Elections

The Interstate Agreement to Elect the President by National Popular Vote

by Joseph F. Zimmerman

Interstate compacts and agreements first were authorized by Article VI of the Articles of Confederation and Perpetual Union (1781–89) that stipulated states may enter into such concordats with the consent of the unicameral Congress. Only a 1785 Maryland-Virginia compact, regulating fishing and navigation on the Chesapeake Bay and the Potomac River, received congressional consent under the articles.

The drafters of the United States Constitution wisely included a nearly identical provision in Section 10 of Article I. The constitution does not make a distinction between an agreement and a compact, and there are no constitutional restrictions on the duration or subject matter of compacts. Congress, however, may add conditions and other restrictions when granting consent to a compact. As explained below, only political compacts are required to obtain the consent of Congress in order to become effective.

The interstate compact clause in 1789 was viewed as a mechanism for settling interstate boundary and other disputes and allowing states added flexibility to solve regional problems by conjoint activities, thereby eliminating the need for Congress to devote some of its time to the question of employing its delegated powers to solve a local or regional problem capable of solution by interstate cooperation. It apparently was anticipated that only a small number of states would enter into a given compact, but such membership today ranges from two states to 50 states, the District of Columbia and the 10 Canadian provinces. With one exception, all compacts prior to 1921 only concerned themselves with state boundaries. In that year, New York and New Jersey enacted the Port of New York Authority Compact, creating a commission with responsibility for developing the port’s facilities. Enactment of an identical compact, with the exception of those which are advisory, by the 50 state legislatures establishes a uniform policy throughout the nation. Today, compacts cover areas ranging from agriculture to water.

It should be noted the U.S. Supreme Court in Peggy v. Tennessee-Missouri Bridge Commission (359 U.S. 275 at 285) in 1959 opined “[a] compact is, after all, a contract” and hence is protected by the Constitution’s contract clause (Art. I, §10) forbidding a state legislature to enact a “law impairing the obligation of contracts …” However, there is no specific constitutional prohibition of congressional impairment of contracts, including interstate compacts. A compact is similar to a treaty in that provisions of the former supersede conflicting state laws. In other words, a state surrenders part of its sovereign authority by entering into a compact, except an advisory one, with a sister state(s).

The Electoral College

Dissatisfaction with the Electoral College generated numerous congressional proposals to amend the U.S. Constitution over the decades. The proposals can be placed in three categories. The first would allocate proportionally the electoral votes among candidates based on the number of popular votes received by each presidential slate. The second would allocate two electoral votes to the slate winning the statewide vote and one vote to the slate winning each congressional (house) district. The third would replace the Electoral...
College by providing for the election of the slate of candidate with the largest nationwide popular vote total. In 1969, the House of Representatives by a 338-70 vote approved House Joint Resolution 681 proposing a constitutional amendment to authorize the direct popular election of the president. A Senate filibuster doomed the proposed amendment.

Only imagination limits the uses to which an interstate compact may be applied. The most innovative compact drafted to date is the proposed 880-word Agreement Among the States to Elect the President by National Popular Vote announced at a Feb. 23, 2006, Washington, D.C., news conference, when a campaign was launched to introduce and enact a bill incorporating the 880-word Agreement in each of the 50 state legislatures. The Agreement would award member states’ electoral votes to the presidential candidate winning the most national popular votes and does not change the constitutional provisions relating to the Electoral College.

The Democratic Deficit

Section I of Article II of the U.S. Constitution provides for the indirect election of the president and the vice president by authorizing each state to “appoint, in a 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 …” The presidential candidate who receives the “greatest number of” Electoral College votes is elected provided the number is a majority of such votes (currently 270 of 538). Should there be a tie vote in the College or no candidates receive a majority of the votes, the House of Representatives selects the president.

Nine state legislatures appointed presidential electors for the first presidential election and four states permitted voters, under a restrictive suffrage system, to cast ballots for electors. Jacksonian democracy led to all state legislatures, except the South Carolina state legislature, to authorize voters to cast ballots for electors in the 1836 election. The last state legislature to appoint electors was Colorado in 1876.

The College has not functioned in the manner intended by the drafters of the constitutional provision; i.e., electors in each state examining and debating the qualifications of each candidate prior to voting. The system has produced a democratic deficit on four occasions when the candidate for president with the largest number of popular votes was not elected president.

In 1824, Andrew Jackson received 151,271 popular votes, but lost the election to John Quincy Adams, who received only 113,122 votes, a difference of 38,149 votes. In 1876, Samuel J. Tilden received 4,288,191 popular votes, yet Rutherford B. Hayes was elected with 4,030,497, a difference of 254,694 votes. Twelve years later, the democratic deficit reappeared as Benjamin Harrison with 5,449,825 votes was elected although Grover Cleveland received 5,539,118 votes, a difference of 89,293 votes. And in 2000, George W. Bush, with 50,455,156 votes was elected although Al Gore received 50,992,335 votes, a difference of 537,179 votes. A small shift in the number of votes received by the two leading candidates in one or two states would have produced a different winner in six elections since 1958. If Gerald R. Ford had received 3,687 additional votes in Hawaii in 1976 and 5,559 additional votes in Ohio, he would have defeated James E. Carter in the Electoral College. Similarly, if Gore had gained 218 of the votes Bush received in Florida in 2000, Gore would have carried Florida’s 25 electoral votes and been elected president. In 2004, John Kerry would have been elected president with 272 electoral votes if he had gained 59,393 additional popular votes in Ohio, even though Bush received the most popular votes.

The present Electoral College system has a second democratic deficit—presidential-vice presidential candidates do not campaign personally in states viewed as solidly Democratic or Republican. Seventeen states were considered battleground states in the 2004 election with 99 percent of the $237,423,744 reported advertising expenditures made during the last month of the campaign spent in these states. Excluding the District of Columbia and the home states of the candidates for president and vice president of the two major parties, 92 percent of all 307 campaign events during the campaign’s last month were held in only 16 states. In other words, the candidates of the two major parties ignored the remaining 34 states including California, Illinois, New York and Texas, the states with large populations. The lack of major party competition for votes for their respective slate in these states depressed voter participation in the 2004 election and weakened candidates for state and local government officers of the second largest party in these states.

The Agreement

The compact utilizes the authority of two sections of the United States Constitution. Section 10 of Article I authorizes two or more states to enter into a compact or agreement with the consent of Congress. As noted, section 1 of Article II stipulates: “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…”

The proposed Agreement would not change any state’s internal procedures for conducting or counting popular presidential-vice presidential votes. Once a states ballots were cast and counted, the popular vote counts from the 50 states and the District of Columbia would be added together to obtain a national grand total for each presidential slate.

Specifically, the proposed compact would require each state to award all of its electoral votes to the presidential candidate who received the largest number of popular votes throughout the nation. In view of the fact the novel compact would not become effective in any state until it is enacted by states collectively possessing a majority of the Electoral College votes (270 of the 538 votes), the presidential candidate receiving the largest number of popular votes would be guaranteed sufficient electoral votes in the Electoral College to be elected president.

Compact membership is not required for the popular votes cast in a given state to count as every state’s popular vote is included in the nationwide total on an equal basis regardless of whether the state has enacted the compact.

Consent of Congress

The constitutionally required consent is designed to safeguard the interests of the national government and states not party to a compact. In 1833, Chief Justice John Marshall of the U.S. Supreme Court explained in *Barron v. Baltimore*, (32 U.S. 243): “If these compacts are continued on pg 8
Interstate Compact Law

Interstate Compact Agencies and the 11th Amendment

by Michael Buenger

In the history of interstate compacts, 1921 is a seminal year because it marks both a subtle and yet profound transformation in American government. American government before 1921 could be defined by two quasi-independent structures, the states and the national government. American government post-1921 added a new layer of governing authority that, while limited and particular, was neither exclusively state nor federal in character. In 1921 the Port Authority of New York (now the Port Authority of New York and New Jersey) was formed by an interstate compact, the first compact agency in the United States.

The adoption of this compact created a multi-state agency exercising a great deal of independence from both the states and the federal government. This subtle revolution in American government led to the creation of many other agencies that occupy the largely overlooked “third tier” of government. The Port Authority compact demonstrated that many interstate issues could be managed in a collective and cooperative manner thus preventing pre-emption by the federal government. The United States now has more than 90 discrete compact agencies responsible for managing or regulating subjects embracing mass transit, economic development, crime control, education, child welfare, the environment and land use, and taxation, just to name a few areas.

The emergence of interstate compact agencies over the last 90 years presents new opportunities to address interstate issues and new challenges in understanding the design of American government. Compact agencies are creations of the states, but only sofar as they are created through the cooperative effort of the states. Compact agencies generally exist outside normal state structures and are accountable to the states in their collective not individual capacities. In instances where a compact receives congressional approval, the compact is “federalized” yet its agency is not. The challenge in determining what space such agencies occupy in American government is that they currently occupy a no-man’s land, arguably being more than a single state and less than the federal government. One area—11th Amendment Immunity—illustrates the difficulty of classifying compact agencies within traditional notions of federalism.

With limited exception, such as waiver by the states or an explicit act of Congress, the 11th Amendment to the U.S. Constitution shields states from suit in federal courts “by citizens of another state, or by citizens or subjects of any foreign state.” Consequently, parties having claims against a state must generally pursue those claims in state court subject to the peculiarities of a state’s law. The 11th Amendment recognizes that states are quasi-sovereign; that is, states are not mere political subdivisions of the national government. The amendment is intended to protect both the status of states and their treasuries from intrusion by the federal courts.

Given the dual purpose of the 11th Amendment, the question arises whether its protections extend to compact agencies. As with all matters concerning the status of compact agencies, the answer is a resounding “maybe.” In Hess v. Port Authority-Trans Union Company the U.S. Supreme Court held that the 11th Amendment did not protect the Port Authority of New York and New Jersey from suit in federal court under the Federal Employers’ Liability Act. The Court held that because the Port Authority was a discrete agency created by a compact and was financially self-sufficient, subjecting it to suit in federal court did not involve concerns for state solvency or state sovereignty. Compact-created agencies, as creatures of multiple sovereigns, “lack the tight tie to the people of one State that
The emergence of interstate compact agencies over the last 90 years presents new opportunities to address interstate issues and new challenges in understanding the design of American government.
In 1960, the Aral Sea, which lies between Kazakhstan and Uzbekistan in Central Asia, was the world’s fourth-largest lake. Its surface area sprawled more than 42,160 miles.

Today, however, due to excessive diversions and misuse, the sea has shrunk to about a quarter of its original size and salinity has increased. Worse still, the body of water continues to diminish.

To Wisconsin state Rep. Jon Richards, this startling example of water mismanagement makes a case for the Great Lakes Compact, an interstate agreement the eight Great Lakes states will discuss during their 2007 legislative sessions.

“The Aral Sea was once the size of one of our Great Lakes now and it is completely dried up because of mismanagement. That should be a warning cry to everybody that, without some thought, these resources which seem inexhaustible can literally disappear on our watch,” he said.

With growing water demands in the United States, Richards considers it imperative that policymakers heed that warning cry.

“The Great Lakes system is a massive fresh water resource. It's immense,” he said. “But most of the water in the Great Lakes was placed there in the last ice age. It’s not the sort of resource that is constantly recharged. Once you drain it, it’s lost forever.”

Details of the Compact

Before the new compact was developed, the Great Lakes system was only nominally protected by the Great Lakes Charter of 1985, a voluntary cooperative agreement by the Great Lakes states and Canadian provinces.

But in 1998, the province of Ontario approved a permit for the Nova Group of Sault Saint Marie, Ontario, that would have allowed the company to remove 160,000 gallons of water from Lake Superior each year to be sold in Asia. The Ontario government rescinded the permit, but the close call led the Council of Great Lakes Governors (CGLG) to examine the issue of bulk removals in greater depth.

Since 2001, the CGLG has worked to develop the Great Lakes-St. Lawrence River Basin Water Resources Agreement to protect and maintain the Great Lakes as one of the United States’ greatest natural resources. In December 2005, the Great Lakes governors and premiers signed the agreement and called for the enactment of its companion compact, which would provide a framework for each state and province to enact laws to protect the Great Lakes. This framework includes:

- A ban on new diversions of water from the basin, with limited exceptions.
- The enforcement of a review standard for proposed uses of Great Lakes water.
- A call for cooperation and sharing of technical data among the states and provinces to improve decision making by the governments.
- The development of regional goals for water conservation and efficiency and the promotion of water conservation and efficiency programs in states and provinces.
- The promotion of an economic development plan that is balanced with sustainable water use.
- A call to recognize the waters of the basin as a shared public treasure and a commitment of continued public involvement to implement the agreements.
State legislatures in Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin must ratify the compact. If all states ratify the compact and Congress consents, the compact will be federal and state law. For the agreement to become law in Ontario and Quebec, the provinces must amend their statutes and regulations as appropriate.

As of May, the compact had been approved in Minnesota, and has also been introduced in Illinois, Indiana, Michigan and New York.

The compact forbids most out-of-basin diversions. Exceptions could be made for municipalities that either border the basin or are located in counties that straddle it. Those communities could only use the water for public water-supply purposes and would have to return all unused water to the basin.

According to Pete Johnson, program director for the CGLG, the compact refers to the basin as the surface water divide.

“If a drop of water hits the ground and would eventually flow into the Great Lakes, that’s the Great Lakes basin,” he said. “If it flows away, it’s outside the basin.”

Johnson said communities that apply for exception must meet a standard set forth by the compact and then undergo regional review by the governors and premiers. Finally all voting members of the compact council—the governors of the Great Lakes states—would approve or reject the exception.

Issues Surrounding the Compact

Waukesha, Wis., which lies 15 miles west of Milwaukee, is the seventh largest city in the state with a population of about 60,000 people.

“We are just to the west by a couple of miles of the sub-continental divide,” said Waukesha Mayor Larry Nelson. “The point of the compact is a city like Waukesha should have to meet certain conditions in order to receive water.”

Nelson said the first criterion is that the community seeking exception should have a serious water conservation plan. And although the common council has not yet decided to apply for Great Lakes water, that facet of application is one it is definitely taking under consideration.

“Last year the common council passed a water conservation plan that is the most comprehensive in the Midwest,” said Nelson.

The plan includes a sprinkling ban from 1 to 5 p.m. during the summer and a potential change in the way utilities charge for residential water usage.

“Right now if you’re a residential water user, water becomes cheaper once you pass a threshold,” Nelson said. “We are going to say you should pay more instead of less for obvious conservation issues.”

Nelson said if the city applies, those strict standards could set a precedent for other communities that apply for exception.

“I think the Great Lakes Water compact could be one of the most important environmental agreements ever,” he said, “as long as it is implemented correctly giving communities like Waukesha a fair chance to get Great Lakes water if we decide to apply and can meet the conditions.”

Wisconsin state Sen. Neal Kedzie, who chairs a study committee dedicated to find out how the compact can be best implemented, said issues like radium content in community water supplies could lead to annexations in order to receive Great Lakes water.

Since 2001, the CGLG has worked to develop the Great Lakes-St. Lawrence River Basin Water Resources Agreement to protect and maintain the Great Lakes as one of the United States’ greatest natural resources.
“Townships do not have the ability to annex, but villages and cities do,” he said. “Potential future requests for water could lead to more annexations. We don’t want to set up any kind of water wars as a result.”

Furthermore, Kedzie said, differences between state land masses inside the basin confuse the issue.

“What complicates matters is when it comes to diversions, the state of Michigan has 99.9 percent of its landmass in the basin, which gives them more flexibility on where to move water without dealing with the rules the compact puts forward,” he said. “It’s not a level playing field among all eight states. To have the compact be a one size fits all, to get all states in harmony, is not easy.”

Despite what could be interpreted as opposition to the compact, most groups that take issue with the compact’s language still see the need for legislation on the topic.

“One of my concerns is that 20 years ago all the legislatures were supposed to pass an agreement and they didn’t,” he said. “We certainly can’t wait that long to determine our best option in determining our water needs.”

To Richards, signing and enacting the compact is of immediate concern.

“What we’re finding all around the country and the world is that water is becoming a more precious commodity and each year fresh water becomes more scarce,” he said. “Pressure to take water from the Great Lakes to meet those needs is going to increase. The real question we have as a region is whether we’re going to adopt these rules or wait and delay and allow thirsty states and thirsty parts of the world to set those rules for us.”

Kedzie said this issue should be of importance to every state, not just those in the eight-state Great Lakes region.

“Obviously because we’re sitting on the world’s largest supply of fresh water; those who have been thinking they could take advantage of catching that water should be aware that we’re putting safeguards on it,” he said. “Water is liquid gold. Every state should take steps to protect that to the best possible degree.”

—Laura Coleman is associate editor of CSG’s State News magazine.

State Legislatures Consider More Than 100 Interstate Compact Bills

April 2007

With the 2007 state legislative sessions purring along—and some having already concluded—interstate compacts have again become an area of emphasis for state policymakers.

Following the trend of the last several years, compacts continue to receive heightened attention with legislators introducing 104 interstate compact bills by the end of March. Last year (2006) saw approximately 95 compact bills considered, which came on the heels of a wildly successful year in 2005, in which 49 compact bills were enacted—the largest number of compact adoptions since 1969.

The increase in interstate compact introductions comes at a time when states are increasingly flexing their muscles on the national stage. As states each struggle with their federalist relationships, they are collectively working to establish and preserve state authority over key policy areas. Interstate compacts are proving to be a remarkable tool not only for promoting multi-state problem solving, but also for enabling states to speak with one unified voice on regional and national policy issues.

Compacts of particular interest to states in 2007 include:

- **Interstate Insurance Product Regulation Compact** enhances the efficiency and effectiveness of the way insurance products are filed, reviewed and approved, allowing consumers to have faster access to competitive insurance products in an ever-changing global marketplace. The compact promotes uniformity through application of national product standards embedded with strong consumer protections. The compact, which has been enacted in 29 states, is currently under consideration in 11 states. For more information, visit www.insurancecompact.org.

- **Interstate Compact for Juveniles** significantly updates the 52-year-old mechanism for tracking and supervising juveniles who move across state borders. The new compact provides enhanced accountability, enforcement, visibility and communication, and seeks to update a crucial, yet outdated, tool for ensuring public safety and preserving child welfare. The compact has been enacted by 31 states and is under consideration in eight states. For more information, visit www.csg.org/programs/ncic/InterstateCompactforJuveniles.aspx.

- **National Popular Vote Compact**—Under the U.S. Constitution, the states have exclusive and complete power to allocate their electoral votes and may change their state laws concerning how they award them at any time. Under the National Popular Vote Compact, all of the state’s electoral votes would be awarded to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. The compact is currently under consideration in 17 states. For more information, visit www.nationalpopularvote.com.

- **Interstate Compact for the Placement of Children**—The new ICPC addresses the deficiencies documented in the current compact system, including a plan to narrow the types of placements covered in the compact and a process, which complies with the principles of the Model State Administrative Procedures Act, for developing rules. The revisions also provide for meaningful enforcement through a wide range of tools for the collective member states to secure compliance including technical assistance, mediation, arbitration, and legal action. The revised ICPC has been adopted by one state and is under consideration in 14 states. For more information, visit www.csg.org/programs/ncic/InterstateCompactforthePlacementofChildren.aspx.
with foreign nations, they interfere with the treaty-making power; which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution.”

In 1893, the Supreme Court in Tennessee (148 U.S. 503 at 520) opined congressional consent is required only for a compact tending to increase “the political power or influence” of the party states and to encroach “upon the full and free exercise of federal authority.” The two states reached a boundary agreement early in the 19th century but had not obtained congressional consent. Congress relied on the compact’s terms for judicial and revenue purposes, thereby implying the grant of consent.

Nevertheless, a number of nonpolitical compacts based on constitutionally reserved state powers have been submitted to Congress for its consent, and on one occasion the House of Representatives approved a resolution granting consent to the Southern Regional Education Compact, but the Senate did not grant consent, saying it is unnecessary as the compact is not a political one.

The Interstate Agreement to Elect the President by Popular Vote clearly does not encroach upon the powers of Congress and hence is a nonpolitical compact. The Agreement, however, is constitutionally based upon the interstate compact clause and the clause directing each state legislature to appoint presidential-vice presidential electors equal to the number of electoral votes the state is constitutionally entitled to.

Summary and Conclusions

In sum, the Interstate Agreement for the Election of the President by National Popular Vote avoids the need for a constitutional amendment to change the system for electing the president and the vice president, and does not alter a state’s internal procedures for conducting or counting the presidential-vice presidential popular votes or recount procedures.

A book—Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote (Los Altos, California: National Popular Vote Press, 2006)—is available online at www.NationalPopularVote.com and may be downloaded without charge.