

The National Popular Vote Plan and Direct Election of the President: An FAQ

What is the National Popular Vote plan?

The National Popular Vote plan (NPV) is a statute that, as of April 2009, had been introduced by state legislators in 48 states and publicly committed to be introduced in the remaining two states. NPV seeks to guarantee election of the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. It creates an agreement among states to award all of their electoral votes collectively to the presidential candidate winning the national popular vote once the number of participating states together have a majority (currently 270 of 538) of electoral votes. In considering the NPV bill, the choice for legislators is straightforward: passing NPV will guarantee election of the national popular vote winner once joined by enough participating states to make it decisive for determining future elections. Until that point, a state's current rules will apply.

The NPV plan is founded on two state powers clearly established in the U.S. Constitution: a state's plenary power to decide how to apportion its electoral votes and a state's power to enter into binding interstate compacts. As of April 2009, New Jersey, Hawaii, Maryland, and Illinois – which together possess a fifth of the total electoral votes necessary to trigger the agreement – have enacted the NPV compact. It has been adopted by a total of 26 state legislative chambers in 16 states, earning public support from nearly 1,300 legislators and national luminaries like the editorial boards of the *New York Times* and *Los Angeles Times* and former U.S. Senators Birch Bayh (D-IN), Jake Garn (R-UT) and David Durenberger (R-MN)

Why isn't a constitutional amendment required to change the method of electing the President?

The Constitution gives states plenary power over how to allocate their electoral votes. States have often changed how they allocate electoral votes, particularly early on in our history. According to the U.S. Constitution (Article II, Section I), state legislatures decide how to apportion their state's electoral votes, a power that the Supreme Court has called "plenary" (absolute). This right cannot be changed by Congress beyond resolving certain administrative questions like the timing of when the Electoral College casts its vote and when states provide their official presidential vote totals. Most states today use the winner-take-all unit rule in which they award all electoral votes to the winner of the statewide popular vote. Few states did so in our early elections, however, and it did not become the norm until a half-century after the approval of the Constitution. Even today, Nebraska and Maine choose to apportion their votes differently.

The U.S. Constitution (Article I, Section 10) also establishes that states can enter into binding interstate agreements. There are hundreds of such compacts like those establishing the Port Authority and protecting states' access to the water of the Colorado River. Many require congressional approval, but others do not. Backers of the National

Popular Vote plan expect that the plan ultimately will come before Congress for approval.

Wouldn't NPV change a system "given to us by the Founding Fathers"?

The Founding Fathers did not design the current system of allocation electoral votes used in most state. Instead they established the Electoral College without any instructions to states on how to make use of it. In the first Presidential election in 1789, only five states even allowed citizens to vote for the president in any form; in the remaining states, the state legislature either directly or indirectly appointed their electors. In 1800, the fourth presidential election won by Thomas Jefferson, only two states allocated electoral votes by the winner-take-all unit rule according to the statewide popular vote. The move to the unit rule was driven entirely by tactical motives because doing so helped your state's majority party. Once more and more states adopted the unit rule, any state using another method risked hurting its favorite candidates by not awarding them all their electoral votes. Essentially, states were forced into the winner-take-all rule by the actions of other states and by partisan calculations – ones that still govern states' decisions about allocating electoral votes today.

The Founders themselves were not shy about fixing problems with the Electoral College. In the wake of the disastrous 1800 presidential election in which Thomas Jefferson tied in the Electoral College with his vice-presidential running mate Aaron Burr, Congress and the states quickly approved the 12th amendment of the Constitution that made significant changes in the workings of the Electoral College. It is undoubtedly true that our nation's founding generation would have been dismayed by how the Electoral College system operates today, with most states and their unique interests completely ignored.

Finally, the Electoral College had important flaws from the beginning that were recognized by astute observers like James Madison, but had to be accepted for political reasons that today do not exist. For example, in many states the right to vote was given only to free, white, wealthy property owners. Women, slaves, minorities, the poor, and indentured servants lacked the right to vote in these states, but still counted for the purposes of determining a state's number of congressional seats and electoral votes. In 1800 other states like Pennsylvania and New York had more free citizens than Virginia, but Virginia had the most electoral votes due to its large slave population that represented 39% of its population – and it is no coincidence that four of our first five presidents were from Virginia. Over the years, states have taken the lead in bringing more democracy to presidential elections, with all states since 1876 holding popular vote elections for president and many states acting to expand their franchise.

Does the National Popular Vote plan eliminate the Electoral College?

Under NPV, the Electoral College remains the actual institution that elects the President, but it will play a secondary role after the all-important popular vote. Currently, the Electoral College serves to ratify the votes of the 50 separate states and the District of Columbia, typically by awarding its electoral votes to the slate associated with the winner

of each state. Under NPV, the Electoral College will instead ratify the national popular vote by having participating states award their electors to the slate of the national popular vote winner. The night of the election, all eyes will be fixed on the national popular vote and which candidate earns more votes in all 50 states and the District of Columbia. Voters seeing those numbers rise on election night will know that one of those votes is their vote. They will know that the candidate with the most votes will win.

For those who believe the electors in the Electoral College should play a meaningful deliberative role in elections, note that the electors have not engaged in any debate or exercised any independent judgment regarding presidential candidates for two centuries.

What if a state approves NPV and then tries to change its rules after an election?

The National Popular Vote compact includes a “blackout” period between July 20 of a presidential election year and the inauguration on January 20 of the following year. The terms of the compact do not allow individual states to withdraw from a compact during this time; they may pass a law stating their intention to do so, but it will not go into effect until after the inauguration. This six-month blackout period covers the national nominating conventions, the election itself, the state certification process, the actual meeting of the Electoral College in December, the counting of the electoral votes by Congress on January 6, and the inauguration of the President and Vice President for the new term on January 20.

Federal law already prohibits states from changing their election laws after the first Tuesday in November. As a formal interstate compact, NPV adds the additional protection of the Impairments Clause of the U.S. Constitution (Article I, Section 10, Clause 1), which prohibits states from dishonoring interstate compacts. In addition to breaking a binding contract, an attempt to pass a last-minute law is politically implausible, requiring approval of both of a state’s legislative chambers and its governor and rejecting public opinion. The public would have been eagerly anticipating a national popular vote for president for months. Any change would be seen as cheating – and thwarting a goal that 70% or more of Americans consistently support in polls in states across the nation.

Even without a contract binding their action, states have not been making last minute changes in allocating electoral votes that might give their party much more directly an advantage – such as Florida Republicans in 2008 going to congressional district allocation when polls showed that John McCain would likely lose Florida or North Carolina Democrats in 2004 going to district allocation once it was clear that George Bush would defeat John Kerry in their state. Finally, the odds are high that one state couldn’t undercut the compact, as there is every reason to expect that the number of electoral votes in participating states will rise far beyond 270.

Isn’t changing the Constitution the real answer?

All meaningful political activity in support of a national popular vote for president is taking place in the states debating NPV, but FairVote is among a number of organizations and individuals who support both the National Popular Vote plan and a constitutional amendment providing for direct election of the president, seeing them as complementary positions. At the same time, it is clear that, as of 2009, there is no consensus on the form of a constitutional amendment to establish a direct election and no energy on Capitol Hill to advance such an amendment. Finally, having states enter the NPV plan is more in keeping with the spirit of the Constitution than amending it.

If a state chooses not to pass NPV, will its votes be discounted?

NPV will ensure that the presidential candidate who receives the most votes throughout the country will be elected president. The votes in *every* state, along with the District of Columbia, will be counted to determine who received the most national popular votes. Whether or not a state enters the NPV agreement, its voters will have an equal vote with everyone else in determining the president. For example, if Ohio does not approve the compact, the votes cast in Ohio will be part of the national popular vote totals. Ohio voters are treated the same as all other voters.

Will NPV be undercut by “faithless electors” who vote against the popular will?

Slates of electors are supplied by the presidential candidates and consist of individuals who strongly support the candidate and their party. The likelihood of faithless electors will not increase under NPV because the electors who are casting votes in states participating in the NPV agreement are the electors selected by the winning candidate. In the history of the United States, there have only been 11 faithless electoral votes cast in the Electoral College. None had an impact on the outcome of the election.

What happens until NPV has enough electoral votes? Are states that have adopted NPV stuck apportioning their vote to the national winner?

NPV only goes into effect when it is ratified by enough states so as to comprise a majority of the Electoral College. The “trigger mechanism” is when participating states constitute a majority of the Electoral College and hence a majority of the people. Until that happens, states continue to apportion their electoral votes to the state winner. For example, during the 2008 election, Maryland, Hawaii, Illinois, and New Jersey had already enacted NPV. But, because their total votes were less than an Electoral College majority of 270, they continued to apportion electors in their current manner.

Why change the current Electoral College system at all?

The Electoral College allows a President to be elected when finishing second or even third in the national popular vote. “Wrong way winners” happened in 2000 with George W. Bush, 1888 with Benjamin Harrison, 1876 with Rutherford B. Hayes, and 1824 with John Quincy Adams. It has nearly happened in many additional elections, including 2004 when a shift of less than 60,000 votes in Ohio would have given John Kerry a national victory over George Bush despite his national popular vote deficit of three and a half million votes.

But even when the Electoral College does not elect a losing candidate, it makes losers of a large and growing number of Americans in election after election. The winner-take-all unit rule governing the Electoral College in most states leads candidates to ignore the vast majority of Americans as they focus exclusively on a handful of “battleground” states that are too close to call and have the power to determine the election. In 2008, more than 98% of all campaign spending and all campaign events after Labor Day were in 15 states representing barely a third of the population. The number of battleground states has steadily declined in recent decades, resulting in candidates focusing on an increasingly narrow band of American voters and making most grassroots involvement meaningless based on living in “spectator states.”

Wouldn't it be better for states to allocate electoral votes by proportional allocation or congressional district?

States adopted the winner-take-all unit rule primarily due to partisan incentives – their leaders did not want other states using the unit rule to gain an advantage for their favored candidates. That reality makes changing rules for allocating electoral rules nearly always suspect from a partisan perspective – such “reform” efforts typically are led by leaders whose party would secure a national advantage by a state dividing its electoral votes and are opposed vigorously by leaders of the major party that typically wins the state.

More broadly, allocating votes by congressional district and proportional allocation both result in far less fair presidential elections than a national popular vote for president, as FairVote demonstrated in its report *Fuzzy Math: Wrong Way Reforms for Allocating Electoral College Votes*

[<http://www.fairvote.org/?page=1786&articlemode=showspecific&showarticle=2741>]

On allocation by congressional district, fewer than one in ten congressional districts is likely to be truly contested by the campaigns, and the current partisan landscape would provide a huge edge to Republican candidates in close elections making the plan a non-starter for Democrats. In 2000, for example, George Bush would have won the Electoral College by 38 electoral votes under the congressional district system even while losing the national popular vote.

Proportional allocation doesn't have this same partisan bias, but it shares the problem of keeping most voters as spectators in presidential races. Political activity under this reform would concentrate on the states where a shift of 2% to 3% would gain or protect an electoral vote – and most states would be outside this range.

Doesn't the current Electoral College system nearly always elect the popular vote winner?

Some Electoral College defenders dismiss “popular vote reversals” (meaning elections where the national popular vote winner loses) as abnormal aberrations. But one out of every 12 presidential elections since the Civil War has experienced a popular vote reversal, and there were several additional close calls, including victories by Woodrow Wilson in 1916, Harry Truman in 1948, Jimmy Carter in 1976 and George Bush in 2004.

Even Barack Obama's victory by nine and a half million votes in 2008 would have been trumped by a shift of barely a half million votes in the right combination of states.

The problem of popular vote reversals is particularly serious in light of today's closely divided electorate. American politics is in a period of narrow division between the major parties, with all races won by less than 10% since 1984. Although two-thirds of our presidential elections since 1824 have been won by more than 5%, today's partisan division makes it more instructive to see how the system regularly has misfired in the remaining 15 elections. Three out of these close elections had popular vote reversals: in 1888 and the particularly pivotal elections of 1876 and 2000. There easily could have been more reversals, with a shift of fewer than 79,000 votes able to reverse the winner in five additional elections since World War II alone.

Doesn't the Electoral College protect small states?

The current use of the Electoral College hurts the great majority of votes who live in small states because their state is completely ignored in presidential campaigns. Small states tend to have a clear partisan tilt that leads the candidates to decide that no campaign activity in that state will affect the result in that state. Of the 18 smallest population states, 10 received absolutely no attention of any sort the peak season of 2008 campaign. Eleven of the 12 smallest states did not have a single campaign visit.

Furthermore, mathematicians have demonstrated that voters in small states do not get extra attention even though their state has a greater number of electoral votes per capita. Voters in large competitive states are more influential than voters in small competitive states because of the winner-take-all unit rule. The unit rule means that big states have far more electoral votes in play, and a shift of 1,000 votes in a big state can result in a far greater gain in electoral votes than a comparable swing of 1,000 votes in a small state. This mathematical reality explains why Delaware and other small states filed a lawsuit in 1966 seeking to overthrow big states' use of the unit rule.

In a national popular vote election, the unit of influence is the individual voter, whether they live in a small state or a big state. Every vote is equal and when that is true, candidates and parties need to be responsive to all voters. We shouldn't try to gerrymander presidential elections to help one set of Americans over other Americans.

Would a national popular vote undermine federalism and protection of minority rights?

No. The question of state rights and federalism relates to the respective powers of the presidency, the Congress and the states rather than to the method of election for those offices. Indeed the concept of state power being protected by the Electoral College would only make sense if states regularly made distinct decisions about how to allocate electors – asserting their state interests as somehow different from other states. But in fact nearly all states allocate electoral votes to the statewide winner (with the only two exceptions always allocating all their votes to the statewide winner as well since changing their rule), making the Electoral College simply an odd electoral device, not any meaningful expression of state differences.

The fact that most states today receive absolutely no attention from campaigns and that the big battleground states receive more attention from presidents and would-be presidents during the governing process than other states undermines the goals of federalism. If every vote counted equally, the people of every state would matter and their views and interests would matter. As it is, the only people earning attention from the campaigns are those who happen to live in competitive states. George Bush's campaign in 2004 was the best-funded in history, but it didn't waste a dime on polling the views of a single person living in more than 30 states during the entire campaign. When voters don't matter, they have little power to protect their interests and the interests of their state.

Wouldn't it be too hard to conduct a national recount in a very close election?

Current statewide winner-take-all unit rule elections significantly increase the probability of a contentious recount due to a smaller margin of victory and larger number of elections – neither the 2000 or 2004 presidential election were remotely close enough for a national recount, but the 2000 election hung on the result in Florida and the outcome of the 2004 election would have changed with a shift of fewer than 60,000 votes in Ohio. As Minnesota's U.S. Senate race in 2008, an extremely close state election can be hard to finalize, yet such a close election in a state is far more likely than a razor-thin vote in the national popular vote.

FairVote's 2007 survey of 7,645 statewide elections in 1980 to 2006 determined that statewide elections resulted in a recount once in every 332 elections (23 out of 7,645). Applied to national presidential elections, this number would mean we might have to conduct a national presidential election recount once every 1,328 years – yet even that number is likely too high, as FairVote found that the odds of having to do a recount decline with more voters participating.

More fundamentally, the United States has no business in the 21st century conducting elections that can't be recounted. Certainly, our large population states like California and Texas do not shy away from statewide popular elections out of fear of running recounts. Congress has the authority to establish standards for recounts in the highly unlikely event one were needed.

Doesn't the current Electoral College system protect American stability?

No. In upcoming elections, one could just as well flip a coin as use the Electoral College to decide the winner if the popular vote margin is inside a still-comfortable half million votes. Al Gore lost the 2000 election despite that winning margin, and George Bush almost certainly would have lost even with a comparable popular vote edge in 2004. Furthermore, state-by-state election results where small shifts often can change who wins the national election are sure to lead to controversies and legal disputes where the courts must intervene as they did in 2000 and certainly would have been forced to with a somewhat closer election.

The Electoral College also has a provision that is an accident waiting to happen without reform: if no candidate wins an absolute majority in the Electoral College, then the U.S. House picks the president (with the winner needing to win a majority of the vote in 26 state congressional delegations) and the Senate picks the Vice-president. In 1948 and 1968, the regional popular candidacies of Strom Thurmond and George Wallace led to them winning a number of electoral votes, and with a few states shifts have put them in power to bargain after the election and give the presidency to whichever candidate was willing to make a deal – as happened in 1876, when Rutherford Hayes was willing to allow states to trample on civil rights in exchange for the White House. In 2004, a shift in fewer than 21,000 votes would have thrown the election into Congress.

Such an opaque and controversial means to pick the president hardly brings the nation together after hotly contested elections where the result matters deeply to tens of millions of Americans. It is a mistake to assume that our nation's relative stability is founded on such rules – just as our stability did not depend on indirect election of Senators or denying women suffrage before less than a century ago we amended the Constitution to provide for direct election of Senators and women's suffrage in all states.

Doesn't the Electoral College encourage candidates to campaign in more parts of the country, including both large and small states?

No. Anyone who lived outside of a battleground state in 2004 could tell you how much they and their neighbors mattered in the 2004 presidential race. As FairVote's *Who Picks the President* report clearly proves, the candidates and their backers completely ignored a majority of states and a majority of people. The 2004 election concentrated almost exclusively on a dozen states home to less than 28% of the electorate and relatively concentrated in the Midwest. The 2008 general election saw a similar focus, with more than 98% of campaign spending and events after Labor Day focused on 15 states representing barely a third of the nation – a sharp contrast to the Democratic presidential primary contest that took place everywhere due to different rules making it valuable for the candidates to contest every state.

While the current Electoral College systems keeps candidates from attempting to maximize vote totals in their strongest areas, it also eliminates any incentive that a candidate might have to visit those areas at all. Similarly, they have no incentive to campaign in any states where they are sure to lose. The only states that matter are the ones that happen to be close.

Does the current Electoral College system keep campaigns from being just one giant TV commercial governed by whomever has the most money?

No. Advertising is going to be a part of modern politics, but the lessons of recent presidential races is that old-fashioned get-out-the-vote activities are essential to success. As long as there are Americans who are willing and able to get involved on the grassroots level—knocking on the doors of neighbors, etc—then there will be grassroots campaigning in the United States. The candidate who can inspire the most of that campaigning will have a significant advantage. As to money, candidates already are trying

to raise as much money as they can. There simply will be a more equitable distribution of their campaign resources.

Does the Electoral College's tendency to magnify the size of a popular vote victory provide a clearer mandate to the president?

No. The average American does not, as a rule, pay much attention to the Electoral College, barely understanding how it functions and generally not liking it. Gubernatorial races are instructive: winners receive mandates, period, with big winners getting bigger mandates. Because he only 43% of the national popular vote that year, Bill Clinton's big Electoral College margin in 1992 hardly gave him a resounding mandate that led Congress to go along with his policy goals on health care, energy and urban development in 1993-1994; his 43% share of the popular vote

Doesn't the Electoral College prevent third-party candidates winning with a low share of the popular vote?

The Electoral College has a neutral impact on third party candidates. The reason why third party candidates and independents have such low odds in presidential elections is not due to the Electoral College: rather it is due to the fact that only one candidate wins, which favors candidates who can draw on large numbers of votes. All governors are from the major parties, and no governor since World War II has won with less than 35% of the vote in nearly 1,000 gubernatorial elections in all 50 states. In 1992, Ross Perot did not win any electoral votes despite earning 19% of the national popular vote, but he would have easily won the Electoral College if doubling his share of the national vote.

Isn't it true that without the Electoral College, the candidates would only care about California, Texas and New York and big cities?

No. The United States is a large nation. California, New York and Texas are our largest population states, but even if a candidate quite unrealistically won every single vote cast in those states, they would still have barely 25% of the vote. Indeed, a candidate could win every single vote cast in the ten biggest states and still not have a majority of the national popular vote. Because big states are geographically dispersed and every vote is equal, any candidate trying to win a majority of national vote must try to win votes everywhere, and volunteers excited by that candidacy have every incentive to be active right in their own neighborhood, knowing that any new vote cast for their candidate will count the same as any vote cast anywhere else.

The same point applies to cities, as can be shown by examining closely contested campaigns in states. For example, John Kerry won the urban areas in Ohio in 2004, but George Bush's campaign mobilized many voters in the rural and "exurban" counties. FairVote analyzed what would have happened in 2008 if voter turnout had risen generally by 10% in the 11 largest population states and if only Barack Obama's vote total had risen by 10% in those states. In the first case, Obama would have needed to carry 50.15% of the popular vote in the rest of the country to maintain his same overall share of the national popular vote – down only slightly from the 50.37% he actually won in those

states. In the second highly unrealistic case of his vote along rising, he still could have afforded to have his share in the remaining states decline by only 3.16%.

The bottom line: When every vote counts the same, every vote matters. You can't write off voters and expect to win the presidency.

More questions?

Please refer to the FairVote Presidential Elections Reform Program (<http://www.fairvote.org/president>) for more information. Additional information may also be found at National Popular Vote (<http://www.nationalpopularvote.com/>) including its excellent resources on the myths associated with the debate over the National Popular Vote plan (<http://www.nationalpopularvote.com/pages/answers.php>).