



FORUM

National Popular Vote: Circumventing the United States Constitution

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In 2016, Donald Trump became President of the United States after winning a majority of electors (he won 304 electoral votes, surpassing the necessary 270 votes) but losing the popular vote to Hillary Clinton. For reference, the national popular vote is the direct vote of individual citizens. The electoral vote, on the other hand, is cast by electors chosen as the result of the popular vote in each state.

As a result of this electoral outcome, the vociferous objections of many with strong sentiments against the electoral college resurfaced. The issue of the electoral college, however, is not a new one.

Founded in 2006, National Popular Vote (NPV) was created to lobby for The National Popular Vote Interstate Compact (NPVIC) which would allocate the electoral votes of the states in the compact to the overall winner of the U.S. popular vote. In the words of the NPV's Agreement Among the States to Elect the President by National Popular Vote:

"The National Popular Vote Interstate Compact will go into effect when enacted by states possessing a majority of the electoral votes—that is, enough to elect a President (270 of 538). At that time, every voter in the country will acquire a direct vote for a group of at least 270 presidential electors supporting their choice for President. All of this group of 270+ presidential electors will be supporters of the candidate who received the most popular votes in all 50 states and DC—thus making that candidate President."

While there is a separate debate to be had about the relevance or “fairness” of the electoral college system, I want to explore the legality of the NPVIC here. The National Popular Vote Interstate Compact collectively apportions votes to the winner of the overall popular vote without a constitutional amendment abolishing the electoral college or the assent of Congress. Yet, by May 2021, 15 states and Washington, D.C., had signed onto the National Popular Vote Interstate Compact.

This constitutes a violation of the Compact Clause, which states that “No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State.”

As I will outline below, NPV is a compact of a political nature that encroaches upon the power of non-member states, does not allow for signatories to withdraw at will, and gives its member states far more power than they would have had in its absence. All of the aforementioned contractual features, when taken together, form an unlawful interstate compact.

According to *Virginia v. Tennessee*, interstate compacts are defined as “all forms of stipulation, written or verbal...which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control.” The NPVIC does just that. It would have the power to change the results of federal elections and “interfere with the federalist structure of the US Constitution’s procedure for electing a president.”

According to the opinion in *United States Steel Corporation v. Multistate Tax Commission*, “A proper understanding of what would encroach upon federal authority...must also incorporate encroachments on the authority and power of non-Compact States.” This component of defining a compact is certainly relevant in the case of NPVIC. Should the NPV Interstate Compact go into effect, non-member states would be negatively affected and votes of individual states would be of no consequence when compared to the popular vote. The election would be determined not by all voices, but instead by the one combined deafening voice of the compact.

The National Popular Vote Manifesto promises that “The Compact ensures that every vote, in every state, will matter in every presidential election.” The key implication here is that the indirect election does not represent the will of the people, acting instead to dilute the one-man-one-vote principle which constitutes the basis of the electoral system. However, this argument misses a key consideration. We live in a republic that was *founded* to be a counterbalance to passing popular opinions and fads. It was intended to allow for the expression of regional and state concerns in addition to individual concerns. In the words of *Baten v. McMaster*: “the

system reflects a considered balance between national and state power.” And the electoral college makes it so all states are represented in elections.

In contrast, with a popular vote, politicians would need only to campaign in areas with the largest population. They would flock to California and New York, yielding to those voter bases and tailoring agendas to fit their demands, meanwhile ignoring states like Wyoming and Montana. Ironically, this was exactly the reason the founders had for instituting the electoral college: to prevent tyranny of the majority.

The NPVIC is allowing just that. By circumventing the laborious process of amending the constitution, it is withholding the power of the rest of the states of our great nation to decide on the fate of the electoral college. It is allowing the electoral college to remain in name only. In that vein, I would like to discuss these aforementioned non-member states.

Statista put together a chart featuring the “number of times each state has consecutively voted for its most recent party in U.S. presidential elections from 1964 to 2020.” Every single state that has enacted the NPV Bill is designated as Democratic leaning with significant voting streaks. California has a Democratic voting streak of 8 elections; District of Columbia: 15; Hawaii: 9; New York: 9; California: 8. The list goes on.

This brings to light a frightening reality. Not only does the NPV Bill violate the Compact Clause by harming non-signatory states, it effectively silences half of the two-party political system in this country. All states who have signed on lean left, leaving the right-wing of America out of the picture should the bill take effect. The National Popular Vote Compact Bill could change the outcome of U.S. elections in perpetuity. If that does not fall under the category of “encroachments on the authority and power of non-Compact States,” then I do not know what does.

Now that we have discussed how the NPV Interstate Compact violates the Compact Clause through its encroachment on non-signatory states, let us turn to the next component: the inability of signatory states to withdraw from the compact at will. In *United States Steel Corporation v. Multistate Tax Commission*, the Supreme Court opined that in a permissible compact, “each State [would] retain[] complete freedom to adopt or reject the rules and regulations of the Commission...each State [would be] free to withdraw at any time.”

Under the rules of the National Popular Vote Compact Bill, however, a member state *cannot* withdraw at will from the compact at *any* point in time. Should a state want to exit the compact within six months of the end of a president’s term; if the said state chooses to leave, they will still have to allocate their electoral votes to the

winner of the popular vote in that election cycle. In the words of the NPVIC, “[a]ny member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.”

The prohibition of compacts in the constitution applies to “treaties of a political character,” according to *Virginia v. Tennessee*. A compact that impacts the outcomes of governmental elections is undeniably political in character and thus unconstitutional.

Finally, an unconstitutional compact is one that “authorize[s] member States to exercise...powers they could not exercise in its absence.” By giving its member states powers that they otherwise would not have had, the NPV Interstate Compact meets this standard of unconstitutionality. ;t allocates electoral votes to the winner of the overall popular vote rather than just to the winner of the vote in their respective states and gives the signatory states more power than those who refuse to sign the bill. As discussed earlier, the states involved would effectively be silencing the rest of the country. And as we have seen, that means that the right-wing of the country would lose its voice in elections and thereby in policy making essentially eradicating the diversity of thought and plurality that is so key to the American political character.

The NPV’s manifesto says the following: “The National Popular Vote interstate compact will go into effect when enacted by states possessing a majority of the electoral votes—that is, enough to elect a President (270 of 538).” Individual states—and even a minority of multiple states—would not possess the power that a compact with the majority of electoral votes would.

Hence, my argument stands that the NPV Bill violates the Compact Clause of the United States Constitution. The Compact’s founders and proponents need to come to terms with the very real fact that they are waging war on our Constitutional order by being unfaithful to the manifest restrictions that document imposes upon the electoral system. No matter what they may think of the merits of our current system, there is no justification for shunting aside the constitution.