

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

*Hans A. von Spakovsky*

## KEY TAKEAWAYS

The National Popular Vote (NPV) scheme strikes directly at the Founders' view of federalism and a representative republic.

The NPV scheme would encourage voter fraud and elevate the importance of urban centers while diminishing the influence of small states and rural areas.

The supporters of NPV are not hiding their goal: They are trying to manipulate the Electoral College out of existence.

Our system for electing a president has worked pretty well. There is no real case being made that it will work better if changed—only that it will look nicer if one subscribes to one particular vision of how democracies should work....We are so accustomed to stable, generally good government that we sometimes forget that failure of government structures is historically much more common than success....[W]e tinker with our success at our peril.

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

**A**fter the 2000 U.S. presidential election, there were many ill-informed calls to abolish the Electoral College. Those calls have accelerated since the 2016 election, with losing presidential candidate Hillary Clinton saying it should be “eliminated”

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and numerous contenders for the Democratic 2020 presidential nomination also calling for getting rid of the Electoral College, including Bernie Sanders and Elizabeth Warren.<sup>2</sup> The *New York Times* claimed in December 2016 that it was an “antiquated mechanism” that is a “living symbol of America’s original sin”—falsely asserting that it was designed to protect slavery.<sup>3</sup>

Even before the contentious 2000 election, there had been more than 700 proposals introduced in Congress to amend the Constitution to change the Electoral College—more than on any other topic.<sup>4</sup> Senator John F. Kennedy (D–MA) spoke out against one of those proposals in 1956, saying that abrogating the Electoral College “would break down the Federal system... which provides a system of checks and balances designed to prevent any party, region or size of state from obtaining too much or too little electoral power.”<sup>5</sup> The most recent is a bill introduced by Senator Jeff Merkley (D–OR) in 2019, amending the Constitution to toss out the Electoral College.<sup>6</sup>

The scheme proposed after the 2000 election to try to avoid the difficulty of convincing the states and Congress to amend the Constitution, the National Popular Vote (NPV) plan or compact, is bad public policy. The NPV would:

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

The NPV plan also strikes at the Founders’ view of federalism and a representative republic—one in which popular sovereignty is balanced by structural protections for state governments and minority interests. The Electoral College is “emblematic of the fact that we are a *federal republic*.”<sup>7</sup>

## The Electoral College and the NPV

The Constitution provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”<sup>8</sup> Although most electors were initially appointed directly by state legislatures, some states, like Pennsylvania and Virginia, allowed popular election of their electors even in the first presidential election.<sup>9</sup>

By 1836, only South Carolina did not provide for the direct election of electors, and “since the Civil War, electors have been popularly chosen in all states.”<sup>10</sup> The slate of electors chosen by voters then cast their votes for President and Vice President in their respective states on the first Monday after the second Wednesday in December.<sup>11</sup> Forty-eight states have a winner-take-all system that allocates all of their electoral votes to whichever presidential candidate wins the popular vote in that state.<sup>12</sup>

Changing or eliminating the Electoral College can be accomplished only by an amendment to the Constitution, which requires the consent of two-thirds of Congress and three-fourths of the states.<sup>13</sup> From a political standpoint, there is a very low probability that such an amendment will be approved in the near future.

Consequently, in an attempt to get around this seemingly insurmountable impediment, the NPV<sup>14</sup> scheme proposes an interstate compact in which participating states agree in advance to automatically allocate their electoral votes to the winner of the national popular vote, disregarding the popular vote results in their states or what the relevant legislatures might then desire. The NPV would “put the fate of every presidential election in the hands of the voters in as few as 11 states and thus...give a handful of populous states a controlling majority of the Electoral College,”<sup>15</sup> undermining the protections that the Electoral College affords to smaller states.

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

So far, 15 states (California, Colorado,<sup>16</sup> Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia, representing a combined 196 electoral votes, have approved the proposed scheme. The NPV is therefore 73 percent of the way to its goal of 270 votes—and to the activation of this unconstitutional, politically dubious, and dangerous cartel. The NPV was passed by the Democratically controlled legislature in a 16th state in 2019, Nevada, but it was vetoed by Governor Steve Sisolak (D), who recognized that the NPV would “diminish the role of smaller states like Nevada in national electoral contests.”<sup>17</sup>

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

In creating the basic architecture of the American government, the Founders struggled to satisfy each state's demand for greater representation, while attempting to balance popular sovereignty against the risk posed to the minority from majoritarian rule.<sup>18</sup> Smaller states, in particular, worried that a system that apportioned representatives based on population would underrepresent their interests in the federal structure.

Out of this concern arose a compromise proposed by the Committee of Eleven at the Constitutional Convention,<sup>19</sup> which helped to balance the competing interests of large states with those of smaller states. By allocating electors based on a state's cumulative representation in the House and Senate, the Electoral College system avoids purely population-based representation, while still giving larger states greater electoral weight.

Furthermore, the arrangement prevents candidates from winning an election by focusing solely on high-population urban centers and forces them to seek the support of a larger cross section of the American electorate. This aspect of the U.S. election system addresses the Founders' fears of a "tyranny of the majority," a topic frequently discussed in the *Federalist Papers*. In the eyes of the Founders, this tyranny was as dangerous as the risks posed by despots like King George—and had the potential to marginalize sizeable portions of the population, particularly in rural and more remote areas of the country. The Electoral College was devised as a response to these fears as a means of "ensuring the participation of a broad regional diversity in the outcome of elections."<sup>20</sup>

Aside from shaping the electoral system, this fear of marginalizing large portions of the population is also the reason that the Constitution calls for a representative republic and not a direct democracy. Under the NPV, this electoral benefit to smaller states and rural areas would disappear, and presidential candidates could win elections by catering to high-density population centers and ignoring the rest of the country.

The NPV would "encourage presidential campaigns to focus their efforts in dense media markets where costs per vote are lowest," and states that are sometimes ignored now will "continue to be ignored under NPV."<sup>21</sup> There is no question that smaller states receive less attention than larger states, but any national direct election system "would magnify, not improve, this problem."<sup>22</sup>

Another false historical claim heard recently is that the Electoral College was designed to protect slavery,<sup>23</sup> and that it is a "shadow of slavery's power

on America today,” according to Representative Alexandria Ocasio-Cortez (D–NY).<sup>24</sup> The argument is that by agreeing to count slaves, even as only three-fifths of a person, Southern states were given more political power than they should have had in comparison to Northern states.<sup>25</sup>

The problem with that argument is that in “1787 and 1788, as the Constitution was being ratified, slavery was practiced in *all of the states*.”<sup>26</sup> According to Professor Allen Guelzo of Princeton University:

If the three-fifths provision operated to give slaveholding states extra leverage in the Electoral College, it gave that leverage to every state, North and South alike. Pennsylvania adopted a gradual emancipation plan in 1780, but it still had slaves in 1840. New York didn't free its last slaves until 1840.... The three-fifths clause gave no advantage to slave states until the Northern states, one by one, abolished slavery.<sup>27</sup>

In the case of New York, Representative Ocasio-Cortez's own state, that did not occur until more than 50 years *after* New York ratified the Constitution and the Electoral College provision.

Some might argue that this still gave an advantage to Southern states because of their larger slave populations. But as Professor Guelzo points out, according to the 1790 Census, New York and Virginia were the largest slave-holding states north and south of the Mason–Dixon Line. If you subtracted the entire slave populations present in each state, then New York had a remaining population of 319,000, and Virginia had a population of 404,000.

Thus, even if slaves were not counted, Virginia still had a larger population of free residents than New York and “would have been allotted more representatives in Congress and a larger electoral vote.”<sup>28</sup> Indeed, it was the Electoral College that helped end slavery:

[Since] Abraham Lincoln, having earned only 39.9% of the popular vote in 1860, nevertheless won a crushing victory in the Electoral College—leading many Southern slaveholders to stampede to secession in 1860 and 1861. They could run the numbers as well as anyone, and realized that the Electoral College would only produce more anti-slavery Northern presidents.<sup>29</sup>

The NPV, at face value, may appeal to traditionally democratic notions of “every vote being equal.” Yet its supporters seemingly have no concern for the many other non-majoritarian aspects of the governmental structure established by the Constitution, such as:

- Every state having two Senators, regardless of its size or population;
- A President’s ability to veto legislation passed by a majority of the people’s popularly elected representatives;
- The lifetime appointment of federal judges, whose power is inherently undemocratic since they are not answerable to voters for their actions;
- The unequal representation in the U.S. House of Representatives due to widely varying populations in congressional districts between different states, such as Delaware, whose single congressional district has a population of over 900,000, while Wyoming’s single congressional district has a population of fewer than 600,000;<sup>30</sup> and
- The unequal apportionment among the states of House districts caused by the inclusion of large numbers of ineligible voters—non-citizens—in the population used to determine how many representatives each state is entitled to, which gives a state such as California, with a very large population of illegal aliens, more representatives than it would receive if apportionment were based on total citizen population.

As former Federal Election Commission (FEC) Chairman Bradley Smith says, “If such direct checks on popular majorities can be reasonable and acceptable in a democracy, then it is difficult to argue that indirect checks on popular majority such as the Electoral College, are inherently illegitimate.”<sup>31</sup>

We should also not forget that one of the major purposes of the Bill of Rights is to protect us from the potential pitfalls of majoritarian rule—otherwise, popular democracy could abolish freedom of religion, limit political speech or outlaw unpopular speech, and restrict the ability to assemble and associate with disfavored minorities.

## The Unconstitutionality of the NPV: Compact Clause

Supporters of the NPV claim that because the Constitution gives state legislatures the power to determine how electors are chosen, the NPV is constitutional and requires no approval by Congress. Such claims, however, are specious.

The NPV is unconstitutional because it would give a group of states with a majority of electoral votes “the power to overturn the explicit decision of the Framers against direct election. Since that power does not conform to

the constitutional means of changing the original decisions of the framers, NPV could not be a legitimate innovation.”<sup>32</sup>

The Constitution’s Compact Clause provides that “No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State.”<sup>33</sup> The Founders created the Compact Clause because they feared that compacting states would threaten the supremacy of the federal government in matters of foreign affairs and relations among the states.<sup>34</sup> If states could make agreements among themselves, they could damage the nation’s federalist structure. Populous states, for example, cannot agree to have their U.S. Senators vote to seat only one Senator from a less populous state.

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

By circumventing the checks and balances of Congress, the NPV would risk setting a precedent that states can validate non-congressionally approved compacts as a substitute for a constitutional amendment. Undoubtedly, many liberal activist groups would like to create their own compacts or to lobby states individually to join compacts. Such compacts could then create *de facto* constitutional amendments regarding many different public policy issues—including purely federal matters.

Even though the plain text of the Constitution makes it clear that no compact shall be made by states without the consent of Congress, courts have recognized certain narrow exceptions to the Compact Clause.<sup>35</sup> Interstate compacts that governed boundary disputes between states were almost always upheld as valid.<sup>36</sup> Although states sometimes did submit their compacts to Congress for ratification, there has been an implied understanding that interstate agreements were legitimate as long as they had a limited, specifically local impact and did not affect national prerogatives.

In the 1920s, interstate compacts expanded their scope and began to establish regulatory agencies such as the “Port of New York Authority” established by New York and New Jersey in 1921 to operate and develop their shared port facilities.<sup>37</sup> As the 20th century progressed, compacts were increasingly used to tackle broader issues facing the states. Modern interstate compacts can govern everything from environmental issues to water conservation, waste disposal, education, child welfare, crime control, and others—*if* approved by Congress.<sup>38</sup>

Although some interstate compacts have expanded to include more national issues, none would affect the federal government or non-participating states to the extent that the NPV would. The NPV addresses an



area of national concern by effectively abolishing the Electoral College and changing the method of choosing the President. However, unlike other agreements that are exempt from the requirement of congressional approval, the NPV aims *to control the behavior of compacting and non-compacting states alike* and “harms those states whose citizens benefit from the current system of election.”<sup>39</sup>

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

## The Unconstitutionality of the NPV

The U.S. Supreme Court has applied the Compact Clause in a number of cases that would potentially apply to the NPV. Those Supreme Court decisions argue against the constitutionality of the NPV without the approval of Congress as outlined in Section 10 of Article I of the Constitution.

***U.S. Steel Corp.*** In *U.S. Steel Corp. v. Multistate Tax Commission*,<sup>40</sup> the U.S. Supreme Court upheld the constitutionality of a Multistate Tax Compact that had been agreed to by 21 states, despite the lack of congressional approval. The compact in that case established a Multistate Tax Commission to assist the consenting states in formulating and implementing tax law for multistate businesses.

In so doing, however, the Court, in an opinion by Justice Lewis Powell writing for the seven-member majority, found it significant that the compact did not enhance state political power in a way that might:

- “[E]ncroach[] upon the supremacy of the United States”;
- Confer any power to the consenting states that they did not already possess; or
- Involve any delegation of state power to the regulatory body it established.<sup>41</sup>

The Court also found it significant that each state was free to withdraw from the compact at any time.<sup>42</sup>

Unless approved by Congress, a compact that violates *any one of these conditions* would run afoul of the Compact Clause.<sup>43</sup> The NPV plan violates



at least two of these conditions. By eliminating the requirement that Congress approve a virtual constitutional amendment, the NPV would enhance the power of certain states at the expense of the national government. Moreover, the NPV would deprive non-participating states of their right under Article V to participate in deciding whether the Twelfth Amendment, which governs the Electoral College, should be changed.

From a constitutional standpoint, one could argue that while states are given the power to decide how electors will be chosen, that power is not completely unrestricted. As Tara Ross has pointed out, the Constitution “presupposes that the electors belong to each individual state and the state may not delegate this responsibility outside of state borders.”<sup>44</sup> For example, in *Clinton v. New York*, the Supreme Court struck down the presidential line-item veto because it disrupted “the ‘finely wrought’ procedure that the Framers designed” in the Constitution for the enactment of statutes—a procedure that was “the product of the great debates and compromises that produced the Constitution itself.”<sup>45</sup>

***U.S. Term Limits, Inc. v. Thornton.*** Similarly, in *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court threw out state-imposed term limits on Members of Congress.<sup>46</sup> A state-imposed qualification that was intended to evade the requirements of the Qualifications Clauses of the Constitution could not stand: “To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.”<sup>47</sup> Such an argument, the Court held, would trivialize the principles behind the Qualifications Clauses and treat them as an “empty formalism,” rather than “the embodiment of a grand principle.... ‘It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.’”<sup>48</sup>

The NPV would obviously disrupt the “finely wrought procedure” that the Framers designed into our presidential election process with the Electoral College—which was a product of the great debates and compromises that produced the Constitution. It would trivialize the federalism principles behind the Electoral College.

The supporters of the NPV are not hiding their goal: They are trying to manipulate the Electoral College out of existence, an objective that cannot be achieved by a state compact, especially without congressional approval.

**Additional Concerns: *U.S. Steel Corp.*** There is another component of the NPV that would most likely violate the *U.S. Steel* test: the plan’s guarantee that “electors would no longer be accountable to the voters in the states they are from.”<sup>49</sup> As a result, voters in other states who are ineligible to vote in a particular state—such as convicted felons<sup>50</sup>—could control that state’s

electoral votes. Furthermore, “candidates could end up being elected with the electoral votes of a state in which they weren’t even qualified to be on the ballot.”<sup>51</sup> In other words, a candidate who is not even on the ballot in a state such as Rhode Island could still be awarded that state’s electoral votes if that candidate wins the national popular vote.

Even more disconcerting, the NPV provides that if the “number of presidential electors nominated in a member state” is fewer than what the winner of the national popular vote is entitled to, that winner “shall have the power to nominate the presidential electors for that state.”<sup>52</sup> In other words, a winning candidate (say a governor from another state, like Texas or Massachusetts) could appoint electors for New York who are not even residents or qualified voters in New York.

**Withdrawal and Enforcement.** Further, in contrast to the compact at issue in *U.S. Steel Corp.*, the NPV places withdrawal limitations on states that join the compact. The plan states that “a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.”<sup>53</sup>

There is no provision in the NPV for enforcing this limitation (or compliance with any of the other provisions of the compact, for that matter), although that will likely not stop participating states from suing any withdrawing states—especially if such withdrawal threw into doubt the results of the presidential election.

Whether the withdrawal provision would be capable of being enforced is, of course, another issue altogether.<sup>54</sup> The withdrawal limitation appears to conflict with the provision in Article II of the Constitution that gives to the legislatures of each state the power to select the manner in which electors are chosen. While a legislature can delegate to the people of its state the ability to choose electors, it retains the power to withdraw that delegation. The NPV scheme would temporarily suspend that legislative power—an act seemingly in violation of the Constitution.

As Professor Norman Williams of Willamette University contends, the withdrawal limitation is unenforceable because the Constitution “trumps interstate compacts and does so whether Congress ratifies the NPVC or not.” He elucidates the likely political problems that could cause the NPV to “unravel in a future presidential election,” if it were to go into effect.<sup>55</sup> There is a partisan divide on the NPV: Every single jurisdiction that has adopted the NPV voted for Hillary Clinton in 2016. He imagines the following situation with the NPV in effect:

Now suppose that in some future presidential election, it looks like the Republican presidential candidate may win the popular vote. In that scenario, there will be overwhelming political pressure in signatory states—which, remember, include heavily Democratic states such as California and New York—to withdraw from the [National Popular Vote Compact]...

Does anyone believe that California or New York will refrain from withdrawing from the NPVC if the Republican candidate narrowly wins the national popular vote but the Democratic candidate overwhelmingly wins the state popular vote in those states? To adhere to the NPVC in that scenario would be political suicide for Democratic legislators in those states, who would surely get ‘primaried’ in the next election.<sup>56</sup>

The lawsuits resulting from this scenario could delay the determination of who is the President for months and would inevitably put the U.S. Supreme Court in the position of once again having to make that decision.

**Individual Electors.** Another potential enforcement problem with the NPV is individual electors. States joining the compact are promising that their state electors will cast their votes for the winner of the national popular vote. But what happens if there is a “faithless” elector who breaks his or her pledge to abide by the NPV and instead votes for the candidate who was chosen by a majority of voters in that elector’s state?

Under a recent decision by the United States Court of Appeals for the Tenth Circuit, whose jurisdiction includes Colorado, which adopted the NPV, the state would not be able to enforce the NPV requirement against such a faithless elector.<sup>57</sup> The case involved an elector who had pledged to vote for Hillary Clinton but instead cast his vote for John Kasich.

The court held that the Colorado Secretary of State could not remove presidential electors and nullify their votes for violating their pledges to vote for the winners of the popular vote in the state’s general election, concluding that “the text of the Constitution makes clear that states do not have the constitutional authority to interfere with presidential electors who exercise their constitutional right to vote for the President and Vice President candidates of their choice.” Colorado was thus barred from removing the elector and discarding his vote.<sup>58</sup>

On the other hand, the Washington State Supreme Court has ruled that the state could impose a \$1,000 fine on an elector for failing to honor his pledge to vote for the winner of the popular vote in his state, although the state did remove the elector and nullify his vote.<sup>59</sup>

The U.S. Supreme Court granted a combined review of both of these cases on January 17, 2020. Therefore, it seems that the issue of faithless electors and the extent of the constitutional authority of the states to police this problem will finally be adjudicated by the Supreme Court.<sup>60</sup>

## The NPV: Bad Public Policy

Setting aside the question of constitutionality, there are also a number of public policy reasons that such an amendment would be detrimental to America's unique democratic system.

**Swing States and Political Influence.** Although the point has been argued that under the current system, swing states garner the majority of candidates' attention, swing states can change from election to election, and many states that are today considered reliably "blue" or "red" in the presidential race were recently unpredictable. For example, "California was competitive for decades, only becoming a Democratic presidential bastion in the last 15 years. Florida was considered a safe Republican seat as late as 1996."<sup>61</sup>

With rare exceptions, however, established urban centers like Houston, Chicago, New York City, and Los Angeles will always have high populations that vote in a predictable fashion. While the Electoral College assures that minority interests in a variety of geographic regions are protected, the NPV would help to protect *only* select urban interests. The Electoral College "embodies the balance [the Founders] aimed to achieve through deference to states with smaller populations and by ensuring that the interests of these states be reflected in national decision-making."<sup>62</sup>

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

Under Samples' analysis, 29 states, such as California, Hawaii, and Vermont, as well as the District of Columbia, would *lose* influence under the NPV.<sup>63</sup> While California's loss would be relatively small (1 percent), Hawaii would lose 42 percent of its influence, Vermont 58 percent, and the District of Columbia a stunning 62 percent. Based on the 2006 elections, "59 percent of voters...lived in states that would either lose influence under direct election or would be indifferent about moving away from the Electoral College."<sup>64</sup>

These problems were summarized in 2019 by Nevada Governor Sisolak (D), who said that the NPV “could leave a sparsely populated Western state like Nevada with a greatly diminished voice in the outcome of national electoral contests.” Furthermore, it would allow the state’s electors to “disregard the will of the state’s electorate.”<sup>65</sup>

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

The presidential election of 2000 saw an unprecedented vote recount in Florida. This recount was a belabored, emotional, costly process, even though it was limited to only one state. For the most part, only one set of state laws was applicable in that recount. Under the NPV, however, any suspicions necessitating a recount in even a single district would be an incentive for a national recount. And why not? Every additional vote a losing candidate could obtain anywhere in the country could make the difference between winning or losing a national election—even if that extra vote would not have changed the results of the electoral vote in that particular state under the current system.

The winner-take-all system for electoral votes reduces the possibility of a recount since popular vote totals are often much closer than the Electoral College totals. In fact, former FEC Chairman Bradley Smith points out that “recounts may have been necessary in as many as six presidential elections since 1880, if a national popular vote system had been in place. That’s nearly one out of every six elections.”<sup>66</sup>

The prospect of a candidate challenging “every precinct, in every county, in every state of the Union,” should cause anyone who witnessed the drama, cost, delay, and contentious litigation sparked by the Florida recount of 2000 to shudder.<sup>67</sup> Worse still, there is little chance that the ballots would be recounted in a consistent manner across the nation or that there would be a national, as opposed to piecemeal, recount.

Election laws vary by state, which means that 50 different standards (plus the District of Columbia’s) would be applied to a recount,<sup>68</sup> and no state or group of states that wanted a national recount could force other states to participate. Ironically, the NPV, which is supposed to make each vote count

equally, would likely result in varied and even conflicting decisions among the states as to the validity of each vote.<sup>69</sup> Moreover, while the total of the national popular vote may be close, the vote totals in particular states may not be close at all—certainly not close enough to trigger a recount under that particular state’s recount laws, even if a losing candidate believes a national recount is warranted.

Thus, in a close election, the 2000 Florida recount madness might be replicated on a national level, with new complexities added by certain states refusing to participate in the recount or even devising their own recount rules. A national recount could result in 51 potential lawsuits heading to the Supreme Court (or more if lawsuits are filed in each relevant state and federal court). The margin of victory in the popular vote could be enough to warrant a recount in the eyes of some, yet not large enough to trigger a recount in specific states with large vote margins. The votes for the presidential ticket could be recounted in selected jurisdictions across the country but not in others, leading to virtually the same type of equal protection problems the Supreme Court found in *Bush v. Gore*<sup>70</sup> because of the unequal treatment of ballots by election officials in separate Florida counties.

A national recount would result in protracted litigation and confusion, thus weakening public faith in the election process and delaying the final resolution of a presidential election. Just as important, however, is the fact that the 2000 election crisis was only a temporary one—a testament to the strength and reliability of this nation’s electoral system. Indeed, the current electoral system has consistently produced Presidents without a constitutional crisis. Therefore, the burden is on the NPV’s supporters to justify changing a system that has functioned well for over 200 years, not those who are defending that system.<sup>71</sup>

**Closer Elections and More Crises.** In addition, the NPV could destabilize America’s two-party system, leading to a higher incidence of close elections. The NPV awards the presidential election to whichever candidate receives the “largest” national vote, not the majority of the national popular vote. In an electoral system defined by the NPV, numerous fringe parties and radical candidates, appealing solely to the largest population centers, would likely emerge. Consequently:

Presidential campaigns would devolve into European-style, multi-candidate races. As more candidates enter the field, individual votes will necessarily be divided among an ever-increasing number of candidates. The result will be lower vote totals per candidate and an increased likelihood that two or more candidates will have close popular vote totals.<sup>72</sup>



The winner-take-all allocation of electoral votes within 48 states necessitates that a candidate be popular enough to appeal to a broad electorate, including moderate voters, and provides the winner of the presidential race with both finality and a mandate, even if his popular vote total is slightly below 50 percent.

With its plurality requirement, however, the NPV could lead to the election of presidential candidates by unprecedented, small margins. These smaller victory margins, combined with the overall decrease in popular support for a single candidate, could trigger chaotic and contentious elections. Furthermore, a President elected by only 25 percent or 35 percent of the American people would not have a mandate to govern, and questions about his legitimacy could pose grave consequences both for the nation and for any actions he or she took as President.

The Electoral College requires a presidential candidate to win simultaneous elections across 50 states and the District of Columbia; the idea of concurrent majorities means that “the president gains a popular legitimacy that a single, narrow, national” election does not provide and emphasizes “the breadth of popular support for the winner.”<sup>73</sup>

**Provisional Ballots.** Under the NPV, provisional ballots could also lead to an extensive, widespread, and complex battle that could further delay and confuse the results of a presidential election. Federal law requires provisional ballots for all voters whose eligibility is called into question or who are unable to cast a regular ballot at the polling place because they are not on the list of registered voters.<sup>74</sup>

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

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



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

To a would-be wrongdoer, this presents a drastic increase in the potential benefit to be obtained from casting fraudulent ballots anywhere—not just in states where the margin of victory is expected to be close. Under the current system, there are some states where such fraud would make no difference, but with the NPV, *every* fraudulent vote obtained anywhere could make the difference in changing the outcome of the national race.

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

It should be noted that while we have had 45 presidents, we have had 58 presidential elections. The winner of the popular vote has prevailed in 54 of those elections.<sup>75</sup> Supporters of the NPV point to those elections (1876, 1888, 2000, and 2016) where the popular vote winner did not prevail.

But Bradley Smith concludes that “the Electoral College clearly played a democratizing and equalizing role” in the 1876 and 1888 elections that “almost certainly better corresponded to true popular sentiment than did reported popular vote totals.” Why? Because in the 1876 election, for example, where Samuel Tilden defeated Rutherford B. Hayes in the popular vote, there was “rampant vote fraud and suppression in the southern states [that] make the actual vote totals from that election unknowable.”

Similarly, in the 1888 election, Southern states voted overwhelmingly for Grover Cleveland, the national popular vote winner, while Republican Benjamin Harrison carried the rest of the nation, winning 20 of 25 states. If blacks had not had their votes suppressed, there is little doubt that Harrison, as a Republican, would have received almost the entire black vote and would have won the national popular vote, which he lost by less than 100,000 votes.<sup>76</sup>

In 2016, Hillary Clinton lost the Electoral College, 227 to 304, even though she had 2.8 million more votes than Donald Trump.<sup>77</sup> But Trump

won 2,626 counties nationwide, while Hillary Clinton won only 487 counties,<sup>78</sup> with most of her vote concentrated in dense, urban areas in a small number of states. Trump's vote was much more widespread across the country,<sup>79</sup> with the Electoral College working the way the Framers of the Constitution intended it to work, giving the more rural, less populated areas of the country a combined voice in the presidential election process.

## Conclusion

As Professor Allen Guelzo says, the criticisms of the Electoral College are “misguided.” It was “designed to counteract the worst human impulses” and is “an underappreciated institution that helps preserve our constitutional system.”<sup>80</sup> Getting rid of the Electoral College, as urged by the supporters of the NPV, is not “likely to produce a more democratic election system. There are plenty of democracies, like Great Britain, where no one ever votes directly for a head of state.”<sup>81</sup>

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

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

America's election systems have operated smoothly for more than 200 years because the Electoral College accomplishes its intended purposes.... [It] preserves federalism, prevents chaos, grants definitive electoral outcomes, and prevents tyrannical or unreasonable rule. The Founding Fathers created a stable, well-planned and carefully designed system—and it works.<sup>82</sup>

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

**Hans A. von Spakovsky** is a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. He is a former member of the Federal Election Commission and a former counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. He is also a former member of the Presidential Advisory Commission on Election Integrity, the Fulton County Registration and Election Board in Georgia, and the Fairfax County Electoral Board in Virginia.

## Endnotes

1. Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 3, 217 (2008).
2. Dan Merica, Clinton: It's time to abolish the Electoral College, CNN (Sept. 14, 2017); <https://www.cnn.com/2017/09/13/politics/hillary-clinton-anderson-cooper-electoral-college-cnntv/index.html>; see also *Where Democrats stand—Do you support eliminating the electoral college in favor of the popular vote?* WASH. POST; <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/eliminate-electoral-college/>.
3. *Time to End the Electoral College*, THE NEW YORK TIMES (Dec. 19, 2019); [https://www.nytimes.com/2016/12/19/opinion/time-to-end-the-electoral-college.html?\\_r=0](https://www.nytimes.com/2016/12/19/opinion/time-to-end-the-electoral-college.html?_r=0).
4. *Frequently Asked Questions*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/faq.html> (last visited Oct. 17, 2001). From 1889 to 2004, 595 amendments were introduced in Congress to amend the Electoral College. CONG. RESEARCH SERV., THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 17 (2004).
5. Statement of Senator John F. Kennedy on Electoral Vote Constitutional Amendment, S.J. Res. 31 (March 1956); <https://www.jfklibrary.org/asset-viewer/archives/JFKSEN/0895/JFKSEN-0895-008>.
6. S.J. Res. 16, 116th Cong., 1st Sess. (2019–2020); <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/16/text?q=%7B%22search%22%3A%5B%22merkley+electoral+college%22%5D%7D&r=1&s=1>.
7. Allen Guelzo, *In Defense of the Electoral College*, NATIONAL AFFAIRS 42 (Winter 2018) (emphasis in original); <https://www.nationalaffairs.com/publications/detail/in-defense-of-the-electoral-college>.
8. U.S. CONST. art. II, § 1, cl. 2.
9. *McPherson v. Blacker*, 146 U.S. 1, 29 (1892).
10. CONG. RESEARCH SERV., THE ELECTORAL COLLEGE: 1–2.
11. U.S. CONST. amend. XII; 3 U.S.C. §§ 1–21. Congress meets in joint session to count the electoral votes in January. If no candidate wins a majority of the electoral votes, the House selects the President, and the Senate selects the Vice President, with each state delegation in the House having only one vote. U.S. Const. amend. XII.
12. Nebraska and Maine provide for allocation of their electoral vote by congressional districts, with two electors awarded to the state-wide winner.
13. U.S. CONST., art. V.
14. See NATIONAL POPULAR VOTE, [www.nationalpopularvote.com](http://www.nationalpopularvote.com). For a justification for this change in extensive detail, see also John R. Koza et al., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (2011).
15. Letter from John Boehner, House of Rep. Speaker, Mitch McConnell, Senate Republican Leader, and Rick Perry, Governor of Texas, to Governors of the Fifty States (June 29, 2011) (hereinafter *Boehner Letter*); <http://www.flashreport.org/blog/wp-content/uploads/2011/08/Letter-Boehner.McConnell.Perry-1.pdf>. Since there is no official national popular vote total, the NPV states would rely on the Certificates of Ascertainment prepared by each state of the vote totals in that state. But, as Sean Parnell points out, those certificates are not always accurate. In 2012, New York's Certificate of Ascertainment was 361,000 votes short of the state's final certified vote total. In 2016, it was 95,000 votes short. As Parnell says, "this was ok under the current Electoral College system, but could be a disaster under any kind of national vote." Sean Parnell, *Presidential popular vote compact would lead to chaos*, THE HILL (July 13, 2019); <https://thehill.com/opinion/campaign/452467-presidential-popular-vote-compact-would-lead-to-chaos?amp>.
16. The NPV was adopted by the Colorado legislature in 2019. However, concerned residents obtained enough signatures of voters to qualify a ballot measure for the 2020 election that would reverse this legislation if approved by voters. Reid Wilson, *National popular vote initiative will appear on Colorado ballots*, THE HILL (August 29, 2019); <https://thehill.com/homenews/state-watch/459300-national-popular-vote-initiative-will-appear-on-colorado-ballot>.
17. Chris Mills Rodrigo, *Nevada Democratic governor vetoes national popular vote bill*, THE HILL (May 30, 2019); <https://thehill.com/homenews/state-watch/446174-nevada-democratic-governor-vetoes-national-popular-vote-bill>.
18. See Tara Ross, *The Electoral College: Enlightened Democracy*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 15 (Nov. 1, 2004), available at <http://www.heritage.org/research/reports/2004/11/the-electoral-college-enlightened-democracy>.
19. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 573–575 (W.W. Norton & Co. 1987).
20. *Boehner Letter*, *supra* note 15.
21. John Samples, *A Critique of the National Popular Vote Plan for Electing the President*, CATO INSTITUTE POLICY ANALYSIS No. 622 (Oct. 13, 2008), available at <http://www.cato.org/pubs/pas/pa-622.pdf>.
22. Ross, *supra* note 18, at 6.
23. Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 26, 2018); <https://time.com/4558510/electoral-college-history-slavery/>.
24. Joe Setyon, *Alexandria Ocasio-Cortez: 'Eliminate' Electoral College, It 'Undermines' Democracy*, REASON (Oct. 8, 2018); <https://reason.com/2018/10/08/alexandria-ocasio-cortez-we-should-elim/>.

25. Despite the claims to the contrary, the three-fifths clause was not a “proslavery” compromise, since Southern states wanted nonvoting slaves to count as whole persons to give them more representation in Congress. James Madison’s “Notes of Debates in the Federal Convention of 1787” show that “the discussions of the electoral college and the method of electing a president never occur in the context of any of the convention’s two climactic debates over slavery.” Allen Guelzo and James Hulme, *In defense of the electoral college*, WASH. POST (Nov. 15, 2016); <https://www.washingtonpost.com/posteverything/wp/2016/11/15/in-defense-of-the-electoral-college/>.
26. Guelzo, *supra* note 7 (emphasis in original). This despite the fact that “the Massachusetts Supreme Court had ruled it to be in violation of the state constitution in 1780, and Vermont had officially banned it in 1777.” *Id.*
27. *Id.*
28. *Id.*
29. *Id.* Lincoln garnered 180 Electoral College votes against only 12 for his famous debate partner, Democrat Stephen Douglas, while Southern Democrat John Breckinridge won 72 electoral votes. Michael Levy, *United States presidential election of 1860*, ENCYCLOPEDIA BRITANNICA; <https://www.britannica.com/event/United-States-presidential-election-of-1860>.
30. See *My Congressional District*, U.S. CENSUS BUREAU; <https://www.census.gov/mycd/>.
31. Smith, *supra* note 1, at 198–199.
32. Samples, *supra* note 21, at 9.
33. U.S. Const. art. I, § 10, cl. 3.
34. THE HERITAGE GUIDE TO THE CONSTITUTION 230 (David Fortier and Matthew Spalding, eds., Second Ed., 2014); <https://www.heritage.org/constitution/#!/articles/1/essays/75/compact-clause>.
35. Matthew Pincus, When Should Interstate Compacts Require Congressional Consent? 42 COLUM. J.L. & SOC. PROBS. 511, 516 (2009); <http://jlsplaw.columbia.edu/wp-content/uploads/sites/8/2017/03/42-Pincus.pdf>.
36. *Id.*
37. *Id.* at 518.
38. *Id.* at 519.
39. Samples, *supra* note 21, at 9.
40. 434 U.S. 452 (U.S. 1978); see also *Virginia v. Tennessee*, 148 U.S. 503 (1893).
41. *U.S. Steel Corp.*, 434 U.S. at 472, 473. Justice Powell also found it significant that each state was free to withdraw from the compact at any time. *Id.*
42. *Id.*
43. Of course, congressional approval of a compact that attempts to change a provision of the Constitution without following the amendment requirement of Article V would also be invalid.
44. Tara Ross, *Federalism & Separation of Powers—Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 ENGAGE 2, 40 (Sept. 2010).
45. *Clinton v. New York*, 524 U.S. 417, 439–440 (1998).
46. *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).
47. *Id.* at 831.
48. *Id.* at 831 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), quoting *Frost & Frost Trucking Co. v. Railroad Comm’n of Cal.*, 271 U.S. 583, 594 (1926)).
49. Boehner Letter, *supra* note 15.
50. Section Two of the Fourteenth Amendment gives states the authority to abridge the right to vote of individuals “for participation in rebellion, or other crime.” The rules governing felons vary across the country. In Maine and Vermont, felons never lose their ability to vote—even in prison. Other states automatically restore voting rights as soon as a felon has served his sentence, while some states such as Iowa and Kentucky require a civil pardon from the governor to restore the ability to vote. See *Felon Voting Rights*, NATIONAL CONFERENCE OF STATE LEGISLATORS, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.
51. Boehner Letter, *supra* note 15.
52. National Popular Vote, *Agreement Among the States to Elect the President by National Popular Vote*, Art. III, available at <https://www.nationalpopularvote.com/bill-text>.
53. *Id.* at Art. IV.
54. Some might argue that since the NPV compact has no formal enforcement mechanism, states maintain their right to withdraw as they see fit. See James Taranto, Faithless Lawmakers, WALL ST. J. (July 29, 2010), available at [http://online.wsj.com/article/SB10001424052748703578104575397100729241576.html?mod=WSJ\\_Opinion\\_MIDDLETopOpinion](http://online.wsj.com/article/SB10001424052748703578104575397100729241576.html?mod=WSJ_Opinion_MIDDLETopOpinion). Nevertheless, this scenario creates a constitutional Catch-22: Either the states have created an unconstitutional compact that can be enforced or the compact could cause an electoral crisis if a state should withdraw from the compact during or immediately before an election.

55. Norman Williams, *The Danger of the National Popular Vote Compact*, HARVARD LAW REVIEW BLOG (March 13, 2019); <https://blog.harvardlawreview.org/the-danger-of-the-national-popular-vote-compact/>.
56. *Id.*
57. *Baca v. Colorado Department of State*, 935 F.3d 887 (10th Cir. 2019).
58. *Baca*, 935 F.3d at 946.
59. *In the Matter of Levi Guerra, et al.*, 193 Wash.2d 380 (2019).
60. *Chiafalo v. Washington and Colorado Dept. of State v. BACA*, Case Nos. 19-465 and 19-518 (U.S. Jan. 17, 2020); <https://www.supremecourt.gov/orders/19grantednotedlist.pdf>.
61. Smith, *supra* note 1, at 210.
62. Boehner Letter, *supra* note 15.
63. Samples, *supra* note 21, at 3–4.
64. *Id.* at 6. The states that lose influence under the NPV (ranked from the smallest loss of influence to the largest) are California, Oklahoma, Minnesota, Louisiana, Oregon, Mississippi, Connecticut, Colorado, Arizona, Kansas, Arkansas, Iowa, Utah, West Virginia, Nevada, New Mexico, Nebraska, Maine, Montana, New Hampshire, Idaho, Hawaii, Rhode Island, Delaware, South Dakota, North Dakota, Vermont, Alaska, D.C., and Wyoming. *Id.* at 4, Table 1.
65. Grace Segers, *Nevada governor vetoes bill that would ignore Electoral College*, CBS NEWS (May 30, 2019); <https://www.cbsnews.com/news/nevada-governor-vetoes-bill-to-join-compact-to-elect-presidents-by-popular-vote/>.
66. Ross, *supra* note 44, at 38, citing Smith, *supra* note 1, at 207.
67. Gary L. Gregg, *The Electoral College Is Good for America*, NATIONAL REVIEW ONLINE (Oct. 25, 2004, 9:39 a.m.), <https://www.nationalreview.com/2004/10/electoral-college-good-america-gary-l-gregg/>.
68. *Enacting the Agreement Among the States to Elect the President by National Popular Vote, Hearing on SB 344 Before the S. Comm. on Legislative Operations and Elections*, 2011 Leg., 76th Sess. (Nv. 2011) (testimony of Tara Ross).
69. Smith, *supra* note 1, at 207.
70. *Bush v. Gore*, 531 U.S. 98 (2000).
71. Gregg, *supra* note 67.
72. Ross, *supra* note 44, at 38.
73. Smith, *supra* note 1, at 203.
74. Provisional ballots are required by the Help America Vote Act, 42 U.S.C. § 15482 (2002).
75. Smith, *supra* note 1, at 213. Some NPV supporters also point erroneously to the election of 1824, in which the House of Representatives selected John Quincy Adams over Andrew Jackson; however, since some state legislatures still selected electors, there was no actual popular vote total.
76. *Id.* at 213. Smith also points out that the national popular vote margin of 540,000 votes between Gore and Bush in 2000 was within the margin of error, so “one cannot say with any confidence that Gore (or Bush) clearly represented the popular majority.”
77. *Official 2016 Presidential General Election Results*, FEDERAL ELECTION COMMISSION; <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf>.
78. *Trending Story that Clinton won just 57 counties is untrue*, ASSOCIATED PRESS (Dec. 6, 2016); <https://web.archive.org/web/20161207142233/http://bigstory.ap.org/article/fb5a5f7da21d460bbffb6985cb01cb2c/trending-story-clinton-won-just-57-counties-untrue>. The AP considered parishes in Louisiana to be counties, while the District of Columbia and Alaska were counted as a single reporting district. Virginia included 95 counties and 38 independent cities.
79. Philip Bump, *Presenting the least misleading map of the 2016 election*, WASH. POST (July 20, 2018); <https://www.washingtonpost.com/news/politics/wp/2018/07/30/presenting-the-least-misleading-map-of-the-2016-election/>.
80. Guelzo, *supra* note 7.
81. *Id.* There are also plenty of nations like Afghanistan, Iran, Russia, Venezuela, and Zimbabwe that Guelzo says show that “direct popular elections would not automatically guarantee greater democracy.”
82. Ross, *supra* note 18, at 13.