

The Presidential Election System and National Popular Vote

by Rob Natelson¹

- I. **To understand the Electoral College, you have to know its place in the complete presidential election system.**
 - A. During the Constitutional Convention of 1787, the framers agreed the executive branch would be headed by only one person. They also agreed that he would be a republican magistrate, not a king. Their most difficult task was working out how the president should be selected.
 - B. One reason for the difficulty was lack of historical models. In some countries, the chief executive was hereditary. Others had an executive council. Still others elected their chief magistrate, but for life.
 - C. Another complication was that the U.S. was to be a *federal* republic.
 - D. The framers balanced many factors:
 1. The states should participate in the election, but not control the president.
 2. The president should be independent of Congress.
 3. The president should have sufficient levels of popular support to govern, even if he was not the most popular person in the country.
 4. The president's support should be wide as well as deep: Electing a president by only a few big states or regions could cause civil war.
 5. A small number of special interests should not dominate elections.
 6. Foreign influence should not dominate elections.
 7. The election system should discourage corruption.
 8. It should discourage "stampeding."

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9. It should produce presidents capable of doing the job.

E. Popular mythology to the contrary, slavery was not a significant factor. The convention records on this subject show little or no connection to slavery.

II. The Current System.

A. The Three-Tiered Presidential Election System:

Tier 1: Each state appoints, at a uniform time fixed by Congress, as many presidential electors as it has Senators and Representatives. Each state's legislature, with or without the governor, decides the method of appointment. Since 1868, all state legislatures have delegated appointment to the people. But federal law (3 U.S.C. §2) recognizes the legislatures' power to appoint if Election Day does not produce a winning slate.

Tier 2: On a uniform day fixed by Congress, electors meet in their state capitals and cast ballots for president and vice president. They send the results to the President of the Senate (Vice President). Ballots are opened and counted in a joint session of Congress. To win, a candidate must have a majority of electors appointed; a plurality is not sufficient.

Tier #3: If no presidential candidate wins a majority of electors appointed, a run-off election in the House of Representatives chooses from the top three electoral vote winners. Each state delegation has one vote. To win, a candidate must have a majority of all states (26), two thirds of states being present. If no vice-presidential candidate obtains a majority of electors appointed, the Senate holds a run-off among the top two electoral vote winners. To win, a candidate must have a majority of all Senators (51), two thirds being present.

B. Compare the Results with Factors the Framers Considered (previous page):

- √ The states participate in the election, but don't control the president.
- √ The president is independent of Congress.
- √ Electoral winners have high popular support. Since popular voting for electors began to dominate in 1828, about 2/3 of the time the electoral winner gets an absolute majority. About 92% of the time, he wins the popular vote by a majority or plurality, and the plurality has fallen below 41% only once (Lincoln, 39% in 1860). The electoral winner has

never lost the popular vote by more than 2%.²

- √ Since 1828: (1) a purely regional candidate has never won—except in 1860, the election that precipitated the Civil War; (2) when the popular vote winner loses the Electoral College, it is usually because his or her support is too regional; and (3) congressional run-offs have been unnecessary because every major candidate campaigns nationally.
- √ Narrow special interest coalitions have never won an election.
- √ Foreign powers have never dictated election results.
- √ Except in 1876, serious polling irregularities have been isolated within just a few states.
- √ No “flash-in-the-pan” candidate has ever won.
- √ With few exceptions, winning candidates have been able to do the job.

III. The National Popular Vote Compact.

A. Terms.

1. Each state legislature would commit its presidential electors to the presidential ticket winning a bare plurality of the national popular vote. That plurality would be calculated from certified results from each secretary of state. Each state would be bound to accept the results from every other state.

2. The compact would take effect when states represented by a majority in the Electoral College (270 electors) subscribed. No state could withdraw between July 20 of a presidential election year and the following January 20, Inauguration Day.

3. It would effectively abolish congressional run-offs, because the plurality vote winner would always get an Electoral College majority.

B. NPV has been endorsed by 15 states and the District of Columbia.

C. NPV is poorly drafted. NPV literature suggests its promoters are

²This excludes the 3% margin in 1876, when Southern suppression of the African-American vote likely prevented the electoral winner from winning the popular vote as well. Excluded also is the 2020 election because of continuing uncertainties in some results.

unaware of the reasons for the current system and of NPV's many defects.

D. NPV's Constitutional Defects.

1. The Constitution requires congressional approval of interstate compacts. But Congress has never approved NPV. Advocates say this is unnecessary, relying on *U.S. Steel v. Multistate Tax Comm'n* (1978), which purported to create an "exception" to the constitutional rule. But the scope of the exception is unclear, the case directly violated the constitutional text. Today's more textually-minded justices may overrule it.

2. Moreover, NPV may not fit within the *U.S. Steel* exception, which seems to apply only to compacts not affecting the federal balance. But NPV state influence and ends congressional run-offs.

3. NPV's July 20 deadline for state withdrawal violates the Supreme Court's most important Electoral College decision—*McPherson v. Blacker* (1892). The Supreme Court reaffirmed *McPherson* in 2020.

4. Even if the justices overruled *McPherson* and upheld the no-withdrawal provision, NPV would be void in at least one signatory state, because NPV also violates the Colorado constitution!

5. NPV's backers have overlooked a longstanding constitutional law principle: When the Constitution grants power to people outside the federal government (as when it grants states power to appoint electors), that power must be exercised in ways the Founders intended. Presidential electors are supposed to represent the people of their states. Just as a state legislature cannot sell its electors to the highest bidder, it cannot relinquish them to out-of-staters.

E. NPV's Political Defects.

1. Even in the face of electoral corruption in other states, a state could not withdraw from the compact until after Inauguration Day. Each state would be forced to assign its own electors based on other states' corrupt tabulations.

2. NPV offers strong incentives for bad behavior, because each state's influence would depend on how many votes—good or bad—it could generate. States could inflate their vote totals by lowering the voting

age, adopting mandatory voting, extending suffrage to felons, and ignoring or even encouraging multiple voting and ballot box stuffing.

3. Because the NPV compact speaks of “votes” rather than “voters,” a state could expand its influence by simply adopting a plural voting scheme—i.e., allowing some or all persons to cast more than one vote. (England allowed varying degrees of plural voting until 1969.)
- 2 NPV would award the presidency to whomever won a popular plurality—no matter how small that plurality. Eight other countries with strong presidential systems follow similar rules: Honduras, Mexico, Nicaragua (with a small modification), Panama, Paraguay, the Philippines, Venezuela, and (with major modifications), Taiwan.
3. The international record is horrible: NPV advocates claim to be promoting “democracy,” but their system regularly chooses presidents the overwhelming majority of voters oppose! For example:
 - a. The winner of the May 5, 2019 Panama presidential election had a plurality of only 33%.
 - b. In the last Venezuelan election before strongman Hugo Chavez, the winner was “elected” with less than 31%.
 - c. In the 2016 Filipino election, the winner received 39%. In the four previous contests, the winner never obtained more than 42%. In 1992, Fidel Ramos won with under 24%!
 - d. In 2006, 38% elected socialist Daniel Ortega president of Nicaragua. Ortega has ensured Nicaragua has not had an honest election since.
 - e. In three of the last four Honduras elections, the winner received 43% or less.
 - f. In Paraguay’s last four elections, no “winner” has received a majority.
 - g. In the 2012 Mexican election, the victor won with 38%; in 2006, only 36%.

Can you imagine what would happen in America with results like these?

5. Pure plurality voting is a standing invitation to would-be dictators. Examples: the 2006 election in Nicaragua, the 1970 election in Chile (then following a system somewhat similar to NPV), and the 1933 parliamentary election in Germany.
6. NPV advocates point out that most U.S. states elect their governors by simple pluralities. The comparison is not apt, because in the states the two major parties are cemented together by the need to win national races.
7. Pure plurality elections in other countries often are marked by divisive regionalism.
8. Even many states demonstrate the regionalism plurality voting encourages. By way of illustration, the current governor of Oregon was elected by carrying only seven counties, all in the northwest corner of the state. **That kind of regionalism at the national level could tear the United States apart!**

Further Reading

Why did the framers create the Electoral College? <https://i2i.org/framers-create-electoral-college-1st-series/>

The Electoral College in context, <https://i2i.org/electoral-college-context-interesting-stuff-might-not-thought-3rd-series/>

Electoral College, answers to questions, <https://i2i.org/electoral-college-answers-to-questions/>

Electoral College rules made simple, <https://i2i.org/electoral-college-rules-made-simple-rather-less-complicated-2nd-series/>

How the Left dominates states through “National Popular Vote”, <https://i2i.org/how-the-left-dominates-states-through-national-popular-vote/>

More on how National Popular Vote would import third world “elections” to America, <https://i2i.org/more-on-how-national-popular-vote-would-import-third-world-elections-to-america/>

Why the “National Popular Vote” scheme is unconstitutional, <https://i2i.org/why-the-national-public-vote-scheme-is-unconstitutional/>