

RECENT DEVELOPMENT

UPDATING THE ELECTORAL COLLEGE: THE NATIONAL POPULAR VOTE LEGISLATION

The Electoral College is an anomaly of the American democracy. The United States is virtually alone in entrusting the election of its President to a small, largely anonymous group of individuals, rather than to its citizen voters.¹ On February 23, 2006, National Popular Vote (“NPV”),² an organization led by several former national legislators of both parties,³ unveiled the proposed text for legislation (“NPV legislation”) that would guarantee a majority in the Electoral College to the winner of the national popular vote for President.⁴ The NPV legislation would effectively abolish the Electoral College by having states pass an interstate compact to pledge their electoral votes to the winner of the national popular vote. The NPV legislation promises to revive the centuries-old debate over the method for selecting the President⁵ and raise important questions about the foundations of American democracy.

This Recent Development evaluates the National Popular Vote legislation and its likely effect on the Presidential election process. In Part I, this Recent Development discusses the Electoral College—the current system for selecting the President—first by describing its origins at the Constitutional Convention, and then by commenting on the evolution of this institution over time. Part II explains the provisions of the NPV legislation and examines the legislation’s progress in several states. Part III presents the views of supporters and critics of the NPV legislation on the likely effects of the legislation’s enactment. Ultimately, the Recent Development concludes that the NPV legislation would probably diminish the dis-

¹ See Donald Lutz et al., *The Electoral College in Historical and Philosophical Perspective*, in CHOOSING A PRESIDENT 31, 47 (Paul D. Schumaker & Burdett A. Loomis eds., 2002).

² National Popular Vote!, <http://www.nationalpopularvote.com/npv/> (last visited Nov. 17, 2006).

³ The legislators included former Representative John Anderson (R-Ill.); former Senator Birch Bayh (D-Ind.); and former Representative John Buchanan (R-Ala.). See Hendrik Hertzberg, *Count 'Em*, NEW YORKER, Mar. 6, 2006, at 27.

⁴ See JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 248–49 (2006) (describing the motivation and legal basis for the NPV legislation), available at <http://www.every-vote-equal.com/tableofcontents.htm>. See also Birch Bayh, U.S. Senator from Indiana, Press Conference on Election of the President by Popular Vote (Feb. 23, 2006) (unveiling the NPV legislation with NPV members).

⁵ The first resolution to amend the Constitution’s Presidential election provisions was introduced in 1797. See LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 42 (2d ed. 1975). Since then, there have been over 1,000 proposed Constitutional amendments concerning the Electoral College. See Lutz et al., *supra* note 1, at 45–46.

parity in presidential campaign resources and media attention between battleground and spectator states, eliminate use of the House contingency procedure, and ameliorate sectionalism. However, such benefits would come at the potential cost of increased spending on Presidential campaigns and the introduction of structural precariousness into the Presidential election system.

I. THE ELECTORAL COLLEGE SYSTEM

Selection of the President is governed by a combination of the Constitution (specifically Article II and the Twelfth and Twenty-third Amendments), state law, and customary practice. Article II of the Constitution mandates election of the President through the Electoral College, which is composed of electors appointed by each state and the District of Columbia.⁶ The number of electors for each state is equal to the sum of the number of senators and representatives to which that state is entitled.⁷ State legislatures have complete discretion over the appointment of electors.⁸ The federal Constitution does not guarantee individuals a right to vote for Presidential electors, and only one state grants its citizens a state constitutional right to vote for Presidential electors.⁹ Despite freedom to choose the appointment process, virtually every state assigns its entire electoral slate to the winner of that state's popular vote (the "winner-take-all" rule).¹⁰ Only Maine and Nebraska use the district system, which assigns an elector to the winner of each congressional district's popular vote and two electors to the winner of the state's popular vote.¹¹ However, neither has actually split its electoral slate between two Presidential candidates since instituting the district system.¹² Once appointed, the electors meet in their

⁶ See U.S. CONST. art. II, § 1, cl. 2. The District of Columbia receives the number of electoral votes "to which the District would be entitled if it were a State." See U.S. CONST. amend. XXIII, § 1.

⁷ See *id.* art. II, § 1, cl. 2.

⁸ See *id.* Under the Constitution, the power of the state legislatures is absolute; accordingly, a state may vest the power to select electors "in a board of Bank directors—a turnpike corporation—or a synagogue." LUCIUS WILMERDING, JR., *THE ELECTORAL COLLEGE* 43 (1958) (quoting Rep. Storrs during a debate in 1826); see NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 44 (1981) ("The Constitution had given the state legislatures an absolute *carte blanche*" to shift "the method of choosing Presidential electors from year to year for the benefit of ruling circles in each state").

⁹ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States"). The Colorado Constitution guarantees its citizens the right to vote for President. See COLO. CONST. sched., § 20; see also KOZA ET AL., *supra* note 4, at 38.

¹⁰ See GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 9 (2004) ("Since the advent of Jacksonian democracy, the states have almost exclusively used the winner-take-all method for allocating their electors to candidates.")

¹¹ See ME. REV. STAT. ANN. tit. 21-A, § 802 (2005); NEB. REV. STAT. ANN. § 32-714 (2006).

¹² See KOZA ET AL., *supra* note 4, at 54.

respective states on the same day to cast separate ballots for President and Vice President.¹³

After electors cast their ballots, the Vice President of the United States, in his capacity as President of the Senate, opens and counts the electors' votes in the presence of the House and Senate.¹⁴ To be elected outright, a Presidential candidate must have a majority of the electoral votes.¹⁵ If no candidate wins a majority, the House elects the President using the House contingency procedure. Under this procedure, the House chooses among the three candidates with the highest electoral vote totals; when voting, the delegation from each state has one vote.¹⁶ The states' delegations continue to vote until one candidate receives a majority and thus is elected.¹⁷

The Electoral College can be best understood through an examination of both its origins at the Constitutional Convention and its subsequent development. Like much of the Constitution, the Electoral College was the product of compromise after protracted disagreement.¹⁸ James Wilson, delegate to the Constitutional Convention from Pennsylvania, called the issue of Presidential selection "the most difficult . . . on which we have had to decide."¹⁹

Under the final formulation, apportionment of electoral votes was essentially population-based, except for the automatic award of two electoral votes to every state.²⁰ Delegates recognized that the House contingency procedure, which gave each state only one vote, was a major concession to small states.²¹ They probably also understood that the Electoral College, which assigns state electoral votes based not on voter turnout but on population alone, would benefit southern states, as slaves could not vote but were still included in the states' population count.²²

¹³ See U.S. CONST. amend. XII.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ The Constitutional Convention deliberated on Presidential selection process for twenty-two days and held thirty votes on the subject. See EDWARDS, *supra* note 10, at 78–79. The idea for an Electoral College may have originated with the Maryland Constitution of 1776, which chose its state senate through a complicated procedure similar to the Electoral College. See PEIRCE & LONGLEY, *supra* note 8, at 22. Cf. MD. CONST. of 1776, art. XIV–XVII (1776).

¹⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 50 (Max Farrand ed., 1937).

²⁰ See U.S. CONST. art. II, § 1, cl. 2.

²¹ See *id.*

²² See Akhil Reed Amar & Vikram David Amar, *Why Old and New Arguments for the Electoral College Are Not Compelling*, in AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE 58, 58–59 (John C. Fortier ed., 2004). For example, Pennsylvania, which had a greater free population than Virginia, received fewer electoral votes. The electoral votes attributable to the slave population provided the margin that elected Jefferson over Adams in 1800. As a result of including slaves in population totals, Amar and Amar argue, a white, slave-owning Virginian was President for thirty-two of the first thirty-six years of the nation's existence. See *id.*; see also EDWARDS, *supra* note 10, at 87 (explaining

As a result of such compromises, the Electoral College had “something for everyone”: roughly population-based apportionment for the large states, equal state influence in the House contingency procedure for the small states, state legislative power over elector selection for the states’ rights supporters, and at least the possibility of a popular vote for the direct election proponents.²³

Despite evidence of careful planning, the Electoral College soon deviated from the Framers’ intentions in at least four ways. First, the Framers anticipated that the process would seldom produce an electoral majority, thereby sending most Presidential elections to the House.²⁴ In practice, however, the House contingency procedure was used infrequently and has not been used once since 1824.²⁵

Second, the Framers believed that the states would employ the district system²⁶ to assign electoral votes, rather than the winner-take-all rule.²⁷ Yet, while states have used a variety of methods to appoint Presidential electors throughout history,²⁸ by 1836 all but one had switched to the winner-take-all rule.²⁹ After switching, a state had a strong incentive not to adopt any other system, because switching while other states retained the

that Madison believed that including non-voting slaves in population totals protected the southern states).

²³ See PEIRCE & LONGLEY, *supra* note 8, at 23; Abner J. Mikva, *Doubting Our Claims to Democracy*, 39 ARIZ. L. REV. 793, 795 (1997).

²⁴ See John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 811 (1961); see also Lutz et al., *supra* note 1, at 39 (“Congress was expected to select the President most or even all of the time”). *But see* Gary L. Gregg II, *The Origins and Meaning of the Electoral College*, in SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE 1, 2 (Gary L. Gregg II ed., 2001) (questioning whether the Framers really intended to design the Electoral College to “fail” frequently) [hereinafter SECURING DEMOCRACY]; ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 20 (2006) (describing disagreement among the delegates as to whether the Electoral College would probably produce majorities).

²⁵ See L. PAIGE WHITAKER & THOMAS H. NEALE, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 4 (Cong. Res. Serv. Rep. No. RL30804, Jan. 16, 2001), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30804_01162001.pdf; Comm. on Int’l Human Rights & the Comm. on Asian Affairs, *The Rule of Law in Hong Kong “One Person, One Vote”: The U.S. Electoral System and the Functional Constituencies Embodied in the Basic Law for the Election of the Chief Executive and of the Legislative Counsel*, 59 REC. 374, 387 n.31 (2004) (describing expected reliance on the House contingency procedure).

²⁶ See WHITAKER & NEALE, *supra* note 25, at 4–5.

²⁷ See PEIRCE & LONGLEY, *supra* note 8, at 46. The district system was one of the earliest proposals to alter the Electoral College. References to such proposals date back to March 14, 1800. See LONGLEY & BRAUN, *supra* note 5, at 57.

²⁸ During the first Presidential election, for instance, five state legislatures directly appointed their electors without reference to the popular vote, two apportioned electors on a district basis, two used the winner-take-all system, one legislature let people choose by district but reserved two electors for itself; and one could reach no decision and so submitted no electors. See PEIRCE & LONGLEY, *supra* note 8, at 32–33; see also *id.* at app. B at 247 (detailing how states chose their Presidential electors between 1788 and 1836).

²⁹ See *id.* at 46.

winner-take-all rule would diminish that state's influence in the Electoral College.³⁰

Third, the Framers did not anticipate that Presidential and Vice Presidential candidates would run on the same ticket. The original constitutional provision had each elector vote for two persons for President;³¹ the candidate with the most votes would become President, and the runner-up would become Vice President.³² After the acrimonious election of 1800,³³ the Twelfth Amendment changed this process by separating the elections for President and Vice President.³⁴

Fourth, the Framers erroneously assumed that electors would exercise independent judgment in voting for President.³⁵ Instead, the modern selection process for electors assures that the electors are already pledged to a Presidential candidate and deviate only rarely.³⁶

³⁰ See JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 23 (1975); WHITAKER & NEALE, *supra* note 25, at 6–7 (describing how the winner-take-all system gives an advantage to states that control large blocs of electoral votes). The system for assigning electors affects the state's strategic importance and a given voter's influence, as evidenced by the following example: a winner-take-all state with fifteen electoral votes will yield a net gain of fifteen electors for its chosen candidate, while a state with the same number of electoral votes but a different elector assignment system will potentially split its electors among several candidates. Thus, a voter in a state with the winner-take-all system will influence more electoral votes. *See id.*

³¹ See U.S. CONST. art. II, § 1, cl. 3, amended by U.S. CONST. amend. XII.

³² *See id.*

³³ When Thomas Jefferson and Aaron Burr received the same number of electoral votes in the 1800 election, a bitter fight ensued in the House. Jefferson ultimately won after thirty-six rounds of balloting. See ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 22–23 (2006).

³⁴ See U.S. CONST. amend. XII.

³⁵ See EDWARDS, *supra* note 10, at 83. The Supreme Court has repeatedly acknowledged the original intent that electors exercise independent judgment in voting for President. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 43–44 (1968) (“The College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large.”); Ray v. Blair, 343 U.S. 214, 232 (1952) (“[T]he plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices”); McPherson v. Blacker, 146 U.S. 1, 36 (1892) (“Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive”). *But see* ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 86–87 (1994) (arguing that Hamilton was in the minority in envisioning independent electors and that Madison’s support of the Electoral College as “a vehicle for the expression of the people” was more representative of the Framers). Bennett has attacked Hardaway’s view, arguing that if “electors were ‘intended’ to be dependent recorders of decisions made by the electorate,” then the office of elector “simply served no purpose.” BENNETT, *supra* note 24, at 16.

³⁶ Most states and the District of Columbia officially bind their electors. *See* WALTER BERNS ET AL., *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* 7–8 (John C. Fortier ed., 2004). While the remaining states do not, their electors still vote as expected the vast majority of the time. *Id.* Of more than 21,000 electors chosen since the first presidential election, only ten have voted for someone other than their pledged candidate. *Id.* *See also* WHITAKER & NEALE, *supra* note 25, at 9–10 (discussing efforts to bind Presidential electors).

From the beginning, the constitutional system for selecting the President has spawned proposals for reform.³⁷ Of 11,000 constitutional amendments introduced to date, more than 1000 have concerned the alteration or elimination of the Electoral College.³⁸ Of those resolutions, only one—now the Twelfth Amendment—passed, in 1804.³⁹ The last major congressional effort to pass an amendment pertaining to the Electoral College came in 1969, when the House of Representatives, alarmed by George Wallace's 1968 Presidential run, passed a direct popular vote amendment.⁴⁰ The proposal died the next year when it failed to attract sufficient votes in the Senate.⁴¹ A similar effort in the aftermath of the close 1976 election failed as well.⁴² By bypassing the Constitutional amendment process entirely, the NPV legislation may avoid some of the political hurdles encountered by earlier reform proposals.

II. THE NATIONAL POPULAR VOTE LEGISLATION

The NPV legislation proposes a state-based mechanism to achieve direct popular election of the President, without resorting to a constitutional amendment. This Part describes the origins of the NPV legislation, how it would work, and the legal basis of its proposed implementation through interstate compact.

Prior to the NPV legislation, instituting direct popular election of the President seemed achievable only by amending the Constitution, which is an extraordinarily difficult process.⁴³ Simply to propose a constitutional amendment requires passage of the bill by two-thirds of both houses of Congress or by a Constitutional Convention called by the legislatures of two-thirds of the states.⁴⁴ Ratification of any proposed amendments requires approval by conventions or by the legislatures of three-fourths of the states.⁴⁵ The innovation of the NPV legislation is that the legislation institutes a direct popular election at the national level, while working within

³⁷ The first resolution to amend the Presidential election provisions of the Constitution was introduced on January 6, 1797. See LONGLEY & BRAUN, *supra* note 5, at 42.

³⁸ See Lutz et al., *supra* note 1, at 45–46.

³⁹ See PEIRCE & LONGLEY, *supra* note 8, at 131.

⁴⁰ See H.R.J. Res. 681, 91st Cong. (1970); see also PEIRCE & LONGLEY, *supra* note 8, at 188.

⁴¹ See CONG. QUARTERLY, INC., POWERS OF CONGRESS 279–80 (1976); see also PEIRCE & LONGLEY, *supra* note 8, at 192.

⁴² See S.J. Res. 26, 96th Cong. (1979); see also PEIRCE & LONGLEY, *supra* note 8, at 205.

⁴³ See, e.g., WILMERDING, *supra* note 8, at 97. (“The national plebiscite system has one great handicap that cannot be overcome. It could be established only by constitutional amendment, and no amendment establishing it stands any chance whatever of passing the Senate or being adopted by the states”).

⁴⁴ See U.S. CONST. art. V.

⁴⁵ *Id.*

and adhering to the preexisting Constitutional framework of the Electoral College.

Compared to a constitutional amendment, the NPV legislation could implement direct popular election of the President with relative ease. The NPV legislation takes effect “when states cumulatively possessing a majority of the electoral votes have enacted [the NPV legislation].”⁴⁶ With the present distribution of electoral votes, the NPV legislation could take effect after passage in as few as eleven states.⁴⁷ In fact, evidence from past efforts to reform the Electoral College suggests that state legislatures may be more receptive to passing such legislation than Congress.⁴⁸

A. How the NPV Legislation Works

The heart of the NPV legislation is a “cheeky idea”⁴⁹: upon implementation of the NPV legislation, states that have passed the NPV legislation will pledge their Presidential electors to the winner of the national popular vote, rather than the state popular vote, thus assuring that the popular vote winner receives a majority in the Electoral College.⁵⁰ Linking the electoral vote to the national popular vote appears to be unprecedented in the history of proposed reforms to the Electoral College.⁵¹ It allows the

⁴⁶ S.R. 06-223, 65th Gen. Assem., Reg. Sess. art. 3 (Colo. 2006).

⁴⁷ The eleven most populous states together have 271 electoral votes, which is one more than the 270 needed to constitute a majority of the Electoral College. See WHITAKER & NEALE, *supra* note 25, at 2–3; Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW, Dec. 28, 2001, <http://writ.news.findlaw.com/amar/20011228.html>. See also Fed. Election Comm’n, Distribution of Electoral Votes, <http://www.fec.gov/pages/elevote.htm> (last visited Nov. 8, 2006) (listing the present distribution of electoral votes).

⁴⁸ Polls of state legislators in 1966 revealed that at least 50% of legislators in forty-four states favored direct popular election of the President. See PEIRCE & LONGLEY, *supra* note 8, at 170–71. Over 59% of legislators overall supported a direct popular vote. See COMM’N ON ELECTORAL COLL. REFORM, AMER. BAR ASSOC., ELECTING THE PRESIDENT 7 (1967). Furthermore, Gallup polls since 1944 have consistently shown that a majority of the American public supports direct election. FairVote, Gallup Direct Election Polls Since 1944, <http://www.fairvote.org/?page=1823> (last visited Nov. 18, 2006). The most recent survey, taken before the 2004 Presidential election, found 61% approval, 35% disapproval, and 4% undecided. *Id.*

⁴⁹ Editorial, *How to Drop Out of the Electoral College*, MINNEAPOLIS STAR TRIB., Mar. 27, 2006, at A8.

⁵⁰ See, e.g., H.R. 2948, 2006 Assem., Reg. Sess. art. 3 (Cal. 2006); S.R. 06-223, 65th Gen. Assem., Reg. Sess. art. 3 (Colo. 2006). See also National Popular Vote!, The Plan, http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=page&page_id=4 (last visited Nov. 18, 2006) (describing NPV legislation in general terms).

⁵¹ This innovation originated in a paper by Professor Robert W. Bennett of Northwestern Law School. See Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241 (2001). Professors Akhil Reed Amar of Yale Law School and Vikram David Amar of Hastings College of Law later promoted the paper in December 2001. See Amar & Amar, *supra* note 22. The idea received renewed attention with the formation of National Popular Vote (“NPV”), the organization now dedicated to passing the legislation, in early 2006. See Rick Lyman, *Innovator Devises Way Around Electoral College*, N.Y. TIMES, Sept. 22, 2006, at A22 (describing formation of NPV).

Electoral College to remain intact, but only as a “tourist attraction,” replicating the national popular vote result, subject only to the possibility of faithless electors.⁵² The NPV legislation overcomes the incentives against abandoning the winner-take-all rule by employing an interstate compact that does not bind states until the participating states cumulatively constitute a majority of the Electoral College, assuring that the national popular vote winner has a majority in the Electoral College.⁵³

The first two articles of the NPV legislation extend the right to join the interstate compact to any state and to the District of Columbia⁵⁴ and mandate that each participating state conduct a popular election for the President and Vice President.⁵⁵ Article three contains the central operative language, which assigns the state’s Presidential electors to the winner of the national popular vote: “The Presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.”⁵⁶

The NPV legislation makes no provision for a recount. Each state’s chief election officer must treat as final “an official statement containing the number of popular votes in a state for each Presidential slate” made by the day established by Congress for making the states’ electoral vote determinations conclusive.⁵⁷ In the extremely unlikely event of a tie in the national popular vote, the NPV legislation provides for the states to revert to the present winner-take-all rule for assigning electors.⁵⁸

States that have passed the NPV legislation will only utilize its procedures for a given election year if the NPV legislation is in effect by July 20 of that election year. To come into effect, the legislation must be adopted by a number of states such that the majority of the Electoral College votes would be apportioned under the NPV legislation.⁵⁹ Member states may withdraw from the agreement at any time, but any withdrawal occurring

⁵² See Hertzberg, *supra* note 3, at 27.

⁵³ See, e.g., H.R. 2948, 2006 Assem., Reg. Sess. art. 4 (Cal. 2006), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_2901-2950/ab_2948_bill_20060907_enrolled.pdf.

(“This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state”). Accordingly, to assure success of the interstate compact, states must pass the NPV legislation “in substantially the same form” as other states. See *id.* See also S.R. 06-223, 65th Gen. Assem., Reg. Sess. art. 4 (Colo. 2006) (requiring that other states have enacted the compact in “substantially the same form” before the NPV legislation can take effect); KOZA ET AL., *supra* note 4, at 248–49 (showing original version proposed by the NPV).

⁵⁴ See H.R. 2948 art. 1 & 2.

⁵⁵ See *id.* art. 2. The bill also mandates the so-called short ballot, listing only the names of the candidates for President and Vice President, not the names of electors. See *id.* art. 5.

⁵⁶ See *id.* art. 3.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See H.R. 2948, 2006 Assem., Reg. Sess. art. 3 (Cal. 2006).

within six months of the end of a President's term cannot take effect until the next President or Vice President is "qualified to serve the next term."⁶⁰

i. *Interstate Compact*

The interstate compact, essentially a contract between states, overcomes the primary barrier to states' abandonment of the winner-take-all rule. In a mixed system where some states assign electors using the winner-take-all rule and others use a different rule, states using the winner-take-all rule wield greater influence over the outcome of the election.⁶¹ In the case of the NPV legislation, the interstate compact ensures that no individual state must "unilaterally disarm" and reduce its Electoral College influence without an assurance that enough other states will do likewise.⁶²

The constitutionality of the NPV interstate compact has not been definitively established.⁶³ The Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."⁶⁴ Although the text of the Constitution plainly requires congressional approval of interstate compacts,⁶⁵ supporters of the NPV legislation ("NPV supporters") argue that congressional approval is unnecessary,⁶⁶ because they believe that the Supreme Court will classify the NPV legislation as one of the types of interstate compacts that do not

⁶⁰ See *id.* art. 4. This provision prevents potential disruptions to ongoing Presidential campaigns. See KOZA ET AL., *supra* note 4, at 266.

⁶¹ See BEST, *supra* note 30, at 23.

⁶² See Bennett, *supra* note 51 and accompanying text.

⁶³ Assuming the interstate compact is constitutionally permissible, the compact would be legally binding on its signatory states.

[C]ompacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and they take precedence over conflicting state laws, regardless of when those laws are enacted.

COUNCIL OF STATE GOVS., *INTERSTATE COMPACTS AND AGENCIES* 2003, at 6 (2003). *Cf.* *Virginia v. Maryland*, 540 U.S. 56, 66 (2004) (noting that congressionally approved interstate compacts have the force of a federal statute). Upon taking effect, the NPV legislation's interstate compact would require states to honor their commitment; they could not then renege by reverting to a state-based method of assigning their electoral votes.

⁶⁴ U.S. CONST. art. I, § 10, cl. 3. Congress may grant its approval in the form of a simple joint resolution. Congress's consent may also be implied. See *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) ("[Congress's] consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them"); KOZA ET AL., *supra* note 4, at 209.

⁶⁵ See U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .").

⁶⁶ See KOZA ET AL., *supra* note 4, at 219 ("The Supreme Court has interpreted this clause to allow states to enter into compacts without Congressional consent"). See also *Virginia v. Tennessee*, 148 U.S. 503, 521–22 (1893) (suggesting that consent of Congress to an interstate compact may be implied by subsequent action).

require Congressional approval.⁶⁷ According to the Court, “the test is whether the Compact enhances state power *quoad* the National Government,”⁶⁸ which can be assessed by examining whether the agreement grants powers that the state did not already have individually, whether it is entirely voluntary as to its adoption or rejection by the states, and whether it burdens interstate commerce.⁶⁹ Compacts that do not increase “the political power or influence” of the party states or “encroach upon the full and free exercise of federal authority”⁷⁰ do not require congressional approval. NPV supporters argue that the Court’s test has been interpreted to favor interstate compacts even in the absence of Congressional approval. For example, the Supreme Court has recognized the authority of the states to enact a compact mandating uniform durational residency requirements without Congressional approval.⁷¹ Indeed, one supporter has proclaimed that he has been “unable to locate a single case where a court invalidated a compact for lack of consent on the grounds that it impermissibly encroached on federal supremacy.”⁷² Lower courts, such as the Third Circuit, have held that encroachment does not occur when the subject of the compact concerns “areas of jurisdiction historically retained by the states.”⁷³

C. Legislative Record

NPV supporters have outlined a three-part strategy for enactment of the NPV legislation: (1) the citizen-initiative process; (2) state legislative action; and (3) action by Congress after passage of the NPV by several states.⁷⁴ Although the public has consistently supported reform of the Electoral College,⁷⁵ the feasibility of using the citizen-initiative process is limited. Only twenty-five states allow some form of citizen-initiative (these

⁶⁷ See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459 (1978); *New Hampshire v. Maine*, 426 U.S. 363, 369–70 (1976).

⁶⁸ See *U.S. Steel Corp.*, 434 U.S. at 473.

⁶⁹ See *id.*

⁷⁰ *Virginia*, 148 U.S. at 520. See also *KOZA ET AL.*, *supra* note 4, at 226–27. The Court applied the same test in *U.S. Steel Corp. v. Multistate Tax Comm’n*, when it upheld a compact lacking express Congressional approval after finding that the compact did not “authorize the member states to exercise any powers they could not exercise in its absence.” 434 U.S. at 473.

⁷¹ See *Oregon v. Mitchell*, 400 U.S. 112, 286–87 (1970).

⁷² *KOZA ET AL.*, *supra* note 4, at 229.

⁷³ *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991). See also *Star Sci., Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002) (finding that the Master Settlement Agreement did not violate the Compact Clause because it did not authorize the exercise of any powers that the states did not already possess); *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 740 F.2d 203, 208 (2d Cir. 1984) (finding the Bank Holding Companies Act reserved power to the states to form the equivalent of an interstate compact).

⁷⁴ See *KOZA ET AL.*, *supra* note 4, at 276 (describing the NPV supporters’ strategy for enacting the NPV legislation).

⁷⁵ Gallup polls taken in 1944, 1966, 1967, 1968, 1977, 1980, 2000, and 2004 all revealed majority support for direct election of the President. See FairVote, *Gallup Direct Election Polls Since 1944*, <http://www.fairvote.org/?page=1823> (last visited Oct. 2, 2006).

states in aggregate comprise less than a majority of the Electoral College), and in some of these states, such initiatives are not binding.⁷⁶ Thus, in practice, the vast majority of the electoral votes that would be assigned through the NPV legislation must come from action by state legislatures.⁷⁷ Unlike state legislative action, Congressional action may take several forms, including approval of the compact on behalf of the District of Columbia, streamlining of state election certification laws, or express consent to the compact.⁷⁸

Thus far, NPV supporters have targeted state legislatures, because apart from the requirement of congressional approval of the compact, interstate compacts are enacted like ordinary state laws, through passage by the state legislatures and with the approval of governors.⁷⁹ The NPV legislation has not yet become law in any state, but it has made some progress, particularly in large states. Sponsors have introduced versions of the NPV legislation in at least six states—California, Illinois, New York, Missouri, Colorado, and Louisiana—since formation of the NPV on February 23, 2006.⁸⁰ It has been passed in three state legislature chambers: the California Assembly, the California Senate, and the Colorado Senate.⁸¹ NPV supporters plan to introduce the NPV legislation in all fifty states by 2007 and have already found sponsors for the next legislative session in twenty-nine states.⁸²

NPV supporters appeared poised for their biggest victory so far when the NPV legislation passed both chambers of the California legislature in August 2006.⁸³ On September 30, however, Governor Arnold Schwar-

⁷⁶ For example, Illinois's statutory initiatives are advisory only. In other states, election administrators and the courts commonly disqualify ballot measures. *See KOZA ET AL.*, *supra* note 4, at 277–79 (describing disadvantages of initiative processes for different states).

⁷⁷ *See id.* at 279 (“In practice, the authors of this book believe that the vast majority of the 270 electoral votes would, as a practical matter, come from state legislatures”).

⁷⁸ *See id.* at 276.

⁷⁹ *See id.* at 203 (“Enactment of an interstate compact is generally accomplished in the same way that ordinary state laws are enacted”). For the District of Columbia, enactment requires Congress to consent to the compact on its behalf. *See id.* at 210.

⁸⁰ *See* Press Release, National Popular Vote, Five New York Republicans Introduce Bill for Nationwide Election of President—Vermont and Arizona Sponsors Announced for 2007 (May 25, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=71 (last visited Nov. 18, 2006).

⁸¹ *See* Press Release, National Popular Vote, Colorado Senate Passes National Popular Vote Bill on Second Reading (Apr. 14, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=59 (last visited Nov. 18, 2006); Press Release, National Popular Vote, California Legislature Gives Final Approval to Bill for Nationwide Popular Election of the President (Aug. 30, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=88 (last visited Nov. 18, 2006).

⁸² *See* Press Release, National Popular Vote, 29 States Now Have Sponsors for Bill for Nationwide Popular Election of the President for Upcoming 2007 Legislative Sessions (Oct. 3, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=105 (last visited Nov. 18, 2006).

⁸³ *See* Nancy Vogel, *A Vote to Quit the Electoral College*, L.A. TIMES, Aug. 31, 2006, at B1.

zenegger (R-Cal.) vetoed the bill,⁸⁴ which some commentators suggested might be fatal to the movement's momentum.⁸⁵ Although passed by the state Senate, Colorado's version of the NPV legislation stalled after a House Committee postponed consideration of it indefinitely on May 2, 2006.⁸⁶

If the NPV legislation is not enacted by 2008, NPV supporters believe that the debate on national popular election of the President will figure prominently during the 2008 campaign, and that such a debate "will inevitably lead to a nationwide decision to embrace national popular election of the President in time for the 2012 Presidential election."⁸⁷

III. EFFECTS OF THE NPV LEGISLATION ON THE SELECTION OF THE PRESIDENT

A. Misfire

One of the enduring concerns about the Electoral College is that the candidate who wins the popular vote may not win a majority in the Electoral College, a situation often referred to as "misfire."⁸⁸ Publicity surrounding the 2000 and 2004 elections has made this possibly the best known aspect of the Electoral College system, despite its relatively infrequent occurrence.⁸⁹ In fifty-five Presidential elections, there have been just four misfires, amounting to one every fifty years.⁹⁰ Economists have estimated that there is a 50% chance of misfire with a margin of 100,000 votes (approximately the Kennedy-Nixon margin in 1960); a 33% chance with

⁸⁴ Governor Schwarzenegger (R-Cal.) said the bill ran "counter to the tradition of our great nation." See *Veto in California on Electoral College*, N.Y. TIMES, Oct. 3, 2006, at A17.

⁸⁵ *Id.*

⁸⁶ See Summarized History for Bill Number SB06-223, <http://www.leg.state.co.us/clics2006a/csl.nsf/billsummary/b8fdcf0acad0de3687257131007f0795> (last visited Nov. 18, 2006).

⁸⁷ KOZA ET AL., *supra* note 4, at 281 (discussing how the NPV legislation will be an issue during the 2008 election).

⁸⁸ See *id.* at 16; WHITAKER & NEALE, *supra* note 25, at 6.

⁸⁹ See, e.g., Jack N. Rakove, *The E-College in the E-Age*, in THE UNFINISHED ELECTION OF 2000, at 201–02 (Jack N. Rakove ed., 2001) ("In the days immediately preceding the Presidential election of 2000, the recognition dawned that Americans might well deliver a split verdict, granting a plurality in the popular vote to one candidate and a majority in the Electoral College to the other"); TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 8–9 (2004) (discussing rampant speculation before the 2000 election that Democratic Presidential candidate Al Gore might win the electoral vote without a popular majority).

⁹⁰ See KOZA ET AL., *supra* note 4, at 16; WHITAKER & NEALE, *supra* note 25, at 6. It is possible that some misfires were in part the result of strategic decisions: some candidates may have campaigned not to win the most popular votes possible nationwide, but to win the most electoral votes. A direct popular vote would probably have caused candidates to campaign differently, which may have affected the outcome of some elections. See BENNETT, *supra* note 24, at 49.

500,000 votes; a 25% chance with 1–1.5 million votes; and a 12.5% chance with 2 million votes.⁹¹

Supporters of the Electoral College defend the possibility of misfire on two grounds. Some argue that the possibility of misfire is not inconsistent with the principles underlying the Constitution, but instead coherent with the rejection of majoritarianism that characterizes the selection procedures for the Supreme Court and Senate, as well as the guarantee of minimum representation in the House of Representatives.⁹² Other supporters of the Electoral College emphasize the relative infrequency of misfires as evidence that the Electoral College accurately reflects the popular majority.

Yet the argument that majoritarianism does not, should not and never has mattered in Presidential elections is belied by the rarity of conflict between the outcome of the Electoral College and popular vote.⁹³ At a minimum, actual practice has fostered the expectation that the Electoral College will and *should* reflect the outcome of the national popular vote. Indeed, many Electoral College supporters deny that the framers intended electors to act independently of the popular result.⁹⁴

Yet viewing the Electoral College as either a repudiation or a reflection of majoritarian interests is largely unsatisfactory. If electors were meant to operate independently, the resultant election process would be unlikely to retain much popular support today. If electors simply exist to implement the results of the popular vote, they are at best superfluous and at worst inimical to democracy if they vote in unexpected ways and produce misfires.

The NPV legislation provides a satisfactory alternative to either traditional characterization of the Electoral College. Under the NPV legislation, electors will have the clear role of implementing the national popular vote, which will probably further popular support for the Presidential election process. To the extent that the Electoral College was or should be intended to reflect the popular will, the NPV legislation solidifies that purpose by preventing misfires, which are inherently anti-democratic.

⁹¹ See LONGLEY & BRAUN, *supra* note 5, at 3.

⁹² ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 15–16 (1971) (expanded & rev. ed. of “The New Age of Political Reform” 1968) (“[N]ear-perfect apportionment is frustrated as well by state lines, which no district may cross, so that a state will gain or lose representation if after it carves a number of equal districts out of its population, it has a fraction left over”).

⁹³ Arguably, the Electoral College’s tendency to reflect popular vote result “may be far more reliable than the critics admit.” BEST, *supra* note 30, at 58–59. She further predicts that the risk of misfire will continue to decline, making the “runner-up President [rare] indeed.” *Id.* at 67.

⁹⁴ The Electoral College has been called simply “a vehicle for the expression of the people,” where “the strongest evidence [demonstrates] that the framers did not intend electors to exercise independent judgment.” HARDAWAY, *supra* note 35, at 86.

B. Battlegrounds and Spectators

A central issue in the debate over the NPV legislation is the phenomenon of the ever-shrinking battleground during Presidential elections. The force of the argument is augmented by the continuing decline in the number of so-called battleground states⁹⁵—those states where no candidate has overwhelming support, meaning that both major party candidates have a reasonable chance of winning the state’s electoral college votes—and the corresponding increase in the number of safe states—the “red states” and “blue states,” which are insurmountably Republican and Democrat, respectively.

Arguably, the Electoral College’s most dramatic impact on Presidential elections in recent years was not the misfire in 2000, but the de facto exclusion of most of the United States from Presidential election campaigns.⁹⁶ In practice, one effect of the Electoral College is to narrow the Presidential election from a nationwide, fifty-state race to one focused on a few battleground states. The gulf in campaign advertising and personal candidate appearances between the battleground and safe states was dramatic in the 2004 election: of the \$237 million spent on advertising during the last month of the Presidential campaign, 72% was spent in five states (Florida, Ohio, Iowa, Wisconsin, and Pennsylvania).⁹⁷ The candidates spent nothing at all in twenty-three states.⁹⁸ Furthermore, sixteen states received 92% of the Presidential and Vice Presidential appearances; the five states with the highest advertising expenditures received 65% of these appearances.⁹⁹

Supporters of the NPV legislation therefore criticize the Electoral College for its effect on the majority of the country: “the remaining two thirds of the states are, for all practical purposes, excluded from the campaign. They are mere spectators in the election process.”¹⁰⁰

Supporters of the Electoral College acknowledge that modern campaigns focus on only a few battleground states, but they argue that the battlegrounds change often and therefore that the Electoral College is not

⁹⁵ In 1960, Richard Nixon visited every state during his Presidential campaign. During the final three weeks of that campaign, Kennedy and Nixon spent 88% of their time in twenty-four battleground states. See KOZA ET AL., *supra* note 4, at 12. In 1976, eleven states did not receive a single visit from the Democratic candidates for President and Vice President. Twelve other states received only one visit. See Mayer et al., *The Electoral College and Campaign Strategy*, in CHOOSING A PRESIDENT, *supra* note 1, at 103.

⁹⁶ Hertzberg, *supra* note 3, at 27–28 (stating that the Electoral College should be blamed for the “death of participatory politics in two-thirds of the country.”).

⁹⁷ See KOZA ET AL., *supra* note 4, at 9–10. See also U.S. Presidential Campaign Spending Triples, CBC NEWS, Nov. 1, 2004, http://www.cbc.ca/world/story/2004/11/01/us_campaign_cost041101.html (last visited Nov. 18, 2006).

⁹⁸ See KOZA ET AL., *supra* note 4, at 10. These ignored states included California, Illinois, Massachusetts, Georgia, and New Jersey. *Id.*

⁹⁹ *Id.* at 11.

¹⁰⁰ *Id.* at 10.

systematically detrimental to the voters of certain states.¹⁰¹ For example, although Michigan and Florida are now considered to be battlegrounds, Michigan was not a battleground during the Clinton years, and Florida was considered a sure Republican state in 1996 and even as late as the summer of 2000.¹⁰²

The fact that battlegrounds change frequently is not clearly a substitute for giving equal weight to every voter in every state. Sixteen states should not represent all fifty, especially as it is unlikely that the battleground states will reflect the interests of all fifty. By dividing the country into safe and battleground states, the Electoral College severely distorts the presidential campaign. If implemented, the NPV legislation would mean that no states are necessarily excluded from the campaign, because the focus of the candidates would be on garnering the majority of the national popular vote, rather than the popular votes of a select number of battleground states. By diminishing the strategic value of locally focused stump speeches, candidates may be motivated to address national issues more comprehensively.

C. Federalism and Sectionalism

Supporters of the Electoral College argue that the Electoral College's central importance to federalism outweighs any anti-democratic consequences.¹⁰³ In this view, eliminating the Electoral College would not only harm federalism,¹⁰⁴ but also exacerbate sectionalism. These supporters of the Electoral College maintain that the current system causes Presidential candidates "to hear and address the unique interests of the various states," rather than factions based on region, state, or ideology.¹⁰⁵ They distinguish states from interest groups organized around specific issues like gun control or racial preferences; comparatively, in this view, states are "safe"

¹⁰¹ See Bonnie J. Johnson, *Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?*, 35 *PUBLIUS* 337, 339 (2005) ("If states that are competitive change over time, it would indicate that the Electoral College bias is not systematic and, thus, not detrimental to state representation or democracy").

¹⁰² See Allan Cigler et al., *Changing the Electoral College: The Impact on Parties and Organized Interests*, in *CHOOSING A PRESIDENT*, *supra* note 1, at 99.

¹⁰³ See ROSS, *supra* note 89, at 54. Federalism, in Madison's classic characterization, rests on the duality of the federal and state governments:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 5, at 291 (James Madison) (Clinton Rossiter ed., 1999).

¹⁰⁴ See ROSS, *supra* note 89, at 54.

¹⁰⁵ ROSS, *supra* note 89, at 76.

factions that can better check and balance one another, preventing tyranny.¹⁰⁶ It therefore follows that the Electoral College helps prevent “local needs from being ignored, controls dangerous factions, and requires a balancing of interests.”¹⁰⁷ Some supporters of the Electoral College also argue that a direct popular vote, instead of making every vote equally valuable to all candidates, would refocus the candidates’ attention on large states at the expense of small states.¹⁰⁸

According to its supporters, the Electoral College minimizes sectionalism, or reliance by candidates on an electorate limited to one geographic section of the country. Some of these supporters argue that the Electoral College forces candidates to broaden their appeal geographically and prevents candidates with solely regional or sectional bases from ascending to the presidency.¹⁰⁹

In contrast, supporters of the NPV legislation argue that the current system leads Presidential candidates to focus disproportionately on appealing to small factions of voters in battleground states, possibly to the detriment of national interests. For example, Presidential candidates have consistently supported the Cuban embargo to woo Cuban American votes in Florida, “the swing bloc within the swing state.”¹¹⁰

Supporters of the NPV legislation note that other scholars have suggested that the present system can actually exacerbate sectionalist tendencies by awarding electors to candidates with strong regional followings, such as Strom Thurmond in 1948 and George Wallace in 1968, but not to broadly based, nationally focused candidates like Ross Perot in 1992.¹¹¹ The current system may foster candidates aiming to play the role of “spoiler.” A spoiler could deny either major party candidate a majority and then bargain for concessions in exchange for their electoral votes.¹¹²

¹⁰⁶ *Id.* at 57–58.

¹⁰⁷ *Id.* at 58.

¹⁰⁸ See Phyllis Schlafly, *Subversive Plan*, N.Y. SUN, May 9, 2006, at 9 (“The elimination of the Electoral College would overnight make irrelevant the votes of Americans in about 25 states because candidates would zero in on piling up votes in large-population states”); Ross, *supra* note 89, at 182 (“Getting rid of the Electoral College would allow Presidential candidates to win with positions that are not at all in the interest of less populous states”).

¹⁰⁹ See Schlafly, *supra* note 109 at 9. (“The Electoral College ensures that no single faction or issue can elect a President because he must win many diverse states to be elected”). Yet the election of 1860 indicates that the Electoral College did not provide complete protection against sectionalism. Abraham Lincoln, a highly sectional candidate, won a majority of the Electoral College in that election even though he did not receive a single vote south of Virginia (he was not even on the ballot in ten states) and won less than 40% of the overall popular vote. See Amar & Amar, *supra* note 22, at 62.

¹¹⁰ Keith Epstein & Chris Echegaray, *Hispanic Dynamics*, TAMPA TRIB., Sept. 18, 2005, Nation/World, at 1.

¹¹¹ See LONGLEY & BRAUN, *supra* note 5, at 9.

¹¹² That strategy worked in 1824 when Henry Clay apparently promised his support to John Quincy Adams in exchange for Adams’s promise to make Clay his Secretary of State. Clay’s support gave Adams victory over Andrew Jackson who had won a plurality of the national popular vote. See *id.* at 36.

An examination of contemporary Presidential elections largely refutes concerns about sectional candidates. For past elections, changing to a direct national popular vote would not have increased the chance that candidates appealing exclusively to one narrow sectional group, like Thurmond in 1948¹¹³ and Wallace in 1968,¹¹⁴ would have won the Presidency outright. Both the current system and the NPV legislation pose high hurdles to such candidates. Furthermore, today, Presidential elections generally do not offer a choice between one sectional candidate and one national candidate, but between two sectional candidates. A national candidate enjoys support from voters of all characteristics and all regions of the country. Yet a stark urban-rural divide has characterized the two most recent Presidential elections: just as Al Gore had limited appeal in rural areas in 2000, George W. Bush polled poorly among urban voters.¹¹⁵ Recent elections also reflect regional differences: while Northeast and West Coast states strongly supported Gore, Bush's victories came in the South and Midwest.¹¹⁶

Recent elections suggest that the Electoral College has not substantially counteracted the regional and sectional divisions within the electorate. Instead, the evidence suggests that sectionalism can and does arise under the Electoral College, which in turn undercuts its alleged importance to preserving federalism. Instead of ensuring that candidates pay attention to each state's concerns, the Electoral College in practice focuses attention on the interests of a small and shrinking group of battleground states while ignoring the concerns of the majority of states¹¹⁷—a list that includes California, New York and Illinois—because such states are considered “safely” on one party's side, these states' citizens are essentially disenfranchised. Compared to the NPV legislation, the current system may actually exacerbate sectionalism by artificially increasing the influence of the small states, which gives an advantage to candidates that have broader appeal in small states.

The NPV legislation does not substantially undercut federalism while arguably minimizing sectionalism. Even without the current Electoral Col-

¹¹³ Thurmond won 2.4% of the popular vote and 39 electoral votes, but not enough to prevent Harry Truman from winning the majority of the electoral votes. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 72 (115 ed. 1995).

¹¹⁴ George C. Wallace won 13.5% of the popular vote and forty-six electoral votes, again not enough to prevent Richard Nixon's electoral majority of 301 votes. *Id.*

¹¹⁵ Many more (59%) rural voters supported Bush than supported Gore (37%). *See Breaking Down the Electorate*, TIME, Nov. 20, 2000, at 74. An overwhelming 71% of voters in cities with over 500,000 people cast ballots for Gore, while Bush earned only 26% of their votes. *Id.* *But see* Ross, *supra* note 89, at 182 (noting that Bush carried at least one state in every region of the country and carried the election for over 2 million square miles of the country, while Gore carried only 580,000 square miles). The statistics cited by Ross demonstrate the extent of the rural-urban divide.

¹¹⁶ *See* Ross, *supra* note 89, at 182.

¹¹⁷ *See supra* Part III.B (discussing the diminishing number of battleground states).

lege system, states would continue to have a central role in the Senate.¹¹⁸ Since the NPV legislation removes the incentive to focus on battleground states, it should prevent disenfranchisement of states that would otherwise be considered safely on one party's side. By requiring candidates to win the national popular vote, the NPV legislation reinforces the role of the President as a representative not of the states, but of the whole population of the United States.

D. Voter Turnout

The United States ranks close to the bottom among world democracies in voter turnout.¹¹⁹ Some scholars argue that a direct popular election, like that proposed by the NPV legislation, would motivate more Americans to vote by ensuring that every vote would count.¹²⁰ Some supporters of the Electoral College, however, suggest that the psychological benefit of knowing that every vote counts will have no appreciable effect on turnout.¹²¹

A comparison of turnout in battleground states and in safe states for the 2004 election suggests that battleground states have higher voter turnout than safe states. Among nine battleground states, aggregate turnout was 66.3% of eligible voters, compared with 58.9% in the other forty-two jurisdictions.¹²² The disparity has increased over time. The turnout for the twelve most competitive states increased from 54% to 63% between 2000 and 2004, while turnout for the twelve least competitive states increased from 51% to only 53%.¹²³

¹¹⁸ The equality of state representation in the Senate is immune from the Article V amendment process of the Constitution. See U.S. CONST. art. V (“[N]o state, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

¹¹⁹ See Robert L. Lineberry et al., *The Electoral College and Social Cleavages: Ethnicity, Class, and Geography*, in CHOOSING A PRESIDENT, *supra* note 1, at 161, 163. While established democracies averaged 73% turnout, turnout in the 2000 American presidential election was 49.3%. See Int'l Inst. for Democracy & Electoral Assistance, Voter Turnout: Main Findings, <http://www.idea.int/vt/findings.cfm> (last visited Nov. 18, 2006).

¹²⁰ See, e.g., Burdett A. Loomis et al., *Electoral Reform, the Presidency, and Congress*, in CHOOSING A PRESIDENT, *supra* note 1, at 74, 78 (arguing that minority party voters would vote in increased numbers for President in a direct election system).

¹²¹ See, e.g., Robert M. Stein et al., *Citizen Participation and Electoral College Reform*, in CHOOSING A PRESIDENT, *supra* note 1, at 125–26 (arguing that electoral reform will have only a slight effect on voter turnout).

¹²² See Scott L. Althaus, *How Exceptional Was Turnout in 2004?*, 15 POL. COMM'N REP. 1 (2005), available at http://www.ou.edu/policom/1501_2005_winter/commentary.htm (finding that the nine battleground states of Florida, Iowa, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, and Wisconsin experienced an 8.4% increase in turnout over 2000, while the other forty-two jurisdictions saw only a 4.7% increase).

¹²³ See FAIRVOTE, THE SHRINKING BATTLEGROUND: THE 2008 PRESIDENTIAL ELECTIONS AND BEYOND 13 (2005), available at http://www.fairvote.org/media/perp/Shrinking_Battleground_Final.pdf (reporting on the decrease in number of competitive battleground states in presidential elections and the likely civil and partisan consequences).

Under the NPV legislation, candidates who currently ignore states in which they have comfortable majorities would have a new incentive to maximize their supporters' turnout. Every candidate would also have an incentive to pursue every possible vote, even in states that are heavily tilted toward another party. Candidates would probably advertise on national television networks instead of on local stations,¹²⁴ so campaigns would reach even voters in sparsely populated areas, most likely increasing the total national turnout.

E. The House Contingency Procedure

Practically since its inception, the House contingency procedure has been much maligned.¹²⁵ As early as 1823, Thomas Jefferson wrote:

"I have even considered the Constitutional mode of election ultimately by the legislature voting by states as the most dangerous blot on our Constitution, and one which some unlucky chance will some day hit."¹²⁶ The NPV legislation would eliminate use of this much-criticized procedure by guaranteeing a majority of the Electoral College to the winner of the national popular vote.

F. The Two-Party System

Current Presidential elections feature two major candidates; only occasionally does a third party candidate credibly campaign. Supporters of the Electoral College claim that a direct popular vote for President would encourage "single-issue zealots, freelance media adventurers, and eccentric billionaires to jump into Presidential contests."¹²⁷ Former Senator Daniel Patrick Moynihan (D-N.Y.) has argued that abolishing the Electoral College would be the "the most radical transformation in our political system that has ever been considered"¹²⁸ because it would severely weaken the two-party system.¹²⁹

¹²⁴ See Michael M. Uhlmann, *Creating Constitutional Majorities: The Electoral College After 2000*, in *SECURING DEMOCRACY*, *supra* note 24, at 103, 106–07 ("Mass-market television advertising is expensive, but per capita it is the cheapest route to electoral success when what counts is the sheer number of votes rather than their state of residence").

¹²⁵ See William T. Gossett, *Direct Popular Election of the President*, in ABA SPECIAL COMMITTEE ON ELECTION REFORM, *ELECTING THE PRESIDENT* 58 (rev. ed. 1977) ("This feature of our system is clearly a political monstrosity, fully distorting the most elementary principles of self-government").

¹²⁶ LONGLEY & BRAUN, *supra* note 5, at 37.

¹²⁷ Arthur Schlesinger, Jr., *Fixing the Electoral College*, *WASH. POST*, Dec. 19, 2000, at A39.

¹²⁸ Daniel Patrick Moynihan, *The Electoral College and the Uniqueness of America*, in *SECURING DEMOCRACY*, *supra* note 24, at 87–88.

¹²⁹ See *id.* at 100 (arguing that the political parties would be replaced by an enormously powerful media).

Supporters of the NPV legislation argue, however, that a variety of other factors, including single-member congressional districts, the open nature of the parties, direct primaries, the Presidential nomination system, public funding requirements, and state ballot laws, would minimize the amount of change any Electoral College reform would have on the two-party system.¹³⁰

Admittedly, a direct popular vote for President, as provided for under the NPV legislation, would provide incentives for third party candidates to run. Since the NPV legislation implements a plurality system, the entry of each new candidate would lower the threshold needed to win the election, so that the more candidates in the race, the greater the incentive for additional candidates to run.¹³¹ Candidates might also enter the race to extract concessions from the major party in exchange for leaving the race.¹³² Indeed, the general election could become a national primary in which highly ideological candidates from minor parties could bargain to lend their support to major candidates in the likely runoff.¹³³ Alternately, minor party candidates could capture the support of a major party's constituency, potentially preventing one of the major party candidates from even reaching the runoff.¹³⁴ The viability of minor party candidates requires such campaigns to overcome the common perception that a vote is "wasted" if cast for minor parties.¹³⁵

One possible solution to any weakness introduced by a simply plurality requirement such as the NPV legislation, is the "instant runoff," in which voters would rank their choices. Under such a system, voters could then pick moderate, major party candidates as their second choice, preventing the highly ideological candidates from qualifying for any runoff.¹³⁶ While the current NPV legislation does not contain an instant runoff provision, it could be included in a future version, thereby assuring that elected candidates meet a specified popular vote threshold.

¹³⁰ See, e.g., Cigler et al., *supra* note 102, at 90–91.

¹³¹ See Stein et al., *supra* note 121, at 134.

¹³² See *id.*

¹³³ See HARDAWAY, *supra* note 35, at 18–19. At least one Electoral College supporter points out that the Nazis in Germany took advantage of direct popular election to establish a minority power base, and ultra-nationalist Vladimir Zhirinovsky's 23% could have swung the 1993 Russian Presidential election. See *id.*

¹³⁴ See BEST, *supra* note 30, at 117–18.

¹³⁵ See PEIRCE & LONGLEY, *supra* note 8, at 85 ("The vast preponderance of Americans apparently still consider it a wasted vote to support a maverick candidacy"); Michael Barone, *The Electoral College and the Future of American Political Parties*, in SECURING DEMOCRACY, *supra* note 24, at 79, 83 (arguing that "[d]on't waste your vote" is a powerful argument against third party candidates).

¹³⁶ See Amar & Amar, *supra* note 22, at 63.

G. Chaos and Fraud in Close Elections

Supporters of the Electoral College argue that under the Electoral College, recounts and controversy associated with close elections can be limited to one state or a handful of states, but that with a direct popular vote, recounts would have to be national, and thus costlier and more chaotic.¹³⁷ Of course, the cut-off for any such recount would in itself be a source of controversy. Indeed, some argue that the 1960 election, which Kennedy won with a 0.2% national popular vote margin, should have been recounted.¹³⁸ Others argue that because voting machines have an error rate of 1% or more, elections with margins of up to 1% are inherently problematic.¹³⁹

Yet, the low probability of very close elections on the national level makes this aspect of the NPV legislation of only minimal concern. Since 1900, every election has had a national popular vote margin exceeding 100,000—a very high absolute number of ballots.¹⁴⁰ Simple arithmetic confirms this result: a 0.1% margin translates into a much larger absolute margin in a national vote than in a state vote. Moreover, the American people may not find very close elections, even on a national level, troubling, having become accustomed to very close elections due to their experience with state races.¹⁴¹

In the extremely unlikely event of a margin much smaller than 100,000 votes, however, the NPV legislation provides little guidance as to when

¹³⁷ See Schlafly, *supra* note 108, at 9. (“If the popular vote were controlling, chaos would be the predictable result in any close election. An allegation of voter fraud in one state would begin a fatal chain reaction of challenges and recounts as campaign managers try to scrape up additional hundreds of votes in many states at once”); see also HARDAWAY, *supra* note 35, at 158–60 (discussing delays in tabulating and reporting results during recounts).

¹³⁸ See Lutz et al., *supra* note 1, at 44. Many states have automatic recount provisions if margins are within a certain percentage. For example, New Mexico requires a recount if the margin is within 0.3%—which would have included the Kennedy-Nixon 1960 results. See *id.*

¹³⁹ See *id.* at 43. Other evidence suggests that the error rate may be even higher. In one study, lever machines had an error rate of 2.2%, optical scan machines had an error rate of 2.7%, and electronic machines had an error rate of 3.1%. See Martha E. Kropf & Stephen Knack, *Balancing Competing Interests: Voting Equipment in Presidential Elections*, in COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 121, 124 (Robert P. Watson ed., 2004) [hereinafter COUNTING VOTES]. In 2000, the rate of uncounted ballots was as high as 7.9% in districts in Chicago and Miami. See Teresa C. Green et al., *Voting Technology and Voting Access in Twenty-first-century America*, in COUNTING VOTES, *supra* note 139, at 105–06. One comprehensive study found that 6% of ballots cast nationwide went uncounted due to faulty voting machines, poorly designed ballots, or absentee ballot mistakes. See Neal Peirce, *Reforming Politics: A ‘One-Stop’ Guide*, STATELINE.ORG, July 17, 2006, <http://www.stateline.org/live/details/story?contentId=127312> (last visited Nov. 18, 2006). None of these problems, of course, is unique to the presidential elections; they are equally true for state and local elections.

¹⁴⁰ See KOZA ET AL., *supra* note 4, at 362.

¹⁴¹ See *id.* at 229.

or how such recounts would be conducted. Ostensibly, such recounts would rely on existing state-by-state recount machinery.¹⁴²

The NPV legislation would not necessarily exacerbate the problem of fraud in close elections. Specifically, NPV supporters argue that with a margin of more than 500,000 popular votes on the national level, even a close election like the one in 2000 would be unlikely to be the product of fraud.¹⁴³

Under the current Electoral College system,¹⁴⁴ the incentives to cheat are substantial, because a few votes could change the result in a state, and thus, in the election:

The large differences in the value of a vote in various states in Presidential elections has the additional negative side effect of increasing the likelihood of contested Presidential elections and recounts. Because the statewide winner-take-all system divides the nation's 122,000,000 popular votes into 51 separate pools, it regularly manufactures artificial crises even when the nationwide popular vote is not particularly close.¹⁴⁵

In contrast, under the NPV legislation, “[t]here are fewer opportunities for razor-thin outcomes when there is one single large pool of votes than when there are 51 separate smaller pools.”¹⁴⁶ Under the NPV legislation, the diminished likelihood of changing the election result should provide fewer incentives for parties to engage in fraud or disenfranchisement.¹⁴⁷

¹⁴² See *id.* at 364 (arguing that the states are always prepared to conduct recounts because recounts occur on a state level “in virtually every election cycle”).

¹⁴³ See KOZA ET AL., *supra* note 4, at 18–19.

¹⁴⁴ In just one example, the U.S. Commission on Civil Rights investigated allegations of voter fraud and disenfranchisement during the 2000 election in Florida and concluded that “[d]espite the closeness of the election, it was the widespread voter disenfranchisement, not the dead-heat contest, that was the extraordinary feature in the Florida election. The disenfranchisement was not isolated or episodic. And state officials failed to fulfill their duties in a manner that would prevent this disenfranchisement.” U.S. COMM. ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION 99 (2001), available at <http://www.usccr.gov/pubs/vot2000/report/main.htm>.

¹⁴⁵ KOZA ET AL., *supra* note 4, at 18. For example, the 1876 Tilden-Hayes contest, though not particularly close on a national level, included five states with margins under 3000 votes and was therefore a controversial election. See *id.* at 19. One effect of the tendency to artificially manufacture crises in close state outcomes is the potential for litigation. The two major candidates in 2004, George W. Bush and John Kerry, collectively stockpiled more than \$20 million in their general election legal and accounting compliance funds in anticipation of legal battles akin to those of 2000. Bush had \$15.6 million in his GELAC fund, and Kerry had \$7.2 million in his GELAC fund. See Chris Cillizza, *Bush, Kerry Have Leftover Cash*, ROLL CALL, Jan. 27, 2005.

¹⁴⁶ KOZA ET AL., *supra* note 4, at 18.

¹⁴⁷ See LONGLEY & BRAUN, *supra* note 5, at 85.

H. Cost of Presidential Campaigns

The skyrocketing cost of Presidential campaigns is already controversial, but a transition to a nationwide popular vote in which every vote counts may increase costs even more rapidly. For the 2004 election, the major candidates for President raised a total of approximately \$919 million.¹⁴⁸ Both major party nominees also opted out of the federal matching fund program during the primaries, which would have set an overall spending cap and limits in individual states. In the future, more candidates are expected to follow this opt-out practice, which will probably contribute to further escalations in fundraising and spending.¹⁴⁹

The increased cost of a national Presidential campaign has gone largely unnoticed in the debate on a direct popular vote for President.¹⁵⁰ The practical difficulties of conducting a comprehensive nationwide campaign should be of substantial concern to NPV supporters. It seems quite likely that a fifty-state campaign would be much costlier than the present sixteen-state campaign. Instead of buying advertisements on local television stations, the candidates would probably need to buy time on the national networks, which although vastly more expensive than the local stations would still be the most cost-effective way to reach large numbers of voters.¹⁵¹ The cost of candidates' direct mailings, automated calling, phone banking, public rallies, polling, radio advertising, canvassing, and other operations—all expensive already—would further increase, if expanded nationwide. The suddenly magnified need for fundraising and the accompanying increase in the stature of major contributors could exacerbate the perception that elites and large corporations hold disproportionate influence over the presidency.

The influence of money on politics, already criticized, would almost certainly come under greater scrutiny as campaign expenditures ballooned. A serious study of the effects of nationwide direct election on campaign

¹⁴⁸ See PoliticalMoneyLine, 2004 Presidential Electronic Filing Summary, http://www.fecinfo.com/cgi-win/pml1_sql_PRESIDENTIAL.exe?DoFn=2004 (last visited Nov. 18, 2006) (showing funding itemization by candidate). The candidates spent a total of \$891 million. See *id.*

¹⁴⁹ See Robert Schlesinger, *Plotting the Cash Path: Potential 2008 Presidential Candidates Are Already Stockpiling Campaign Money*, CAMPAIGNS & ELECTIONS, Sept. 2005, at 19 (discussing the political pressures on candidates to opt out of federal fund matching programs).

¹⁵⁰ NPV supporters have acknowledged the increased cost of campaigning in larger states than smaller ones, but they have never explicitly addressed the issue of increased costs in a direct-vote presidential election. See KOZA ET AL., *supra* note 4, at 172 (“Changing the statewide percentage of the popular vote in a large state is more costly (in terms of campaigning time, advertising, and organizational efforts) than generating the same percentage change in a small state”).

¹⁵¹ See Uhlman, *supra* note 124, at 106 (“Mass-market television advertising is expensive, but per capita it is the cheapest route to electoral success when what counts is the sheer number of votes rather than their state of residence”).

expenditures is essential in evaluating the ultimate desirability of the NPV legislation.

I. Structural Precariousness

If adopted, the status of the NPV legislation, as an interstate compact, is at least theoretically precarious because any member state could withdraw from it at any time.¹⁵² The NPV legislation attempts to foster at least election-year stability by prohibiting withdrawals from taking effect after July 20 of the election year.¹⁵³ Theoretically, this provides enough time for candidates to transition their campaigns to a battleground-centered race; however, it seems likely that such an event would still throw campaigns into disarray and undermine the purpose of NPV legislation.

The possibility of state withdrawal may be mitigated by several circumstances. First, more states than necessary may join the interstate compact, making the withdrawal of a few states irrelevant to the guaranteed majority. Second, since the early 1800s, state legislatures have been reluctant to manipulate the presidential voting system. Third, the popularity and self-propagating legitimacy of a true nationwide popular vote may make any switch back to a state-based system politically unfeasible.

Fourth, a switch would be advantageous and feasible only under the rare convergence of several circumstances. Specifically, the candidate would have to be trailing in nationwide polls, but have a reasonable likelihood of capturing a majority of the electoral votes under the state-based, winner-take-all system. Further, states that could affect the outcome of the election would have to be members of the NPV interstate compact. The composition of these states would have to be controlled by the trailing candidate's party and willing to manipulate the system for assigning electors. Practically, then, the danger of strategic withdrawals seems low. In sum, while state withdrawal remains a possibility, it is probably unlikely.

IV. CONCLUSION

The product of constitutional compromise, the Electoral College has largely deviated from the expectations of the Framers. By the mid-nineteenth century, electors were no longer selected through diverse appointment procedures, but almost only through the winner-take-all rule. Despite many proposed constitutional amendments to the process, only one has succeeded. The NPV legislation has the potential to address many of

¹⁵² See H.R. 2948, 2006 Assem., Reg. Sess. art. 4 (Cal. 2006). For example, if one political party saw an advantage in reverting to the winner-take-all Electoral College system, it might be able to persuade enough states to withdraw from the agreement, resulting in a reversion to the current winner-take-all system.

¹⁵³ See *id.* art. 3.

the criticisms¹⁵⁴ of the Electoral College without succumbing to political hurdles that have traditionally stymied Electoral College reform efforts.¹⁵⁵ Specifically, the NPV legislation would ameliorate many of the problematic effects associated with the Electoral College with respect to misfire,¹⁵⁶ the shrinking number of battleground states,¹⁵⁷ federalism and sectionalism,¹⁵⁸ voter turnout,¹⁵⁹ the House contingency procedure,¹⁶⁰ the two-party system,¹⁶¹ and chaos and fraud during close elections.¹⁶² The NPV legislation could, however, create problems of its own, by damaging the two-party system,¹⁶³ increasing the cost of campaigns,¹⁶⁴ and infusing the election system with the potential for instability.¹⁶⁵

The NPV legislation stands for a simple principle: every vote is equal.¹⁶⁶ It is a laudable proposal, whose benefits outweigh its costs, as well as an innovative way to update the Constitution's structure to reflect the preference in modern politics for majoritarian rule. For these reasons, it should be enacted.

—Stanley Chang*

¹⁵⁴ See *supra* Part III.

¹⁵⁵ See *supra* Part I.

¹⁵⁶ See *supra* Part III.A.

¹⁵⁷ See *supra* Part III.B.

¹⁵⁸ See *supra* Part III.C.

¹⁵⁹ See *supra* Part III.D.

¹⁶⁰ See *supra* Part III.E.

¹⁶¹ See *supra* Part III.F.

¹⁶² See *supra* Part III.G.

¹⁶³ See *supra* Part III.F.

¹⁶⁴ See *supra* Part III.H.

¹⁶⁵ See *supra* Part III.I.

¹⁶⁶ While the choice between the present Electoral College system and the NPV legislation could perhaps be reduced to a “choice of rules” question, this simplification diminishes the role of these rules in promoting particular democratic values. To the extent that a certain rule reaffirms this central, desirable tenet of a political system, it should be favored over other alternatives. Cf. Akhil Reed Amar & Vikram David Amar, *Why Old and New Arguments for the Electoral College Are Not Compelling*, in *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* 61 (John C. Fortier, ed., 2004) (distinguishing the presidential election method from merely a choice of rules in a sports game).

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