

House Committee on Rules  
Meeting on 2019-05-20  
Testimony of Kyle Markley

The gist of the National Popular Vote Compact is that the states would agree to assign their electoral college seats to the Presidential candidate who wins the national popular vote. The sentiment of the supporters of this idea is that it will make every vote equal, that is to say that every vote will carry the same weight no matter which state the voter lives in.

It is true that it is easy to sum each state's vote totals. It is true that every vote would be weighted equally. But in truth, this would not make a fair election. That's because the election would still be conducted on a state-by-state basis, with each state separately determining the rules and procedures governing their portion of the election.

With each state making its own rules, and a great diversity of opinion about what rules are right, important differences are inevitable. Differences in what sort of documentation is required in order to register to vote, in what places that registration can be made, and in what will cause an elector to fall off of the voter rolls. Some states conduct their elections entirely by mail. Other states require voting in-person on election day, but the specific hours and overall length of time that their polling places are open. Even the density of polling places will be different. Identification requirements at polling places will also differ. Timelines and procedures for absentee voting will be different. Some states allow ex-felons to vote, while others forbid it. Several states (including Oregon) have considered reducing the age to be eligible to vote to 16.

Of course, all of these differences between the states do not create any difficulty in calculating the national popular vote. If we used the national popular vote to elect the President, every vote would indeed be weighted equally. But the citizens of the various states would plainly not enjoy an equal *opportunity* to vote – and this would surely influence the result of the election!

In some states, voter registration and voter turnout would be suppressed by strict documentation requirements, difficult absentee voting, and short and inconvenient hours at the polling places. In others, registration and turnout would be enhanced by easy documentation, universal vote by mail (perhaps even postage-paid!), and granting the franchise to ex-felons and to minors on the cusp of majority. The states with tight controls and a guarded franchise would yield fewer votes in proportion to their population, and the states with easy rules and a generous franchise would yield more votes in proportion to their population.

The *intent* of electing the President by nationwide popular vote is to give the individual people equal influence in the election. But the *effect* is to give some states more sway over the election than others – not by virtue of their unequal populations, but by consequence of their different rules. And this also creates an incentive for states to manipulate their rules in order to increase their sway over our highest office. The incentive is to enact rules that yield an increased vote count, rather than rules that provide for a fair, secure, and well-managed election.

Having considered all of this, it is clear to me that fairness in elections requires *uniform rules* applying to the entirety of the district covered by the election. A nationwide popular vote for President is only fair if the rules and procedures for the election are uniform across the entire country. It is a sad irony that the understandable desire to provide an equal vote to all people instead creates an inequality. And the inequality in the opportunity to vote is so great that I fear it may violate our Constitutional guarantee of “equal protection of the laws.”

Our current system, wherein the states conduct their elections separately and then convene an electoral college to elect the President, does show some signs of dysfunction. But I think this is due to the choice of nearly all the states to assign their electors in a winner-take-all fashion. If the states could work together to adopt a compact to assign their electors *proportionally*, with each state's electors assigned according to its own individual results, then the result would be a very good reflection of the intent of the people. This would preserve each state's interest in being able to set their own rules and procedures while thwarting the incentives for states to try to increase their sway.

Different rules in different states are not a problem in this case because the weight of a state in the electoral college depends on its population, not on its election rules. (Influence in the electoral college is actually slightly in favor of the lower-population states, but it would take a Constitutional amendment to change this.) The equal opportunity to vote is protected because the rules are uniform within each district (each state). As long as a state's electors are assigned in a manner that reflects the results of the election *within that state only*, and *not of other states*, then the electoral college serves as an insulator that permits each state to have different election rules while maintaining a fair result for the Presidential race.

Different rules in different states affect their rates of voter registration and voter turnout. We need a method to aggregate the results of each state in a way that the votes within each state matter, but the turnout within each state does not. The National Popular Vote Compact is deeply flawed because it would create inequality and might be unconstitutional. But if modestly changed – to assign electors proportionally by each state, instead of utilizing the dubious nationwide sum – it would indeed be an improvement.