

REFORMING THE ELECTORAL COLLEGE: FEDERALISM, MAJORITARIANISM, AND THE PERILS OF SUB-CONSTITUTIONAL CHANGE

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Frustrated by their inability to secure passage of a federal constitutional amendment abolishing the Electoral College, its opponents have sought to establish the direct, popular election of the President by having individual states agree to appoint their presidential electors in accordance with the nationwide popular vote. Ostensibly designed to prevent elections, such as the one in 2000, in which the Electoral College “misfired” and chose the candidate who received fewer popular votes, the National Popular Vote Compact has been adopted by several states. In this article, I argue that National Popular Vote Compact is an unnecessary and dangerous reform. It is unnecessary because the Electoral College is only modestly malapportioned and less so than many other accepted features of the U.S. political process, which distort popular political preferences to a greater extent. Moreover, that malapportionment is simply the consequence of having a presidential election system that combines elements of majoritarianism and federalism, as other industrialized democracies have adopted. It is dangerous because the NPVC contains a host of defects that would make electoral misfires more likely and trigger a series of political and constitutional crises. The abolition or reform of the presidential election system requires a federal constitutional amendment; attempting to achieve some reform via a sub-constitutional agreement among several states risks creating a presidential election system that is neither workable nor fair.

The ghosts of the 2000 Presidential election continue to haunt the nation. As that election reminded everyone, the process for electing the President of the United States departs from a purely majoritarian system. Because each state has as many presidential electors as they have U.S. Representatives and Senators, smaller states have more electoral votes than their population warrants. At the same time, all but two states have adopted a “winner-take-all” system in which the winning presidential candidate receives all of the state’s electors regardless of the actual vote margin in the state. As a result, the Electoral College vote does not track precisely the national popular vote. A candidate who wins many states by a few percentage points can achieve a dominating Electoral College

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vote, as Ronald Reagan did in 1980.¹ More rarely, the national popular vote winner can actually lose the election, as the 2000 Presidential election graphically demonstrated.²

To be sure, the Electoral College has long been the target of criticism. In the past two centuries, more proposed constitutional amendments have sought to replace or reform the Electoral College than any other feature of our constitutional order.³ Unsurprisingly, after the 2000 election, calls for reform increased in number and vehemence. Sanford Levinson condemned the institution in unequivocal terms and proposed its abolition,⁴ while the *New York Times* labeled the Electoral College an “antidemocratic relic.”⁵ More hyperbolically, Jamin Raskin fulminated that the Electoral College “directly contradicts the sovereignty of the people” and produces “the worst of all worlds from the standpoint of democracy.”⁶

Since 2000, one of the most serious efforts to reform the Electoral College has quietly unfolded not in Washington, D.C., but in state capitals across the nation. Galvanized by a shared sense of outrage regarding the 2000 election, several reform-minded citizens, including Yale law professor Akhil Amar, imagined a novel way to transform the manner in which the nation elects its President that avoids the time consuming and daunting process required for a federal constitutional amendment.⁷ Their idea is to have a large group of states agree to appoint their presidential electors in accordance with the national

¹ Reagan received only 50.7% of the national popular vote but won 44 states, comprising 489 of the 538 electoral votes. DAVID LEIP, *ATLAS OF U.S. PRESIDENTIAL ELECTIONS* (2009), available at <http://uselectionatlas.org/RESULTS/national.php?year=1980&f=0&off=0&elect=0>.

² FEDERAL ELECTION COMMISSION, *FEDERAL ELECTIONS 2000* (2000).

³ Robert P. Watson, “The State of Elections: People, Politics, and Problems,” in *COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA* 3, 16-17 (Robert P. Watson ed., 2004); L. PAIGE WHITAKER & THOMAS H. NEALE, *THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS* 15 (Congressional Research Service Report, Jan 16, 2001). In fact, in the current Congress, there are no less than three bills pending that propose a constitutional amendment to replace the Electoral College with a direct, nationwide popular election.

⁴ SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 81-97 (2006).

⁵ Editorial, *Drop Out of the College*, *N.Y. Times*, March 14, 2006.

⁶ Jamin B. Raskin, *What’s Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure It Never Happens Again*, 61 MD. L. REV. 652, 696, 697 (2002).

⁷ See Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FindLaw, Dec. 28, 2001, available at <http://writ.news.findlaw.com/amar/20011228.html>; Robert W. Bennett, *State Coordination in Popular Election of the President without a Constitutional Amendment*, 5 GREEN BAG 2D 141, 148 (2002).

popular vote rather than their respective statewide popular vote. Memorialized in a proposed interstate compact known as the “National Popular Vote Compact” or “NPVC,”⁸ their proposal goes into effect once states comprising a majority of the Electoral College join it. From that point on, the national popular vote will conclusively decide the winner of the election regardless whether all the states agree or a constitutional amendment abolishing the college is adopted. In essence, these reformers seek to use the coordinated action of a number of states to turn the Electoral College into the vehicle of its own reform.

Not surprisingly given the hostility to the Electoral College, the NPVC has drawn substantial support. To date, six states and the District of Columbia have formally adopted the compact, and several other states have moved toward joining it.⁹ Moreover, editorials in publications ranging from the venerable *New Yorker*, to urban mega-papers, such as the *New York Times* and *Los Angeles Times*, to small-town newspapers, such as the *Sarasota Herald Tribune*, proclaim its merits.¹⁰ Reflecting this editorial onslaught, public opinion polls show widespread, bipartisan support for moving to the direct popular election of the President, as the NPVC seeks to do. By one recent poll, 72% of Americans favor dispensing with the Electoral College and moving to a direct popular election for President.¹¹ Seeking to build upon this support, the NPVC’s proponents hope that the compact will be in force by the time of the next Presidential election in 2012.¹²

⁸ Robert Bennett, as well as the Amar brothers, originally proposed that each state implement this reform through coordinated, contingent legislation in each state. Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241, 244-45 (2001); Amar & Amar, *supra* note 7. Later, John Koza championed the idea that the agreement be formally memorialized in an interstate compact. JOHN KOZA ET AL., *EVERY VOTE COUNTS: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 247 (2nd ed. 2008).

⁹ See 2010 D.C. Laws L18-0274; 2008 Hawaii Laws 62; 2008 Ill. Legis. 95-714; 2010 Mass. Legis. ch. 229; 2007 Md. Laws 43; 2007 N.J. Sess. Laws ch. 334; 2009 Wash. Leg. ch. 264.

¹⁰ Hendrik Hertzberg, Count ‘Em, *The New Yorker*, Mar. 6, 2006, Editorial, One Person, One Vote for President, *New York Times*, June 22, 2010, at A26; Editorial, Electoral College Dropout, *Los Angeles Times*, Aug. 18, 2008; Editorial, Abolish the Electoral College, *Sarasota Herald Tribune*, Jan. 10, 2009, at A16.

¹¹ WASHINGTON POST-KAISER FAMILY FOUNDATION-HARVARD UNIVERSITY: SURVEY OF POLITICAL INDEPENDENTS 12-13 (2007) (available at <http://www.nationalpopularvote.com/resources/Wash-Post-Kaiser-Harvard-June-2007.pdf>)

¹² KOZA, *supra* note 8, at 281.

Calls to replace the Electoral College with a direct popular election for President have an obvious and intuitive appeal to Americans, who have an abiding faith in the virtue and essential justice of majoritarian democracy. Surprisingly, however, despite all the popular and academic interest in the NPVC,¹³ there has been no sustained investigation as to how the NPVC would alter the mechanics of Presidential elections and interact with other features of the Presidential election process. This article undertakes that analysis, filling the analytical gap. In so doing, it yields several important and counterintuitive insights routinely ignored in the debate over the Electoral College.

First, the Electoral College is not the threat to American democracy that its critics urge. While the Electoral College admittedly gives some states more electoral clout than their population would otherwise require, that “malapportionment” is both modest in degree and, more importantly, merely the price paid for having a presidential election system that combines elements of majoritarianism and federalism, as other large, federal democracies do. Moreover, when the actual operation of the Electoral College is examined, it turns out that the Electoral College blends those two values in a manner heavily weighted toward majoritarianism. In all but one election, the Electoral College has elected the candidate who won a majority of the national popular vote winner. To be sure, the Electoral College does reward candidates whose political support is spread in a more geographically broad fashion throughout the nation, but, in a federal union such as the United States, that federalism-based bias against “favorite son,” sectional candidates is a desirable feature – and one that would be lost in moving to a purely majoritarian election system as the NPVC seeks to do.

Second, the current presidential election system – in particular, the state-by-state, winner-take-all process in which the prevailing candidate in the state receives all that state’s presidential electors –

¹³ See, e.g., Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009); Kristin Feeley, *Guaranteeing a Federally Elected President*, 103 NW. L. REV. 1427 (2009); David Gringer, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182 (2008); Stanley Chang, 44 HARV. J. LEGIS. 205 (2007). In addition, the *Election Law Journal* held a symposium devoted entirely to the NPVC. See 7 ELEC. L. J. 188 (2008).

discourages the election of Presidents with only plurality support across the nation. A candidate with only 30% or 35% political support is highly unlikely to win the White House under the current system; in fact, no President has ever been elected with less than 40% of the popular vote and most have received a majority. In contrast, the direct popular election system envisioned under the NPVC expressly contemplates and countenances the election of “plurality Presidents” – *i.e.*, those who are elected with less than a majority of the popular vote. Even worse, by transforming the current, state-by-state voting process, the NPVC would erode the current two-candidate system, producing more minor party candidates, which in turn would further fragment the national popular vote and produce more plurality Presidents with ever-declining levels of support. Indeed, that has been the experience of other countries with voting systems like that proposed by the NPVC, and, as those countries have experienced, plurality presidencies typically lack the legitimacy and political support necessary to effectively lead the nation.

Third, even if moving to a direct popular election for President were desirable, a sub-constitutional, interstate compact is the wrong mechanism to use to achieve that result. Unlike a constitutional amendment abolishing the Electoral College, the NPVC does not ensure a fair and workable presidential election process. To contrary, as an interstate compact which governs only those states that join it, the NPVC promises a number of political and legal fights among the states that will undermine the legitimacy of presidential elections and provoke enervating constitutional litigation of the sort witnessed in 2000. These problems fall into two, broad categories: problems of obstruction and problems of implementation.

As to obstruction, the NPVC cannot prevent non-signatory states from undermining the calculation of a national popular vote, nor can it ensure that even signatory states will not withdraw from the compact on the eve of or, worse, shortly after a presidential election. Either circumstance will

effectively preclude the determination of the national popular vote winner and may even obstruct the election of the President, resulting in political discord and divisive constitutional litigation.

As to implementation, the NPVC cannot guarantee that even those states that join the compact will employ a uniform election process that ensures that voters across the nation are treated in an equal fashion. Indeed, the same constitutional flaw that the U.S. Supreme Court identified in Florida in 2000 – the use of divergent vote tabulation standards in different counties in Florida – would be replicated fifty-fold, as different states use different legal standards and procedures for conducting the presidential election contest in their respective states. Consequently, far from preventing another 2000, the NPVC almost assuredly would produce a series of political and legal crises, along with the accompanying litigation that inevitably form a part of such imbroglios, that would make the 2000 election look like child's play.

Part I briefly describes the current system for electing the President, the modern criticism of it, and the manner and extent to which the NPVC seeks to reform it. Part II then assesses the extent to which the Electoral College departs from the majoritarian ideal of a purely population-based apportionment of political power among the states. In particular, it shows that the formal malapportionment of the Electoral College is dwarfed by that present in other, accepted features of our constitutional order, most notably the U.S. Senate and the nomination process employed by the two major political parties. Like those other institutions, the Electoral College departs from the majoritarian ideal so as to implement another vital political value: federal union. The Electoral College's malapportionment is the product of the Framers' decision to create a presidential election process that combines elements of majoritarianism and federalism. Moreover and surprisingly for majoritarians, the Electoral College combines those two goals in a way that heavily favors majoritarianism. Indeed, as this part demonstrates, the Electoral College does a better job of promoting majoritarianism than does the NPVC.

The remainder of the article then turns to the problems with using an interstate compact rather than a constitutional amendment as the mechanism to reform the Electoral College. Part III identifies the various ways in which both non-signatory and signatory states could obstruct the Presidential election. Part IV then analyzes the how the NPVC, even if adopted by all fifty states, would operate in practice. Specifically, it shows that, contrary to conventional wisdom, there is no national popular election for President; rather, there are fifty-one such elections, with each state employing different criteria for suffrage, different voting equipment, and different tabulation standards. Simply aggregating the vote totals from each state would be both unconstitutional and, equally importantly, inconsistent with the conception of political equality that is a fundamental element of majoritarian election processes. As an interstate compact, the NPVC cannot resolve these fundamental problems of constitutionality and fairness.

Finally, Part V discusses the problem of a nationwide recount. Significantly, the NPVC provides no process for conducting a nationwide recount if the popular vote is close. In such a circumstance, the absence of a nationwide recount would generate substantial popular doubt about the democratic provenance of the supposed winner. Even worse, however, would be a partial nationwide recount – *i.e.*, one in which only one or several states participated. Were one to occur and alter the outcome of the election, the ensuing political and legal battle would be devastating to the political fabric of the nation.

To their credit, several defenders of the NPVC have acknowledged some of these flaws and have suggested changes be made to the compact. The ultimate problem with the NPVC, however, is that it is a sub-constitutional, state-initiated attempt to alter the method by which the U.S. President is elected. The strength of the NPVC – its ability to go into effect based on the coordinated action of several states – is also its gravest weakness – its inability to bind other states that do not wish to move to the direct popular election of the President or that wish to conduct their election in a manner different from those of other states. Only a federal constitutional amendment can bind all the states and therefore bring

about a direct, nationwide popular election in a way that is both workable and consistent with our commitment to political equality. By employing a sub-constitutional interstate compact, the NPVC's supporters hoped to obviate the need to engage in the laborious amendment process, but, in so doing, they have created an election system that only promises to create more problems of the sort that it was meant to solve. Were the NPVC to go into effect, constitutional crisis of sort witnessed in 2000, far from being a singular event, would be a regular circumstance.

I. ELECTING THE PRESIDENT

A. The Current System.

As the U.S. Supreme Court pointedly reminded the American people in *Bush v. Gore*,¹⁴ the President is not elected by the people but rather by electors appointed by the states – the so-called “Electoral College.” The Framers adopted this system of indirect election so as to provide the President with a degree of independence from Congress. Were the President selected by Congress – the principal alternative to the Electoral College considered by the Framers – the Framers feared that he would be too dependent on Congress and that potential candidates for the office would seek congressional support by making undesirable, if not downright corrupt, promises in return for such support.¹⁵ Moreover, further reflecting the “Great Compromise” in which legislative power was split between the popularly-apportioned House of Representatives and federally-apportioned Senate, the Framers specified in the Constitution that each state receives electors equal in number to the Representatives and Senators that state possesses in Congress.¹⁶

The Constitution leaves it to each state to determine how its electors are selected, specifying that the electors shall be appointed by each state “in such Manner as the Legislature thereof may

¹⁴ 531 U.S. 98 (2000).

¹⁵ 1 Max Farrand, *The Records of the Federal Convention* 69 (1911) (Madison).

¹⁶ U.S. CONST. ART. II, §1. By virtue of the 23rd Amendment, the District of Columbia participates in the Presidential election and receives three electors.

direct.”¹⁷ Although originally many state legislatures appointed the electors directly, by the mid-1830’s, all but one state (South Carolina) had moved to a system of holding popular elections to select the electors.¹⁸ Relatedly, while states at first used different electoral systems – some states used an at-large system that effectively gave all the state’s electors to the winning candidate, while others used a district system, while still others used a combination of both the at-large and district systems – all of the states ultimately adopted the at-large system in which the winner of the statewide vote typically received all of the state’s electors.

In actuality, the at-large system was not a true “winner take all” system because citizens still voted for individual electors, which could result in some voters, intentionally or not, selecting electors who supported different candidates.¹⁹ In the twentieth century, states moved to a true “winner-take-all” system with the adoption of the so-called “short ballot,” which removed the electors’ names from the ballot and listed only the presidential and vice presidential tickets. With the short ballot, regardless of the number of electors possessed by the state, citizens would cast only one vote for the presidential and vice-presidential ticket of their choice; the state would then award the winning ticket all of that state’s electors.²⁰ Today, all states use the short ballot,²¹ and all but two states use this winner-take-all system. The two exceptions, Maine and Nebraska, award their two “senatorial” electors to the winner of the statewide election, but, in each state, the voters in each congressional district select an elector for

¹⁷ U.S. CONST. ART. II, § 1.

¹⁸ Whitaker & Neale, *supra* note 3, at 2. South Carolina’s legislature continued to appoint the state’s electors until the Civil War. *Id.*

¹⁹ William Josephson & Beverly Ross, Repairing the Electoral College, 22 J. LEGIS. 145, 161 (1996). For example, in 1912, California voters elected 11 Progressive and 2 Democratic electors, and, in 1916, West Virginia voters elected 7 Republican and one Democratic elector. *Id.*

²⁰ See, e.g., Ala. Code § 17-6-23 (“When electors for the President and Vice President of the United States are to be elected, the names of the candidates for President and Vice President shall be listed on the ballot, but not the names of the electors.”); Va. Stat. Ann. § 24.2-644(B) (“The qualified voter at a presidential election shall mark the square preceding the names and party designation for his choice of candidates for President and Vice President. His ballot so marked shall be counted as if he had marked squares preceding the names of the individual electors affiliated with his choice for President and Vice President.”).

²¹ KOZA, *supra* note 8, at 56.

that district. As a result, the two presidential candidates can split the electors from those states, as in fact happened in Nebraska in 2008.²²

The timing of the presidential election is not specified by the Constitution but rather by statute. Congress has set the Tuesday after the first Monday in November as the date on which the general election must take place.²³ The presidential electors then cast their vote on the first Monday after the second Wednesday in December.²⁴ Each elector casts two votes, one for President and one for Vice President.²⁵

Although by tradition American political scientists and constitutional commentators refer to it as a “college,” the Electoral College never meets as one body. Unlike Congress or other representative institutions, the Electoral College was not conceived as a deliberative body in which the electors would discuss and debate the relative merits of the candidates. Rather, the Framers feared that, were all the electors to assemble in one place, they would engage in vote-swapping and collusion.²⁶ To prevent that eventuality, the Framers therefore specified in the Constitution that the electors for each state should meet in their respective states.²⁷ The Framers further envisioned that the electors would be sage, independent men capable of evaluating the relative merits of the candidates and that, when separated into their various states, they would determine who among the presidential aspirants was best qualified in intellect and temperament to lead the nation.²⁸

²² Barack Obama lost the state of Nebraska (and two of its three congressional districts) but won a majority of support in one of the state’s congressional districts, thereby giving him one of Nebraska’s five electoral votes.

²³ 3 U.S.C. § 1.

²⁴ 3 U.S.C. § 7.

²⁵ U.S. CONST. AMEND. XII. As originally enacted, the Constitution specified that the electors would cast two votes, but the electors could not designate which person they favored as President versus Vice President. As a result, in the 1800 election, Democratic-Republican electors cast the same number of votes for Thomas Jefferson and his running mate Aaron Burr, which deprived the former of an Electoral College majority and sent the election to the House of Representatives (which only selected Jefferson on the 37th ballot). That election ultimately prompted the passage of the 12th Amendment.

²⁶ Federalist No. 68 (Hamilton) at 412-13 (Clinton Rossiter ed. 1961).

²⁷ U.S. CONST. ART. II, § 1, cl. 3; see *also* 3 U.S.C. § 7 (specifying that electors shall meet at a location in the state designated by the legislature thereof).

²⁸ Federalist No. 68 (Hamilton) at 412-13 (Clinton Rossiter ed. 1961).

Not surprisingly, the post-Framing-era rise of party politics has produced an Electoral College much unlike that envisioned by the Framers. Far from being elite political sages, the electors are almost invariably dedicated partisans, usually prominent officials in the state party apparatus, who can be trusted to vote for the presidential candidate of their party. As a result, while there have been a handful of instances in which a “faithless elector” voted for some other candidate,²⁹ party loyalty typically ensures that the electors ultimately cast their vote for the candidate to which they are pledged.³⁰ Since 1796, there have been only 10 faithless electors out of the over 20,000 electors, and none of those faithless electors affected the outcome of the election.³¹ Hence, as a practical matter, the popular vote in each state conclusively determines which candidate receives that state’s electoral votes. It is for that reason that Americans typically know who has won the Presidential election the night of the general election; no one waits with baited breath for the Electoral College ballots to be counted, even though it is that act, not the popular vote, that has constitutional significance.

While the Electoral College’s vote may be a formality, it is a formality that is and must be performed. After the electors cast their ballots in mid-December, the ballots are transmitted to Congress, which opens and counts the votes in early January.³² To be elected President and Vice President, the winning candidates must receive a majority of the electoral votes of all the states. In the event that no candidate receives a majority, the election for President is thrown to the House of Representatives to determine the President from among the top three vote recipients in the Electoral College’s balloting.³³ In the House’s voting, each state receives one vote with a majority of states

²⁹ Josephson & Ross, *supra* note 19, at 147 & n.18; Whitaker & Neale, *supra* note 3, at 10.

³⁰ Some states legally bind the electors to support the candidate to which they are pledged. Whitaker & Neale, *supra* note 3, at 9. The constitutionality of such provisions is hotly contested. *Id.* at 10 & n.47; *cf.* Ray v. Blair, 343 U.S. 214 (1952) (upholding requirement that elector pledge to support party’s candidate but distinguishing laws that bound electors to so vote).

³¹ Bradley Smith, Vanity of Vanities: National Popular Vote and the Electoral College, 7 ELEC. L.J. 196, 211 (2008).

³² 3 U.S.C. § 15.

³³ If no Vice Presidential candidate receives a majority, the Senate elects the Vice President from among the top two vote recipients. U.S. CONST. AMEND. XII. There has been one election in which the election of the Vice President was thrown to the Senate. In 1836, Martin Van Buren’s running mate, Richard Johnson, failed to receive the

necessary to elect the President. On only two occasions (1800 and 1824) has the election gone to the House under this contingent election procedure.

Today, there are 538 electors from the fifty states and the District of Columbia. As a result, a presidential candidate must receive 270 electors to be elected President. California has the most electors (55), while Alaska, Delaware, the District of Columbia, Montana, North Dakota, South Dakota, and Vermont have the fewest (3). As a theoretical matter, a candidate could win the Presidency by winning the top eleven most populous states, which collectively possess the bare minimum 270 electoral votes. In actuality, since 1960 (the first election in a fifty-state union), no candidate has won the White House with less than 22 states (John F. Kennedy in 1960).

B. The Criticism of the Electoral College.

As the foregoing summary indicates, for well over a century, the people in every state have voted in the Presidential election.³⁴ Moreover, with just a few exceptions, the electors selected by the people have faithfully voted the electorate's preferences. Hence, while in form the Electoral College serves as a political intermediary between the people and the President, in practice the votes of the people are transmitted almost automatically into electoral votes. In short, the popular provenance of the electors, coupled with the faithful transmittal of electoral preferences by the electors themselves, has fatally undermined any suggestion that the Electoral College is *anti-democratic*.³⁵ The President is truly elected by the People.

necessary majority (because Virginia's electors balked at his qualifications), but the Senate ultimately elected him anyway.

³⁴ The last state to have its legislature appoint its electors was Colorado in 1876, which took place only because Colorado had been so recently admitted to the union as a state that its legislature did not have time to provide for a popular election for its presidential electors.

³⁵ See Geoffrey C. Hazard, *Rising Above Principle*, 135 U. PENN. L. REV. 153, 165 (1986). Some commentators continue to decry the College as "antidemocratic." See, e.g., Martin Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1110 (2001). That is a misnomer, however. The substance of the commentators' criticism – that the Electoral College does not guarantee the election of the candidate with the most votes – suggests that their concern is more properly viewed as one of anti-majoritarianism than anti-democracy. Cf. Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 868, 876 (2007) (arguing that Electoral College does not respect majority vote and noting that anti-democratic charge is

Rather, the principal charge against the Electoral College is that it is *anti-majoritarian*.³⁶ Specifically, the controversy surrounding the Electoral College has centered upon the allocation of political power among the people in the states resulting from the fact that electors are allocated on a state-by-state basis with each state receiving the number of electors corresponding to the number of Representatives and Senators that state has. This allocation of electors departs from the majoritarian ideal in two ways. First, because of indivisible population variances among the states, the number of Representatives allocated to each state does not map perfectly with the population of the states. Both Missouri and Minnesota, for example, have 8 Representatives (and therefore 10 electors), but Missouri has 684,000 more inhabitants than Minnesota.³⁷ Second, because each state receives two senatorial electors regardless of its population, less populous states receive more electors than a strict, population-based allocation would produce. Wyoming, for example, has three electors for its 563,000 residents (or one for every 187,600 residents in the state), while California has fifty-five electors for its 37 million-plus residents (or one for every 677,000 residents). If electors were apportioned strictly on the basis of population, Wyoming would have only one elector, while California would receive sixty-five.

The critics seize on this apportionment of electors and allege that, as a consequence, the Electoral College can elect a President who lost the nationwide popular vote. As evidence, the critics point to the fact the Electoral College has “misfired” at least three times in our history.³⁸ In 1876, Republican Rutherford Hayes won a bare majority of electoral college votes, even though Democrat Samuel Tilden received 250,000 more popular votes. In 1888, Republican Benjamin Harrison received a substantial majority of electoral votes, despite the fact that Democrat Grover Cleveland received 91,000

synonymous with anti-majoritarian charge); Brannon P. Denning, Publius for All of Us, 26 CONST. COMM. 75, 85 (2009) (distinguishing between charges that college is anti-democratic versus anti-majoritarian and declaring that former is “more precise”).

³⁶ KOZA, *supra* note 8, at 16; James A. Gardner, Forcing States to be Free, 35 CONN. L. REV. 1467, 1494 (2003), Levinson, *supra* note 35, at 868.

³⁷ U.S. CENSUS BUREAU, 2010 CENSUS (2011), available at <http://2010.census.gov/2010census/data/apportionment-pop-text.php>.

³⁸ KOZA, *supra* note 8, at 16; NEIL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 116 (1981).

more popular votes. Finally and most recently, in 2000, Republican George W. Bush won a bare majority of electoral votes, while Democrat Albert Gore received over half a million more popular votes nationwide.³⁹ On this view, the Electoral College poses a danger to American democracy; even though the people vote, the Electoral College so distorts the manner in which their votes are aggregated that the loser may actually win. For this reason, the critics urge that, like legislative appointment of U.S. Senators, the Electoral College should be discarded in favor of the direct popular election of the President.⁴⁰

To be sure, throughout American history there have been many efforts to reform or eliminate the Electoral College, but all have failed. Of the 11,000 constitutional amendments proposed in Congress, over 1,000 have dealt with the Electoral College, and many of those have sought to implement a direct popular election.⁴¹ In the current Congress, there is one bill proposing a constitutional amendment to eliminate the Electoral College and move to a direct popular election.⁴² Article V, though, imposes a high threshold for amendments: a proposed amendment must pass both houses of Congress by a two-thirds vote and then be ratified by three-quarters of the states.⁴³ In 1969, the House passed such an amendment, but it failed to secure the necessary two-thirds majority in the

³⁹ Peter Shane, When Inter-Branch Norms Break Down, 12 CORNELL J.L. & PUB. POL'Y 503, 538 (2003) ("Gore lost not because we have an electoral college, but because we have an electoral college that is so profoundly malapportioned."). The election of 1824 is also sometimes listed as an example of an election of a minority President, but the circumstances of that election cloud the picture. *E.g.*, KOZA, *supra* note 8, at 16. Four strong candidates (John Quincy Adams, Andrew Jackson, Henry Clay, and William Crawford) split the Electoral College vote, sending the election for the second and last time to the House of Representatives. The House ultimately selected Adams, even though Jackson had won more votes. Three points distinguish this election from the others. First, it was the House, not the Electoral College, that selected the President (and therefore who deserves the blame if any). Second, the four candidates had split the popular vote too, such that Jackson received only 41% of the popular vote. Third and most importantly, six states, including the populous state of New York which heavily favored Adams over the three Southern candidates, did not conduct a popular election and instead used legislative appointment for their presidential electors. It is simply impossible to know whether Adams lost the nationwide popular vote because there was none.

⁴⁰ Levinson, *supra* note 35, at 868.

⁴¹ JUDITH BEST, THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE viii (1996); Stanley Chang, Updating the Electoral College, 44 HARV. L. REV. 205, 210 (2007).

⁴² H.J. Res. 36, 112th Cong., 1st Sess. (2011).

⁴³ U.S. CONST. ART. V.

Senate.⁴⁴ In 1979, a similar amendment was rejected by the Senate by a vote of 51-48.⁴⁵ Since then, other proposed amendments abolishing the Electoral College have died without floor action.⁴⁶ Popular support for constitutional reform, it seems, is widespread but shallow.

C. The National Popular Vote Compact.

In the wake of the 2000 Presidential election, several critics of the Electoral College came up with a clever way to circumvent the Electoral College without, in their view at least, the need for a constitutional amendment. Noting that the Constitution assigns to the state legislatures the power to direct the manner in which each state's electors are selected, these critics imagined that each state could decide on its own to award all of its electors to the candidate who won the nationwide popular vote. Of course, were only one or two individual states to do so, there would be no guarantee that their adoption of such a appointment system would ensure that the candidate who won the popular vote would win the Electoral College vote.⁴⁷ At the same time, there could be substantial domestic political costs for states that unilaterally adopted such a system. Few states would relish appointing electors pledged to the candidate who lost that state's poll without the guarantee that the popular vote winner would actually prevail nationwide.

Appreciating this collective action problem, proponents developed the idea of an interstate compact among the states. Under the terms of this proposed National Popular Vote Compact, each state agrees to hold a statewide popular election for President, as every state already currently does.⁴⁸ After the election, each signatory state's chief election official determines the number of votes cast for

⁴⁴ Sanford Levinson, *Is Moderation Sufficient When Addressing the Ills of the Electoral College*, 6 ELECTION L.J. 220, 222 (2007).

⁴⁵ 125 Cong. Rec. 17766 (Jul. 10, 1979).

⁴⁶ Josephson & Ross, *supra* note 19, at 150; Whitaker & Neale, *supra* note 3, at 15.

⁴⁷ One of the critics, law professor Robert Bennett, disagrees. Bennett argues that even if one or two large states decided to unilaterally adopt such an appointment process, the number of electors controlled by those states would make it nearly impossible for a candidate who lost the popular vote to amass an Electoral College majority out of the remaining states. Bennett, *supra* note 8, at 244.

⁴⁸ Agreement among the States to Elect the President by Nationwide Vote, art. II (available at <http://www.lwv.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11957>).

each presidential/vice presidential slate of candidates in her state and communicates those numbers to all other states' chief election officials.⁴⁹ Once all of the statewide popular election vote totals are ascertained and the national popular vote winner determined, the compact requires that each signatory state appoint the slate of electors committed to the candidate who won the national popular vote, regardless whether that candidate won that particular state's own poll.⁵⁰

For a measure that seeks to profoundly alter the manner in which the nation's chief executive is selected, the NPVC is otherwise surprisingly brief and cursory. To address the collective action problem, the compact provides that it will not go into effect until states comprising a majority of the Electoral College sign on.⁵¹ In that way, there is no obligation for a state to appoint electors contrary to its own voters' will until such time that it can be sure that, in so doing, the national popular vote winner will secure the Presidency thereby. To prevent states from triggering the validity of the NPVC late in the presidential campaign, the NPVC only governs presidential elections in which the requisite college of states has ratified the NPVC by July 20th of the election year. Correspondingly, to prevent strategic defections by individuals states late in the election cycle, the compact also specifies that a signatory state may withdraw from the compact only if it does so before July 20th in a presidential election year.⁵² As to other important aspects of the election process, such as the conduct of the election in the states, the counting of ballots, or the triggering and manner of conducting recounts, the proposed compact is silent.

Proponents of the NPVC believe that it will fundamentally transform American presidential elections. In their view, once the compact goes into effect, the election of the President would become solely the product of the nationwide popular vote; whether a candidate won a particular state, such as

⁴⁹ *Id.* art. III. Moreover, to instill public confidence in the counting of ballots, the official must make public those vote totals "as they are determined or obtained." *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* art. IV.

⁵² If a state attempts to withdraw after that date, the compact purports to bind the state through the upcoming presidential election.

Florida in 2000, would be irrelevant. Indeed, supporters hope that even those states that refused to sign on to the compact would find themselves powerless to produce a victory for any other candidate.⁵³ By virtue of their Electoral College majority, the signatory states' pledge to appoint their electors to the national popular vote winner would be conclusive. The NPVC supporters also hope that its passage will change the nature of Presidential campaigns. In their view, a few, select swing states (Ohio, Pennsylvania, Florida) currently receive too much attention from the presidential candidates, while "safe" states (California and New York for the Democrats; Texas and the South for the Republicans) receive too little.⁵⁴ By eliminating the importance of winning individual states, proponents of the NPVC believe that candidates will spend more time in other states, attempting to increase their national vote margins.

As of January 2011, six states (Illinois, Maryland, Massachusetts, New Jersey, Hawaii, Washington) and the District of Columbia have adopted the NPVC. Those states collectively possess seventy-four electoral votes, leaving the NPVC 196 electoral votes short of its necessary 270-vote majority. Nevertheless, supporters are confident that political momentum is building and moving their way. Opinion polls conducted in the past two years in thirty-one additional states, possessing collectively 363 electoral votes, indicate substantial support in those states for moving to the direct popular election of the President.⁵⁵ Moreover, the NPVC has been passed in one or both houses of the legislature in a number of states, including the electoral vote behemoth of California.⁵⁶ Together, those states comprise an additional 164 electoral votes. If those states ratified the NPVC, it would be only thirty-two electoral votes short of ratification. Based on these expressions of popular support,

⁵³ KOZA, *supra* note 8, at 247.

⁵⁴ See, e.g., *id.* at xxix (Foreward by John B. Buchanan), Chang, *supra* note 13, at 218-19.

⁵⁵ See www.nationalpopularvote.com.

⁵⁶ California Senate Bill 37 (adopted by both California Senate and Assembly but vetoed by Gov. Schwarzenegger). The Connecticut House, for example, approved the NPVC on May 11, 2009.

proponents of the NPVC hope that the NPCV will gather the requisite number of states to be in effect for the 2012 Presidential election.⁵⁷

II. MALAPPORTIONMENT, FEDERALISM, AND FALSE MAJORITARIANISM.

As noted above, the Electoral College has drawn substantial criticism, with the 2000 election prompting renewed efforts to reform the system for electing the President. Criticism typically focuses on the Electoral College's malapportionment – that it distorts the popular vote by aggregating it in ways that favor smaller over larger states. As subpart A shows, however, the malapportionment of the Electoral College is far less severe than often painted by its critics. In fact, other, commonly accepted features of the American political system distort popular political preferences to a greater extent than does the Electoral College. More importantly, as subpart B discusses, the Electoral College's deviation from a purely population-based apportionment is the price paid for having a presidential election process that combines elements of majoritarianism and federalism. By rewarding candidates who win more states than their competitors, the Electoral College promotes the elections of Presidents who have support across a broad, geographic swath of America. Finally, as subpart C demonstrates, whatever one thinks of the Electoral College, the NPVC would actually make matters worse by substituting a system that promotes neither federalism nor majoritarianism. Indeed, the NPVC promises a false majoritarianism that will produce more electoral miscarriages than the Electoral College has done in the past or could do in the future.

A. How Malapportioned?

The extent to which the Electoral College is malapportioned is often overstated. The inclusion of the “senatorial” electors results in a slight formal bias in favor of voters from smaller states, but the “senatorial” electors comprise less than one fifth of the 538-member Electoral College. Significantly, more than four-fifths of the electors are allocated on the basis of population. As a result, while

⁵⁷ KOZA, *supra* note 8, at 281.

Wyoming may have more electors than it would receive under a strict population-based allocation, it still has only three electors (compared with 55 for California and 38 for Texas). To be sure, Wyoming and the other smaller states possess disproportionately greater influence in the Electoral College as a result of the “senatorial” electors, but the extent of that disproportional influence is mitigated by the fact that the vast bulk of electors are allocated on the basis of population.⁵⁸

The effect of that mitigation can be seen by comparing the Electoral College to that most malapportioned of all American institutions, the U.S. Senate. The smallest state in the Union, Wyoming with 563,000 residents, has the same number of Senators as the largest state in the Union, California with 37.2 million residents. To see more precisely the extent of the malapportionment that results from the equal representation of states in the Senate, we can use the same formula that the U.S. Supreme Court has developed for calculating the malapportionment of state legislative districts.⁵⁹ The formula

⁵⁸ Some political scientists contend that the states’ adoption of winner-take-all balloting overwhelms the Electoral College’s formal bias in favor of smaller states and actually produces an election process that favors the larger states. See, e.g., John F. Banzhaf, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 VILL. L. REV. 304, 313 (1968). They contend that, while a citizen in a larger state has a lower probability of casting a vote that will change the electoral outcome in the state than a citizen in a smaller state, the larger-state citizen controls more electors. They argue that, as the population of a state increases, the probability of a given citizen’s casting a dispositive vote declines only in proportion to the square root of the population. In other words, a tripling of the state’s population does not mean that the probability of a given citizen casting the dispositive vote declines by one-third; rather, it declines by far less and is therefore outweighed by the additional electors assigned to the state by virtue of the three-fold increase in population. Hence, while a voter in a large state may have only a .0001% chance of affecting how 55 electors are determined, a voter in a small state will only have a .0003% chance of affecting how 3 electors are determined, and, in their view, a voter with a .0001% chance of controlling 55 electoral votes has more power than a voter with a .0003% chance of controlling 3 electoral votes. Based on this insight, Banzhaf determined that voters in California had more than three times the voting power than did the citizens in the smallest states in the 1960 election. *Id.* at 329; see also John F. Banzhaf, The Distribution of Voting Power of Citizens of the Individual States Under the Current Electoral College Calculated Using the Banzhaf Index, available at Banzhaf.net/ec2000.html (updating calculation for 2000 election).

The validity of Banzhaf’s theory of voting power is hotly contested among political scientists. That said, at least some smaller states agree with Banzhaf and feel disadvantaged by the Electoral College. In the mid-1960s, Delaware and a group of small states sued New York in the U.S. Supreme Court, alleging that New York’s and other large states’ adoption of winner-take-all voting violated the Constitution. *Delaware v. New York*, 385 U.S. 895 (1966). As Delaware expressly argued, the winner-take-all system “debases the national voting rights and political status of [Delaware’s] citizens and those of other small states by discriminating against them in favor of citizens of the larger states.” Motion for Leave to File Complaint, *Delaware v. New York*, No. 28 Original, 1966 WL 100407, at *11 (Jul. 20, 1966). The Supreme Court, however, dismissed the suit without opinion.

⁵⁹ That formula calculates the ideal size in population of a legislative district in an apportionment in which all legislative districts have equal population. It then determines the extent to which the smallest and largest districts

focuses on the extent to which legislative districts depart from a perfect, population-based apportionment, comparing the most under-represented district to the most over-represented district. Evaluated under that formula, the U.S. Senate is horribly malapportioned. Wyoming, the most over-represented state, deviates from a perfect apportionment by 90.8%, while California, the most under-represented state, deviates by 504.5%. That means that the maximum deviation from an ideal apportionment is an eye-watering 595.3%! Even more shockingly, the average deviation from an ideal apportionment is 72.2%, and the median deviation is 55.6%, meaning that half of the states are under- or over-represented by more than 55%. In contrast, the Electoral College produces a maximum deviation of 85.3%, with an average deviation of 21.1% and a median deviation of 11.7%.

Nor is the Senate alone in deviating from the majoritarian ideal of perfect equality of population in allocating delegates to multi-member institutions. The nomination system used by the two national parties to select their candidates for President also departs from the majoritarian ideal. Voters in state primary elections and caucuses do not directly nominate the party candidates; rather, just as the Electoral College serves as an intermediary between the people and the President in the general election, the two national parties provide that their nominee will be selected by delegates to the national party conventions, which delegates are in turn selected on the basis of the primary election votes, caucus results, or conventions in each of the states. Moreover, the allocation of delegates to each state is set according to rules adopted by each party, and, here's the rub: the allocation of delegates made by both the Republican and Democratic parties deviates from a strictly population-based apportionment to a greater extent than does the Electoral College.

by population in the apportionment under question deviate from that ideal in percentage terms. The two percentage deviations are then summed together to produce a "maximum deviation" in percentage terms. *Connor v. Williams*, 404 U.S. 549, 550 n.2 (1972).

The two national political parties use different formulae for allocating delegates to each state. The exact details of the formulae are not important for present purposes.⁶⁰ What is important is that both the Democratic and Republican presidential nomination process is severely malapportioned. At the 2008 Democratic National Convention, for example, Texas was the most underrepresented state, receiving only 227 delegates (5.26% of the entire Convention), even though at the time it comprised 7.8% of the nation's population and 6.3% of the Electoral College. Meanwhile, the District of Columbia was the most overrepresented, receiving 40 delegates (0.93% of the total) even though it comprised only 0.2% of the nation's population and 0.55% of the Electoral College.⁶¹ Again, gauged by the Supreme Court's malapportionment standard, the Democratic National Convention had a maximum deviation from population equality of 118.9%.⁶² Moreover, the malapportionment was pervasive: thirty-three states were under- or over-represented by 10% or more, and forty-one states were under- or over-represented by 5% or more. Perhaps most strikingly, the average deviation from perfect equality was 20.9%.

Likewise, at the 2008 Republican National Convention, Alaska was the most overrepresented state, receiving 29 delegates (1.15% of the total), even though it comprised only 0.2% of the nation's

⁶⁰ For an extensive examination of the formula, see Norman R. Williams, *The Presidential Nomination Process* (forthcoming 2011) (manuscript on file with author).

⁶¹ This malapportionment nearly produced (and, according to some supporters of Hillary Clinton, did produce) a "misfire" in the Democratic nomination process in 2008. Excluding Michigan, Barack Obama received 17,535,458 votes in all of the Democratic nominating contests as against 17,493,836 for his primary challenger, Hillary Clinton. See 2008 Democratic Popular Vote (available at www.realclearpolitics.com/epolls/2008/president/democratic_vote_count.html). Yet, if one included the votes from the Michigan Democratic primary, in which Obama did not participate because the Michigan primary was held too early under party rules, Clinton received more popular votes than Obama. *Id.* Regardless of the propriety of ignoring the Michigan primary result, Obama's sizeable majority in both the total delegate count (54% of the total) and pledged delegate count (51.4% of the pledged delegate total) overstated the size of his popular vote plurality in the Democratic primaries and caucuses (48.2% versus 47.8% for Clinton). *Id.*

⁶² The DNC allocated 4314 delegates to the states and DC, yielding an ideal delegate representation ratio of 1 delegate for every 65,235 individuals. Texas, with 1 delegate for every 91,858 residents, was the most underrepresented, while DC, with 1 delegate for every 14,301 residents, was the most overrepresented. This calculation credits Florida and Michigan with their full delegations, as the full Convention voted, but it ignores the delegates allocated to territories and Americans overseas. Including the latter produces an even greater malapportionment.

population and .55% of the Electoral College. Meanwhile, Michigan was the most underrepresented, receiving only 30 delegates (1.3% of the total), even though it comprised 3.5% of the population and 3.2% of the Electoral College. Again, the malapportionment is both staggering and extensive: the maximum deviation from population equality is a shocking 255.3%.⁶³ Moreover, 44 states were under- or over-represented by 10% or more, and 39 were under- or over-represented by 20% or more. Incredibly, the average deviation from a perfect apportionment was 42%!

Viewed in comparison to the severe malapportionment of the two parties' nomination process, the Electoral College's maximum deviation from perfect population equality – the relatively modest 85.3% -- is insignificant. That is not to suggest that Americans should therefore blithely accept the Electoral College. Rather, the critical point is that the Electoral College is not unique in misallocating political power among the states and that, when compared with how we select the presidential candidates for the two major parties, the Electoral College actually distorts popular political preferences to a much less significant degree. It may be that any malapportionment is undesirable or, more modestly, that the malapportionment of these institutions is just too great, but before either of those judgments can be made, it is first necessary to examine why the Electoral College departs from a purely population-based apportionment and then determine whether those reasons justify the deviation from a perfect population-based apportionment.

B. The Wages of Federalism.

The term malapportionment by its very name suggests something evil and wrong, and, as a consequence, defenders of particular instances of malapportionment typically find themselves bearing

⁶³ The RNC allocated 2,321 delegates to the states and DC, yielding an ideal delegate representation ratio of 1 delegate for every 121,250 individuals. Michigan, with 1 delegate for every 331,281 residents, was the most under-represented, while Alaska, with 1 delegate for every 21,618 residents, was the most over-represented. To be sure, Michigan (along with Florida, New Hampshire, South Carolina, and Wyoming) received only half the delegates to which they would otherwise be entitled because of their violating party rules regarding the timing of their primary election, but even if that penalty were ignored, Michigan's 60 delegates would still have comprised only 2.4% of the reconstituted Convention.

the burden of proof that the malapportionment is justified.⁶⁴ A bias against malapportionment is justified, but it begs the analytically anterior question whether there is malapportionment in the first place. The mere fact that a particular apportionment deviates from a purely population-based one is not sufficient to demonstrate the existence of malapportionment, as there is no single, appropriate way to apportion voting rights for members of multi-member bodies. As a result of *Reynolds v. Sims*,⁶⁵ state legislators are now apportioned primarily on the basis of “one person, one vote,” but boards of directors of corporations are typically apportioned on the basis of “one share, one vote,” a rule that often leads some people (e.g., Warren Buffett) to have much greater voting power than other people (e.g., you or me). Even certain governmental bodies, such as water districts, often have apportionment and voting rules that deviate from a purely population-based one.⁶⁶ Hence, the critical question vis-à-vis the Electoral College is whether its deviation from a perfect, population-based apportionment constitutes malapportionment or, alternatively, whether it is simply a consequence of the Electoral College’s legitimate implementation of some other value. As it turns out, in the same way that the deviation from population-based apportionment of corporate boards is justified in order to maximize investment and capital aggregation, the deviation from population apportionment of the Electoral College is justified in order to serve federalism.

As is often noted, the U.S. Constitution creates a political structure that combines elements of both majoritarianism and federalism.⁶⁷ That is most apparent with respect to the Congress, in which the House is apportioned on the basis of population (majoritarianism) and the Senate is apportioned on the basis of equal representation for each state (federalism). As a consequence, the Electoral College, whose numbers are tied expressly to the numbers of Representatives and Senators each state has in

⁶⁴ See *Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

⁶⁵ 377 U.S. 533 (1964).

⁶⁶ See, e.g., *Ball v. James*, 451 U.S. 355, 359 (1981) (upholding apportionment of water district in which only property owners could vote for governing board and in which each property owner received votes on basis of amount of property owned).

⁶⁷ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

Congress, combines elements of majoritarianism and federalism. In short, by tying each state's electoral vote to its congressional representation, the Framers adopted a presidential election system that blends majoritarianism and federalism. Indeed, James Madison in Federalist 39 expressly described the Presidential election process as a "mixed" system that blended, in his words, "national" and "federal" characteristics.⁶⁸ The "malapportionment" of the Electoral College is simply a byproduct of the Framers' decision to combine majoritarian and federal elements in the election process.

Now, of course, one might take the position that the Presidential election process should be entirely majoritarian: Just add up all the popular votes and whoever has the most votes is the winner. The proposition that the President should be elected through an exclusively majoritarian process, however, is a normative claim, and, like all such claims, it must be defended, not just stated. Moreover, the United States is far from alone in departing from a strictly majoritarian election process for the chief executive. Notably, many other large, federal democracies also employ presidential election processes that combine majoritarian and federal elements. Many require candidates to demonstrate substantial support in a minimum number of states in order to prevail. For example, Indonesia, the second largest democracy after the U.S., requires a candidate to receive a majority of the popular vote nationwide *and* at least 20 percent of the vote in a majority of the provinces in order to become President.⁶⁹ Likewise, Nigeria also requires the winning candidate to receive a minimum level of support in at least two-thirds of its constituent states.⁷⁰ Of the five most populous democracies, only Brazil uses a purely majoritarian, direct popular vote to elect its chief executive.⁷¹

⁶⁸ The Federalist No. 39 (Madison) at 244 (Clinton Rossiter ed. 1961).

⁶⁹ CONSTITUTION OF INDONESIA ART. VI-A.

⁷⁰ CONSTITUTION OF NIGERIA ART. 134(1), (2).

⁷¹ CONSTITUTION OF BRAZIL ART. 77. Meanwhile, the European Union, has eschewed direct popular election for its new post of President. Pursuant to the Treaty of Lisbon, the European President is *appointed* by a supermajority vote of the European Council, which is composed of the heads of state from each member country. Treaty of Lisbon, art. 9-B(5). Specifically, the President must be elected by a supermajority of 55% of the member states representing at least 65% of the Union's population.

To be sure, there is a limit to the amount of deviation from a population-based apportionment that Americans would countenance in the name of federalism. Few people today, for example, would likely want to have the President selected on a purely corporatist basis in which each state received the same, equal number of electors.⁷² Nevertheless, some modest deviation seems an acceptable cost for implementing democracy in a large, federal union such as the United States. As such, the choice between maintaining the Electoral College or abolishing it in favor of a purely majoritarian election process can only be made by assessing whether the Electoral College's deviation from a purely population-based apportionment exceeds what is necessary or desirable for the sake of federal union. Strikingly, once that assessment is undertaken, the Electoral College's deviation from a purely population-based apportionment seems perfectly reasonable.

1. Strict v. Modest Majoritarianism.

At the outset, it is useful to distinguish between two forms of majoritarianism. For some majoritarians, no derogation from a purely majoritarian political process is justified. For them, the question is not one of degree but of principle: majoritarianism is the most important value that an electoral system must abide and implement; all other values, including federalism, must yield to the demands of majoritarianism. I label this form "strict majoritarianism." Given their uncompromising approach, strict majoritarians will find much of what follows in this discussion to be beside the point. Yet, also because of its uncompromising approach to issues of constitutional design, strict majoritarianism offers a normatively unappealing account of and prescription for the American constitutional order. The same reasons proffered on behalf of a purely majoritarian presidential election process also condemn the malapportionment in the presidential nomination process and the federal legislative process (i.e., U.S. Senate), as well as a host of federal and state legislative rules that

⁷² Of course, that is process envisioned by the Constitution when the Electoral College fails to produce a winner, and it is essentially the system that the Framers thought they were adopting (as they thought the Electoral College would routinely fail to produce a majority candidate).

depart from pure majoritarianism. The enduring existence of these institutions and rules suggests that few Americans are drawn to strict majoritarianism.

For other majoritarian critics of the Electoral College, some deviation from a purely population-based apportionment is acceptable in the name of federal union. For them, majoritarianism is but one value that a well-crafted political system must implement, and, therefore, some trade-off between majoritarianism and other values, such as federalism, is permissible. For them, the question is one of degree, not principle. I label this form “modest majoritarianism.” Of course, the fact that the Electoral College deviates *less* from a perfect, population-based apportionment than do the U.S. Senate or presidential nomination process places modest majoritarians in a quandary: why is the comparatively smaller deviation of the Electoral College problematic but the greater deviation of the Senate and nomination process acceptable? Nevertheless, unlike strict majoritarians, modest majoritarians accept the validity of a political or electoral process that combines elements of majoritarianism and federalism. Thus, the debate between modest majoritarians and defenders of the Electoral College centers on the issue of how much political institutions and processes should tilt toward majoritarianism versus federalism.

The problem with the modest majoritarians’ critique of the Electoral College, however, is that it relies too much on conclusory assertions and too little on a sustained analysis of the history and operation of the Electoral College. Conspicuously absent is any analysis as to why the Electoral College passes the permissible bounds of what is acceptable in the name of federal union. That omission is both disappointing and telling, because, on closer inspection, the Electoral College actually blends majoritarian and federalist interests in a normatively appealing fashion. Moreover, in what is sure to be a surprise to many majoritarians, the Electoral College blends those two values in a manner heavily weighted towards majoritarianism, not federalism. To see how that is true, we must look more closely at how the Electoral College determines presidential elections in practice.

2. The Electoral College in Operation.

Malapportionment, of course, is not an evil in and of itself; it is a danger because it distorts the outcomes of the ensuing political process. Thus, for example, the malapportionment of state and federal legislative districts is viewed as constitutionally problematic because the ensuing malapportioned legislature is likely to take different action than a perfectly population-apportioned legislature would have done. Unlike Congress or state legislatures, however, the Electoral College does not engage in a variety of political and legislative tasks. Rather, it exists for one day and for one purpose only: to cast two votes, one for President and one for Vice President.⁷³ Once that single task is done, the Electoral College dissolves to be reconstituted only four years later following another presidential election. As such, the malapportionment of the Electoral College is only consequential to the extent that it produces electoral outcomes different than would have taken place if the Electoral College were apportioned purely on the basis of population.

Evaluated on this basis, the Electoral College fares much better than most majoritarians would have you believe. The U.S. has conducted 56 presidential elections. In 39 of those elections, one of the candidates received an absolute majority of the national popular vote, and, in all but one of those elections (1876), that candidate won the White House. In the remaining 17 elections, no candidate received a majority of the popular vote.⁷⁴ Of these plurality contests, the candidate who received the most popular votes won 14 of the elections. In short, in 52 of the nation's 56 presidential elections, the Electoral College elected as President the person who won the most popular votes. Majoritarians rejoice! Despite its malapportionment, the Electoral College has selected the candidate who won a majority of the vote 97% of the time, and it has selected the candidate who won the most votes 93% of the time.

⁷³ 3 U.S.C. §§ 7, 8.

⁷⁴ JAMES M. MCPHERSON, *TO THE BEST OF MY ABILITY: AMERICAN PRESIDENTS* (2000).

Now, in a “the glass is 93% full -- no, it’s missing 7%” moment, majoritarians typically point to the four presidential elections in which the person who won the most popular votes lost the Presidency (1824, 1876, 1888, and 2000) and argue that, in those cases, the Electoral College “misfired.” In fairness to majoritarians, any electoral error is problematic, particularly when what is at stake is the U.S. Presidency. Under our constitutional framework, the occupant of the White House has a tremendous amount of authority, formal and otherwise, with respect to the development and implementation of the policy program of the federal government, and, thus, a “misfire” can have significant consequences for U.S. policy, both foreign and domestic. A President Gore would undoubtedly have pursued policies much different than those of President George W. Bush. Nevertheless, the fact that, even judged on their own terms, so few misfires have occurred demonstrates that the Electoral College in fact is heavily weighted towards majoritarianism, not federalism.

The more fundamental problem with the majoritarians’ argument, however, is that they assume that, just because the candidate who won the most popular votes lost the White House in those four elections, there has been some electoral error or “misfire.” Implicit in that critique is an unstated belief about how elections should be conducted – specifically, about what voting rule to use to determine which candidate should be deemed to have won the election. The selection of the appropriate voting rule is a critical one, and, as the diversity of voting systems both in the U.S. and other nations indicate, there are a variety of available options.

The majoritarians’ criticism of the Electoral College’s “misfires” necessarily rests upon the belief that the candidate who receives the most votes should be the victor. This is the “first past the post” electoral rule.⁷⁵ To be sure, that rule appeals to many Americans’ sense of fairness; if elections are a race (as the media often characterize them), surely the winner is the one who crosses the finish line first. Yet, it is both curious and ironic that majoritarians of all people would endorse the first-past-the-

⁷⁵ For a general discussion of the first-past-the-post rule, see MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (Barbara North & Robert North trans., Methuen & Co. 3d ed. 1969).

post principle. To see why, suppose there were four candidates for the White House, each of who split the national popular vote such that the candidate with the most votes still only receives 30% of the vote. According to the first-past-the-post principle, that candidate – the one with only 30% of the vote – is nevertheless the victor. One would think that majoritarians especially would be aghast at such a prospect. Absent a run-off election (which there isn't in American presidential elections), there is no way to be sure that the plurality vote recipient was in fact the candidate with the greatest political support across the nation. That would be especially true in cases in which the runner-up trailed the plurality vote recipient by only a small amount. In those situations, there would be good reason to suspect that the second-place, closely-trailing candidate might in fact have greater political support and would win a run-off election if one were held.⁷⁶ Stated directly, in an election in which no candidate receives a majority of the vote, the first-past-the-post rule does not serve majoritarian interests.

Nor does the first-past-the-post principle serve the interests of a federal union. The first-past-the-post principle focuses entirely on the numeric strength of each candidate's vote; the geographic distribution of those votes among the states is entirely irrelevant. Yet, ignoring the geographic distribution of votes can be deeply problematic in a large, federal union. Suppose, for example, a candidate (Candidate A) wins by landslide amounts in states in one section of the country (which states comprise a minority of all states in the nation) but does poorly in other sections of the country. Nevertheless, Candidate A does well enough in those other sections that, at the end of the day, Candidate A has received the most popular votes nationwide. Under the first-past-the-post principle, Candidate A wins the election, but this distribution of votes is problematic for a candidate who aspires

⁷⁶ In state and local elections, where there is a run-off between two, closely-matched candidates, the candidate who came in second in the first election can often prevail in the ensuing run-off election. See, e.g., 2010 Georgia Election Results, available at http://sos.georgia.gov/elections/election_results/2010_0810/swfed.htm (Georgia GOP gubernatorial primary contest; run-off election was won by candidate who came in second in first election); see also William C. Shelton, Majorities and Pluralities in Elections, 26 AM. STAT. 17, 17 (1972) (endorsing need for run-off election where there is no candidate winning a majority and the vote is close or split among three candidates).

to lead a federal union such as the U.S. Candidate A, as President, will likely be beholden to the interests of only one section of the nation. Indeed, such sectional Presidencies can produce a great deal of political tension within the union – it cannot be forgotten that the election of 1860, in which Abraham Lincoln’s support came almost exclusively from northern states, produced the Civil War. It is for this reason that many, large federal democracies eschew the first-past-the-post principle and require the winning candidate to demonstrate political support across sections of the nation.⁷⁷

In addition to concerns about sectionalism, there is another reason unique to the U.S. that cautions against the election of a President with geographically limited appeal, as the first-past-the-post principle permits. In our constitutional system with divided government, the President must work with Congress to accomplish her legislative agenda. Even if a President elected predominantly with the support of voters in only one or two sections of the nation were inclined to work in a more nation-regarding fashion, the geographically limited scope of her political support will likely undermine her ability to work with Congress, the Senate of which is composed of a majority of Senators from states that the President lost. This last point is often ignored by majoritarians. A President who owes her election to landslide victories in only a minority of states is not as likely to be a successful President as one who carried a majority of states and therefore whose “coattails” likely brought into Congress a number of legislators of like mind and party. Thus, purely for pragmatic reasons to encourage the election of Presidents who can work successfully with the Congress, the presidential election system should reward candidates whose political support is more geographically broad. In essence, because the President must work with a Congress, which is elected via a blend of majoritarian and federal processes, the President should likewise be elected through a blend of those two processes.⁷⁸ The first-past-the-post principle fails to accommodate these interests.

⁷⁷ See text accompany notes 69-71, *supra*.

⁷⁸ For the same reasons, the diametrically opposite rule that the candidate who wins the most states should be deemed the victor is likewise normatively undesirable. A candidate might win a majority of small states by a

So, if the first-past-the-post rule is not the appropriate principle to use in determining the victor of American presidential elections, what rule is? What voting rule combines elements of majoritarianism and federalism in a normatively attractive way? As a first cut at the problem, let's consider the following rule: The candidate who wins a majority of the national popular vote is the President, but in those situations in which no candidate receives a majority, the candidate who wins the most states shall become President. This rule gives a preeminent role to majoritarianism – a candidate who wins a majority of the popular vote becomes President regardless of how many states she wins (or loses). At the same time, when no candidate receives a majority, this rule gives a tie-breaking role to federalism concerns.

For majoritarians, the tie-breaking component of this proposed rule – one vote per state – nevertheless might favor federalism concerns too much, such as by awarding the White House to the candidate who won more a bare majority of states even if all those states were less populated, smaller ones. To address this concern, we can tweak the tie-breaking feature to add a majoritarian component. Let's assign to each state an electoral vote that is calculated on the basis of its population; for example, each state shall receive its pro rata share of, say, 435 electoral votes. Then, to keep a federalist component to this tie-breaking rule (i.e., so that the rule gives some incentive for candidates to seek to win more states than less rather than just concentrate on the largest states), let's then give each state two more electoral votes above and beyond its population-based vote, so that each state shares in a pool of 535 electoral votes.⁷⁹ Thus, we have the following electoral rule: The candidate who wins a

narrow popular vote margin (perhaps even a narrow plurality), but lose big in the remaining states, thereby producing a President whose national popularity is small. Such a President might be able to work well with the Senate (a majority of whose members come from states that this minority President won) but she will be unable to work with the House of Representatives (a majority of whose members come from states and districts that the President lost). In essence, this "strict federalist" voting rule is the mirror image of the first-past-the-post rule: Both rules may produce Presidents unlikely to have sufficient political support to work successfully with Congress, but, while the latter produces Presidents who may not be able to work with the Senate, the majority of states rule will produce Presidents who may not be able to work with the House.

⁷⁹ Or 538 electoral votes if the District of Columbia is treated as a state for presidential election purposes as the Constitution currently requires. U.S. CONST. amend. XXIII.

majority of the national popular vote shall become the President, but in those situations in which no candidate receives a majority, the candidate who receives more electoral votes shall become President.

Admittedly, there are other voting rules that blend majoritarianism and federalism in a more simple fashion than this one, but the key point is that only the most strict of strict majoritarians would condemn this proposed voting rule. It yields to federalism concerns only when majoritarianism offers no clear guidance as to which candidate to choose (i.e., no candidate has received a majority of the national popular vote), and even then, the tie-breaking component is heavily weighted towards majoritarianism. In fact, when no candidate has won a majority of the popular vote, selecting the candidate who won more electoral votes may actually work in service of majoritarianism. In the absence of a run-off election (which the U.S. does not conduct), such geographically broad electoral success may reasonably serve as a proxy for majority support.⁸⁰

Now, here's the rub: with two exceptions, this voting rule produces results identical to those produced in fact by the Electoral College throughout our history. In 38 of the 39 presidential elections in which one of the candidates received a majority of the popular vote, that candidate prevailed and became President. In 16 of the remaining 17 elections in which no candidate received a majority of the popular vote, the candidate who won the most electoral votes became President. In fact, in two of the alleged misfires to which majoritarians point (1888 and 2000), the outcome of the election would have come out the same way as under this proposed voting rule. In both elections, the top vote recipient received only a plurality of the popular vote – 48.6% and 48.4% of the national popular vote, respectively. Meanwhile, the runner-up in those elections (who became President) received 47.8% and

⁸⁰ In these close, plurality elections, winning more electoral votes than one's plurality-achieving competitor could be viewed as a proxy for majoritarian support; a candidate who wins more electoral votes may be viewed as more likely to possess the majoritarian political support that would allow her to prevail in a run-off election if one were held. Obviously, that counter-factual assumption will not be true in all cases, but any plurality tie-breaking electoral rule regarding which non-majority-receiving candidate should prevail – including the majoritarians' "first past the post" rule – will fail to identify the candidate with majoritarian support in some cases. The question is whether it is a reasonable proxy, not an air-tight one, and, on that basis, it is surely reasonable to assume that, in these cases, a candidate who wins more electoral votes is more likely to have majoritarian support than her competitor in a head-to-head contest.

47.9%, respectively, of the national popular vote – a difference of less than 1%. In both elections, the prevailing candidate ultimately won the election because he received more electoral votes.⁸¹ In only two elections (1824 and 1876) has the candidate who should have won under this proposed rule actually lost, and, even then, when one actually looks at those two elections, a more complicated picture emerges.

The 1824 election was a misfire, but the misfire was not the fault of the Electoral College and its voting system. At that time, several states did not conduct popular elections for President, making the calculation of a national popular vote an act of imagination rather than mathematics. Moreover, among those states that did hold a popular election, no candidate in the four-candidate field came close to a majority in the popular vote. Nor, unfortunately, did any candidate receive a majority of the electoral college vote, so, per Article II and the Twelfth Amendment to the U.S. Constitution, the election was thrown to the House of Representatives, where each state receives one, equal vote.⁸² The House ultimately chose John Quincy Adams, the candidate who had come in second in both the popular vote and electoral vote behind Andrew Jackson. Now, admittedly this is a misfire under our proposed voting rule, but note that the cause of the misfire was not the Electoral College, which (as majoritarians demand) gave the most electoral votes to the candidate who had won the most popular votes. Rather, the cause was the contingent election process in which each state gets an equal electoral vote in the House balloting. In short, the apportionment of the Electoral College had nothing to do with the results of the 1824 election, and apportioning the Electoral College purely on the basis of population would not

⁸¹ FEDERAL ELECTION COMMISSION, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS, available at <http://www.fec.gov/pubrec/2000presgeresults.htm>; 1888 Presidential General Election Data – National, available at <http://www.uselectionatlas.org/RESULTS/data.php?year=1888&datatype=national&def=1&f=0&off=0&elect=0>. In fact, in both elections, the prevailing candidate won more states than his competitor. In 1888, Benjamin Harrison carried a majority of the states (20 of the 38), and, in 2000, George Bush did even better, carrying 30 states and receiving an absolute majority of the vote in 26 of those states.

⁸² U.S. CONST. AMEND. XII.

have changed the result. Perhaps the contingent election procedure should be abolished or reformed,⁸³ but that is a question independent of the apportionment of the Electoral College.

The 1876 election is a more difficult call, but, even here, there are mitigating considerations. In that election, Samuel Tilden received 51% of the national popular vote but still lost the election. Rutherford B. Hayes was a close second with 47.9% of the national vote – less than 250,000 votes out of over 8 million cast (or slightly over 3%) separated the two men – but Hayes won because he carried 20 of the 38 states, giving him a bare majority in the Electoral College.⁸⁴ Under our proposed voting rule, this is admittedly a misfire, but one should not be too quick in condemning the result. Tilden won only a handful of states outside the South and none of the Western states; meanwhile, Hayes won states in every section of the country, including the South. If one were to use a voting rule that is only slightly more generous to federalism concerns – e.g., the candidate who wins a majority of the popular vote in a majority of the states shall become President – the 1876 election comes out the same way as it did. In other words, for those who place more value on the need to have a President who obtains political support across the nation and not just be the choice of one or two sections of the nation, the 1876 election was not a misfire.

The point is not that Hayes was rightfully declared the winner in 1876. Nor is the point that the United States should adopt the hypothetical voting rule discussed above. As is readily apparent, the Electoral College system differs from the hypothetical voting rule, in that the electoral vote determines the victor without any regard to the popular vote (i.e., the electoral vote is not a tie-breaking feature but is the principal component of the Electoral College's voting rule). Rather, the central point is that the Electoral College in operation produces results almost identical to that under the hypothetical voting

⁸³ There are two possible reforms, each of which would require a constitutional amendment. First, the requirement of an absolute majority of the Electoral College could be eliminated in favor of a rule that the candidate who won the most electoral votes be deemed the President. Alternatively, the contingent election procedure could be retained but the voting rule in the House changed to make it more majoritarian, such as each state receives the number of votes as it possesses Representatives.

⁸⁴ 1876 Presidential General Election Data – National, available at <http://uselectionatlas.org/RESULTS/index.html>.

rule – a rule that blends majoritarianism and federalism in a way that heavily favors majoritarianism. In the vast majority of elections, the Electoral College selects the national popular vote winner. In a tiny minority of elections, it selects the popular vote loser, but, significantly, it only does so when the national popular vote is close and the popular vote loser demonstrated greater support across the country by winning more states with more electoral votes than his or her competitor. In close elections, the Electoral College rewards the candidate who transcends particular sections of the country and appeals to voters in a broad array of geographical areas. In a federal union, that is of no small value and – lest the whole point of this discussion be lost – it justifies the Electoral College’s modest deviation from a perfect, population-based apportionment.

Majoritarians are sure to respond that, even if the Electoral College has rarely misfired in the past, there is nothing to prevent it from misfiring more often in the future. True enough, one can hypothesize numerous theoretical scenarios in which a candidate wins a slim majority of the national popular vote but still loses the White House. Other features of the presidential election process, however, operate to make such scenarios unlikely as a practical matter. Specifically, the existing partisan divisions among the states, combined with the prevalent use of the unit or “winner take all” voting rule in all but two states, make it highly unlikely for a candidate to win a majority of the national popular vote but lose the White House. Thus, while it is theoretically possible for a candidate who wins a slim plurality in each of the 40 smallest states plus DC to become President over the candidate who wins a resounding majority in the 10 largest states (and therefore wins a majority of the national popular vote), such scenarios are unlikely in practice. In the nation as it exists today, partisan affiliation does not correlate with the size of the states. Of the ten most populous states, Democrats typically carry four of them (California, New York, Illinois, and Michigan), Republicans typically carry three of them (Texas, Georgia, and North Carolina), and three are toss-ups (Pennsylvania, Ohio, and Florida). The same is true of the smallest states: Wyoming, Alaska, and the Dakotas may be reliably Republican in

presidential contests, but Vermont, Washington, DC, and Delaware are reliably Democratic. As a consequence, such “41-smallest-states-to-the-10-largest-states” misfires are far more likely to be imagined than experienced.

Again, the lessons of history cannot be ignored. True misfires (i.e., when a candidate wins a majority of the national vote but loses the White House) are exceptionally rare. In only one election in over 200 years worth of presidential contests has such a scenario transpired. That is strong evidence that the Electoral College typically tracks the majority will – that it blends majoritarianism and federalism in way heavily tilted toward the former.

C. The NPVC in Comparison.

Strict majoritarians are still unlikely to be persuaded. They are likely to respond that, even if the Electoral College typically follows popular majorities, surely the nation can do better, such as by moving to an electoral system that *guarantees* that the candidate who receives a majority of the national popular vote wins the White House. For strict majoritarians, such a electoral rule would forever eliminate the possibility of any misfire, at least as they define it. For reasons discussed above, I am dubious of the desirability of jettisoning federalism entirely from the electoral mix – that is, of having an presidential electoral system that centers exclusively on the numerical strength of each candidate’s performance in the nation as a whole without giving any regard to whether the prevailing candidate’s support extends across the nation. Whether or not one agrees with that conception of the role of federalism in the presidential election process, however, there should be no dispute about the desirability of the NPVC. Whatever might else be said about it, the NPVC is not the majoritarians’ dream rule: it does not guarantee that the person who is elected President obtained or has the support of a majority of the American people. Indeed, it would trigger more misfires than the Electoral College.

The NPVC defines the “national popular vote winner” as the person who receives the most votes in the nation.⁸⁵ This is the first-past-the-post rule discussed above.⁸⁶ Thus, under the NPVC, a candidate need only receive a plurality, not a majority, of the national vote in order to become the “national popular vote winner” and therefore President.⁸⁷ In a multi-candidate field (as often happens in American presidential elections), the NPVC may produce a President who was elected with 45%, 35%, or even less of the national vote. In fact, the NPVC could produce Presidents with lower levels of popular support than that received by those Presidents (Hayes, Harrison, and George W. Bush) whom strict majoritarians condemn as illegitimate.

For majoritarians, such plurality presidencies should be a grave source of concern. A candidate that wins only a plurality of the vote may be opposed, perhaps vehemently, by a majority of the electorate. The 2002 French Presidential election is illustrative. The French President is elected on a nationwide popular vote of the sort that the NPVC seeks to introduce in the U.S. In the 2002 French election, the Gaullist incumbent, Jacques Chirac, received 19.8% of the vote, while the radical right-wing National Front candidate, Jean-Marie Le Pen, came in second with 16.8% of the vote. A host of other candidates, including that of the Socialist Party, split the remaining votes. Under French law, when the winning candidate receives less than a majority of the popular vote, a run-off election between the top two vote recipients must be held.⁸⁸ In the ensuing run-off, Chirac won with 82% of the vote against Le Pen’s 18%, demonstrating that the vast majority of French voters (even those who had supported candidates other than Chirac in the first round) did not wish Le Pen to be President. Of course, the requirement of a run-off ensured that Le Pen would not become President of France, but this episode illuminates the danger of allowing a mere plurality vote determine the winner of an election. In a highly

⁸⁵ NPVC, *supra* note 48, at art. III (designating “national popular vote winner” as “the presidential slate with the largest national popular vote total”).

⁸⁶ See text accompanying notes 75-78, *supra*.

⁸⁷ See also Md. Elec. Law § 8-505(c) (adopting NPVC and directing, when it comes into force, state’s presidential electors to vote for candidate who received plurality of national popular vote).

⁸⁸ FRENCH CONSTITUTION OF 1958 TIT. II, ART. VII.

fragmented race, a fringe candidate can potentially capture the Presidency with a small plurality of the vote. Indeed, under a plurality voting system, had Le Pen received just 862,000 more votes in the first round, he would have been elected President of France despite the widespread and vehement opposition to him. The idea of an American “Le Pen” winning the White House thanks to the NPVC should give everyone (and especially majoritarians) pause.

Ah, but just as the French run-off election prevented Le Pen from winning the Elysée Palace, surely the United States could require a run-off election to prevent similarly unpopular candidates from winning the White House, right? Wrong. The NPVC does not require a run-off election when no candidate receives an outright majority of the popular vote in the general election. Indeed, it cannot require one. Federal law specifies only one election for presidential electors.⁸⁹ True, Congress could in theory delete that requirement and allow states that wish to conduct a second, run-off election to do so, but conducting a run-off election would be quite costly, both for the state governments that would have to carry it out and for the two candidates who would have to raise money to fund a post-general-election campaign. Indeed, one of the unsung virtues of the current process is that it obviates the need for such costly run-off elections. More importantly, those states that do not join the NPVC – and there could be many of them – could still refuse to participate in the run-off election, making the whole enterprise pointless. In this respect, the NPVC’s strength – its ability to become law on the basis of unilateral action by several states – also is its weakness. Signatory states cannot force non-signatory states to adopt any particular form of election process, such as a run-off election when the general election fails to produce a majority winner. As such, the NPVC cannot guarantee that the “national popular vote winner” is in fact the choice of a majority of the American people. To the contrary, it virtually ensures that some Presidents will not be.⁹⁰

⁸⁹ 3 U.S.C. § 1.

⁹⁰ As an alternative solution to the plurality presidency problem, Sanford Levinson has proposed that states use a system of ranked voting in which voters rank all of the candidates in order of preference on a single ballot.

Implicitly conceding that the NPVC cannot preclude such plurality presidencies, its supporters instead respond that such presidencies are unlikely to happen in the U.S.⁹¹ That confidence, however, is gravely misplaced. Even under the current, Electoral College system, plurality Presidencies are somewhat common. In 17 of the 56 presidential elections that have taken place – more than 30% of the time – the candidate who won the White House received only a plurality of the popular vote.⁹² Critically, however, the current system actually discourages plurality presidencies (and places a floor on the level of support that, in practice, a plurality President can possess and still win the White House) by making the presidential contest a two candidate affair. Specifically, the winner-take-all, “unit” rule, according to which the winner of the statewide vote receives all of that state’s presidential electors discourages third party or independent candidacies.⁹³ Third-party or independent candidates can rarely muster sufficient support to win one state, let alone a sufficient number of states to capture the Presidency, which depresses support for those candidates.⁹⁴ In 1992, for example, Ross Perot received 18.9% of the votes nationwide, but he did not receive a plurality of the vote in any state, which meant

Levinson, *supra* note 44, at 222. In this balloting system, when no candidate receives an outright majority, the candidate with the lowest number of votes is eliminated and the ballots that listed that candidate first are retallied to identify those voters’ second preference. This process continues until one of the remaining candidates receives a majority. Ranked voting, however, could confuse voters, who might not understand the ballot or what was being asked of them. Rainey & Rainey, *supra* note 96, at 186. The notorious “butterfly” ballot fiasco in Florida in 2000, in which many voters in Palm Beach erroneously voted for Pat Buchanan because they could not understand the design of the ballot, comes to mind. Moreover, even if the NPVC required signatory states to use ranked-order ballots – which it doesn’t – non-signatory states could simply refuse to use such ballots, thereby again precluding the determination of which candidate had the support of a national majority.

⁹¹ Koza, *supra* note 8, at 404-05.

⁹² See text accompanying note 74, *supra*.

⁹³ Ann Althouse, Electoral College Reform: Déjà Vu, 95 NW. L. REV. 993, 1005 (2001); Josephson & Ross, *supra* note 19, at 189. In fact, both national major political parties capitalize on this feature of the current system and seek to depress support for other candidates by stressing that a vote for a minor-party or independent candidate is a “wasted” vote.

⁹⁴ In the 20th Century, the only minor-party or independent candidates to receive a substantial number of electors were Theodore Roosevelt in 1912, Strom Thurmond in 1948, and George Wallace in 1968. In the 1912 election, former Republican President Roosevelt challenged the incumbent Republican President Howard Taft for the Republican nomination, and, after failing in that mission, he formed a separate party that split the Republican electorate in the general election. See Norman R. Williams, Revisiting Pacific Telephone, 87 OR. L. REV. 979, 1016-17 (2009). Roosevelt nevertheless captured six states. Meanwhile, Thurmond and Wallace both ran regional (and racially tinged) campaigns that drew support in the South but nowhere else. In 1968, Wallace received 46 electoral votes by winning five southern states (Arkansas, Louisiana, Mississippi, Alabama, and Georgia). In 1948, Thurmond received 39 electoral votes by winning four southern states (Alabama, Louisiana, Mississippi, and South Carolina).

that he received no electors. By disfavoring third-party and independent candidacies in this way, the current system makes the Presidential race essentially a two-party contest. As a result, in a race dominated by the two, major-party candidates, the winning candidate typically receives a majority of the popular vote or close thereto. Since the Civil War, no President has been elected with less than 40% of the popular vote.⁹⁵

In transforming the state-by-state, winner-take-all voting system, the NPVC would eliminate this bias against third-party or independent candidates, thereby producing more “plurality” Presidents with lower levels of popular support than previously experienced. A vote for a minor party or independent candidate would no longer necessarily be meaningless if that candidate had widespread support throughout the country. Indeed, minor party or independent candidates would undoubtedly campaign on the basis that all they need do is receive a plurality of the national vote, not a majority of the national vote nor even a plurality in a number of states, to win the Presidency. Moreover, as minor party and independent candidates proliferated and received ever more support, the percentage support for the candidates of the two major parties would correspondingly decline, which would in turn further encourage minor party and independent candidates (because the threshold for winning a plurality would correspondingly decrease). As a result, a minor-party or independent candidate might win the White House but lack the popular legitimacy and support necessary to govern the nation.⁹⁶

While supporters of the NPVC doubt the likelihood of such plurality Presidencies, the experience of other nations with voting systems similar to that established by the NPVC confirms that elections of plurality Presidents with the support of ever smaller political minorities will take place. Among those

⁹⁵ Woodrow Wilson received the lowest vote margin for a prevailing candidate in 1912 with 41.8%. In fact, that election witnessed the last strong, nationwide third party candidacy for the Presidency – that of former President Theodore Roosevelt who ran on the Progressive or “Bull Moose” party ticket – which split Republican support.

⁹⁶ Glenn W. Rainey & Jane G. Rainey, “The Electoral College: Political Advantage, the Small States, and Implications for Reform,” *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 170, 186 (Robert P. Watson ed., 2004).

major, industrialized democracies that elect their President according to a popular vote,⁹⁷ most countries require either a run-off election if no candidate receives a majority of the popular vote in the first election (such as Brazil, France, and Indonesia)⁹⁸ or set some minimum threshold of plurality support that a candidate must secure in order to avoid a run-off election (such as Argentina).⁹⁹ Of the so-called “G20” group of industrialized countries, only Mexico, Russia, and South Korea elect their presidents according to a direct popular vote in which a mere plurality of the popular vote is sufficient.¹⁰⁰ That so few countries elect their presidents based on a mere plurality shows that the fear of plurality presidencies is a genuine and widely shared one.

More importantly, the actual experience of those few nations that do permit plurality presidencies should give pause to even the most ardent majoritarian. For much of their recent histories, Mexico, Russia, and South Korea have been one-party states in which one political party effectively controlled the political system and ensured its candidate won the Presidency with a substantial majority of the vote. Russia continues to be such a state.¹⁰¹ Since the restoration of democracy and development of a multi-party political system in South Korea and Mexico, though, those two countries have witnessed the election of numerous plurality presidencies. In South Korea, since the end of the military dictatorship in the early 1980s, no President has ever been elected with a majority of the vote. The current President, Lee Myung-bak, was elected in 2007 with 48.7% of the vote, and his predecessor, Roh Moo-hyun, was elected in 2002 with 48.9%. Yet, in 1997, Kim Dae-jung, was elected with only 40.3%; in 1992, Kim Young Sam, was elected with only 42%; and, in 1987, Roh Tae-woo was elected with only 36.6% of the popular vote. Mexico has fared even worse. The current President, Felipe Calderon,

⁹⁷ Of the so-called “G20” countries, many are parliamentary democracies in which the head of government is selected by the national legislature. See, e.g., CONST. OF SOUTH AFRICA art. 86, § 1. There are also several non-democratic nations among the G20. See CONST. OF THE PEOPLE’S REPUBLIC OF CHINA art. 62(4) (providing that the President is selected by National People’s Congress, which is not elected).

⁹⁸ CONST. OF BRAZIL art. 77, para. 3; CONST OF FRANCE OF 1958 art. 7; CONST. OF INDONESIA art. 6A (3), (4).

⁹⁹ CONST. OF ARGENTINA, art. 94-98 (specifying that a candidate who wins 45% of the vote or at least 40% of the vote with a 10% margin of victory shall become President; otherwise, a second, run-off election must be held).

¹⁰⁰ CONST. OF MEXICO, art. 81; CONST. OF THE RUSSIAN FEDERATION art. 81; CONST OF REP. OF SOUTH KOREA art. 67.

¹⁰¹ In the 2008 Russian presidential election, for example, Dmitri Medvedev won with over 70% of the vote.

was elected in 2006 with only 36% of the vote, and his predecessor, Vicente Fox, was elected in 2000 with only 42%. In short, in both South Korea and Mexico, no President has ever been elected with a majority, and, in both countries, there have been presidents elected with as little as 36% -- a little more than a third -- of the vote.

In short, the NPVC will undoubtedly produce more Presidents elected with less than a majority of the vote (and some with significantly less than majority support) than the current system. Whatever might be said of the current system with its bias in favor of the two-major parties, it effectively precludes fringe candidates, such as a Le Pen, from making serious runs for, let alone winning, the Presidency. For that reason, even opponents of the Electoral College, such as Sanford Levinson, view the NPVC's endorsement of plurality Presidents as a significant flaw.¹⁰²

* * * *

In sum, the Electoral College deviates from a purely population-based apportionment of political power among the states, but that deviation is the byproduct of the admirable desire to blend both majoritarianism and federalism in the presidential election process. In a federal union, like the United States, sectional Presidents are a constitutional and political danger, and, therefore, the electoral system should prevent candidates (as the current Electoral College system does) from winning the White House by merely racking up huge support in a few states in one or two areas of the country.

Moreover, even for those strict majoritarians who reject the role of federalism in the presidential election process, the NPVC represents a normatively undesirable change. The NPVC would replace the current electoral system that produces Presidents whose support is both substantial and geographically spread across the nation with an electoral system that would produce Presidents whose support is both insubstantial and geographically limited. That is not reform -- it is a recipe for disaster.

III. OBSTRUCTING THE NATIONAL POPULAR VOTE.

¹⁰² Levinson, *supra* note 44, at 225; Brandon H. Robb, Making the Electoral College Work Today, 54 LOY. L. REV. 419, 460 (2008).

For the foregoing reasons, one should be deeply skeptical of the desirability of, if not outright opposed to, moving to a purely majoritarian, first-past-the-post presidential election system, but, even if that were the best of all possible presidential election systems, a subconstitutional, interstate compact is the wrong way to bring it out. The National Popular Vote Compact goes into effect once states comprising a majority of the Electoral College sign on to the compact. At that point, the success of the NPVC depends on two, crucial events: (1) every state in the union continues to conduct a popular election for President from which the national popular vote winner can quickly and easily be determined; and (2) every signatory state honors its commitment to appoint as electors those individuals pledged to the national popular vote winner. As this part shows, states can fatally obstruct the NPVC at precisely those points. As subpart A shows, states that never sign on to the NPVC may seek to obstruct the determination of the national popular vote winner. As subpart B shows, even signatory states may opt to withdraw from the compact immediately prior to or, worse, immediately after the presidential election.

A. Obstruction by Non-Signatory States.

The fundamental linchpin on which the NPVC hangs is the existence of a “national popular vote winner” selected by the citizens in the fifty states and District of Columbia. That feature of the NPVC raises the troubling question of what happens if one or more non-signatory states decide to eliminate their statewide popular elections for President and return to appointment of their Presidential electors by the legislature or some other manner that does not involve a statewide popular election. As even supporters of the NPVC concede, such a move is not entirely implausible.¹⁰³ After all, there is no legal obligation for all fifty states to continue to use popular elections to select their presidential electors. In fact, in the first few decades of the nation’s history, many states selected their electors by legislative appointment.

¹⁰³ See Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 727(2007).

The NPVC addresses this problem, though in a way that is, quite frankly, astounding. The NPVC specifies that the chief election official of each member state shall determine the national popular vote winner by adding all the votes from states “in which votes have been cast in a statewide popular election.”¹⁰⁴ The unstated but clear implication is that signatory states are free – indeed, commanded by the NPVC – to ignore non-signatory states that refuse to conduct a statewide popular election for President. That’s an effective way to avoid non-signatory states from blocking the NPVC, but it does so in a way that is fundamentally inconsistent with the political theory on which the NPVC is ostensibly based. If there has been no nationwide popular vote, by definition there can be no national popular vote winner among the candidates. Moreover, for the NPVC to declare by legislative fiat that the winner of a 40- or 45-state contest is the “national popular vote winner” makes a mockery of that term and would raise serious questions about the democratic provenance of the declared victor.

To illustrate, suppose, for example, that the NPVC had gone into effect in 2008 but that the ten most populous states had refused to join the NPVC and repealed their system of popular elections for the Presidency. The NPVC would still have gone into effect in the 40 least-populous states, which comprise a bare majority of the electoral college and which, in this scenario, would have been the only states conducting a popular election for President. In the 2008 Presidential election, 131 million votes were cast nationwide, but, the ten most populous states cast over 68 million (over 51%) of the votes.¹⁰⁵ The remaining 40 states cast 63 million votes collectively. It would surely be strange to declare the winner of an election involving little more than one fifth of the nation’s population – an election that could be won with little more than 10% of the population – to be the “national” popular vote winner and therefore President. A President who wins an election conducted in only 40 states comprising less than half of the nation’s population is no more the choice of the American people than a President who

¹⁰⁴ NPVC, *supra* note 48, at art. III.

¹⁰⁵ FEDERAL ELECTION COMMISSION, 2008 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 3 (Jan. 22, 2009) (available at <http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf>).

wins an election held in only ten states or one. To be sure, this scenario is an extreme one, but the principle remains the same – the refusal of even one small state to hold an election potentially jeopardizes the NPVC’s ability to declare as President the winner of the vote in the remaining states.

Indeed, the NPVC’s willingness to anoint a “national popular vote winner” in the absence of an actual national vote potentially undermines its *raison d’être* – to prevent electoral “misfires.” It is not hard to imagine situations in which the candidate who would win a 40-state, 45-state, or even 49-state contest would lose a full 50-state election. Several past, close presidential elections would have come out differently under the NPVC if certain states had failed to conduct a statewide popular election and selected their electors through some other mechanism. For example, in 1960, Richard Nixon would have beaten John Kennedy in the “national” popular vote if any *one* of a handful of pro-Kennedy states (such as Georgia, Louisiana, New York, or Pennsylvania) had failed to participate in the election.¹⁰⁶ In 1968, Hubert Humphrey would have beaten Richard Nixon if just a couple of the pro-Nixon states (such as Florida, Indiana, Nebraska, or Oklahoma, just to name a few) had failed to participate in the election.¹⁰⁷ On the other hand, the 2000 Presidential election – the election “misfire” that prompted the NPVC – would have come out the same way if any one of a handful of pro-Gore states (such as California, New York, Illinois, or Massachusetts) had refused to participate in the election.¹⁰⁸ So much for the NPVC necessarily preventing “misfires.”

The proponents of the NPVC understandably do not wish to allow one or more non-signatory states to block their reform, but that instinct cannot justify twisting the definition of what constitutes a “national popular vote winner” to mean something other than what it purports to mean. The

¹⁰⁶ Kennedy won the nationwide vote by less than 115,000 votes. His margin of victory was greater than that the identified states. See <http://psephos.adam-carr.net/countries/u/usa/pres/1960.txt>.

¹⁰⁷ Nixon won the nationwide vote by slightly over 511,000 votes. His margin of victory in just the identified states alone ranged from 223,000 in California to 148,000 in Oklahoma. See <http://uselectionatlas.org/RESULTS/data.php?year=1968&datatype=national&def=1&f=0&off=0&elect=0>.

¹⁰⁸ FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2000 (available at <http://www.fec.gov/pubrec/fe2000/cover.htm>). Incidentally, had the 2008 election been conducted in only the 40 least populous states, Barack Obama would have still beaten John McCain in the popular vote but his winning vote margin would have been reduced from ten million to approximately two million.

underlying foundation of the NPVC is that the current Electoral College system is fatally flawed because it does not treat all Americans as political equals. To replace the Electoral College system with its modest malapportionment with a system that both contemplates and countenances the disenfranchisement of entire states is hardly a move forward for democracy and political equality. Perhaps a recalcitrant non-signatory state's refusal to conduct an election would be anti-democratic, but that does not justify adopting a system that is even more anti-democratic.

Less dramatically but more likely, non-signatory states could continue to hold popular elections for President but block the determination of the national popular vote winner. Troublingly for supporters of the NPVC, such obstruction could take many forms. For example, non-signatory states could stop tabulating their own state's ballots after one of the candidates obtained an unsurpassable lead in the counted ballots in that state. For example, suppose that, in a strongly Republican state such as Utah or Texas, it is determined that the Republican candidate has received a majority of all ballots cast after only 75% of the state's ballots have been opened and counted.¹⁰⁹ At that point, the state can honestly declare the Republican candidate the statewide victor even though not all ballots have been counted. Nothing in federal law or the NPVC prevents such partial tabulations, which could, in a close national race, preclude determining which candidate won the national popular vote.

Even worse, such states could (and likely would) use such partial tabulations for partisan ends. A Republican-dominated, non-signatory state could tabulate only those ballots in known Republican districts until the statewide vote produced an insurmountable lead for the Republican candidate. In that scenario, neither the Democratic Presidential candidate nor, for that matter, the rest of the country would know exactly how many votes the Democrat received in the untabulated ballots. In a close national race, such untabulated ballots, of course, could be determinative of whether the Democratic or Republican presidential candidate is the national popular vote winner. And, here's the rub: other states

¹⁰⁹ For example, in the 2000 election, favorite son George W. Bush received 59% of the vote in Texas compared to 38% for John Kerry. *Id.*

would still be obligated to count this partial, partisanized tabulation because the NPVC requires that other states include the vote counts from every state that conducts a statewide election, not just those that count every ballot.

Alternatively, non-signatory states could refuse to publicly announce their states' vote totals prior to the Electoral College vote in mid-December. Although the NPVC requires signatory states to announce their vote totals at least six days before the Electoral College votes so that the national popular vote winner can be determined, the NPVC obviously does not and cannot command non-signatory states to do likewise. Moreover, there is no obligation under federal law for states to announce or communicate to other states their state vote totals prior to the meeting of the Electoral College.¹¹⁰ Even a supporter of the NPVC, Robert Bennett, concedes (in something of an understatement) that such action would create "difficulty" for signatory states.¹¹¹

Instead, the NPVC's supporters discount the likelihood of such obstruction, pointing to the federal Electoral Count Act. One section of that act, 3 U.S.C. § 5, provides that states that appoint their electors pursuant to a law adopted prior to Election Day and that resolve disputes regarding the appointment of their electors more than six days prior to the meeting of the Electoral College are entitled to have Congress treat their decision as "conclusive."¹¹² The NPVC's supporters contend that, in order to make use of this "safe harbor" provision, non-signatory states will necessarily have to make

¹¹⁰ The NPVC's proponents point to 3 U.S.C. § 6, which requires each state to mail a "certificate of ascertainment" to the Archivist of the United States listing the electors and any state popular vote totals "as soon as practicable." KOZA, *supra* note 8, at 453. The Archivist, in turn, must treat all such certificates as public records and make them available for inspection at the Archivist's office, *id.*, which would offer signatory states the opportunity to learn the popular vote totals in the recalcitrant, non-signatory states. Significantly, however, there is nothing to prevent non-signatory states from mailing the certificate so late that it will not arrive at the Archivist's office until after the Electoral College votes, thereby precluding the determination of the national popular vote winner in time for the College's election.

¹¹¹ Bennett, *supra* note 8, at 148.

¹¹² 3 U.S.C. § 5.

their vote totals public in time for any judicial contest to be resolved in early December and that, at that point, the signatory states will know every state's vote totals.¹¹³

As an initial matter, the NPVC supporters over read the safe-harbor provision. The ECA does not require the vote totals be made public for the state to avail itself of the safe harbor, only that any judicial disputes be resolved six days prior to the Electoral College balloting. Significantly, states could comply with that requirement without making their actual vote totals public, such as by releasing the vote totals only to the candidates on the condition that the totals are kept confidential until after the Electoral College meets. Such selective release would allow the losing candidate to pursue a judicial election contest, which itself could be kept closed to the public to ensure the vote total's confidentiality, but it would frustrate the NPVC by keeping other states from knowing the official vote tally. And, even if the numbers leaked, such unofficial revelation of the numbers would not suffice even under the express terms of the NPVC. The NPVC provides that members states can treat as conclusive only "an official statement containing the number of popular votes." Of course, some signatory states could ignore that requirement and calculate the national popular vote winner based on the leaked numbers, but imagine the litigation (and constitutional crisis) if the certified vote count from the non-signatory state announced after the Electoral College met differed from the leaked number to such an extent as to swing the national vote to the other candidate. Even worse, imagine the chaos if different signatory states credited different, unofficial tabulations in the non-signatory states, such that the signatory states could not agree who is the "national popular vote winner."

More importantly, even if the safe harbor provision effectively requires a state to make its vote totals public a week before the Electoral College meet, a state could simply choose to forego the benefit of the safe harbor provision and keep its vote total secret until after the Electoral College vote. The only

¹¹³ Rami Fakhouri, *The Most Dangerous Blot in our Constitution: Retiring the Flawed Electoral College "Contingent Procedure,"* 104 NW. L. REV. 705, 725 (2010). See also ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 53-54 (2006).

price would be that the state would not be guaranteed that Congress would treat its electors' votes as valid, but, unless the statewide popular vote in the non-signatory state was close or there was some other flaw in the appointment of its electors, Congress would have no ground for disqualifying that state's electors. Merely eschewing the safe harbor provision is not grounds itself for refusing to count a state's electors.¹¹⁴ Thus, foregoing the safe harbor provision would not impose any cost and would therefore be a small price to pay for some non-signatory states wishing to block the NPVC.

To be sure, refusing to conduct a statewide election, conducting only a partial tabulation, or concealing the vote totals until mid-December, right before the meeting of the Electoral College, might strike many as an unneighborly response by non-signatory states. The NPVC's proponents dismiss such a response as unlikely because, in their view, the public in the obstructing states would never stand for such electoral shenanigans.¹¹⁵ Yet, the NPVC seeks to fundamentally alter the method in which the nation selects the President, and therefore it seems naïve to believe that non-signatory states will simply acquiesce in this transformative change in our constitutional structure without doing all in their power to prevent its operation. Indeed, history suggests otherwise. In the early nineteenth century, states switched from district to at-large elections for their presidential electors because they feared that adhering to the district system left them at a comparative disadvantage vis-à-vis states that switched to the at-large election process, which maximized the state's electoral influence. This same desire to preserve their own electoral influence will surely encourage those states that benefit from the current system – the large swing states that receive great attention from the presidential candidates, for example – to do their utmost to forestall the NPVC's operation.

More importantly, whether non-signatory states are likely to respond in the foregoing ways and whether they are being reasonable in doing so are beside the point. The key consideration is that the

¹¹⁴ In 1961, for example, Congress counted the votes from the duly-appointed electors from Hawaii, even though their appointment was not confirmed by the state court until after the safe harbor time period had elapsed. Josephson & Ross, *supra* note 19, at 166.

¹¹⁵ Koza, *supra* note 8, at 453; Fakouri, *supra* note 113, at 725.

NPVC has not and cannot overcome these obstructive actions by non-signatory states if and when they do take place. As such, in a close national election, it would take only one state refusing to conduct an election, conducting a partial tabulation, or failing to release its vote totals to trigger a profound constitutional crisis and whirlwind of litigation.

B. Obstruction by Withdrawing States.

The NPVC will inevitably require some states to appoint electors pledged to the candidate who lost those states' popular vote. In some of those states, there will be enormous political pressure placed on the state legislature to pull out of the NPVC and appoint electors to the candidate who won the statewide poll. Had the NPVC been in force in Massachusetts in 2004, for example, Massachusetts would have been forced to appoint electors committed to George W. Bush, even though native son John Kerry won the state's popular vote by over 25 percentage points – a prospect that would surely trouble that state's heavily Democratic legislature. Indeed, in every state where the state legislature is controlled by the party of the national popular vote loser, there will be calls by disaffected constituents to withdraw from the NPVC. While that may appear to be sour grapes, such after-the-fact partisan machinations do happen. In Oregon in 1876, for example, the Republican Hayes won a resounding victory, but the Democratic Governor LaFayette Grover disqualified one of the Republican electors and appointed a Democratic replacement.¹¹⁶

In fairness, the NPVC foresees this problem and attempts to address it by forbidding states from withdrawing from the compact after July 20th in a presidential election year.¹¹⁷ States that are signatories as of July 20th are mandated by the NPVC to adhere to the compact and its rules for

¹¹⁶ The Electoral Commission authorized by Congress ultimately rejected Governor Grover's action, helping produce a bare electoral vote majority for the Republican Hayes.

¹¹⁷ NPVC, *supra* note 48, at art. IV.

appointing electors.¹¹⁸ Depending on whether Congress ratifies the NPVC, however, that provision is either toothless or fraught with difficulties.

1. In the Absence of Congressional Consent.

Article I, Section 10 of the U.S. Constitution requires Congress to consent to any interstate compact before it can go into operation.¹¹⁹ Let's suppose Congress does not consent to the compact, as its supporters urge is unnecessary despite the seemingly categorical command of the Compact Clause.¹²⁰ In that case, the compact does not acquire the force of federal law, as congressionally-endorsed compacts do,¹²¹ and therefore, it remains merely the law of the state.¹²² Its status as state law, however, makes it no different from any other statute enacted by the state legislature. And, like any other state statute, a subsequent legislature can amend or repeal the NPVC consistent with the state's own constitutionally-prescribed legislative process.¹²³ A prior legislature may not bind subsequent legislatures through subconstitutional measures, such as statutes or congressionally-unratified interstate compacts.

In response, the NPVC's supporters invoke the Contracts Clause of the U.S. Constitution, which forbids states from "impairing the obligations of contracts."¹²⁴ In their view, the Contracts Clause forbids a state from withdrawing from the NPVC except as permitted by the NPVC itself.¹²⁵ Strikingly, however, the federal courts have never held that the Contracts Clause applies to unratified interstate

¹¹⁸ *Id.* at art. III.

¹¹⁹ U.S. CONST. ART. I, § 10.

¹²⁰ KOZA, *supra* note 8, at 439; Schleifer, *supra* note 103, at 471. See also Tushnet, *supra* note 13, at 1500 n.5 (proclaiming himself "skeptical" that NPVC requires congressional consent).

¹²¹ New York v. Hill, 538 U.S. 110, 111 (2000); Cuyler v. Adams, 449 U.S. 433, 438, 440 (1981).

¹²² Washington Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982).

¹²³ Cf. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 33-34 (1951) (Reed, J., concurring) (arguing that state constitution provides no authority to state to avoid obligation under interstate compact to which Congress has consented).

¹²⁴ KOZA, *supra* note 8, at 424.

¹²⁵ *Id.*

agreements, let alone ordered a state that withdrew from an interstate agreement lacking Congress's approval to adhere to its terms after the fact.¹²⁶

To be sure, the Supreme Court has never squarely addressed the issue whether the Contracts Clause applies to interstate agreements, but the Court has signaled that states retain the freedom to withdraw from interstate compacts to which Congress has not consented. In *United States Steel Corp. v. Multistate Tax Commission*,¹²⁷ the Court upheld the Multistate Tax Compact, even though Congress had not ratified it. Significantly, among the reasons identified by the Court for why Congress's consent was not constitutionally necessary was the fact that signatory states could withdraw from the compact at any time.¹²⁸ That implicitly suggests that, as a federal constitutional matter, states are free to withdraw from interstate agreements to which Congress has not consented. Stated differently, the price of foregoing congressional consent is, if not the invalidity of the compact itself, at least the right of member states to withdraw at will.

Moreover, to hold that the Contracts Clause applies to unratified interstate agreements would be a novel and constitutionally dubious expansion of the scope of the Contracts Clause. The Contracts Clause was adopted by the Framers to address the problem posed by state interference with private contracts, particularly those between creditors and debtors. Although the Clause has been read to

¹²⁶ The three interstate agreements to which the NPVC supporters point were all ratified by Congress. See *C.T. Hellmuth & Assoc., Inc. v. Washington Metro. Area Trans. Auth.*, 414 F.Supp. 408, 409 (D. Md. 1976); *Aveline v. Pennsylvania Bd. of Prob. & Parole*, 729 A.2d 1254, 1258 (Pa. Com. Pl. 1999); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 277 (1959)); see also *Koza*, *supra* note 8, at 425-26 (relying on these three decisions). Moreover, in none of the three was the issue of the Contract Clause's applicability to states withdrawing from interstate compact even remotely presented. *C.T. Hellmuth* addressed whether the Maryland public information act applied to a congressionally approved interstate compact, not whether Maryland could withdraw from the compact. 414 F.Supp. at 409. *Aveline* addressed whether the state parole board had discretion to deny residence to an out-of-state parolee. 729 A.2d at 1256-57. And, *Petty* addressed whether the terms of the interstate compact waived the sovereign immunity of the agency created by the compact. In fact, the pertinent quote upon which the NPVC supporters rely – that “a compact is a contract” – comes not from the Court's opinion but from Justice Frankfurter's dissent, and even then Justice Frankfurter meant only that compacts should be interpreted like contracts, not that the Contract Clause applied to them, let alone prohibited states from withdrawing from unratified compacts. See 359 U.S. at 285 (Frankfurter, J., dissenting).

¹²⁷ 434 U.S. 452 (1978).

¹²⁸ *Id.* (noting that states could unilaterally withdraw from compact to which Congress had not consented).

protect contracts other than those involving private debts,¹²⁹ interstate agreements among the states, particularly one appertaining to the election of the President, fall far outside the range of agreements with which the Framers were concerned. Like state constitutions, which the Court has ruled do not constitute a constitutionally enforceable contract between the state government and its citizens,¹³⁰ interstate agreements are typically political, not commercial, instruments.¹³¹ That is certainly the case with respect to the NPVC.

Moreover, as a functional matter, endowing unratified interstate agreements with constitutional protection under the Contracts Clause would conflict with the Compact Clause, which delegates to Congress the exclusive authority to review interstate agreements. There would be little point in having Congress review interstate agreements if the Constitution required the federal courts to enforce those agreements to which Congress had refused its assent. Indeed, judicial enforcement of an interstate agreement, which would necessarily depend on a finding that the agreement was valid, would be a slap in the face to Congress, whose refusal to ratify the agreement signified its contrary view of the agreement's validity. Hence, as a matter of interbranch comity, it would be far better to read the Contract Clause's applicability to interstate agreements as coterminous with the Compact Clause: only those interstate agreements to which Congress has consented are protected by the Contract Clause, while those interstate agreements to which Congress has not consented are not protected by the Contract Clause.

Finally, whatever one thinks about the merits of the Contract Clause, it surely counts against the desirability of the NPVC that it necessarily relies on lawsuits raising novel constitutional points. The

¹²⁹ *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) (applying Contract Clause to law regulating natural gas contracts). Equally, it has also been construed to permit substantial state interference with contracts. *Home Building & Loan Ass'n v. Blaisdell*, 298 U.S. 398 (1934) (upholding state mortgage foreclosure moratorium). Hence, even if the NPVC did fall within the scope of the Contracts Clause, it is uncertain whether withdrawal from the NPVC would constitute impermissible state action. *Id.*

¹³⁰ *Church v. Kelsey*, 121 U.S. 282, 283-84 (1887).

¹³¹ To be sure, a congressionally approved interstate compact is enforceable against a state that violates its terms, but not because of the Contracts Clause but rather because of the Supremacy Clause: Congress's consent transforms the agreement into federal law, which supersedes any inconsistent state law.

litigation that would be necessary to establish that the Contract Clause forbids states from withdrawing from the NPVC in an untimely fashion could arise only in the context of a state having withdrawn from the compact on the eve of or shortly after the Presidential election. A lawsuit at any other time would be either unripe or moot. Moreover, such a lawsuit would likely take place only when the withdrawing state's action was critical to the outcome of the election, as there would be little incentive for anyone to go to the expense of suing the state if its actions were inconsequential. Thus, the necessary lawsuit would likely be filed right before or immediately following the general election, and it would involve a state whose action was critical to the election's outcome. In short, it would be another *Bush v. Gore*, albeit one dressed in Contracts Clause rather than Equal Protection garb. And, whatever one may think of the merits of *Bush v. Gore*, it is surely better for the stability of the republic if the Supreme Court does not again decide the outcome of the Presidential election.

2. With Congressional Consent.

Even if Congress does consent to the compact, it is not clear that the NPVC is valid and enforceable against a state that decides to withdraw from it after July 20th in a presidential election year. Article II of the U.S. Constitution entrusts the method of appointment of the presidential electors to the state legislature. For some, that federal constitutional delegation of authority must be read literally, meaning that the state legislature's power cannot be circumscribed to any extent or in any manner. In *McPherson v. Blacker*,¹³² the paradigmatic U.S. Supreme Court decision involving the state legislature's power to select the manner of appointing presidential electors, the Supreme Court upheld the Michigan legislature's decision to change its system for selecting presidential electors. As the Court viewed it, the state legislature's power was "plenary." Emphasizing that point, the Court endorsed a U.S. Senate report that declared that "there is no doubt of the right of the legislature to resume the

¹³² 146 U.S. 1 (1892).

power [of appointment] at any time, for it can neither be taken away nor abdicated.”¹³³ More recently, in *Bush v. Gore*, three Justices viewed *McPherson* as establishing that Article II’s delegation of power to the state legislatures cannot be circumscribed even by the state constitution.¹³⁴

Read in this strict sense, Article II would divest Congress of the power to impose federal legislative restrictions on the state legislatures, for if the constitutional delegation to the state legislature is exclusive, neither Congress nor the state constitution nor a prior state legislature can interfere with the current state legislature’s appointment authority. Hence, on this view, even a congressionally ratified interstate compact cannot limit the state legislature’s Article II power to appoint electors in the manner it so chooses, regardless of when the legislature exercises that power.

Again, this expansive reading of *McPherson* is not free from doubt, but the important point is that it is not so absurd that states will refrain from invoking it in defense of their untimely withdrawals from the NPVC. Hence, even if Congress ratifies the NPVC, that alone may not deter states from withdrawing from the NPVC after July 20th. And, again, the ensuing litigation to decide whether the states’ expansive reading of Article II is the correct one would likely arise in the midst of a disputed Presidential election, plunging the nation into another round of Supreme Court litigation.

3. Remedy.

Finally, even if the NPVC legally precludes state legislatures from withdrawing from the NPVC after July 20th, it is far from clear that there is a workable remedy when states do withdraw after the deadline. Suppose, for example, that a state legislature repeals the NPVC on the eve of the election and specifies instead that the winner of the statewide vote shall receive that state’s slate of electors. Would a court issue an injunction directing the state’s chief election officer to certify a different slate of electors than that mandated under state law? There is more than bit of skepticism among constitutional commentators that courts would actually intervene and enjoin the state to comply with

¹³³ *Id.* at 35.

¹³⁴ 531 U.S. at 114 (Rehnquist, C.J., concurring).

the NPVC.¹³⁵ Even if a court were inclined to intervene, would it do so if the state's electors have already been appointed and received the federally-mandated certificate of ascertainment? At that point, even if the state elections official complied with the court order – itself a questionable proposition¹³⁶ – the court's action would produce two competing sets of electors. Perhaps in theory the court could "disqualify" one set, but that eventuality is not free from doubt – the Constitution entrusts to Congress the responsibility to count the electors' votes, a responsibility that both entails the power to judge the qualifications of the electors and arguably renders non-justiciable any demand that a court disqualify a particular slate of electors.¹³⁷

Matters become only more complicated if the withdrawal of one state reduces the number of electors controlled by the bloc of signatory states below the 270-electoral threshold set by the NPVC for its operational validity, thereby prompting other states to withdraw from the compact. Under the terms of the NPVC, all the other signatory states would still be obligated to conform to the NPVC, but it is not hard to imagine other states defending their withdrawal on the ground that the original state's withdrawal rendered the NPVC ineffective as a practical matter. Divergent judicial decisions (one court ordering Withdrawing State A to comply with the NPVC, another court allowing Withdrawing State B to go its own way) would only serve to deepen the resulting constitutional crisis, particularly if the election outcome hinged on the actions of these withdrawing states. To be sure, the U.S. Supreme Court could ultimately produce a uniform binding resolution, but, again, American democracy is better off if the Supreme Court does not pick the winner of the Presidential election.

¹³⁵ See Smith, *supra* note 182, at 215 (questioning whether federal court would stop state from withdrawing from NPVC).

¹³⁶ One can easily imagine a Secretary of State from the same party as the statewide winner defiantly refusing to comply with such an order, proclaiming instead his or her willingness to "protect the rights of the voters of this state." Though risking being held in contempt of court, the Secretary could potentially conclude that the long-term political benefits to his or her career outweighed the immediate legal costs.

¹³⁷ U.S. CONST. amend. XII. *Cf.* Nixon v. United States, 506 U.S. 224, 233-35 (1993). *But cf.* Bush v. Gore, 531 U.S. 98 (2000) (adjudicating constitutional challenge to counting of *popular*, not electoral, ballots in presidential election).

In the event that the federal courts did not intervene in a sufficiently timely fashion, Congress could resolve the matter, but, depending on whether there are one or two (or more) slates of electors from the withdrawing state, Congress's choices are both limited and unappealing. Suppose that there are two slates of electors appointed by the withdrawing state, one pledged to the statewide winner and another pledged in accordance with the NPVC to the national popular vote winner. Perhaps Congress would enforce the NPVC and count the votes of the electors from the slate pledged to the national popular vote winner, but there is no guarantee that it would do so. In fact, if the legislature withdrew from the NPVC after July 20th but still prior to the election, the safe harbor provision of 3 U.S.C. § 5 *requires* Congress to count the votes of the "statewide" electors since those electors were appointed in accordance with the terms of the safe-harbor provision. What action Congress ultimately takes, of course, is likely to depend less on the merits of the particular legal arguments and more on the partisan affiliations of the Representatives and Senators and their views regarding how their decision will impact the election outcome.¹³⁸

On the other hand, suppose that there is only one slate of electors from the withdrawing state, who are pledged to and voted for the statewide winner. After all, there is no guarantee that state officials will act contrary to extant state law and certify a competing slate of electors pledged to the national popular vote winner (or that a court will require them to do so). In this scenario, Congress has only one option: either count the electors' votes or don't, the latter of which "enforces" the NPVC in the sense of depriving the state of the benefit of its untimely withdrawal. Significantly, Congress cannot appoint electors pledged to the national popular vote winner on the state's behalf or require the state to do so. Yet, refusing to count the state's electors effectively disenfranchises that state. Viewed from the standpoint of democratic theory, the cure (statewide disenfranchisement) is worse than the disease

¹³⁸ If the safe harbor provision of Section 5 is inapplicable and if the two chambers then disagree as to which electors are the lawful ones, the Electoral Vote Count Act specifies that the electors certified by the executive of the state shall be counted, which (depending on the particular circumstances) may be the statewide or national popular vote winner. 3 U.S.C. § 15.

(untimely withdrawal from the NPVC). Moreover, because both Article II and the Twelfth Amendment require an absolute majority of the entire Electoral College, not just a majority of the states whose electors are accepted by Congress as qualified to vote, the disqualification of the state's electors could potentially produce a situation in which no candidate has the requisite Electoral College majority, thereby sending the election to the House of Representatives where each state receives only one vote – perhaps the worst of all worlds for majoritarians.

Once again, the point here is not that such imbroglios are likely – though no one should overconfidently assume they will not occur – or that Congress cannot sort it out when they do occur – though Congress's decision will almost assuredly be shaped by its partisan composition. Rather, the point is that the NPVC cannot prevent the constitutional crisis and politically polarizing litigation that would assuredly follow a state's untimely withdrawal from the NPVC. As a subconstitutional, state-initiated measure, the NPVC simply cannot ensure that either signatory or non-signatory states abide by its requirements.

IV. THE MYTH OF THE NATIONAL ELECTION.

Even if non-signatory states helpfully go along with the NPVC or, more optimistically, even if all states join the compact, the troubles do not end. Perhaps even more disturbing than the ways in which states can obstruct the NPVC's operation are the ways in which the NPVC, if actually implemented, will affect the presidential election system and do so in an adverse manner. Somewhat surprisingly, all of the discussions regarding the NPVC ignore the critical fact that the NPVC relies on a fictional institution – a nationwide popular vote for President. Despite the media-hyped fascination with election night, there has never been a true national election for President, and, critically, the NPVC does not create one. Rather, even after the NPVC goes into effect, there will still be fifty-one separate state elections for President, each with its own qualifications for voting, each with its own voting machinery, and each with its own legal regime regarding the initial tabulation and, if necessary, the recounting of votes. Subpart A

catalogues some of the more significant differences among the states with regard to electoral processes. Subparts B and C then explore the constitutional and philosophical problems that those interstate differences entail.

A. The National Election that Isn't.

The NPVC appeals to many majoritarians and others because it is based on a very simple idea – that one can simply amalgamate votes from all the states, sum them up, and then declare the candidate with the most votes the “national popular vote winner.” That simple idea, however, ignores the fact that the Presidential election is not conducted by federal officials operating under a federal electoral statute that lays out uniform processes and procedures for conducting the election. Rather, the Presidential election is conducted by state officials operating under state election laws, each of which differ from the laws of other states in significant ways.

Take suffrage qualifications. As a result of several constitutional amendments, suffrage has been extended to virtually all adults. Virtually all, not all. Forty-eight states prohibit prison inmates from voting, thirty-five states prohibit individuals on parole from voting, and thirty states prohibit individual on probation from voting.¹³⁹ Moreover, eleven states deny voting rights to at least some former convicts even after they have fully completed their sentence.¹⁴⁰ As a result, 5.3 million mentally-competent adult citizens are not eligible to vote, many of them for life.¹⁴¹ The U.S. Supreme Court upheld these felon disenfranchisement statutes in *Richardson v. Ramirez* on the ground that the 14th Amendment contemplates the disenfranchisement of criminals by expressly excusing their

¹³⁹ THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2010) (available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cfd_lawsinus.pdf).

¹⁴⁰ *Id.* at 1, 3. The eleven states that disenfranchise at least some ex-felons are Alabama, Arizona, Delaware, Florida, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, and Wyoming. *Id.* at 3; see also *Simmons v. Galvin*, __ F.3d __ (1st Cir. 2009) (upholding Massachusetts' denial of voting rights to currently incarcerated felons).

¹⁴¹ *Id.* See also Raskin, *supra* note 6, at 688 (decrying disenfranchise of ex-felons for life).

disenfranchisement in apportioning Representatives in Congress.¹⁴² Even so, the fact remains that, in some states, felons and parolees are able to vote for President and in other states they are not.

Similarly, most – but not all – states ban some individuals from voting because of mental incapacity.¹⁴³ Even among those states that disqualify voters on this basis, there are significant differences among the laws of the states as to the requisite level of mental illness or incapacity to trigger disenfranchisement. Many states use catch-all, general language, disenfranchising those who have been determined by a court of law to be “incapacitated” or “incompetent” without further defining what that precisely means.¹⁴⁴ Six states ban “idiots” and “insane” persons from voting;¹⁴⁵ three states ban those of “unsound mind;”¹⁴⁶ and, three states prohibit those who are “non compos mentis” from voting.¹⁴⁷ Meanwhile, four states ban those who are “under guardianship” for mental disability or illness from voting,¹⁴⁸ while one state prohibits those “under guardianship” or “insane or not mentally competent” from voting.¹⁴⁹ Complicating matters further, some states provide that the establishment of a guardianship or conservatorship itself presumptively disqualifies a person from voting, while others provide that even confinement in a state mental hospital is not sufficient reason to disqualify a

¹⁴² 418 U.S. 24, 55-56(1974).

¹⁴³ Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, New Hampshire, and Pennsylvania are among the states that do not disenfranchise individuals because of mental incapacity. BAZELON CENTER FOR MENTAL HEALTH LAW, STATE LAWS AFFECTING VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES (Jun. 2008), available at <http://www.bazon.org/LinkClick.aspx?fileticket=1kgFTxMFHZE%3d&tabid=315>; Sally Hurme and Paul Applebaum, Defining and Assessing Capacity to Vote, 38 McGEORGE L. REV. 931, 975-79 (2007) (cataloguing state laws).

¹⁴⁴ ALA. CONST. art. 8, § 177(b); ARIZ. CONST. art. 7, § 2(C); ARK. CONST. amend. 51, § 11(a)(6); CAL. ELEC. CODE § 2208(a); CONN. GEN. STAT. § 9-12(a); DEL. CONST. art. 5, § 2; FLA. CONST. art. 6, § 4(a); GA. CONST. art. 2, § 1; LA. CONST. art. 1, § 10(a); NEV. CONST. art. 2, § 1; N.Y. ELEC. CODE § 5-106(6); N.D. CONST. art. 2, § 2; OKLA. STAT. TIT. 26, § 4-101(2); ORE. CONST. art. 2, § 3; S.C. CODE ANN. § 7-5-120(B)(1); S.D. CONST. art. 7, § 2; TENN. STAT. § 33-3-102(a); TEX. CONST. art. 6, § 1; UTAH CONST. art. 4, § 6; VA. CONST. art. 2, § 1; WASH. CONST. art. 6, § 3; WISC. CONST. art. 3, § 2(4)(B); WYO. CONST. art. 6, § 6.

¹⁴⁵ IOWA CONST. art. 2, § 5; KY. CONST. § 145(3); MISS. CONST. art. 12, § 241; N.J. STAT. ANN. § 19:4-1(1); N.M. CONST. art. 7, § 1; OHIO CONST. art. 5, § 6.

¹⁴⁶ AK. CONST. art. 5, § 2; MONT. CONST. art. 4, § 2; W. VA. CONST. art. 4, § 1.

¹⁴⁷ HI. CONST. art. 2, § 2; NEB. CONST. art. 6, § 2; R.I. CONST. art. 2, § 1. See also Hurme and Applebaum, *supra* note 143, at 935.

¹⁴⁸ ME. CONST. art. 2, § 1; MD. CONST. art. 1, § 4; MASS. CONST. amend. art. 3; MO. CONST. art. VII, § 2.

¹⁴⁹ MINN. CONST. art. 7, § 1.

prospective voter.¹⁵⁰ The exact number of individuals disenfranchised by these laws is unknown, but some sense of the scale of the issue can be inferred from the fact that, according to the U.S. Census Bureau, there were over 12 million voting-age adults with a mental disability in 2006.¹⁵¹ For many of these individuals, whether they are entitled to vote in the presidential election depends critically on their state of residence.

Or take voter registration and ballot systems. Different states use different registration and voting systems, each of which impacts voting behavior and tabulation in different ways. For example, states that allow voters to register and vote on the same day typically have a higher turnout rate than states that require voters to register well in advance of the election.¹⁵² Likewise, mail-in voting, which is used in Oregon, results in a higher voter turn-out rate than election systems in which voters must go to a polling station or request an absentee ballot well in advance of the election.¹⁵³ As a result of these differences, voter turnout rates vary significantly from state to state. One recent study of voter participation in the 2010 general election found that voter participation rates varied from a low of 28.2%

¹⁵⁰ Compare CAL. ELEC. CODE §§ 2208, 2209 (disqualifying those under conservatorship) and ME. CONST. art. 2, § 1 (same) and MASS. CONST. amend. art. 3 (same) with COLO. REV. STAT. 1-2-103(5) (providing that guardianship is not sufficient reason to disqualify ward from voting) and HAW. REV. STAT. § 334-61 (same).

¹⁵¹ U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, tbl. B18005, available at http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-_lang=en&-_caller=geoselect&-state=dt&-format=&-mt_name=ACS_2006_EST_G2000_B18005.

¹⁵² Craig Leonard Brians & Bernard Grofman, Election Day Registration's Effect on U.S. Voter Turnout, 82 Soc. Sci. Q. 170, 170 (2001).

¹⁵³ In the 2010 general election, nearly 72% of all registered voters in Oregon turned out to vote. See OREGON SECRETARY OF STATE, STATISTICAL SUMMARY 2010 GENERAL ELECTION, available at <http://www.sos.state.or.us/elections/nov2010/g2010stats.pdf>. In contrast, in that same election, only 59.6% of the registered voters in California, which allows any voter to vote by mail but requires that they affirmatively request such ballots prior to the election, actually voted. See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE, NOVEMBER 2, 2010 GENERAL ELECTION 3 (2011), available at <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf>. Meanwhile, New York, which substantially restricts voters ability to cast absentee ballots and therefore requires most voters to go to polling stations, experienced a voter turnout of 40%. See Sam Roberts, New York State's Voter Turnout this Year was Lowest in U.S., *N.Y. Times*, Nov. 17, 2010, at A28.

of all voting-eligible adults in the District of Columbia to a high of 55.5% of all such adults in Minnesota.¹⁵⁴

Moreover, even if voter participation rates were the same in all the states, there would still remain statistically significant disparities among the states in the tabulation, recording, and reporting of votes as a result of the use of different types of voting machinery. One study that investigated “undervoting” in the 2000 Presidential election – the number of ballots cast in which there was no recorded vote for President – found that the percentage of undervotes varied from county to county across the nation, ranging from as much as 15% of the ballots to as little as 0.02%.¹⁵⁵ To be sure, there are multiple causes for these disparities. Some voters may choose simply not to vote in the Presidential race, although it seems improbable that 15% of the people who take the time to go to the polls to vote would intentionally choose not to vote in the presidential race. Instead, most studies focus on the use of different voting machines in different localities as the key explanation. In the aftermath of the “hanging chad” fiasco in the 2000 election, several studies investigated the extent to which different voting systems failed to record a vote. In 2000, counties that used punchcard voting systems had an undervote rate of 2.8%, while counties that used optical scan voting systems had a 0.9% undervote rate.¹⁵⁶ Another study found that lever machines had an error rate of 2.2%, optical scan machines a 2.7% rate, and electronic machines a 3.1% rate.¹⁵⁷ Meanwhile, a federal court reviewing the Illinois election system found that precincts in Illinois that used optical scan ballots with error notification backup systems failed to record a vote less than 1% of the time, while precincts that used optical scan

¹⁵⁴ UNITED STATES ELECTIONS PROJECT, 2010 GENERAL ELECTION TURNOUT RATES (2010), available at http://elections.gmu.edu/Turnout_2010G.html.

¹⁵⁵ David C. Kimball, Chris T. Owens, and Katherine Keeney, “Unrecorded Votes and Political Representation,” *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 135, 137 (Robert P. Watson ed., 2004).

¹⁵⁶ *Id.* at 139.

¹⁵⁷ 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).

ballots without backup systems or that used punch card ballots failed to do so over 4% of the time.¹⁵⁸ Hence, whether one's ballot is accurately read depends significantly on what vote equipment is used, which differs from state to state.

Finally, take vote tabulation standards. Different states employ different definitions of what constitutes a valid vote. For example, California expressly forbids the counting of ballots that are "not marked as provided by law."¹⁵⁹ In contrast and more generously, Florida provides that even mismarked ballots must be counted so long as there is "a clear indication on the ballot that the voter has made a definite choice."¹⁶⁰ Even more generously, Massachusetts requires ballots to be counted where the intent of the voter "can be determined with reasonable certainty from an inspection of the ballot."¹⁶¹ And, most generously of all, Oregon and other states provide that votes must be counted unless "it is impossible to determine the elector's choice for the office or measure."¹⁶² These differences in tabulation standards have led courts in the respective states to opposite conclusions regarding the validity of mismarked ballots. For example, in *Escalante v. City of Hermosa Beach*, a California appeals court threw out ballots in which the voters had punched an incorrect chad, even though the voter's intent was discernable.¹⁶³ Likewise, a Georgia appeals court declared that ballots in which the voter failed to fully punch out the chad were invalid.¹⁶⁴ Yet, in *Delahunt v. Johnston*, the Massachusetts

¹⁵⁸ *Black v. McGuffrage*, 209 F.Supp.2d 889, 893 (N.D. Ill. 2002). Although Congress has passed the Help America Vote Act, which requires the Federal Election Commission to establish error standards for voting machines, states retain the authority to choose different systems so long as they comply with the federal requirement. 42 U.S.C. § 15301(a)(5).

¹⁵⁹ Cal. Elec. Code § 15154.

¹⁶⁰ Fla. Stat. Ann. § 102.166(4)(a). See also Tex. Elec. Code § 65.009 (requiring ballot to be counted "if the voter's intent is clearly ascertainable unless other law prohibits counting the vote"); Va. Stat. Ann. § 24.2-644(A) ("Any ballot marked so that the intent of the voter is clear shall be counted").

¹⁶¹ *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996).

¹⁶² Or. Stat. Ann. § 254.505(1). See also S.C. Stat. Ann. § 7-13-1120 (prohibiting counting of ballots where "for any reason it is impossible to determine the voter's choice"); Ala. Code § 17-12-13 (same); S.D. Stat. § 12-20-7 (same).

¹⁶³ 195 Cal. App. 3d 1009, 1018-19 (Cal. App. 1987).

¹⁶⁴ *Rary v. Guess*, 198 S.E.2d 879, 880 (Ga. App. 1973).

Supreme Judicial Court held that punchcard ballots in which the chad was only dimpled and had not been punched out were valid ballots required to be counted.¹⁶⁵

These differences among the states have significant implications for any state-initiated effort to reform the presidential election process, as the NPVC seeks to do. Those implications operate along two dimensions, one constitutional and the other philosophical.

B. Constitutional Consequences.

Simply aggregating votes from each of the 50 states and District of Columbia raises severe problems under the Equal Protection Clause of the 14th Amendment. In *Bush v. Gore*,¹⁶⁶ the U.S. Supreme Court held that the Equal Protection Clause requires that states not discriminate among voters in tabulating votes for elective offices. As the Court noted in that infamous case, there is no right to vote for presidential electors, but, once a state chooses to vest the people with the right to vote for such, the Equal Protection Clause attaches and forbids the states from allocating voting power in ways that, in the Court's words, "value one person's vote over that of another."¹⁶⁷ There, the Supreme Court ruled that the use of different standards in different Florida counties for tabulating votes for President violated the Equal Protection Clause.¹⁶⁸

The disparities in voting qualifications and processes from state to state identified above have been accepted as constitutional only because, until the NPVC goes into effect, each state counts only the votes of its own citizens in determining which candidate wins that state's slate of presidential electors. *Bush v. Gore* required uniformity only within Florida because that was the relevant voting community for the office of presidential elector *from Florida*. Once the relevant voting community is expanded to

¹⁶⁵ Delahunt, 671 N.E.2d at 1243. See also *Duffy v. Mortenson*, 497 N.W.2d 437 (S.D. 1993) (holding that ballot in which chad was indented and had two corners separated but which was not displaced was valid vote); *Wright v. Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981) (holding that ballot in which chad was partially attached and not fully displaced – a "hanging" chad – was valid vote).

¹⁶⁶ 531 U.S. 98 (2000).

¹⁶⁷ *Id.* at 104-05.

¹⁶⁸ *Id.* at 106-07.

include the entire nation, however – as the NPVC seeks to do – it is hard to see how the disparate voting qualifications and systems in each state would be constitutionally tolerable.

Take the suffrage disparities. Surely it would be unconstitutional for a state to agree to treat as valid the votes of individuals in other states who would not be entitled to vote in the original state if they lived there. For example, while Oregon permits ex-felons to vote, Virginia does not for at least five years after they have completed their sentence.¹⁶⁹ For states to include the votes of felons from those states that enfranchise them in determining the national popular vote winner – as the NPVC requires them to do – would be unfair to felons in those states that disenfranchise them and to non-felons in all states (whose votes would thereby be diluted by the felons' votes). Likewise, while Illinois allows mentally disabled individuals under guardianship to vote, Missouri does not.¹⁷⁰ For states to include the votes of mentally incapacitated individuals from several states in determining the national popular vote winner – as the NPVC requires them to do – would be unfair to both mentally disabled adults in states that disenfranchise them and to mentally competent voters in all states (whose votes are diluted by including other states' mentally incapacitated voters).

Or take the differences in voting machinery and tabulation standards. Although *Bush v. Gore* acknowledged that states often delegate to local officials the authority to choose their voting machinery,¹⁷¹ the Court did not suggest that any resulting disparity among voting equipment and their error rates was acceptable. At some level, such disparities, particularly those that exist from state to state, could be viewed as irrational or arbitrary and therefore violate equal protection. More importantly, the Court in *Bush v. Gore* did require the deployment of a uniform statewide standard for evaluating and tabulating votes for presidential electors, as well as a system of training election

¹⁶⁹ Sentencing Project, *supra* note 140, at 2-3.

¹⁷⁰ Mo. CONST. art. VIII, § 2; see also Hurme & Applebaum, *supra* note 143, at 958-60 (describing disenfranchisement of Steven Prye, a person with schizoaffective disorder, when he moved from Illinois to Missouri).

¹⁷¹ *Bush*, 531 U.S. at 109.

personnel to ensure such uniformity.¹⁷² If the differences in voting standards between Palm Beach and Miami-Dade counties violated the Equal Protection Clause,¹⁷³ so too must the differences between states that count mismarked ballots as valid, such as Massachusetts, and those states, such as California, that typically do not.

These examples merely give a taste of the problems that are likely to arise. Ultimately, the fundamental problem with the NPVC in this respect arises from the fact that it requires each signatory state to appoint its electors based on votes in other states. In essence, signatory states are enfranchising as voters of those states all of the voters in the United States. The notion that states may enfranchise voters in other states is of questionable constitutionally in its own right.¹⁷⁴ Even if the states may do so, however, the Equal Protection Clause requires that they do so in a manner that treats voters equally. Critically, the NPVC omits any requirement that signatory states adopt a uniform system of suffrage, voting, or tabulation, and, even if the NPVC were amended to provide for one, the non-signatory states would be under to no obligation to conform to the NPVC standards. In short, while the NPVC purports to give effect to a national popular election, there has never been such an election for President, and the NPVC neither does nor can provide for one. As such, it is both misleading and ultimately unconstitutional to anoint a “national popular vote winner” based on the raw aggregation of votes among fifty-one disparate voting jurisdictions, each with its own legal regime governing voting qualification, processes, and tabulation.

C. Philosophical Considerations.

¹⁷² *Id.* at 109.

¹⁷³ *Id.* at 106-07.

¹⁷⁴ *Cf. Brown v. Chattanooga Bd. of Comm.*, 722 F. Supp. 380, 399 (E.D. Tenn. 1989) (invalidating city measure that gave voting rights in municipal elections to nonresident property owners from outside the city limits). Comity among the states has been understood in other contexts as limiting the power of the states to concern themselves with the interests or desires of citizens of other states. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (noting that Illinois has no legitimate interest in regulating tender offers for the benefit of out-of-state shareholders); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935) (noting that New York has no legitimate interest in setting minimum price for milk for the benefit of Vermont dairy farmers).

Given the nation's propensity to view election issues through a legal lens, these differences among voting systems are likely to be fought over in constitutional terms, but such legalism should not overshadow the deeper, philosophical problem posed by the NPVC in this respect. The NPVC rests upon the notion that the most just way to elect the President is to allow the American people to decide the matter free of any distorting effects resulting from the state-by-state election process currently in use. As one supporter of the NPVC tersely puts it, the NPVC stands "for a simple principle: every vote is equal."¹⁷⁵ Yet, what proponents of the NPVC fail to appreciate is that these differences among voting regimes in the states produce more subtle but equally significant distortions of voting power. In essence, by leaving each state's voting system intact, the NPVC replaces one form of malapportionment with another. Citizens in states that have generous voting qualification laws, that encourage voter turnout, and that employ voting machinery with low tabulation and recording error rates are more likely to participate in the presidential election and have their vote counted than citizens in states that have strict voting qualification laws, that depress voter turn-out, or that use voting machinery with high error rates. In short, the political influence of a particular citizen is dependent on that person's state of residence, just as it is in the current system. The NPVC simply replaces one system biased in favor of citizens from smaller states with one biased in favor of citizens from states with more generous voting qualifications and processes.

Moreover, unlike the Electoral College's slight bias in favor of smaller states, the differences in voting regimes among the states can produce significant disparities in actual voting power among citizens in different states. These disparities can be seen graphically by comparing state population figures to the number of votes cast and recorded in each state. Kentucky and South Carolina, for

¹⁷⁵ Chang, *supra* note 13, at 229.

example, have virtually identical state populations,¹⁷⁶ yet there were almost 95,000 more votes cast and recorded in the 2008 presidential election in South Carolina than in Kentucky.¹⁷⁷ Likewise, Kansas and Arkansas have almost identical populations, but there were almost 150,000 more votes cast and recorded in Kansas than Arkansas. And, not to belabor the point, Oregon and Connecticut have virtually identical state populations, yet there were 181,000 more votes cast and recorded in Oregon, which uses mail-in voting to increase voter participation, than in Connecticut, which does not. Meanwhile, New York, which has almost twice the population of Michigan, cast and recorded only 52% more votes. To be sure, the disparity between state population and vote totals is not exclusively the product of differences in the states' voting systems. There are undoubtedly other cultural, social, economic, and political factors at work, but these disparities are too great to simply pass off simply on the ground that citizens of Michigan and Oregon are more civically active and inclined to vote than citizens of New York and Connecticut – differences in the legal regime regarding elections do matter.¹⁷⁸

As should be obvious, these disparities among the states undermine the central rationale of the NPVC – that adoption of the NPVC will equalize political power among citizens in different states. As the

¹⁷⁶ The state population figures for the states mentioned here all come from the U.S. Census Bureau, 2000 Census (available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-PH1-R&-ds_name=DEC_2000_SF1_U&-format=US-9S).

¹⁷⁷ The total number of votes cast and recorded in each state in the 2008 presidential election for each of the states discussed here come from FEC 2008 Election Results, *supra* note 105.

¹⁷⁸ Once the political implications of these differences are recognized, some states could seek to maximize their citizens' electoral power. Suppose, for example, that California were to extend the franchise to all adult residents, including illegal aliens. There is nothing in the U.S. Constitution or the NPVC that would prevent such a move, as federal law imposes no limits on who a state may affirmatively enfranchise. In 2010 in California, there were 17.2 million registered voters, of which 10.3 million (or 59%) actually voted. According to the 2010 Census, there were 26.86 million adults resident in California. If the newly enfranchised voters voted at that same rate as registered voters, California would experience an increase of 5.5 million additional voters. If other states did not respond, Californians could easily account for over 16% of all votes cast nationally, even though the state comprises only 12% of the nation's population. For majoritarian critics of the Electoral College, such a scenario should be deeply troubling. Based on its population, California has 12.3% less power than its population warrants, but, under this scenario, California would end up with 33% more power than its population warrants. In other words, such electoral changes could produce a malapportionment of power greater than that under the Electoral College. Furthermore, as should be obvious, California's additional 5.5 million votes could easily swing the Presidential election. And, not to gild the lily, California would have every incentive to act in this fashion, even if it does not become a signatory state, because such a move would augment California's influence in the Presidential election. Critically, nothing in the NPVC prevents states from acting in this fashion and tailoring their electoral regimes to augment their citizens' influence in the Presidential election at the expense of citizens in other states.

foregoing statistics indicate, citizens in some states are more likely to vote and have their votes counted and recorded than citizens in other states, giving the former greater opportunity to influence the Presidential election than the latter. Thus, while the Electoral College gives Wyoming's citizens slightly more influence in Presidential elections than California's citizens, the NPVC would produce a presidential election system that gives Oregon's citizens more influence than Connecticut's and California's citizens more influence than New York's. In practice, the political power of citizens would still depend upon and vary according to state residence.

To be sure, these disparities among the states exist today, but their impact is both geographically confined and minimized by the fact that citizens in each state are voting only for their state's presidential electors, whose votes are then tallied in accordance with the Electoral College formula. No matter how difficult (or easy) a state makes it for its citizens to vote for President, voters within each state are competing only with other voters in that state, who are subject to the same legal regime. It is for that reason that, under the current Presidential election system, voters in one state have no reason to care about the voting regime employed in other states; Californians and Oregonians are not affected by the fact that Virginia disenfranchises its felons or Missouri its mentally incapacitated adults. Moreover, it is for that reason that states have no incentive to expand the franchise in the hypothetical manner described above. Under the current system, enfranchising illegal aliens or others would not give any state any greater influence in the Presidential election than it already has in the Electoral College.

Were the NPVC to go into effect, however, the legal regimes of every state would be vitally important to voters in every state, both signatory and non-signatory alike. A Californian (or resident of any state for that matter) would have every reason to be upset by the fact that Illinois allows its mentally incompetent adults to vote, that Oregon employs a mail-in voting system, or that Massachusetts counts dimpled chads as valid ballots because those voters and their ballots will be

counted in determining which candidate is the national popular vote winner and therefore President. Moreover, that will be true even if California were not a signatory state, because signatory states would be obligated to count the votes cast in other states in determining the national popular vote winner.

In short, there is simply no way to equalize voting power among the people in the various states while each state is allowed to set its own rules regarding suffrage, voting procedures, and tabulation standards. Disparity in voting power does not result solely from the apportionment of the Electoral College; rather, it is primarily the result of a system that confides to the states the responsibility for conducting the Presidential election. As a result, adopting the NPVC would not help; in fact, it would only exacerbate political differences among voters in different states.

V. THE MOTHER OF ALL RECOUNTS (OR NOT).

Related to the problem of voting system disparities is the issue of recounts. Because of the inherent flaws in tabulating and recording votes, states typically provide for a recount when the initial tabulation is close so as to ensure that the right candidate is declared the winner. Again, different states have different legal regimes regarding recounts. Forty states permit candidates to request a recount.¹⁷⁹ Moreover, eighteen states provide for an automatic recount if the vote margin in the state is less than a specified amount, ranging from 1% of all votes cast (on the high end) to a tie vote (on the low end).¹⁸⁰ The problem here, however, goes beyond just the fact that disparities among the states exist. Rather,

¹⁷⁹ See, e.g., Cal. Elec. Code § 15621; 21-A Me. Rev. Stat. § 737-A; Wy. Stat. § 22-16-110. See also Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, app. B (2005) (summarizing state laws regarding recounts); NCSL, *Recounts* (2004), available at <http://www.ncsl.org/default.aspx?tabid=16526> (same).

¹⁸⁰ Specifically, two states (Georgia and South Carolina) use 1% of all votes cast. Ga. Stat. Ann. § 21-2-495(c); S.C. Code § 7-17-280. Two states (Nebraska and Wyoming) use 1% of the votes cast for the winning candidate as the requisite vote margin to avoid an automatic recount. Neb. Rev. Stat. § 32-1119; Wy. Stat. § 22-16-109. Three states (Alabama, Florida, and Minnesota) use 0.5% of all votes cast. See, e.g., Ala. Code § 17-16-20(a); Fla. Stat. Ann. § 102.141(7); Minn. Stat. § 204C.35(b)(1). Two states (Colorado and North Dakota) use 0.5% of the votes cast for the winning candidate. Co. Rev. Stat. § 1-10.5-101(b); N.D. Code § 16.1-16-01(1)(b). One state (Ohio) uses 0.25% of all votes cast. Oh. Rev. Code § 3515.011. One state (Oregon) uses 0.2% of the votes cast for the top two candidates. Or. Rev. Stat. § 258.280(1)(b). Finally, one state (Arizona) uses 0.1% of the votes cast for the top two candidates. Az. Rev. Stat. § 16-661(A)(1). The other states specify either an absolute vote margin, 2000 votes (Connecticut, Michigan, and Washington) or a tie vote (South Dakota, Tennessee, Texas). Tokaji, *supra*, at app. B. Tex. Elec. Code § 216.001.

the critical issue is that no state provides for a recount if the *national* popular vote for President is close. And, inexplicably, the NPVC does not require signatory states to amend their recount statutes to provide for a recount in those states when a close election does take place.

The NPVC's failure in this regard is truly baffling. In a close national election, there would be no obligation for any state, except those with automatic recount statutes and in which the *statewide* vote was close, to conduct a recount. The national popular vote loser could petition for a recount in those states that authorize them, but there is no guarantee that the state election officials in every state would order one, particularly in those states in which the recount is paid for by the government. Moreover, several states do not provide for statewide recounts. As a result, even if the national popular vote was close, it is likely that only a few states would conduct a recount, and it is entirely possible that no state would conduct a recount if the statewide vote tally was not close in any of the states. As one might imagine, the failure to conduct a nationwide recount could fatally undermine the public's confidence in the vote totals and, therefore, the election. In a close national election, only by conducting a recount in every state could the nation be confident in the outcome of the election.

Even worse, the NPVC would not prevent some states from conducting a recount – in other words, it does not prevent a partial nationwide recount confined to particular states. A partial recount limited to some states, however, could severely undermine the public's confidence in the election if those recounts narrowed the national vote margin or, perhaps even more dramatically, switched the outcome of the election. Imagine if a recount took place in five states, the result of which was to give the election to the candidate who was initially behind in the national voting (i.e., the candidate who looked initially to have lost the election gains enough votes in the recount in those five states to become the national popular vote winner). The other candidate could plausibly respond that, had a recount taken place in the other 45 states, she would have gained even more votes than the “loser” gained in

the five states and would have therefore remained the national popular vote winner.¹⁸¹ In that case, a partial recount could actually produce an election in which the wrong candidate – the candidate who actually received fewer votes nationally – won the White House. In short, the NPVC’s failure to require a nationwide recount opens the door to the same “misfires” that its proponents decry.¹⁸²

In the best (and most unlikely) of all worlds, all the states, signatory and non-signatory alike, would amend their recount laws to provide for a mandatory recount if the national election is a close one, say, within 1% of all votes cast, but that only raises a different set of problems. If such a nationwide recount were to take place, what procedure would be used? Would it be a machine or hand recount? What ballot tabulation standards would apply? Would a ballot that violates state election law but nevertheless reveals the voter’s intent qualify as a valid ballot? What if some states applied a different standard? Who would be in charge of overseeing the nationwide recount to ensure a uniform system of tabulation? Even putting aside *Bush v. Gore* and the related constitutional concerns,¹⁸³ state administered recounts operating under different rules and administrative processes would only serve to undermine the public’s confidence that the national popular vote winner was in fact the more popular candidate among the voters. If differences in vote tabulation standards among Florida’s sixty-seven counties caused concern in 2000, imagine the outcry resulting from the deployment of different vote tabulation procedures and standards in the 3,141 counties throughout the nation.

Proponents of the NPVC respond that this is all needless fear-mongering – that the likelihood of a national election being decided by a few thousand votes is nil.¹⁸⁴ The supporters, however, miss the point – it’s not the absolute vote spread that matters but the percentage vote margin. Precisely

¹⁸¹ Cf. *Gore v. Harris*, 772 So.2d 1243, 1261-62 (Fla. 2000) (ordering statewide recount to ensure that all votes are recounted to ensure accuracy of election result).

¹⁸² Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 207 (2008).

¹⁸³ See *id.* (noting that local variation in recount procedures and standards raise Equal Protection issue).

¹⁸⁴ KOZA, *supra* note 8, at 391 (arguing that a close national election would likely occur only once every 1,328 years).

because the number of missed or miscounted ballots rises in proportion to the number of ballots cast, the threshold for triggering mandatory recounts in those states that provide for them is typically specified in percentage terms. Of course, in a nation in which 130 million votes are cast for President (as happened in 2008), a 1% recount threshold would justify a recount where the winning vote margin is 1.3 million votes or less. Moreover, judging by past experience, national elections within that margin are more common than the NPVC supporters misleadingly suggest. The 2000 Presidential election was well within that 1% margin (a 543,000 vote margin out of almost 100 million votes cast), as were the 1880, 1884, 1888, 1960, and 1968 elections. In fact, the 1880 election was decided by less than 2,000 votes out of almost nine million cast (a 0.02% vote margin).¹⁸⁵ Moreover, as Presidential campaigns adapt to the new system, such close elections would become more common – the large popular vote margins of recent elections are in part a product of the fact that campaigns do not focus on the popular vote but rather the electoral vote.¹⁸⁶

Admittedly, there might be less need for a nationwide recount under the NPVC than statewide recounts in individual states under the current system, but, when a close national election happened, it would be catastrophic, requiring a nationwide recount for which the NPVC has not provided and cannot mandate in any event. Even if the NPVC required signatory states to amend their recount statutes to provide for recounts when the national vote is close, non-signatory states would still remain free to keep their current recount procedures (or lack thereof) in place. And, in the absence of a true nationwide recount, there could be no certainty that the “national popular vote winner” had actually

¹⁸⁵ NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, HISTORICAL ELECTION RESULTS, available at <http://www.archives.gov/federal-register/electoral-college/scores.html#1888>.

¹⁸⁶ Smith, *supra* note 182, at 207. The NPVC supporters dismissive attitude is undermined by the NPVC itself, which expressly addresses the even more (and *extraordinarily*) unlikely situation in which there a perfect tie in the national popular vote. NPVC art. III (providing that in the case of a tie in the national vote, each state will appoint its electors in accordance with the statewide vote). That the framers of the NPVC thought it necessary and advisable to address that unthinkable scenario makes it all the more inexcusable for the NPVC to fail to address the problems associated with the much more likely scenario of a close election.

won the election, as recounts often produce a different winner.¹⁸⁷ Again, that serves only to emphasize the extent to which the NPVC affirmatively courts constitutional crises.

There is a larger lesson to be drawn here too. These problems of obstruction and implementation identified here are not unique to the NPVC; they would accompany any subconstitutional, state-initiated effort to reform the Presidential election system. No one state or group of states can create a presidential election system in which every citizen is guaranteed to be subject to a uniform legal regime regarding suffrage, voting procedure, and ballot tabulation. Only a federal constitutional amendment abolishing the Electoral College can provide for such a uniform, federal electoral system.¹⁸⁸ As a consequence, all state-initiated efforts to reform the Presidential election system entail significant constitutional difficulties and invite politically paralyzing litigation of the sort witnessed in 2000. The problem is not simply with the NPVC; it is with any state-by-state effort to transform a Presidential election process in which citizens in every state have a vested interest.

CONCLUSION

None of this is to defend the current system for electing the President in Panglossian terms as the best of all possible worlds. There is little doubt that, if we as a nation were drafting the Constitution anew today, we would not choose the current system in its exact form. The pertinent question, though, is not whether we would choose the current system if we were writing on a clean slate, but whether we should abandon the system we currently have in favor of a purely majoritarian election process and, more importantly, whether we should do so via subconstitutional, state-initiated electoral reform.

¹⁸⁷ A recent example of this is the 2008 Minnesota U.S. Senate race. Norm Coleman was initially declared the winner, but, after a recount, Al Franken was determined to have received more votes.

¹⁸⁸ See, e.g., S.J. Res. 4, *supra* note 42 (authorizing Congress to determine “the manner in which the results of the election shall be ascertained and declared”). Robert Bennett, one of the original proponents of the idea of states using their elector-appointment power to bring about a national popular election for President, concedes that there is “no obvious way” to ensure the correctness of the national vote tally in a close election. Bennett, *supra* note 8, at 184. Bennett suggests instead that in a close election, if no nationwide recount were possible, the NPVC should revert to the current system, requiring member states to appoint their electors in accordance with the state tally. *Id.*

The Electoral College, though modestly malapportioned, has worked far better than its detractors are willing to admit. The Electoral College departs from a purely population-based apportionment to a far less degree than other, accepted features of our constitutional order, and it does so only in order to create an electoral system that combines elements of both majoritarianism and federalism. In a federal union spanning thousands of miles and comprising fifty constituent states, the latter is of no small value. Indeed, only the most strict of majoritarians desire a purely majoritarian presidential election system, and those individuals should be deeply troubled by the prospect of plurality Presidencies, which the NPVC expressly countenances. Indeed, the NPVC promises to create more difficulties and “misfires” in its own way than the Electoral College system its proponents so earnestly seek to replace.

Moreover, even if a more majoritarian system is sought, it is vital to design the system so as to ensure that Presidential election system is a truly fair and workable one. There are many features of the presidential election process, such as the rules regarding voter eligibility, ballot design and tabulation, recounts, run-off elections, etc., that must be addressed. Simply asking state officials to count up all the votes cast in each state under the current rules established by state officials – as the NPVC contemplates – is not reform; it is an invitation to constitutional crisis and unending politically motivated litigation.

In short, true reform, if it is to be undertaken, must be made at the level of constitutional amendment. Sub-constitutional efforts, particularly those that are state-initiated, cannot guarantee the participation of all the states. To the contrary, such efforts are sure to lead to even greater problems as different states continue to employ different legal regimes regarding the election process. In short, true reform cannot be done on the cheap. Attempts to do so, like NPVC, promise only a repeat of 2000.