

Incompatible: Ranked Choice Voting and National Popular Vote cannot coexist

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KEY POINTS

NPV requires a single, conclusive vote tally from every state for each candidate, but RCV can produce different initial and final vote totals for each candidate.

States using RCV might report only the initial or final vote totals, shifting large blocks of votes between the candidates based on arbitrary decisions.

Alternatively, states using RCV could report both the initial and final vote totals, leaving it up to NPV states to decide which numbers to use to determine the winner.

Whenever a third-party or independent candidate finishes ahead of a major party candidate in a RCV state, this could cause hundreds of thousands or even millions of votes to be erased from the major party candidate's national vote total.

The incompatibility of RCV and NPV could prevent a conclusive determination of which candidate has won the presidency, causing a political, legal, and constitutional crisis and throwing the nation into turmoil.

Introduction

The National Popular Vote interstate compact (NPV) and an election method known as Ranked Choice Voting (RCV) are major reforms proposed to the American political process. They are also fundamentally incompatible in a way that could spark political, legal, and constitutional crises in presidential elections.

Under NPV, each state that joins the compact pledges to award its electoral votes to the candidate deemed to have received the most votes nationally, even if that candidate did not receive the most votes in that state. The compact takes effect if joined by states with at least 270 electoral votes between them (the number needed to elect a president); at present fifteen states and the District of Columbia have joined, with a total of 196 electoral votes.¹

With RCV (also known as “Instant Runoff Voting”),

¹ A more complete explanation of how the National Popular Vote interstate compact works is available at <https://www.nationalpopularvote.com/written-explanation>.

voters rank candidates by preference – first, second, third, and so on. When a candidate receives a majority of first-place votes, the race is over and that candidate is the winner. If there is no majority winner after counting first-place votes, the candidate with the fewest first-place votes is eliminated, and voters who picked that candidate as their first choice have their votes counted for their next choice. This process continues until there is a winner with a majority. Two states, Alaska and Maine, have enacted RCV and more may join them in the next few years.²

The problem is that NPV needs a single, definitive vote tally for each candidate from every state. The RCV process can yield two different vote counts – an initial total of all voters' first choice votes, and a final number that has eliminated votes for some candidates and added votes to others.

Today, federal law requires that every state include vote totals for each slate of presidential electors on a document known as a Certificate of Ascertainment.³ NPV proponents identify these certificates as the primary source of vote totals for compact states to determine the winner.⁴ But exactly how those vote totals are reported is left to each state, with no guidance in federal law on how a state using RCV should report its vote totals. NPV likewise fails to address RCV, and contains no provisions for dealing with disputes or ambiguities. How an RCV state decides to report its numbers could determine which candidate wins under NPV if the national vote count is close.⁵

² More information on Ranked Choice Voting is available at https://www.fairvote.org/ranked_choice_voting.

³ 3 U.S. Code § 6, which reads (in part): "It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast....".

⁴ From the book *Every Vote Equal* published by National Popular Vote Inc.: "MYTH: There is no official count of the national popular vote. QUICK ANSWER: Current federal law provides for an official vote count of the popular vote for President from each state in the form of a public "Certificate of Ascertainment."" p.580, fourth edition.

⁵ At least three of the last sixteen presidential elections have had popular vote margins of

RCV might even make it impossible to determine an NPV winner.

Initial or Final RCV Vote Totals?

States using RCV might report either initial or final vote counts, which could result in dramatically different vote totals.

Consider the choice that Utah would have faced in 2016 if it had used RCV and NPV had been in effect. Evan McMullin, an independent candidate with appeal primarily on the right, finished in third place with about 244,000 votes. Hillary Clinton received roughly 311,000 votes to finish in second place, and Donald Trump won the state with approximately 515,000 votes. Several other candidates, including Gary Johnson and Jill Stein, received a little over 60,000 votes between them.⁶

Because Donald Trump's vote total in Utah only came to about 45.5 percent, the RCV process would have been used to determine the state's winner. If Trump, Clinton, and McMullin evenly split the other third-party and independent voters,⁷ then the final step in the RCV process would have been to take the ballots that had McMullin ranked first (or at least ahead of Trump and Clinton) and re-allocate them between the two final candidates. It is difficult to know which would benefit more – McMullin's appeal was primarily to right-of-center voters who did not like Trump – but for purposes of this example assume that all of them "returned home" and voted for Trump.

Under this scenario, Trump finishes with about 779,000 votes out of Utah – the 515,000 he received as voters' first choice, 244,000 from voters who

less than one percent: Kennedy-Nixon in 1960, Nixon-Humphrey in 1968, and Bush-Gore in 2000. Carter-Ford in 1976 had a popular vote margin of about two percent. Because of other problems associated with calculating a national vote total under NPV, anything less than a two or three percent margin could potentially be close enough for it to be impossible to conclusively determine a winner if just a handful of states adopt RCV.

⁶Report of Utah's State Board of Canvassers, November 28, 2016. Available at <https://elections.utah.gov/Media/Default/2016%20Election/2016%20General%20Election%20-%20Statewide%20Canvass%203.pdf>.

⁷An even split would not have been required to force a final RCV round between Trump, Clinton, and McMullin – Trump would have had to win roughly five-sixths of the votes of other third-party candidates in order to avoid a final RCV round between him, Clinton, and McMullin, which seems unlikely.

ranked McMullin first, and another 20,000 from splitting the rest of the third party and independent voters. Clinton gains only 20,000 votes from those voters who did not rank her, Trump, or McMullin first.

If NPV is in effect – does Utah report on its Certificate of Ascertainment the initial numbers, or the final numbers after the RCV process has been used? There is no obviously correct answer, and Utah may be well within its authority to report either number, even though Trump stands to either gain or lose 244,000 votes depending on this essentially arbitrary choice. Those 244,000 votes would not have been decisive in 2016 of course, but in a much closer election like 1960 the decision of which numbers to report would decide the election.

This example is of a single state reporting RCV vote totals in a way that alters nearly a quarter million votes. At least two states are set to use RCV in 2024, and more may decide to do so. Depending on which states use RCV in future elections and the relative performance of third-party and independent candidates, millions of votes could be added or subtracted from various candidates based on arbitrary decisions of state officials.⁸ Under the terms of the compact, NPV states have no choice but to accept such numbers provided by other states.

Why Not Both?

States using RCV do not have to decide between only reporting the initial or the final numbers – they can report both. This would remove the power from RCV states to determine which totals are used by NPV states. But it would shift that power to officials in the compact's member states.

The 2016 presidential election in Maine in 2016 clearly illustrates the problem. Had both RCV and NPV been in effect in Maine that year, it likely would have reported both initial and final numbers owing to the state's system of awarding two electors to the statewide winner and one elector to the winner of each of the state's two congressional district.

⁸There is also no reason to believe the choices that RCV states make will be uniform – some might opt to report only the initial vote count while others decide to only report the final tally. This would presumably add yet another level of controversy and uncertainty, potentially increasing the likelihood of an electoral crisis as a result of mixing NPV with RCV.

Maine's 2016 Certificate of Ascertainment does break out the vote totals both by congressional district and statewide. In the 1st congressional district, Hillary Clinton received about 213,000 votes, a majority of the roughly 394,000 votes cast.⁹ In the 2nd Congressional district Donald Trump received a majority, approximately 181,000 votes out of about 353,000 votes.

Statewide, however, neither candidate received a majority – Hillary Clinton wound up receiving a plurality with nearly 358,000 out of almost 772,000 total votes. Approximately 336,000 Mainers voted for Donald Trump, and just under 55,000 voters chose a third-party or independent candidate.

If RCV had been in place in Maine in 2016, it would not have been needed to determine the winner of each congressional district because Clinton and Trump each received a majority. To determine the statewide winner, the RCV process would have been used, and the 55,000 voters that did not choose Clinton or Trump as their first choice would have had their votes re-allocated to either Clinton or Trump depending on how (and if) they ranked those two candidates.

The end result? Maine would report initial vote totals from each congressional district, which aggregate to about 358,000 votes for Clinton and 336,000 for Trump, and statewide totals with up to 55,000 more votes split between the two. As in the Utah example, it is impossible to determine how those 55,000 votes would be split (but it is worth noting that about 40,000 of those votes were for McMullin and the Libertarian Gary Johnson, suggesting a more rightward tilt).

Reporting both initial and final vote totals present a significant problem for NPV member states – which set of conflicting numbers should they use to determine the winner? The compact assumes a single set of numbers from each state. It provides no guidance to determine which of these numbers are correct and should be used.

The NPV compact also fails to provide any mechanism for resolving these or similar issues or ensuring each member state makes the same choice.¹⁰ This

⁹ Numbers taken from Maine's Certificate of Ascertainment for 2016, available at <https://www.archives.gov/files/electoral-college/2016/ascertainment-maine.pdf>.

¹⁰ Interstate compacts that establish an ongoing function typically create some sort of

makes it possible – and in these politically polarized times, perhaps likely – that in a close election where the choice might benefit a particular party, NPV states would split. Republican officials could choose numbers to help deliver the White House to the Republican candidate while Democratic officials chose numbers that boost the Democratic candidate.

Of course an RCV state would not need a congressional district system like Maine's to report both sets of results. A state using RCV that has the winner-take-all system could also decide for any number of reasons that it would report, either on its Certificate of Ascertainment or its official statewide canvas of votes, both the initial and the final vote totals.

The Zero Option

The examples of Maine and Utah in 2016 illustrate how vote totals reported by RCV states cannot provide a single, uniform vote total for each candidate. In both states, had RCV been in place, votes for third-party and independent candidates would have been transferred through the RCV process to either the Democratic or Republican candidate (or ignored if those voters did not rank either the Democratic or Republican candidate).

But what happens when a third-party or independent candidate finishes ahead of either the Democratic or Republican candidate? Hundreds of thousands or even millions of votes could literally be erased from the national vote count that NPV relies on. Maine and Utah again illustrate the problem.

In 1992, billionaire businessman Ross Perot ran for president. After leading both George H.W. Bush and Bill Clinton in late spring polls, Perot finished third in the national vote, with about 18 percent. He did not win a single elector.

Perot did, however, finish in second place in both Maine and Utah. What would have happened had RCV been in place in 1992?

In Utah, Bush won the state with just under 323,000 votes total, Perot finished in second place receiving a little over 203,000 votes, and Clinton came in third with about 183,000 votes. Another 34,000 votes went to other

commission or agency to oversee its implementation and resolve differences between member states, or at least establishes a dispute resolution process. There is no such mechanism or process in the NPV compact.

third-party and independent candidates.¹¹

Assuming voters for other third-party and independent candidates did not break strongly for Clinton (ranking him second on their ballots), the then-Governor of Arkansas would have been eliminated in the RCV process and his voters would have had their votes allocated to either Bush or Perot (or ignored if they did not rank either of them).

In Maine, the outcome was reversed. Clinton won, receiving about 263,000 votes, while Perot barely topped Bush by about 300 votes, 206,820 to 206,504. Fewer than 3,000 voters opted for other candidates.¹²

Bush might have overtaken Perot for second place if RCV had been in place, but assuming he did not, then the same thing that happened to Clinton in Utah would happen to Bush here – voters who ranked him above Clinton and Perot would have had their votes transferred to the last two candidates standing or ignored.

Had RCV been in place, Maine might have reported zero votes for Bush and Utah might have reported zero votes for Clinton. Hundreds of thousands of votes would have been erased from the national vote count. If the states had reported both initial and final results, each NPV state could have unilaterally decided whether to use those final results with zero votes for third-place candidates.

Clinton received about five million more votes than Bush in 1992, of course, so it would not have been enough to change the outcome. But other presidential elections have been much closer. If a single mid-size state such as Arizona, Minnesota, or Virginia adopted RCV and had a third-party or independent candidate finish ahead of a major-party candidate, it could completely erase a million or more votes from either the Democratic or Republican candidate's national vote total.

It is worth noting that third-party or independent candidates finishing in second or even first place in one or more states is a semi-regular feature of

¹¹ Available at <https://uselectionatlas.org/RESULTS/state.php?year=1992&fips=49&f=0&of f=0&elect=0>.

¹² Available at <https://uselectionatlas.org/RESULTS/state.php?year=1992&fips=23&f=0&off=0&elect=0>.

American presidential politics. Ross Perot in 1992 was the most recent, but third-party or independent candidates beat major party candidates in one or more states in 1892, 1912, 1924, 1948, and 1968. In 2016 Evan McMullin finished only a few percentage points behind Hillary Clinton in Utah, and if RCV been in place in that election it is possible he could have finished in second place in that state.¹³

NPV also is likely to produce more third-party or independent runs by celebrity or wealthy candidates, and RCV is likely to produce more voters who rank third-party candidates first as a “protest vote” but then vote for a major party candidate.¹⁴ Both increase the probability of votes for the Democratic or Republican candidate being zeroed out in RCV states under NPV.

Possible Solutions

Although little attention has previously been given to the incompatibility of RCV and NPV, there does seem to be some awareness of the problem. In Maine, two identical bills to implement NPV were introduced during the 2021 legislative session, LD 1330 and LD 1384. In addition to the standard language implementing the NPV compact, both bills repeal RCV in presidential elections.¹⁵

Another indication of growing awareness of the problem came in comments made in November 2020 by Rob Richie, president of the organization Fair-Vote and a leading proponent of RCV. Speaking at an online event organized

¹³ McMullin would have beaten Clinton for second place in Utah in 2016, if RCV had been in place, if he was ranked ahead of Clinton by a large share of voters who chose other third-party candidates and if at least several thousand people who voted for either Trump or Clinton decided to rank him ahead of the candidate they actually voted for. This might have happened if those Trump and Clinton voters believed that they were not “wasting” their votes.

¹⁴ See: Cerrone, Joseph and McClintock, Cynthia, “Ranked-Choice Voting, Runoff, and Democracy: Insights from Maine and Other U.S. States,” January 2021, pp. 7-11. Available at SSRN: <https://ssrn.com/abstract=3769409>.

¹⁵ Both bills repeal RCV for presidential elections in two separate sections of Maine’s laws. One repeal would have been necessary even if there were no conflict between NPV and RCV, similar to a state with “winner take all” repealing that law as part of adopting NPV. The other repeal provision eliminates Mainers use of RCV to vote for president, unneeded if no conflict existed.

by advocates of NPV, Richie predicted that as more states adopt RCV, “I anticipate states with RCV for presidential elections to establish a compact of their own to make it work in concert with the compact. Until then there are straightforward ways for ranked choice voting states to accommodate the compact.”¹⁶

Implicit in Richie’s comments is that, without such a compact among RCV states or the adoption on their own of “straightforward ways... to accommodate” NPV, there is a conflict between RCV and NPV, presumably along the lines of what has been outlined in this paper.

The outline of such a hypothetical compact among RCV states would presumably involve committing to a uniform method of reporting vote totals, most likely either only the initial or only the final tabulation. This would give NPV what it needs: a single, uniformly reported vote tally for each candidate from each RCV state.

There are two obvious and significant problems.

1. No such compact has been proposed, making it impossible to know if the details of the compact would appropriately address the current incompatibility between NPV and RCV.
2. It seems unlikely that RCV states opposed to NPV would join a compact to solve NPV’s problem.¹⁷

There is also the thorny question of what the standard would be. Releasing and relying on only initial votes would prevent the erasure of hundreds of thousands or millions of votes for major candidates who happen to finish third in an RCV state, but this might conflict with federal law regarding the vote totals required to be on the Certificate of Ascertainment.¹⁸ Reporting

¹⁶ Available at <https://www.youtube.com/watch?v=ieOvGPcSMV8>, relevant comments start at approximately 15:45.

¹⁷ Several states have even considered legislation intended specifically to thwart NPV as well as resolutions condemning it, such as HJR 52 in Missouri (2021), HB 1531 in New Hampshire (2020), and SB 2271 in North Dakota (2021).

¹⁸ Federal law requires “the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast...” and it is unclear if a state could report the initial

only the final numbers avoids problems with the Certificate of Ascertainment but would wind up erasing hundreds of thousands or millions of votes whenever a third party or independent candidate finishes in second or even first place in any RCV state.

A potential solution to this problem might be to have *two* additional compacts (beyond the NPV compact), one among RCV states pledging to report on their Certificates of Ascertainment and statewide canvas both the initial and final numbers, and a second compact that NPV member states would join pledging to all use either the initial or final vote tabulations, or perhaps creating a process or body that would make such determinations for all member states. The feasibility of such a solution is questionable for reasons noted earlier – no such compact has been proposed and it is unclear why anti-NPV states that have RCV would ever join. It also seems likely to spark public confusion and even outrage.

Regarding the “straightforward ways” that individual states might attempt to solve these problems, the most straightforward is what has been proposed in Maine’s 2021 NPV legislation – repeal of RCV for presidential elections. This is a reasonable approach in states that join the compact – to date no compact member state uses RCV – but why an RCV state that is not a member of the NPV compact would agree to this or any other policy that solves NPV’s problem is unclear. It seems especially unlikely that anti-NPV states would help NPV states solve a problem that the NPV compact simply fails to address.

Another solution might be for Congress to establish a uniform standard for how RCV states report vote totals on their Certificates of Ascertainment. Yet Congress does not have the power to dictate to states how they choose their electors, so any such action would still leave NPV states to determine whether to follow Congress’s lead or not. This too might require another compact signed onto by all member states.¹⁹ Again, there is no proposed federal legis-

numbers on the certificate when it was actually the final numbers that were used to determine that state’s slate of electors. It seems likely that a certified statewide canvas of votes would need to include the final numbers actually used to determine the election outcome.

¹⁹ Because the Constitution gives each state broad authority in how it selects its presidential electors, federal law could not require NPV member states to use a specific vote total.

lation or compact to address these conflicts, making it impossible to evaluate how well they might function. Also, the likelihood of this hypothetical legislation passing Congress seems remote.

One option that would not be available is any sort of lawsuit or other action by NPV members states to require RCV states to report their votes in any particular manner. The U.S. Supreme Court ruled in December 2020 in *Texas v. Pennsylvania, Georgia, Wisconsin and Michigan* that one state does not have a “judicially cognizable interest in the manner in which another State conducts its elections.”²⁰

Conclusion

According to the most popular understanding of the 1960 presidential election, John Kennedy won the popular vote over Richard Nixon by about 113,000 votes, the narrowest margin in recent history. But due to an unusual situation in Alabama that year, many at the time (including *Congressional Quarterly*) and some historians today credited Nixon with a popular vote win.²¹ The uncertainty over who won the popular vote didn’t matter, of course, because NPV was not in place and Kennedy won the Electoral College vote.

But it’s easy to imagine the chaos, controversy, and constitutional crisis that would have ensued if the presidency was to be determined by the national vote count and there was no clear, conclusive national vote count available.

That crisis is what the National Popular Vote interstate compact could create,

²⁰ U.S. Supreme Court orders for Friday, December 11, 2020. Available at https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf. For a further discussion of the issues involved, see: Marcia Coyle, “Why Texas’s election suit failed to reach first base in the Supreme Court” National Constitution Center, December 14 2020, available at <https://constitutioncenter.org/interactive-constitution/blog/why-texas-election-suit-failed-to-reach-first-base-in-the-supreme-court>.

²¹ Six of Alabama’s eleven electors were unpledged that year, ultimately voting for U.S. Senator Harry Byrd of Virginia. The common account gives all of Alabama’s popular vote for the Democratic electors to Kennedy, but other accounts give only 5/11ths of Alabama’s popular vote to Kennedy or give it all to Byrd. The latter two accounts put Nixon ahead in the national vote count. None of the three possible methods are obviously and indisputably correct or incorrect. More details are available at https://www.realclearpolitics.com/articles/2012/10/19/did_jfk_lose_the_popular_vote_115833.html.

particularly if one or more states used Ranked Choice Voting in their presidential election. Voters across the country (and people around the world) would witness state election officials shifting large blocks of votes away from some candidates and in favor of other candidates. Even more alarmingly, a modestly competitive third-party or independent candidate finishing in second place in an RCV state could cause a million or more votes simply to disappear from the Democratic or Republican candidate. All this would, at best, appear arbitrary – more likely it would seem partisan as it worked to benefit one candidate over another.

The problem is not Ranked Choice Voting itself, which at least two states plan to use in the presidential election of 2024. Within a single jurisdiction RCV provides only a single result – Maine using RCV to determine who wins its four electoral votes does not pose a threat to the Electoral College. The problem is the National Popular Vote interstate compact, which assumes that every state will conduct its elections in a uniform manner and provide only a single vote total for each candidate. As this paper has demonstrated, this will not be the case, and no solutions to this problem have been proposed by advocates of NPV.

At a bare minimum, any state considering NPV should defer a decision until this issue is resolved and there can be confidence the compact would not plunge the nation into an intractable electoral crisis.