

# 7 | Strategy for Enacting the Proposed Interstate Compact

Public opinion has supported nationwide popular election of the President for over six decades. For example, the Gallup poll in 1944 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 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>

Table 7.1 shows the results for these public opinion polls in 1944, 1977, and 1980.

**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>3</sup>

<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.

<sup>3</sup> *Id.* at 2.

Public opinion plays only an indirect and muted role in the top-down process of amending the federal constitution. Proposed amendments generally require a two-thirds vote by both houses of Congress, followed by favorable votes in three quarters of the state legislatures.<sup>4</sup>

The authors of this book envision a bottom-up strategy for securing enactment of the proposed “Agreement Among the States to Elect the President by National Popular Vote” (presented in chapter 6). The contemplated process would start where support for this proposal is strongest—the voters. The three-part process would include the following:

- (1) **Citizen-Initiative Process:** The citizen-initiative process could be used to place the proposed compact on the ballot in various states in 2006 and 2008. Each ballot measure would enable a state’s voters to vote directly on a state law enacting the proposed interstate compact in that state (section 7.1).
- (2) **State Legislative Action:** The proposed compact would be introduced into state legislatures throughout the country in 2006 and 2007. There is a possibility that one or more state legislatures might adopt the proposed compact prior to the November 2006 elections. (section 7.2).
- (3) **Action by Congress:** After enactment of the compact by numerous states, Congress might take one or more of the following actions in 2008 or 2009 (section 7.3):
  - (a) consenting to the proposed compact on behalf of the District of Columbia,
  - (b) streamlining existing federal law regarding the certification by the states of the results of the presidential elections, and
  - (c) granting consent (expressed or implied) to the proposed compact.

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<sup>4</sup> For a detailed discussion of various alternative modes of amending the federal constitution, see Orfield, Lester Bernhardt. 1942. *The Amending of the Federal Constitution*. Ann Arbor, MI: The University of Michigan Press.

## 7.1 DIRECTLY INVOLVING THE PEOPLE

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 previously mentioned 22 states with the statutory initiative process. Also, the District of Columbia has a citizen-initiative process for statutes. Table 7.2 shows the 25 jurisdictions that permit either statutory or constitutional initiatives and the number of electoral votes in each. As can be seen, these 25 jurisdictions collectively possess 260 electoral votes (i.e., just short of the 270 electoral votes necessary to elect a President

**Table 7.2 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
<b>Total</b>			<b>260</b>

in the Electoral College). See *The Initiative: Citizen Law-Making*<sup>5</sup> for citations to the constitutional and statutory provisions governing the initiative processes in various states.

The effort to secure adoption of the proposed compact could involve with the use of the citizen-initiative process.

The citizen initiative process is, however, problematic in many of the 25 jurisdictions listed in table 7.2. For example, in Illinois, the statutory initiative is advisory only. Moreover, the constitutional initiative in Illinois is limited to matters relating to legislative procedure. As a result, it would not be possible to use the citizen-initiative process for the purpose of enacting the proposed interstate compact in Illinois.

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 proposed interstate compact. The initiative process for constitutional amendments in Florida is extraordinarily time-consuming and uncertain. The procedure generally includes a preliminary review of the proposition by the Florida Supreme Court (a step that is not governed by any fixed schedule and that can take a year or longer). The initiative process for constitutional amendments in Mississippi is unusually difficult to use.

The first step in invoking the citizen-initiative process in a typical state is to file the proposed legislation with a state official (usually the Attorney General). Ohio, Maine, Massachusetts, and Missouri have extraordinarily early deadlines for starting the citizen-initiative process in order to place a question before the voters.

In Nevada, the citizen-initiative process spans two general elections.

Although the District of Columbia has the citizen-initiative process for statutes, Congress has been the body that has historically granted consent to interstate compacts on behalf of the District. It is not clear, under existing home rule legislation, whether a statutory initiative in the District would be the appropriate legal vehicle for enacting an interstate compact.

In some states, there are significant legal limitations (including both statute 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

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<sup>5</sup> Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger. Pages 24–25.

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. Finally, 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.

On the other hand, in numerous states (including many western states), the citizen-initiative process is an accepted part of the overall political process.

## 7.2 STATE LEGISLATIVE ACTION

Even if there were no practical or legal obstacles to the effective use of the citizen initiative process, the 25 jurisdictions listed in table 7.2 do not possess a majority of the electoral votes. Thus, at least some state legislatures must enact the proposed interstate compact in order to bring it into effect. In practice, the authors of this book believe that the vast majority of the 270 electoral votes would, as a practical matter, come from state legislatures.

Almost all state legislatures will convene shortly after the November 2006 elections. Most will convene in January and February of 2007. The legislatures of Louisiana and Florida will convene in the spring of 2007. A few legislatures will convene as early as December 2006.

A state legislature enacts an interstate compact in the same way that it enacts an ordinary statute. Enactment of a statute typically requires a majority vote of the legislature and gubernatorial approval. All governors have the power to veto legislation passed by their state legislatures. If a governor vetoes a bill, the legislation may nonetheless become law if the legislature overrides the veto in the manner provided by the state's constitution. Overriding a gubernatorial veto typically requires a super-majority (e.g., two-thirds vote of all houses of the state legislature). See *The Book of the States* for general information about vetoes in particular states.<sup>6</sup>

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<sup>6</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.

### 7.3 CONGRESSIONAL ACTION

The ideal time to seek congressional action on the proposed interstate compact would be after the compact has been adopted by states possessing a majority of the electoral votes. At that time, the group of states supporting the compact might include states that had enacted the compact by means of the citizen-initiative process as well as states where the legislature enacted the compact. The interstate compact might go before Congress in 2008 or 2009.

Congressional action on the proposed compact might include one or both of the following:

- granting the consent of Congress to the proposed interstate compact on behalf of the District of Columbia, and
- amending existing federal laws regarding the timing of the certification of the results of presidential election.

Congress has the option of explicitly consenting to the 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>7</sup>

Thus, enactment of a legislative bill covering either of the above two items would constitute implied consent by Congress to the proposed compact (section 5.9).

The federal legislation concerning the compact could be adopted by a majority vote of both houses of Congress and approval by the President. The President could veto such legislation. If the President vetoes the bill, the Congress could override the veto by a two-thirds vote of both houses.

In the unlikely event that all of the above steps are completed by July 20, 2008, the compact would govern the 2008 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 vote is equal.

If, on the other hand, the compact is not effective by July 20, 2008, the debate on the issue of nationwide popular election of the President would inevitably become a part of the 2008 campaign. Candidates for Senator, Representative, and President would be asked for their position on the

<sup>7</sup> *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

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 two-thirds of the states. In addition, the citizen-initiative process could be used in the November 2008 elections to further demonstrate voter support for nationwide popular election of the President (and to increase the number of states that have enacted the proposed compact). The authors of this book believe that a robust debate on the issue in 2008 will inevitably lead to a nationwide decision to embrace nationwide popular election of the President in time for the 2012 presidential election.

