



Summer 2014

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### Recommended Citation

Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the Federal Structure*, 44 N.M. L. Rev. 383 (2014).

Available at: <https://digitalrepository.unm.edu/nmlr/vol44/iss2/5>

# THE COMPACT CLAUSE AND NATIONAL POPULAR VOTE: IMPLICATIONS FOR THE “FEDERAL STRUCTURE”

Tara Ross\* and Robert M. Hardaway\*\*

*“The relevant inquiry must be one of impact on our federal structure.”<sup>1</sup>*

## I. INTRODUCTION

Article II, Section I of the U.S. Constitution provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .”<sup>2</sup> By 1836, every state legislature except that of South Carolina had directed that electors be chosen by a popular vote within the state.<sup>3</sup> South Carolina eventually followed suit, but not until after the Civil War.<sup>4</sup> There have been a number of unsuccessful attempts to alter this state-by-state system of electing Presidents,<sup>5</sup> via constitutional amendment, but none of these attempts have succeeded. Unfortunately, a far more radical idea has now surfaced. Because it skirts the

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The authors would like to thank Prof. Derek T. Muller and Dr. Michael Greve for their thoughtful comments on drafts of this paper. They would also like to thank Ms. Dominique Layton and Ms. Alison Ruggiero for their research assistance.

1. U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 471 (1978).

2. U.S. CONST. art. II, § 1, cl. 2.

3. See L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL30804, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 1–2 (2004). Popular elections have been the general rule, but there have been occasional exceptions. See, e.g., CQ PRESS, PRESIDENTIAL ELECTIONS: 1789–2008, at 192 (2010).

4. CQ PRESS, *supra* note 3, at 192.

5. The Congressional Research Service reports that 595 amendments were proposed between 1889 and 2004. WHITAKER & NEALE, *supra* note 3, at 17.

difficult amendment process,<sup>6</sup> its proponents hope to succeed where other anti-Electoral College activists have failed.

In 2006, a California-based group proposed that state legislatures effectively reassert their prerogative to cast their states' electoral votes by legislative decree, rather than by popular vote within their state. The National Popular Vote effort ("NPV") asks state legislatures to award electors to the winner of the national popular vote, even if this outcome stands in direct opposition to the sentiments of voters within their own states.<sup>7</sup> States would sign an interstate compact purportedly binding them to such a system of elector allocation.<sup>8</sup> If enacted, NPV would replace the constitutional state-by-state election process—a process that operates today as a unique combination of federalism and democracy—with a more purely democratic, national direct election system.

NPV's proposal threatens the very foundations of the federalist system established in the Constitution. The consequences of such action would be far-reaching. As Professor Derek Muller has concluded:

[T]he invisible federalism that has gone largely unnoticed in present presidential election debates serves a valuable purpose. It accounts for non-voters, it maximizes enfranchisement, and it discourages interstate meddling. Federalism is not simply an impediment to Electoral College reform—it is a foundational element of its defense, one that precludes reform."<sup>9</sup>

Professor Norman R. Williams notes that "the Electoral College departs from the majoritarian ideal so as to implement another vital political value: federal union."<sup>10</sup> This blend serves the country, and the result—

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6. Article V of the Constitution provides for constitutional change with the approval of two-thirds of Congress and three-quarters of the states. U.S. CONST. art. V. NPV's plan, by contrast, would allow change with the approval of as few as eleven states. NPV's proposal is explained and defended in detail at JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (3d ed. 2011).

7. See KOZA ET AL., *supra* note 6, at 248 ("The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the 'national popular vote winner.'"). In fact, the compact works so hard to ditch the sentiments of voters that it gives presidential candidates the power to appoint out-of-state individuals as electors, in some circumstances. This possibility is discussed more thoroughly in TARA ROSS, *ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE* 160–61, 163 (Colonial Press L.P. 2d ed. 2012) (2004).

8. See KOZA ET AL., *supra* note 6, at 248–49 (detailing the terms of the compact).

9. Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1292 (2012).

10. Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 179 (2011).

surprising to some—is that the “Electoral College does a better job of promoting majoritarianism than does [NPV].”<sup>11</sup> Indeed, eliminating federalism in this manner “promises to create more difficulties and ‘misfires’ in its own way than the Electoral College system its proponents so earnestly seek to replace.”<sup>12</sup>

Eliminating federalism from the presidential election process has practical ramifications, but it also has legal ones. This article will first discuss the history and benefits wrought by America’s federalist presidential process. Next, it will turn to an examination of the interstate compact that has been proposed by NPV, taking this federalist background into consideration. Article 1, Section 10 of the United States Constitution (the “Compact Clause”) governs the use of such compacts, and the history of this clause suggests that it was meant to prohibit states from “enter[ing] into *any* Agreement or Compact with another State”<sup>13</sup> without the consent of Congress. This prohibition came about, at least in part, because the Founders were concerned about protecting the nation’s federal structure.

Despite this strict beginning, modern court precedents regarding the Compact Clause have been more lenient than the constitutional text might suggest. However, even under the more relaxed standard in *United States Steel Corp. v. Multistate Tax Commission*,<sup>14</sup> the Court has expressed its view that compacts implicating the “federal structure” may need to be submitted to Congress for its approval.<sup>15</sup> If any compact ever implicated the federal structure, NPV is it. At a minimum, the compact must be submitted to Congress for review and approval before it can go into effect.

If the compact is eventually submitted to Congress, that body should decline to give its consent. NPV’s compact wreaks havoc on the basic, federalist principles of America’s republic.

## II. THE FEDERALIST ELECTORAL COLLEGE

### A. *Historical Foundations*

An understanding of the history of the Constitution and the federalist principles embodied in that document is critical to an objective evalua-

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11. *Id.*

12. *Id.* at 236.

13. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

14. 434 U.S. 452 (1978).

15. *See id.* at 471; *see also* discussion *infra* note 243 and accompanying text.

tion of the current attacks on the Electoral College, whether these attacks are offered by NPV advocates<sup>16</sup> or other foes of the system.<sup>17</sup>

Shortly after America won its independence from Great Britain, the thirteen colonies began to bicker among themselves: They imposed protective tariffs upon each other; they issued their own paper money; and they quarreled over boundaries.<sup>18</sup> The colonies were supposed to work together through the Confederation Congress established by the Articles of Confederation,<sup>19</sup> but they seemed unable to do so. They did not trust

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16. NPV denies that it is attacking the Electoral College or federalist principles, instead claiming that its plan is merely another expression of states' rights. *See, e.g.,* Laura Brod, *Don't Rush to Judgment: There Is a Conservative Story to Be Told About the National Popular Vote*, in Ed Morrissey, *Is There a Conservative Case for National Popular Vote?*, HOTAIR (Aug. 15, 2010, 4:30 PM), <http://hotair.com/archives/2010/08/15/is-there-a-conservative-case-for-national-popular-vote> (NPV is "not in conflict with the Constitution and not an end run around the Constitution. In actuality, the legislation is an exercise of power by the states that is explicitly granted through the Constitution"); *see also* Richard Bolen, *A Conservative Case for National Popular Vote: Why I Support a State-Based Plan to Reform the Electoral College*, NAT'L POPULAR VOTE (Summer 2010), [http://nationalpopularvote.com/pages/blogs/bolen\\_201008.php](http://nationalpopularvote.com/pages/blogs/bolen_201008.php); Jason Cabel Roe, *Opponents of the National Popular Vote Have It Wrong*, NAT'L POPULAR VOTE (Aug. 6, 2010), [http://www.nationalpopularvote.com/pages/blogs/biggovernment\\_20100806.php](http://www.nationalpopularvote.com/pages/blogs/biggovernment_20100806.php). Despite these claims, NPV proponents occasionally give away their real goal: elimination of the Electoral College. *See, e.g.,* Tim Sampson, *Vote of No Confidence*, POLITICS, Aug. 2008, at 12, 14, <http://tsampson.squarespace.com/vote-of-no-confidence> (noting NPV Founder's claims that a constitutional amendment eliminating the Electoral College is the logical consequence of NPV); Tara Ross, *Anti-Electoral College Group Caught With Its Hand in the Cookie Jar!*, TARAROSS.COM (Jan. 16, 2013, 8:20 a.m.), <http://www.taraross.com/2013/01/anti-electoral-college-group-caught-with-its-hand-in-the-cookie-jar>.

17. The attacks made are numerous and come from a variety of sources. *See, e.g.,* DAVID W. ABBOTT & JAMES P. LEVINE, *WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE* (1991); ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* (2006); GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* (2d ed. 2011); LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000 (1999); NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 211–12 (Yale Univ. Press rev. ed. 1981) (1968); Editorial, *Electoral College Dropout: California Should Join the States Seeking Reform of the Presidential Election System*, L.A. TIMES, Aug. 18, 2008, at A14; Editorial, *Flunking the Electoral College*, N.Y. TIMES, Nov. 20, 2008, at A42; Editorial, *Another Chance to Lead: Electoral College Bill Sets Reform in Motion*, SACRAMENTO BEE, Sept. 6, 2006, at B6.

18. *See, e.g.,* CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* 11–17 (1st Harvest ed. 2003); CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 5–11 (2d prtq. 1986).

19. *See* ARTICLES OF CONFEDERATION of 1781, art. IX.

each other and would sometimes act independently, to the detriment of the Union.<sup>20</sup> Such difficulties worried General George Washington, who lamented to John Jay: “What a triumph for the advocates of despotism to find that we are incapable of governing ourselves.”<sup>21</sup> In a letter to James Madison, he continued: “Thirteen Sovereignties pulling against each other, and all tugging at the federal head, will soon bring ruin on the whole.”<sup>22</sup>

Great Britain took advantage of the chaos. It continued to punish the American colonies by imposing trade restrictions and tariffs.<sup>23</sup> Some thought that such sanctions would force the colonies back into the British Empire.<sup>24</sup> “[I]f such exclusions be continued,” the spy Edward Bancroft wrote in 1784, the Americans “will, in less than twelve months, loudly clamor against the Confederation, and openly concert measures for entering into something like their former connections with Great Britain.”<sup>25</sup> A weak Confederation Congress seemed impotent and unable to respond.

Finally, on the last day of Virginia’s 1785–86 legislative session, Madison slipped in a resolution accepting Maryland’s invitation for a four-state convention at Annapolis.<sup>26</sup> The Virginia resolution also expanded the invitation: Every colony would be included.<sup>27</sup> This convention was to meet in Annapolis and address the intolerable state of commerce among the states,<sup>28</sup> but, unfortunately, only twelve representatives appeared for this meeting.<sup>29</sup> The representative from New York, Alexander Hamilton, encouraged his fellow delegates to act anyway. At his urging and with the help of Madison, the Annapolis delegates issued a call for a new convention “to take into consideration the situation of the United States; to devise *such further provisions* as shall appear to them necessary

20. See, e.g., BERKIN, *supra* note 18, at 11–17; BOWEN, *supra* note 18, at 5–11.

21. Letter from George Washington to John Jay (Aug. 15, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 212, 213 (W.W. Abbot et al. eds., 1994) [the collection is hereinafter referred to as CONFEDERATION SERIES].

22. Letter from George Washington to James Madison (Nov. 5, 1786), in 4 CONFEDERATION SERIES, *supra* note 21, at 331, 332.

23. See, e.g., U.S. Dep’t of State, *Milestones: 1784–1800, John Jay’s Treaty, 1794–95*, OFFICE OF THE HISTORIAN, <http://history.state.gov/milestones/1784-1800/JayTreaty> (last visited Mar. 19, 2013).

24. BURTON J. HENDRICK, *BULWARK OF THE REPUBLIC: A BIOGRAPHY OF THE CONSTITUTION* 32 (1937).

25. *Id.* at 32–33.

26. He solicited the help of John Tyler, Speaker of the House of Delegates. *Id.* at 55.

27. *Id.*

28. *Id.*; see also BERKIN, *supra* note 18, at 24–25.

29. BERKIN, *supra* note 18, at 25.

to render the Constitution of the federal government *adequate to the exigencies of the Union . . .*”<sup>30</sup> Congress approved the recommendation and delegates were appointed for a convention in Philadelphia.<sup>31</sup>

The fifty-five delegates who attended this convention would have been excused for any doubts they may have had regarding their probability of success.<sup>32</sup> The Articles of Confederation had described itself as a “firm league of friendship,”<sup>33</sup> but it was clear that—like the Holy Roman Empire which Voltaire has denigrated as “neither holy, Roman, nor an empire”<sup>34</sup>—the firm league of friendship was neither firm, nor a league, nor very friendly. The delegates doubtless knew that it would be difficult to reconcile the interests of the small states with those of the large states. Indeed, small states like Rhode Island refused to even attend, fearing the large national government that would result.<sup>35</sup> Similarly, Delaware’s delegates were not authorized to accept any plan that changed the one state, one vote provision in Article V of the Articles of Confederation.<sup>36</sup>

The conflict reared its head early and often that summer in Philadelphia. As the Convention opened, Edmund Rudolph presented “the Virginia Plan,” which contemplated congressional representation based on

30. Proceedings of Commissioners to Remedy Defects of the Federal Government (Sept. 11, 1786), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 69-398, at 41 (1927); *see also* THE FEDERALIST No. 40, at 243 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) (discussing and quoting from the proceedings). More information on these events can be found at BERKIN, *supra* note 18, at 25; BOWEN, *supra* note 18, at 9; HENDRICK, *supra* note 24, at 63–64; JOHN R. VILE, 1 THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 19–21 (2005).

31. Congress attempted to limit the scope of the Convention to “*revising the articles of Confederation*.” THE FEDERALIST No. 40, *supra* note 30, at 244.

32. George Washington, for instance, may have been privately concerned about an unsuccessful convention and any resulting damage to his reputation. *See, e.g.*, JAMES MACGREGOR BURNS & SUSAN DUNN, GEORGE WASHINGTON 36 (American Presidents Series, Arthur M. Schlesinger, Jr. ed., 2004); *see also* BOWEN, *supra* note 18, at 20–21. On the other hand, any skepticism about the Convention’s chances was balanced by a fair amount of hope, as evidenced by the identities of the men selected to attend as delegates. James Madison wrote to Thomas Jefferson at the time: “The names of the members will satisfy you that the States have been serious in this business.” BOWEN, *supra* note 18, at 37 (citation omitted in original).

33. ARTICLES OF CONFEDERATION of 1781, art. III.

34. E.D. HIRSCH, JR. ET AL., *The New Dictionary of Cultural Literacy: What Every American Needs to Know* 208 (3d ed. 2002).

35. *See, e.g.*, WILLIAM PETERS, A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION 12 (1987); BOWEN, *supra* note 18, at 13.

36. *See, e.g.*, PETERS, *supra* note 35, at 28; BOWEN, *supra* note 18, at 33.

state population, an idea supported by the large states.<sup>37</sup> Soon William Paterson countered with the alternative “New Jersey Plan,” which instead preserved the small-state friendly principle of “one state, one vote.”<sup>38</sup> The interests of the two sides were seemingly irreconcilable. Large state delegates such as Rufus King of Massachusetts pronounced himself “filled with astonishment that if we were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *State* sovereignty.”<sup>39</sup> But those from small states simply did not trust those from the large states. Gunning Bedford, delegate from Delaware, expressed skepticism at the claim that “although the three great States form nearly a majority of the people of America, they never will hurt or injure the lesser States.”<sup>40</sup> He stated bluntly: “*I do not, gentlemen, trust you. If you possess the power, the abuse of it could not be checked; and what then would prevent you from exercising it to our destruction?*”<sup>41</sup>

It was at this point, as later described by Luther Martin of Maryland, that “[w]e were on the verge of dissolution, scarce held together by the strength of a hair.”<sup>42</sup> Even Washington, the presiding chair, wrote to Hamilton that he “*almost despair[ed] of seeing a favourable issue to the proceedings of the Convention, and do therefore repent having had any agency in the business.*”<sup>43</sup> Gouverneur Morris of Pennsylvania urged the delegates to find compromise. “This Country must be united,” Morris urged. “If persuasion does not unite it, the sword will. . . . The scenes of horror attending civil commotion can not be described . . . . The stronger party will then make traytors of the weaker; and the Gallows & Halter will finish the work of the sword.”<sup>44</sup>

Only at the last minute, when it seemed that the Convention might fall apart, was a two-pronged compromise proposed: One arm of Con-

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37. BOWEN, *supra* note 18, at 37–39; Matthew Spalding, *The Formation of the Constitution*, in THE HERITAGE GUIDE TO THE CONSTITUTION 7, 9 (David F. Forte & Matthew Spalding eds., 2005).

38. BOWEN, *supra* note 18, at 102, 104–106; Spalding, *supra* note 37, at 9.

39. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 227–28 (Adrienne Koch ed., W.W. Norton & Co. 1987) (1966).

40. Robert Yates, *Notes of the Secret Debates of the Federal Convention of 1787*, THE AVALON PROJECT: YALE LAW SCH., [http://avalon.law.yale.edu/18th\\_century/yates.asp](http://avalon.law.yale.edu/18th_century/yates.asp) (last visited Mar. 22, 2012).

41. *Id.* (emphasis added).

42. PETERS, *supra* note 35, at 99.

43. Letter from George Washington to Alexander Hamilton (July 10, 1787), in 5 CONFEDERATION SERIES, *supra* note 21, at 257, 257; *see also* PETERS, *supra* note 35, at 110.

44. MADISON, *supra* note 39, at 241; *see also* PETERS, *supra* note 35, at 103.



gress would have representation based on population, but the other arm would have equal representation for each state.<sup>45</sup> It was eventually decided that the election of the President would also reflect this compromise: Each state would automatically receive two electors; the remaining electors would be allocated based on population.<sup>46</sup> Emphasizing the importance of states even further, the states were given equal representation during the secondary House election procedure, to be used if no candidate obtains a majority of electoral votes.<sup>47</sup> The decision was a significant gesture by large state delegates: They believed most elections would be decided in the House. James Madison later explained that the presidential election process was the “result of a compromise between the larger & smaller States, giving to the latter the advantage in selecting a president from the Candidates, in consideration of the advantage possessed by the former in selecting the Candidates from the people.”<sup>48</sup>

The compromise regarding the composition of Congress, also reflected in the presidential selection process, was critical to the success of the Convention. John Dickinson wrote in his *Letters of Fabius* that this representation was more than a “mere compromise.”<sup>49</sup> Instead, the “*equal representation of each state in one branch of the legislature*,” was an original substantive proposition” in the Philadelphia Convention.<sup>50</sup> Indeed, it seems quite likely that, without some element of “one state, one vote” representation in the new Constitution, some delegates and states would have rejected the invitation to replace the Articles of Confederation with a new form of government.

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45. The compromise was accepted by the Convention on July 16. See MADISON, *supra* note 39, at 297–98.

46. MADISON, *supra* note 39, at 590–94; see also BERKIN, *supra* note 18, at 140–46. James Wilson, delegate from Pennsylvania described the discussions surrounding the selection of the Executive: “This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide.” MADISON, *supra* note 39, at 578.

47. MADISON, *supra* note 39, at 592.

48. Letter from James Madison to Henry Lee (Jan. 14, 1825), in 9 THE WRITINGS OF JAMES MADISON 215, 217 (Gaillard Hunt ed., 1910).

49. *Letters of Fabius*, DEL. GAZETTE (1788), reprinted in III THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 304, 304 (Max Farrand ed., rev. ed. 1966). John Dickinson wrote a series of letters defending the proposed Constitution as it was being debated and ratified in the states. These letters appeared in the *Delaware Gazette* in 1788.

50. *Id.*

### *B. Modern Benefits of the Founders' Federalist Design*

The presidential election process established by the Constitution has served this country well for more than 200 years.<sup>51</sup> Some opponents of the system will dispute this claim. They conclude that any system that allows candidates to obtain the presidency without winning the national popular vote must be fatally flawed. But they have simply leapt to such a conclusion without bothering to argue the point.

True, such outcomes have occurred twice in American history.<sup>52</sup> But such results are not anomalous with those of parliamentary democracies around the world. In 1974, for example, the Labour Party in Great Britain lost the popular vote, yet it won four more seats than its opposition in the Parliament.<sup>53</sup> The Labour Party was thus able to form the government.<sup>54</sup> As far as can be ascertained, this parliamentary outcome did not result in any appeals to the United Nations, claims that the “wrong Prime Minister” had been elected, or demands that Great Britain revert to a national, direct popular vote for the election of Prime Ministers.

Such appeals were not made because the British people recognize certain benefits to their parliamentary democracy, even when the Prime Minister is elected by Members of Parliament representing less than a majority of voters. Similarly, the unique and federalist structure of the Electoral College has repeatedly proven its value throughout the course

51. The 12th Amendment separated the voting for President and Vice President but otherwise left most of the original Article II procedures in place. U.S. CONST. art. II, § 1, cls. 2 & 3; *id.* amend. XII.

52. The elections of 1888 and 2000 are the only two elections fairly included in this category, as both authors have discussed elsewhere. See ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 4 (1994) (discussing the election of 1876 and the impact of fraud on that election); ROSS, *supra* note 7, at 192–94 (discussing the elections of 1824 and 1876). Some scholars—and even the Congressional Quarterly—believe that 1960 should be included in this number. See CQ PRESS, *supra* note 3, at 159. The issue turns on how the popular votes in Alabama are counted. The state tally was difficult to pinpoint that year because the state was not using a presidential short ballot. Instead, voters could cast ballots for individual electors. The matter was further complicated by the fact that the Democratic slate consisted of both pledged and unpledged electors. Eventually, the pledged electors voted for JFK. The unpledged electors voted for Harry Byrd. This matter is discussed in greater detail at HARDAWAY, *supra* note 52, at 151; ROSS, *supra* note 7, at 270–71 n.15. As it relates to NPV, the situation in Alabama shows the potential impossibility of compiling a reliable national popular vote when states' ballots may vary so drastically.

53. 1974 Feb: *Hung Parliament Looms*, BBC NEWS, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/vote\\_2005/basics/4393301.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/vote_2005/basics/4393301.stm) (last updated Apr. 5, 2005).

54. *Id.*

of American history. The system has several important benefits that have proven themselves time and again.

### 1. Broad Support of the Electorate

The Electoral College has served one of the primary objectives of the Founders<sup>55</sup>—namely, to assure that support for a winning presidential candidate be broad, not only deep.<sup>56</sup> The Constitution requires a majority of states' electoral—not individual—votes to win.<sup>57</sup> Multiple, concurrent victories are required if a candidate is to obtain this required majority of electoral votes.<sup>58</sup> In other words, candidates not only need to obtain the votes of many individuals, but they must also ensure that these votes are

55. Obviously, an element of difficulty always exists in attempting to summarize the collective thoughts of a group of individuals such as the Founders. Opinions among these men and women would have varied. Indeed, some of the Founders did not want to adopt the Constitution at all! However, early Americans' differences in opinion were trumped by common goals and shared concerns. Importantly, both pro- and anti-Constitution forces spoke of the need to extend republican principles across the land, despite its size. Both sides of the debate also recognized the need to resolve the inherent tension between self-government and the protection of political minority groups. The Founders, of course, would have been most concerned about the small states in this context.

56. Both authors have discussed the benefits of federalism, as it pertains to the presidential election process, at length. See Ross, *supra* note 7, at 67–105; see generally HARDAWAY, *supra* note 52 (making the case for “preserving federalism” in presidential elections).

57. U.S. CONST. amend. XII.

58. Candidates must win a minimum of 11 states, assuming they obtain the votes of the 11 largest states. These states have 270 electors (a bare majority) among them; they could technically deliver the presidency to the candidate. In practice, however, no candidate ever wins with as few as 11 states: The voters in these states are far too different from each other. A candidate who could win the votes of red Texas and blue California, simultaneously, would undoubtedly win other, smaller states as well. A Senate minority report in 1970 explained it this way:

A commonly heard indictment of the electoral college . . . is that the 11 largest States (plus another small State or the District of Columbia) would suffice to carry a candidate into office. The conclusion one is supposed to draw from this argument is that the 11 largest States are therefore in a position to dictate to the other 39. But what those who use this essentially emotional argument always conveniently forget to add is that the very compromises which enable a candidate to carry the 11 largest States also enable him to carry many others as well. And that is precisely why no candidate has ever won with anything like 11 States. In point of fact, only one President in this century (John F. Kennedy) was ever elected with less than a majority of the States supporting him. That exception excluded, no one in this century has ever won with less than 29 States, and the average number carried by the winner has been nearly 37.

S. COMM. ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT, S. REP. NO. 91-1123, at 47–48 (1970) (minority views of Messrs. Eastland, McClellan,

distributed across the country in an efficient manner.<sup>59</sup> The White House can be won only by candidates who have obtained the support of many people, across state and regional lines. The system has built-in incentives, ensuring that candidates and political parties work to build and maintain national coalitions of voters. Such coalitions are needed for victory.

A direct election system, by contrast, would not require any efficiency in the distribution of votes. A majority of individuals' votes—no matter where those individuals reside—would be sufficient for victory. Candidates would thus have less motivation to reach out to such a wide variety of voters. To the contrary, candidates might find it easier and more efficient to tailor a message to one type of voter. With such a direct election system in place, for instance, a popular regional demagogue could strive for an overwhelming popular vote advantage in his region. If he successfully ekes out a narrow, national popular vote *plurality*, he wins a spot in the runoff—or perhaps the presidency itself<sup>60</sup>—despite being opposed in all other regions of the country.<sup>61</sup> Such campaigns failed in the mid-1900s with the Electoral College system in place.<sup>62</sup> A direct election

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Ervin, Hruska, Fong, and Thurmond), *available at* <http://teachingamericanhistory.org/library/document/minority-view-on-the-direct-popular-election-of-the-president/>.

59. Others have discussed these dynamics as well. *See, e.g.*, JUDITH A. BEST, *THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE* 67 (1996) [hereinafter BEST, *CHOICE OF THE PEOPLE*]; JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* 251 (1963), *quoted in* JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 66 (1975) (noting that presidential candidates are motivated “to widen and ‘flatten out’ their vote, [and] to win states by dependable but not wasteful popular majorities”); GEORGE GRANT, *THE IMPORTANCE OF THE ELECTORAL COLLEGE* 45–55 (2004).

60. NPV does not provide for a runoff, although some other election alternatives do. *See KOZA ET AL.*, *supra* note 6, at 248 (awarding the presidency to the winner of the “largest national popular vote total”).

61. Electoral College opponents dispute that a candidate could obtain this many votes in one region of the country. But they have forgotten (or choose to forget) that elimination of the Electoral College will likely undermine the two-party system. If a presidential election is one among multiple candidates, then it becomes much easier for one of these regional candidates to obtain the winning (minimal) plurality that he needs. This matter is discussed more in ROSS, *supra* note 7, at 81–95; *cf.* HARDAWAY, *supra* note 52, at 19–21 (discussing the results of several third party campaigns in American history).

62. The candidate who came closest to succeeding during this time period was Governor George Wallace. The Governor hoped to deprive Richard Nixon of an electoral majority, thus pushing the election in to the secondary House contingent election procedure. *See, e.g.*, LONGLEY & PEIRCE, *supra* note 17, at 59–69. Despite fears that he would succeed, Wallace failed in his attempt to influence the election in heavy reliance on one region of the country. He ultimately obtained only 46 electoral votes,

system would unfortunately give such candidates a greater likelihood of success.

The Electoral College, as it operates today, is a unique blend of democratic and federalist principles. And it is the “federalist” aspect of this blend that ensures that American presidents work to achieve substantial support across many regions of the country. They will otherwise find themselves unable to win the required majority of electoral votes.

## 2. Protecting the Electoral Interests of Rural Areas

A second benefit is closely related to the first. The Electoral College provides candidates with incentives to include rural areas and smaller states in their campaigns. These states benefit from their two extra Senate “add-on” votes, which they receive regardless of size.<sup>63</sup> In today’s federalist system, as discussed above, candidates must distribute their votes efficiently and build national coalitions.<sup>64</sup> With a direct election system in place, there is no need for such coalition-building and cross-regional appeal. The sparsely populated regions of the country would suffer the most from these changed incentives.

With a direct election system in place, campaigning would necessarily gravitate toward the main centers of population—urban areas such as New York City, Los Angeles, and Chicago.<sup>65</sup> Such a change in strategy is

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far less than Nixon’s winning majority of 301 electoral votes. CQ PRESS, *supra* note 3, at 251.

63. Small states are allocated a minimum of three electoral votes regardless of population. U.S. CONST. art. II, § 1, cl. 2.

64. See discussion *supra* notes 56–62 and accompanying text.

65. The changed incentives make such an outcome almost inevitable. Why spend massive amounts of time and energy on sparsely populated areas when you could instead spend the same amount of energy on a densely populated area and get many millions more voters on your side? It seems self-evident that a campaign for the “most individuals” would concentrate on the areas where the “most individuals” are, yet some Electoral College opponents *still* dispute this point. Perhaps most notably, certain Republican lobbyists—usually paid by NPV—are trying to convince red state legislators that a change from the Electoral College’s federalist system to NPV’s purely democratic plan will somehow ensure that “red” rural areas are heard. This matter is discussed in more detail at Ross, *supra* note 7, at 155; see also Tara Ross & Trent England, *George Soros Supports the Tea Party? What the National Popular Vote Wants You to Believe*, WKLY. STANDARD BLOG (Aug. 16, 2011, 9:31 AM), [http://www.weeklystandard.com/blogs/george-soros-supports-tea-party\\_590271.html](http://www.weeklystandard.com/blogs/george-soros-supports-tea-party_590271.html); Tara Ross, *Opponents of the Electoral College Try a ‘Tea Party’ Strategy*, NAT’L. REV. ONLINE (Feb. 14, 2011 9:51 A.M.), <http://www.nationalreview.com/corner/259676/opponents-electoral-college-try-tea-party-strategy-tara-ross>.

simply practical.<sup>66</sup> Campaigns can get the biggest bang for their buck if they spend their time and resources on these densely populated areas. After all, these candidates are simply going for a majority of individual votes; they do not care where those individuals reside. Rural areas, even in large states such as Texas and California, would inevitably receive diminished attention from candidates. These less densely populated areas would be in danger of being tyrannized by the majority in the large cities—exactly the dynamic that the Founders strove to avoid.<sup>67</sup>

Electoral College opponents dispute such a description, instead claiming that today's system creates a disproportionate focus on so-called "battleground" states.<sup>68</sup> They forget several factors: First, presidential campaigns are not only about the amount of money that candidates spend in swing states during the final weeks and months of a campaign.<sup>69</sup> Elections are about four years of governance and what voters thought of those years. "Safe" states are safe because they've already made up their minds. They are not being ignored.<sup>70</sup> Second, the identity of "safe" and

66. Cf. BEST, CHOICE OF THE PEOPLE, *supra* note 59, at 55 ("Many of the proponents of the direct nonfederal election with a 40 percent plurality rule assume that they can make such a major change in the rules without changing the way the game is played and without changing the nature of the winning team. That is nonsense.").

67. The Constitutional Convention and state ratification debates witnessed no shortage of speeches against the dangers of a tyrannical majority. Alexander Hamilton, for instance, warned against the tyranny that inevitably flowed from pure democracies: "It has been observed, by an honorable gentleman, that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved that no position in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure, deformity." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 253 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

68. See, e.g., FAIRVOTE, CTR. FOR VOTING AND DEMOCRACY, THE SHRINKING BATTLEGROUND 1 (2005) ("The fundamental reality is that fewer and fewer Americans play a meaningful role in electing the president—and that the major party campaigns act on that understanding with utter disregard for the interests and views of most voters outside of swing states."); KOZA ET AL., *supra* note 6, at 9–16 (discussing why "Voters in Two Thirds of the States Are Effectively Disenfranchised" by the existence of swing states).

69. See, e.g., FAIRVOTE, CTR. FOR VOTING AND DEMOCRACY, PRESIDENTIAL ELECTION INEQUALITY: THE ELECTORAL COLLEGE IN THE 21ST CENTURY 31–45 (2006); KOZA ET AL., *supra* note 6, at 9–16 (discussing the amount of money spent on advertising and other efforts in the swing states).

70. California is *very* relevant, even if it is a safe blue state. Certainly, no Democratic candidate wants to try to win without it. If California became more purple—or even red, as it was prior to the 1990s—then Democrats would be scrambling to re-

“swing” states is constantly changing, as the relatively “new” swing states of North Carolina, New Hampshire, and Virginia demonstrate. Finally, even assuming, *arguendo*, that battleground states receive too much attention,<sup>71</sup> this problem is not cured by creating a new, disproportionate focus on urban areas to the exclusion of rural ones.

The Electoral College serves America by ensuring that presidential candidates must reach out to a wide variety of voters. Urban areas cannot be the sole drivers of presidential politics; the needs and concerns of their rural neighbors must be taken into account.

### 3. A President “Justly Styled the *Man of the People*”<sup>72</sup>

The Founders worried about the dangers of “pure” democracies.<sup>73</sup> They knew that, as a matter of history, such governments become unsustainable. Eventually, bare or emotional majorities begin to oppress (even very large) minority groups within the country.<sup>74</sup> They wanted their new government to include safeguards against these dangers, but they also recognized the importance of incorporating the voice of the people into the presidential election process.<sup>75</sup> When they had finished their work, they felt that they had reconciled these competing needs fairly well.<sup>76</sup> One

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place its electoral votes with votes from other states. Republicans obviously feel the same way about states such as Texas. *Every state matters.*

71. A final push in battleground states does not indicate that the presidential election system is failing, in the opinion of these authors. Indeed, there is great diversity, even within the battleground states. Thus, even with this focus in the closing weeks of a campaign, presidential candidates are incentivized to appeal to a wide variety of Americans. As former Federal Election Commission chairman Bradley Smith points out, the battleground states

form a diverse group indeed . . . [They include] small states and large, east and west, north and south, agricultural and industrial, urban and rural, and states with large minority populations and states with small minority populations. Thus, even on a shrunken battleground, it is likely that pandering too strongly to parochial concerns will be checked by the need to compete in another “battleground” state elsewhere. Worse yet, pandering to extreme might antagonize voters in other states so as to convert safe states into battleground states. Politics is not static.

Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 203–204 (2008).

72. 2 ELLIOT’S DEBATES, *supra* note 67, at 448.

73. THE FEDERALIST NO. 10, *supra* note 30, at 76 (James Madison); this matter is discussed at length in ROSS, *supra* note 7, at 17–21.

74. 2 ELLIOT’S DEBATES, *supra* note 67, at 253.

75. Thomas Jefferson, Inauguration Address (Mar. 4, 1801), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 321, 322 (Adrienne Koch & William Peden eds., 1944).

76. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 175 (7th prtg. 1930) (“[F]or of all things done in the convention the members

delegate concluded: “[The President] will be chosen in such a manner that he may be justly styled *the man of the people*.”<sup>77</sup>

The Founders’ presidential election system has adapted to the times and still serves this essential purpose. The country has taken a few unanticipated turns: The Founders did not anticipate the rise of political parties or the nearly uniform adoption of winner-take-all electoral vote allocations by the states. Yet, these adaptations have worked to reinforce the objectives of the Founders. Today, the Electoral College, together with the winner-take-all system, has laid the foundation for a stable two-party system in this country.<sup>78</sup> This two-party system, in turn, undermines the efforts of extremist candidates and instead rewards those candidates who work to build national coalitions, as discussed above. In short, the candidate who appeals to the widest variety of Americans possible—the candidate who is most justly styled *the man of the people*—is able to obtain an electoral majority. Extremist candidates, failing to reflect the voice of the people, have historically failed.

A former member of the Socialist Party offered testimony to this effect at a Senate hearing in 1977:

One thing we all had in common was an absolute detestation of the electoral college. It was one of the chief barriers to the success of minority parties.

....

We knew that we didn’t have a snowball’s chance in the nether regions to get on the ballot and to win any States. Whereas, under the system you propose, we would have made hay while the Sun shined during the late autumn.

We started out always with 5 or 6 or 7 percent who said they were for Norman Thomas. And I’m quoting Thomas: About the third week in October, it would be down to 2 percent; on the first day of November, it would be down to about 1 percent; and on the first Tuesday after the first Monday in November, it would be

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seemed to have been prouder of that than of any other, and they seemed to regard it as having solved the problem for any country of how to choose a chief magistrate.”).

77. 2 ELLIOT’S DEBATES, *supra* note 67, at 448. James Madison agreed, “He [the President] is now to be elected by the people.” MADISON, *supra* note 39, at 629. Alexander Hamilton also described the Electoral College as an institution that would allow the “sense of the people” to “operate in the choice of the [President].” THE FEDERALIST NO. 68, *supra* note 30, at 410 (Alexander Hamilton).

78. This matter is discussed at length in Ross, *supra* note 7, at 81–95; *see also* HARDAWAY, *supra* note 52, at 19–21.



down to about 150,000 votes. Period. The reason was that there was no chance of victory in any State.<sup>79</sup>

Other extremist third party candidates have had difficulty affecting national results: In 1968, segregationist George Wallace hoped to force a House contingent election. He obtained 13.5 percent of the national vote, yet failed to rob Nixon of his electoral victory.<sup>80</sup> Nixon won that year with 301 electoral votes.<sup>81</sup> Candidates such as Ralph Nader and Patrick Buchanan have similarly had trouble affecting national policy.<sup>82</sup> More mainstream third-party candidates, such as Ross Perot (1992) and Teddy Roosevelt (1912) have still been unable to win.<sup>83</sup> They have, however, had a larger impact on national policy as the two major parties have worked to regain disaffected voters.<sup>84</sup>

Opponents of the nation's federalist presidential election system often claim that America's two-party system would survive the abolition of the Electoral College.<sup>85</sup> History justifies no such claim. Other countries regularly experience multi-candidate presidential races in their direct election systems.<sup>86</sup> The 2002 election in France, for instance, was held

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79. Martin Diamond & Birch Bayh, *The Electoral College and the Idea of Federal Democracy*, 8 J. FEDERALISM 63, 75 (1978). Martin Diamond was a member of the Socialist Party when he was young, although he is better known for his later defenses of such founding institutions as the Electoral College. One commentator explains that "Martin Diamond's movement away from the left . . . between 1936 and 1950 enabled him to see the light regarding the American Founding." Richard G. Stevens, *Editor's Preface: Martin Diamond's Contribution to American Political Thought*, 28 POL. SCI. REVIEWER 3, 7 (1999).

80. CQ PRESS, *supra* note 3, at 161.

81. *Id.* at 251.

82. For example, in 2000, Ralph Nader obtained 2.7 percent of the national popular vote and zero electoral votes. *Id.* at 169, 259. Patrick Buchanan had an even smaller impact: 0.4 percent of the national vote and zero electoral votes. *Id.*

83. Ross Perot achieved 18.9 percent of the popular vote in 1992. *Id.* at 167. He did not obtain a single electoral vote. *Id.* at 257. Teddy Roosevelt did better than Perot, but still could not win. The Republican vote that year was divided between Roosevelt and the incumbent William Howard Taft. The two men together earned a combined 7.6 million popular votes. *Id.* at 147. Yet they could not defeat Woodrow Wilson. Wilson obtained fewer popular votes than Roosevelt and Taft's combined total, but he was elected with an astounding 435 electoral votes, compared to 88 for Roosevelt and 8 for Taft. *Id.* at 147, 237.

84. In the mid-term elections of 1994, for instance, both political parties worried about the loss of Perot voters. The parties had different proposals for fiscal responsibility, of course, but both parties knew that they could not regain the support of Perot voters without first addressing the issue.

85. See, e.g., KOZA ET AL., *supra* note 6, at 478–83.

86. For a discussion of this dynamic in Russian and German elections, please see HARDAWAY, *supra* note 52, at 18–19.

among sixteen candidates.<sup>87</sup> The top vote-getter, the incumbent, achieved only 19.88 percent of the vote, while a radical right-wing candidate placed second with 16.86 percent.<sup>88</sup> The electorate was then asked to choose between the incumbent and an extremist candidate.<sup>89</sup> Can this type of system be said to deliver a candidate who is *the man of the people*?

The French example represents what can happen in a system that combines a direct election system with a runoff. Some Electoral College opponents argue that direct election alternatives *without* a runoff would be different.<sup>90</sup> The “first past the post” dynamic would allegedly demotivate the supporters of third parties, thus preserving America’s two-party system. Such arguments fail to take into account the fact that other countries utilizing similar systems have persistent third parties.<sup>91</sup> And it ignores evidence within America’s own political system that “first past the post” is not always sufficient to drive out third party candidates. Just ask two sitting Senators, Lisa Murkowski and Marco Rubio. They might not have been elected in 2010 if “first past the post” had demotivated the supporters of third-parties as it was “supposed to.”<sup>92</sup>

87. See Williams, *supra* note 10, at 204 (discussing the 2002 elections in France). For election totals, see Office for Democratic Institutions and Human Rights, *Republic of France Presidential Elections, 21 April and 5 May 2002*, ORG. FOR SECURITY & CO-OPERATION EUROPE (Apr. 21, 2002), <http://www.osce.org/odihr/elections/france/16167> [hereinafter Democratic Institutions].

88. See Democratic Institutions, *supra* note 87.

89. The incumbent, Jacques Chirac, won. See Charles Bremmer, *Chirac Landslide Crushes Le Pen*, TIMES (London, UK), May 6, 2002, at 1; Bruce Wallace, *Chirac Crushes Le Pen: French President Captures 82% of Vote, Dashing Hopes of Ultra-Nationalist*, TIMES-COLONIST (Victoria, B.C.), May 6, 2002, at A1.

90. See, e.g., KOZA ET AL., *supra* note 6, at 478–83.

91. India and Canada are often cited as such examples. Some political scientists include the United Kingdom because of the persistence of the third-party Liberal Democrats. See, e.g., Royce Carroll & Matthew Sørberg Shugart, *Parties, Alliances, and Duverger’s Law in India 8–9* (Mar. 20, 2008) (paper presented at the annual meeting of the Western Political Science Association), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/3/7/7/9/pages237792/p237792-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/3/7/7/9/pages237792/p237792-1.php); William H. Riker, *The Two-Party System and Duverger’s Law*, 76 AM. POL. SCI. REV. 753, 760 (1982); see also W. M. Dobell, *Updating Duverger’s Law*, 19 CANADIAN J. POL. SCI. 585 (1986).

92. See, e.g., Christine Armario, *Meek Says Clinton Never Convinced Him to Quit Race*, CHI. DAILY HERALD, Oct. 29, 2010, at 16; Ralph Z. Hallow, *Libertarian Won’t Give Spot to Murkowski: Incumbent Senator Still Weighs Bid to Hold on to Alaska’s Seat*, WASH. TIMES, Sept. 13, 2010, at A3 (discussing “frenzied efforts to talk Mrs. Murkowski into dropping out of the race for good”); Editorial, *For Crist’s Sake, Drop out; The Turncoat Threatens to Spoil Certain Republican Victory*, WASH. TIMES, May 3, 2010, at B2.

America's two-party system is the most stable in the world.<sup>93</sup> Arguably, the critical ingredient in American success is the combination of democracy and federalism in its presidential election process.<sup>94</sup> Third parties need to do more than simply overcome the major parties in one national pool of voters. They must accomplish this feat many times in many states' election pools—simultaneously! This is a difficult task.

In short, eliminating federalism from the equation in American presidential politics could have much more far-reaching consequences than is generally anticipated by Electoral College opponents. A nation that used to elect "a man of the people" would instead find itself electing a "man of (a lucky subset of) the people."

#### 4. Certainty of Outcome

The Constitution's federalist presidential election process provides Americans with one indisputable benefit: Certain and stable electoral outcomes.<sup>95</sup> A direct election system would be more likely to result in post-election disputes, uncertainty, and even litigation. Worse, fraud would be more difficult to prevent.

The Electoral College creates these quick and undisputed election outcomes for two reasons: First, the state-by-state nature of the election, combined with the winner-take-all allocation of votes, tends to magnify margins of victory.<sup>96</sup> Over the years, these margins have given winning candidates certain and demonstrable victories.<sup>97</sup> Such certainty can't be

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93. Bernard Grofman et al., *Introduction: Evidence for Duverger's Law from Four Countries*, in *DUVERGER'S LAW OF PLURALITY VOTING: THE LOGIC OF PARTY COMPETITION IN CANADA, INDIA, THE UNITED KINGDOM AND THE UNITED STATES* 1, 2 (Bernard Grofman et al. eds., 2009) (describing the United States as the only "truly two-party" system and noting that the "other major democracies all have persistent third or fourth parties that call into question the predicted equilibrium of two parties").

94. This issue is discussed in more detail at Ross, *supra* note 7, at 91–94.

95. This issue is discussed in more detail at HARDAWAY, *supra* note 52, at 26; Ross, *supra* note 7, at 97–105.

96. Several examples are listed at Ross, *supra* note 7, at 98–101.

97. Consider the somewhat fractured electorate in 1992. That year was an unusual one because of the presence of a strong third-party candidate, Ross Perot. The final results were Bill Clinton (43 percent), George H.W. Bush (37.4 percent), and Ross Perot (18.9 percent). *See* CQ PRESS, *supra* note 3, at 167. With a direct election system in place, the post-election discussion could have been about the strong showing by Perot and the generally fractured results. After all, Clinton received a plurality, but he was barely above the 40 percent mark suggested by some as an appropriate runoff threshold. (And this is all to say nothing of the possibility that, without the Electoral College, third-party candidates could make stronger showings.) As it was, with the Electoral College in place, few remarked upon the fractured popular vote. Instead,

provided in a direct popular election system. Popular vote totals tend to be closer, and these narrow margins can easily result in election challenges and recounts.

Electoral College opponents see the issue differently. They contend that a change to a national direct election should improve the situation because “[t]here are fewer opportunities for razor-thin outcomes when there is one single large pool of votes than when there are 51 separate smaller pools.”<sup>98</sup> Such a claim does not withstand scrutiny. First, system opponents forget that a move to a direct election system would represent a serious blow to the two-party system, as discussed above.<sup>99</sup> As more candidates enter the field, each candidate necessarily obtains fewer votes. The likelihood of close vote totals thus increases. Second, they too quickly dismiss the history of American elections. If the two-party system is *not* significantly affected, as they hope,<sup>100</sup> then these historical results bear even more directly on what we might expect from a move to direct election system.

In 1968, Richard Nixon won the popular vote by less than 1 percent.<sup>101</sup> In 1844, James Polk won by only 1.4 percent.<sup>102</sup> The popular vote margins in 1884, 1888, and 2000 were each less than 1 percent.<sup>103</sup> The winner in 1880 won by only one tenth of 1 percent!<sup>104</sup> In each one of these cases, the national trauma of a contentious national recount was avoided because of a decisive result in the Electoral College. Even in 2000, the recount was limited to one state: Florida.<sup>105</sup> The country was fortunately spared the scene of haggling over “hanging chads” in every precinct of the country, as could have been required with a direct election system in place.<sup>106</sup> Indeed, former Federal Election Commission chairman Bradley

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the country quickly accepted that Clinton, who had won 68.8 percent of the electoral vote, was the rightful President. *See id.* at 257.

98. KOZA ET AL., *supra* note 6, at 18.

99. *See* discussion *supra* notes 72–94 and accompanying text.

100. The National Popular Vote movement claims that it is a “myth” that moving to direct election will cause “a breakdown of the two-party system.” KOZA ET AL., *supra* note 6, at 478.

101. CQ PRESS, *supra* note 3, at 161.

102. *Id.* at 130.

103. *Id.* at 140–41, 169.

104. *Id.* at 139.

105. Bush won the election in Florida by only 537 votes. *Id.* at 169.

106. There is no shortage of books discussing the election dispute in Florida. *See generally, e.g.*, JEFF GREENFIELD, OH, WAITER! ONE ORDER OF CROW! INSIDE THE STRANGEST PRESIDENTIAL ELECTION FINISH IN AMERICAN HISTORY (2001); BILL SAMMON, AT ANY COST: HOW AL GORE TRIED TO STEAL THE ELECTION (2001); JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001).

Smith has calculated that recounts may have been necessary in as many as six presidential elections since 1880, if such a national popular vote system had been used.<sup>107</sup>

The state-by-state nature of American presidential elections creates certainty in a second manner: The system makes it harder to steal elections.<sup>108</sup> With the Electoral College in place, dishonest individuals must predict, in advance, where stolen votes will matter. No one knew that a few hundred stolen votes would change the outcome of Florida (and thus the entire election) in 2000.<sup>109</sup> On the other hand, if someone thinks that he can identify a problematic area (think Ohio in 2004), then, in all likelihood, others have made the same prediction and that area is closely watched.<sup>110</sup> It is never impossible to steal votes, unfortunately, but attempts at fraud are complicated. To the degree that fraud and errors do occur, the Electoral College makes it possible to isolate the problem to one or a handful of states. The country is given a clear set of problems to resolve one way or another before moving on to a definitive election outcome.<sup>111</sup>

Without the Electoral College, of course, any vote stolen in any part of the country can affect the national outcome—even if that vote was very easy to steal. Dishonest individuals would only have to succeed once, or maybe a handful of times, in any random American precinct. Meanwhile, anti-fraud forces would need to play defense in every corner of the country.

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107. Smith, *supra* note 71, at 207. The recount provisions in states can vary quite a bit. Some permit optional recounts if the popular vote is closer than .5 percent or even 1 percent. Some states may even require mandatory recounts in certain situations. See, e.g., *Automatic Recounts*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 24, 2012), <http://www.ncsl.org/legislatures-elections/elections/conducting-recounts.aspx>. An evaluation of these varying standards is beyond the scope of this article.

108. This matter is discussed at length in Ross, *supra* note 7, at 101–104.

109. Obviously, people knew, as a general matter, that the state was an important swing state. That is not the same as knowing that *one state* would decide the election by only a few hundred votes. The latter type of prediction can rarely be made. If it can be, then, as noted in the text, probably many other individuals will also have it figured out. Poll watchers and others will descend upon the state.

110. See, e.g., Adam Cohen, *Where the Action's at for Poll Watchers: Ohio as the New Florida*, N.Y. TIMES, Oct. 31, 2004, at 10; Paul Farhi & Jo Becker, *Some Fear Ohio Will Be Florida of 2004*, WASH. POST, Oct. 26, 2004, at A1.

111. As happened in 1876. See generally, e.g., WILLIAM H. REHNQUIST, CENTENIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

### C. NPV's Challenge to Federalism

The Electoral College system provides enviable stability, but this has not prevented some from calling for its abolition on the grounds that it violates the principle of “one man, one vote.”<sup>112</sup> Most recently, NPV claims to be utilizing existing constitutional provisions to “reform” the system.<sup>113</sup> It seeks such reform in order to make “every vote equal.”<sup>114</sup>

NPV asks states to sign on to an interstate compact that will go into effect when states holding 270 electors have ratified it.<sup>115</sup> By the terms of this compact, participating states would be required to allocate their electors to the winner of the *national* popular vote, instead of the winner of a *state's* popular vote.<sup>116</sup> State legislatures that adopt NPV would change the general rule of elector allocation for the first time since 1836.<sup>117</sup> In doing so, they would essentially be depriving their constituents of the right to choose their own electors by popular vote. Instead, electors would revert to a pre-1836 rule of elector allocation: A state legislature decides how to award a state's electors. Legislatures that approve NPV effectively dictate how electors will be awarded: to the winner of a tally

112. See, e.g., Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 240 (2011); Ben Wildavsky, *School of Hard Knocks*, U.S. NEWS & WORLD REP., Nov. 20, 2000, at 52, 52 (quoting George Edwards); see also KOZA ET AL., *supra* note 6, at 20 (citing the need for “every vote equal”).

Some go even further in their demands for pure democracy and also call for abolition of the Senate. For instance, the platform of the Greens/Green Party USA (distinguishable from Ralph Nader's Green Party of the United States) includes a plank to “(a)bolish the disproportional, aristocratic US Senate.” *Platform of the Greens/Green Party USA*, GREENS/GREEN PARTY USA, <http://www.greenparty.org/Platform.php> (last visited Apr. 3, 2013); see also *Abolish the Senate!*, SLATE (Nov. 2, 2000), [http://www.slate.com/articles/news\\_and\\_politics/chatterbox/2000/11/abolish\\_the\\_senate.html](http://www.slate.com/articles/news_and_politics/chatterbox/2000/11/abolish_the_senate.html). Of course, abolition of the U.S. Senate would be difficult, given that Article V requires unanimous consent for such a change: “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST. art. V.

113. See KOZA ET AL., *supra* note 6, at 20.

114. See generally *id.*

115. Technically, the compact reads when “states cumulatively possessing a majority of the electoral votes.” *Id.* at 249. Currently, 270 electors constitute a majority.

116. *Id.* at 248 (“The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the ‘national popular vote winner.’ . . . [E]ach member state shall certify the appointment . . . of the elector slate nominated in that state in association with the national popular vote winner.”).

117. Since the 1830s, states have used popular elections within their own borders to determine which slate of electors will represent the state, but there have been occasional exceptions even to this general rule. See WHITAKER & NEALE, *supra* note 3, at 1–2; CQ PRESS, *supra* note 3, at 192.

taken largely outside of state borders. This national outcome would control, even if the state's internal results were completely different and even if a winning candidate did not appear on a state's ballot.<sup>118</sup>

In short, NPV discards the federalist, state-by-state nature of the election process contemplated by the Constitution,<sup>119</sup> its compact attempts to implement a national election in its stead. It does so by abandoning the importance of state-level elections in this country. Such a change is more than merely semantic. The relevant unit of measurement—the factor that drives the election outcome—in the former election is *states'* electoral votes. It is a federalist election. The relevant unit in the latter is *individuals'* votes.<sup>120</sup> It is a purely democratic election.

The elimination of federalism from the election process will inevitably change the nature of presidential elections. A federalist process encourages candidates to generate broad-based appeal and to build national coalitions that encompass both urban and rural areas.<sup>121</sup> It supports moderation, compromise, and a strong two-party system.<sup>122</sup> As described above, it gives Americans “a man of the people” to represent them. The more purely democratic, national election system proposed by NPV cannot provide these benefits. It would be more likely to fracture and divide the country, leaving Americans with a President selected by one or a handful of regions, urban areas or special interest groups.<sup>123</sup> The delegates

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118. This issue is discussed in more detail at Ross, *supra* note 7, at 160–61, 163.

119. Although NPV advocates pretend otherwise. See, e.g., Brod, *supra* note 16 (describing “an important states’ right that the National Popular Vote Plan recognizes” and stating that NPV “preserves the Electoral College and each state’s right to award their electors”).

120. NPV pretends that it is still operating according to states’ electoral votes, but that is all it is: a pretense. A majority of electoral votes are precommitted to the winner of the individual tally. The individual tally drives the election outcome. Presidential candidates will respond to the changed rules of the game; their campaigns will be driven by the need to get the support of a plurality of individuals, instead of a majority of states’ votes.

121. See discussion *supra* notes 56–71 and accompanying text.

122. See discussion *supra* notes 72–94 and accompanying text.

123. There are many other potential practical and logistical problems with the NPV legislation, but they are beyond the scope of this article. These problems include, but are not limited to: (1) Issues surrounding untimely—or even timely—withdrawals from the NPV compact; (2) Issues created by the existence of 51 state (and D.C.) laws governing the one (allegedly) national election created by NPV’s compact; and (3) Issues created if and when non-participating states attempt to complicate NPV’s tabulation of a “national popular vote total.” For more discussion, see Ross, *supra* note 7, at 151–83; Williams, *supra* note 10, at 209–28.

to the Constitutional Convention knew that pure democracies tend to implode for this very reason. They explicitly rejected such an alternative.<sup>124</sup>

NPV supporters nevertheless claim that since *individual states* are empowered by Article II of the Constitution to cast their electoral votes in any way that they wish, a *combination of states* can therefore agree to cast them in accordance with a national election unsanctioned by federal or constitutional law.<sup>125</sup> Interestingly, NPV makes this claim even as it simultaneously admits that there are some limits to a state's Article II power. NPV's book, *Every Vote Equal*, states:

[T]he state's power in this area is limited by various general constitutional limitations, such as the equal protection clause of the 14th Amendment, the 15th Amendment (outlawing the denial of vote based on race, color, or previous condition of servitude), the 20th Amendment (women's suffrage), the 24th Amendment (outlawing poll taxes), and the 26th Amendment (18-year-old vote).<sup>126</sup>

NPV fails to sufficiently address why Article V is not on this list of limitations, stating only that the "winner-take-all statutes are state law",<sup>127</sup> thus, the states are free to "repeal" and "replace" them.<sup>128</sup> Obviously, states may repeal their own state statutes, but implementation and repeal of one state law on a subject does not mean that any subsequent replacement for that law is automatically constitutional.

Indeed, the extent of legislative discretion in allocating electors remains an open legal question. NPV has admitted to some restrictions, but there may also be others. For instance, does Article IV, Section 4 of the Constitution, which guarantees to every state "a Republican Form of Government,"<sup>129</sup> prevent a minority of legislatures from colluding to implement a national direct election system?<sup>130</sup> Does Article V prevent such changes by means of an interstate compact, instead of a formal constitutional amendment? Does NPV violate the express terms of Article II?<sup>131</sup>

124. See discussion *supra* note 67 and accompanying text.

125. See KOZA ET AL., *supra* note 6, at 376–84.

126. *Id.* at 40.

127. *Id.* at 381.

128. *Id.* at 383.

129. U.S. CONST. art. IV, § 4.

130. See, e.g., Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009); William G. Ross, *Popular Vote Compact: Fraught with Constitutional Perils*, JURIST (Feb. 28, 2012), <http://jurist.org/forum/2012/02/william-ross-vote-compact.php>.

131. See, e.g., Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1540 (2012) ("[NPV] is unconstitutional because it violates Article II of the Constitution. . . . [W]hile states have the authority



Even if all these challenges are set aside, does the Compact Clause of the U.S. Constitution nevertheless place some restrictions on this attempt to replace a federalist presidential election process with a more purely democratic one?

Each of these questions is important and will need to be addressed if NPV is to survive court challenges, but it is to the latter question that this Article will now turn. The effect of NPV on the nation's "federalist structure" is massive,<sup>132</sup> and this disruption should cause the compact to fail under Article I, Section 10 of the Constitution. Even under the loosest interpretations of the Clause, NPV's compact must be approved by Congress before it can go into effect. Congress should decline to give its consent to such a radical upheaval of the federalist structure.

### III. THE CONSTITUTION'S COMPACT CLAUSE

#### A. *History of Interstate Compacts*

Article I, Section 10 of the United States Constitution governs the use of interstate compacts. It provides: "No State shall enter into any Treaty, Alliance, or Confederation," and "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."<sup>133</sup> The need for this language flowed naturally from American history to that point: The colonists were relying upon compacts with each other long before this constitutional language was ratified.

While still under British rule, the colonies sometimes entered into intercolonial agreements; these agreements were binding if approved by the King.<sup>134</sup> After the colonies won their freedom, their new charter continued with this tradition. The Articles of Confederation provided that

No State, without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any King, Prince or State . . . .

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled . . . .<sup>135</sup>

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to appoint electors based on the results of a statewide or district election, they cannot appoint electors based on election results in other states.").

132. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

133. U.S. CONST. art. I, § 10, cls. 1 & 3.

134. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 760 (2010) (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692, 730–32 (1925)).

135. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1–2.

The two provisions were similar, with at least one notable difference: The Articles limited the use of any “conference” or “agreement” between a state and a foreign power, but did not place this same limitation on arrangements between states. The implication is that simple agreements between states were permitted, even without congressional approval.<sup>136</sup>

When the language of the U.S. Constitution was drafted, it differed from that of the Articles.<sup>137</sup> The Articles created distinctions based partly on the identity of the compacting party. The Constitution instead seems more concerned with the nature of the agreement itself. Whereas the Articles had allowed treaties and alliances among states or between states and foreign powers (with congressional approval), the Constitution creates a flat prohibition on “any Treaty, Alliance, or Confederation.”<sup>138</sup> The Constitution also permits any “Agreement or Compact,” but only with congressional approval.<sup>139</sup>

Thus, at first glance, the constitutional text suggests that there is no category of simple agreements among states that does not require congressional review, as the Articles had permitted. Instead, the plain reading of the text indicates that review is always required. The delegates created this language, with its subtle differences from the original language in the Articles, but wrote very little about their reasons for doing so.<sup>140</sup> Of the provision regarding treaties, alliances, and confederations,

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136. Hollis, *supra* note 134, at 760 (citing Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 455–56 (1935)); *see also* U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 460 n.10 (1978) (“Congressional consent clearly was required before a State could enter into an ‘agreement’ with a foreign state or power or before two or more States could enter into ‘treaties, alliances, or confederations.’ Apparently, however, consent was not required for mere ‘agreements’ between States.”).

137. Frankfurter & Landis state that the language of the Articles, “[curbing] political combinations by the States was retained almost *in haec verba* by the Constitution.” Frankfurter & Landis, *supra* note 134, at 694. This conclusion seems a bit strong, given that the Articles allowed the states to enter into political agreements such as a “treaty, confederation or alliance” (albeit with congressional oversight) whereas the text of the Constitution prohibits them altogether. *Cf.* Hollis, *supra* note 134, at 761 (discussing the “change from the Articles”); Weinfeld, *supra* note 136, at 456 (noting that the Articles “gave the States a limited right to enter into agreements with foreign powers, and gave them an unlimited right to enter into agreements among themselves” but in the Constitution “the rights of the States to enter into agreements among themselves became limited”).

138. *See* U.S. CONST. art. I, § 10, cl. 1.

139. *Id.* art. I, § 10, cl. 3.

140. Abraham Weinfeld lists, chronologically, the few discussions that were held in the Constitutional Convention regarding interstate compacts. *See* Weinfeld, *supra* note 136, at 453–54.

James Madison simply observed that it “makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution.”<sup>141</sup> He did not explain the reasons for creating a new, flat-out prohibition for something that was previously permissible with congressional approval. Of the provision allowing agreements or compacts with congressional approval, Madison added: “The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.”<sup>142</sup>

Many commentators have theorized that the Founders acted in reliance upon the work of Emerich de Vattel, whose *The Law of Nations* was well-known to the founding generation.<sup>143</sup> Vattel distinguished between an agreement and a treaty. The former have “temporary matters for their object” and are “accomplished by one single act, and not by repeated acts” (Section 153).<sup>144</sup> The latter, by contrast, is “made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time” (Section 152).<sup>145</sup> Confusingly, Vattel later added that some treaties are “accomplished once for all, and not by successive acts”; they are “no sooner executed than they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect.” (Section 192).<sup>146</sup>

Abraham Weinfeld speculates that the “‘agreement or compact’ mentioned in the Constitution is the ‘agreement, convention, compact’ described in secs. 153 and 192 of Vattel.”<sup>147</sup> He further explains:

Enumeration of kinds of treaties forbidden or permitted carries the danger that some other kind of treaty may develop for which

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141. THE FEDERALIST NO. 44, *supra* note 30, at 277 (James Madison). Michael Greve argues that the Articles “proved inadequate to prevent disruptive controversies over ill-defined boundaries, discrimination by some states against sister states, and infringements on the United States . . . . The Founders responded to these problems by strengthening the national government’s authority and, simultaneously, by explicitly precluding the exercise of certain powers by the states.” Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 297 (2003).

142. THE FEDERALIST NO. 44, *supra* note 30, at 280 (James Madison).

143. See, e.g., David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact not a Compact?*, 64 MICH. L. REV. 63, 75–76 (1965); Hollis, *supra* note 134, at 773–75; Weinfeld, *supra* note 136, at 458–60.

144. EMER DE VATTEL, THE LAW OF NATIONS § 153, at 192 (Joseph Chitty & Edward D. Ingraham eds., 1883) (1758).

145. *Id.* § 152.

146. *Id.* § 192, at 208.

147. Weinfeld, *supra* note 136, at 460.

there will be no provision. The framers therefore preferred to use generic terms to include the treaties they had in mind and similar ones. They had before them the bible of international law, the book of a recognized authority, Vattel, and he described a category of international arrangements, called “accord, convention, paction,” which were fulfilled by a single act and not by a continuous performance of acts; when the act in question was performed, such agreements were executed once for all, if valid they brought about a permanent and irrevocable state of things. That category clearly described boundary settlements including cessions or exchanges of land connected with such settlements, and so the framers used the words “agreement or compact.” The other treaties, of peace, commerce, etc. they simply called “treaty” just as Vattel did in Section 152. Consequently they prohibited a State from making a treaty but permitted making an agreement or compact with consent of Congress.<sup>148</sup>

Other early commentators differed slightly in their analysis, but agreed that the Constitution perceived only two categories of arrangements among states: (1) forbidden treaties; and (2) agreements that would be permissible with congressional approval.<sup>149</sup> This system ensures that Congress has the opportunity to define which arrangements are prohibited treaties, alliances or confederations and which are permissible agreements or compacts. In 1925, then-Professor Felix Frankfurter and Professor James M. Landis subscribed to this theory when they observed that

only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of “Treaty, Alliance, or Confederation,” and what arrangements come within the permissive class of “Agreement or Compact.” But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal con-

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148. *Id.* at 461 (internal citations omitted); *see also* Engdahl, *supra* note 143, at 77 (offering a similar theory that the important distinction is between “dispositive and nondispositive” arrangements).

149. *Cf.* Hollis, *supra* note 134, at 778 (“All four approaches assume the Constitution prohibits states from certain types of deal making, while giving Congress the power to authorize states to conclude other types of deals. None of them support a third category . . . where states can make agreements without any federal say whatsoever.”).

trol over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest.<sup>150</sup>

Joseph Story similarly found that congressional review was always necessary in his *Commentaries on the Constitution*.<sup>151</sup> Story proposed a distinction between a “Treaty, Alliance, or Confederation” and an “Agreement or Compact.”<sup>152</sup> The former was of a “political character,” whereas the latter concerned “private rights of sovereignty.”<sup>153</sup> “In such cases,” Story noted, “the consent of congress may be properly required, in order to check any infringement of the rights of the national government.”<sup>154</sup>

Despite this background, does the practice of early Americans indicate that they viewed certain types of agreements to be outside the requirement of congressional consent?<sup>155</sup> The most honest view of “state practice” in this context acknowledges its most notable characteristic: the relative scarcity of interstate agreements before the mid-1800s. State practice afterwards was a bit mixed, with examples on both sides of the issue.

In the early 1900s, Frankfurter and Landis completed a survey of these interstate compacts. Their survey included a list of all compacts that were completed “without congressional assent” since America’s founding.<sup>156</sup> Of the eleven agreements referenced, four were negotiated in the late 1800s and early 1900s.<sup>157</sup> It is perhaps a bit of a stretch to find that these agreements conclusively demonstrate the intent of the Founders a

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150. Frankfurter & Landis, *supra* note 134, at 694–95.

151. III JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (Hilliard, Gray & Co., Boston) (1833).

152. U.S. CONST. art. I, § 10, cls. 1 & 3; *see also* III STORY, *supra* note 151, at 271–72, § 1397.

153. III STORY, *supra* note 151, at 271–72, § 1397.

154. *Id.* at 272, § 1397.

155. For a discussion of this issue, *see* Hollis, *supra* note 134, at 762; *see also* Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 517 (2009) (offering the view that “certain agreements between states were always thought to be exempt from the congressional consent requirement,” based on state practice in the 1800s).

156. Frankfurter & Landis, *supra* note 134, at 749–54.

157. These agreements were: the Massachusetts and Connecticut Agreement of 1871, the Louisiana and Arkansas Levee Agreement of 1896, the New Hampshire and Massachusetts Boundary Agreements of 1889 and 1894, and the North Dakota Drainage Agreement of 1909. *See id.* at 753–54.

full century earlier.<sup>158</sup> Two others were upheld by a Court because congressional consent was found to be implied.<sup>159</sup> Two were apparently never challenged in court.<sup>160</sup> One was abandoned when Congress refused to approve it.<sup>161</sup> One was upheld by a state court in the mid-1800s,<sup>162</sup> and the other left the Supreme Court divided in 1840.<sup>163</sup> Chief Justice Taney, joined by three members of the Court, deemed this latter compact to be a violation of the Compact Clause.<sup>164</sup> In sharp contrast, at least thirty-nine

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158. *Cf.*, Engdahl, *supra* note 143, at 82 (discussing the “the clouding of the draftsmen’s intent” by the work of other political philosophers as early as 1795).

159. The first was a boundary agreement between Virginia and Tennessee, which was negotiated in 1803. Frankfurter & Landis, *supra* note 134, at 749–50. This agreement was in litigation as early as 1818 because of matters unrelated to the Compact Clause. Engdahl, *supra* note 143, at 66 n.15. The Supreme Court was eventually asked to rule on the issue of congressional consent, but did not make such a ruling until 1893. *See Virginia v. Tennessee*, 148 U.S. 503, 525 (1893).

Another compact was upheld based on the reasoning in *Virginia*. *See Frankfurter & Landis, supra* note 134, at 751. A boundary agreement between North Carolina and Tennessee was concluded in 1821; this agreement was necessary because of the congressionally approved Cession Act of North Carolina of 1789. By this act, territory that used to be in North Carolina became the state of Tennessee. When congressional consent to the boundary agreement was later questioned, the Court held: “The cession act is very general, and necessarily demanded definition to satisfy the requirements of a boundary line—a line not only necessary to mark private property, but political jurisdiction. This was realized, and commissioners were appointed to run and settle the line exactly. Their work as executed was confirmed by the states.” *North Carolina v. Tennessee*, 235 U.S. 1, 16 (1914).

160. These agreements were: the North Carolina and South Carolina Boundary Agreements of 1813 and 1815 and the North Carolina and Georgia Boundary Agreement of 1818. *See Frankfurter & Landis, supra* note 134, at 750–51. In the case of the latter agreement, Georgia requested help from Congress at one point: It sought federally appointed commissioners to help run the lines. Congress failed to act. *Id.*

161. This agreement was the South Carolina and Georgia Navigation Agreement of 1825. *See id.* at 752.

162. The Georgia Supreme Court upheld the Georgia and Tennessee Agreement of 1837, despite lack of congressional consent. *Id.*; *see also* *Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co.*, 14 Ga. 327, 339 (1853). At about the same time, another state Supreme Court seemed sympathetic to the idea that some agreements were outside the scope of the Compact Clause. *See Dover v. Portsmouth Bridge*, 17 N. H. 200, 223 (1845). The court never definitely reached the question, however. It instead found that two states could authorize private companies to construct a bridge, without violating the Compact Clause. The only contractual obligation was between the companies, not the states.

163. The agreement was the Vermont and Canada Extradition Agreement of 1839. *See Frankfurter & Landis, supra* note 134, at 752–53.

164. *See Holmes v. Jennison*, 39 U.S. 540, 570 (1840) (opinion of Taney, C.J.). The other Justices found that there was no agreement between Vermont and Canada. *See*

other state compacts were negotiated and submitted to Congress for its approval during the same time period.<sup>165</sup>

To the degree that state practice is considered, such practice leans in favor of submitting these agreements to Congress. But if we look to the full history of the clause, an even stronger picture emerges: It is reasonable to conclude that most early Americans defaulted upon a belief that all compacts and agreements, even simple boundary agreements, should be submitted to Congress for its consideration. Such an interpretation is consistent with a plain reading of the constitutional text; it would also explain the change in language between the Articles of Confederation and the U.S. Constitution. Finally, it is in keeping with the political writings of the time period.<sup>166</sup>

### B. Court Precedents

#### 1. The “All-Embracing” Compact Clause

The historical background of the Compact Clause favors a reading that would allow for only two types of arrangements: (1) treaties, which are entirely prohibited; and (2) agreements, which are permissible with the consent of Congress.<sup>167</sup> This background, combined with a plain reading of the text, would suggest that it is “all-embracing.”<sup>168</sup> In other words, every type of agreement is covered by the explicit text of the language in Article I, Section 10. There are no exceptions to its provisions.<sup>169</sup> Early

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*id.* at 584 (opinion of Thompson, J.); *id.* at 588 (opinion of Barbour, J.); *id.* at 598 (opinion of Catron, J.).

165. See Frankfurter & Landis, *supra* note 134, at 735–48. The Court found that at least one of these received implied congressional consent. See, e.g., *Green v. Biddle*, 21 U.S. 1, 87 (1823).

166. See also Greve, *supra* note 141, at 298 (“In short, the constitutional text and context of the Compact Clause clearly evidence the Founders’ special concern over all—not just some—state agreements.”).

167. Cf. Hollis, *supra* note 134, at 759–60 (discussing two constitutional categories of compacts before the Court added a third category).

168. U.S. CONST. art. I, § 10, cls. 1 & 3; Greve, *supra* note 141, at 298 (citing WALACE R. VAWTER, *INTERSTATE COMPACTS—THE FEDERAL INTEREST* 6 (1954)).

169. According to this view, when the Constitution says “any Agreement or Compact,” it really does mean “any.” U.S. CONST. art. I, § 10, cl. 3 (emphasis added). If an arrangement is to fall outside of the bounds of the Compact Clause, it must fail to satisfy some other portion of the clause. It is impossible to flunk the “any” test. For instance, an agreement might not be “with another State, or with a foreign Power,” or perhaps it is not properly categorized as an “Agreement or Compact” because it is not a binding arrangement.

Supreme Court decisions on this issue were few, but they were generally in line with such an interpretation of the Clause.<sup>170</sup>

The early case of *Rhode Island v. Massachusetts* verbalized the presumption that even simple agreements such as boundary agreements were included in the ambit of the Clause, “by necessary implication.”<sup>171</sup> The Court reasoned that a certain type of agreement is not excluded, simply because it is not expressly named.<sup>172</sup> *Rhode Island* involved a simple boundary dispute. The Court was primarily concerned with jurisdictional issues, but it also had reason to discuss the breadth of the Compact Clause:

[I]t is most manifest that by universal consent and action, the words “agreement” and “compact,” are construed to include those which relate to boundary; yet that word “boundary” is not used. No one has ever imagined that compacts of boundary were excluded because not expressly named; on the contrary, they are held by the states, Congress, and this Court to be included by necessary implication . . . . No such exception has been thought of, as it would render the clause a perfect nullity for all practical purposes, especially the one evidently intended by the Constitution in giving to Congress the power of dissenting to such compacts.<sup>173</sup>

The purpose of the Compact Clause’s requirements, the Court noted, was to guard states “against the derangement of their federal relations with the other states of the Union and the federal government.”<sup>174</sup> Excluding boundary agreements from the Clause does not serve this purpose.<sup>175</sup>

The Court continued with its all-embracing theory of the Compact Clause a few years later, when it was asked to consider whether the State of Vermont could deliver an individual within its borders, George Holmes, to the country of Canada, pursuant to an agreement between Vermont and Canada.<sup>176</sup> Holmes was accused of murder and the Canadian government wanted to try him for the crime.<sup>177</sup> The Court was una-

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170. By contrast, state courts did not always subscribe to the theory. *Cf.* discussion *supra* note 162.

171. *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838).

172. *Id.*

173. *Id.* at 725–26.

174. *Id.* at 726.

175. *Id.*; *see also* *Poole v. Fleeger’s Lessee*, 36 U.S. 185, 209–10 (1837) (addressing a boundary dispute and finding it valid under the Compact Clause because “with such [congressional] consent, it might be done: and in the present instance, that consent has been expressly given”).

176. *See* *Holmes v. Jennison*, 39 U.S. 540 (1840) (opinion of Taney, C.J.).

177. *Id.* at 561.



ble to reach a decision in *Holmes v. Jennison*, and the judgment of the lower court was thus left in place.<sup>178</sup> The Court nevertheless handed down several nonbinding opinions.<sup>179</sup> Chief Justice Taney's opinion, signed by three other Justices (including Joseph Story), reiterated the two-part test for the Compact Clause:

The first clause of the tenth section of the first article of the Constitution, among other limitations of state power, declares that "no state shall enter into any treaty, alliance, or confederation;" the second clause of the same section, among other things, declares that no state without the consent of Congress, shall "enter into any agreement or compact with another state, or with a foreign power."

We have extracted only those parts of the section that are material to the present inquiry. The section consists of but two paragraphs, and is employed altogether in restrictions upon the powers of the states. In the first paragraph, the limitations are absolute and unconditional; in the second, the forbidden powers may be exercised with the consent of Congress, and it is in the second paragraph that the restrictions are found which apply to the case now before us.<sup>180</sup>

The Framers, the Chief Justice concluded, used the "broadest and most comprehensive terms," showing that "they anxiously desired to cut off all connection or communication between a state and a foreign power."<sup>181</sup> Such intercourse would be "dangerous to the Union."<sup>182</sup> Therefore, the clauses of Section 10 should be applied to "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."<sup>183</sup>

Taney's opinion did not address the fact that the Compact Clause treats state-to-state agreements in the same manner as it treats state-to-foreign power agreements.<sup>184</sup> Could his opinion be limited only to the lat-

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178. *See id.* (noting that the "members of the Court, after the fullest discussions, are so divided that no opinion can be delivered as the opinion of the Court").

179. *Id.* Justice Taney's opinion is nevertheless given great deference and even treated as authoritative. *See Hollis, supra* note 134, at 781–82 (citing numerous instances in which a court or legal authority relied upon Taney's opinion in *Holmes* or distinguished itself from the case).

180. *Holmes*, 39 U.S. at 570.

181. *Id.* at 572.

182. *Id.* at 574.

183. *Id.* at 572.

184. Some legal commentators have suggested that *Holmes* still stands as valid precedent, at least in the context of compacts with foreign powers. *See, e.g., Hollis, supra* note 134, at 779–82; Derek T. Muller, *The Compact Clause and the National Popular*

ter situation? Some legal commentators have made such an argument,<sup>185</sup> but Taney himself did not make that distinction.<sup>186</sup>

The other three Justices' opinions neither agreed nor disagreed with much of this discussion. Indeed, they never really analyzed Article I, Section 10 at all: They refused to find that an informal or implied agreement existed between Vermont and Canada. As Justice Thompson observed, "There is nothing in this record to warrant an inference that the State of Vermont had ever entered into any agreement or compact with Canada in relation to the surrender of fugitives from justice."<sup>187</sup> Justice Barbour concurred,<sup>188</sup> and Justice Catron similarly refused to equate an "intent to surrender" with an "agreement between two states."<sup>189</sup>

*Vote Interstate Compact*, 6 ELECTION L.J. 372, 383 (2007); see also Greve, *supra* note 141, at 298 ("The 'all-embracing' nature of the Compact Clause has always been recognized with respect to state agreements with foreign nations." (citing VAWTER, *supra* note 168, at 6)).

185. See, e.g., Hollis, *supra* note 134, at 782 (citing *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 466 n.18 (1978)).

186. Justice Taney first discussed the restrictions created by the Compact Clause, *Holmes*, 39 U.S. at 571–74, then *separately* discussed several reasons why this agreement with a foreign power would be unconstitutional even absent the prohibitions in Article I, Section 10. See *id.* at 574 ("But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States."). The *U.S. Steel* Court would later cite Taney, but apparently conflated his two discussions. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 465 (1978) ("Mr. Chief Justice Taney focused on the fact that the agreement in question was between a State and a foreign government. Since the clear intention of the Framers had been to cut off all communication between the States and foreign powers, he concluded that the Compact Clause would permit an arrangement such as the one at issue only if 'made under the supervision of the United States . . .'" (quoting *Holmes*, 39 U.S. at 568–79)).

187. *Holmes*, 39 U.S. at 584 (opinion of Thompson, J.).

188. *Id.* at 588 (opinion of Barbour, J.) ("[W]hile it is authorized, through the President and Senate, to make treaties; the states are prohibited from entering into any treaty, agreement, or compact, with a foreign state. Now, there is nothing in the record to show that Vermont has violated this prohibition in the Constitution, because it does not appear that that state has entered into any treaty, agreement, or compact, whatsoever, with any foreign state.").

189. *Id.* at 596 (opinion of Catron, J.). Assuming it were a domestic situation, Justice Catron seems troubled by the question of whether it would be a formal agreement, a question of comity between states, or a question of law under Article IV, Section 2 of the Constitution. If it is an agreement, he implies that it would be subject to the Compact Clause: "The Constitution equally cuts off the power of the states to agree with each other, as with a foreign power . . ." *Id.* at 597. In the end, Justice Catron refused to commit to himself on the question. See *id.* ("I have come to the conclusion, divided as the Court is, that it is better for the country this question should for the present remain open."). The *U.S. Steel* Court read Justice Catron a bit

The broad language of *Rhode Island* was reinforced a few years later, but in a domestic context. Florida and Georgia were involved in a boundary dispute of their own, and the U.S. Attorney General sought to be heard in the case.<sup>190</sup> Chief Justice Taney, writing on behalf of the Court, allowed the Attorney General to intervene.<sup>191</sup> A refusal to hear from the United States, the Chief Justice observed, would undermine “one of the great safeguards of the Union,” found in Article I, Section 10.<sup>192</sup> After all, but for the legal dispute, Florida and Georgia presumably would have attempted to settle a boundary dispute through discussions and agreement conducted by their respective “political departments.”<sup>193</sup> Taney swept even this simple boundary agreement into the ambit of the Compact Clause: “And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of Congress.”<sup>194</sup> The United States, through its Congress, has an opportunity to be heard when boundaries are settled by negotiation; it should also be heard in a legal dispute on the same subject. To hold otherwise, would allow the states, “in the form of an action, [to] accomplish what the Constitution prohibits them from doing directly by compact.”<sup>195</sup>

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differently, stating that the Justice “expressed disquiet over what he viewed as Mr. Chief Justice Taney’s literal reading of the Compact Clause.” *U.S. Steel*, 434 U.S. at 465. But Catron seemed less disturbed by the literal reading of the Clause and more disturbed by the suggestion that Vermont’s “intent to surrender” could be equated with an “agreement.” *Holmes*, 39 U.S. at 596 (opinion of Catron, J.).

190. *Florida v. Georgia*, 58 U.S. 478 (1854).

191. *Id.* at 495. The United States was not made a party to the case. *Id.*

192. *Id.* at 494.

193. *Id.*

194. *Id.* The *U.S. Steel* Court relied upon this same language to suggest that Taney would have supported a looser view of the Compact Clause, similar to the state court decision in *Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co.*, 14 Ga. 327, 339 (1853). See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 466 n. 18 (1978). The *U.S. Steel* Court relied heavily on Taney’s use of the word “political.” This reliance was misplaced. Taney was not implying that only political agreements are covered by the Compact Clause. Such an implication would have been inconsistent with his strong statements in *Holmes v. Jennison*:

And the use of all of these terms, “treaty,” “agreement,” “compact,” show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms . . . and we shall fail to execute that evident intention, unless we give to the word “agreement” its most extended significance; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.

*Holmes*, 39 U.S. at 572 (opinion of Taney, C.J.). Instead, Taney’s language in *Florida* was merely distinguishing between two different methods by which states may execute a boundary agreement: the political route versus a legal one.

195. *Florida*, 58 U.S. at 495.

In *Holmes*, Taney had read the Compact Clause broadly because of his perception that the Founders wanted to prevent intercourse that would be “dangerous to the Union.”<sup>196</sup> In *Florida*, his reasoning was similar: The provisions in Article I, Section 10, were meant to preserve the Union from the dangers of internal conflict. The Constitution, Taney concluded, “guard[s] the rights and interests of the other states” and “prevent[s] any compact or agreement between any two states, which might affect injuriously the interest of the others.”<sup>197</sup> The provision was “adopted by the States for their general safety.”<sup>198</sup>

## 2. The Limited Compact Clause

Despite a strong start, the Court soon lost its enthusiasm for defending an all-embracing view of the Compact Clause. In 1893, the landmark case of *Virginia v. Tennessee*<sup>199</sup> created a new, third type of arrangement among states: Agreements that fall outside the scope of the clause and thus do not require congressional oversight. Unfortunately, the change seems to have been driven more by political considerations than by the text of the Constitution. David Engdahl describes this period: “New occasions for, and new varieties of, interstate cooperation engendered impatience with the onerous requirement of congressional consent, and disputes arose as to whether particular kinds of interstate arrangements were encompassed by the compact clause at all.”<sup>200</sup> The requirement of congressional consent had become a hassle. *Virginia* was the first step in doing away with it.

The change between the *Florida*<sup>201</sup> Court’s conclusions in 1854 and the *Virginia*<sup>202</sup> Court’s logic in 1873 was drastic. Nevertheless, modern legal commentators often blow past the Court’s changed tone.<sup>203</sup> Instead, they make simplistic observations that an “unvarnished reading of the Compact Clause” might lead to the conclusion that no agreement is possible without congressional consent, but the “Supreme Court has long

196. *Holmes*, 39 U.S. at 574.

197. *Florida*, 58 U.S. at 494.

198. *Id.* at 495.

199. 148 U.S. 503 (1893).

200. Engdahl, *supra* note 143, at 66.

201. 58 U.S. at 478.

202. 148 U.S. at 503.

203. For instance, NPV all but ignores the early Compact Clause cases in its 894-page book regarding its interstate compact proposal. KOZA ET AL., *supra* note 6. It gives one sentence to *Florida*, 58 U.S. 478. See KOZA ET AL., *supra* note 6, at 220. It completely ignores *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838), and *Holmes v. Jennison*, 39 U.S. 540 (1840).

held” to the contrary.<sup>204</sup> The attitude of these commentators mimics the inappropriate policy concerns of the *Virginia* Court: Why let a little thing like the plain text of the Constitution get in the way of something that seems more practical?

In *Virginia*, Justice Stephen Field allowed such policy concerns to dictate the contours of what should have been a purely legal decision. Rather than focusing on the text of Article I, Section 10 of the Constitution, Field determined that it would be more practical to focus on the “object of the constitutional provision.”<sup>205</sup> The Constitution could not possibly mean “every possible compact or agreement between one State and another.”<sup>206</sup> What about a simple sale of land? Or the transportation of goods purchased? Or a joint effort to combat the outbreak of some disease?<sup>207</sup>

Field turned to Justice Story’s distinction between treaties that are of a “political character” and compacts that concern “private rights of sovereignty.”<sup>208</sup> When Story spoke of these distinctions, he had found that the former categorization was entirely prohibited; the latter was permissible, but required the consent of Congress.<sup>209</sup> Field nevertheless contorted Story’s two categories into reasons to create and recognize a third category: Those agreements that require no intervention by Congress whatsoever.

The requirement of consent, Field concluded, is only “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just

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204. Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71, 98–99 (2003); see also, e.g., Todd Jefferson Hartley, *Handshake Deals: The Future of Informal State Agreements and the Interstate Compact Clause*, 22 U. FLA. J.L. & PUB. POL’Y 91, 102 (2011) (noting only that the “constitutional rules [for interstate compacts] have remained relatively undeveloped since *Virginia v. Tennessee*”); Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1961 (2007) (stating that “no case required the Supreme Court to define the contours of the Compact Clause” before *Virginia*); Michael S. Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387, 389 (2007) (stating only that “[a]lthough the plain language of the Compact Clause suggests that all interstate agreements and compacts require congressional consent, the Supreme Court has not interpreted it that way”).

205. *Virginia*, 148 U.S. at 519; see also Greve, *supra* note 141, at 300.

206. *Virginia*, 148 U.S. at 518 (emphasis added).

207. *Id.*

208. III STORY, *supra* note 151, at 271–72, § 1397.

209. *Id.* at 272, § 1397.

supremacy of the United States.”<sup>210</sup> With this “curious feat of judicial doubletalk,”<sup>211</sup> Justice Field thus changed the direction of Compact Clause jurisprudence. Rather than requiring congressional approval for any agreement between states, the Court would require approval only for certain political agreements.<sup>212</sup> Over time, the erosion of Article I, Section 10 has gotten even worse, as the “prohibited” category of contracts now exists on paper but almost never in practice.<sup>213</sup>

Technically speaking, Field’s statements in *Virginia* were mere dicta, but his words were taken seriously by the legal community.<sup>214</sup> In 1978, the Court fully converted Field’s view into constitutional law in *United States Steel Corp. v. Multistate Tax Commission*.<sup>215</sup>

At issue in *U.S. Steel* was the Multistate Tax Commission, which gave an interstate commission authority to help develop uniformity of certain state and local tax laws.<sup>216</sup> The compact creating the commission was never approved by Congress and was subsequently challenged.<sup>217</sup> In heavy reliance on the lenient *Virginia* precedent, the Court upheld the compact despite the lack of congressional consent.<sup>218</sup>

Writing for the Court, Justice Powell acknowledged the discrepancy between the plain text of the Constitution and the Court’s opinion: “Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.”<sup>219</sup> Powell declined to engage in such a “literal reading of the Compact Clause,” determining that policy—not the law—was more im-

210. *Virginia*, 148 U.S. at 519.

211. Engdahl, *supra* note 143, at 66.

212. As David Engdahl discusses, Justice Field’s decision also enabled the Court to give itself a new power. Previously, Congress decided if a compact had a political impact. *Virginia* removed that power from Congress and gave it to the Court. *Id.* at 68.

213. *Cf. Greve, supra* note 141, at 308 (“After *U.S. Steel*, one can hardly imagine a state compact that would run afoul of the Compact Clause without first, or at least also, running afoul of other, independent constitutional obstacles.”).

214. *See, e.g., U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468 (1978) (“Although this Court did not have occasion to apply Mr. Justice Field’s test for many years, it has been cited with approval on several occasions.” (citing *Louisiana v. Texas*, 176 U.S. 1, 17 (1900); *Stearns v. Minnesota*, 179 U.S. 223, 246–48 (1900); *North Carolina v. Tennessee*, 235 U.S. 1, 16 (1914)).

215. 434 U.S. 452.

216. *Id.* at 455–56.

217. *Id.* at 454.

218. *Id.* at 468–72.

219. *Id.* at 459.

portant.<sup>220</sup> “At this late date,” he held, “we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.”<sup>221</sup> Powell left unexplained why a literal reading of the law was not an “effective alternative” for a Supreme Court Justice allegedly concerned only with the letter of the law, not policy.<sup>222</sup>

His position was the opposite of that taken in 1840 by Chief Justice Taney and Justice Story in *Holmes v. Jennison*,<sup>223</sup> and Powell’s efforts to distinguish the two cases was limited, at best. In *Holmes*, Chief Justice Taney had written that “every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties” should be included in the ambit of the Compact Clause.<sup>224</sup> Powell failed to address this language directly, but instead generally observed that Taney appeared focused on the “fact that the agreement in question was between a State and a foreign government.”<sup>225</sup>

Taney obviously did discuss the fact that the compact was between a state and a foreign power—those were the facts of his case. However, his logic extended further. He spoke of the definition of “treaty,” “agreement,” and “compact,” and determined that the Founders intended to “use the broadest and most comprehensive terms” in Article I, Section 10.<sup>226</sup> Neither the language of the Constitution—nor Chief Justice Taney in *Holmes*—distinguished between the use of these terms in a foreign versus a domestic context. To the contrary, Taney reinforced his use of those definitions a few years later in *Florida v. Georgia*.<sup>227</sup> In *U.S. Steel*, however, Powell dismissed this background and assumed that Taney’s lan-

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220. *Id.* at 460.

221. *Id.*

222. *Id.*

223. 39 U.S. 540 (1840) (opinion of Taney, C.J.).

224. *Id.* at 572.

225. *U.S. Steel*, 434 U.S. at 465.

226. *Holmes*, 39 U.S. at 572.

227. 58 U.S. 478, 494–95 (1854); *see also* discussion *supra* notes 190–95 and accompanying text. Powell cited *Florida* for the opposite purpose, however. “Mr. Chief Justice Taney,” he wrote, “may have shared the Georgia court’s view of compacts which, unlike the ‘agreement’ in *Holmes v. Jennison*, did not implicate the foreign relations power of the United States. . . . [H]e suggested in dictum that the Compact Clause is aimed at an accord that is ‘in its nature, a political question, to be settled by compact made by the political departments of the government.’” *U.S. Steel*, 434 U.S. 466 n.18 (quoting *Florida*, 58 U. S. at 494). In this section of the case, however, Taney was not discussing the definition of “compact.” He was simply distinguishing between legal and political recourse to settle a matter. He did not think that use of a lawsuit should enable a party to do an end-run around the Compact Clause. *Florida*, 58 U. S. at 494.

guage must be limited to the foreign context. He instead relied on *Virginia*, which showed more concern for policy than the law.

Powell correctly noted that many cases since *Virginia* had (at least implicitly) relied upon Justice Field's logic. But he failed to specifically address or justify the leap between *Holmes*' plain reading of the constitutional text and *Virginia*'s "functional" reading of the same text,<sup>228</sup> except to approvingly cite the Supreme Court of Georgia: "'We can see no advantage to be gained by, or benefit in such a provision; and hence, we think it was not intended.'"<sup>229</sup>

So if the Founders' reasons are not immediately (and subjectively) clear, then the Court has no obligation to uphold a plain reading of the text? Such a rule of constitutional construction seems a bit dangerous, to say the least.

Having superficially justified a switch from a textual to a functional reading of the text, Powell laid out the new rule, based on the dicta in *Virginia*: The test for whether congressional approval is required, Justice Powell wrote for the Court, "is whether the Compact enhances state power *quoad* the National Government."<sup>230</sup> This standard, Powell determined, was not met in *U.S. Steel*. Powell emphasized that the agreement did not "authorize the member States to exercise any powers they could not exercise in its absence," no sovereign power had been delegated to the Commission, and "each State is free to withdraw at any time."<sup>231</sup> Instead, "the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States."<sup>232</sup>

*U.S. Steel* stands as the controlling precedent in Compact Clause cases today. Yet its rule is narrower than that found in the plain text of the Constitution. Today, the Court will only apply the Compact Clause to agreements that are directed "' . . . to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"<sup>233</sup> According to constitutional scholar Michael Greve, the Court has successfully emasculated the Compact Clause.<sup>234</sup>

228. *U.S. Steel*, 434 U.S. at 468.

229. *Id.* at 467 (quoting *Union Branch R. Co. v. East Tennessee & G.R. Co.*, 14 Ga. 327, 340 (1853)).

230. *Id.* at 473.

231. *Id.*

232. *Id.* at 472.

233. *Id.* at 471 (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)).

234. Greve, *supra* note 141, at 288.



#### IV. THE COMPACT CLAUSE AND NATIONAL POPULAR VOTE

##### A. Congressional Approval

If the National Popular Vote proposal is approved by the requisite number of states, the Court will be asked to weigh in on NPV's interstate compact. Despite the stricter interpretations of the Compact Clause in case such as *Rhode Island*<sup>235</sup> and *Florida*,<sup>236</sup> the Court will undoubtedly evaluate NPV under the more recent and looser standards found in *Virginia*<sup>237</sup> and *U.S. Steel*.<sup>238</sup>

In the wake of *U.S. Steel*, how will the Court evaluate the NPV proposal? Its advocates hope that the Court's watered-down views of Article I, Section 10 will allow the compact to slip by, despite its devastating impact on America's federalist structure. But the Court will act more consistently, both with the Constitution and *U.S. Steel*, if it finds that the compact requires congressional approval before it can go into effect. The compact severely undermines the federalist Electoral College, effectively replacing the system with a purely democratic system. Moreover, the Court will almost certainly be asked to evaluate the compact under other clauses of the Constitution. Simple congressional approval of an interstate compact cannot cure a violation of Article IV or V of the Constitution—to say nothing of its Fourteenth Amendment.

The *U.S. Steel* Court focused most of its opinion on the vertical relationship between the federal government and participant states. How is the balance of power between these two affected? Writing for the Court, Justice Powell relied upon three criteria as he evaluated this question.<sup>239</sup> First, does the compact give a member state political power that it could not exercise but for the compact? Second, does the compact delegate sovereign power to another entity? Third, does the compact allow member states to withdraw at any time?<sup>240</sup> Powell's criteria were not set up as a formal test, but they offer a starting point for evaluating NPV's proposal.

Moreover, read properly, the *U.S. Steel* case requires evaluation beyond the vertical effects of a compact. Often overlooked in *U.S. Steel* are a few statements that Powell made about the *horizontal* effects of a compact. In other words, what effect does a compact have on non-participating states? Powell acknowledged that compacts may have such effects and that these effects may be problematic. In *U.S. Steel*, he was specifically

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235. 37 U.S. 657 (1838).

236. 58 U.S. 478 (1854).

237. 148 U.S. at 503.

238. 434 U.S. at 452.

239. *U.S. Steel*, 434 U.S. at 472–73.

240. *Id.* at 473.

asked to consider whether the compact in question “impair[ed] the sovereign rights of nonmember States.”<sup>241</sup> Powell rejected the claim, but not because it was inappropriate to consider the question. Instead, he found that the compact in *U.S. Steel* was not an “affront to the sovereignty of nonmember States.”<sup>242</sup> He left open the possibility that a future compact implicating the “federal structure” would cause problems.<sup>243</sup> If NPV is to proceed without congressional approval under the *U.S. Steel* standard, it must show that neither the vertical relationship between the federal and state governments nor the horizontal relationship among states has been changed.

### 1. Vertical Impact

How does NPV affect the balance of power between the federal government and member states? Despite its hope to the contrary, NPV will have trouble surviving the first and third of Powell’s factors. NPV advocates contend that their compact does not grant any new political powers to a member state. Instead, they claim that each state is simply

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241. *Id.* at 477.

242. *Id.* at 478.

243. *Id.* NPV erroneously states that *U.S. Steel* does not support the proposition of evaluating horizontal impacts, except in a dissenting opinion. KOZA ET AL., *supra* note 6, at 563; see also *The National Popular Vote Plan—Podcast*, FEDERALIST SOC’Y FOR L. & PUB. POL’Y STUD. (Apr. 20, 2012), <http://www.fed-soc.org/publications/detail/the-national-popular-vote-plan-podcast>.

More support for the idea that horizontal impact must be evaluated can be found in Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682, 684 (1961) (“The cases which have interpreted the compact clause have confirmed these statements, and established that Congress has a two-fold duty: first, to prevent undue injury to the interests of noncompacting states; second, to guard against interference with the ‘rightful management’ by the National Government of the substantive matters placed by the Constitution under its control.”) (citing *Rhode Island v. Massachusetts*, 37 U.S. 464, 513–14 (1838); *Wharton v. Wise*, 153 U.S. 155, 169–70 (1894)); Muller, *supra* note 184, at 385 (arguing that “[e]very Compact Clause case, from *Virginia v. Tennessee* to the modern cases, considers not simply the federal sovereignty interest, but also the interests of non-compacting sister states”). Cf. *Barron v. Baltimore*, 32 U.S. 243, 249 (1833) (noting that the purpose of the Compact Clause and other provisions in Article I, Section 10 is to “generally restrain State legislation on subjects intrusted to the General Government, or in which the people of all the States feel an interest”) (emphasis added); Hollis, *supra* note 134, at 759–60 (“Glossing over the distinction between prohibited treaties and congressionally approved compacts, the Court has devised a third category of interstate agreements that states can make free from any congressional oversight or approval. To determine which agreements fall within this third camp, the Court has adopted as governing criteria the agreement’s legal character and its federalism implications.”) (emphasis added).

exercising the power granted to it in Article II, Section 1: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .”<sup>244</sup> The claim is appealing on the surface because the Constitution gives states such broad discretion. In *Bush v. Gore*, the Court held that “the State legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself.”<sup>245</sup> Member states thus have the power to award their electors in any number of ways. The Constitution does not require states to award electors in a winner-take-all fashion to the candidate achieving the most popular votes in a state. As a matter of history, many other types of systems have been used.<sup>246</sup> Even today, two states—Maine and Nebraska—do not rely upon the winner-take-all system used in the other forty-eight states.<sup>247</sup>

The problem is that the NPV compact does far more than simply change the allocation of electors within the borders of a member state. The compact unilaterally changes the nature of the election system at a national level. Existing constitutional provisions establish a federalist presidential election process; the outcome rides on the votes of the states themselves. By contrast, NPV implements a purely democratic system; the outcome would always be driven by the preferences of individual voters in a national electorate. The Founders directly rejected the idea of such a national election pool.<sup>248</sup>

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244. U.S. CONST. art. II, § 1, cl. 2.

245. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

246. See, e.g., *McPherson v. Blacker*, 146 U.S. 1, 29–32 (1892) (discussing the wide variety of methods used during the nation’s first several presidential elections).

247. Maine and Nebraska give one elector to the winner of each congressional district. The two remaining electoral votes are awarded to the popular vote winner of the entire state. ME. REV. STAT. tit. 21-A, § 802 (2009); NEB. REV. STAT. § 32-1038 (2011).

248. NPV believes that the delegates’ rejection of a direct popular election is irrelevant. It notes that the “Constitutional Convention specifically voted against a number of different methods for selecting the President.” KOZA ET AL., *supra* note 6, at 398. Yet, the “constitutional provision that was eventually adopted does not prohibit any of the methods that were debated and rejected.” *Id.* The choice was left “exclusively to the states.” *Id.* As an example, NPV notes that the Convention rejected “having state legislatures choose the President” and “having governors choose the President.” *Id.* Yet, some states later used these two rejected methods in the first presidential election. The same rationale, NPV believes, should carry over if states want to choose a direct popular election. NPV is ignoring an important point. The Convention delegates rejected *national* implementation of all these methods. States may choose to implement such methods *internally* without contradicting the delegates’ decision. They may not seek to implement such methods *nationally*.

Such national changes could be made, of course, but the method provided by the Constitution is the formal constitutional amendment process—a process that explicitly provides for a congressional role in the decision.<sup>249</sup> The NPV compact, by contrast, attempts to obtain this same power through simple state legislation and a contract that leaves Congress out in the cold.<sup>250</sup>

NPV's compact thus fails Justice Powell's first criterion. Member states will assume new power, relative to the federal government, if the compact is implemented: They purport to have the power to make a change previously possible only through the provisions of Article V, including its requirement that two-thirds of Congress approve of the change.<sup>251</sup> Allowing NPV's interstate compact to be implemented without congressional approval thus allows NPV member states to usurp power from the federal government.

Powell's third factor provides similar problems for NPV. Member states are not free to withdraw at any time. The compact provides for withdrawal most of the time, but forbids participants from withdrawing "six months or less before the end of a President's term."<sup>252</sup> Withdrawals during this time period "shall not become effective until a President or Vice President shall have been qualified to serve the next term."<sup>253</sup> This restriction on the states is a reversal of the current situation, in which states have broad discretion and may change their minds about elector allocation any time before voting actually starts.<sup>254</sup>

Powell's three factors are a starting point for evaluating the vertical impacts of NPV's compact, but they are not the only considerations. The

249. U.S. CONST. art. V.

250. NPV claims that congressional approval of its compact is not needed. *See KOZA ET AL.*, *supra* note 6, at 561.

251. Or at least convene a Convention for proposing amendments. *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . .").

252. *KOZA ET AL.*, *supra* note 6, at 249.

253. *Id.*

254. *Cf.* *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. . . . [T]he State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself . . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

Court should consider other ways in which the balance of power between the federal and state governments will change if NPV is implemented.

First, NPV would deprive Congress of the power to decide the presidential and vice-presidential election in certain circumstances. Today, if the election ends in a tie or with a plurality winner, the House chooses a President and the Senate chooses a Vice President.<sup>255</sup> NPV effectively removes this possibility, instead automatically awarding the election to anyone who can win a mere plurality among individual voters.<sup>256</sup>

Second, the federal government has a vested interest in protecting the provisions of the federal Constitution. Part of this interest lies in protecting the right to assent by two-thirds of Congress before constitutional change can be made, as discussed above. But the federal interest also includes a general need to protect the integrity of the entire amendment process, including the requirement that three-quarters of the states ratify proposed changes.<sup>257</sup> Moreover, other constitutional provisions may suffer if NPV is implemented: For instance, some academics have contended that the Equal Protection Clause of the Fourteenth Amendment may be routinely violated because of NPV's attempt to conduct one national election in reliance upon fifty-one sets of state (and D.C.) election laws.<sup>258</sup> Other academics contend that Article IV's guarantee of republican government may also be jeopardized through implementation of NPV.<sup>259</sup>

All this discussion aside, NPV may have already conceded that its compact intrudes upon at least one area of federal concern. On its website, NPV writes that the compact "does not 'encroach upon or interfere with'" federal power or supremacy "because there is simply no federal

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255. U.S. CONST. amend. XII.

256. Technically, the election could revert to the Congress in one extremely unlikely situation. NPV provides: "In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state." KOZA ET AL., *supra* note 6, at 248. If this calculation revealed that no candidate has won the electoral vote, then the election would be sent to the Congress. U.S. CONST. amend. XII. It is mathematically possible for the election to end in a precise tie, of course, but the large size of the electorate (129 million plus voters) essentially guarantees the opposite result.

257. U.S. CONST. art. V ("[Amendments] shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.").

258. *See, e.g., Williams, supra* note 10, at 226–28. This matter is also discussed more at Ross, *supra* note 7, at 176–79.

259. *See, e.g., Kristin Feeley, Comment, Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009). This matter is also discussed more at Ross, *supra* note 7, at 179–81.

power—much less federal supremacy—in the area of awarding of electoral votes.”<sup>260</sup> Yet the same group quietly acknowledges that one state found it necessary to submit a request to the Department of Justice, asking for preclearance for NPV, as required by the Voting Rights Act.<sup>261</sup> Such federal approval would not be needed if there was “simply no federal power—much less supremacy” at stake.

## 2. Horizontal Impact

As mentioned, the compact changes America’s presidential election system from a federalist system—reliant on states’ votes—into a purely democratic one—reliant on individuals’ votes.<sup>262</sup> This decision has ramifications for the relationship between member and non-member states.

First, member states assume the ability to decide—for the nation—what manner of presidential election system Americans will utilize. They seek to implement a national direct election system, despite the fact that this method was directly rejected by the delegates to the Constitutional Convention.<sup>263</sup> Such an assumption of power has ramifications for the federal government, as discussed above, but it also has ramifications for relations among sister states. Member states deprive non-member states of the opportunity, under the Article V amendment process, to participate in a decision regarding what type of election system America will have.<sup>264</sup> Further, member states deprive non-member states of the protections offered by the supermajority requirements of Article V.<sup>265</sup> Instead, a *minority* of states could implement NPV, even if the majority of states disagree. As few as 11 states could enact NPV, compared to the 38 states currently required for a constitutional amendment.<sup>266</sup>

260. Following the release of *Enlightened Democracy*, which criticized this assertion, NPV deleted this language on its website. See *Myths About Congressional Consent*, NAT’L POPULAR VOTE, [http://nationalpopularvote.com/pages/answers/m15.php#m15\\_2](http://nationalpopularvote.com/pages/answers/m15.php#m15_2) (copy on file with author); see also Ross, *supra* note 7, at 173–74.

261. A copy of California’s preclearance letter can be found on NPV’s website: <http://nationalpopularvote.com/resources/CA-Herren-Letter-2012-1-13-DOJ-VRA-Preclearance.pdf>. Information on the Voting Rights Act can be found on the Department of Justice website. See Civil Rights Division, *Section 5 of the Voting Rights Act*, U.S. DEP’T. JUST., [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited Apr. 16, 2013).

262. See discussion *supra* notes 119–23 and accompanying text.

263. See also discussion *supra* notes 67 & 246 and accompanying text.

264. See U.S. CONST. art. V.

265. Three-quarter of the states, currently 38, must approve an amendment. *Id.*

266. The compact goes into effect when states with 270 electoral votes—a winning majority—have signed on. KOZA ET AL., *supra* note 6, at 249. The 11 biggest states currently have exactly 270 electoral votes. Following the 2010 Census, these states are: California (55 electoral votes), Texas (38), New York (29), Florida (29), Pennsylvania

Second, the compact allows member states to control each other in certain situations. This grant of authority is new and surely impacts horizontal relations among sister states. Today, states are free to change their manner of elector allocation at any moment up until voting actually starts. NPV's compact would purport to restrict states and bind them for about six months during presidential election years, as discussed above.<sup>267</sup>

Third, as Derek Muller points out, the power of the states' electors is changed. Member states' electors are given the entire responsibility for deciding the election. The electors in non-member states effectively have no power. Muller explains:

As of July 20 in an election year, it would be clear that the electors representing the compacting states, whichever states they may be, would effectively decide the presidential election. The non-compacting states' electors would have absolutely no influence in deciding the election—the bloc of electors from the compacting states would always have sufficient incremental power to elect the President, regardless of what non-compacting states did. Non-compacting states' electors could neither add nor take away from the ability of a presidential candidate to win. In *ex ante* analysis, it is clear that the non-compacting states wield no effective political power in deciding the election. While the ultimate *outcome* of the election may not be pre-determined, the ability of states to *participate* in the political process with effective electoral votes and to wield political power *has* been pre-determined.<sup>268</sup>

This analysis does not significantly change, even if there are faithless electors in the member states. Because of the way that the system is structured, electors are extremely unlikely to be faithless: They are party loyalists who want to vote as they have been asked to vote.<sup>269</sup> However, assume that an elector or electors is disturbed by a discrepancy between a

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(20), Illinois (20), Ohio (18), Michigan (16), Georgia (16), North Carolina (15), and New Jersey (14). See *Apportionment Data*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/data/apportionment-data.php> (last visited Apr. 16, 2013).

267. See discussion *supra* notes 250–52 and accompanying text.

268. Derek T. Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 ELECTION L.J. 227, 231 (2008).

269. Electors are nominated in a different manner in different states, but they are most commonly elected at state party conventions or are otherwise appointed by the political parties. They obtain their positions because of their loyalty and hard work for the party. See AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE 83 app. C (John C. Fortier ed., 3d ed. 2004) (listing the method of nomination in each state). As a matter of history, electors are rarely faithless because of the manner in which they are selected. This matter is discussed in greater detail at Ross, *supra* note 7, at 112–14.

state outcome and the national outcome and decides to flip, perhaps voting with the minority in the non-member states. Power is restored to these electors, but only because an elector in a member state decided to restore power to them. This elector is acting contrary to the NPV pact.

Finally, implementation of NPV will change the voting power of some states relative to others.<sup>270</sup> NPV is the first to complain the winner-take-all allocation of electoral votes “makes popular votes unequal from state to state.”<sup>271</sup> Electoral College opponents complain that the weight of a voters’ ballot depends on the state in which he lives, and NPV often cites the “numerous examples of large disparities in the value of votes under the statewide winner-take-all system.”<sup>272</sup> In equalizing voting power, however, NPV is by definition increasing the political power of some states and decreasing the political power of other states. Perhaps NPV feels that such an action is appropriate because it values a purely democratic presidential election process, as opposed to a democratic-federalist one. Nevertheless, such a drastic change in relationship among states serves as yet another reason why NPVs compact cannot stand without—at least—congressional approval.

### *B. Other Constitutional Considerations*

Even with congressional approval, this particular compact may require more than a simple evaluation under Article I, Section 10, of the Constitution. If the compact violates other constitutional provisions, then simple congressional approval will not cure that violation.<sup>273</sup> It is beyond the scope of this article to evaluate these claims in depth, but it is worth noting that NPV’s proposal must do more than satisfy Section 10 or the Court’s existing *U.S. Steel* precedent.<sup>274</sup> NPV must prove its validity under the entire Constitution.

Justice Clarence Thomas expressed a similar point in *U.S. Term Limits, Inc. v. Thornton*. “States may establish qualifications for their delegates to the electoral college,” he noted, “as long as those qualifications

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270. See generally JOHN SAMPLES, CATO INSTITUTE, A CRITIQUE OF THE NATIONAL POPULAR VOTE PLAN FOR ELECTING THE PRESIDENT (2008) (discussing which states gain power and which states lose power).

271. KOZA ET AL., *supra* note 6, at 570.

272. *Id.* at 18.

273. NPV notes that an interstate compact would be converted into federal law if it is approved by Congress. *Id.* at 216–17. If NPV violates the Constitution, the question is moot. Obviously, a federal law cannot trump constitutional provisions.

274. The two standards are not necessarily the same. As discussed in this article, these authors believe the requirements of Section 10 are stricter than the Court acknowledged in *U.S. Steel*.



pass muster under other constitutional provisions.”<sup>275</sup> Does NPV’s attempt to impose national change through simple state legislation “pass muster” under Article V of the Constitution?<sup>276</sup> If NPV’s compact were implemented through simple congressional approval, per the requirements of Section 10, this approval would take the form of a simple majority vote from both houses of Congress.<sup>277</sup> By contrast, a constitutional amendment would require a supermajority: three-quarters of the states and two-thirds of each house would need to approve the change.<sup>278</sup> Allowing NPV to survive, in reliance on Section 10’s simple congressional approval requirement, seemingly allows Article I of the Constitution to trump the harder requirements in Article V.<sup>279</sup>

Similarly, NPV may have trouble surviving claims that its implementation will violate the Equal Protection Clause of the Fourteenth Amendment.<sup>280</sup> NPV creates one new, national electorate, even as it leaves in place fifty-one sets of state election laws to govern that single election pool. The effect of NPV is to arbitrarily treat voters differently, based only upon their place of residence. Yet the Court has held that states may not by “arbitrary and disparate treatment, value one person’s vote over that of another. . . .”<sup>281</sup> Can states combine together, through NPV’s compact, to do something that they are prohibited from doing alone?<sup>282</sup> Even

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275. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting). The other justices did not dispute Thomas on this point.

276. *U.S. CONST.* art. V. NPV argues that its legislation does not alter the text of the Constitution in any way. But, as John Samples as noted, this argument is a bit disingenuous: “NPV offers a way to institute a means of electing the president that was rejected by the Framers of the Constitution. It does so while circumventing the Constitution’s amendment procedures.” *SAMPLES, supra* note 270, at 13–14; *see also* discussion *supra* notes 119–23 and accompanying text.

277. *See U.S. CONST.* art. I, § 10, cl. 3.

278. *Id.* art. V.

279. Two cases provide support for the idea that NPV’s compact is invalid under Article V of the Constitution. *See Clinton v. New York*, 524 U.S. 417, 440 (1998) (finding that an Act disrupts “the ‘finely wrought’ procedure that the Framers designed”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995) (holding that a state provision cannot stand because to “argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded”). These cases are discussed more in Tara Ross, *Legal and Logistical Ramifications of the National Popular Vote Plan*, *ENGAGE*, Sept. 2010, available at [http://www.fed-soc.org/doclib/20100910\\_RossEngage11.2.pdf](http://www.fed-soc.org/doclib/20100910_RossEngage11.2.pdf).

280. *U.S. CONST.* amend XIV, § 1.

281. *Bush v. Gore*, 531 U.S. 98, 104–105 (2000) (per curiam).

282. This issue is discussed in greater detail in Ross, *supra* note 7, at 176–79.

if they can combine in such a manner, does Article II allow states to adopt citizens of other states for purposes of vote tabulation?<sup>283</sup>

Finally, NPV must survive the claim that its plan violates the Guarantee Clause of the Constitution: “The United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>284</sup> At the Constitutional Convention, the Founders deliberately rejected a purely democratic form of government; instead, they chose a system that combined the best elements of republicanism, democracy, and federalism. NPV appears to fly in the face of this decision. Can a Republican Form of Government exist when the head of that government is elected based on purely democratic principles?<sup>285</sup>

Admittedly, even if NPV violates Article IV, such a claim will be harder to establish because the Court has long held that Guarantee Clause claims are not justiciable.<sup>286</sup> Some academics have argued against

283. Williams, *supra* note 131, at 1539 (“[W]hile states have the authority to appoint electors based on the results of a statewide or district election, they cannot appoint electors based on election results in other states.”); Williams, *supra* note 10, at 228 (“In essence, signatory states are enfranchising as voters of those states all of the voters in the United States. The notion that states may enfranchise voters in other states is of questionable constitutionality in its own right.”). Cf. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 251 (1992) (arguing that the “fundamental allocation of authority among states is territorial” although the principle “is largely implicit, so obvious that the Founders neglected to state it”).

284. U.S. CONST. art. IV, § 4.

285. The delegates may have had slightly different views regarding what the guarantee of Republican government meant. See Robert G. Natelson, *Guarantee Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 282, 282 (2005). However, there was a consensus that republicanism and pure democracy were incompatible. Robert G. Natelson explains:

It is sometimes claimed that the Founders wanted American governments to be “republics rather than democracies,” but this claim is not quite accurate. In their linguistic usage, the Founders employed the terms “democracy” and “republic” with overlapping or even interchangeable meanings. Only one species of democracy was deemed inconsistent with republicanism. This was “pure democracy” or “simple and perfect democracy,” a theoretical constitution identified by Aristotle and mentioned by John Adams and James Madison, among others. A pure democracy had no magistrates, because the “mob” made all decisions, including all executive and judicial decisions. The Founders saw this kind of democracy as inconsistent with republicanism, because it did not honor the rule of law. The Guarantee Clause’s protection against domestic violence assures orderly government and the rule of law, and protects the states’ legitimate magistracy against mob rule.

*Id.* at 283.

286. The Supreme Court has long held that such claims are not justiciable. See, e.g., Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 35 U. COLO. L. REV. 849 (1993–1994) (discussing the nonjusticiability of Guarantee Clause

this position, but the Court could still feasibly refuse to entertain a hearing on the claim.<sup>287</sup> Interestingly, if the claim cannot be brought in Court, then it must be brought before Congress instead.<sup>288</sup> Which brings us full circle: NPV cannot credibly claim that its compact does not require congressional approval. Even if it does not need such approval under Article I, Section 10, Congress could be called upon to decide if the compact violates Article IV of the Constitution.

## V. CONCLUSION

The Electoral College is a vital part of the Founders' federalist Constitution. NPV pretends to be in line with this federalist structure, but its claims are disingenuous. In reality, NPV would destroy the federalist nature of the presidential election process. A system that today operates as a combination of democracy and federalism would change: It would instead operate as pure democracy. This change from federalism to pure democracy would be made even if a majority of states disapproved.

As a policy matter, eliminating federalism from the presidential election process will have many practical consequences that make such a change inadvisable. However, the disruption of federalism also has several legal ramifications that cannot be ignored.

NPV's compact may not withstand scrutiny under Articles II, IV and V of the Constitution. It may also fail the Equal Protection requirements in the Fourteenth Amendment. But assuming it survives these challenges, it will also run into problems with Article I, Section 10 of the

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claims). However, in recent years, the Court has given tentative signs that it could soften its position at some point in the future. *See* *New York v. United States*, 505 U.S. 144, 184 (1992) ("This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable."). Indeed, the Tenth Circuit recently held as much in *Kerr v. Hickenlooper*, 744 F.3d 1156, 1177–78 (10th Cir. 2014). Moreover, many academics have urged the Court to reconsider its refusal to hear such claims. *See, e.g.,* Chemerinsky, *supra*.

287. Erwin Chemerinsky wrote a thoughtful paper on the subject that is often cited. *See* Chemerinsky, *supra* note 286.

288. *Luther v. Borden*, 48 U.S. 1, 42 (1849) ("Under [Article IV], it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. . . . It is true that the contest in this case did not last long enough to bring the matter to this issue, . . . [and] Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."). *But see* Natelson, *supra* note 285, at 875–78.

Constitution. The Compact Clause's requirement of congressional approval will apply to this compact even under today's lenient *U.S. Steel* standard.

If NPV's compact is eventually presented to Congress for approval, Congress should decline to give its consent. Such radical change should never be made through a simple interstate compact and bare majorities in Congress. If this change is to be made, it should be made with the full cooperation and knowledge of the American people. The constitutional amendment process would require widespread debate and acquiescence before federalism is eliminated from the presidential election system. The Founders would have expected nothing less.

