

The National Popular Vote Plan Is a Bad Idea

Federal Elections, 2010

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In [the December 15, 2008,] *Wall Street Journal*, Jonathan Soros writes that "It's Time to Junk the Electoral College." I have no doubt that the electoral college will survive this latest assault, but bad arguments ought to be slapped down anyway—especially on the very day when the electors meet in their state capitals to cast their official ballots.

A Bad Solution

Soros backs an idea first floated by the Brothers Amar (law professors Akhil and Vikram), which would undo the electoral college but not by amending the Constitution to eliminate it. Instead, state legislatures (responsible for legislating the manner in which presidential electors are chosen) would write statutes that would award their electoral votes to the party whose candidate won a nationwide popular-vote majority. So, for instance, if a Republican won nationally but lost badly in New York, and New York's state legislature had written such a law, the state's electoral votes would go Republican even though more New Yorkers had voted Democratic.

Since no state legislature wants to jump off this cliff unless everyone else jumps too, each state that passes such legislation would make its operation contingent on the enactment by enough of the rest of the states to make a total of 270 electoral votes, or a majority in the college. If that threshold were reached, the practice of the remaining states wouldn't matter, since the states in the so-called "National Popular Vote Compact" would control the outcome. (Of course the votes of citizens everywhere would continue to matter, since the decisive thing would be a national tally of the popular vote.)

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This idea is a solution in search of a problem. Soros identifies just two reasons to adopt this proposal. The first is that the current winner-take-all practice (in effect in 48 states) leads candidates to campaign only in competitive states, and to ignore states safely in either camp. The second reason is that once in a while the winner of the nationally aggregated popular vote is not the winner of the election, as happened in 2000.

Take the second reason first. Soros does not even attempt to argue that an occasional burp, in which the winner of the electoral college majority is not the winner of a national popular vote plurality, is an injustice. Maybe he regards it as self-evidently undemocratic, but it's not. The electoral college with the winner-take-all rule in (most of) the states is perfectly democratic. It's just federally democratic, rather than being nationally democratic. What is needed (and never provided by electoral college critics) is an argument why we should prefer the undifferentiated aggregate majority rule of the nation's voters to the differentiated and

segmented majority rule of the states' voters.

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Also, as many people have pointed out (including me on previous occasions), the current arrangement has the advantage of confining recount contests within the bounds of particular states. Any election in which the "wrong" candidate wins the electoral-vote majority will very probably be a quite close election nationally—as was 2000. Controversies over counts and recounts will at least occur in just one or a few states (e.g., Florida [in 2000]), rather than in thousands of precincts in all 50 states. [In 2008] it was some days before the state of Missouri was sure which candidate would receive its electoral votes. Take that problem national in a close election, and think about the nightmare of delays and the crisis of legitimacy that might result.

Soros's other argument is that [in 2008], for instance, the two major candidates "devoted more than 98% of their television ad spending and campaign events to just 15 states which together make up about a third of the U.S. population." (I'm not sure I trust that 98% figure, but let that go.) In any electoral environment, the candidates' resources will go wherever the payoff is likely to be greatest—and that means slighting the scenes of victories you can take for granted as much as those where your defeat is assured. So where would candidates' resources be more efficiently expended in an electoral environment in which only the national popular vote mattered?

Most likely, we would see campaigning in urban centers and vote-rich near suburbs. The northeast corridor (D.C. to Boston), the great cities of the West and Gulf coasts and the Great Lakes (from San Diego to Seattle, from Mobile to Houston, and from Buffalo to Milwaukee)—many of them taken for granted in recent elections—would suddenly become relevant, and would remain permanently so as long as they retained their prominence as dense population centers. Some of the great river cities on the Missouri and Mississippi and Ohio might get some attention too. Advertising in and candidate travel to these rich seams of votes would be the order of the day. Oh, and has anyone noticed that most of them are biased heavily to the Democratic Party? I'm sure that has nothing to do with the proposal's popularity. Who would lose out? The states and localities in flyover country—the rural areas, the small towns, the more culturally conservative parts of the country.

Soros complains that only one third of the states were paid any attention in the recent campaign. Does anyone think that candidates would show up in more of the country under his proposal?

Think again of the permanent importance of this bias toward the urban and against the rural. One of the interesting things about our current system is that it doesn't stand still. Anyone old enough to remember Ronald Reagan can recall when California was a state Republicans sometimes won. One day it will be again. So complaints that candidates only go to one third of the country ring hollow when we reflect that over time there is considerable change in *which* third of the country is most heavily targeted by candidates. Any state feeling slighted today need only become more competitive between the parties—something one of the parties surely wants in every one of those states—to change its fortunes in the next presidential election. But under Soros's idea the geography of presidential campaigning would follow the iron law of population density. Movement over time would occur glacially by comparison.

A Harebrained Idea

Maryland, New Jersey, Illinois, and Hawaii are so far the only states to pass the legislation desired by Soros and friends. Each one is, lately, a predictably Democratic state. Not so long ago Illinois was a battleground, and if it becomes one again it will probably have the good sense to repeal this foolish legislation.

A last problem with the "compact" is that if it really is a compact among the states concerned, it appears to violate Article I, section 10 of the Constitution: "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State ..." Do Soros et al. plan to push a bill in Congress that would permit the states to do this? One might say it is no true "compact" at all since it entails each state merely exercising its independent Article II power to say how its electors will be chosen. But the conditioning of each state law's operation on the choice of other states to do likewise may make this an unconstitutional compact.

I don't think this could be effectively challenged in any court, but I also don't think it will ever reach that point. The four states mentioned above provide fewer than one fifth of the votes needed to make this scheme effective. And too few of the other 46 states, I'm sure, will find it in their interest or their country's interest to pursue this harebrained idea.

Further Readings

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Source Citation

Raskin, Jamin. "The Electoral College System Should Be Reformed by Adopting the National Popular Vote Plan." *Federal Elections*. Ed. Debra A. Miller. Detroit: Greenhaven Press, 2010. Current Controversies. Rpt. from "Deformed Reform: The Cure for the Electoral College That Is Worse Than What Ails Us." *Slate.com*. 2007. *Opposing Viewpoints in Context*. Web. 25 Mar. 2014.

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