

## **PROBLEMS WITH THE NATIONAL POPULAR VOTE PLAN**

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## PROBLEMS WITH THE NATIONAL POPULAR VOTE PLAN

Because of the problematic nature of the Electoral College system for electing the President, many constitutional amendments have been proposed to modify or replace it. An amendment providing for direct popular election of the President passed the House of Representatives by a large majority in 1969 but it later failed in the Senate. Even if it had passed the Senate, ratification by three-quarters of the states was doubtful. The so-called 'National Popular Vote Plan' (NPVP) has been proposed as a way to bring about direct popular election of the President while circumventing the constitutional amendment process.

The basic idea is that any state could cast its electoral votes, not for the presidential candidate winning the popular vote of that state, but for the candidate winning the popular vote nationwide. The NPVP is a proposed compact among states controlling at least 270 electoral votes that commits each member state to cast its electoral votes in this manner, thereby guaranteeing election of the national popular vote winner. As of August 2014, 10 states and the District of Columbia, controlling 161 electoral votes, had enacted legislation in support of NPVP.

The NPVP is undoubtedly a clever device but it raises several sets of problems. The first includes all the issues that pertain to direct popular election itself and thus also to any proposed constitutional amendment to accomplish this; I allude to one only of these issues here. The second includes the problems that uniquely arise in trying to convert the Electoral College system into direct popular election through the NPVP device; these issues are my focus here. (A third set involves legal and constitutional uncertainties pertaining to interstate compacts, which I do not address here.)

The most basic problem is that, under the present Electoral College system which the NPVP would nominally preserve, the 'national popular winner' is an unofficial designation bestowed only by the media and commentators. No official body designates such a winner and the designation may be contested in the kind of very close election in which the NPVP would be mostly likely to make a difference. The NPVP requires 'the chief election official of each member state' to make a determination of 'the national popular vote winner' and, in doing so, to treat as 'conclusive' official statements concerning the popular vote for president from non-member (as well as member) states. This presumably guarantees that the election officials of all member states would make the same determination of the 'national popular vote winner,' but it accomplishes this by depending on (possibly questionable and/or contested) statements by state officials. Furthermore, the national popular vote, however determined, might be extraordinarily close. (Consider the recorded national popular vote margins in 1880 and 1960.) This would make a national vote recount essential, even if the popular vote were not close in any individual state. But under present law only states are able to conduct recounts and they conduct them only when the vote within the state is very close, and in any case the NPVP could not compel non-member states to conduct recounts.

There is also the problem that states are not constitutionally required to hold direct popular votes for unified elector slates (thereby producing statewide presidential popular vote counts), though at present all states (even Maine and Nebraska with their district systems) actually do this. (But in 1960 Alabama electors were elected individually, making the 'national popular vote winner' in that very close election even more ambiguous.) The NPVP compact requires member states to hold such elections, but obviously it cannot require non-member states to do so. A provision in the plan implies

that non-member states that fail to hold such elections will not be included in the determination of ‘the national popular vote winner.’ This sidesteps the problem and provides an incentive for all states (non-members as well as members) to (continue to) hold such elections. But if some non-member state were nevertheless to fail to hold such an election (for example, by voting for electors individually) and were thereby excluded from the compact’s determination of the ‘national popular vote winner,’ and if the outcome of the election turned on this exclusion, a huge political and legal controversy would likely arise.

In addition, the concept of a ‘national popular vote winner’ remains muddled even in principle as long as different states have somewhat different voter qualification laws (regarding residency, voter ID, felon disqualification, etc.) and considerably different laws pertaining to ballot access for minor parties and independent candidates, with the result that identifying ‘the national popular vote winner’ entails adding up votes across states in which voters eligible under somewhat different standards are presented with somewhat different sets of presidential candidates.

In the event of a genuinely multi-candidate presidential election, the NPVP has the advantage of precluding an Electoral College deadlock in which no candidate receives the required 270 electoral votes, thereby reliably keeping elections out of the House of Representatives. But it might do so in way that could provoke great controversy — if, for example, the ‘national popular vote winner’ got only about 35% of the vote and also failed to win 270 electoral votes counted in the normal manner.

A final issue pertains to the durability of the interstate compact itself, especially in the face of controversies such as those envisaged above. The compact provides a nice example of what political theorists call a ‘social contract,’ but it also highlights the problem of ‘credible commitment’ — whether the terms of the ‘social contract’ would be adhered to and how they could be enforced promptly and reliably in a closely contested election. Clearly there would be a strong incentive for a state whose electorate supported (perhaps by a large majority) the national popular vote loser to defect from the compact precisely when the compact produces a winner different from the normal Electoral College winner, and such a defection would tend to be legitimized in the face of a very close national popular vote. Such a defection could produce legal controversies that would make those that followed the 2000 election seem minor.

In sum, the NPVP is something of a jury-rigged addition to an already jury-rigged Electoral College system. In contrast, a properly drafted constitutional amendment could produce a new presidential election system from the ground up. If the national popular vote is really to determine the presidential election winner, a national election commission, not 50 different state entities, needs to run presidential elections, with nationally uniform voter qualifications, national voter registration, a nationally uniform ballot access law, and so forth. In addition, the issue of whether there should be some sort of runoff (instant or otherwise) in the event the leading candidate falls below some threshold needs to be confronted. (The failed 1969 amendment addressed some but not all of these issues.)