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FREE SPEECH

The National Popular Vote  
Proposal:  
*A Step Away from Federalism  
and a Step towards Chaos*





### *Points in Summary*

- The National Popular Vote (NPV) proposal is an attempt to get states to agree to a compact whereby each state would cast its Electoral votes in favor of the candidate who wins the national popular vote. This would effectively replace the Electoral College with a national popular election, without requiring a constitutional amendment.
- The NPV plan suffers from five significant practical issues: (1) the NPV plan would eliminate the Electoral College, sacrificing a crucial constitutional check on majority power; (2) the proposal would sever the connection between a state's voters and its electoral votes, removing the ability of a state's voters to dictate how their state's electoral voters are cast; (3) if a state attempts to withdraw from the NPV compact, the result would be chaos; (4) due to differing election standards in all 50 states, the NPV plan is impractical, and would be difficult to enforce effectively; and (5) the National Popular Vote plan would not achieve its primary goal of making candidates reach out to a broad swath of voters.
- Many myths abound about the NPV plan, most prominently that: (1) NPV would force presidential candidates to run truly national campaigns; (2) most states are ignored by presidential campaigns because only swing states matter in the Electoral College system; (3) the Electoral College does not guarantee that the winner of the national popular vote will win the White House, and is thus undemocratic; and (4) the NPV plan is not an end-run around the Constitution because the winner-take-all method of distributing electoral votes is not found in our founding document.
- In reality: (1) the NPV plan would decrease candidate outreach to undecided and independent voters, a far cry from its promise of making candidates run national campaigns; (2) which states are classified as "swing" states and which are classified as "safe" states changes regularly; (3) NPV will likely result in multi-party votes with more fractured support for the eventual President; and (4) the NPV plan nullifies the Electoral College without amending the Constitution, and is therefore constitutionally suspect.
- While NPV is often promoted as a means of making America more democratic, in practice, the plan is a serious step away from federalism and towards a less inclusive, more chaotic process for electing the President.

## *Introduction*

The National Popular Vote (NPV) proposal would fundamentally shift how our nation elects the President. While many well-intentioned individuals and organizations support this cause and compelling arguments can be made in its favor, the NPV plan ultimately represents a scheme that creates more problems than it purports to solve and would largely fail to achieve the outcomes desired by its proponents.

The Institute for Free Speech has prepared this primer to briefly review and summarize some of the key shortcomings of the NPV proposal as well as to debunk some of the most common myths associated with this plan for electing the President.

## *The Reality behind the National Popular Vote Proposal*

The U.S. Constitution sets out the institution by which the President is elected: the Electoral College. While the system has undergone numerous amendments in the nation's history, the basics of the system remain unchanged. Each state receives a number of Electors based on its representation in Congress, and these Electors cast votes for President. Each state may decide how to cast its Electoral votes based on its own laws, giving each state's voters control over their state's votes.

Critics of the Electoral College frequently argue that it is undemocratic for the President to be elected if he or she did not win a majority or a plurality of the nation's voters, as occurred in 2000 when Al Gore won the popular vote, but George W. Bush won the election. The National Popular Vote proposal is an attempt to get states to agree to a compact whereby each state would cast its Electoral votes in favor of the candidate who wins the national popular vote. This would effectively replace the Electoral College with a national popular election, without requiring a constitutional amendment.

While the simplicity of a national popular vote for electing the President is often appealing, such a system would suffer from a number of foreseeable flaws. Additionally, the value of the Electoral College as a check on majority power is often forgotten. The following sections explain the challenges facing a national popular vote system, and evaluate the accuracy of statements made about the NPV proposal.

## *Five Practical Issues with the National Popular Vote Proposal*

### **I. The Electoral College is a critical part of our constitutional checks and balances.**

The NPV plan would jettison a nearly 220-year-old system for electing our nation's President. In doing so, it would reject one of the many carefully-crafted checks on majority rule designed by the Founding Fathers to safeguard minority rights.

The Electoral College ensures that in order to be elected President, a candidate must appeal to not only a majority or even plurality of voters, but also to voters from a geographical



cross-section of the country. This system requires that candidates for the highest office in the land are not able to simply rely on highly energized, sympathetic, and homogenous voters concentrated in only a few densely-populated parts of the country.

Instead, candidates must be able to appeal to multiple constituencies, building broad coalitions based on policies that address the needs and interests of Americans across the country. The plan would eliminate the need for candidates to build these coalitions in support of their candidacies, allowing them instead to focus on issues that appeal to and motivate their partisan base.

The requirement that candidates appeal to voters across the country and not just in a handful of populous areas is an important check on the power of a narrowly-focused majority to trample the rights of the minority. The NPV scheme would eliminate this important check.

## **II. The NPV proposal would remove any connection between a state's voters and its electoral votes.**

Another important deficiency with the plan is that it severs the intrinsic link between a state's citizens and a state's electoral votes. Instead of each state's electoral votes being determined based on the interests of its citizens, a state's electoral votes are allocated based on criteria having little, if anything, to do with the interests and preferences of its residents.

Advocates of the NPV plan claim that states have not always relied on citizens' votes to allocate their electoral votes. For example, in early American history, several states gave the power to appoint electors directly to the state legislature.

However, even then, the electors were appointed by officials that were accountable to the state's voters, and presumably were required to heed the interests and preferences of their citizens. The NPV compact breaks this vital connection, allowing a state's electoral votes to be awarded based on criteria wholly unrelated to the wishes of its citizens.

For instance, if a state legislature can award electoral votes based on election results outside of its jurisdiction, could that legislature also simply delegate the power to appoint electors to a special commission? Could it establish a system of choosing electors that sought to "correct" or "balance out" perceived inequities in the demographics of who votes and who does not? Could it substitute for the recorded totals of nationwide votes an estimate based on how the vote would have turned out if only other states had run "fair" elections?

By cutting the link between a state's voters and a state's electoral votes, the NPV plan would open a Pandora's Box of possibilities for alternate methods of awarding electoral votes.

### **III. The NPV compact would cause chaos if a state attempts to withdraw.**

Abandoning the Electoral College as it presently operates would also create significant opportunities for political gamesmanship as states may seek to obtain partisan advantage for one party or another by entering or leaving the compact (or threatening to do so), if it seems advantageous at any given moment.

For example, a state legislature may conclude late in the election cycle that a candidate overwhelmingly favored by its voters is unlikely to win a majority or plurality nationwide, but might win the Presidency if the state were to revert to the traditional Electoral College. As state legislators are only accountable to their own voters, and not any sort of national majority, they may conclude it is in their best interest to abandon the NPV plan.

The temptation to withdraw from the compact under such a scenario would be irresistible to some. One need only recall the partisan maneuvering regarding a Massachusetts U.S. Senate seat in 2004, when a legislature controlled by Democrats stripped a Republican governor of the power to appoint a replacement in the event that Democrat John Kerry won the presidency, and again in 2009 when the Democratic legislature restored the power to appoint a replacement to a Democratic governor when it appeared doing so would provide the U.S. Senate with a timely 60th vote for health care reform.

Because the authority to determine how a state's electors are appointed is given exclusively to the state legislature, it may well be that a state cannot delegate that power to a body not under its jurisdiction, i.e. the other 49 states. It is thus uncertain whether a state could legally withdraw from the compact even though NPV supporters claim that states cannot. Nevertheless, simply the attempt to do so would spur nationwide outrage and chaos, leading to court battles reminiscent of *Bush v. Gore* in the 2000 election.

### **IV. Differing election standards make the NPV plan impractical and confusing.**

Concerns over ballot fraud, controversial election management practices, and different recount processes would also create the potential for chaos and conflict.

Under the present system, a specific instance of ballot fraud can only impact the state in which it occurs. Thus, only in a handful of states, where the vote is likely to be very close, can election fraud affect the outcome. While still concerning, the damage is contained to a single state.

However, under the NPV plan, a fraudulently-cast ballot in any state doesn't simply affect how that one state awards its electoral votes; it affects how a majority of electoral votes are cast. Thus, a fraudulently-cast ballot in Texas or New York, or rather thousands or even tens of thousands of fraudulently-cast ballots in these or other states, would help to determine how 270 Electoral College votes will be cast; not simply the electoral votes of the state in which the fraud occurred.



Similarly, each state has different sets of election laws, determining who may vote, and what process they must follow. Practices such as expunging felons from voter rolls, same-day voter registration, voter identification, and countless other procedures differ from state to state, creating significant problems because not all voters will be treated the same way nationally.

Consider Utah and Wyoming, states which have dramatically different policies on voting by felons. Utah bars currently incarcerated felons from voting, but that ban is lifted once they are released. Wyoming, however, permanently bars felons from voting even after release.

Under the Electoral College system, both states select their electors based on the election rules and standards they have chosen – in Utah, to include citizens with felony convictions in their past, and in Wyoming to prohibit such citizens from participating.

However, under the NPV plan, both states risk having their electoral votes allocated through processes that they have otherwise rejected: Utah might see its electoral votes determined without the votes of citizens they believe should be allowed to vote, while Wyoming might see their electoral votes cast based on the votes of released felons, in contrast to its laws.

This example and countless others demonstrate how each state has determined, through 50 separate political processes responsive to each states' citizens, who can and cannot vote and under what circumstances. The NPV compact would instead force states to allocate their electors based on an election process that is contrary to the wishes of a state's residents.

It's also important to note that the prospect of a recount would create confusion and outrage in the case of a close election. States have different standards and requirements for triggering recounts, and it is not at all clear whether recounts would be held in all fifty states in the event of a close national vote, or only in those states in which the vote was close. If only "close" states go through a recount, voters in other states are not treated equally, and if the recount is nationwide, the nation will endure a crisis equivalent to fifty Florida 2000 recounts.

In addition, standards for recounts vary from state to state, and what is counted as a vote in one state may be disqualified in another. This sparked considerable controversy in Florida during the 2000 recount, when standards varied by county. The NPV plan would magnify the confusion and controversy over how to determine valid and invalid votes in a nationwide recount.

**V. The National Popular Vote plan would not achieve its main goal.**

Finally, the belief of NPV advocates that abandoning the Electoral College will ensure candidates reach out to and address the concerns of more voters is simply not accurate.

All elections require candidates to make strategic decisions about which voters to reach out to, in what manner, and how often. Because resources are scarce, especially candidates' time, a presidential campaign under the NPV system would simply require candidates to allocate their scarce resources differently, perhaps choosing to ignore different voters than they may now, but inevitably choosing to devote few if any resources to broad swaths of the public.

In fact, the NPV plan is likely to increase candidates' time spent on addressing the needs and issues of "base" voters while decreasing outreach to undecided and independent voters. Rather than appealing to a broad cross-section of voters in different states around the country, it would be in a candidate's self-interest to appeal primarily to well-organized constituencies with large and motivated national memberships.

Candidates are also likely to spend more time in urban and suburban areas, where potential votes are far more plentiful. Whereas, under the current system, holding a Presidential campaign event in a smaller, rural community might make sense in order to garner enough votes to win a specific state's electoral votes, under the NPV system, there is little reason for candidates to venture outside of densely-populated areas.

## *Debunking Four Common Myths about the National Popular Vote Proposal*

- I. Myth: NPV would force presidential candidates to run truly national campaigns because votes in every corner of the country would have equal weight.**

**Fact:** Eliminating the Electoral College would undermine the need for national campaigns and promote campaigns aimed at heavily populated urban areas. Candidates have limited time and resources and must strategize and prioritize. Campaigns aimed at big cities would be immensely more productive, as a matter of pure math. In a world without the Electoral College, rural areas and small states will never again matter in a presidential election.

- II. Myth: Most states are ignored by presidential campaigns because of the Electoral College. Only swing states matter. NPV would fix this.**

**Fact:** The identity of "swing" and "safe" states changes all the time. Texas used to vote reliably Democrat, just as California used to vote reliably Republican. Georgia, Kentucky, and Louisiana all voted for Bill Clinton, but they were considered very safe Republican states in 2008. An honest assessment of American history shows many other such examples. No political party has ever been able to ignore any state for too long without feeling the ramifications at the polls.

- III. Myth: The person who wins the national popular vote should win the White House. The Electoral College does not guarantee such results, and is thus undemocratic.**



***Fact:*** The question is not “democracy” v. “no democracy.” Rather, the question is “democracy with federalism” (the Electoral College) v. “democracy without federalism” (NPV). America’s unique blend of democracy and federalism has served the country well. In this context, it encourages presidential candidates to create national coalitions. A candidate must do more than simply rack up a majority of voters in one region or support among the voters of one special interest group. Rather, the candidate must appeal to a variety of Americans before they can win a majority of states’ electoral votes.

Moreover, NPV proponents too quickly dismiss the possibility that the presidential election system will change as the rules of the game change. These changes will make it impossible for candidates to achieve majority support: NPV allows any plurality winner to take the White House. Multi-party races will become more common, and voters will be more easily fractured, splitting their votes across several candidates. If a President is elected with the support of 30% of Americans, is this “better” or “more fair” than our current system? No election system can make a majority of Americans agree on the identity of the best President. But the Electoral College offers the next best thing: it can be won only by a candidate who achieves simultaneous victories across many states; thus, it is better able to identify a good compromise candidate that satisfies most Americans, as represented by their states.

**IV. *Myth:* NPV is not an “end-run” around the Constitution because the winner-take-all method of distributing electoral votes is not in our founding document.**

***Fact:*** NPV’s compact turns the current presidential election system on its head. If it is legal, is it only because NPV has found a loophole in the law. The compact will certainly be contested. There are many reasons to argue that it would be unconstitutional, as has been detailed elsewhere.<sup>1</sup>

Legislators should remember that the Constitution was the product of much give and take. It never would have been ratified, at least by the small states, but for the compromises that were made at the Constitutional Convention. Indeed, the small states explicitly objected to a national direct election for President; they feared that the large states would trump them each and every presidential election year. Moreover, the delegates deliberately created a difficult constitutional amendment process (requiring approval from  $\frac{2}{3}$  of Congress and  $\frac{3}{4}$  of the states). This tough process exists, at least in part, to protect the small states from tyranny by the large states. NPV attempts to undercut all of these protections and go against the Founders’ wishes.

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<sup>1</sup> Tara Ross, “Legal and Logistical Ramifications of the National Popular Vote Plan,” *The Federalist Society for Law & Public Policy Studies* (2010).



## *Conclusion*

However well-intentioned its proponents are, the National Popular Vote proposal would not achieve its goal of making presidential elections more responsive to the people. On the contrary, NPV would allow presidential campaigns to focus all of their efforts and resources in the areas with the highest population. It would also further fragment the political landscape by making it easier for parties and candidates to succeed by appealing to just one region or special interest. The Founders understood that the nation could not survive if political power was centralized this way, and created the Electoral College to ensure that small states and rural areas could not be ignored by presidential campaigns.

The Electoral College is conducive with democratic values because it forces presidential candidates to appeal to a diverse range of Americans. While NPV is often promoted as a means of making America more democratic, it is actually a step away from democratic values, away from constitutional checks and balances, away from federalism, and towards the tyranny of the majority that so concerned the Founders.



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