

# 7 | Strategy for Enacting the National Popular Vote Compact

The National Popular Vote compact (described in chapter 6) must be enacted by states possessing a majority of electoral votes (i.e., 270 out of 538) in order to take effect.

This chapter discusses four elements of the strategy to win enactment of the compact by the requisite combination of states, including

- the role of public opinion (section 7.1),
- the role of state legislatures in enacting the compact (section 7.2),
- the role of the citizen-initiative process in enacting the compact in certain states (section 7.3), and
- the role of Congress (section 7.4).

## 7.1. THE ROLE OF PUBLIC OPINION

The starting point for the strategy to enact the National Popular Vote Compact is public opinion.

Public opinion has supported nationwide popular election of the President for over six decades.

According to a Gallup report entitled “Americans Have Historically Favored Changing Way Presidents Are Elected,” the first nationwide poll on the topic of direct election of the President is believed to have been a 1944 Gallup poll that asked:

“It has been suggested that the electoral vote system be discontinued and Presidents of the United States be elected by total popular vote alone. Do you favor or oppose this proposal?”<sup>1</sup>

In 1977 and 1980, the nationwide Gallup poll asked:

“Would you approve or disapprove of an amendment to the Constitution which would do away with the Electoral College and base the election of a President on the total vote cast throughout the nation?”<sup>2</sup>

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<sup>1</sup> Gallup News Service. 2000. *Americans Have Historically Favored Changing Way Presidents Are Elected*. November 10, 2000. Page 1.

<sup>2</sup> *Id.* at 2.

Table 7.1 shows the results for the Gallup nationwide public opinion polls in 1944, 1977, and 1980.<sup>3</sup>

**Table 7.1 PUBLIC SUPPORT FOR NATIONWIDE POPULAR ELECTION OF THE PRESIDENT**

	APPROVE	DISAPPROVE	NO OPINION
June 22–27, 1944	65%	23%	13%
January 14–17, 1977	73%	15%	12%
November 7–10, 1980	67%	19%	15%

The Gallup News Service has also reported:

“The greatest level of support, 81%, was recorded after the 1968 election when Richard Nixon defeated Hubert Humphrey in another extremely close election.”<sup>4</sup>

In 2007, the *Washington Post*, the Kaiser Family Foundation, and Harvard University conducted a nationwide poll that showed 72% support for direct nationwide election of the President.

In 2008, AOL conducted a nationwide online poll of 113,691 people asking:

“How would you prefer the United States elect its President?”

The results were:

- National popular vote—74%,
- Electoral College vote—21%, and
- Some other way—5%.

A 2010 nationwide poll prepared for the Aspen Institute by Penn Schoen Berland and released at the Aspen Ideas Festival found that “74 percent agree it is time to abolish the Electoral College and have direct popular vote for the president.”<sup>5</sup>

State-level polls have been conducted by a number of groups.

In California in August 2007, Fairbank, Maslin, Maullin & Associates conducted a poll of 800 likely voters in California for Californians for the Fair Election Reform organization. Voters were asked about a

“proposal [that] would guarantee that the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia

<sup>3</sup> Other Gallup polls on this subject are discussed in Carlson, Darren K. 2004. Public flunks electoral college system. November 2, 2004. *Gallup Daily News*. See <http://www.gallup.com/poll/13918/Public-Flunks-Electoral-College-System.aspx>. Also see Saad, Lydia. 2011. Americans would swap electoral college for popular vote. *Gallup Daily News*. October 24, 2011.

<sup>4</sup> Gallup News Service. 2000. *Americans Have Historically Favored Changing Way Presidents Are Elected*. November 10, 2000. Page 2.

<sup>5</sup> <http://www.slideshare.net/PennSchoenBerland/time-aspen-ideas-festival-2011-full-report>.

will win the Presidency. Would you generally support or oppose switching to a system in which the Presidency is decided by the actual votes in all 50 states combined?”

The results of this 2007 poll in California were that 69% would support a change to popular vote; 21% would oppose the change; and 9% didn't know.

In California in October 2008, the Public Policy Institute of California (PPIC) conducted a telephone survey of 2,004 Californians asking:

“For future presidential elections, would you support or oppose changing to a system in which the president is elected by direct popular vote, instead of by the Electoral College?”<sup>6</sup>

The results of the 2008 PPIC poll in California were that 70% would support a change to popular vote; 21% would oppose the change; and 10% didn't know.

In New York in October 2008, the Global Strategy Group conducted a poll on the National Popular Vote bill and reported:

“Voters in New York are largely in favor of switching to a system that elects the President of the United States according to vote totals in all 50 states. Two-thirds of voters (66%) currently support the proposal, while just a quarter (26%) is in opposition to it. Support for the proposal is broad across demographics as a majority of each subgroup is in favor of it.”

Recent polls conducted by Public Policy Polling for the National Popular Vote organization show high levels of public support for a national popular vote for President in battleground states, small states, Southern, border states, and elsewhere. Detailed reports on the polls, including the cross-tabs, are available at the web site of National Popular Vote.<sup>7</sup> Overall support in the various states was

- Alaska–70%,
- Arizona–67%,
- Arkansas–80%,
- California–70%,
- Colorado–68%,
- Connecticut–74%,
- Delaware–75%,
- District of Columbia–76%,
- Florida–78%,
- Idaho–77%,

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<sup>6</sup> *PPIC Statewide Survey: Californians and Their Government*. October 2008.

<sup>7</sup> <http://www.nationalpopularvote.com/pages/polls.php>.

- Iowa–75%,
- Kentucky–80%,
- Maine–77%,
- Massachusetts–73%,
- Michigan–73%,
- Minnesota–75%,
- Mississippi–77%,
- Missouri–70%,
- Montana–72%,
- Nebraska–67%,
- Nevada–72%,
- New Hampshire–69%,
- New Mexico–76%,
- New York–79%,
- North Carolina–74%,
- Ohio–70%,
- Oklahoma–81%,
- Oregon–76%,
- Pennsylvania–78%,
- Rhode Island–74%,
- South Carolina–71%,
- South Dakota–75%,
- Utah–70%,
- Vermont–75%,
- Virginia–74%,
- Washington–77%,
- West Virginia–81%,
- Wisconsin–71%, and
- Wyoming–69%.

The poll in Nebraska is noteworthy because Nebraska awards three of its electoral votes by congressional district (with two being awarded statewide) under a law first used in the 1992 election. In 2008, Barack Obama won Nebraska's 2nd congressional district, thereby winning one of Nebraska's electoral votes.

A survey of 977 Nebraska voters conducted on January 26–27, 2011, contained a comparative question about a national popular vote, Nebraska’s current congressional-district approach, and the statewide winner-take-all rule that Nebraska’s current governor advocates as a replacement for Nebraska’s congressional-district approach.

The first question was:

“How do you think we should elect the President: Should it be the candidate who gets the most votes in all 50 states, or the current Electoral College system?”

The survey showed 67% overall support for a national popular vote for President. On this first question, support for a national popular vote by political affiliation was 78% among Democrats, 62% among Republicans, and 63% among others. By congressional district, support for a national popular vote was 65% in the 1st congressional district, 66% in the 2nd district (which voted for Obama in 2008), and 72% in the 3rd district. By gender, support for a national popular vote was 76% among women and 59% among men. By age, support for a national popular vote was 73% among 18–29-year-olds, 67% among 30–45-year-olds, 65% among 46–65-year-olds, and 69% among those older than 65. By race, support for a national popular vote was 68% among whites and 63% among others.

The second question in the survey presented a three-way choice among various methods of awarding Nebraska’s electoral votes,

- 16% favored a statewide winner-take-all system (i.e., awarding all five of Nebraska’s electoral votes to the candidate who receives the most votes statewide);
- 27% favored Nebraska’s current system of awarding electoral votes by congressional district; and
- 57% favored a national popular vote.

Table 7.2 shows the results of this second question by political affiliation.

**Table 7.2 NEBRASKA RESULTS, BY POLITICAL AFFILIATION, ON THREE ALTERNATIVE METHODS OF ELECTING THE PRESIDENT.**

<b>METHOD</b>	<b>DEMOCRAT</b>	<b>REPUBLICAN</b>	<b>OTHER</b>
Candidate who gets the most votes in all 50 states	65%	53%	51%
Nebraska’s current district system	26%	27%	32%
Statewide winner-take-all system	9%	20%	17%

Table 7.3 shows the results of this second question by congressional district. Note that the 2nd district was the district carried by Obama in 2008.

**Table 7.3 NEBRASKA RESULTS, BY POLITICAL AFFILIATION, ON THREE ALTERNATIVE METHODS OF ELECTING THE PRESIDENT.**

<b>METHOD</b>	<b>FIRST DISTRICT</b>	<b>SECOND DISTRICT</b>	<b>THIRD DISTRICT</b>
Candidate who gets the most votes in all 50 states	53%	58%	59%
Nebraska's current district system	26%	31%	26%
Statewide winner-take-all system	21%	12%	15%

Another noteworthy survey involved 800 Utah voters conducted on May 19–20, 2009. This survey showed 70% overall support for the idea that the President of the United States should be the candidate who receives the most popular votes in all 50 states. Voters were asked:

“How do you think we should elect the President: Should it be the candidate who gets the most votes in all 50 states, or the current Electoral College system?”

By political affiliation, support for a national popular vote on the first question was 82% among Democrats, 66% among Republicans, and 75% among others. By gender, support was 78% among women and 60% among men. By age, support was 70% among 18–29-year-olds, 70% among 30–45-year-olds, 70% among 46–65-year-olds, and 68% for those older than 65.

Then, voters were pointedly asked a “push” question that specifically highlighted the fact that Utah’s electoral votes would be awarded to the winner of the national popular vote in all 50 states under the National Popular Vote compact.

“Do you think it more important that a state’s electoral votes be cast for the presidential candidate who receives the most popular votes in that state, or is it more important to guarantee that the candidate who receives the most popular votes in all 50 states becomes President?”

Support for a national popular vote did drop in this “push” question, but only from 70% to 66%.

On this second question, the results by political affiliation were as follows: 77% among Democrats, 63% among Republicans, and 62% among others. By gender, support was 72% among women and 58% among men. By age, support was 61% among 18–29-year-olds, 64% among 30–45-year-olds, 68% among 46–65-year-olds, and 66% for those older than 65.<sup>8</sup>

<sup>8</sup> The Utah survey (and the others cited in this section) was conducted by Public Policy Polling and had a margin of error of plus or minus 3 1/2%. See <http://www.nationalpopularvote.com/pages/polls>.

## 7.2. THE ROLE OF STATE LEGISLATURES

A state legislature enacts an interstate compact in the same way that it enacts an ordinary state statute.

The law-making process at the state level generally entails adoption of a proposed legislative bill by a majority vote of each house of the state legislature. All state Governors currently have veto power over legislative bills (or at least most bills<sup>9</sup>) passed by their legislatures. Thus, bills are presented to the Governor for approval or disapproval.<sup>10</sup> If a Governor vetoes a bill, the legislation may nonetheless become law if the legislature overrides the veto in the manner specified by the state's constitution. Overriding a gubernatorial veto typically requires a super-majority (typically a two-thirds vote, but sometimes only a majority) of both houses of the legislature.<sup>11</sup>

In the District of Columbia, interstate compacts may be enacted by the Council of the District of Columbia. The Mayor has veto power, and the Council has power to override a veto. In addition, all legislation enacted by the Council is subject to congressional review under the District of Columbia Home Rule Act of 1973. Prior to 1973, Congress typically approved interstate compacts on behalf of the District.

On February 23, 2006, the National Popular Vote organization held its first press conference in which it announced its state-based proposal to reform the Electoral College (described in chapter 6) and released the first edition of this book.

The National Popular Vote bill was introduced into all 50 state legislatures shortly thereafter.

As of mid-2012, the National Popular Vote bill has been enacted into law by nine jurisdictions:

- California (55 electoral votes),
- the District of Columbia (3 electoral votes),
- Hawaii (4 electoral votes),
- Illinois (20 electoral votes),
- Maryland (10 electoral votes),
- Massachusetts (11 electoral votes),
- New Jersey (14 electoral votes),
- Vermont (3 electoral votes), and
- Washington state (12 electoral votes).

The nine jurisdictions that have enacted the National Popular Vote compact possess 132 electoral votes—49% of the 270 electoral votes needed to bring the compact into effect.

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<sup>9</sup> For example, the North Carolina Governor does not have veto power over redistricting bills.

<sup>10</sup> Council of State Governments. 2005. *The Book of the States*. Lexington, KY: The Council of State Governments. 2005 edition. Volume 37. Pages 161–162.

<sup>11</sup> For simplicity, we refer to the two houses of a state legislature, even though Nebraska has a unicameral state legislature.

As of mid-2012, the National Popular Vote bill has been approved by 31 legislative chambers in 21 jurisdictions. In addition to the legislative bodies of the above nine jurisdictions, the bill has been approved by the

- Arkansas House,
- Colorado Senate,
- Colorado House (in different years),
- Connecticut House
- Delaware House,
- Maine Senate,
- Michigan House,
- New Mexico House,
- Nevada Assembly,
- New York Senate,
- North Carolina Senate,
- Oregon House,
- Rhode Island Senate, and
- Rhode Island House.

See appendix Z for a history of the National Popular Vote bill.

### **7.3. THE ROLE OF THE CITIZEN-INITIATIVE PROCESS**

The effort to secure adoption of the National Popular Vote compact could potentially involve the use of the citizen-initiative process.

State statutes are most commonly changed by passing a new law that amends or repeals existing law. State statutes are sometimes altered by passage of an amendment to the state constitution. In certain states, state statutes or state constitutional amendments may be enacted by the citizen-initiative process.

The people in 22 states have reserved to themselves the power to enact state statutes through the citizen-initiative process.

In addition, the people in 19 states have reserved to themselves the power to adopt state constitutional amendments through the citizen-initiative process. These 19 states include two states (Florida and Mississippi) that are not among the just-mentioned 22 states with the statutory initiative process.

Also, the District of Columbia has a citizen-initiative process for statutes.

Thus, a total of 25 jurisdictions permit either statutory or constitutional initiatives.

Table 7.4 shows the 25 jurisdictions that permit either statutory or constitutional initiatives. These 25 jurisdictions collectively possess 260 electoral votes based on the 2000 census. Note that, as of mid-2012, the National Popular Vote compact has been enacted in five of the 25 jurisdictions having the citizen-initiative process (California, the District of Columbia, Illinois, Massachusetts, and Washington state).

**Table 7.4 THE 25 JURISDICTIONS WITH THE CITIZEN-INITIATIVE PROCESS**

STATE	STATUTORY	CONSTITUTIONAL	ELECTORAL VOTES
Alaska	Yes	No	3
Arizona	Yes	Yes	10
Arkansas	Yes	Yes	6
California	Yes	Yes	55
Colorado	Yes	Yes	9
District of Columbia	Yes	No	3
Florida	No	Yes	27
Idaho	Yes	Very limited	4
Illinois	Advisory only	Very limited	21
Maine	Yes	No	4
Massachusetts	Yes	Yes	12
Michigan	Yes	Yes	17
Mississippi	No	Yes	6
Missouri	Yes	Yes	11
Montana	Yes	Yes	3
Nebraska	Yes	Yes	5
Nevada	Yes	Yes	5
North Dakota	Yes	Yes	3
Ohio	Yes	Yes	20
Oklahoma	Yes	Yes	7
Oregon	Yes	Yes	7
South Dakota	Yes	Yes	3
Utah	Yes	No	5
Washington	Yes	No	11
Wyoming	Yes	No	3
Total			260

The book *The Initiative: Citizen Law-Making*<sup>12</sup> provides details on the constitutional and statutory provisions governing the initiative processes in the various states.

The citizen-initiative process is problematic in several of the 25 jurisdictions listed in table 7.4 for a number of reasons.

For example, in Illinois, the statutory initiative is advisory only. Moreover, the constitutional initiative in Illinois is limited to matters relating to legislative procedure. Fortunately, the National Popular Vote bill has already been enacted by the Illinois legislature.

<sup>12</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger. Pages 24–25.

Because there is no statutory initiative in Florida or Mississippi, the constitutional initiative process would have to be invoked in those states in order to adopt the National Popular Vote compact.

In Florida, the initiative process for constitutional amendments is unusually time-consuming and uncertain. The procedure generally includes the circulation of a small petition followed by a preliminary review of the proposition by the Florida Supreme Court. If the Supreme Court approves, then a substantial number of additional signatures are required.

In Mississippi, the initiative process for constitutional amendments is somewhat difficult to use, and, as a result, it has been successfully invoked on only a few occasions.

The first step in invoking the citizen-initiative process in a typical state is to file the wording of the proposed legislation and the wording of the proposed petition with a state official (usually the Attorney General). Ohio, Maine, Massachusetts, Mississippi, Nevada, Florida, and Missouri have deadlines for starting the citizen-initiative process that come unusually early in each two-year election cycle.

There are numerous other difficulties associated with the use of the citizen-initiative process. In some states, there are significant legal limitations (involving both statutory law and case law) concerning the circulation of petitions on private property. In some states (such as Alaska and Arizona), weather conditions shorten the time window during which it is practical to circulate initiative petitions. Signature gathering is difficult in Michigan because of a combination of the weather and relatively tight legal limitations on petition circulation on private property. In some states, election administrators and the courts are not favorably disposed to the citizen-initiative process, and it is common for ballot measures to be disqualified in pre-election or post-election challenges. In some states, state constitutional provisions and existing judicial interpretations do not make it clear whether the citizen-initiative process is co-extensive with the powers of the state legislature.

Notwithstanding the difficulties in invoking the citizen-initiative process, the fact is that, in numerous states (notably many western states), the citizen-initiative process is an accepted part of the overall political process and can be successfully invoked in a relatively routine manner.

Section 8.1 contains additional information about the citizen-initiative process.

## **7.4. THE ROLE OF CONGRESS**

Congress typically does not consider interstate compacts until the compact has been enacted by the requisite combination of states.

Congress has the option of explicitly consenting to a compact (section 5.10). However, as the U.S. Supreme Court wrote in the 1893 case of *Virginia v. Tennessee*,

“ . . . consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them . . . .”<sup>13</sup>

Legislation conferring congressional consent on an interstate compact may be adopted by a majority vote of both houses of Congress and approval by the President. The President can veto such legislation. If the President vetoes the bill, the Congress can override the veto by a two-thirds vote of both houses.

The question of whether the National Popular Vote compact requires explicit consent of Congress is discussed in sections 5.9, 5.10, and chapter 9.

In the event that all of the above steps are completed by July 20, 2016, the compact would govern the 2016 presidential election, and the President would, for the first time in American history, be elected by all of the people in an election in which every voter in every state is politically relevant and in which every vote is equal.

If, on the other hand, the compact is not effective by July 20, 2016, the debate on the issue of the nationwide popular election of the President would inevitably become a part of the 2016 campaign. Candidates for Senator, Representative, and President would be asked for their position on the issue. Newspapers and television stations would editorialize on the question of how the President should be elected. The travel, advertising, and “on the ground” activity of the presidential candidates would be scrutinized in terms of whether the candidates are, in fact, ignoring voters in a large number of states. In addition, the citizen-initiative process could be used in the November 2016 elections to further demonstrate voter support for nationwide popular election of the President (and to increase the number of states that have enacted the National Popular Vote compact). The authors of this book believe that a robust debate on the issue will inevitably lead to a nationwide decision to embrace nationwide popular election of the President.

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<sup>13</sup> *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.