

**NATIONAL POPULAR VOTE
OPPOSITION to HB 2927 as introduced
Summarized as Enacts Interstate Compact for Agreement Among the States
to Elect the President by National Popular Vote.**

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From
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Dear Chair Williamson and members of the House Rules Committee

The NPV (National Popular Vote Compact) is an attempt to address two ‘problems’, presidential elections in which the person who got the most popular votes did not get the most electoral votes and the ‘disenfranchisement’ of voters in non-battleground states.

Only four times in our history has the holder of the most popular votes not gotten the most electoral votes,¹ 1876, 1888, 2000 and 2016. Thus eighty-seven years before the first time this happened in 1876, then a twelve year gap to 1888, then a one hundred and twelve year gap to 2000, then a sixteen year gap to 2016. Even counting 1824 this happens on average once every forty-five years. We really should get this fixed before the election of 2060 or maybe before 2128.

The NPV website identifies battleground states by counting post-convention public campaign events attended by the presidential or vice-presidential candidates. Private fund raisers don’t count. Non-campaign events don’t count, this category is, as far as I can tell, events that would occur even if the candidates did not attend for example the Al Smith dinner in New York or the VFW convention. In 2008 only 14 states had seven or more post-convention general election campaign events.² If you don’t live in one of these states your state is without influence, the

¹ Five counting the election of 1824 in which the likely holder of the most popular votes also had the most electoral votes and still did not get elected President in 1824. In 1824 the electors from the states of SC, GA, NY, VT, DE, and LA were appointed by their respective state legislatures (and not elected in a popular vote) so the popular vote totals are less meaningful.

² Table 9.1 <http://archive.nationalpopularvote.com/pages/answers.php>

political parties do not reach out to you and you are disenfranchised. Personally I would think that where the money came from would be a better test of influence. In the 2008 more than half of campaign donations (\$427,014,623 out of \$851,122,440) came from just five states: California, New York, Illinois, Texas, and Virginia plus the District of Colombia.³ Only one of these, Virginia, was a battleground state. The focus on battleground states is largely an effect of a horse race obsessed media and shows a basic misunderstanding of how a national coalition is formed. Nationwide support is not created by the actions of a set of single individuals operating for three months every four years but by political parties operating in all of the states all of the time.

Still just because a problem is minor or infrequent does not mean that we should not try to fix it, so we need to take a look at the problems with National Popular Vote Compact.

The NPV includes this clause “The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.” Without this the chief election official of each state in the compact would have to vet the elections of all 49 other states and there is not enough time in the election cycle to do this. Some discretion has to remain with the Secretary of State. If the chief election official of Wyoming were to certify that 300,000,000 votes were cast in Washakie County for the Constitutional Law Party that clearly does not commit Oregon’s electoral votes. The question is how overt must a fraud be to let us out of the compact. If a large non-member state is the last to certify its total and this moved the national vote to give a party a 50,000 vote edge would that be suspicious enough to let us opt out? It can be argued that election fraud on that scale has never occurred in the US and would be difficult to achieve. Still, human ingenuity is great and we have never given anyone an incentive to commit a fraud that large.

The NPV is enforceable, but only by court action, which would have to be resolved in the time between the date that all state elections are certified and five days before the Electoral College has to vote.

³ Table 9.2 <http://archive.nationalpopularvote.com/pages/answers.php>

Any recounts would have to take place in the time between the date that all state elections are certified and five days before the Electoral College has to vote.

It may require an act of Congress to become operational. "...treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty... In such cases, the consent of Congress may be properly required..." U.S. Supreme Court Virginia v. Tennessee, 148 U.S. 503 (1893) ⁴ If an act of Congress is not obtained the courts might rule that this clause does not apply, but they would have to make a ruling, which would have to be resolved in the time between the date that all state elections are certified and five days before the Electoral College has to vote.

A large number of Constitutional objections to the NPV have been proposed. To be fair I find most of them implausible, but if the NPV became operational every one of them would be litigated in federal court and in the state courts of every party to the compact. All of these cases would have to be resolved in the time between the date that all state elections are certified and five days before the Electoral College has to vote.

If any of these problems are not resolved the electoral votes of some states might not be counted and it is possible, even likely, that the presidential election, after the compact goes into effect, would be decided by the House of Representatives.

We could deal with the problem of equity by dividing the states' electoral votes into fractions. The NPV website speaks well of this. "The fractional proportional approach would succeed in making voters relevant in all 50 states and the District of Columbia because some fraction of an electoral vote would always be at stake in every state."⁵ This could be done without a compact or a constitutional amendment. There is one objection and one problem with this. The objection is that it is impossible to cast or count fractional electoral votes. As casting is under the absolute control of the state legislatures, electors will cast fractional votes if we tell them to, and it is difficult to believe that the House of Representatives would refuse to count fractional votes if they were cast. The problem is more difficult to resolve as it involves power. Winner take all voting increases the power of the dominant party within a state. This is why it was devised and why once devised all states adopted it. No state is going to abandon power over something as trivial as treating all of its voters equally, unless all other states do the same, and that would require a constitutional amendment.

⁴ <https://supreme.justia.com/cases/federal/us/148/503/case.html>

⁵ Page 682 Chapter 9 <http://archive.nationalpopularvote.com/pages/answers.php>

Now that we are talking about power, what does the NPV do to political power in the US?

Its most obvious effect is to concentrate power in urban areas. Advocates of the NPV deny this on two grounds. First, that in statewide elections the campaign reaches all areas within a state. This is true but only using a much more expansive view of campaigning than is used in their analyses of nationwide campaigns. If a visit to Bend counts as campaigning in Western Oregon then a visit to Vermont should count as campaigning in New England, and suddenly we are left with a lot of battlegrounds. The second is that even big cities are too small to control elections. Republicans have been elected Governor of California without winning in San Francisco. In 2010 the population of the nation's fifty largest cities was only 46,795,097⁶, hardly enough to dominate the nation. It should not be necessary to point this out but no matter what its citizens believe San Francisco is not the only city in the Bay Area. What needs to be counted is the population of urban areas. In 2010 the population of the fifty largest Metropolitan Statistical Areas was 167,444,290: more than enough to control an election.

The National Popular Vote Compact is a potentially disastrous attempt to solve a rarely occurring non-problem, and I hope that the Committee will not allow it to move forward.

⁶ Table 9.37 <http://archive.nationalpopularvote.com/pages/answers.php>