

## **National Popular Vote**

Imagine the likely scenario that Rhode Island voters will overwhelmingly support the re-election of President Obama, Democrat, this November by the same 63%-35% margin as they did in 2008. Then imagine the possible scenario that Rhode Island's (4) "Electoral Votes" would instead be assigned to the President's Republican opponent! In future Presidential elections the reverse scenario could also occur.

Outrageous? Yes, but possible if the National Popular Vote (NPV) initiative is passed in Rhode Island and in a number of other states. This potential sham would clearly not represent the constitutionally guaranteed voice of Rhode Island voters.

This Policy Brief summarizes some of the key shortcomings of the NPV compact as well as to list more extensive research and analysis on this subject. Most of the following material was reproduced from a Policy Memorandum previously published by the Center for Competitive Politics<sup>1</sup>.

**The National Popular Vote (NPV)** proposal would represent a fundamental shift in 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.

In addition to the scenario presented above, there are six major reasons why the NPV initiative should be of major concern for citizens and policymakers:

- 1) The Electoral College is a critical part of our constitutional checks and balances
- 2) The NPV proposal would remove any connection between a state's voters and its electoral vote
- 3) The NPV compact would cause chaos if a state attempts to withdraw
- 4) Differing election standards make the NPV plan impractical and confusing
- 5) The National Popular Vote plan would not achieve its main goal
- 6) The National Popular Vote plan may be unconstitutional

### **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.

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

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 own citizens.

Advocates of the NPV plan claim that states have not always relied on citizens' votes to allocate their electoral votes. For example, early in 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 for a state's electoral votes to be awarded based on criteria wholly unrelated to the interests and preferences of the state's citizens.

For example, if the state legislature can award electoral votes based on election results outside of its jurisdiction, could the legislature also simply delegate the power to appoint electors to a special commission? Could they 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 they 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.

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

Abandoning the Electoral College as it presently operated 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 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.

### **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 undesirable, the damage is contained to a single state.

However, under this 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.

But under the NPV plan, both states risk having their electoral votes allocated through processes that they have otherwise rejected: Utah might see their 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 their 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 that 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 50 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.

What if no state recount was automatically triggered because of close statewide vote, but the national vote was exceptionally close?

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.

### **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 do 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, doing a Presidential campaign event in smaller, rural communities 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.

### **NPV May Be Unconstitutional<sup>2</sup>**

Supporters of the NPV claim that because the Constitution gives state legislatures the power to determine how electors are chosen, the NPV is constitutional and requires no approval by Congress. Such claims, however, are specious. The NPV is unconstitutional because it would give a group of states with a majority of electoral votes "the power to overturn the explicit decision of the Framers against direct election. Since that power does not conform to the constitutional means of changing the original decisions of the framers, NPV could not be a legitimate innovation."<sup>3</sup>

The Constitution's Compact Clause provides that "No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State."<sup>4</sup> The Founders created the Compact Clause because they feared that compacting states would threaten the supremacy of the federal government in matters of foreign affairs and relations among the states.<sup>5</sup> If states could make agreements among themselves, they could damage the nation's federalist structure. Populist states, for example, cannot agree to have their U.S. Senators vote to

seat only one Senator from a less populous state.

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

By circumventing the checks and balances of Congress, the NPV would risk setting a precedent that states can validate non-congressionally approved compacts as a substitute for a constitutional amendment.

### **Further Reading:**

*A Critique of the National Popular Vote Plan for Electing the President*, John Samples, Cato Institute, October 2008, available at: <http://www.cato.org/pubs/pas/pa-622.pdf>.

*Enlightened Democracy: the Case for the Electoral College*, Tara Ross, Colonial Press, September 2005.

*The Importance of the Electoral College*, Dr. George Grant, Vision Forum Ministries, August 2004.

*Securing Democracy: Why We Have an Electoral College*, Professor Gary L. Gregg, Intercollegiate Studies Institute, January 2008.

<sup>1</sup> Center for Competitive Politics, by Sean Parnell, March 1, 2011; [http://www.campaignfreedom.org/2011/03/01/httpwww-campaignfreedom-orgdoclib20110819\\_npvpolicymemo-pdf/](http://www.campaignfreedom.org/2011/03/01/httpwww-campaignfreedom-orgdoclib20110819_npvpolicymemo-pdf/)

<sup>2</sup> The Heritage Foundation: [http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme#\\_ftn17](http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme#_ftn17)

<sup>3</sup> Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 Election L.J. 3, 217 (2008); Samples, *supra* note 13, at 9

<sup>4</sup> U.S. Const. amend. XII; 3 U.S.C. §§ 1–21. Congress meets in joint session to count the electoral votes in January. If no candidate wins a majority of the electoral votes, the House selects the President and the Senate selects the Vice President, with each state delegation in the House having only one vote; art. I, § 10, cl. 3

<sup>5</sup> The Heritage Guide to the Constitution 178 (Edwin Meese III et al. eds., 2005).