

**THE STATE OF MINNESOTA**  
**SENATE ELECTIONS COMMITTEE**  
*SF 1362: An Act Relating to Elections*  
*Sec. 80, the National Popular Vote Compact*  
March 16, 2023

Submitted By: Tara Ross  
Author of *Enlightened Democracy: The Case for the Electoral College* and  
*Why We Need the Electoral College*

**Overview**

I urge you to strip SF 1362 of Section 80, approving the Agreement Among the States to Elect the President by National Popular Vote. The National Popular Vote legislation that has been proposed will create many legal and constitutional problems. The proposal should be considered independently, not lumped into an omnibus bill. Such treatment will simply ensure that the difficult issues presented are never thoroughly evaluated. Moreover, the Electoral College—and its benefits—are not generally well understood. Such constitutional institutions should be carefully studied and understood, not casually eliminated.

**Legal problems with NPV's compact**

- Equal Protection. NPV attempts to combine 51 different state (and D.C.) election processes into a single national outcome. This will create chaos, litigation, and confusion. It will also create claims that Minnesota has violated the Equal Protection Clause of the United States Constitution.
- Article V. Minnesota has great discretion in how it allocates its electors. It may not, however, violate another portion of the Constitution in the process. NPV's compact looks like an impermissible end run around Article V of the Constitution.
- Other States. NPV cannot force non-signatory states to cooperate with the NPV compact. Multiple states have already considered legislation that would allow them to withhold popular vote totals until after the meetings of the Electoral College.

**Modern Benefits of the Electoral College**

- The Benefits of Federalism. Presidential candidates must build national coalitions of voters. Historically speaking, the candidate who builds the broadest coalition of support will win. The process discourages presidential candidates from focusing too exclusively on one region, state, or special interest group.
- Moderation and Compromise. As a matter of history, the Electoral College has encouraged Americans to work together, across state lines. A direct election system, by contrast, would result in multi-party presidential races, a fractured electorate, increasingly extremist third-party candidates, and constant recounts.
- Stability and Certainty in Elections. The Electoral College typically produces quick and undisputed outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

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**Full Testimony**

I urge you to strip SF 1362 of Section 80, approving the Agreement Among the States to Elect the President by National Popular Vote. The National Popular Vote legislation that has been proposed will create many legal and constitutional problems. The proposal should be considered independently, not lumped into an omnibus bill. Such treatment will simply ensure that the difficult issues presented are never thoroughly evaluated. Moreover, the Electoral College—and its benefits—are not generally well understood. Such constitutional institutions should be carefully studied and understood, not casually eliminated.

First, I will discuss the special legal and constitutional difficulties created by NPV's plan. Next, I will discuss the benefits of the Electoral College.

***Legal Problems Created by NPV***

The current presidential election process blends federalist and democratic principles. America holds 51 completely separate, purely democratic elections every presidential election year (each state, plus D.C.). Each state is responsible for its own election. Differences among states' laws are irrelevant because votes cast in one state do not affect the outcome in another state. In short: 51 elections are held; 51 sets of state election laws govern these elections; 51 outcomes are achieved. Everyone is treated fairly.

NPV would change this. America would still hold 51 state-level elections, governed by 51 sets of election laws. But NPV would attempt to derive only one outcome from these 51 processes. Suddenly, variances among states' laws—previously irrelevant—would matter a great deal. **Now these varying laws ensure unequal treatment of voters.**

Consider the issue of early voting. Voters in Minnesota have their own laws for this process, but other states might have different provisions regarding when early voting starts, how long it lasts, or who may early vote and how they may early vote. If Minnesota's voters are competing only against other Minnesota voters in a contest to determine the identity of Minnesota's electors, then they have no reason to care what the rules are in another state. Ballots cast in other states do not affect the identity of a Minnesota elector. However, once

NPV throws voters of all states into the same election pool, then many problems arise. **With NPV in place, the identity of an Minnesota elector could be dictated by a vote cast in Mississippi or Oregon or any other state.** How can Minnesotan voters be equal with those in Oregon if they have less time to vote? Or if it is harder to obtain an absentee ballot?

There are other differences among states' laws: States differ in whether they allow felons to vote. They differ in their requirements for ballot qualification. States have different criteria for what triggers recounts within their borders—and how to count a hanging chad once that recount begins. Absentee ballots may be more or less difficult to obtain in various states.

One well-respected constitutional lawyer, Prof. Vikram David Amar, has acknowledged the real dangers created by these issues. Amar's opinion is important: NPV is based upon an idea that he and two other professors proposed in 2001. Yet Amar notes that a "problem I see in the current National Popular Vote bill is that it does not guarantee a true national election with uniform voter qualification, voter mechanics, and vote-counting standards. Absent such uniformity, some states might have incentives to obstruct or manipulate vote counts."

If NPV is adopted, **Minnesota had better brace itself for the Equal Protection lawsuits that will follow.** The Supreme Court has held that a state may not by "arbitrary and disparate treatment, value one person's vote over that of another." If Minnesota adopts NPV, it is making a deliberate choice to place its voters in a situation that guarantees unequal treatment, each and every presidential election year. Such a decision flies in the face of the most basic rules of democracy.

Lawsuits claiming Equal Protection problems are just the tip of the iceberg.

States that have rejected NPV will ask the Supreme Court to rule upon the constitutionality of NPV's compact. **The Supreme Court has already struck down statutes that were said to upset the compromises struck and the delicate balances achieved during the Constitutional Convention.** Writing for the majority in *Clinton v. New York*, Justice Stevens emphasized the "great debates and compromises that produced the Constitution itself." He found that the Line Item Veto Act could not stand because it disrupted "the 'finely wrought' procedure that the Framers designed."

In the same way, NPV's compact upsets the delicate balances and great compromises achieved in the presidential election process. NPV pretends that it can implement a direct national election of the President, without a constitutional amendment, even though the delegates to the Constitutional Convention explicitly rejected that very method. The move is too clever by half, and the Supreme Court can be expected to see through the ruse.

Finally, states that choose not to participate in NPV's compact can be expected to work against its implementation in other ways. The Constitution gives each state responsibility for itself in presidential elections. Non-signatory states have many tools with which they can make their voices heard.

**States such as New Hampshire and North Dakota have already considered legislation that could complicate NPV's efforts to generate a reliable national popular vote total.**

The legislation proposed in those states would withhold popular vote totals until after the meetings of the Electoral College. Other states have similar options available to them: They could release vote totals for the winner, but not the loser, in their states. Or they could grant each of their voters two or three ballots to cast for President, thus inflating the vote totals from their states. Some states might choose to revert to an older form of ballot in which presidential electors, not presidential candidates, are listed on a ballot. (A coherent vote total for national *candidates* is impossible to tabulate when the only ballots cast are for individual *electors*.)

Formally eliminating the Electoral College through a constitutional amendment would be unhealthy for the country. But NPV's attempt to skirt the constitutional amendment process would create added difficulties. These logistical and legal nightmares could haunt the country each and every presidential election year.

***The Benefits of the Electoral College***

The Constitution seeks to reconcile two seemingly irreconcilable goals: The Founders wanted the people to govern themselves, but they also wanted to protect minority interests. A simple democracy would not accomplish this objective: Bare or emotional majorities can too easily outvote and tyrannize minority groups—even very large, reasonable ones. An old analogy notes that a simple democracy is like two wolves and a sheep voting on what's for dinner.

The sheep doesn't feel good about being eaten just because it got a chance to vote!

The Founders sought to create something better than this type of simple democracy. They created a Constitution with many safeguards: We have separation of powers, presidential vetoes, a bicameral Congress, and supermajority requirements to do things like amend the Constitution. The Electoral College is just one of these safeguards, intended to protect our liberty from unreasonable rule.

The Electoral College continues to help our country in many ways: **It encourages coalition-building and motivates candidates to reach out to a wide variety of voters.** It penalizes those who rely upon isolated pockets of support in one region, one state, or among voters in one special interest group. It encourages moderation and compromise from political parties and their candidates. Finally, the state-by-state election process isolates voting problems to one or a handful of states, making it much harder to steal elections.

If this is true, then what has been happening lately? We are experiencing a series of close, contested, and angry elections because both parties are overly focused on their own bases. No one seems interested in building diverse coalitions, as the Electoral College requires.

**We've been here before.** The country has been divided and angry. We've had series of close presidential elections in which it seemed that coalition-building was a thing of the past. In the years after the Civil War, the Electoral College proved its ability to heal this sort of division.

Consider the political landscape as it existed back then: Democrats were strong in the South, but they also didn't have enough electoral votes in those states to win a presidential election. Thus, they had to reach out to some non-southerners. In the meantime, Republicans were in the opposite situation: They were strong in the North and the Northwest. They had enough electoral votes to win without southern support, but just barely. It was safer to seek out some southern votes, too. In other words, both political parties were forced to reach a hand across the political aisle—pretty much whether they wanted to or not. Both parties had incentives to earn the support of new voters. Over time, the incentives inherent in the presidential election process helped to heal some of the divide between North and South. Such coalition-building and inclusiveness is healthy for our country.

The incentives today are the same. The first party to realize its mistakes and to focus on coalition-building will also begin winning presidential elections in landslides. In a country as large and diverse as our own, such incentives are healthy and necessary if we are to regain our footing and thrive. Eliminating the Electoral College will simply undermine our ability to heal.

One last benefit of the Electoral College deserves a special mention in the wake of the election that we just witnessed: **The Electoral College encourages stability and certainty in our political system.** Events such as those that occurred in 2020 are rare.

The Electoral College typically produces quick and undisputed election outcomes for two reasons: First, the system (along with the winner-take-all rule) tends to magnify the margin of victory, giving the victor a certain and demonstrable election outcome. Such certainty can't be provided by a direct popular election. Popular votes are often close, and these close votes can result in constant litigation and recounts.

Second, the system controls the impact of fraud and error. Regardless of what you thought about the allegations of fraud during the last election, the Electoral College provided one indisputable benefit in the middle of those contests: **It isolated our problems to a handful of states.** The country was given a clear set of problems to resolve one way or another before moving on to a definitive election outcome. We did not have to fight over allegations of fraud in Texas (yes, there were some) or any of the states with wider popular vote margins. In a national popular vote system, we would have had no clear process for arriving at a final total.

### ***Conclusion***

The National Popular Vote legislation that has been proposed presents difficult legal issues that deserve careful, thoughtful consideration. Moreover, including NPV in an omnibus bill is a disservice to a constitutional institution that has served the country well for decades. These issues deserve independent evaluation. Please omit NPV from SF 1362. Thank you.