National Popular Election of the President

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March 19, 2018

Answering 11 Criticisms of the National Popular Vote Bill (HB 5421)

This memorandum provides answers to Hans von Spakovsky's incorrect claims that a nationwide popular vote for President would

(1) enable the 11 biggest states to control the outcome of presidential elections;
(2) diminish the influence of rural areas;
(3) elevate the importance of big urban centers;
(4) diminish the influence of smaller states;
(5) lead to contentious fights over provisional ballots;
(6) lead to more recounts;
(7) encourage voter fraud;
(8) lead to presidents being elected with small vote percentages;
(9) radicalize American politics;
(10) violate the Constitution; and
(11) require congressional consent to take effect.

1. Eleven big states controlling the outcome of presidential elections

Hans von Spakovsky says that the National Popular Vote bill

> "would give the most populous states a controlling majority of the Electoral College, letting the voters of as few as 11 states control the outcome of presidential elections."[1]

The facts are that the 11 biggest states already contain a majority of the electoral votes (270 of 538). Von Spakovsky's claim that the biggest states would "control the outcome" is based on the politically preposterous scenario that a candidate would win 100% of the popular vote in the 11 biggest states and 0% in the 38 other states.

The fact is that that *no* big state delivered more than 63% of its popular vote to *any* presidential candidate in the 2000, 2004, 2008, or 2012 elections. Moreover, 5 of the biggest states (Ohio, Florida, Virginia, Pennsylvania, Michigan, and North Carolina) are closely divided "battleground" states or competitive states that are nearer 50%–50%.

Moreover, the 11 biggest states are a lock for either political party. When President George W. Bush won in 2000 and 2004, the biggest states divided 6–6, and he carried Texas, Florida, Ohio, North Carolina, Georgia, and Virginia.

In criticizing the idea of a nationwide vote for President, von Spakovsky ignores the fact that 50.01% (not 100%) of the voters of the same 11 biggest states could elect a President under the *current* state-by-state winner-take-all system.

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[1] All quotations of Hans Von Spakovsky are from "Protecting Electoral College from popular vote" in *Washington Times* on October 26, 2011, unless otherwise indicated.

More importantly, von Spakovsky ignores the fact that a small handful of states control the outcome of presidential elections *today* under the *current* state-by-state winner-take-all system. Under the *current* system, presidential candidates have no reason to pay attention to the issues of concern to voters in states where the statewide outcome is a foregone conclusion. Two-thirds of the 2012 general-election campaign events (176 of 253) were in just 4 states (Ohio, Florida, Virginia, and Iowa). Georgia (along with 37 other states) was totally ignored.

In a nationwide popular vote for President, every vote in every state would be equal throughout the United States. A vote cast in one of the 11 biggest states would be no more (or less) valuable or controlling than a vote cast anywhere else. The National Popular Vote bill would ensure that *every* vote, in *every* state, will be politically relevant in *every* presidential election.

See our video about big states at https://www.youtube.com/watch?v=Kfm6O1Fm14w.

2. Diminishing the influence of rural areas

Hans von Spakovsky says that the National Popular Vote bill would

"diminish the influence of rural areas."

Under the current state-by-state winner-take-all method of awarding electoral votes, a state's political influence is based on whether it is a closely divided "battleground" state. In 2012, the only states that received any campaign events and significant advertising expenditures were the 12 states where the outcome was between 45% and 51% Republican—that is, within 3 percentage points of Romney's nationwide percentage of 48%. The other 38 states were ignored.

Not surprisingly von Spakovsky offers no data to back up his assertion. The reason for this is that his assertion is totally false.

The facts are that the current system diminishes the influence of rural states because *none* of the 10 most rural states are "battleground" states. The 10 most rural states are Vermont (60.61% rural), Maine (57.86% rural), West Virginia (53.75% rural), Mississippi (50.20% rural), South Dakota (47.14% rural), Arkansas (46.10% rural), Montana (44.69% rural), North Dakota (44.68% rural), Alabama (43.74% rural), and Kentucky (43.13% rural).

3. Elevating the importance of big urban centers

Hans von Spakovsky says that the National Popular Vote bill would

"elevate the importance of big urban centers."

This concern arises from the misimpression that the big cities have more people than they actually do, and that they are more Democratic than they actually are, and from misinformation about how actual presidential campaigns are run.

The 10 biggest cities in the United States (San Jose is the 10th) together account for only 8% of the U.S. population.

The 100 biggest cities contain just *one-sixth* of the U.S. population. The 100 biggest cities voted ***63%* Democratic** in 2004.

By coincidence, a different *one-sixth* of the U.S. population live outside the nation's Metropolitan Statistical Areas (MSA's). This rural population voted ***60%* Republican**.

The remaining two thirds of the U.S. population lives *inside* a Metropolitan Statistical Area, but *outside* the central city. These *suburban* areas are evenly divided politically.

We don't have to speculate how presidential campaigns would be run in an election in which every vote is equal and the winner is the candidate who receives the most popular votes—because we already know.

Inside the handful of closely divided "battleground" states—such as Ohio, Florida, Virginia, and Iowa—every vote is *already* equal, and the winner is the candidate who receives the most popular votes *inside* those states.

Consider Ohio—the state that received over a quarter of the entire country's 253 general-election campaign events (and a similar percentage of the ad spending) in 2012.

Here is how real-world presidential candidates—advised by the nation's most astute strategists—campaigned in the nation's most critically important "battleground" state in 2012:

- The 4 biggest metro areas (with 54% of the state's population) received 52% of Ohio's 73 general-election campaign events—that is, almost exactly their share of the population.
- The 7 metro areas centered around medium-sized cities (with 23.6% of the state's population) received 23.3% of Ohio's 73 events—that is, almost exactly their share of the population.
- The 53 rural counties outside the state's Metropolitan Statistical Areas (with 22% of the state's population) received 25% of Ohio's 73 events—that is, almost exactly their share of the population (actually, a tad more).

In short, actual presidential candidates campaign everywhere—big metro areas, medium-sized metro areas, and rural areas—in elections in which every vote is equal, and the winner is the candidate who receives the most popular votes.

The same pattern exists inside the other major "battleground" states (Florida, Virginia, and Iowa) during the general-election campaign. These three states (along with Ohio) account for over two-thirds of the nation's campaign events (and a similar fraction of campaign expenditures).

No presidential campaign is going to ignore the rural one-sixth of the U.S. population any more than it is going to ignore the urban one-sixth. It is political preposterous to think that well-run campaigns would operate in any other way.

There is, of course, nothing in the National Popular Vote bill that mentions cities—much less anything that "elevates the importance of big urban centers." Under a nationwide vote for President, every vote is *equal*. The one-sixth of the people who live in the nation's 100 biggest cities are no more important—or less important—than the one-sixth of the people who live in rural areas.

See our video on big cities at https://www.youtube.com/watch?v=_gbwv5hf2Ps.

4. Diminishing the influence of smaller states

Hans von Spakovsky says that the National Popular Vote bill would

"diminish the influence of smaller states."

The small states (the 13 states with only three or four electoral votes) are the most disadvantaged and ignored group of states under the current state-by-state winner-take-all method of awarding electoral votes. The reason is that political power in presidential elections comes from being a closely divided battleground state, and 12 of the 13 smallest states are noncompetitive states in presidential elections.

These 12 small non-battleground states are not ignored because they are small, but because they are one-party states in presidential elections. In the last six presidential elections, six of the 13 small states have almost always gone Republican (Alaska, Idaho, Montana, North Dakota, South Dakota, and Wyoming), while 6 other small jurisdictions have regularly gone Democratic (Delaware, the District of Columbia, Hawaii, Maine, Rhode Island, and Vermont).

The political irrelevance of the 12 smallest states under the *current* system becomes especially clear if you notice that these states together have the same population—12 million—as the closely divided battleground state of Ohio. The 12 small states have 40 electoral votes—more than twice Ohio's 18 electoral votes. However, Ohio received 73 of the nation's 253 post-convention campaign events in 2012, while the 12 small non-battleground states received none.

Now let's look at the one state, among the smallest 13 states, that receives any general-election campaign attention. New Hampshire received 12 of the 253 general-election campaign events. New Hampshire received this much attention because political clout comes from being a closely divided battleground state (not from being a small state). In a national popular vote for President, *every vote would be equal*. Under National Popular Vote, a vote in Wyoming would suddenly become as important as a vote in New Hampshire. If every vote were equal, each of the 12 smallest states would be likely to receive about 1 general-election event, instead of just one state (New Hampshire) receiving 12 events.

The fact that the small states are disadvantaged by the current state-by-state winner-take-all system has long been recognized by prominent officials from those states. In 1966, Delaware led a group of 12 predominantly small states in suing New York (then a closely divided battleground state) in the U.S. Supreme Court in an (unsuccessful) effort to get state winner-take-all statutes declared unconstitutional.

See our video on small states at https://www.youtube.com/watch?v=XWGWPTlLYnk.

5. Contentious fights over provisional ballots

Hans von Spakovsky has stated that a nationwide election of the President would lead to

> "contentious fights over provisional ballots"

and has also stated

> "Every additional vote found anywhere in the country could make the difference to the losing candidate."

The fact is that provisional ballots are far more likely to lead to contentious fights under the *current* state-by-state winner-take-all system than under a nationwide vote.

One reason is that the closely divided "battleground" state of Ohio has historically had an unusually large number of provisional ballots. For example, there were more than 150,000 provisional ballots in 2004 in Ohio, where President George W. Bush's margin was only 118,601. The national outcome of the 2004 election in the Electoral College would have been reversed with a switch of 59,393 votes out of a total of 5,627,903 votes in Ohio (despite

President Bush's nationwide lead of over 3,000,000 votes). Provisional ballots are either accepted or rejected within about two weeks after an election (and about 71% are generally accepted). After all the valid provisional ballots were counted in Ohio in 2004, President Bush was declared the winner of Ohio (and hence nationally).

If provisional ballots had existed in Florida in 2000, provisional ballots would clearly have played a critical role in determining the winner (where the winner's final statewide margin was only 537 votes).

In 2008, the number of provisional ballots exceeded the leading candidate's margin in Missouri (McCain's 3,903-vote margin out of 2,925,205 votes), North Carolina (Obama's 14,177-vote margin out of 4,310,789 votes), and Indiana (Obama's 28,391-vote margin out of 2,751,054).

There were 12 closely divided battleground states in the 2012 election. Thus, there were 12 states where provisional ballots could potentially have played a decisive role in determining the winner under the current state-by-state winner-take-all system.

We agree with von Spakovsky that any vote "anywhere in the country could make the difference" in a nationwide vote for President. Indeed, the most important reason to adopt the National Popular Vote plan is to make *every* vote in *every* state politically relevant in *every* presidential election. However, we believe that all votes should be carefully scrutinized, vigorously contested (if appropriate), and ultimately counted if judged to be valid. We do not view the fact that every vote "could make the difference" as an evil.

6. Recounts

Hans von Spakovsky has stated that the current state-by-state winner-take-all method of awarding electoral votes

"reduces the possibility of a recount"

and

"has provided orderly elections for more than 200 years."

Nothing could be further from the facts.

The current state-by-state winner-take-all system of electing the President has repeatedly produced unnecessary artificial crises that would not have arisen if there had been a single large national pool of votes and if the winner had been the candidate who received the most popular votes nationwide.

There have been five litigated state counts in the nation's 57 presidential elections under the current system. This high frequency contrasts with relative rarity of recounts in elections in which the winner is simply the candidate receiving the most votes from those served by the office. There were only 22 recounts among the 4,072 statewide general elections in the 13-year period between 2000 and 2012—that is, a probability of 1-in-185.

In other words, the probability of a disputed presidential election conducted using the current state-by-state winner-take-all system is dramatically higher than the probability of a recount in an election in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes.

Recounts would be far less likely under the National Popular Vote bill than under the current system because there would be a single large national pool of votes instead of 51 separate pools. Given the 1-in-185 chance of a recount and given that there is a presidential election every four years, one would expect a recount about once in 740 years under a National Popular Vote system. In fact, the probability of a close national election would be even less than 1-in-185 because the 1-in-185 statistic is based on statewide recounts, and recounts become less likely with larger pools of votes. Thus, the probability of a national recount would be even less than 1-in-185 (and even less frequent than once in 740 years).

Many people do not realize how rare recounts are in actual practice, how few votes are changed by recounts, and how few recounts ever change the outcome of an election.

The average change in the margin of victory as a result of a statewide recount is a mere 294 votes.

Recounts are discussed in considerable additional detail in our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (available for reading or downloading for free at www.NationalPopularVote.com).

Also, see our short video on recounts at https://www.youtube.com/watch?v=z8FwrXRmGA4.

7. Voter Fraud

Hans von Spakovsky has stated that a nationwide election of the President would

> "encourage voter fraud since every bogus vote could make the difference in changing the outcome of a national race."

Executing electoral fraud without detection requires a situation in which altering a very small number of votes can have a very large impact.

Under the current state-by-state winner-take-all system, a small number of people in a closely divided battleground state can affect enough popular votes to flip all of that state's electoral votes and, hence, the national outcome.

A mere 537 popular votes in Florida in 2000 determined 25 electoral votes and thereby decided the national winner in an election in which 105,000,000 votes were cast.

A shift of 1,710 votes in California would have switched all of California's electoral votes and thereby defeated President Wilson in 1916, despite his nationwide lead of 579,000 votes. It is easier to flip 1,710 votes than 579,000 votes.

As former Colorado Congressman and presidential candidate Tom Tancredo (R) has said,

> "The issue of voter fraud … won't entirely go away with the National Popular Vote plan, but it is harder to mobilize massive voter fraud on the national level without getting caught, than it is to do so in a few key states. Voter fraud is already a problem. The National Popular Vote makes it a smaller one." [2]

[2] Tancredo, Tom. Should every vote count? November 11, 2011. http://www.wnd.com/index.php?pageId=366929.

In summary, the outcome of a presidential election is less likely to be affected by fraud with a single large nationwide pool of votes than under the current state-by-state winner-take-all system.

See our video on voter fraud at https://www.youtube.com/watch?v=4DdeFNCvVW0.

8. Presidents elected with small vote percentages

Hans von Spakovsky has stated:

> "since the winner under the NPV is whatever candidate gets the most votes, … this could lead to presidents elected with very small pluralities."

In fact, the current system of electing the President doesn't require that a candidate receive a majority of a state's popular vote in order to win all of the state's electoral votes. Even states with majority-vote requirements for other offices (such as Georgia and Louisiana) do not have such a requirement for President.

Moreover, the current system does not, of course, require that a candidate receive a majority of the nationwide popular vote.

In fact, 18 of our 57 presidential elections have been won by a candidate who did not receive a majority of the popular vote nationwide, including Presidents

- Lincoln (1860), who received 39% of the national popular vote,
- John Quincy Adams, who failed to receive the most popular votes nationwide,
- Hayes, who failed to receive the most popular votes nationwide,
- Benjamin Harrison, who failed to receive the most popular votes nationwide,
- George W. Bush (2000), who failed to receive the most popular votes nationwide,
- Polk,
- Taylor,
- Buchanan,
- Garfield,
- Cleveland,
- Wilson (1912 and 1916)m
- Truman,
- Kennedy,
- Nixon (1968), and
- Clinton (1992 and 1996).

As a practical matter, there is plenty of real-world evidence that candidates do not win elective office with small vote percentages in elections in which the winner is the candidate receiving the most popular votes. For example, of the 1,027 winning candidates for state chief executive (governor) since World War II and 2015,

- 88% got over 50% of the popular vote;
- 98% got over 45% of the popular vote;
- 99% got over 40% of the popular vote; and
- 100% got over 35% of the popular vote.

Similarly, there is no history of candidates winning U.S. Senate or congressional elections with very small vote percentages (even though most states do not have explicit majority-vote requirements and run-offs, as Georgia and Louisiana do).

Moreover, there is no reason to expect a breakdown of the two-party system. Four states elected their governors by popular vote when the Constitution took effect in 1789. Since then, all states have adopted popular election of their chief executive. After over 5,000 gubernatorial elections in which the winner was the candidate receiving the most popular votes, the two-party system has yet to break down in elections for chief executive. In fact, Duverger's law (which is based on a worldwide study of elections) asserts that the two-party system is, in fact, sustained when plurality voting is used to fill an office. Plurality voting is the method used throughout the United States today for virtually every election other than President, and the method used in the National Popular Vote bill.

See our video 'Myths about 15% Presidents, Regional and Extremist Candidates, and Break-Down of the Two-Party System" at https://www.youtube.com/watch?v=X_IUIaf9egA

9. Radicalize American politics

Hans von Spakovsky has stated that a nationwide election of the President

"could radicalize American politics."

If an Electoral College type of arrangement were essential for avoiding extremist candidates, we would see evidence of extremism in elections (such as gubernatorial elections) that do not employ this kind of arrangement. In fact, there is no history of extremist governors, senators, and congressmen chosen in elections in which the winner is the candidate receiving the most popular votes.

See our video 'Myths about 15% Presidents, Regional and Extremist Candidates, and Break-Down of the Two-Party System" at https://www.youtube.com/watch?v=X_IUIaf9egA

10. Constitutionality

Hans von Spakovsky has questioned the constitutionality of the National Popular Vote bill.

The Constitution leaves it to each state to choose the method of selecting its own presidential electors. Article II states:

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors…."

48 states currently have so-called "winner-take-all" laws that award *all* of the state's presidential electors to the candidate receiving the most popular votes inside each *separate* state.

These "winner-take-all" laws are state laws. They are ***not*** part of the U.S. Constitution. They were never debated by the Constitutional Convention. They were never mentioned in the *Federalist Papers*.

Only three states enacted winner-take-all laws for our nation's first presidential election in 1789, and all repealed them by 1800.

After 10 states had adopted winner-take-all laws, Missouri Senator Thomas Hart Benton warned in an 1824 Senate speech:

> "The general ticket system [winner-take-all], now existing in 10 States was … not [the offspring] of any disposition to give fair play to the will of the people. **It was adopted by the leading men of those states, to enable them to consolidate the vote of the State**."

The National Popular Vote bill is state legislation that would replace existing state winner-take-all laws with a new law guaranteeing the Presidency to the candidate receiving the most popular votes in all 50 states (and DC).

Some defenders of existing state winner-take-all laws have argued that the National Popular Vote might be unconstitutional because it is state legislation, as opposed to a federal constitutional amendment—overlooking the fact that existing winner-take-all laws were not enacted as a federal constitutional amendment, but, instead, as state legislation in exactly the way specified in the Constitution.

State winner-take-all laws can be changed or repealed in the same way that they were originally enacted—namely by passing a different state law.

The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it. That is, the 10th Amendment addresses the question of whether there are *implicit* restrictions on the states as to allowable methods for appointing presidential electors.

> **"The powers** not delegated to the United States by the Constitution, **nor prohibited by it to the States, are reserved to the States** respectively, or to the people."

Section 1 of Article II of the Constitution contains only one restriction on state choices on the manner of appointing their presidential electors, namely that no state may appoint a member of Congress or federal appointees as presidential elector.

The 10th Amendment was ratified in 1791 (that is, *after* ratification of the original 1787 Constitution) and thus takes precedence over the original Constitution. Even if there were enforceable implicit restrictions in the original Constitution on state choices on the manner of appointing their presidential electors (perhaps in the form of penumbral emanations from section 1 of Article II), such implicit restrictions were extinguished in 1791 by the 10th Amendment.

See our video "Myths about Constitutionality" at https://www.youtube.com/watch?v=ubIeQ-uO_b0

11. Congressional Consent

Hans von Spakovsky has raised the issue of whether the National Popular Vote interstate compact can go into effect without congressional consent.

An interstate compact is a type of law authorized by the U.S. Constitution that enables sovereign states to enter into legally enforceable contractual obligations with one another. The Constitution authorizes states to enter into interstate compacts. The Constitution contains no subject matter limitation on compacts.

If congressional consent turns out to be required for a given interstate compact, the U.S. Supreme Court has ruled that such consent may be given *before or after* the requisite number or combination of states have approved the compact. The Court said in *Virginia v. Tennessee* (148 U.S. 503):

> "The constitution does not state when the consent of congress shall be given, **whether it shall precede or may follow** the compact made, or whether it shall be express or may be implied."

Except for the relatively few interstate compacts initiated by Congress itself or the small number of compacts to which Congress has given advance consent, Congress has historically only voted on a compact after it has been enacted by the requisite number or combination of states specified in the compact (and often not even then).

Concerning the question as to whether Congressional consent is required for a particular compact, the U.S. Supreme Court ruled in 1893 (*Virginia v. Tennessee*, 148 U.S. 503) and 1976 (*New Hampshire v. Maine*, 426 U.S. 363) and 1978 (*U.S. Steel Corporation v. Multistate Tax Commission,* 434 *U.S.* 452) that congressional consent is only required for interstate compacts that

> "encroach upon or interfere with the just supremacy of the United States."

In the case of the National Popular Vote compact, the Constitution empowers each state to choose the method of appointing its presidential electors. Article II states:

> "Each State shall appoint, **in such Manner as the Legislature thereof may direc**t, a Number of Electors…."

In the 1893 case of *McPherson v. Blacker* (146 *U.S.* 1), the U.S. Supreme Court ruled that

> "The appointment and mode of appointment of electors belong ***exclusivel***y to the states."

That is, there simply is no federal power—much less federal supremacy—because the choice of method of appointing its own presidential electors is ***exclusively*** a state power.

The absence of federal power concerning the choice of method of awarding electoral votes becomes especially clear if one compares Article II giving the states ***exclusive*** power over presidential elections (quoted above) with the parallel constitutional provision in Article I giving states ***primary***—but not ***exclusive***—power over congressional elections. Article I states:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the Congress may at any time by Law make or alter such Regulations**."

Some defenders of the existing state-by-state winner-take-all method of awarding electoral votes have made the argument that the federal government has an "interest" in the National Popular Vote compact. However, even if there were some arguable "federal interest" in the states' exercise of one of their exclusive powers, the U.S. Supreme Court has specifically cautioned (*U.S. Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452):

> "The dissent appears to confuse potential impact on 'federal interests' with threats to 'federal supremacy.'"

The U.S. Supreme Court then said:

> "Absent a threat of encroachment or interference through enhanced state power, **the existence of a federal interest is irrelevant**. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval."

Some defenders of the current system have argued that the U.S. Supreme Court has been wrong on this issue since the 19th Century and have said that they intend to litigate the National Popular Vote compact after it is enacted by states possessing a majority of the electoral votes—presumably in a lawsuit among the states under the original jurisdiction of the U.S. Supreme Court.

If the U.S. Supreme Court applies its long-standing precedents, it will decide that the National Popular Vote compact may take effect without congressional consent.

Of course, if the Supreme Court decides that the National Popular Vote compact requires congressional consent, the compact would not take effect until subsequently approved by Congress.

In this event, consideration of the compact by Congress would then occur at a moment when states representing a majority of the Electoral College had already enacted the compact and in a political environment where about 75% of the public favors election of the President on the basis of which candidate receives the most popular votes in all 50 states and DC.

See our video "Myths about Interstate Compacts and Congressional Consent" at https://www.youtube.com/watch?v=1fPQfe0dkP8

Barry Fadem, President

National Popular Vote