



A Public Forum

Pros and Cons of the National Popular Vote Interstate Compact

Thursday, February 12, 2009

7:00 pm – 8:30 pm

Memorial Presbyterian Church
601 24th Ave. SW in Norman, OK

Panelists

Keith Gaddie, Ph.D.

Professor of Political Science at the University of Oklahoma; areas of scholarship include American Politics, Electoral Behavior, Race and Politics, Research Methodology

Tim Mauldin, Ph.D.

Professor of Political Science at Oklahoma City University; teaches courses in the areas of Public Management, Policy Analysis, International Relations, American Government and American History

Harry F. (Rick) Tepker, J.D.

Floyd & Irma Calvert Chair in Law and Liberty Professor of Law, University of Oklahoma; joined the OU faculty in 1981; teaches courses in the areas of Constitutional Law, Employment Law and Equal Employment Opportunity

The League of Women Voters position on the selection of the President is to “Promote the election of the President and Vice-President by direct-popular vote and work to abolish the Electoral College.” The League is now studying the issues surrounding the proposed National Popular Vote Interstate Compact to determine whether the compact would be an acceptable vehicle for achieving a direct-popular vote of the President and Vice-President.

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LWVUS Study on the National Popular Vote Compact

Background Paper

Selection of the President

The League's History

A League study of the presidential electoral process culminated in its 1970 position supporting direct election of the President by popular vote as an essential element of representative government. The League also has supported national voting qualifications and procedures for presidential elections to ensure equity for voters from all states and to facilitate the electoral process.

At the 2002 Convention, the League voted to expand and update its position. The League came to concurrence on a new position in June 2004. The new position takes into account the entire presidential selection process and supports a process that produces the best possible candidates, informed voters and optimum voter participation.

At the 2008 Convention, the delegates voted to adopt a new study, "The Advisability of Using the National Popular Vote Compact among the States as a Method for Electing the President."

The League's Position

Statement of Position on Selection of the President, as Announced by the National Board, January 1970, Revised March 1982 and Updated June 2004:

The League of Women Voters of the United States believes that the direct-popular-vote method for electing the President and Vice-President is essential to representative government. The League of Women Voters believes, therefore, that the Electoral College should be abolished. The League also supports uniform voting qualifications and procedures for presidential elections. The League supports changes in the presidential election system – from the candidate selection process to the general election. We support efforts to provide voters with sufficient information about candidates and their positions, public policy issues and the selection process itself. The League supports action to ensure that the media, political parties, candidates, and all levels of government achieve these goals and provide that information.

Explanation of the Position

The League strongly believes that the Electoral College should be abolished and not merely "reformed." One "reform" which the League specifically rejects is the voting by electors based on proportional representation in lieu of the present "winner-takes-all" method. Such a system would apportion the electoral votes of a state based on the popular vote in that state. Instead of making the Electoral College more representative, such proportional voting would increase the chance that no candidate would receive a majority in the Electoral College, thereby sending the election of the President to the House of Representatives where each state, regardless of population, would receive only one vote. Election of the President by the House further removes the decision from the people and is contrary to the "one person, one vote" principle. The League also does not support reform of the Electoral College on a state-by-state basis because the League believes there should be uniformity across the nation in the systems used to elect the President.

The Electoral College - A Review

Although the LWVUS has specifically adopted a position calling for the abolition of the Electoral College, a short review of the mechanics of that system of Selection of the President is helpful to an understanding of the National Popular Vote Compact.

The Electoral College is a process established by the founding fathers as a compromise between election of the President by Congress and election by popular vote. In short, the people of the United States vote for electors who then vote for the President and Vice President.

Each state is entitled to a number of presidential electors equal to its total representation in the House and Senate. The District of Columbia is awarded a number of electors equal to that of the least populous state.

The founding fathers designed this constitutional plan to promote several principles they considered important. One goal was to ensure that smaller states had a role in the election of the President. Secondly, the emphasis on the power of the state as contrasted to the power of the individual voter fostered the principles of federalism which are the core of the governmental process. Finally, the use of electors rather than popular vote assuaged concerns that the electorate was not competent or knowledgeable enough to be entrusted with the direct election of important government officials, such as the President and Vice President.

The electors are selected, according to the Constitution, in the "manner" designated by the state's "legislature" (the Congress in the case of the District). At present, the "manner" chosen by every state is by popular election. Most of the states (and the District of Columbia) use a winner-take-all system, in which the candidate who receives a majority of the vote, or a plurality of the popular vote (less than 50 percent but more than any other candidate) takes all of the State's electoral votes. In Maine and Nebraska, the winner of the popular vote in each congressional district wins an elector, and the remaining two electors are chosen based on the statewide vote.

On Election Day, the voters cast their ballots for electors, even though the names of the candidates for President and Vice President are often the names shown on the ballot. Each state's electors meet forty days after Election Day, and the formal balloting for president takes place at those meetings.

Many different proposals to alter the presidential election process by amending the Constitution, including direct nation-wide election by the people, have been offered over the years. None have been passed by Congress and sent to the States for ratification. Under the most common method for amending the Constitution, an amendment must be proposed by a two-thirds majority in both houses of Congress and ratified by three-fourths of the states.

The Movement against the Electoral College

The most compelling argument against the Electoral College is that it prevents the direct election of the President by popular vote and is, therefore, contrary to modern principles of representative government. Studies show that more than 70 percent of American citizens favor the election of the President by popular vote.

Beyond this basic theoretical objection is the very practical objection that the Electoral College system enables candidates who have not received the most votes cast by American voters to become President.

We have seen such an outcome four times in our history. The first time was the 1824 election which was won by John Q. Adams even though he received fewer electoral votes and fewer

popular votes than Andrew Jackson. (Adams won the election in the House of Representatives, with 13 State delegations voting for him, seven voting for Jackson and three voting for Crawford. This happened because there were more than two viable candidates, and would have been a less likely outcome in a two candidate race.)

In 1876, Rutherford B. Hayes beat Samuel J. Tilden by one electoral vote, becoming President despite trailing in the popular vote by a count of 4,288,546 to 4,034,311. In 1888, Benjamin Harrison beat Grover Cleveland with an electoral vote of 233 to 168, despite Cleveland's popular vote margin of 5,534,488 to 5,443,892. Most recently, in the 2000 presidential election, George W. Bush received fewer popular votes than Albert Gore, Jr., but received a majority of electoral votes. The situation was almost reversed in 2004. Although President Bush received more than three million more popular votes than John Kerry, Kerry would have been elected President if Ohio's electoral votes had been cast in his favor.

These circumstances have prompted much discussion on the advisability and feasibility of reforming our election process to eliminate the Electoral College and to elect the President by direct election. This conversation is not new. Over the past 200 years, according to the National Archives, more than 700 proposals have been introduced in Congress to reform or eliminate the Electoral College. Indeed, several joint resolutions were introduced in the current Congress on this issue. The proposals, all introduced in the House of Representatives, were referred to the Committee on the Judiciary, where no action has been taken.

Against this background comes the National Popular Vote Compact Proposal (NPV).

The National Popular Vote Compact Proposal

The National Popular Vote Compact proposal offers a method of achieving the result of election of the President by popular vote without amending the Constitution to eliminate the Electoral College. Instead, this method uses the mechanism of the Electoral College to ensure that the candidate who receives the most popular votes is elected President of the United States.

Under the proposed legislation to enact the National Popular Vote Compact, all of the state's electoral votes would be awarded to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. The bill would take effect only when enacted, in identical form, by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President (270 of 538)

The NPV Compact proposal is predicated upon the portion of the United States Constitution which states:

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors...” (Article II, Section 1, Clause 2) (emphasis added)

The constitutional wording, “as the Legislature thereof may direct,” contains no restriction on the states' exercise of their power with respect to their electors. The U.S. Supreme Court has repeatedly characterized the authority of the states over the manner of awarding their electoral votes as “plenary” and “exclusive.” Therefore, the states have the right to decide how to select their electors and award their electoral votes. Thus, proponents of the NPV Compact claim that the U.S. Constitution need not be changed in order to implement nationwide NPV. Rather, they maintain, this change can be accomplished in the same way that the current system evolved—namely, the states will use their exclusive and plenary power to decide the manner of awarding their electoral votes.

An additional constitutional underpinning of the NPV is the Compact Clause (Article I, Section 10, Clause 3), which permits states to enter into legally enforceable contractual obligations to undertake agreed joint action with other states. Interstate compacts are typically used to address problems that concern more than one state—the states which are affected enter into a compact (contract) which regulates their actions, ensuring uniform response by the states to address their mutual concerns. These contracts are typically enacted through the passage of identical legislation by the compacting states.

Under the state legislation proposed to establish the NPV, the popular vote counts from all 50 states and the District of Columbia would be added together to obtain a national grand total for each presidential candidate. Then, state elections officials in all states participating in the plan would award their electoral votes to the presidential candidate who receives the largest number of popular votes in all 50 states and the District of Columbia. The NPV Compact plan would take effect only when it has been enacted by states collectively possessing a majority of the electoral votes. The 270-vote threshold also corresponds essentially to states representing a majority of the people of the United States. As a result, every vote in all 50 states and the District of Columbia would be equally important in presidential elections.

The compact contains a six-month blackout period during which no state can withdraw from the compact. The blackout period starts on July 20 of each presidential election year and runs through the January 20 inauguration. Interstate compacts are contracts. It is settled compact law and settled constitutional law that withdrawal restrictions—very common in interstate compacts—are enforceable because the U.S. Constitution prohibits a state from impairing any obligation of contract.

The legislation contains other procedural provisions that would ensure the smooth functioning of the agreement. For example, one clause addresses the possibility of a tie in the national popular vote. If there is no national popular vote winner, each state chooses the electors for the candidate who has won that state.

Another clause addresses circumstances in which the winner of the national popular vote might be prevented from receiving the electoral votes from a member state. For example, it is possible that the winner of the national popular vote fails to appear as a candidate in a particular state and, therefore, there are no appropriate electors for the state to certify. To address that situation and five other situations identified by the drafters of the legislation as possible anomalies in the process they have developed, a mechanism is provided whereby the desired result is obtained by allowing the presidential candidate who has received the largest number of votes in the national election to select the electors in the state in which no electors associated with the winning slate have been elected. The full text of the compact is available at www.lwv.org.

Current Status of the National Popular Vote Compact

Since passage of the National Popular Vote Compact is accomplished on a state-by-state basis, its status is fluid. As of September 1, 2008, the legislation necessary to activate the compact has been signed into law in four states: Maryland, New Jersey, Hawaii and Illinois, for a total of 50 of the 270 electoral votes required to activate the NPV Compact. NPV Compact bills have been introduced in 15 other states, where some have passed committee and others have passed one house.

*Portions of this background paper are from the LWVUS Impact on Issues, 2006-2008

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Support for the National Popular Vote Compact

Because the League already supports direct election of the president, arguments against the Electoral College (EC) are not included in the material supporting the National Popular Vote Compact (NPV Compact).

Constitutional Issues The NPV Compact is a way to assure that every person's vote counts equally and that the person receiving the most votes is the winner of the presidency. The same result would be achieved by constitutional amendment but the U.S. Constitution is difficult to amend. The NPV Compact is a viable way to attain the same goal as amending the Constitution to eliminate the EC.

A constitutional amendment is not needed to effectuate the NPV Compact because states already have the right to implement changes in how electors are appointed.

The NPV Compact is a compact between states – a method of concerted state action that has long been sanctioned by the Constitution and the courts.

Evaluating Fairness A candidate can be elected president by receiving the most electoral votes even though he or she did not receive the most popular votes. This is not a result voters expect or desire. As election campaigns are now waged, major emphasis and resources are concentrated in key EC battleground states because that is where elections are won or lost. The NPV Compact would eliminate the emphasis on battleground states and would be more apt to assure campaign strategies that appeal to a broad spectrum of the electorate which would foster greater voter participation.

The argument that the plan would negatively impact states' rights is countered by poll results showing that most voters want their individual vote to count, rather than allotting them to electors representing the state as a whole.

Any claim that the NPV Compact is an unprecedented disregard for the U.S. Constitution ignores the reality that voting

rights have been changed through state action many times. Women's suffrage, for example, was instituted by twenty states before passage of the constitutional amendment that made the right universal.

Mechanical Considerations Those opposed to the NPV Compact cite mechanical issues that might lead the NPV to fail, but the Compact includes provisions that address issues of enforcement, winning levels and recounts.

Other Issues The Voting Rights Act and the NPV Compact are in harmony, assuring equality of votes throughout the United States.

League Issues Opponents say that the NPV Compact conflicts with the League's support of uniform voting standards. Supporters of the Compact advocate its passage in all states, which would result in uniform voting standards. It is true that the NPV Compact could be in effect for an interlude when not all states had signed on to it. The same could be demonstrated for other laws, such as the Equal Rights Amendment. Nonetheless, it must be remembered that uniform voting standards are not now in effect. The NPV Compact could help assure that every vote would be counted equally.

Further, implementation of a method which assures direct election of the president by popular vote is in keeping with the League's long-held position.

To prepare for the consensus meeting, please read the complete version of this paper (available at www.lwv.org) by the LWVUS National Popular Voter Compact Study Committee.

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Opposition to the National Popular Vote Compact

There is little respect for the Electoral College (EC). The League opposes it and most voters want a direct popular vote. But is the National Popular Vote Compact (NPV Compact) an appropriate way to achieve that result?

Evaluating Fairness Voters supporting the candidate who receives the majority of votes in their state want their state's electors to support their choice. Adoption of the NPV Compact may require a state elections official to direct its state's electors to cast their ballots in support of a candidate who was not favored by the voters of that state.

Passage of the NPV Compact will result in the emphasis of presidential campaigns shifting from the battleground states to areas of large concentrations of population. So, while some voters are disenfranchised by the EC, others might be disenfranchised by the NPV Compact. Because the Compact requires entry into a contract with other states which binds state elections officials to direct electors to vote in a certain way, regardless of the outcome of the election in their state, states' rights are diminished.

In addition, one can question the advisability of a method that bypasses the normal constitutional amendment process in this manner.

Constitutional Issues Many constitutional scholars argue that this plan will lead to extensive litigation involving challenges to the NVP Compact on issues such as the scope of constitutional powers, the Compact itself, the need for congressional approval, the concerns of non-compacting states, and constitutional protections of state interests and their role in elections.

Mechanical Issues/Flaws The methods for enforcement of this plan are unclear. Opponents question the power and timing to

withdraw from the Compact and the power to enforce compliance.

Others express concern about an onslaught of lawsuits between compacting and non-compacting states, as well as procedures in close elections.

The plan, allowing the election of a president by a plurality of votes, does not improve on the current system; neither the present system nor the NPV Compact requires that the president be elected by a majority.

Other Issues The Voting Rights Act requires pre-clearance for legislative changes. This, too, has the capacity to engender lawsuits to ensure compliance.

League Issues This proposal does nothing to achieve the goal of uniform standards of voting. The NPV Compact is effective when passed by states representing 270 electoral votes, effectively negating the impact on presidential elections of the voters in states which represent the other half of electoral votes. A system which assures no voter disenfranchisement is a better way to assure that every person's vote counts.

The League has long supported the abolition of the EC. Although the NPV Compact purports to foster the same result, it creates additional concerns. Amending the U.S. Constitution is a difficult process, and we should seriously consider supporting the normal amendment procedures to abolish the EC versus this specific "work-around."

To prepare for the consensus meeting, please read the complete version of this paper (available at www.lwv.org) by the LWVUS National Popular Voter Compact Study Committee.

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LEAGUE OF WOMEN VOTERS

The League of Women Voters is a nonpartisan political organization that encourages informed and active participation in government, works to increase understanding of major public policy issues and influences public policy through education and advocacy.

Any person of voting age, male or female, may become a voting member of the League. Associate membership is available for students not yet eligible to vote.



For updates on LWV activities go to <http://norman.ok.lwvnet.org> and click "Meetings and Events".

National NPV Study Calendar

Feb 12	Thur	7:00 pm– 8:30 pm	Public Meeting: National Popular Vote Interstate Compact. Memorial Presbyterian Church 601 24th Ave SW Details Page 1
Apr 1	Wed	11:30 am– 1:00 pm	All-Member Pot Luck Luncheon and NPV Study Consensus Meeting Memorial Presbyterian Church 601 24th Ave SW
May 1	Fri		NPV Study Consensus Deadline



2009 Annual Meeting

May 6	Wed	11:30 am– 1:30 pm	Pot Luck Luncheon, Speaker (TBA), and Business Meeting Memorial Presbyterian Church 601 24th Ave SW
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<http://norman.ok.lwvnet.org>

LEAGUE OF WOMEN VOTERS OF NORMAN

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