



LWVUS National Popular Vote Compact Study, Supporting Arguments

by

Gail Dryden(CA), Barbara Klein (AZ), Sue Lederman (NJ),
Carol Mellor (NY), and Jack Sullivan (CA)

The National Popular Vote (NPV) Compact provides a way to choose the President of the United States by popular vote without amending the Constitution. These are the arguments in favor of the NPV Compact.

The League of Women Voters of the United States (LWVUS) already has a position in favor of abolition of the Electoral College and adoption of the “direct-popular-vote” method for electing the president and the vice president. The NPV Compact proposes a way to accomplish the goal of using the direct popular vote for presidential elections.

Given that the LWVUS is already on record favoring abolishing the Electoral College, we do not here directly address the shortcomings of the Electoral College except to the extent necessary to present the arguments.

CONSTITUTIONAL ISSUES

Difficulty of Amending the Constitution. Amendment of the Constitution to eliminate the Electoral College would accomplish the goal of election of the president by popular vote, but that is a very long process with uncertain results. People want to believe that their votes count but the current system suggests to many that this is not the case. Most of the electorate is also in favor of a system in which the candidate who receives the most votes wins – over 70 percent in some polls favor a direct election for president. Thus, a more rapid, direct path to the national popular vote would be in the interests of the electorate.

Amendment Necessary or Not. No constitutional amendment is needed to implement the NPV Compact. Under the U.S. Constitution, the states already have the right and power to implement the change. Primary constitutional authority for the Compact is found in Article II, section 1, clause 2.

Supreme Court cases have established that this wording gives exclusive and complete power of appointment and mode of appointment of electors to the states and that it is up to each state to decide how to exercise the power as they deem fit (as long as no other provisions are violated).

Interstate Compacts are Legitimate. The crux of the NPV Compact proposal is an interstate compact in which states would commit to cast their votes for the winner of the national popular vote. Interstate compacts, involving a myriad of topics, have long been a part of U. S. history and are, in fact, sanctioned by the Constitution. The courts over the years have upheld such compacts and ruled that they are contracts that bind the parties to the terms of the agreement.

Congressional Consent. The constitutional provision which permits interstate compacts between states says:

“No state shall, without the consent of Congress,...enter into any agreement or compact with another state...” U. S. Constitution. Article 1, Section 10.

Supreme Court rulings have established that most compacts do not, in fact, require congressional approval. However, to avoid time-consuming litigation on this procedural issue, backers have decided to seek congressional consent. In deference to the exclusive power of the states to decide the manner of awarding electoral votes, the question might be presented to Congress in the form of a bill to grant consent to the Compact on behalf of the District of Columbia. Proponents believe that positive action on this legislation would imply tacit congressional consent to the Compact as a whole.

EVALUATING FAIRNESS

President of the Minority. Voters assume that the candidate who wins an election will be the candidate that received the most votes—either a majority or a plurality (in multi-candidate elections). When the “victor” actually receives fewer votes than another candidate, people are led to question the nature of our electoral system. It is unnerving to the electorate when a country supposedly based on majority rule ends up with a “minority” president. This problem is eliminated under the NPV Compact. Furthermore, presidents elected by a popular majority via the NPV Compact would be “stronger” presidents because they would have a greater, more democratic legitimacy.

Few Battleground States. Under the current Electoral College system, presidential campaigns focus on a few key states which are the determinants of an Electoral College victory or loss. The electoral votes of these battleground states are viewed as the lynchpins of the election, and most media and candidate attention are focused on the few “competitive” states whose Electoral College votes are believed to be at stake. Voters in other states become observers of the process watching as the voters in a very few of the fifty states are courted intensely by the presidential candidates. Under this system, some votes are worth much more than other votes. A large portion of the country is ignored by the major candidates, except to the extent that the candidates visit “safe” states in search of campaign funds to fuel their activities in the toss-up states.

Under the NPV Compact, candidates would have to be sensitive to the trend of opinion in all states and to develop campaign strategies that appeal to a very broad spectrum of the electorate. In this way, the NPV Compact would bring many more voters directly into the electoral process and take them out of the “spectator from afar” role. Equally important, with the outcome depending on the NPV, voters across the country would have a sense that their vote would indeed count in a meaningful way and this would provide stimulus for greater attention to the campaign and greater participation in the electoral process. The NPV Compact would make it worthwhile for candidates to campaign throughout the country, thereby increasing interest in the election nationwide.

State Identity. States’ rights advocates argue that it is an affront to state sovereignty to award a state’s electoral votes to a candidate who did not carry that state. This assumes that the voters within that state care more about their state identity than their own personal vote. The question is whether it is more important for the winner in a particular state to receive the state’s electoral

votes or for the winner of the entire country to be selected as president. Polls indicate that only about 20 per cent of the public support the current system of awarding all the electors of that state on a winner-take-all basis instead of a popular vote. Seventy per cent oppose the current system, 10 per cent are undecided, suggesting that most voters might opt for the national popular vote over states' rights.

Influencing the Winner. Critics of the NPV Compact claimed that “11 colluding states” (as they term them) could theoretically impose their will on the country because those states contain the majority of the population and account for the 270 electoral votes needed for the Compact to take effect. While these 11 largest states do contain 56 per cent of the population, the real likelihood of such “collusion” is extremely small as they have little in common politically. Of the 11 states, recently five tended to vote Republican (Texas, Florida, Ohio, North Carolina, and Georgia) and six tended to vote Democratic (California, New York, Illinois, Pennsylvania, Michigan and New Jersey). Furthermore, the NPV Compact has so far been enacted by four states: Hawaii (a small state), Maryland (an average-sized state), and New Jersey and Illinois (large states). Although passed by the Maine Senate and both houses in Vermont, California and Rhode Island, the Compact has not been signed into law by the governors of those states. Support for the NPV Compact has been across the board so far and in no way limited to the largest states.

Questioning the Approach. Opponents have portrayed the interstate compact approach as inappropriately disregarding the U.S. Constitution. This argument ignores the fact that many amendments to the Constitution have begun as state actions to change practices which could have been (and eventually were) changed by constitutional amendment.

The very right to vote for president was begun through enactment of laws by state legislatures - on a state-by-state basis. In 1789 only five states permitted a direct vote for electors. By 1824 three-quarters of the states had such a right, but it was not until 1880 that a direct vote of the people was fully enacted.

Other fundamental voting changes have been accomplished through state-by-state changes in law. Among such changes in voting initiated by state action were the abolition of the requirement that voters be property holders and the extension of the franchise to women, blacks and persons under 21. All of these changes were begun by legislation in individual states, followed by constitutional amendment, and few, if any, questioned supporters' motives. No one criticized the approach as an end run around the Constitution. Many citizens benefited from this process, including women who were able to vote in some states before passage of the 19th amendment. .

Small States. The political power of small states would be increased under the NPV Compact. Currently, political power generally resides in the closely divided battleground states. Few of the 22 least populous states are battlegrounds. With the NPV Compact each vote becomes important regardless of the state; state size and closeness of the race within a state would be less relevant.

Electing the REAL Winner. Out of our nation's 55 presidential elections, there have been four “wrong winners,” that is, elections in which the candidate elected to the presidency is not the person who won the most votes. This is a failure rate of 1 in 14, which does not instill confidence in the procedures for electing the President of the United States.

When an election is a landslide, there is less chance of a “wrong winner,” but the more divided the country and the closer the elections, the greater the chance of erroneous results. We now

appear to be in an era where many elections are close. The NPV Compact would eliminate the possibility of a “wrong winner.”

MECHANICAL CONSIDERATIONS

Enforcements: Post-Election Protection of Rules. Some critics warn that a state legislature might, for partisan reasons and after signing onto the Compact, change the rules for awarding electoral votes -- after the people have voted, but before the Electoral College meets.

The drafters of the NPV Compact have anticipated such a problem and have included a mechanism which permits a state to withdraw from the Compact, but only according to a timetable which prevents deleterious effect upon a particular election.

There is a black-out period from July 20th until January 20th of presidential election years during which time a compacting state cannot withdraw or repeal its law. This time frame was chosen because it includes six major events relating to the presidential election (the national conventions, the campaign period, Election Day, Meeting of the Electoral College, counting of the electoral votes, and Inauguration Day).

Case law supports the enforcement of such a provision holding that interstate compacts are contracts that bind the parties to the agreement. Further, Americans are committed to the notion of fairplay and would react strongly to efforts by one state to “break the rules.”

Winning Levels. The winner-take-all rule (currently used by 48 of the 50 states) is not required by the U.S. Constitution. It is entirely a product of state law. Accordingly, changing the winner-take-all rule does not require an amendment to the Constitution but may be changed in the same way that it was originally adopted, namely by the enactment of state laws by state legislatures on a state-by-state basis.

Recounts. It is anticipated that the need for recounts will diminish under the NPV Compact because, although the vote count can be extremely close in battleground states, the numbers are not close on a nationwide basis. Should a recount be necessary, the plans and resources to conduct a recount would still be the responsibility of the state experiencing the close vote. However, due to the larger pool of voters, it is more likely that the national results would not be close and, as a result, fewer statewide recounts would be necessary.

Election Fraud. The adoption of the NPV Compact would diminish the danger of both voter fraud and election fraud/voter suppression. Under the current system, with only a few battleground states in play, the temptation to engage in election fraud or voter suppression is increased by the skewed weight of votes in battleground states. In the Electoral College system, with most states using a winner-take-all process, one fraudulent vote could affect the entire state’s electoral votes. Under a direct popular vote system nationwide, one fraudulent vote has far less effect on the outcome.

OTHER ISSUES-

Voting Rights Act. The NPV Compact is in total harmony with both the terms and purpose of the Voting Rights Act, which was enacted to guarantee equality of the vote throughout the United States, particularly in relation to racial minorities. The NPV Compact’s goal is to create an equal vote for all voters throughout the United States.

Faithless Electors. The faithless elector issue is not a practical concern. States already have constitutional authority to address problems as they come up. The NPV Compact, awarding the nationwide winner the majority of electoral votes as a base, makes the possibility of a faithless elector having any effect on the election unlikely. Considering the support the winner would need to garner a nationwide win, the candidate would probably earn at least another half of the remaining votes in non-compacting states as well – a strong support that would discourage faithless electors. Additionally, the state electors casting their votes for president will be from the party that won nationwide. The NPV Compact is more likely to protect against faithless electors than does the current system.

LEAGUE ISSUES

Uniform Standards. The LWVUS supports uniform national voting standards. The NPV Compact aims for having all the states become members of the compact, and thus shares the goal of a uniform and universal method of electing the President. The fact that the Compact will become effective at a time when states representing 270 electoral votes have joined does not change the ultimate goal that all states adopt the Compact. Further, the NPV Compact creates uniform standards because every national vote would be counted equally if it were to go into effect.

CONCLUDING ARGUMENTS SUPPORTING THE NPV COMPACT

One of the most compelling arguments in support of the NPV Compact is that this method ensures that the candidate who receives the most votes in the national election is elected President, and does so by using the Electoral College system of electing the President of the United States. Amending the U.S. Constitution in order to eliminate the Electoral College and, instead, establish the direct election of the president is much more cumbersome and much less likely to succeed. Above all, the most appealing argument in support of the NPV Compact is that every vote, of every party and of every voter is counted fairly and equally.