.

[41] FairVote Archives, "The National Popular Vote Plan," at http://archive.fairvote.org/?=1950.

[42] FairVote, "About FairVote–Center for Voting and Democracy," at http://archive.fairvote.org/about_us/.

[43] John R. Koza et al., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*, 4th ed. (Los Altos, CA: National Popular Vote Press, 2014).

The National Popular Vote (NPV) Initiative[44]

As noted previously, the NPV initiative was the ultimate result of the various studies and proposals offered following the presidential election of 2000.

How the NPV Would Work

The NPV initiative seeks to establish direct popular election of the President and Vice President through an interstate compact, rather than by constitutional amendment. Ideally, under the compact's provisions, legislatures of the 50 states and the District of Columbia would pass legislation binding the signatories to appoint presidential electors committed to the presidential/vice presidential ticket *that gained the most votes nationwide*. If all 50 states and the District of Columbia were compact members, this would deliver a unanimous electoral college decision for the candidates winning a plurality of the popular vote.

Specifically, the plan calls for an agreement among the states, an interstate compact effected through state legislation, in which the legislature in each of the participating states agrees to appoint electors pledged to the candidates who won the *nationwide popular vote*. State election authorities would count and certify the popular vote in each state, which would be aggregated and certified as the "nationwide popular vote." The participating state legislatures would then choose the slate of electors pledged to the "nationwide popular vote winner," *notwithstanding the results within their particular states*.[45] In order to ensure success, the initiative would come into effect only if states whose total electoral votes equal or exceed the constitutional majority of 270 were to approve the plan.

If the nationwide popular vote were effectively tied, the states would be released from their commitment under the compact, and could choose electors who represented the presidential ticket that gained the most votes in each particular state.

One novel NPV provision would enable the presidential candidate who won the national popular vote to fill any vacancies in the electoral college with electors of his or her own choice.

States would retain the right to withdraw from the compact, but if a state chose to withdraw within six months of the end of a presidential term, the withdrawal would not be effective until after the succeeding President and Vice President had been elected.

Managing the NPV Campaign: National Popular Vote Inc.

The NPV advocacy effort is managed by National Popular Vote Inc., a "501(c)(4)"[46] nonprofit corporation established in California in 2006 by Barry Fadem, an attorney specializing in initiative and referendum law, and John R. Koza, Ph.D., an automated systems scientist and

[44] Thomas H. Neale is the author of this section.

[45] The provision under which all states would award electoral votes to the nationwide popular vote winners, notwithstanding results within the individual state, is the distinguishing characteristic of NPV. For instance, assume that presidential ticket "A" won 55% of the popular vote in State "X," and ticket "B" won 45%. Under the current general ticket system, electors for presidential ticket "A" would be chosen under existing state law. Under NPV, assume the same in-state results, but assume that ticket "B" won the nationwide popular vote. The state legislature, in compliance with the NPV compact, would be obligated to choose electors committed to ticket "B," because that ticket won the national popular vote, notwithstanding the in-state returns.

[46] 26 U.S.C. 501 (c)(4). Nonprofit tax-exempt organizations recognized by the Internal Revenue Service under this provision of the IRS Code often lobby for legislation and participate in political campaigns and elections.

entrepreneur.[47] As a 501(c)(4) entity, it is permitted to engage in political activity in furtherance of its goal, without forfeiting its tax-exempt status, so long as this is not its primary activity. NPV states on its website that its "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."[48] Dr. Koza serves as chairman of NPV Inc., and Mr. Fadem serves as president. NPV's advisory board includes former Senators and Representatives of both major political parties.[49]

In 2006, National Popular Vote Inc. published a detailed handbook, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*. This publication, in its fourth edition at the time of this writing, provides a detailed account of various issues related to the NPV initiative, including the electoral college, earlier reform efforts, interstate compacts, the text of the proposed compact, a strategy for advancing the initiative, and a 340-page section addressing "myths about the National Popular Vote Compact."[50]

National Popular Vote Inc. maintains an office in Mountain View, CA.

Supporters in various state legislatures began to introduce measures to adopt the interstate compact shortly after NPV's inaugural press conference on February 23, 2006. The NPV Compact has been introduced at various sessions in the legislatures of all 50 states and the Council of the District of Columbia, which performs the functions of a state legislature in the nation's capital, and has received some form of active consideration in 38 states and the D.C. Council.[51]

Among other activities, NPV maintains a regular communications program of email newsletters announcing activities and soliciting readers to petition governors and state legislators to support the compact.[52] At the time of this writing, NPV claims that 3,112 state legislators have either sponsored or cast a recorded vote in their respective legislatures for the compact. NPV also claims endorsements from legislators and endorsements by the *New York Times*, *Los Angeles Times*, *Chicago Sun-Times*, *Minneapolis Star Tribune*, *Boston Globe*, *Miami Herald*, and other newspapers.[53]

NPV also advocates use of the citizen initiative process where available to enact state adherence to the compact;[54] it asserts that when Article II, Section 1, clause 2 grants authority to the states to appoint "in such Manner as the Legislature thereof may direct," the authority extends to the states' entire lawmaking process, which in some states includes the proposal and passage of

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[47] Rick Lyman, "Innovator Devises Way Around Electoral College," *New York Times*, September 22, 2006, at http://www.nytimes.com/2006/09/22/us/politics/22electoral.html.

[48] National Popular Vote Inc. website, "About," at http://www.nationalpopularvote.com/pages/about.php.

[49] Advisory Board members listed on the NPV Inc. website include former Reps. Tom Campbell and Tom Downey and former Sens. Birch Bayh, David Durenberger, and Jake Garn. NPV also lists former Rep. Tom Tancredo, former Gov. Howard Dean, and former Rep. and Speaker of the House of Representatives Newt Gingrich as supporters. See NPV website at https://www.nationalpopularvote.com/written-explanation.

[50] Koza et al., *Every Vote Equal*.

[51] Active consideration includes enactment, passage in one or more chamber, or hearings. National Popular Vote Inc. website, "Status of National Popular Vote Bill in Each State," at https://www.nationalpopularvote.com/state-status.

[52] National Popular Vote Inc. website, "Newsletters," at http://www.nationalpopularvote.com/pages/newsletters.php.

[53] National Popular Vote Inc. website, State legislators: "Agreement Among the States to Elect the President by Popular Vote," at https://www.nationalpopularvote.com/written-explanation; and Newspaper endorsements: "News History," at https://www.nationalpopularvote.com/news-history.

[54] Koza et al., *Every Vote Equal*, pp. 293-294. There is no evidence at the time of this writing that the initiative process has been successfully invoked to place NPV proposals on state ballots.

legislation and constitutional amendments through citizen initiative.[55] The citizen initiative approach to the interstate compact, however, has yet to be used at the time of this writing.[56]

Status of the National Popular Vote Interstate Compact in 2018: How Many States Have Ratified the NPV Initiative?

At the time of this writing, in October 2018, the following 11 states and the District of Columbia have adopted the National Popular Vote Compact. Collectively, they are assigned a total of 172 electoral votes.[57] The National Popular Vote Interstate Compact has been introduced since its inception in all 50 states and the District of Columbia. States that have adopted NPV at the time of this writing are listed in chronological order, by year of adoption, as follows:

- **Hawaii** (4 electoral votes), 2008;
- **Illinois** (20 electoral votes), 2008;
- **Maryland** (10 electoral votes), 2008;
- **New Jersey** (14 electoral votes), 2008;
- **Washington** (12 electoral votes), 2009;
- **Massachusetts** (11 electoral votes), 2010;
- **District of Columbia** (3 electoral votes), 2010;
- **Vermont** (3 electoral votes), 2011;
- **California** (55 electoral votes), 2011;
- **Rhode Island** (4 electoral votes), 2013;
- **New York** (29 electoral votes), 2014; and
- **Connecticut** (7 electoral votes), 2018.

After initial momentum in 2008, when four states joined the compact in one year, NPV has made slow progress toward its goal of approval by states accounting for 270 electoral votes. Obvious highlights were California's approval in 2011, which added 55 electoral votes to the tally, and New York's accession to the compact in 2014. Connecticut's action in 2018 added 7 electoral votes, bringing the total to 172, 63.7% of the 270 votes needed for NPV to go into effect.[58]

NPV was introduced in 18 legislatures in 2018; it was adopted by Connecticut, as noted earlier, and, according to the National Conference of State Legislatures, remains currently under consideration in two states—Ohio (18 electoral votes) and Pennsylvania (20 electoral votes).[59]

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[55] Koza et al., *Every Vote Equal*, Chapter 8, pp. 297-341. See also Katherine Oh, "The National Popular Vote Compact via Direct Democracy," American Constitution Society, ACS blog, November 15, 2017, at https://www.acslaw.org/acsblog/the-national-popular-vote-compact-via-direct-democracy.

[56] Initiative and Referendum Institute, "Ballotwatch," at http://www.iandrinstitute.org/index.cfm.

[57] National Conference of State Legislatures website, at http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx; Connecticut Legislature, Public Act 18-9, Session Year 2018, at https://www.cga.ct.gov/2018/ACT/pa/2018PA-00009-R00HB-05421-PA.htm.

[58] Computed by CRS.

[59] National Conference of State Legislatures website, State Elections Database, at http://www.ncsl.org/research/elections-and-campaigns/elections-legislation-database.aspx.

Conversely, proposals to rescind approval of the NPV Interstate Compact have been introduced in the legislatures of Hawaii, Maryland, Massachusetts, New Jersey, and Washington, to date, but none has been approved.[60]

Some observers note that, despite NPV's assertion of bipartisan support, all the jurisdictions that have joined the compact to date could be identified as "leaning" Democratic or "solid" Democratic in their support of the Democratic Party, as classified by a recent Gallup survey. For instance, 9 of the 11, including California, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Rhode Island, and Vermont, were found by Gallup to be among the "most solidly Democratic states in 2017."[61] Alluding to this fact, one commentator observed that

> [a]ll the states to have joined so far are very blue. Until some purple states and red states sign on, the compact has little in the way of territory to conquer.... The seven states where President Obama won [in 2012] by the widest margins, along with D.C., have joined. So have three others—New Jersey, Illinois and Washington—where Obama won by at least 15 percentage points. But none below that threshold have done so.[62]

The 2016 presidential election results in Connecticut, the most recent adherent to the NPV Compact, appear to bear out this observation—the Democratic candidates won the popular vote cast for all candidates on the ballot in 2016 by 54.6% to the Republicans' 40.9%.[63] On the other hand, both states where the NPV remained under active consideration in late 2018—Ohio and Pennsylvania—were carried by the Republican presidential ticket in 2016.

As the NPV campaign developed momentum in the states, particularly between 2008 and 2011, defenders of the existing arrangements and the electoral college announced measures to promote retention of the electoral college system. In October 2011, the Heritage Foundation, a conservative public policy institute, released a report opposing the NPV compact.[64] That same month, *Roll Call* reported that the State Government Leadership Foundation, a project of the Republican State Leadership Committee, would begin a campaign to defend the electoral college and counter recent NPV gains.[65] Further activity, however, does not appear to have been undertaken by these groups by the time of this writing.

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[60] National Conference of State Legislatures website, at http://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx#Current%20Status%20of%20the%20Compact. According to the National Conference of State Legislatures, legislation to repeal New Jersey's accession to the NPV compact was pending as of September 2018.

[61] Jeffrey M. Jones, "State Partisanship Shifts Toward Democratic Party in 2017," Gallup Politics, February 1, 2018, at http://news.gallup.com/poll/226556/state-partisanship-shifts-toward-democratic-party-2017.aspx?g_source=link_NEWSV9&g_medium=TOPIC&g_campaign=item_&g_content=State%2520Partisanship%2520Shifts%2520Toward%2520Democratic%2520Party%2520in%25202017.

[62] Nate Silver, "Why a Plan to Circumvent the Electoral College is Probably Doomed," *Five Thirty Eight*, April 17, 2014, at http://fivethirtyeight.com/datalab/why-a-plan-to-circumvent-the-electoral-college-is-probably-doomed/.

[63] Rhodes Cook, *America Votes 32, 2015-2016: Election Results by State* (Thousand Oaks, CA, CQ Press: 2018), p. 9.

[64] Hans von Spakovsky, "Destroying the Electoral College: the Anti-Democratic National Popular Vote Scheme," Heritage Foundation, October 27, 2011, at https://www.heritage.org/election-integrity/report/destroying-the-electoral-college-the-anti-federalist-national-popular.

[65] Eliza Newlin Carney, "GOP Nonprofit Backs Electoral College," *Roll Call*, December 8, 2011, at http://www.rollcall.com/issues/57_71/GOP-Nonprofit-Backs-Electoral-College-210872-1.html. For further information on the State Government Leadership Foundation, see its website at http://sglf.org/.

The National Popular Vote Initiative: Pro and Con[66]

Arguments in support of and opposed to the National Popular Vote proposal resemble those advanced in favor of and against direct popular election of the President. The central issue turns on the question of the asserted simplicity and democratic attractiveness of the direct election idea as compared to a more complex array of factors cited by supporters of the electoral college system.

Arguments Favoring the NPV Compact

Proponents of the NPV initiative arguably share the philosophical criticism voiced by proponents of direct popular election, who maintain that the electoral college system is intrinsically undemocratic—it provides for "indirect" election of the President and Vice President. This, they assert, is an 18th century anachronism, dating from a time when communications were poor, the literacy rate was much lower, and the nation had yet to develop the durable, sophisticated, and inclusive democratic political system it now enjoys. They maintain that only direct popular election of the President and Vice President is consistent with modern democratic values and practice.

Beyond this fundamental challenge, critics cite what they identify as a wide range of technical failings of the electoral college arrangement. Perhaps the most prominent of these is that the electoral college system can result in the election of a President and Vice President who have won the electoral vote, but gained fewer popular votes than their major opponent. This condition results at least in part from the nearly universal reliance on the "winner-take-all" or general ticket system of awarding electoral votes in the states, which is also criticized by NPV advocates. Under the general ticket system, the candidates winning the most popular votes in a state (a plurality is sufficient) are awarded *all* that state's electors and electoral votes; under these circumstances, a presidential ticket can gain all of a state's electoral votes on even a slim margin of popular votes.[67] Presidents were elected in 1876, 1888, 2000, and 2016 who received fewer popular votes than their major party opponents, while the runner-up in both popular and electoral votes was elected by the House of Representatives when four candidates split the vote in the presidential election of 1824.[68]

NPV supporters advocate the compact on the grounds of fairness and respect for the voters' choice. At the core of their arguments, they assert that the process would be simple, national, and democratic; the NPV interstate compact would provide de facto for a single, democratic choice, allowing all the nation's voters to choose the President and Vice President directly, with no intermediaries. The "people's choice," they assert, would win in every election, and every vote would carry the same weight in the election, no matter where in the nation it was cast. No state would be advantaged, nor would any be disadvantaged. According to NPV, the central argument in favor is that the compact "would guarantee the Presidency to the candidate who receives the

[66] Thomas H. Neale is the author of this section.

[67] For instance, in 2016, Republican nominee Donald J. Trump won Michigan with 47.5% of the popular vote to Democratic nominee Hillary Rodham Clinton's 47.3%. Under the winner-take-all system, candidate Trump won all 16 Michigan electoral votes, notwithstanding the closeness of the popular vote contest. Conversely, Clinton won New Hampshire with 46.8% of the popular vote to Trump's 46.5%, taking New Hampshire's four electoral votes. See Cook, *America Votes 32*, p. 9.

[68] This was a contingent election, since no candidate won a majority of electoral votes. For more information, see above.

most popular votes [or at least a plurality] in all 50 states (and the District of Columbia)."[69] According to NPV, there would never again be a presidential election "misfire" or another "wrong winner."

Other elements of the electoral college system criticized by NPV advocates (and other electoral college reformers) would arguably disappear or be rendered irrelevant. These include the faithless elector phenomenon, the general ticket system's asserted "disfranchisement" of voters who backed the losing candidates, and various asserted "voting power" advantages attributed to large (populous) states, small states, states with large populations of noncitizens, states with low rates of voter participation, and populous states with concentrations of minority-group voters. In addition, the NPV compact would almost certainly eliminate the need for contingent election of the President and Vice President under the Twelfth Amendment.[70]

NPV advocates also assert the compact would provide a practical benefit to states that tend to be noncompetitive in presidential elections and which therefore receive fewer campaign visits by major party candidates. With "every vote equal," NPV maintains that presidential and vice presidential nominees and their organizations would need to spread their presence and resources more evenly as they campaigned for every vote nationwide, rather than concentrate on winning key "battleground" states. They assert that, under the present system

> candidates have no reason to poll, visit, organize, campaign, or worry about the concerns of voters of states that they cannot possibly win or lose. This means that voters in two thirds of the states are effectively disenfranchised in presidential elections because candidates concentrate their attention on a small handful of "battleground" states. In 2004, candidates concentrated over two-thirds of their money and campaign visits in just five states; over 80% in nine states, and over 99% of their money in just 16 states.[71]

For instance, NPV notes that California voters seldom see the presidential or vice presidential nominees or benefit from campaign spending because the Golden State, having voted Democratic since 1988, is considered to be reliably "blue," and Democratic Party candidates are said to take its 55 electoral votes for granted. They also note that Republican candidates make few California appearances, but, NPV asserts, for the opposite reason: why spend time and resources in support of an apparently hopeless cause? Similar arguments made by NPV on the Republican side apply to Texas, a state that has voted for Republican presidential nominees since 1980. In 2016 for instance, NPV claims that no Democratic nominee participated in a general election campaign event in California or Texas, while a Republican nominee appeared in only one campaign event in each of those states. By comparison, according to their calculations, the hotly contested battleground states of Florida, North Carolina, and Pennsylvania received, respectively, 71, 55, and 54 candidate appearances.[72] According to NPV's analysis of campaign appearances, the 2016 major party candidates for President and Vice President appeared at a total of 375 campaign events during the general election campaign, but they visited only 12 states; by NPV's calculation, 38 states and the District of Columbia were bypassed during the campaign.[73]

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[69] National Popular Vote website, at http://www.nationalpopularvote.com/pages/explanation.php.

[70] For further information on contingent election, see above at footnote 13.

[71] National Popular Vote website, at http://www.nationalpopularvote/com/pages/explanation.php.

[72] National Popular Vote website, "Two-thirds of Presidential Campaign Is in Just Six States," at https://www.nationalpopularvote.com/campaign-events-2016.

[73] National Popular Vote website, "Two-thirds of Presidential Campaign Is in Just Six States," at https://www.nationalpopularvote.com/campaign-events-2016.

NPV advocates also maintain that the concentration of campaign resources, advertising, and candidate appearances in battleground states depresses turnout in "flyover" states, where candidates make few campaign appearances.[74] The U.S. Elections Project report, *America Goes to the Polls, 2016*, appears to offer statistics consistent with this assertion, finding that the participation rate of the population eligible to vote in 14 battleground states[75] was 65% in the 2016 presidential election, as opposed to comparable nationwide turnout of 60%.[76] It also reports findings similar to those advanced by NPV: 95% of campaign visits during the 2016 campaign were made in battleground states, as was 99% of "ad spending."[77] The NPV manifesto also cites a Brookings Institution study of the 2004 presidential election in support of its argument, stating, "Because the electoral college has effectively narrowed elections like the last one to a quadrennial contest for the votes of a relatively small number of states, people elsewhere are likely to feel that their votes don't matter."[78] It should be noted, however, that a range of other political, social, cultural, and economic factors may also contribute to the disparity in turnout between battleground and nonbattleground states.

NPV further suggests that the disparity in participation may ultimately damage the ability to govern on the state and local levels and could have a negative impact on the legitimacy of public institutions:

> Diminished voter turnout in presidential races in non-battleground states weakens down-ballot candidates, thereby making the state even less competitive in the future. Governance—not just electioneering—is affected by the winner-take-all rule.[79]

Arguments Opposing the NPV Compact

National Popular Vote opponents oppose the compact on various grounds. Some argue that it is unconstitutional or "anticonstitutional," that is, contrary to the Founders' intentions and the spirit of the nation's fundamental charter. It is also asserted that NPV would solve few of the electoral college system's alleged problem issues and would create some of its own. Finally, some observers note that the NPV compact is an interstate compact as defined in Article I, Section 10, clause 3 of the Constitution, and as such would be subject to congressional approval. This issue is examined in greater detail in a separate section of this report.

On the most fundamental philosophical basis, opponents might argue that the NPV compact violates one of the basic principles of majoritarian democracy: it does not require that candidates win a *majority* of the popular vote in order to gain the presidency. Rather, it would anoint as

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[74] In the specific context of the National Popular Vote Initiative, NPV identifies "flyover states" as those in which polls show one party's candidates as holding an insurmountable lead. Given the predicted result, NPV asserts that neither party is willing to devote funds or candidate appearances in a state where the results are a foregone conclusion—the campaigns "fly over" (i.e., they avoid these states). A second category of flyover states cited by NPV includes those which control too few electoral votes to be likely to wield a decisive influence on the election's results.

[75] The report identified the following as battleground states in the 2016 presidential election: Arizona, Colorado, Florida, Georgia, Iowa, Maine, Michigan, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin.

[76] U.S. Elections Project, "Battleground States, Competition and Turnout," in *America Goes to the Polls, 2016, A Report on Voter Turnout in the 2016 Election*, p. 12, at https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf/.

[77] U.S. Elections Project, *America Goes to the Polls, 2016*, p. 13.

[78] Pietro S. Nivola, "Thinking About Political Polarization," The Brookings Institution, Policy Brief #139, January 2005, at http://www.brookings.edu/research/papers/2005/01/01politics-nivola.

[79] Koza et al., *Every Vote Equal*, p. 38.

winner the ticket that gains *more* popular votes than any other. A majoritarian democracy, it may be argued, should require a majority in order to elect; it may be further noted that the existing system, by comparison, requires a majority in the electoral college. As one commentary noted

> only the strictest of majoritarians desire a purely majoritarian presidential election system, and those individuals should be deeply troubled by the prospect of plurality presidencies, which the NPVC [sic] expressly countenances. Indeed, the NPVC promises to create more difficulties and "misfires" in its own way than the Electoral College system its proponents so earnestly seek to replace.[80]

Further, opponents might ask how the NPV compact would function in the event of a multicandidate election, a phenomenon that recurs from time to time in U.S. presidential elections. One commentator posited the following problematic scenario under such circumstances:

> Under the compact, one can easily imagine a multi-candidate race in which a candidate would win, say, a thirty-four percent plurality of the popular vote nationwide while losing in every state and D.C. If all of the states and D.C. were signatories to the compact, all the electoral votes in such a hypothetical race would be awarded contrary to the will of voters choosing electors (still not voting directly for President under this plan). Would the United States accept a President who wasn't the choice of sixty-six percent of those voting, nor even the choice of a single state?[81]

The existing electoral college system, NPV skeptics might also assert, is a fundamental element in the federal constitutional arrangements established by the Constitution. Fearing "the tyranny of the majority,"[82] the Founders established a system of government that provides checks and balances designed to restrain the majority and secure minority rights. These principles are also embedded in the structure of federal elections: the Senate, the House of Representatives, and the presidency were deliberately provided with different terms of office and different electorates, and the states were given an important role in the federal election process. In particular, through the electoral college the United States elects its *national* Presidents and Vice Presidents in a state-based *federal* election. Successful nominees are compelled under this system to present a broad political vision that commands nation-spanning "concurrent majorities" and appeals to the great variety of Americans.[83] As in the case of the Senate, less populous states are accorded a small numerical advantage by assignment of two at-large electors reflecting the Constitution's equal apportionment of Senators to each state regardless of its population. The NPV initiative, they could claim, would discard the Founders' intentions in favor of what they consider to be a flawed "majoritarian" presidency that would ill-serve a continent-spanning and profoundly diverse republic.

Another criticism centers on the use of the NPV compact to effect a fundamental change in the presidential election process and a de facto amendment to the Constitution, but without following the procedures set out in Article V. Critics may note that NPV's founders admit their plan is an

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[80] Norman R. Williams, "Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change," *Georgetown Law Review*, vol. 100, issue 1 (2011), p. 173.

[81] Alexander S. Belenky, "The Good, the Bad, and the Ugly: Three Proposals to Introduce the Nationwide Popular Vote in U.S. Presidential Elections," *Michigan Law Review*, vol. 112 (June 2014), at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1124&context=mlr_fi.

[82] See especially James Madison, "The Size and Variety of the Union as a Check on Faction," Federalist 10, in *The Federalist* (Cambridge, MA: The Belknap Press of Harvard University Press, 1967), pp. 129-136.

[83] Daniel P. Moynihan, "The Electoral College and the Uniqueness of America," in *Securing Democracy: Why We Have an Electoral College*, ed. Gary L. Gregg, II (Wilmington, DE: ISI Books, 2001), pp. 91-93.

"end run" around the Constitution.[84] Proponents might counter with the argument that Article V presents too high a hurdle for what they consider a necessary reform of the system. Opponents, however, could respond that the Founders intended the various supermajority requirements in Congress and the states to ensure that successful constitutional amendments enjoy broad national support. The bare majority of electoral votes required to implement NPV, they might note, meets none of these supermajority requirements. As one study critical of the NPV initiative concluded, because the use of an interstate compact "does not conform to the constitutional means of changing the original decisions of the Framers, NPV could not [therefore] be a legitimate innovation."[85] A final argument on this line might be that one "end run" around the amendment process might lead to others, setting a dangerous precedent for similar efforts in the future.

Opponents might note that the NPV would eliminate the electoral college system's multiplier effect generated by the winner-take-all or general ticket system used in 48 states and the District of Columbia, which tends to magnify the winning ticket's margin of victory, and is said to confer greater legitimacy to the victors.[86] For instance, in 2016, Republican nominee Donald Trump's clear electoral vote majority of 304 votes (56.5% of the total), compared with Democratic nominee Hillary Clinton's 227 (42.2% of the total) could be said to reinforce and confirm his victory, notwithstanding Clinton's plurality of the popular vote (48.2%), compared with Trump's 46.1%.[87]

From a practical standpoint, NPV opponents might argue that the NPV would actually lead to an increase in contested election results and legal challenges in the states, as the political parties maneuver to claim every possible vote. They assert that the existing tabulation of popular votes within each state reduces contested results and recounts. Under NPV, the incentive to gain every vote would arguably lead to far broader disputes and widespread recounts at every level of election administration. As a Heritage Foundation study concluded

> Under the NPV … any suspicions necessitating a recount in even a single district would be an incentive for a national recount.... 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.[88]

Opponents might also assert that the increased incidence of recounts would be further complicated by wide-ranging disparities in state procedures, potentially leading to prolonged periods of uncertainty following close presidential elections.[89]

Critics may also note that the NPV plan contains no "statute of limitations," unlike proposed constitutional amendments, for which Congress typically sets a seven-year ratification period.[90]

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[84] This is the term applied by NPV founder John Koza in a 2006 interview: "When people complain that it's an end run," Dr. Koza said, "I just tell them, 'Hey, an end run is a legal play in football.'" Rick Lyman, "Innovator Devises Way Around Electoral College," *New York Times*, September 22, 2006, at http://www.nytimes.com/2006/09/22/us/politics/22electoral.html.

[85] John Samples, *A Critique of the National Popular Vote Plan for Electing the President*, Cato Institute, Policy Analysis No. 622, October 13, 2008, p. 9.

[86] For additional information on the multiplier effect, see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, pp. 9-10.

[87] Cook, *America Votes 32*, p. 9.

[88] Hans von Spakovsky, *Destroying the Electoral College*, p. 8.

[89] Samples, *A Critique of the National Popular Vote Plan for Electing the President*, p. 11.

[90] Congress has set the seven-year period as a reasonable time limit for the ratification process for the 18th and 20th through 26th Amendments.

Where, critics may ask, is a similar time limit that would "sunset" the NPV compact, after which it would expire or return to "square one"? According to its website, NPV was launched on February 23, 2006;[91] if it were a constitutional amendment proposed by Congress, it would have expired on February 23, 2013, since by the end of the customary seven-year deadline it was "ratified" by only eight states and the District of Columbia. By what reasoning, they might ask, should the NPV be exempt from the standards of timeliness and contemporaneity Congress customarily sets for constitutional amendments?

Opponents might finally argue that NPV's assertion that the compact would have the effect of spreading campaign spending resources and candidate events in non-battleground states is a questionable argument to justify a fundamental change in the presidential election process. Campaign appearances and spending, they might assert, should not be considered to be a local economic stimulus package, nor are the amounts in question sufficient to make much of a difference in the economic condition of most states. As one critical analysis notes, "... the nation does not hold presidential elections to foster local economic development."[92] Moreover, they might continue, it is equally dubious to assert that nominees will slight the concerns of citizens of the nonbattleground states from which they draw their greatest support, or that concentrated campaigning in the battleground states somehow "disenfranchises" voters in others. In the modern era, only a tiny percentage of voters actually attends an in-person presidential or vice presidential candidate appearance. Television (especially broadcast and cable TV news networks), social media, the internet, and newspapers—not the traditional rallies, torchlight parades, and handbills—dominate presidential election campaigns in the 21st century.[93]

National Popular Vote: Legal Issues[94]

In addition to policy issues discussed previously, some observers have also raised questions related to the NPV initiative based on the fact that it is an interstate compact as defined in the Constitution. Others have questioned whether NPV might conflict with some provisions of the Voting Rights Act.

The NPV Initiative As an Interstate Compact

The NPV initiative has been described by its supporters variously as a bill,[95] a state-level statute,[96] and an interstate compact.[97] The latter reference necessitates an analysis of whether the initiative complies with the Compact Clause of the Constitution.

[91] See National Popular Vote website, at http://www.nationalpopularvote.com/pages/summary.php.

[92] Samples, *A Critique of the National Popular Vote Plan for Electing the President*, p. 11.

[93] For instance, see Jeff Zeleny, "The Up-Close-and-Personal Candidate? A Thing of the Past," *New York Times*, November 30, 2011, at http://www.nytimes.com/2011/12/01/us/politics/presidential-candidates-make-fewer-in-person-appearances.html?_r=0.

[94] Andrew L. Nolan is the author of this section.

[95] "Explanation of the National Popular Vote Bill," National Popular Vote website, at http://www.nationalpopularvote.com/pages/explanation.php#exp_1page.

[96] "What Is the National Popular Vote Plan? Facts and FAQs," FairVote.org website, at http://www.fairvote.org/reforms/national-popular-vote/what-is-the-national-popular-vote-plan/.

[97] "Explanation of the National Popular Vote Bill," National Popular Vote website, at http://www.nationalpopularvote.com/pages/explanation.php#exp_1page.

An interstate compact—under the broadest understanding—is a contract between two or more consenting states.[98] The Supreme Court has further suggested that an interstate compact often requires reciprocal commitments between the governments of two or more states, such that one state's commitment is conditioned on the action of another state and no state can unilaterally repeal its commitment.[99] The use of interstate compacts predates the Constitution, as the Articles of Confederation contained a similar Compact Clause that provided a qualified prohibition on states entering into any agreements between them without the consent of Congress.[100] The chaos resulting from the disunity created by the Articles of Confederation prompted the Framers of the Constitution generally to "impose more uniformity" among the states,[101] resulting in a Constitution that *wholly* prohibits states from entering into any treaties, alliances, and federations.[102] Nonetheless, the Constitution maintained the Articles of Confederation's *qualified* prohibition on interstate compacts and agreements, allowing states to enter into an interstate compact so long as the participating states seek the consent of Congress.[103] Specifically, the Compact Clause provides that "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State.... "[104] While the historical rationale for Article I's *qualified* prohibition on interstate compacts is unclear,[105] the Compact Clause generally reflects the view of the Framers that states should be able to work cooperatively together, as well as the concern that unchecked interstate alliances might threaten the harmony of the Union or the authority vested by the Constitution in the federal government.[106] As the Supreme Court noted in *Cuyler v. Adams*, "By vesting in Congress the power to grant or withhold consent, or to condition consent on the states' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."[107]

Of note, the Compact Clause places no limits on what might be done through an interstate compact other than the requirement of congressional consent. In the early years of government under the Constitution, compacts were used almost exclusively to settle boundary disputes. Beginning with the establishment of the Port of New York Authority[108] in 1921, however, compacts began to be used to address more complex, regional issues requiring intergovernmental cooperation. Some compacts are merely advisory in form, but others may be regulatory, with

[98] See *Texas v. New Mexico*, 482 U.S. 124, 128 (1989) (noting that a "Compact is, after all, a contract.") (quoting Petty v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)).

[99] See *Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985) (*dicta*). The *Northeast Bancorp* Court further noted that an interstate compact often entails the existence of a "joint organization or body" overseeing the agreement. *Id.*

[100] Articles of Confederation, Article VI ("No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.").

[101] Adam Schleifer, "Interstate Agreement for Electoral Reform," *Akron Law Review*, vol. 40, issue 1 (2007), pp. 717, 728-729.

[102] U.S. Constitution, Article I, §10, clause 1.

[103] U.S. Constitution, Article I, §10, clause 3.

[104] U.S. Constitution, Article I, §10, clause 3.

[105] See *United States Steel Corp v. Multistate Tax Commission*, 434 U.S. 452, 463 (1978) ("Whatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost.").

[106] Michael L. Buenger and Richard L. Masters, "The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems," *Roger Williams Law Review*, vol. 9, issue 1 (fall 2003), pp. 71, 85.

[107] 449 U.S. 433, 439-440 (1981).

[108] 1921 N.Y. Laws Ch. 154; N.J. Laws Ch. 151; 42 Stat 174 (1921).

significant powers granted to multistate commissions.[109] More recently, compacts have addressed such wide-ranging concerns as mental health treatment, law enforcement and crime control, education, driver licensing and enforcement, environmental conservation, energy, nuclear waste control, facilities operations, transportation, economic development, insurance regulation, placement of children and juveniles, disaster assistance, and pollution control. Approximately 200 interstate compacts are in effect today.[110]

Accordingly, the central legal issue with respect to the Compact Clause is whether a given interstate compact requires the consent of Congress. While a "literal" reading of the Compact Clause "would require the States to obtain congressional approval before entering into *any* agreement among themselves, irrespective of form, subject, duration, or interest to the United States [emphasis added],"[111] the Supreme Court has repeatedly rejected such a reading. In 1893, in *Virginia v. Tennessee*,[112] Justice Stephen Field, writing for the Court, contended that a broad reading of the Compact Clause would "embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects[,]"[113] requiring congressional consent to agreements "which the United States can have no possible objection or have any interest in interfering with," as well as those that "may tend to increase ... the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States.... "[114] Surmising that the Compact Clause could not have been intended to have such a broad reach,[115] Justice Field concluded that the Clause prohibits states from entering into compacts without congressional consent only when the underlying compact is "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[116] The Supreme Court has subsequently reaffirmed Justice Field's "functional view of the Compact Clause,"[117] and, accordingly, generally where an agreement does not fall within the scope of the Compact Clause as envisioned by the Court in *Virginia v. Tennessee*, the agreement "will not be invalidated for lack of congressional consent."[118]

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[109] Administrators under compacts with congressional compacts with congressional consent may have the power to promulgate rules and regulations and may also review federal agency action under certain circumstances. See *Seattle Master Builders Assn. v. Pacific Northwest Elec. Power*, 786 F.2d 1359, 1362 (9th Cir. 1986).

[110] Council of State Governments, National Center for Interstate Compacts (NCIC), at http://www.csg.org/programs/ncic/default.aspx. The NCIC website includes a database of current interstate compacts searchable by state, name of compact, and subject.

[111] See *United States Steel Corp.*, 434 U.S. at 459.

[112] 148 U.S. 503 (1893).

[113] 148 U.S. 503 (1893) at 517-518.

[114] 148 U.S. 503 (1893) at 518.

[115] 148 U.S. 503 (1893) at 518. Justice Field listed four examples of interstate agreements that could in "no respect concern the United States": (1) an agreement by one state to purchase land within its borders owned by another state; (2) an agreement by one state to ship merchandise over a canal owned by another; (3) an agreement to drain a malarial district on the border of two states; and (4) an agreement to combat an immediate threat, such as invasion or an epidemic.

[116] 148 U.S. 503 (1893) at 519.

[117] *United States Steel Corp.*, 434 U.S. at 468; see also *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) ("The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"); *Northeast Bancorp*, 472 U.S. at 175-76 (same).

[118] See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). It should be noted, however, that the consent power of Congress is absolute. Congress can require consent to any interstate compact and can deny consent to any interstate compact if it so chooses. This may be true even where affirmative consent is not necessary. *St. Louis & San Francisco Ry. Co. v. James*, 161 U.S. 545 (1896); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). See also *Cuyler v.*

Whether the NPV initiative requires congressional consent under the Compact Clause first requires a determination as to whether NPV even constitutes an interstate compact. At times, its supporters have resisted framing the initiative as an interstate compact, arguably out of concern for running afoul of the Compact Clause's provisions.[119] For example, Professor Akhil Amar has argued that because the initiative does not create a "new interstate governmental apparatus," the NPV should not be considered an interstate compact, as NPV compact signatory states are merely exercising power collectively that each state could exercise on its own.[120] It is unclear, however, whether the creation of a new interstate governmental entity formed out of an agreement between two or more states is necessary, as opposed to sufficient, in order to deem an agreement as being an interstate compact subject to the Compact Clause. While the Supreme Court, in *Northeast Bancorp*, suggested that a "joint organization or body" formed out of an interstate agreement is a "classic indic[ium] of a compact,"[121] the Court has never adopted a definition of an interstate compact that solely rests on the existence of an interstate governmental body. Instead, the Court appears to have adopted a broader definition of what an interstate compact can entail. For example, in *Virginia v. Tennessee*, the Court noted that the words "compacts" and "agreements" are synonymous and "cover all stipulations affecting the conduct or claims of the parties."[122] In other words, when two or more states enter into a stipulated agreement whereby one state agrees to perform an act in consideration for a reciprocal act by the other state(s), that agreement can be considered an interstate compact.[123] This broad definition of a compact appears to encompass the NPV compact, as the initiative requires signatory states to agree mutually to appoint their electors to the winner of the national popular vote.[124] Moreover, NPV binds each assenting state, as no member state can withdraw from it within six months or less of the end of a President's term.[125] Because NPV prohibits states from freely "modify[ing] or repeal[ing] [the agreement]

Adams, 449 U.S. 433 (1981), where the Court deferred to Congress's political judgment that the Interstate Agreement on Detainers was to be treated as a compact pursuant to the Compact Clause even if the Constitution did not require such treatment. Justice White noted that the "requirement that Congress approve a compact is to obtain its political judgment." *Cuyler*, 449 U.S. at 441, n. 8 (White, J., dissenting).

[119] See, for example, Robert Bennett, "California Bill Could Spur Changes in How We Elect President: A New Movement Is Afoot to Institute a National Popular Vote," *Chicago Sun Times*, September 30, 2006, p. 14. ("First, calling the measure an interstate compact is neither necessary nor wise. The constitution says that congressional approval is required for an 'agreement or compact' among states. Though this requirement might not be applicable to the present effort, the chance should not be taken.").

[120] See Akhil Reed Amar, "Some Thoughts on the Electoral College: Past, Present, and Future," *Ohio Northern University Law Review*, vol. 33, no. 2 (2007), pp. 467, 478.

[121] 472 U.S. at 175.

[122] 148 U.S. at 520.

[123] 148 U.S. at 520. ("The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution.... ")

[124] See *Agreement Among the States to Elect the President by National Popular Vote*, Article III, at http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf. ("The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the 'national popular vote winner.'").

[125] *Agreement Among the States to Elect the President by National Popular Vote*, Article IV, at http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf. ("Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.").

unilaterally" and requires "reciprocation" of mutual obligations,[126] it appears that the initiative can be described as an interstate compact.

Assuming the NPV initiative is an interstate compact, the question remains whether it is one that implicates the Compact Clause. The answer to that question primarily depends on whether NPV is "directed to the formation of any combination tending to the *increase* of political power in the States, which may *encroach upon or interfere* with the just *supremacy of the United States*."[127] In other words, the "test" for whether a particular interstate compact requires congressional consent is centrally concerned with *vertical* balances of power between the federal government and the states; namely, "whether the Compact enhances state power *quoad* the National Government."[128] While the NPV arguably increases the political power of the states that have consented to it by ensuring that those states' desired outcome for the presidential election—the awarding of the majority of electoral votes to the presidential candidate supported by the majority of the voting populace—it is unclear how that increase in political power would be at the expense of the power of the federal government. After all, the Constitution provides the federal government with no role in determining the members of the electoral college.[129] One scholar has suggested that the NPV initiative would lead to a vertical alteration of power by eliminating the possibility that the House of Representatives would resolve a presidential election in the absence of an electoral majority for a single candidate because it is premised on a majority of electoral votes going to a single candidate.[130] The House of Representatives, however, has decided only two presidential elections in American history, and whether such an arguably hypothetical and de minimis diminishment of federal power through the NPV would be sufficient to require congressional consent under the Compact Clause is simply unresolved by the relevant case law.[131]

While the Supreme Court's case law interpreting the Compact Clause is centrally concerned with *vertical* federalism concerns (i.e., the balance of power between the state and federal governments),[132] the Court has recognized a potential secondary rationale suggested for the Compact Clause: to preserve the *horizontal* balance of powers among the various states.[133] And

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[126] *Northeast Bancorp,* 472 U.S. at 175.

[127] *Virginia,* 148 U.S. at 519 (emphasis added).

[128] *Multi-State Tax Comm'n,* 434 U.S. at 473.

[129] U.S. Constitution, Article II, §1.

[130] Schleifer, "Interstate Agreement for Electoral Reform," pp. 739-740. Another commentator has argued that the "NPV is clearly a threat to federal supremacy since it would replace a federal institution established by the Constitution with a popular vote system." Ian J. Drake, "Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact," *Publius, The Journal of Federalism,* vol. 44, issue 4, October 2014, at https://academic.oup.com/publius/article/44/4/681/1890901.

[131] It should be noted, however, that the Supreme Court in *Multi-State Tax Commission* did agree that the "pertinent inquiry [with respect to the Compact Clause] is one of potential, rather than actual, impact on federal supremacy." *Multi-State Tax Comm'n,* 434 U.S. at 472. Arguably, the potential for an erosion of the House of Representatives's authority necessitates congressional consent.

[132] *Multi-State Tax Comm'n,* 434 U.S. at 472. ("But the test is whether the Compact enhances state power *quoad* the National Government."); see also *New Hampshire v. Maine,* 426 U.S. 363, 369 (1976) (quoting *Virginia* v. *Tennessee,* 148 U.S. at 519) ("The application of the Compact Clause is *limited* to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'") (emphasis added).

[133] See Texas v. New Mexico, 138 S. Ct. 954, 958 (2018) (holding that "Congress's approval [of an interstate compact] serves to 'prevent any compact or agreement between two States, which might affect injuriously the interests of the others.'") (quoting Florida v. Georgia, 58 U.S. 478, 17 How. 478, 494 (1855)); see also Jennifer S. Hendricks, "Popular Election of the President: Using or Abusing the Electoral College?" *Election Law Journal,* vol. 7, issue 3 (2008), pp. 218-225. ("[T]he Court's focus on federal concerns is a happenstance of the cases and arguments that have come before it. The Court has never *rejected* state interests as a factor in deciding whether to require congressional consent to a

horizontal federalism concerns could very well be implicated by the Compact Clause, as the provision appears to have been included in the Constitution out of concern both for the supremacy of the federal government *and* unity among the various states.[134] Whether the NPV compact threatens the powers of nonconsenting states has been the subject of much debate among academics. Those in support of the initiative have contended that the nonconsenting states do not lose any power as a result of the NPV.[135] According to this line of argumentation, even under the NPV, all states would retain their right to select the electors of their choosing, as nonmember state electors would still be counted in the electoral vote.[136] Others, however, have pointed to the underlying premise of the NPV—to enhance the political power of more populous states in presidential elections—as evidence that the initiative diminishes the power of nonconsenting states.[137] In other words, while noncompacting states would still retain the power to appoint electors, the influence that comes with that power would arguably be diminished because a state's role in the national election would be defined by its percentage of the popular vote and not by its percentage of electors, warranting congressional interest in approving a compact that effectuated such a change in national elections.[138] Ultimately, however, whether the NPV actually threatens the power of nonconsenting states is a debate that remains active within academia but would likely be the source of considerable litigation if the initiative ever became effective.[139]

If congressional consent is needed for the NPV, that consent can take various forms. Usually congressional consent to an interstate compact takes the form of a joint resolution or act of

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compact."). The Court has, at times, assumed the premise that the Compact Clause is concerned with preserving the rights of States that are not members to a particular compact. *Multi-State Tax Comm'n,* 434 U.S. at 477 ("Appellants' final Compact Clause argument charges that the Compact impairs the sovereign rights of nonmember States.... We find no support for this conclusion."); see also *Northeast Bancorp,* 472 U.S. at 176 ("Petitioners also assert that the alleged regional compact impermissibly offends the sovereignty of sister States outside of New England. We do not see how the statutes in question either enhance the *political* power of the New England States at the expense of other States or have an 'impact on our federal structure.'") (emphasis in original and internal citations omitted).

[134] See above, footnotes 76-81 and accompanying text.

[135] Hendricks, "Popular Election of the President: Using or Abusing the Electoral College?" p. 226.

[136] Hendricks, "Popular Election of the President: Using or Abusing the Electoral College?" ("Complaining that some of those choices will not count because the NPV states would have enough votes to control the Electoral College is akin to current complaints that Democratic votes in Texas or Republican votes in California 'don't count.' Being in the minority does not mean that your vote is not counted; it just means that you lose."); see also Schleifer, "Interstate Agreement for Electoral Reform," pp. 740-41 ("'any judgment of 'enhancement' [of member states' power] requires a baseline for comparison.' Setting this baseline at today's distribution of electoral clout seems legally arbitrary—today's distribution is not a matter of legal right or inherent constitutional architecture, but is instead an accident of demographics.") (internal citations omitted).

[137] *See* Derek T. Muller, "The Compact Clause and the National Popular Vote Interstate Compact," *Election Law Journal*, vol. 6, no. 4 (2007), pp. 372, 392; see also Drake, "Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact," p. 7. ("[The member states] will be the de facto group that actually elects the president.... Thus, the NPV compact 'tend[s] to increase and build up the political influence of the contracting states' in relation to the non-contracting states."). Adam Schleifer raises an additional argument that *member* states' power would be diminished under the NPV, as "[s]tates as political units are no longer making electoral decisions on their own, but are instead linking those decisions to the undivided citizenry." See Schleifer, "Interstate Agreement for Electoral Reform," p. 740.

[138] Derek T. Muller, "More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks," *Election Law Journal*, vol. 7, no. 3 (2008), pp. 227, 231. ("While the ultimate *outcome* of the election may not be pre-determined, the ability of states to *participate* in the political process with effective electoral votes and to wield political power *has* been pre-determined. Non-compacting states and their electors are left on the outside.") (emphasis in the original).

[139] Drake, "Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact," p. 17. ("It is likely that if and when the requisite number of states have enacted the NPV compact there will be multiple suits filed in state and federal courts seeking injunctions against states' implementation of the compact.").

Congress specifying its approval of the text of the compact and adding any conditions or provisions it deems necessary, often embodying the compact document. As with most congressional actions, consent to an interstate compact must occur with the approval of both houses and must be signed by the President before it becomes law.[140] Very rarely has the President vetoed or threatened to veto consent legislation by Congress.[141] While congressional consent to an interstate compact is most often explicit, consent by Congress may also be implied by subsequent acts of Congress as "[a]n inference clear and satisfactory that Congress ... intended to consent" to a compact may be sufficient.[142] Congress may also delegate its power to approve a compact to a federal official so long as an "intelligible principle" against which approval can be measured is apparent.[143] Ultimately, if congressional consent is truly needed for NPV to be effective, the initiative might have difficulty ever being enacted because the approval of both houses of Congress and the President would likely necessitate additional hurdles beyond the already challenging task of amassing support at the state level for the NPV.[144]

The NPV Initiative and Article II of the Constitution

Beyond the legal issues raised with respect to the Compact Clause, the NPV initiative also potentially raises other broader constitutional concerns, including whether the states can functionally obviate the role of the electoral college through the NPV. Article II of the Constitution establishes that the election of the President should occur *indirectly* through the election by the electoral college.[145] The choice of an *indirect* election for the President was a deliberate one by the Framers of the Constitution, because, while noting the importance that the "sense of the people" should influence the choice for President,[146] they found it "equally desirable" for the "immediate election" of the President to be made by a body representative of distinct state interests and removed from the threat of unchecked majoritarianism.[147] The result was that the Constitution established a presidential election process that was "manifestly

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[140] See *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991) ("If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7."); see also ibid. at 276, footnote 21 (citing the limited provisions of the Constitution which permit Congress or a part of Congress to take some actions without complying with the bicameral and presentment requirements of Article I, §7 of the Constitution, without citing the Compact Clause).

[141] In 1942, President Franklin D. Roosevelt vetoed the Republican River Compact, stating that it "seeks to withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation." *Congressional Record*, vol. 87, pt. 3, April 2, 1941, pp. 3285-3286. He did, however, sign a later, modified version of the compact. See 57 Stat. 86, also, Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements*, 2nd ed. (Albany, NY: State University of New York Press, 2012), p. 56.

[142] *Virginia v. West Virginia*, 78 U.S. 39, 60 (1870). Congressional consent "is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them.... " *Virginia*, 148 U.S. at 521.

[143] *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998).

[144] Ian J. Drake, "Move to Diminish Electoral College Faces Constitutional Roadblocks," The Constitution Center, September 20, 2013, at http://blog.constitutioncenter.org/2013/09/move-to-diminish-electoral-college-faces-constitutional-roadblocks/ ("Thus, the dilemma facing NPV proponents: the NPV compact must be submitted to Congress but cannot be approved by Congress.")

[145] U.S. Constitution, Article II, §1, clause 2.

[146] Hamilton, "The Method of Electing the President," in *The Federalist*, Number 68, p. 440.

[147] Hamilton, "The Method of Electing the President," in *The Federalist*, Number 68, p. 441. See also Norman Williams, "Why the National Popular Vote Compact is Unconstitutional," *Brigham Young University Law Review*, vol. 2012, issue 5, pp. 1523, 1549. Professor Williams of Willamette University provides an overview of the historical foundation for the electoral college in this article, noting that a proposal at the Constitutional Convention that the President be elected by "citizens of [the] U.S." drew "substantial opposition."

nonmajoritarian,"[148] with the electoral college, a body established to represent the distinct views of each state, as the centerpiece of the election process.[149] The central constitutional issue presented by the NPV, therefore, is whether the states, through an interstate compact, can functionally transform the presidential election system enshrined in the Constitution into a more majoritarian process.

Supporters of the NPV argue that the Constitution provides the legal means for states to transform the presidential election system into one where the President is elected based solely on the result of the national popular vote. Specifically, clause 2 of Article II, Section 1 of the Constitution provides the states with the power to "appoint, in such Manner as Legislature therefore may direct," the electors who represent the state in the electoral college.[150] Facially, the Constitution's primary limitation on the power of a state to select its electors is the final number of electors awarded to each state.[151] While perhaps an argument can be made that the structure, logic, and history of the Constitution place limits on the manner or method in which a state chooses its electors, the text of the Constitution simply does not impose any such limits.

Supreme Court case law also supports reading Article II of the Constitution to *broadly* provide states with wide discretion as to the manner in which its electors are selected. Specifically, in 1892 in *McPherson v. Blacker,* a unanimous Supreme Court upheld a Michigan law providing for the election *by individual congressional district* of presidential electors against a challenge that the law violated Article II of the Constitution.[152] In so holding, the Court placed great emphasis on a number of state laws that existed shortly after the ratification that provided a variety of "modes of choosing the electors," including selection by the legislature itself, by a "vote of the people for a general ticket," "by vote of the people in districts," or by some permutation of those methods.[153] Viewing this evidence together with the text of Article II[154] and the historical evidence from the Constitutional Convention[155] led the Court to broadly conclude state legislatures have "conceded plenary power ... in the matter of the appointment of electors,"[156] allowing the Michigan law to stand. Applying *McPherson* to the case of the NPV, the argument can and has been made that if the states have plenary power with respect to the manner of how electors are appointed, the power necessarily allows states to select electors in line with the results of the national popular vote.[157] More recently, supporters of the NPV have relied on the

[148] Williams, "Why the National Popular Vote Compact is Unconstitutional," p. 1577.

[149] U.S. Constitution, Article II, §1, clause 2.

[150] U.S. Constitution, Article II, §1, clause 2.

[151] U.S. Constitution, Article II, §1, clause 2. As noted earlier in this report, the Constitution prohibits a Senator, Representative, or any "Person holding an Office of Trust or Profit under the United States" from serving as an elector.

[152] 146 U.S. 1, 23 (1892).

[153] 146 U.S. 1, 23 (1892), at 29-33 (surveying the laws of the various states from the nation's early history).

[154] 146 U.S. 1, 23 (1892), at 27 (noting the word "appoint" in Article II, §1, clause 2 was "manifestly used as conveying the broadest power of determination.").

[155] 146 U.S. 1, 23 (1892), at 28 (reading the Journal of the Convention to conclude that the Framers intended to "leav[e] it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.").

[156] 146 U.S. 1, 23 (1892), at 35 ("[T]he power and jurisdiction of the State is exclusive.... "); see also Ibid. at 27 ("[The Constitution] recognizes that the people act through their representatives in the legislature and leaves it to the legislature exclusively to define the method of effecting the object."); *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[A] State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself.").

[157] See, for example, Vikram David Amar, "Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power,"

Supreme Court's 2015 ruling in *Arizona Legislature v. Arizona Independent Redistricting Commission (AIRC)*—which held that the State of Arizona had wide discretion under the Elections Clause of the Constitution to select the method by which the state provided for redistricting[158]—to argue that the states retain broad discretion in selecting electors under Article II, which uses similar language to the provision interpreted in *AIRC*.[159]

Others have argued that the structure of the Constitution and historical evidence suggest that the states do not have such vast discretion in appointing electors as to functionally transform the election for President into a national popular referendum.[160] As noted elsewhere in this report, the electoral college was created by the Framers to ensure that states with the least population retained power in the selection of the President, providing a check against domination by the most populous states.[161] The electoral college, being a product of the choices of individual state legislatures, was envisioned by the Framers as a body that would represent the specific interests of a given state, as opposed to the undifferentiated nation at large.[162] Accordingly, it may be argued that allowing the most populous states to collude to ensure that the national popular vote, as opposed to the wishes of an individual state, dictates the results of a state's slate of electors, could arguably be irreconcilable with the Framers' intentions with respect to the electoral college.[163]

As such, for those who find the NPV compact constitutionally suspect under Article II, *McPherson*'s broad pronouncements about the nature of a state's power to appoint electors should be viewed in the context of that particular case, where the state of Michigan was attempting to appoint its electors based on the votes of an individual district in the state, as opposed to the state as a whole. In contrast to the law at issue in *McPherson*, with NPV, there appears to be no evidence contemporaneous with the ratification of the Constitution of a state selecting its electors in accordance with the results of the *national* popular vote. Unlike the State of Michigan in *McPherson*, an NPV state's electors might not be a product of the views of the state at the time of the election, but instead would reflect national popular sentiment about who

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Georgetown Law Journal, vol. 100, issue 1 (2011), pp. 237, 251 (rejecting that "no single state could ever take account of the vote tally in any other state as any kind of meaningful factor in the process for allocating its electors" because such an argument is inconsistent with the concept that states have plenary power "to determine the manner of selecting electors.").

[158] See 135 S. Ct. 2652, 2671 (2015).

[159] See, for example, T. Hart Benton, *Case Note, Congressional and Presidential Electoral Reform After Arizona State Legislature v. Arizona Independent Redistricting Commission*, 62 Loy. L. Rev. 155, 186 (2016) ("The Court's interpretation of the scope of the legislature in *AIRC* could be instrumental in ensuring that voters may constitutionally enact legislation adopting the Compact in their respective states."); Vikram David Amar, *Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities*, 69 Ark. L. Rev. 253, 281 (2016) ("The path for direct democracy adoption of the NPV Plan or similar reforms seems unobstructed, constitutionally speaking at least."); but see Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 Fla. St. U. L. Rev. 717, 739 (2016) (noting that while a broad reading of the delegation issue in *AIRC* could "potentially authoriz[e] the people to amend the manner of choosing electors," the delegation issue in that case was a "narrow issue.").

[160] Williams, "Why the National Popular Vote Compact is Unconstitutional," p. 1577.

[161] Williams, "Why the National Popular Vote Compact is Unconstitutional," pp. 1577-1579.

[162] Hamilton, "The Method of Electing the President," in *The Federalist*, Number 68, p. 441. ("And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.").

[163] See Williams, "Why the National Popular Vote Compact is Unconstitutional," pp. 1577-1578. This may be especially true given the historical evidence that the concept of a national popular vote was "overwhelmingly defeated" at the Constitutional Convention.

should be the President. Moreover, the Supreme Court, in interpreting arguably analogous language from Article I of the Constitution allowing states to regulate the manner of the selection of the Members of the House of Representatives and Senate,[164] concluded that the states cannot exercise their delegated authority in a way that would "effect a fundamental change in the constitutional structure."[165] The question that remains is whether the Court in a future case challenging the NPV compact would interpret the states' authority under Article II to appoint electors to be broad enough to allow the President to be selected as a result of the national popular vote, a question that, given the lack of any precise precedent respecting the constitutionality of the NPV compact under Article II, will likely remain unresolved until such time.[166]

The NPV Compact and the Voting Rights Act[167]

Other critics claim the NPV compact might violate Sections 2 and 5 of the Voting Rights Act (VRA). Writing in *Columbia Law Review*, David Gringer invokes the voting power theory.[168] He argues that the plan conflicts with Section 2 of the VRA because moving from "a state-based [vote] to a national popular vote dilutes the voting strength of a given state's minority population by reducing its ability [voting power] to influence the outcome of presidential elections."[169]

Gringer also asserts that the NPV compact may violate Section 5 of the act.[170] In 2013, however, the U.S. Supreme Court invalidated Section 4(b) of the VRA,[171] which contained a formula prescribing which states and jurisdictions with a history of discrimination were required to obtain prior approval or "preclearance" under Section 5 before changing any voting standard, practice, or procedure.[172] Although the Court invalidated only the coverage formula in Section 4, by extension, Section 5 has been rendered currently inoperable. Prior to the Supreme Court ruling,

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[164] U.S. Constitution, Article I, §3, clause 1, ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislator thereof.... ").

[165] *United States Term Limits v. Thornton*, 514 U.S. 779, 837 (1995), (holding that "important changes in the electoral process" must occur "through the amendment procedures set forth in Article V.").

[166] In addition to constitutional questions respecting the Compact Clause and Article II, §1, clause 2, others have suggested that NPV would violate the Guarantee Clause of Article IV. See Kristin Feeley, "Comment: Guaranteeing a Federally Elected President," *Northwestern University Law Review*, vol. 109, no. 3 (2009), pp. 1427, 1459. ("NPV legislation violates the structural principle that no state should legislate for any other state. Placing no constitutional limit on state power over electors also creates the dangerous potential for eleven states to form a superstate and render the remaining thirty-nine states irrelevant in the election of the President. The limitations the Guarantee Clause provides against these results are desirable.") and the Fourteenth Amendment's Equal Protection Clause; see Williams, "Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change," p. 173. ("Simply aggregating votes from each of the fifty states and District of Columbia raises severe problems under the Equal Protection Clause of the Fourteenth Amendment."). Given the dearth of case law and scholarly debate on the Guarantee Clause and the Equal Protection Clause in even a related context to the NPV compact, however, these topics are outside the scope of this report.

[167] L. Paige Whitaker, Legislative Attorney in the American Law Division of the Congressional Research, provided counsel and assistance in preparing this section.

[168] As noted earlier, the voting power theory holds that a state's influence depends on the size of its electoral college delegation, and its consequent ability to influence the outcome of an election. For a fuller explanation of voting power, see Lawrence D. Longley and Neal R. Peirce, *The Electoral College Primer 2000* (Yale University Press, New Haven: 1999), pp. 149-161.

[169] David Gringer, "Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College," *Columbia Law Review*, vol. 108 (2008), p. 208.

[170] 42 U.S.C. §1973c.

[171] 42 U.S.C. §1973b.

[172] See *Shelby County v. Holder*, 133 S. Ct. 2112 (2013).

Gringer argued that the NPV compact would qualify as a covered practice under Section 5, and that the legislatures of all the "covered" states would have been required to obtain preclearance before implementing the compact.[173]

Responding to this point, National Popular Vote Inc. noted the following:

> The National Popular Vote bill manifestly would make every person's vote for President equal throughout the United States in an election to fill a single office (the Presidency). It is entirely consistent with the goal of the Voting Rights Act. There have been court cases under the Voting Rights Act concerning contemplated changes in voting methods for various representative legislative bodies.... However, these cases do not bear on elections to fill a single office (i.e., the Presidency).[174]

It should, however, be noted that in 2012, the Justice Department's Civil Rights Division specifically declined to challenge California's accession to the NPV compact on VRA grounds.[175]

Finally, it may be noted that the states' authority to appoint electors by any method their legislatures choose is not absolute. Federal court decisions have struck down state laws concerning appointment of electors that were found to be in violation of the Fourteenth Amendment's guarantee of equal protection:

> Although Clause 2 (of Article II, Section 1 of the Constitution) seemingly vests complete discretion in the states, certain older cases had recognized a federal interest in protecting the integrity of the process. Thus, the Court upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a presidential elector.... [I]n *Oregon v. Mitchell* (42 U.S. 112 (1970)), the Court upheld the power of Congress to reduce the voting age in presidential elections and to set a thirty-day durational residency period as a qualification for voting in presidential elections. Although the Justices were divided on the reasons, the rationale emerging from this case, considered with *Williams v. Rhodes*, (393 U.S. 20 1968)) is that the Fourteenth Amendment limits state discretion in prescribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment may override state practices that violate that Amendment and may substitute standards of its own.[176]

Concluding Observations[177]

Critics of the electoral college system have sought direct election of the President and Vice President without success for close to two centuries. The NPV initiative represents a novel effort to achieve this goal by use of an interstate compact that would circumvent the stringent requirements necessary for the proposal and ratification of constitutional amendments.

Since its inception in 2006, NPV has achieved a degree of success: 11 states and the District of Columbia, controlling a total of 172 electoral votes, have joined the compact since 2008. Progress has arguably been sporadic, however, notwithstanding active campaigning by National Popular

[173] Gringer, "Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College," p. 188.

[174] National Popular Vote, *Myths About the National Popular Vote*, "20.1, 20.2 Myths About the Voting Rights Act," at http://www.nationalpopularvote.com/pages/answers/section.php?s=20.

[175] U.S. Department of Justice, Civil Rights Division, Letter of T. Christian Herren, Jr., Chief, Voting Rights Section, at http://www.fairvote.org/assets/NewFolder/Chapter-188-approval-letter-from-DOJ.pdf.

[176] *United States Constitution: Analysis and Interpretation (The Constitution Annotated)*, Article II, §1, Clauses 2-4, at http://www.crs.gov/conan/details.aspx?mode=topic&doc=Article02.xml&t=1|2&s=1&c=2.

[177] Thomas H. Neale is the author of this section.

Vote Inc. When populous states like California and New York have joined the compact, the results have been widely publicized: additional state approvals are predicted, and opponents sound the alarm, but NPV has yet to develop sustained momentum toward its stated goal of states controlling 270 electoral votes. To date, only Democratic-leaning states[178] have joined the compact. This evident lack of support in Republican-controlled state legislatures arguably raises questions about further accessions to the compact in the immediate future, particularly given the fact that the GOP controlled both legislative chambers in 31 states in 2018.[179]

To date, while the NPV initiative has generated interest among supporters of direct popular election of the President, it does not appear to have gained widespread awareness or support among the public at large. This could change, however, if NPV were to develop sustained momentum, and if more states were to join the compact, particularly populous ones like Ohio (18 electoral votes) and Pennsylvania (20 electoral votes), where the compact was under active consideration in 2018.[180] Under these circumstances, proponents might be energized and encouraged by the sense of progress, while at the same time, opponents could be expected to coalesce around the issues identified earlier in this report. The activities of both might bring the NPV initiative to the more immediate attention of Congress.

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[178] As defined in a recent Gallup Poll. See Jeffrey M. Jones, "State Partisanship Shifts Toward Democratic Party in 2017," Gallup Politics, February 1, 2018, at http://news.gallup.com/poll/226556/state-partisanship-shifts-toward-democratic-party-2017.aspx.

[179] National Conference of State Legislatures, "State Partisan Composition," at http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

[180] National Conference of State Legislatures, State Elections Database, at http://www.ncsl.org/research/elections-and-campaigns/elections-legislation-database.aspx.