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GUEST COLUMN: National Popular Vote flawed, unconstitutional

By: Michael J. Norton Feb 21, 2019



The Colorado Freedom Institute represents the interests of thousands of Coloradans who oppose the scheme which would be created by Senate Bill 19-042 and which would replace the Electoral College provided for by the United States Constitution.

Senate Bill 19-042 seeks to effect a fundamental change in the presidential election process. But it would do so in a way that would be both unconstitutional and wrong.

Senate Bill 19-042 would replace our current system with the National Popular Vote (“NPV”) concept. Unless you live and vote in New York City, Chicago, Los Angeles or San Francisco, NPV would be a disaster.

- It would devalue the minority interests that the Founders of our nation sought to protect and directly contravene our Founders’ view of federalism and a representative republic.
- It would diminish the influence of smaller states like Colorado and rural areas of our state and nation.
- It would radicalize the United States political system, create electoral administrative problems and lead to more costly recounts and contentious litigation over the results of presidential elections.
- It would encourage even more voter fraud in our nation.
- It also would violate the United States Constitution.

Article II, Section 1 of the United States Constitution provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”

Although this section of the United States Constitution entrusts to the state legislatures the power to determine the manner in which presidential electors are selected, that power is limited, and the extent of that limitation is both based upon and borne out by the historical understanding of the scope of state authority under Article II.

At the time of the framing of the United States Constitution, the Framers envisioned a system in which states would select electors in accordance with the sentiments of citizens of the particular state, not the nation generally.

In creating the basic architecture of the American government, our Founders sought to satisfy each state's demand for greater representation while attempting to balance popular sovereignty against the risk posed to the minority from majoritarian rule. Smaller states in particular worried that a system that apportioned representatives on the basis of population would underrepresent their interests in the federal structure. While Colorado, not yet a state, did not have a seat at the table during the Constitutional convention, the people of Colorado should be greatly concerned by this proposal.

In the years following the framing of the United States Constitution, every single state, both original and newly admitted, established a system of selecting presidential electors based either directly or indirectly on the sentiments of the voters of the particular state. At no point in our nation's history has any state sought to appoint its electors on the basis of voter sentiment outside the state, let alone the national popular vote. The United States Constitution's delegation of power to the state legislature must therefore be read in light of this uniform, uncontested understanding that states are required to select electors in accordance with popular sentiment of voters in the state or the districts within it.

In the first presidential elections in our nation, electors were initially appointed directly by most state legislatures. However, some states like Pennsylvania and Virginia allowed popular election even in the first presidential election.

By 1836, only South Carolina did not provide for the direct election of electors, and "since the Civil War, electors have been popularly chosen in all states." The slate of electors chosen by voters then cast their votes for president and vice president in their respective states on the first Monday after the second Wednesday in December.

The District of Columbia and 48 states award electoral votes on a winner-takes-all system that allocates all of their electoral votes to whatever presidential candidate wins the popular vote in that state. Only two states, Nebraska and Maine, do not follow this system, as a result of which, in these two states, there could be a proportional split of electoral votes among presidential candidates based on the presidential vote in particular congressional districts.

By allocating electors on the basis of a state's cumulative representation in the House and Senate, the Electoral College system avoids purely population-based representation but still gives larger states greater electoral weight. Furthermore, the arrangement prevents candidates from winning an election by focusing solely on high-population urban centers and forces them to seek the support of a larger cross section of the American electorate. This aspect of the U.S. election system addresses the Founders' fears of a "tyranny of the majority," a topic frequently discussed in the Federalist Papers. In the eyes of the Founders, this tyranny was as dangerous as the risks posed by despots like King George and had the potential to marginalize sizeable portions of the population, particularly in rural and more remote areas of the country. The Electoral College was devised as a response to these fears as a means of ensuring the participation of a broad regional diversity in the outcome of elections.

As is clear, while the states have experimented over time with different systems for selecting their electors, every single system ever employed has selected the electors based on the expression of support among state voters, not the voters of another state or of the nation at large.

The NPV scheme proposes an interstate compact in which participating states agree in advance to automatically allocate their electoral votes to the winner of the national popular vote. This would disregard the popular vote results in Colorado or even what our General Assembly at the time may then desire. The NPV would put the fate of every presidential election in the hands of the voters in 11 or fewer states and give a handful of populous states a controlling majority of the Electoral College, thereby undermining the protections of the Electoral College.

The NPV agreement would go into effect only after "states cumulatively possessing a majority of the electoral votes" needed to win an election, i.e., 270 electoral votes, join the purported compact. Because it is far easier politically to get a smaller number of states with the required electoral votes to join the compact than it is to get two-thirds of Congress and three-fourths of the states to pass a constitutional amendment, the compact is an expedient and surreptitious way for proponents of the NPV to circumvent the Electoral College without formally amending the Constitution.

The NPV agreement would marginalize large portions of the population of Colorado, the very reason that the Constitution calls for a representative republic and not a direct democracy. Without question, smaller states like Colorado would receive less attention than larger states. Indeed, the votes of Coloradans might not be counted at all.

An unforeseen consequence of the NPV is the likelihood that the plan would encourage vote fraud. Currently, a fraudulent vote is counted only in the district in which it was cast and therefore can affect the electoral votes only in that particular state. Under the NPV, however, vote fraud in any state would affect the aggregate national vote. It is obvious that there would be a drastic increase in the potential benefit obtained from casting fraudulent ballots in larger states. This prospect is even more worrisome when one considers how much easier it is to cast fraudulent votes in strongly partisan neighborhoods and one-party districts where there are no (or few) members of the opposition party to work as election officials or poll watchers.

Most importantly, the NPV is unconstitutional because it would give a group of states with a majority of electoral votes the power to overturn the explicit decision of the Framers against direct election in a manner not in conformance with the constitutional means of changing the original decisions of the Framers, i.e., by constitutional amendment.

The requirement that states appoint electors committed to the presidential candidate who won the national popular vote exceeds the power delegated to the states under Article II, Section 1. If a majority of states have the power to select electors on any basis, there is nothing to stop a majority of states from agreeing to appoint electors committed to candidates only from those states or, more ominously, from one political party. The same reasons that would condemn the validity of such regionalist or partisan compacts likewise condemn the NPV.

The United States Constitution's Compact Clause provides that "No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State." If states could make agreements among themselves, they could damage the Nation's federalist structure. Populist states, for example, cannot agree to have their U.S. Senators vote to seat only one Senator from a less populous state.

The very purpose of this clause was to prevent a handful of states from combining to overturn an essential part of the constitutional design. The plain text makes it clear that all such state compacts, with minor exceptions, must be approved by Congress. The NPV proposal is not such a minor exception and litigation, costly to Colorado's taxpayers, is certain to result.

Changing or eliminating the Electoral College can be accomplished only by an amendment to the United States Constitution, which would require the consent of two-thirds of the Congress and three-fourths of the states. There is therefore almost no probability that such an amendment will be approved in the near future. While proponents maintain the NPV is simple and fair, it is not fair to the people of Colorado. Paraphrasing H. L. Mencken, for every complex problem, there is an answer that is clear, simple, and wrong.

SB 19-042 would forward the NPV which is both unconstitutional and bad public policy. The U.S. should maintain the Electoral College, which has successfully elected Presidents throughout this nation's history in a way that best represents the diverse and various interests of America and, importantly, of Colorado. On behalf of the Colorado Freedom Institute, we urge Colorado's legislators to vote against this bill.

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