Why MAP Is Better Than NPV

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There's a better way than the National Popular Vote compact to give individual voting people more voting power in our Presidential elections. But it takes some explanation to show why.

In the beginning, state legislatures had "plenary" (full) power to choose how their states' Electoral College votes were awarded. Some gave them out on a winner-take-all basis; others were more proportional. Some legislatures made their own decisions and ignored the popular vote altogether.

That plenary power was from Article II, Section 1, Clause 2 of the US Constitution: "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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Article II, Section 1, Clause 3 is where it originally said electors got two votes; that was replaced by the 12th Amendment in 1804 after Jefferson and Burr tied in 1800 and the race went 36 ballots in the House. (BTW, enough of the electoral votes received by each man came from the three-fifths counting of slaves that John Adams should probably have been re-elected . . . but that's another story, for which you might read the Garry Wills book "Negro President".) Anyway, the 12th Amendment shifted to giving each elector one vote for a Presidential ticket, but left the legislatures in charge of how to select the electors.

Then came the 14th Amendment in 1868, after the Civil War. As part of enforcement of the other Civil War Amendments granting African Americans the right to vote, Section 2 of the 14th Amendment says that – if a state denies "or in any way abridge[s]" the right of its male citizens 21 and over to vote for President and Vice President (or any of a list of other offices) – it is to lose a number of US House seats in proportion to the denial . . . which would also cost it that many electoral votes.

https://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution

It may have been expected to apply to only the "returning" Confederate states, but it doesn't say that.

Both these amendments were, of course, adopted after the original language – so Congress and the states are presumed to have passed them knowing what else was previously in the Constitution, and agreed to any impact the amendments would have on that older language. In other words, the amendments supersede the original language – and the 14th, coming after the 12th, takes precedence over it in the same way. Several later amendments have changed who was eligible to vote, but nothing later has changed how the Electoral College itself works. (Unless you count the term limits in the 22nd Amendment in 1951.)

Now fast forward to the 1960s, and a bunch of big Supreme Court opinions on voting rights. The one-person-one-vote line of decisions (such as *Reynolds v Sims*) holds that one way to not only abridge but actually deny the voting rights of a person or a group is to dilute their voting ***power*** – their ability to actually elect who they want by voting. Well, winner-take-all awarding of electoral votes does exactly that . . . it dilutes the voting power of anyone who didn't vote for the state's plurality winner. (The more candidates there are, the less likely that state winners are even majority winners – and the more people whose voting rights are denied by dilution.)

Combine this solid Supreme Court precedent with Section 2 of the 14th Amendment, and the upshot is that a state legislature's power to appoint Presidential electors however it chooses is no longer plenary. Instead, a state which doesn't apportion its electoral votes to Presidential candidates/tickets in proportion to the share of popular votes they got in that state is ****violating the Constitution**** -- and subject to the "***M***al-***A***pportionment ***P***enalty" of losing House seats and electoral votes. (At least the state's "House-based" EC votes should be apportioned; one could make an argument either way about awarding the two "Senate-based" EC votes separately, or maybe even winner-take-both.)

This is related to why the National Popular Vote compact proposal is unconstitutional too. NPV would mean an even worse denial of the voting rights of pluralities or even majorities of voters in some NPV states. It would totally dilute their voting power based on results from other states which may very well have vastly different rules for who can vote, who can get on the ballot, when which ballots can get recounted, etc. (And the 11th Amendment specifically bans citizens of one state suing another state -- unless Congress specifically authorizes such suits under Section 5 of the 14th Amendment.)

I would support a direct-popular-vote Constitutional amendment once all states have the same good and fair rules in all those vital areas – or at least once all states meet good, fair, and strong enough standards for them. In the meantime, we can get closer to a direct popular vote without NPV by enforcing Section 2 of the 14th Amendment. Here's one good source for more information on that section and the Mal-Apportionment Penalty already in the US Constitution at that point:

http://asagordon.byethost10.com/