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IDEOLOGICAL ENDOWMENT: THE STAYING POWER OF THE ELECTORAL COLLEGE AND THE WEAKNESSES OF THE NATIONAL POPULAR VOTE INTERSTATE COMPACT

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INTRODUCTION

The National Popular Vote (“NPV”) movement is designed to eliminate the federalist impact of the Electoral College without amending the Constitution. By fashioning an interstate compact to grant participating states’ electoral votes to the winner of the national popular vote, NPV proponents suppose they can induce states to forfeit their electoral “weights” and replace the current, federalist election process with a fully majoritarian one. But by leaving the Electoral College in place, the NPV movement is setting itself up for a double pushback: first, in the form of immediate legal resistance, and second, through states’ long-term involvement in a meaningfully intact federalist system.

This Comment argues that the NPV will fail to institutionalize a majoritarian election process and that a constitutional amendment is necessary to eliminate the Electoral College’s federalist impact. Applying sociological theory, this Comment concludes that proponents of abolishing the Electoral College by constitutional amendment should aim to “dis-embed” pro-Electoral College federalist theory by implementing a compelling majoritarian alternative. It explains why the NPV has not accomplished this task and how future efforts should proceed differently.

I. THE NATIONAL POPULAR VOTE MOVEMENT WILL FAIL TO INSTITUTIONALIZE A MAJORITARIAN ELECTION PROCESS

The Electoral College works, in conjunction with other constitutional institutions such as the enumeration of federal powers and the bicameral Congress, to maintain the Framers’ anticipated balance between state and federal authority. Together, these institutions form a coherent federalist system. And this system poses considerable—and likely fatal—legal and

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practical barriers to the NPV's efforts to institutionalize majoritarian elections.

The most significant constitutional challenges to the NPV will likely arise under the Compact Clause, which forbids states from entering into "any Agreement or Compact with another State" without the "Consent of Congress." NPV supporters highlight that this Clause is interpreted loosely, and that current jurisprudence, as represented by *U.S. Steel v. Multistate Tax Commission* (1978), forbids only those compacts that "enhance[] state power *quoad* the National Government." Accordingly, NPV supporters presume their anticipated compact effects a horizontal shift in power among states rather than affecting the vertical relationship between federal and state power. But this argument is patently thin. There are few subjects likely to upset *U.S. Steel's* vertical balance more than the means by which states select a federal executive. The NPV compact would take effect once the combined electoral votes of the participating states could determine the election's outcome. The ability of a few states to determine election outcomes would give "the states" a unified face and an important advantage in bargaining with the federal government. As Adam Schleifer points out in his article *Interstate Agreement for Electoral Reform*, the NPV compact would also prevent the House of Representatives from acting as an Electoral College tiebreaker in the way the Twelfth Amendment anticipates. Predictable state voting prevents ties and nullifies this potential federal presence, further disrupting the vertical balance.

The NPV also faces a number of other significant constitutional obstacles. In *New York v. United States* (1992), the Supreme Court instructed that "[a] departure from the Constitution's plan for the intergovernmental allocation of authority cannot be ratified by the 'consent' of state officials" because "the Constitution divides authority between federal and state governments for the protection of *individuals*" (emphasis added). While *New York* dealt with the specific issue of anti-commandeering, the Court conveyed a broader concern for the preservation of federalism. This discredits the NPV movement's claim that the constitutional freedom of states to allocate electoral votes allows them to allocate by reference to the national majority alone. And the NPV compact's form is independently objectionable. As the Supreme Court has objected to the Line Item Veto Act and other circum-constitutional shortcuts, the Court would presumably take issue with the NPV compact, which, as *The New York Times* has pointed out, blatantly advertises itself as an "end run."

Yet even if the NPV overcomes the challenges to its constitutionality, it will fail to eliminate states' federalist participation in presidential elections. The process it envisions is not *truly* majoritarian. Though the NPV hinges its arguments upon the supposed vestigiality of the Electoral College, it leaves the Electoral College in place, depending upon its state-centric system in a fundamental way to facilitate the NPV's goals. The states' uneven electoral weights make the NPV compact easier to effectuate than a constitutional amendment. Because of these weights, as few as eleven pro-NPV states could reconfigure the country's electoral process. And highlighting this fact

is more than a formalistic endeavor. Allowing the states to institutionalize majoritarianism ignores that citizens have made a substantive choice to temper their majority interests through the reigning constitutional order. It also denies that majoritarianism is an ideology, that a state's choice to vote in line with the national majority is still a choice, and that a state's agency in this choice is irremediably federalist. Also, as Schleifer highlights, the perceived unfairness of an NPV-initiated majoritarian system could generate a pro-federalist backlash among states not party to the agreement. Since states currently tally their own votes, non-participating states could purposefully obfuscate to prevent NPV states from discerning the national tally or from effectuating the compact more generally.

The uncertain duration and enforceability of the anticipated compact raise even greater long-term concerns. The NPV's current popularity likely stems from immediate concerns about the Electoral College's fairness and a perceived anti-Democratic bias. It seems telling, for example, that the "Amar Plan," the root of the NPV legislation, was proposed by Professors Akhil Reed Amar and Vikram Amar after the 2000 election, in which Republican George W. Bush defeated Democrat and national popular vote winner Al Gore. It is likewise revealing that Maryland and New Jersey, two of the country's most Democratic states, are the only ones to have enacted the NPV, and that Michigan, a battleground state that gains money and attention from the Electoral College system, has not introduced NPV for a vote. However, as time passes, states' incentives will change. Majoritarianism may not work well for all states, and some of them will desire less egalitarian alliances. As Stanley Chang observes in *Recent Development: Updating the Electoral College: the National Popular Vote Legislation*, states' ability to legislate *out* of the NPV compact, after initially agreeing to it, would enable them to do this. As Schleifer notes, the possible unenforceability of the compact might enable dissatisfied states to withdraw from the compact sooner rather than later. But in either case, the Electoral College's continued existence is what would facilitate states' post-NPV deal making. The NPV's design as an end run around the constitutional amendment process will seal the compact's undoing.

II. ELECTORAL COLLEGE REFORM MUST CONFRONT THE THEORY OF FEDERALISM AND PRESENT A COMPELLING MAJORITARIAN ALTERNATIVE

Aside from highlighting the fact that a constitutional amendment is a necessary prerequisite to Electoral College reform, the NPV's likely failure also conveys a broader social message. While a majority of Americans support presidential elections by popular vote, the states' continued reliance on the Electoral College indicates that our society still believes in the Electoral College to some extent—if not at an individual level, then at an institutional one. This makes sense from a sociological perspective. As sociologists Margaret Somers and Fred Block explain in their article *From Poverty to Perversity*, popular theories become "embedded" in the public's consciousness and have independent influence on political outcomes. The NPV's

failure stems from its inability to dis-embed the federalist theory supporting the Electoral College. And the lessons for other would-be reformers are clear.

According to Somers and Block, it is fundamentally difficult for new theories to dis-embed old ones. In order to successfully dis-embed the prevailing theory, a new theory must contain “the means of making itself true” and assume a very specific form. First, a new theory must demonstrate why the prevailing theory aggravates society’s problems. Second, the new theory must explain how intelligent people could have believed the prevailing theory. And finally, the new theory must present a more compelling narrative than the one provided by the prevailing theory.

Using this framework, it is easy to understand how the prevailing federalist theory became embedded and why the NPV movement has failed to dis-embed it. The Framers conceived of our current system in response to a national crisis and incorporated that system into a coherent narrative about American identity. A federalist government was created to avoid the disarray of the Articles of Confederation and the tyranny of the Crown. Moreover, as *The Federalist*, the debates surrounding the Constitutional Convention, and other vehicles of national debate made clear, the new government reflected our identity as a people.

The NPV also conceives of itself in the context of a national crisis. As the compact’s proponents point out, the Electoral College’s recently highlighted potential to deviate from majority opinion threatens the perceived fairness and legitimacy of our electoral framework. Yet supporters of the NPV downplay the novelty of their proposal. The compact does not suggest that people are mistaken when they believe the prevailing theory of federalism behind the Electoral College. Nor does the compact present a new narrative. Instead, by leaving the Electoral College intact and proceeding on a state-by-state basis rather than adopting a national solution through a constitutional amendment, the NPV would *inhabit* the current system. It would bootstrap upon the existing federalist narrative rather than providing a new (and more compelling) majoritarian one.

In arguing that the interstate compact is constitutional, NPV supporters imply that it is consistent with federalism for states to allocate electoral votes based on national returns. But this argument is both disingenuous and counterproductive. It is disingenuous because the NPV begins with a not-so-secret presumption that federalist elections are unfair. It is counterproductive because, as Part I demonstrates, the NPV compact would only last as long as the participating states found it expedient. The NPV might provide a temporarily compelling version of the existing federalist narrative, but it cannot take root without reconceptualizing our electoral narrative along majoritarian lines. The states may reject the NPV model at any time, and the NPV never clearly says that they should refrain from doing so.

Despite the NPV’s inadequacies, however, there is reason to think that a properly constituted majoritarian narrative could meet Somers and Block’s criteria and dis-embed the prevailing federalist theory. Unlike the NPV, an amendment-oriented initiative would send a clear signal that fundamental

change is sought; it would also emphasize that majoritarian elections are not only “fair” and “who we are” but also “who we are *now*.” This is the appropriate tenor for reform, and there are plenty of notes to fill in the score.

When the Framers designed our current system, the states played a salient role in citizens’ lives. But that role has since diminished in relevant ways. The widespread use of elector pledges and winner-take-all voting indicates that citizens are now suspicious of state discretion in the context of presidential elections. Advancements in transportation and communications technology, meanwhile, signal that personal allegiances are increasingly based upon interstate ideological ties. This diminishing state affiliation suggests that the Electoral College works to promote arbitrary battlegrounds rather than to protect identity or to combat faction. Since the framing, states have also lost a great deal of power vis-à-vis the federal government. The Fourteenth and Seventeenth Amendments reflect contemporary understandings that states are potentially as tyrannical as the federal government and that majoritarianism is preferable to federalism in some electoral contexts. The trend toward majoritarianism is even more pronounced in areas pertaining to the scope and execution of federal law; the President’s increased involvement in administrative decision making and the expansion of Commerce Clause jurisprudence, for example, reflect the perceived impracticality of interest group representation and decentralized decision making in our increasingly complex society.

Placed in context, these developments toward greater federal power and majoritarianism fill in Somers and Block’s criteria. Federalism made sense at the time of the framing and still makes sense in deliberative (mostly legislative) contexts today. Yet, for ideological and practical reasons, our nation has since veered toward majoritarianism in areas under Executive purview—the areas with which Electoral College reform is most concerned. As time goes on, the prevailing federalist theory will aggravate society’s problems by increasing the probability of recounts and contentious electoral-popular splits, preventing candidates from focusing on national issues, and decreasing the legitimacy of government. And this is a message that individuals and institutions should both be able to understand.

CONCLUSION

As a creative, unorthodox attempt at Electoral College reform, the NPV deserves the attention it has garnered. But, as this Comment demonstrates, the NPV fails on both legal and sociological grounds. From a legal perspective, the NPV overlooks significant constitutional and practical-institutional obstacles. From a sociological perspective, the NPV is structurally incapable of dis-embedding the federalist theory underlying the Electoral College. This Comment suggests that a properly-constituted Electoral College reform effort could succeed where the NPV falls short. Yet, as Somers and Block point out, “all ideas are not created equal.” Reform is more complex than the game-theory dilemma the NPV portrays it as, and it must be framed by a compelling story with which the public can identify. Acknowledging how

deeply embedded the current federalist system is by returning to the amendment process would be a good way to start.