

**Request to the National Board of the League of Women Voters to Permit All League Members to Hear Both Sides of the Debate Concerning Problems with the 7 “Consensus” Questions about the National Popular Vote Bill**  
March 30, 2009

As explained in our 20-minute DVD and this letter, we are requesting that the National Board of the League of Women Voters (at no expense to the League) permit all League members to hear both sides of the debate concerning the 7 “consensus” questions about the National Popular Vote bill.

The 2008 National Convention passed a resolution to “study the advisability of using the National Popular Vote Compact among the states as a method for electing the President.”

The 10 problems with the “consensus” questions are:

- The “consensus” questions force a choice that is **contrary to the explicit wording of the 2008 National Convention’s resolution**. The resolution called for the National Popular Vote bill to be considered as “**a method**” to achieve a goal — not that it be designated as the only method, to the exclusion of a constitutional amendment (point 1).
- The forced-choice wording of the “consensus” questions is **designed to prevent a consensus**. In fact, the outcome of the vote is virtually pre-determined by this change in the wording from that authorized by the 2008 National Convention. If, say, 80% of League members feel that **both** the National Popular Vote bill and a constitutional amendment are entirely acceptable methods to achieve the desired goal (with, say, half slightly preferring one method over the other), then “support” for the National Popular Vote bill approach will register at only 40% in these so-called “consensus” questions — even though 80% of the members favor the National Popular Vote bill (point 2).
- The “consensus” questions contain **built-in editorializing** (point 3).
- The consensus questions contain **built-in misinformation** (point 4).
- The national office of the League has **not actively worked to advance the League membership’s long-standing position** in favor of a constitutional amendment for direct election of the President (point 5).
- the national office either
  - (a) has **failed to disclose** to the membership, during the present debate on the achievability of a constitutional amendment, its own realization that a constitutional amendment is not politically achievable at the present time, or
  - (b) has **not faithfully executed the membership’s long-standing mandate** (reaffirmed in 2004) to work for a constitutional amendment, because the national office, in fact, opposes the membership’s position (point 6).
- The 7 “consensus” questions provide the membership with **no way to answer the specific question posed by the 2008 National Convention**, namely whether to endorse the National Popular Vote bill as “a method” (point 7).
- Votes of some League chapters have been cast **with different levels of knowledge** about the defects in the 7 questions (point 8).
- There are **no clear and transparent rules, established in advance**, for counting the votes on the confusing and deeply flawed questions (point 9).
- All League members should hear **both sides of this debate** (point 10).

## **GENERAL BACKGROUND ON THE NATIONAL POPULAR VOTE BILL**

The National Popular Vote bill would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states (and the District of Columbia).

When the National Popular Vote bill is in effect, all the electoral votes from the states that have enacted the bill will be awarded, as a bloc, to the presidential candidate who receives the most popular votes in all 50 states (and the District of Columbia). The bill takes effect only when enacted by states possessing a majority of the electoral votes — that is, enough electoral votes to elect a President (270 of the 538 electoral votes).

In the last three years, the National Popular Vote bill has been debated, and approved, by 25 state legislative houses in 16 states, including Arkansas, California, Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington. This is more than a quarter of the nation's state legislative chambers, in more than a third of the states.

The National Popular Vote bill is currently endorsed by 1,512 state legislators.

The National Popular Vote bill has been endorsed by newspapers, such as the *New York Times*, *Chicago Sun-Times*, *Minneapolis Star-Tribune*, *Los Angeles Times*, *Boston Globe*, *Hartford Courant*, *Sacramento Bee*, *The Columbian*, *the Wichita Falls Times*, *the Anderson Herald Bulletin*, *the Fayetteville Observer*, *The Tennessean*, *Sarasota Herald Tribune*, *Miami Herald*, and many others including columnists such as E.J. Dionne and Hendrik Hertzberg.

The bill has been endorsed by organizations such as Common Cause, Fair Vote, the NAACP, Public Citizen, the Sierra Club, Defenders of Wildlife Action Fund, the National Latino Congress, US PIRG, the National Black Caucus of State Legislators, and many others.

The bill has already been enacted into law in states possessing 20% of the electoral votes needed to bring this legislation into effect, namely Hawaii, Illinois, Maryland, and New Jersey.

The National Popular Vote bill is also endorsed by a National Advisory Board formed to advance the bill, including former

- U.S. Senator Birch Bayh (D) of Indiana, author of the 25<sup>th</sup> and 26<sup>th</sup> Amendments to the U.S. Constitution, and author of the specific version of the constitutional amendment that the League of Women Voters has historically supported,
- Republican congressman and independent presidential candidate John Anderson of Illinois,
- Congressman, former Stanford Law School Professor, and current Republican candidate for governor of California, Tom Campbell,
- Republican congressman John Buchanan of Alabama,
- Democratic congressman Tom Downey of New York,
- Republican U.S. Senator David Durenberger of Minnesota, and
- Republican U.S. Senator Jake Garn of Utah.

Nationally, public support for a national popular vote has been above 70% for decades.

Support is high throughout the country in polls (mostly taken since the November 2008 elections), including small states such as Delaware (75%), Maine (71%), Nebraska (74%), New Hampshire (69%), Nevada (72%), New Mexico (76%), Rhode Island (74%), and Vermont (75%).

Support is high in closely divided battleground states, including Colorado (68%), Florida (78%), Iowa (75%), Michigan (73%), Minnesota (75%), Missouri (70%), New Hampshire (69%), Nevada (72%), New Mexico (76%), North Carolina (74%), Ohio (70%), Pennsylvania (78%), Virginia (74%), and Wisconsin (71%).

Support is high in Southern and border states, including Arkansas (80%), Kentucky (80%), Mississippi (77%), Missouri (70%), North Carolina (74%), and Virginia (74%).

Support is also high in other states where state-level polling is available, including California (70%), Connecticut (73%), Massachusetts (73%), New York (79%), Oregon (76%), and Washington (77%).

The 4 major shortcomings of the current system of electing the President all stem from the winner-take-all rule. The winner-take-all rule awards all of a state's electoral votes to the candidate who receives the most popular votes in that particular state.

First, voters in two thirds of the states are ignored in presidential elections because of the winner-take-all rule. Because of the winner-take-all rule, candidates have no reason to visit or pay attention to the concerns of states where they are comfortably ahead or hopelessly behind. Instead, candidates concentrate their attention on a small handful of closely divided "battleground" states. In 2008, candidates concentrated over two-thirds of their campaign visits and ad money in just six states, and 98% in just 15 states.

Second, the winner-take-all rule permits a candidate to win the Presidency without winning the most popular votes nationwide. This has occurred in 4 of the nation's 56 presidential elections — a failure rate of 1 in 14 (1824, 1876, 1888, and 2000). But because half of all American presidential elections are landslides, the failure rate is actually 1 in 7 of the non-landslide elections. Near misses are common, and a shift of 60,000 votes in Ohio in 2004 would have defeated President Bush, despite his nationwide lead of 3,500,000 votes.

Third, turnout is depressed in the spectator states because voters realize that they don't matter in presidential elections. This, in turn, affects state and local elections.

Fourth, and most importantly, every vote is not equal.

### **CONSTITUTIONAL BASIS OF THE NATIONAL POPULAR VOTE BILL**

It is important to realize what the U.S. Constitution says, and does not say, about electing the President.

The U.S. Constitution gives the states the power to decide the manner of awarding their electoral votes. Article II of the Constitution states:

"Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a number of Electors ..."

The Constitution does not mention, much less require, the use of the winner-take-all rule for awarding a state's electoral votes (i.e., awarding all of a state's electoral votes to the presidential candidate who receives the most votes in each separate state). Only 3 states used the winner-take-all rule in the nation's first presidential election in 1789. The winner-take-all rule is strictly a matter of state law, and it may be adopted, or eliminated, by any state at any time.

The U.S. Supreme Court has repeatedly said that the awarding of electoral votes is an "exclusive" and "plenary" power of the states. In 1892, the Court ruled:

"the appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States." (*McPherson v. Blacker*, 1892).

In 2000, the Court stated:

"the State legislature's power to select the manner for appointing electors is **plenary**"

Nearly all the major electoral reforms affecting the method of electing the President have been initiated by action at the state level.

In the nation's first presidential election in 1789, only five states permitted the people to vote for President. However, since 1880, all the states have permitted the people to vote for President. This fundamental change – surely the most important single change ever made in the method of electing the President – was not accomplished by a federal constitutional amendment. Instead, this fundamental change was accomplished by the method that the Founding Fathers built into the Constitution, namely action by the state legislatures.

The elimination of wealth qualifications for voting was another substantial change in voting that was not accomplished by a federal constitutional amendment, but, instead, by the method that the Founding Fathers built into the Constitution, namely action by the states.

Between the 1848 Seneca Falls Convention and 1869, the woman's suffrage movement concentrated on passing a federal constitutional amendment. After Congress voted against including women in the 15<sup>th</sup> Amendment in 1869, a schism developed between the National Women's Suffrage Association that insisted that an amendment was the only method that should be used to win women's suffrage and the American Women's Suffrage Association. The American Women's Suffrage Association endorsed an amendment, but then rolled up their sleeves, got to work, and immediately started winning the right to vote by using the Constitution's built-in method for changing the voting system, namely action at the state level.

Those rigidly insisting on a constitutional amendment got nowhere with Congress over the next 50 years, whereas those working at the state level won the right to vote for women in Wyoming as early as 1869.

Everyone now realizes that this acrimonious and long-running argument, involving form over substance, delayed achievement of the goal of women's suffrage by many decades. By 1919, those working at the state level had succeeded in installing women's suffrage in 30 states.

Then, thanks to their success at the state level, with almost two-thirds of Congress already being elected by women, the 19<sup>th</sup> Amendment was finally able to get through Congress in 1919 — 50 years after Wyoming gave women the right to vote.

The National Popular Vote bill is state-based legislation that similarly employs the Constitution's built-in mechanism for changing the method of electing the President, namely action by the states.

The fact is that there is nothing in the United States Constitution that needs to be changed in order to elect the President by a national popular vote. You don't show respect for the United States Constitution by unnecessarily amending it, especially when the Founders have provided a specific built-in method for making changes, within the structure of the Constitution.

Former U.S. Senator Birch Bayh of Indiana, author of the 25<sup>th</sup> and 26<sup>th</sup> Amendments to the U.S. Constitution, and author of the specific version of the constitutional amendment that the League of Women Voters has historically supported, has stated:

“I unequivocally support this new strategy to provide for the direct election of the President and Vice President. This new approach is consistent with the Constitution.”

Another member of National Popular Vote's Advisory Board, former congressman and Stanford Law School Professor, Tom Campbell, makes the point that

“The ingenious approach ... provides, for the first time, a solution that is achievable.”

Even opponents of the idea of direct election of the President regularly concede that the National Popular Vote bill is constitutional, including those who have spoken in the 25 state legislative chambers in 16 states that have approved the bill.

In the 3 years since our initial press conference, no one has yet to identify any specific section of the United States Constitution that would be violated by the National Popular Vote bill, and we challenge anyone to find such a section.

## **POINT 1: The “consensus” questions force a choice that is contrary to the explicit wording of the 2008 National Convention's resolution.**

The 2008 National Convention passed a resolution to “study the advisability of using the National Popular Vote Compact among the states as **a method** for electing the President.”

The National Convention resolution called for a study as to whether the National Popular Vote bill should be considered as an acceptable method to achieve the goal of popular election of the President — not that it be designated as the “only method” (to the exclusion of a constitutional amendment that the League has long endorsed).

However, “consensus” question 1 forces a choice between the amendment approach and the state-level approach of the National Popular Vote bill.

1. Which statement best reflects the consensus of the group? **Select one.**

1(a) Action to alter a basic element of the Constitutional framework, which is achievable by amendment to the Constitution, **should be accomplished by amendment to the Constitution.**

1(b) Action by states through a compact process is **an acceptable way to alter the method for electing the President and Vice-President.**

1(c) The group could not reach consensus.

Question 6 similarly forces a choice:

6. Which statement best reflects the consensus of the group? **Select one.**

6(a). It is **more important to achieve the goal of national popular election of the President** than it is to achieve the goal of abolition of the electoral college.

6(b). It is **more important to amend the Constitution** to abolish the Electoral College **than it is to achieve the goal of popular election of the President** by alternative methods, such as the NPV Compact.

These forced-choice questions are reminiscent of the schism in the women's movement that delayed women's suffrage for many decades, between those who rigidly insisted that an amendment was the only acceptable method, and those who feel (as National Popular Vote does) that both methods are acceptable, but that state action is the practical way to advance the goal.

## **POINT 2: The forced choice wording of the “consensus” questions are designed to prevent a consensus.**

“Consensus” questions 1 and 6 require the membership to choose between the state-based method and the amendment method as the only way to achieve the desired goal of direct election of the President.

If, for example, 80% of League members feel that **both** the National Popular Vote bill and a constitutional amendment are acceptable methods (with half slightly preferring one method over the other), then “support” for the National Popular Vote bill would register at 40% — not 80%.

This re-wording of the question as contained in the resolution passed by the 2008 National Convention virtually pre-determines the outcome of the voting.

This unauthorized re-wording means that the substantial number of League members who feel that both methods are acceptable can only vote for the state-based approach if they are willing to say that an amendment is not acceptable.

This forced-choice is a false choice. The wording of “consensus” questions 1 and 6 virtually pre-determines that there will be no consensus.

## **POINT 3: All 7 Questions contain extensive built-in editorializing**

Have you ever walked into a voting booth and been presented with a ballot question beginning with the disparaging lead-in “despite the novelty”?

3(b). **Despite the novelty** of the use of the compact approach to address a fundamental constitutional issue such as voting, ...

## **POINT 4: The consensus questions contain built-in misinformation.**

The editorializing in question 1 tries to convey the notion that the winner-take-all rule is a “basic element of the Constitutional framework.”

1(a) Action **to alter a basic element of the Constitutional framework**, which is achievable by amendment to the Constitution, should be accomplished by amendment to the Constitution.

This is manifestly false because the winner-take-all rule is not in the United States Constitution. It was never mentioned at the Constitutional Convention or in the Federalist Papers. The winner-take-all rule was used by only 3 states in the nation's first presidential election in 1789.

The winner-take-all rule is nothing more nor less than an ordinary state law that may be adopted, or eliminated, by any state at any time. Indeed, all the U.S. Constitution says about how a state awards its electoral votes is (Article II):

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a number of Electors ...”

Similarly, question 2 incorrectly advances the notion that voting is “a fundamental constitutional issue” that must necessarily be addressed by a constitutional amendment.

2(a). Because a compact has never before been used to address **a fundamental constitutional issue such as voting**, the **chance that it might set a precedent for the future** leads to the conclusion that it is better that the League continue to work for an amendment to the Constitution to establish the direct popular election of the President and the abolition of the Electoral College.

Does anyone think that the 30 states that gave women the right to vote before the 19<sup>th</sup> Amendment were wrong because they acted without a constitutional amendment, or that these states “set a bad precedent” when they used a power specifically given to the states by the U.S. Constitution?

Does anyone think that all 50 state legislatures were wrong, or set a bad precedent, when they decided to permit their voters to vote for President, without using a constitutional amendment?

Does anyone think that all the states were wrong in eliminating the wealth qualification for voting, without using a constitutional amendment?

Question 7 attempts to argue against the obvious fact that the National Popular Vote bill is more achievable than a constitutional amendment, by referring to “the need for action by so many states” — conveniently omitting the reality that an amendment requires approval by more states than the National Popular Vote bill.

#### **Achievability**

7(a). The NPV Compact will have problems being passed because of the need for congressional consideration and **the need for action by so many states**.

And question 7 contains demonstrable misinformation when it refers to “the need for” congressional consent — ignoring United States Supreme Court rulings, dating back to 1893 (*Virginia v. Tennessee*) and reaffirmed in 1978 (*U.S. Steel Corporation v. Multistate Tax Commission*), that congressional consent is only required if an interstate compact threatens federal supremacy. Given that the Supreme Court has repeatedly ruled that the method of awarding of electoral votes is an “exclusive” state power, there is no federal authority in this area in the first place — much less a threat to federal supremacy.

“The appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States.” (*McPherson v. Blacker*, 1892).

Question 7’s built-in misinformation about achievability is combined with a total lack of logic. A constitutional amendment requires congressional consent, by a **two-thirds** majority. So, even if these U.S. Supreme Court rulings did not exist, the only effect would be the extra step of getting a simple **majority** vote in Congress.

This built-in misinformation and illogic is, of course, designed to try to distract attention from the obvious fact that the National Popular Vote bill is more achievable than a federal constitutional amendment.

This entire “consensus” process contains numerous additional examples of editorializing, omissions of relevant facts, misinformation, overlooking of established court decisions (while highlighting entirely hypothetical scenarios), as discussed in greater detail on the web at [www.NationalPopularVote.com/lwv](http://www.NationalPopularVote.com/lwv).

**POINT 5: The national office of the League has not actively worked to advance the League membership’s long-standing position in favor of a constitutional amendment for direct election of the President.**

The League has a long-standing official position (1970 and 1982) that was reaffirmed in 2004 stating:

“The League of Women Voters believes that the direct-popular-vote method for electing the President and Vice-President is essential to representative government.”

Question 5 forces a choice between the National Popular Vote bill and uniformity.

5(a). The **uniformity** of voting systems is more important to American democracy than the possibility that the NPV Compact can be adopted.

However, the Constitution gives the states control over elections, and voting systems are not identical from state-to-state now.

Moreover, former Senator Bayh’s amendment — which is the one that the League has historically supported — does not impose uniformity on the states.

So, why is this choice being forced when the League’s own constitutional amendment does not call for uniformity?

This false choice would seem designed to suggest that the National Popular Vote bill is somehow inferior to the League’s own constitutional amendment, when, in fact, neither imposes uniformity on the states.

Only 3 bills for a constitutional amendment on direct election were introduced during recent sessions of Congress since the League membership’s vote in 2004.

None had even a single co-sponsor.

And, all 3 proposed amendments differ significantly from the League’s own amendment.

It is extraordinary that an organization with a large national staff in Washington has, year after year, failed to recruit even one of the 535 members of Congress to sponsor the organization’s own constitutional amendment.

**POINT 6: The National Office has either (a) failed to disclose to the membership, during the present debate on achievability of a constitutional amendment, its own realization that a constitutional amendment is not politically achievable at the present time, or (b) has not faithfully executed the membership’s long-standing mandate to work for a constitutional amendment, because the national office, in fact, opposes the membership’s position.**

The failure of the national office to perform even the minimal step of bill introduction for the League’s own constitutional amendment could, conceivably, be due to the fact that the national office has made a determination that there is no practical possibility of getting an amendment through Congress at the present time.

If this is true, this internal determination about “achievability” is highly relevant to the current debate, and should have been disclosed to the membership during this study process.

However, there could be another explanation. When we visited the League’s national office in 2005, prior to the launch of the National Popular Vote proposal in 2006, we were surprised to be pummeled with written questions and concerns that disputed whether direct election of the President was a good idea, as opposed to questions about the specific mechanics of our proposal.

The national office’s behavior raises the possibility that the reason why it has failed to take even minimal actions to advance the membership’s position, is that the national office has simply decided to entirely ignore the membership’s mandate in favor of direct election of the President (as adopted in

1970 and 1982, and reaffirmed in 2004), and that the national office, in fact, actually seems to favor the current system of electing the President, and oppose the membership's position in favor of direct election of the President.

**POINT 7: The 7 “consensus” questions provide the membership with no way to answer the specific question posed by the 2008 National Convention, namely whether to endorse the National Popular Vote bill as “a method” to achieve the desired goal.**

The 7 “consensus” questions provide no way to answer the question posed by the 2008 National Convention, namely whether the National Popular Vote bill is an acceptable method to achieve the desired goal.

The two questions (1 and 6) that come closest to asking about the acceptability of the National Popular Vote bill to be “a method” for achieving the goal of direct election of the President force the membership to say that a constitutional amendment is unacceptable in order to say that the National Popular Vote bill is acceptable.

**POINT 8: Votes have been cast with different levels of knowledge about the problems in the 7 questions.**

Although some chapters have, midway through the process, added a vote on the actual question posed by the 2008 National Convention in the comment section of the national office's form, the practical reality is that a great many chapters have already submitted responses.

**POINT 9: There are no clear and transparent rules, established in advance, for counting the votes on the confusing and deeply flawed questions.**

The 2008 National Convention passed a resolution to “study the advisability of using the National Popular Vote Compact among the states as a method for electing the President.”

Counting the votes on the single question asked by the 2008 National Convention would have been straight-forward.

However, now there are 7 separate questions.

The existence of 7 separate questions necessarily means that different percentages of votes will be cast for the various alternatives on each of the 7 questions. What are the rules for distilling and combining the different numerical results on 7 questions into an answer to the one question that the 2008 National Convention asked?

The fact is that there are no clear and transparent rules, established in advance, for interpreting the membership's responses to these confusing, and deeply flawed, questions.

**POINT 10: Every League member should hear both sides.**

We have sent out this short video to some League members whose names and addresses we have.

However, we believe that **all** members of the League of Women Voters have a right to hear **both** sides of this debate and, in particular, to hear a discussion of the questionable nature of the so-called “consensus” questions.

Accordingly, we are prepared to send, at no cost to the League, a video and materials presenting the facts to every League member, and we hereby request the national office to permit all of its members to hear both sides of this debate.

We think the case in favor of the National Popular Vote bill is compelling; that there is a real possibility of success in time for the 2012 election, and that the League could, and should, play an important role in advancing its long-held role in advancing the goal of electing the President by a national popular vote.

Thank you for your consideration and attention to this important matter.

Additional information can be found in the book, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (available for reading or downloading for free on the web [www.every-vote-equal.com](http://www.every-vote-equal.com), or from Amazon) and at [www.NationalPopularVote.com/lwv](http://www.NationalPopularVote.com/lwv).

Answers to 61 “myths” about the National Popular Vote bill may be found in the second edition of our book (available for reading or downloading for free on the web [www.every-vote-equal.com](http://www.every-vote-equal.com), or from Amazon).

March 30, 2009