

2-17-2013

Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause

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Recommended Citation

Brody, Michael (2013) "Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause," *Legislation and Policy Brief*: Vol. 5: Iss. 1, Article 2.
Available at: <http://digitalcommons.wcl.american.edu/lpb/vol5/iss1/2>

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CIRCUMVENTING THE ELECTORAL COLLEGE:
WHY THE NATIONAL POPULAR VOTE
INTERSTATE COMPACT SURVIVES
CONSTITUTIONAL SCRUTINY UNDER THE
COMPACT CLAUSE

MICHAEL BRODY*

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INTRODUCTION

It’s Election Night 2016.¹ Brian Williams stands by at NBC, waiting to give the first returns of the night. “Kentucky to Christie,” Williams triumphantly announces to kick off the evening’s festivities. Kentucky turns flush red on NBC’s virtual election map. Williams continues: “Maryland to Clinton.” Now comes the hard part for Williams. Clinton won Maryland by an incredible two-to-one margin. NBC viewers intently watch the map, expecting to see the Old Line State turn blue. Instead, Maryland sits idly in its static grey color. This election has something new.

Confused NBC viewers keep watching, waiting for Williams to provide an explanation. “We’d love to tell you who will win Maryland now, but unfortunately we can’t,” Williams says. “We’ll have to wait until all votes nationwide have been counted.” Realizing that many of his viewers are likely perplexed by this new electoral voting system, Williams starts explaining the newly enacted National Popular Vote Interstate Compact (NPVC), in which several states have agreed to

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¹ This hypothetical scenario is for illustrative purposes only.

allocate their Electoral College delegates to the winner of the *national* vote, as opposed to the traditional state vote.

Debate about the Electoral College has raged through the years, but it came to the forefront of national political attention after the 2000 presidential election produced the fourth electoral “misfire” in United States history.² In 2001, law professors Akhil Reed Amar and Vikram David Amar introduced the idea of state legislatures allocating their respective electoral votes to the winner of the national popular vote.³ Five years later, the organization “National Popular Vote,” consisting of a bipartisan group of prominent current and former congressmen, held its initial press conference in Washington, D.C. to explain the legislation that would soon be introduced in all 50 U.S. states.⁴ National Popular Vote introduced the NPVC, which, if adopted by enough states, would essentially replace the constitutionally mandated Electoral College with a direct national popular vote.⁵ Significantly, this law would be enacted by a horizontal agreement among the states, not a constitutional amendment.⁶ At the time of this writing, California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Vermont, Washington, and the District of Columbia have enacted the National Popular Vote Compact (NPVC).⁷ Cumulatively, these jurisdictions equal 132 of the necessary 270 electoral votes for the NPVC’s provisions to go into effect.⁸

² A “misfire” refers to an election in which the presidential candidate who won the most popular votes failed to win the presidency. There have been four such elections (1824, 1876, 1888, and 2000). Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Sub-Constitutional Change*, 100 GEO. L.J. 173 at 196 (2011).

³ Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001) <http://writ.news.findlaw.com/amar/20011228.html>.

⁴ *Prepared Remarks from Press Conference, NAT’L POPULAR VOTE*, <http://www.nationalpopularvote.com/pages/releases/20060223.php> (last visited Dec. 29, 2012).

⁵ *Id.*

⁶ *See id.*

⁷ CAL. ELEC. CODE § 6920 (West 2012); D.C. CODE § 1-1051.01 (West 2011); HAW. REV. STAT. § 14D-1 (West 2008); MD. CODE ANN., ELEC. LAW § 8-5A-01 (West 2011); 10 ILL. COMP. STAT. 20/5 (West 2011); 2010 Mass. Acts Ch. 229; N.J. STAT. ANN. § 19:36-4 (West 2011); 2011 VT. STAT. ANN., tit. 17, §§ 2751-2755 (West 2011); WASH. REV. CODE § 29A.56.300 (West 2011).

⁸ A candidate must receive 270 out of a possible 538 electoral votes in order to win the Electoral College. OFFICE OF THE FED. REG., *A Procedural Guide to the Electoral College*, http://www.archives.gov/federal-register/electoral-college/procedural_guide.html (last visited Dec. 29, 2012). This number is derived from the combination of three different sources. First, the U.S. Census figures determine the number of congressional representatives each state can have. 2 U.S.C. § 2a (West 2011). Second, 3 U.S.C. § 3 (West 2011) states that “[t]he number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office.” Third, the Twenty-Third Amendment of the Constitution grants presidential electors to the District of Columbia, but no more than the least populous state. U.S. CONST. amend. XXIII. Article IV of the NPVC states that “[t]his agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.”). 888-Word Interstate Compact, NAT’L POPULAR VOTE, available at <http://www.nationalpopularvote.com/pages/misc/888wordcompact.php> (last visited Dec. 29, 2012) [hereinafter *National Popular Vote Compact*].

If the NPVC is triggered and becomes binding law, the chief election official in each member state will add up the total number of national popular votes for each candidate, and the state's certifying official will then appoint that state's slate of electoral votes to the winner of the *national* popular vote.⁹ Member states are permitted to withdraw from the NPVC, but cannot do so after July 20th in the year of a presidential election.¹⁰ As this article will later explain, each state is entitled to choose how it wants to allocate its electoral votes. Thus, constitutional scrutiny of the NPVC centers on the manner in which it will be enacted, not whether each state has the individual power to change its method of electoral vote allocation.

Part II of this article will discuss the formation of the Electoral College, the roles that both state and federal governments play in the election of the President, and the emergence of the NPVC as an alternative to a constitutional amendment. Part III surveys the history of the Compact Clause, which would be implicated by enactment of the NPVC. Part IV then takes a detailed look at the principles of federalism that are inherent in the Electoral College, explores the roles of presidential electors, and concludes that under existing Compact Clause precedent, the NPVC does not require Congressional consent in order for it to be effective.

II. ELECTORAL COLLEGE BACKGROUND

Article II of the Constitution requires each state legislature to define a method to appoint electors to vote for the President.¹¹ In *McPherson v. Blacker*, a late nineteenth century case, the Supreme Court confirmed that state legislatures have this plenary power under Article II when it upheld the Michigan legislature's proposal to establish a district-based voting system.¹² *McPherson* affirmed the principle that the Constitution does not require any particular legislative scheme for appointing presidential electors.¹³ The Court has said that this power is so exclusively vested within state legislatures that "the text of the election law itself,

⁹ *National Popular Vote Compact*, *supra* note 8.

¹⁰ The NPVC states that it "shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes." *Id.*

¹¹ U.S. CONST. art. II, §1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.").

¹² *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("[The Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.").

¹³ *Id.*

and not just its interpretation by the courts of the States, takes on independent significance."¹⁴

At the Constitutional Convention, the delegates considered several methods of presidential selection: (1) popular election, (2) election by state legislatures, (3) election by special electors, and (4) election by the national legislature (Congress).¹⁵ George Mason scoffed at the idea of having people directly vote for the president, saying "it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours [sic] to a blind man."¹⁶ Charles Pinckney, another delegate, feared that under a direct vote, the populous states would be able to control the outcome of presidential elections to the detriment of smaller states.¹⁷ However, Pinckney believed this method was the most effective for the selection of the president, as the legislature would "be most attentive to the choice of a fit man to carry [the laws passed by the legislature] properly into execution."¹⁸ Gouverneur Morris thought Pinckney's fears were exaggerated, and ensured delegates that even though groups of voters might control the popular will in small districts, "the general voice of the State is never influenced by such artifices."¹⁹ While the people might not have known of all activity in Washington, Morris thought they would know of those "great and illustrious characters which have merited their esteem & confidence."²⁰

James Wilson, James Madison, and Morris favored a direct national vote by the people.²¹ The delegates to the Convention had originally decided that Congress would elect the president, but Morris expressed his opposition to that plan, explaining that the president might turn out to be a puppet of the legislature, leading to "[c]abal and corruption."²² Madison initially saw no problem with a direct national vote, as he felt

¹⁴ *Bush v. Gore*, 531 U.S. 98, 112–13 (2000); accord Bradley T. Turflinger, *Fifty Republics and the National Popular Vote: How the Guarantee Clause Should Protect States Striving for Equal Protection in Presidential Elections*, 45 VAL. U. L. REV. 793, 825 (2011).

¹⁵ JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 308 (Adrienne Koch ed., Ohio Univ. Press 1976). Thomas Paine had a unique proposal that was never discussed during the Convention—that the delegates from the colonies select the president by lot. Lolabel House, *A Study of the Twelfth Amendment of the Constitution of the United States* 1 (1901) (unpublished Ph.D. dissertation, University of Philadelphia).

¹⁶ MADISON, *supra* note 15.

¹⁷ *Id.* at 307.

¹⁸ *Id.*

¹⁹ *Id.* at 308.

²⁰ *Id.*

²¹ NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICA AND THE DIRECT VOTE ALTERNATIVE* 21 (Murray Printing Co. 1981).

²² MADISON, *supra* note 15, at 525.

that “the President [was] to act for the *people*, not the *States*.”²³ Wilson introduced the idea that each state send electors to convene and cast their vote for president in accordance with the popular will of their respective states.²⁴ This feature, Wilson argued, would prevent state intervention in the electoral process and “would produce more confidence among the people.”²⁵ A direct national election would diminish the southern states’ voting power because slaves were represented as three-fifths of a person for census purposes, but had no concomitant suffrage rights.²⁶ The resulting Electoral College compromise gave each state a number of delegates equal to the number of its Congressional representatives.²⁷

In 1788, Congress determined that each state would appoint presidential electors on the first Wednesday in January of 1789.²⁸ The Framers projected that the states would use the district system when deciding how to allocate electors,²⁹ but a complete lack of uniformity quickly developed for the first presidential election.³⁰ The legislatures of Georgia, South Carolina, Connecticut, New Jersey, and Delaware each appointed electors without referencing the citizens of their respective states in any way.³¹ The Massachusetts legislature appointed two at-large electors on its own, and used a district-based system to allow the people to choose the state’s other electors.³² Maryland and Virginia each used a district-based system, whereas New Hampshire and Pennsylvania allowed their citizens to select electors on a general ticket.³³ New York cast no votes, as its legislature’s two houses could not agree on how to appoint electors.³⁴ For the second presidential election in 1792, nine state legislatures decided that they would themselves appoint electors.³⁵ Four states used either a district system or general

²³ *Id.* at 524-25 (emphasis added). Eldridge Gerry, though, feared that “one set of men dispersed through the Union & acting in Concert” would always be able to determine the president, as they could override “[t]he ignorance of the people” under a direct national vote. *Id.* at 50.

²⁴ *Id.*

²⁵ *Id.*

²⁶ PEIRCE & LONGLEY, *supra* note 21 (1981). If each state’s vote totals were counted separately and independent of one another, southern states could reap the benefit of having increased state citizenship, and thus increased voting power, without having to grant slaves the right to vote. Paul Finkelman, *The Proslavery Origins Of The Electoral College*, 23 CARDOZO L. REV. 1145, 1154-55 (2002).

²⁷ This figure would include the number of representatives in both the House of Representatives and the Senate. See ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 82 (Praeger Publishers 1994).

²⁸ 34 JOURNALS OF THE CONTINENTAL CONGRESS 613 (Sept. 13, 1788).

²⁹ Letter from James Madison to George Hay Montpelier (Aug. 23, 1823), reprinted in 3 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 459 (Yale Univ. Press 1911).

³⁰ PEIRCE & LONGLEY, *supra* note 21, at 32-34.

³¹ *Id.* at 32-33.

³² *Id.*

³³ *Id.*

³⁴ *McPherson v. Blacker*, 146 U.S. 1, 30 (1892).

³⁵ PEIRCE & LONGLEY, *supra* note 21, at 34.

ticket, while New Hampshire and Massachusetts used a system in which the selection of electors would be shared between the legislature and the people.³⁶

In 1796, only six out of sixteen states used either the district system or general ticket.³⁷ That year's presidential election saw the emergence of political parties, as Federalist members of Congress caucused to nominate John Adams as the party's candidate to succeed George Washington, while Republican party members organized to nominate Thomas Jefferson.³⁸ The rise of political parties incentivized the party in control of the state legislatures to act strategically at the time of each presidential election.³⁹ For the first several elections in the late eighteenth and early nineteenth centuries, some state legislatures would often make abrupt changes to their method of allocation, such as vesting within themselves the power to appoint and taking away that away from the citizens.⁴⁰ For example, on the night before a statewide election, the Federalist New Jersey legislature, realizing that the election would not produce the winner it wanted, repealed a state law that called for the allocation of delegates based on a statewide popular vote.⁴¹

In 1818, New Jersey Senator Mahlon Dickerson advocated for uniformity in the election of the president.⁴² On the Senate floor, Dickerson recognized the dangers of unpredictability: "[the electoral systems] are the subjects of constant fluctuation and change—of frequent, hasty, and rash, experiment—established, altered, abolished, re-established, according to the dictates of the interest, the ambition, the whim, or caprice, of party and faction."⁴³ However, Dickerson conceded that the lack of uniformity among the states would only be acceptable if each state made its method permanent.⁴⁴ State legislatures slowly caught on to the general ticket system, and by 1836, South Carolina was the lone state that had not adopted it.⁴⁵ Unlike the district system, which might allow a minority party to pick up some electoral votes, the general ticket and its "winner-take-all" format gave the ruling political party of each state the ability to deliver its entire state to the party's national candidate.⁴⁶ Currently, Maine and Nebraska are the only states that do

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 37.

³⁹ *Id.* at 44–45.

⁴⁰ PEIRCE & LONGLEY, *supra* note 21, at 45.

⁴¹ *Id.*

⁴² 31 ANNALS OF CONG. 178 (1818).

⁴³ *Id.* at 181.

⁴⁴ *Id.* at 179–80.

⁴⁵ PEIRCE & LONGLEY, *supra* note 21, at 46.

⁴⁶ *Id.* at 46–47.

not use the winner-take-all system, as each of those states allocates its electoral votes based on the district method.⁴⁷

Wilson's idea of having representative electors was projected as something far different than what it quickly became in practice. Alexander Hamilton liked the idea of the states delegating a select group of electors to represent their state.⁴⁸ These electors, Hamilton thought, would produce a better and more informed decision than the people themselves.⁴⁹ Because the electors would not formally convene together, but vote only within their respective states, they would be less exposed to the "heats and ferments" of being in the physical presence of each other.⁵⁰ Hamilton also believed that, because the electors and the state legislatures' appointing them were among the "enlightened and respectable citizens," the electors would naturally direct towards the most accomplished candidate for the presidency.⁵¹ However, with the introduction of political parties, Hamilton's vision that the delegates would provide a free, unconstrained choice quickly disappeared.⁵² Instead, "party discipline" was seen as a way of avoiding an executive branch that had a president and vice president from different parties.⁵³ This rigorous discipline was partly responsible for the result of the 1796 presidential election, which produced John Adams, a Federalist, as president, and Thomas Jefferson, a Republican, as vice president.⁵⁴

For decades, a number of constitutional amendments have been proposed to change the presidential election to a straight national popular vote.⁵⁵ A 2007 poll assembled by the *Washington Post*, Kaiser Family Foundation, and Harvard University showed 72% public support for a national popular vote to determine the winner of the presidential election.⁵⁶ But support for a shift to a national popular vote is nothing new, as polls have shown 65% of Americans approving of a change to a direct national vote as early as 1944.⁵⁷ The NPVC is one of the latest and most successful attempts to prevent the College from producing such a misfire. In both 1969 and 1979, proposed constitutional amendments

⁴⁷ ME. REV. STAT. ANN. tit. 21-A, §§ 802, 805(2) (West 2011); NEB. REV. STAT. §§ 32-714, 32-1038(1) (2011).

⁴⁸ THE FEDERALIST No. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 411-12.

⁵² JOHN R. KOZA, ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY POPULAR VOTE 43-44 (3d ed. Nat'l Popular Vote Press 2011).

⁵³ Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing The President*, 100 Nw. U. L. REV. 121, 128 (2006).

⁵⁴ *Id.*

⁵⁵ See KOZA, *supra* note 52, at 95-131 (providing detailed explanations of previously attempted amendments).

⁵⁶ *Id.* at 276.

⁵⁷ *Id.* at 275 (citing a Gallup News Service poll showing that popular support for a direct national vote got as high as 81% after the 1968 presidential election).

to scrap the Electoral College in favor of a direct popular vote failed to earn the necessary two-thirds vote from the Senate.⁵⁸ Since then, however, no Congressional proposals to move towards a national popular vote have had any success.⁵⁹

III. THE COMPACT CLAUSE: A RARELY IMPLICATED AND WIDE-OPEN PROVISION

Among the constitutional provisions likely to be in play in potential litigation concerning the NPVC is the seldom-invoked Compact Clause.⁶⁰ In Article I, Section 10, clause 3, of the Constitution, the Compact Clause is among several restrictions, all of which require states to obtain some form of Congressional consent:

“No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”⁶¹

Congressional consent is the federal government’s check on the otherwise free market for states to collude on legislative matters.⁶² The manner in which Congress must assent to approval of interstate compacts was initially unclear.⁶³ Justice Story explained that express congressional consent would leave no doubts as to a compact’s validity and that implied consent was possible, but provided minimal elaboration of what was required for the implication of congressional consent.⁶⁴ Story seemed less concerned with the effects that compacts might have on non-compacting states than with the possibility that they might infringe upon the powers of the national government.⁶⁵ He classified compacts as applying to issues pertaining to “mere private rights of sovereignty; such as questions of boundary; interests in land situated in

⁵⁸ Williams, *supra* note 2, at 185.

⁵⁹ *Id.*

⁶⁰ The Equal Protection Clause is also likely to be implicated. *See* Williams, *supra* note 2, at 226–28.

⁶¹ U.S. CONST. art. I, § 10, cl. 3.

⁶² *See* JOSEPH F. ZIMMERMAN, INTERSTATE RELATIONS: THE NEGLECTED DIMENSION OF FEDERALISM 36 (Greenwood Publ’g Group, Inc. 1996) (explaining that “[t]he purpose of the congressional consent requirement is to protect the Union by controlling collective actions of states.”). *See also* U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 496 (1978) (White, J., dissenting) (“As the constitutional arbiter of political differences between States, the Congress is the proper body to evaluate the extent of harm being imposed on non-Compact States, and to impose ameliorative restrictions as might be necessary.”).

⁶³ *See generally* Green v. Biddle, 21 U.S. 1 (1823).

⁶⁴ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 311 (Boston, Hilliard, Gray & Co. 1833).

⁶⁵ *Id.* at 310.

the territory of each other; and other internal regulations for the mutual comfort and convenience of states, bordering on each other.”⁶⁶

Functionally, compacts have taken on a role similar to legislation, meaning that presidents have veto power.⁶⁷ Both individuals and states can seek relief in state and federal court to prevent the obligations of a compact from coming into effect.⁶⁸ Federal courts could interpret compacts under state law only until 1981, when the Supreme Court said that Congress’ consent to a compact gave it the force of federal law.⁶⁹ When compacting parties reach an agreement on a compact, they must then seek approval from each of the respective state legislatures.⁷⁰ Initially, governors appointed joint commissions to draft interstate compacts.⁷¹ Since 1930 though, standards have been relaxed regarding who can be a party to compact negotiations and whether compacting individuals are required to have authorization to act on behalf of their respective state legislatures.⁷²

The Compact Clause has its roots in the colonial era, when the colonies set up joint commissions to deal with boundary disputes.⁷³ These disputes developed as populations within each colony crept up on other colonies, and disputes emerged over the control of Atlantic seaboard territory.⁷⁴ When making agreements among themselves, the colonies were required to gain approval of the Crown after they negotiated settlements.⁷⁵ If the colonies could not come to an agreement, their method of recourse was an appeal to the Crown, with appellate remedies available in the Privy Council.⁷⁶ After the American Revolution, the drafters of the Articles of Confederation, aware of the potentially destructive nature of boundary disputes and their potential to weaken the young union, included language in the Articles to assure that the national government

⁶⁶ *Id.*

⁶⁷ For example, in 1942, President Franklin D. Roosevelt vetoed the Republican River Compact, believing that it encroached on national interests in appropriating water. 88 CONG. REC. 3285–86 (1942).

⁶⁸ See ZIMMERMAN, *supra* note 62, at 39 (“Although the Eleventh Amendment prohibits a citizen of one state to sue another state without its consent, a citizen can challenge a compact or its execution in a state or national court against an individual or in a proceeding to prevent a government officer from enforcing a compact.” (citing *Ex Parte Young*, 209 U.S. 123 (1908))).

⁶⁹ *Cuyler v. Adams*, 449 U.S. 433, 440 (“But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”).

⁷⁰ See ZIMMERMAN, *supra* note 62, at 35.

⁷¹ *Id.* at 34.

⁷² *Id.* at 34–35 (referencing the Interstate Commission on Crime and regional governors’ conferences as examples of how some compacts are now formed through “*ad hoc* arrangements”).

⁷³ Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution— A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692 (1925).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 754–55 appx. B (citing the Massachusetts and New Hampshire Settlement of 1740).

had control in the remedying of interstate disputes.⁷⁷ Congressional consent was established as a requirement for interstate disputes, as the main concern was that states might “split the confederacy” by way of an agreement.⁷⁸ Maryland and Virginia entered into one such compact under the Articles, as the two states formed an agreement to establish navigation and fishing rights on the Potomac River.⁷⁹

Interstate compacts remained permissible under the Constitution, but states could no longer make treaties or alliances with other states or nations.⁸⁰ As Michael Greve explains, the “broad and unqualified” language in the Compact Clause and the other Article I, Section 10 restrictions on the States reflects “the Founders’ special concern over all-not just some—state agreements.”⁸¹ The Compact Clause’s placement in Article I, Section 10 of the Constitution is highly relevant to a determination of the Framers’ original intent with the Clause, as it sits alongside numerous other powers prohibited to the States.⁸² *The Federalist* is fairly sparse in its discussion of the Compact Clause, lumping it in with a discussion of a number of other clauses that were “copied” from the Articles of Confederation.⁸³ However, Greve views its placement in Article I, Section 10 as the Framers’ expression of the “Madisonian negative.”⁸⁴ At the Constitutional Convention, James Madison had advocated for a national veto power over all state legislation.⁸⁵ Madison wanted the national government to retain a supervisory role over the states and prevent them from encroaching on federal prerogatives.⁸⁶ While other delegates at the Convention rejected the extreme nature of the proposal, they agreed with Madison that a “certain species of state laws” needed to have some form of federal check.⁸⁷ Specifically, the Framers feared giving states the exclusive control to handle debtor relief laws, import duties, and the printing of money.⁸⁸ Along with the other prohibitions

⁷⁷ ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 2 (“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, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”). Congressional consent under the Articles of Confederation was different in that the congressional body itself was different—a unicameral one instead of the bicameral one that is in place today. ZIMMERMAN, *supra* note 62, at 33.

⁷⁸ ZIMMERMAN, *supra* note 62, at 33.

⁷⁹ *Wharton v. Wise*, 153 U.S. 155, 163–165 (1894). The Court also explained that even though the compact was entered into before the Constitution, it was still valid, as it did not conflict in any way with the Constitution. *Id.* at 167–68.

⁸⁰ Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 379 (2007).

⁸¹ Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 297–98 (2003).

⁸² U.S. CONST. art. I, § 10.

⁸³ THE FEDERALIST NO. 44, at 277, 280 (James Madison) (Clinton Rossiter ed., 2003).

⁸⁴ Greve, *supra* note 81, at 313.

⁸⁵ Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 649 (1999).

⁸⁶ *Id.*

⁸⁷ Greve, *supra* note 81, at 313.

⁸⁸ *Id.*

in Article I, Section 10, compacts were treated as part of a “clas[s] of state laws with a manifest detrimental effect on sister states.”⁸⁹

Compact Clause case law is sparse, but the Supreme Court has provided a broad framework for which Compact Clause questions are to be addressed. One of the early leading cases on the Compact Clause did not concern the Compact Clause at all.⁹⁰ In *Holmes v. Jennison*,⁹¹ Chief Justice Taney explained that the governor of Vermont did not have the authority to enter into an informal agreement with Canadian authorities to deliver a Canadian citizen who had been arrested in Vermont.⁹² Fearing that individual states could gain the power of deciding their own exclusive conditions on which to negotiate with foreign countries,⁹³ Taney realized that to allow the states to form agreements in this manner would infringe on the federal government’s exclusive treaty-making power.⁹⁴ However, Taney did not determine that the agreement was flat out impermissible, but that it had to be “made under the supervision of the United States,” thus giving some meaning to the congressional consent requirement in the Constitution.⁹⁵ Though the agreement at issue in *Holmes* addressed an agreement between a state and a foreign country, not one between states, scholarship suggests that the same principles apply to the federal government’s supervisory interest in either instance.⁹⁶

Fourteen years later, in *Florida v. Georgia*,⁹⁷ Taney clarified that the vertical protection established in *Holmes* was to be evaluated by way of a horizontal component. Taney explained that the Compact Clause’s purpose was to protect the interests of the non-compacting states.⁹⁸

⁸⁹ *Id.* (“Uniformly, the prohibitions and negatives are directed against classes of state laws with a manifest detrimental effect on sister states. As Madison might have put it, the Convention sought to arrest factionalism at the borders.”). See also, Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1500–01 (2007) (“What nonetheless remains notable about Section 10 is that it represents an express articulation of the interstate model also evident in the other constitutional interstate provisions—that is, prohibitions on the states that are independently binding but subject to ultimate congressional control.”).

⁹⁰ See *Holmes v. Jennison*, 39 U.S. 540, 578 (1840) (plurality opinion).

⁹¹ *Id.*

⁹² *Id.* at 578.

⁹³ *Id.* (“Such conflicting exercises of the same power would not be well calculated to preserve respect abroad or union at home.”).

⁹⁴ *Id.*

⁹⁵ *Holmes*, 39 U.S. at 578. See also *Poole v. Fleegeer*, 36 U.S. 185, 209 (1837) (“If Congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution . . .”).

⁹⁶ Greve, *supra* note 81, at 298 (“The text of the Clause, of course, treats state agreements with foreign powers on a par with state-to-state agreements. If it compels a rigid interpretation in the foreign dimension, it compels an equally rigid, forbidding interpretation in its domestic dimension.”).

⁹⁷ *Florida v. Georgia*, 58 U.S. 478, 494 (1854).

⁹⁸ *Id.* (“This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others.”).

He reasoned that even though the dispute rested between Florida and Georgia, every other state in the Union had an interest in the dispute, and their collective interests were represented by the United States as a whole.⁹⁹ After this case, it appeared as though the constitutionality of a compact was to be determined by way of a horizontal component (*i.e.*, potential effects on other states) if it did not concern a power in which the federal government's power was undisputedly supreme.

The more "modern" view of the Compact Clause emerged in the dictum of *Virginia v. Tennessee*, another land dispute case.¹⁰⁰ Though his Compact Clause scrutiny was not necessary,¹⁰¹ Justice Field's analysis in that case has been viewed as the turning point in the Supreme Court's Compact Clause jurisprudence.¹⁰² Specifically, Justice Field said that the Compact Clause prohibited "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."¹⁰³ Justice Field's application of his seemingly profound analysis boiled down to his determination that the states were simply making formal determinations on "that which actually existed before,"¹⁰⁴ and thus neither state changed its relation to the federal government in a way that would deem the agreement unconstitutional.¹⁰⁵

In *U.S. Steel v. Multistate Tax Commission*,¹⁰⁶ the Court entertained its most significant and most recent application of the Compact Clause. Affirming Justice Field's dictum as binding constitutional law under the Compact Clause,¹⁰⁷ the Court looked at the Multistate Tax Commission, which was composed of the member states' respective tax administrators.¹⁰⁸ The Commission conducted mostly advisory work in its "recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."¹⁰⁹ The Commission established uniform administrative regulations that would not be binding until a given state adopted it "in accordance with

⁹⁹ *Id.*

¹⁰⁰ *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). The Court also used this case as an opportunity to clear up the distinction between compacts and agreements, explaining that it "[d]id not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement.'"). *Id.* at 520.

¹⁰¹ *Id.* at 525.

¹⁰² See Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 732–33 (2007).

¹⁰³ *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

¹⁰⁴ *Id.* at 520.

¹⁰⁵ *Id.* at 520–21.

¹⁰⁶ 434 U.S. 452 (1978).

¹⁰⁷ *Id.* at 471.

¹⁰⁸ *Id.* at 456.

¹⁰⁹ *Id.*

its own law.”¹¹⁰ Another provision allowed the Commission to conduct audits for member states and to use compulsory process in the courts of member states.¹¹¹ The states that formed the Commission had unilateral exit rights from the compact, and could exercise those rights by enacting a repealing statute.¹¹² In concluding that the compact at stake did not require congressional consent, the Court determined that the member states were not collectively creating a new power that they did not already have individually.¹¹³

Though much of the majority opinion in *U.S. Steel* did not articulate the circumstances that would need to occur in order for the Compact Clause to be violated, the Court opened up the possibility that such a circumstance might be present if the Commission had definite authority to impose punishments.¹¹⁴ The Court explained that the compact granted the Commission, in its auditing capacity, the power to require individual attendance and production of documents.¹¹⁵ But because the procedure for enforcing that requirement would have to be conducted in the same manner as it would if acted upon by a random auditing agent, the Court concluded that the Commission had no exclusive punishing power and thus was not providing the member states with a benefit that they did not already have.¹¹⁶ After *U.S. Steel*, the constitutionality of an interstate compact boils down to two either/or elements: (1) does the compact encroach on federal supremacy, or (2) does it encroach on the sovereignty of other states?¹¹⁷

IV. THE NPVC SHOULD SURVIVE A MECHANICAL APPLICATION OF EXISTING COMPACT CLAUSE PRECEDENT

A. *U.S. STEEL’S* MAGICAL FOOTNOTE

If opponents of the NPVC claim *U.S. Steel* as the guiding light for a constitutional challenge to the NPVC, they may as well concede defeat. Unless the Compact Clause is broader than *U.S. Steel* purports it to be, the NPVC does not require Congressional consent, because it impinges only on a federal interest, not an area where the federal

¹¹⁰ *Id.* However, the signatories “retain[ed] complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.” *U.S. Steel Corp.*, 434 U.S. at 457.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 475–76.

¹¹⁴ *Id.* at 475.

¹¹⁵ *U.S. Steel Corp.*, 434 U.S. at 475.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 471.

government has any supreme power.¹¹⁸ Footnote 33 in the *U.S. Steel* opinion acknowledges that every interstate agreement in some way implicates a federal interest.¹¹⁹ Justice Powell, writing for the majority, conceded that the Multistate Tax Compact presented a federal concern, but that “federal interest” was an over-inclusive standard, explicitly stating that “[t]he dissent appear[ed] to confuse potential impact on ‘federal interests’ with threats to ‘federal supremacy.’”¹²⁰ Thus, if a compact implicates a federal interest, it does not necessarily follow that federal supremacy has also been implicated.¹²¹ Justice Powell’s footnote acknowledged this distinction, finding that the Multistate Tax Compact allowed states to have “[e]nhanced capacity to lobby within the federal legislative process,” but that none of the compacting states encroached or interfered with federal power, which “in the relevant areas remain[ed] plenary.”¹²²

An area of federal supremacy has been infringed by the NPVC only if as a consequence of the legislation’s enactment, the compacting states touch on an area that the federal government has deemed to be within its exclusive jurisdiction.¹²³ The Framers, however, seldom discussed the vertical relationship between state governments and national governments in the selection of the president, as it seemed implicit that the procedure would be conducted wholly by the states, with a federal stamp of approval only for the final tally.¹²⁴ Alexander Hamilton acknowledged that presidential elections were to be conducted in each state, with the federal government—specifically, the House of Representatives—stepping in only in the event that a candidate failed to receive a majority of the electoral votes.¹²⁵ The *U.S. Steel* plaintiffs unsuccessfully argued that the creation of the Multistate Tax Commission impacted both foreign affairs and interstate commerce, each of which were under the federal government’s plenary control.¹²⁶ However, unlike in *U.S. Steel*, where the plaintiffs could cite to specific Constitutional provisions that they believed had been violated, NPVC opponents have very little authority to rely on.

¹¹⁸ See Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?* 42 COLUM. J.L. & SOC. PROBS. 511, 535–44 (2009) (discussing alternative modes of Compact Clause interpretation post-*U.S. Steel*).

¹¹⁹ *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 479 n.33 (1978).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ For example, the federal government would not want states to create or interfere with national foreign policy. See PAUL BREST, ET. AL. PROCESSES OF CONSTITUTIONAL DECISIONMAKING, Fifth Edition (2011 Supplement) 121 (Wolter Kluwer Law & Business 2011).

¹²⁴ THE FEDERALIST No. 68, *supra* note 48, at 412.

¹²⁵ *Id.*

¹²⁶ Brief for Appellants at 35–44, *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978) (No. 76-635), 1977 WL 189135.

While various statutes enforce the minimal powers that Congress has over elections,¹²⁷ NPVC opponents are left with little support for arguing that the NPVC encroaches on an area of distinct federal supremacy. Accordingly, NPVC opponents will have to craft an argument that the first prong of *U.S. Steel* applies broadly to all federal interests, not just to specific constitutional provisions in which Congress has plenary constitutional authority.¹²⁸ NPVC opponents will have to work against a slew of lower court opinions that have failed to find compacts to have encroached on federal supremacy.¹²⁹ Challenges to the NPVC under the federal supremacy prong of the *U.S. Steel* test could be supported by Supreme Court language that suggests that Electoral College delegates assume a federal responsibility when they cast their votes.¹³⁰ However, the electors receive their authority to vote only from the state legislature, and thus to truly implicate a matter of federal supremacy, a litigant would have to argue that the electors become federal officers when they are appointed.¹³¹

Since deciding in *McPherson* that states were firmly vested with the power to choose how to allocate electors,¹³² the Supreme Court has only further bolstered a state's plenary power to choose its electors, by saying that the federal government plays only two roles in the selection of the president: it can choose (1) when elections are held, and (2) when the state's pledged electors can vote.¹³³ Presidential electors vote wholly within their respective states; the list of whom they vote for is then directed to the President of the Senate, who counts the votes.¹³⁴ Congress's other Article II role in the election process gives it the power

¹²⁷ See, e.g., 3 U.S.C. § 5 (2011) (explaining the procedures for elector controversies).

¹²⁸ Justice White explained in his *U.S. Steel* dissent how he thought the Compact Clause contemplated a broader notion of what federal supremacy meant for scrutinizing a compact. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 489–90 (1978).

¹²⁹ For examples of cases that nicely articulate the failure of the first prong of the *U.S. Steel* test, see *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002) (determining that the Master Settlement Agreement did not abridge the federal government's power to regulate tobacco, as specific sections of the agreement allowed for flexible adjustments if future congressional regulation were to be passed); *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (explaining that an interstate compact dealing with the placement of foster children "focus[ed] wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states"); *New York v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 182–83 (S.D.N.Y. 1990) (finding that an interstate compact to regulate airline advertising was valid because states had concurrent jurisdiction with Congress in such regulation).

¹³⁰ See, e.g., *Burroughs v. United States*, 290 U.S. 534, 545 (1934) ("While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.") (internal citations omitted).

¹³¹ *Ray v. Blair*, 343 U.S. 214, 224–25 (1952) ("[The electors] act by authority of the state that in turn receives its authority from the federal constitution.").

¹³² See *supra* text accompanying notes 12 and 14.

¹³³ See *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890).

¹³⁴ U.S. CONST. art. II, § 3.

to determine when elections will be held.¹³⁵ A third prong of congressional control can exist, as the House of Representatives would elect the president by a majority vote in the event that the electors cannot reach a majority.¹³⁶ But a reading of the NPVC's text makes it difficult to see any provision by which the federal government can claim supreme power over the election for president.¹³⁷ Thus, the second prong of the *U.S. Steel* test is where the meat of the debate must be.

B. THE NPVC DOES NOT DETRACT FROM STATES WHO WISH NOT TO SIGN ON.

The NPVC passes constitutional muster under the Compact Clause because the only extraneous element that the NPVC guarantees is that member states will have a security blanket in enacting their preferred method of delegate allocation.¹³⁸ The NPVC assures that it satisfies the dispositive legal principle at work in *U.S. Steel*—that is, whether the states collectively are creating a power that they did not already have individually.¹³⁹ Neither side of the NPVC debate argues that the states do not already possess this plenary power to individually allocate their pledged delegates to the winner of the national election; some even point to the potentially absurd methods in which a state could allocate its delegates, like Rhode Island's allocating its electors the winner of the election in Vermont.¹⁴⁰ The question is whether the states are creating a new power in doing it collectively, or if they are constructively legislating for non-member states by effectively nullifying that state's decision to allocate votes in a certain manner.¹⁴¹

¹³⁵ U.S. CONST. art. II, § 1, cl. 3.

¹³⁶ U.S. CONST. amend. XII.

¹³⁷ See *National Popular Vote Compact*, *supra* note 8.

¹³⁸ Justice White's dissent in *U.S. Steel* explained that every time a compact is formed, it effectively creates a new power for the compacting states.

[T]he very creation of the Compact sets it apart from separate state action. The Compact did not become effective in *any* of the ratifying States until at least seven States had adopted it. Thus, unlike reciprocal legislation, the Compact provided a means by which a State could *assure* itself that a certain number of other States would go along before committing itself to an apportionment formula.

U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 493 (White, J., dissenting).

The *U.S. Steel* majority may not have disputed Justice White's point, because the Court was focused mainly on whether the Compact created *new* powers for the States, not if it was simply a means of assuring that it could get the desired effect out of powers they already had. If Justice White's articulation of the law is truly the standard, and not subsumed within the majority's new power analysis, then the NPVC might be evaluated differently.

¹³⁹ *Id.* at 475–76.

¹⁴⁰ Tara Ross, *Federalism & Separation of Powers: Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 Engage 2, 40 (Sept. 2010).

¹⁴¹ Kristin Feeney, *Guaranteeing A Federally Elected President*, 103 Nw. U. L. Rev. 1427, 1451 n.131 (2009) (arguing that even though non-signatory states are not being forced to adopt the NPVC, other states are nullifying their electoral choices and "practically legislat[ing] for them.").

The interstate coordination required for the enactment of the NPVC is akin to an assurance game.¹⁴² While the “we can do this unilaterally, so doing it collectively shouldn’t matter” argument is plausible, it becomes somewhat flawed when picked apart. A state would have no incentive to allocate its electors to the national winner without knowing that other states would follow, as such a decision would only serve to diminish political power of the state.¹⁴³ Simply put, a compacting state would not be able to get to the desired result of a nationwide popular vote without assurance that it would be joined by enough sister states in making the change so that the new method of allocation would be controlling at the Electoral College.¹⁴⁴ Such behavior was exactly the kind that Justice White was concerned about in his *U.S. Steel* dissent, as he argued that under the Compact Clause, actions “that would be permissible for individual states to undertake are not permissible for a group of states to agree to undertake.”¹⁴⁵ For states that desire a change to a national popular vote, the less risky option is to maintain the status quo (*i.e.*, statewide popular election) so as not to diminish any political power.¹⁴⁶ The dominant strategy, at least for states that prefer a change to a direct national vote, is to pledge its electors to the winner of the national popular vote.¹⁴⁷ But because of the lack of assurance, states that want change reach an inefficient result.¹⁴⁸ Thus, the triggering component¹⁴⁹ of the NPVC provides the assurance that each signatory state can pursue the dominant strategy without having to hope that other potential signatory states entertain the same degree of selflessness in changing their method of allocation.¹⁵⁰ If a court were to look only to this coordinated behavior among the signatory states and ignore any detrimental effects on non-signatories, such ignorance

¹⁴² See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 220 (2009) (for a helpful graphical explanation of assurance game strategy).

¹⁴³ Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?* 7 ELECTION L.J. 218, 224 (2008) (“The NPV[C] states need a compact only because no state wants to be altruistic all by itself.”).

¹⁴⁴ *Id.* at 224 n.35 (“If a state adopted [the] NPV[C] by itself, it could prevent the ‘wrong’ winner from becoming president only when doing so is contrary to the state’s own internal preference. The nature of the problem thus requires more than one state to participate in the solution.”)

¹⁴⁵ *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 482 (1978) (White, J., dissenting).

¹⁴⁶ See McAdams, *supra* note 142.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ *National Popular Vote Compact*, *supra* note 8.

¹⁵⁰ See McAdams, *supra* note 142, at 221. (“Everyone wants to keep their money in the bank if everyone else does, but wants to remove their money if enough others are going to remove theirs . . . [T]he inefficient equilibrium results when everyone seeks to avoid the risk of pooling and goes it alone.”)

would presume that a Compact Clause inquiry is workable only by the narrowly defined *U.S. Steel* test.¹⁵¹

The NPVC is distinguishable from an arrangement in which the member states collectively merged and agreed that the voters within the block would determine the actual person who would win the election, to the exclusion of the voting preferences of non-member states.¹⁵² Even though the member states are collectively establishing an agreement, they are still sharing power with non-member states because the member states are not consolidating their power.¹⁵³ The situation would be different if the NPVC's system tried to disenfranchise specific voters in states.¹⁵⁴ If power can be transferred simply because the signatory states gang up and agree on the method they think is best for allocating, then the argument from the non-signatory states must be that the *purpose* behind their method of allocation must be realized when the Electoral College actually convenes.¹⁵⁵ At best though, the NPVC only marginalizes the satisfaction of non-member state legislatures with the end product.¹⁵⁶ In fact, the NPVC acknowledges and preserves the significance of individual state elections because the actual maintenance of them is crucial in giving effect to the NPVC's aims.¹⁵⁷

A signatory state undoubtedly has the power to bind itself to a particular method of allocation, but might it be prevented from constructively binding another state in the process?¹⁵⁸ If, by random chance and without collusion, state legislatures decided to allocate their electors to the popular vote, no problem would be presented, yet the same result

¹⁵¹ See Pincus, *supra* note 118, at 536 (finding merit to Justice White's dissent in *U.S. Steel* and advocating that "[a] new judicial test should give some meaning to the text of the Constitution. Otherwise, the Compact Clause is reduced to a redundancy, serving to signify that the states cannot do collectively what they cannot do individually.").

¹⁵² Hendricks, *supra* note 143 (explaining that NPVC member states "want to pledge their votes not to the winner within their own bloc but to the winner in the nation").

¹⁵³ *Id.*

¹⁵⁴ Cf. Derek Muller, More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks, 7 ELECTION L.J. 227, 232 (2008) (explaining that the NPVC shifts power to the signatory states because "it is the political power for a group of states to decide how electors should be appointed, as a collective group, to the exclusion of non-compacting states.")

¹⁵⁵ See Turflinger, *supra* note 14, at 834 ("The Constitution guarantees to the states the power to choose presidential electors, but it does not guarantee that a state's presidential electors will have their candidate selected president.").

¹⁵⁶ Hendricks, *supra* note 143 ("Voters in every state would retain political power over the selection of the president.").

¹⁵⁷ Article III of the NPVC says that each member state will calculate the total number of votes that "have been cast in a statewide popular election and shall add such votes together to produce a 'national popular vote total' for each presidential slate." *National Popular Vote Compact*, *supra* note 8.

¹⁵⁸ *U.S. Term Limits v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting) ("Because powers are reserved to the States 'respectively,' it is clear that no State may legislate for another State.") See also *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (explaining how states cannot exercise their Article II plenary power in a manner that violates another part of the Constitution).

would occur.¹⁵⁹ So the problem is in the *manner* in which the NPVC would be enacted, not its *effect*.¹⁶⁰ The non-signatory states would have to argue that the second prong of the *U.S. Steel* test is broader than the facts of *U.S. Steel* allowed it to be and that any legislation that inflicts negative third party externalities can be used as an affirmative basis to show that legislation violates the Compact Clause.¹⁶¹ Under the NPVC, the negative externalities would be the disruption and nullification of a non-signatory's power to give effect to its method of allocation.¹⁶² *U.S. Steel* seems to foreclose a non-signatory state from arguing that pecuniary externalities are an affirmative defense under the second prong of the test, though it is not clear whether political externalities can be used as a defense.¹⁶³ Thus, the Compact Clause, on its own, might not be enough to declare that a state's reasonable expectations have been frustrated.¹⁶⁴ A deeper analysis must define what those reasonable expectations are, and what constitutional guarantees apply to them, if any.

C. DOES THE GUARANTEE CLAUSE HAVE THE ANSWER?

A *prima facie* transfer of power under a Compact Clause analysis might be present, but only if a non-signatory state is entitled to giving effect to the protection of that power under another constitutional provision such as the Guarantee Clause.¹⁶⁵ Article IV, section 4 of the Constitution declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."¹⁶⁶ For purposes of the NPVC, the Guarantee Clause might help determine if the people in the non-signatory states are entitled to protections *within* their state that cannot be frustrated by what other states might do.¹⁶⁷

¹⁵⁹ See Amanda Rolat, *Testimony of Amanda Rolat Before the Committee on Government Operations and the Environment of the Council of the District of Columbia Regarding the National Popular Vote Plan*, BRENNAN CENTER FOR JUSTICE 7 (May 19, 2010), available at http://www.brennancenter.org/page/-/Democracy/NPV_Testimony.pdf. See also, Hendricks, *supra* note 143, at 226.

¹⁶⁰ *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 484 (1978) (White, J., dissenting) ("Judging by effect, not form, it is obvious that non-Compact States can be placed at a competitive disadvantage by the Multistate Tax Compact.").

¹⁶¹ Greve, *supra* note 81, at 335 (illustrating this scenario by the following analogy: "[This] is a lot like saying that a private firm need not fear price-fixing among its competitors because the competitors are permitted to take unilateral actions that might put the firm out of business anyway.").

¹⁶² See Feeney, *supra* note 141.

¹⁶³ *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 478 (1978) ("Moreover, it is not explained how any *economic* pressure that does exist is an affront to the sovereignty of nonmember States. Any time a State adopts a *fiscal* or administrative policy that affects the programs of a sister State, pressure to modify those programs may result.") (emphases added).

¹⁶⁴ See Turflinger, *supra* note 14, at 835–42.

¹⁶⁵ *Id.* at 835.

¹⁶⁶ U.S. CONST., art. IV, § 4.

¹⁶⁷ See Turflinger, *supra* note 14, at 833–842.

John Adams said he “never understood” the Guarantee Clause and “believe[d] no man ever did or will.”¹⁶⁸ In the famous 1793 case of *Chisholm v. Georgia*, Justice Wilson articulated a “short definition” of a republican state, saying it required “that the Supreme Power resid[e] in the body of the people.”¹⁶⁹ In the 1849 case of *Luther v. Borden*, Justice Taney concluded that only the political branch of the government could define what it meant to have a republican form of government.¹⁷⁰ In *Luther*, the Supreme Court held that the decision to recognize which of two Rhode Island governments was legitimate rested with Congress and not the courts, rendering the Guarantee Clause non-justiciable.¹⁷¹ More than 100 years later in *Baker v. Carr*, the Court explained that a political question was “primarily a function of the separation of powers” and would only come up in instances pertaining to the judiciary’s relationship with other branches of the federal government “not of the federal judiciary’s relationship to the States.”¹⁷²

Assuming the Guarantee Clause would even become justiciable in NPVC litigation, a litigant would have to show that non-signatory states would no longer be accountable to their respective electorates, at least not at the Electoral College.¹⁷³ A non-signatory state would need to demonstrate that the method of allocation it has chosen can no longer be given effect, specifically because the enactment of the NPVC prevented that state from making an independent decision about its electors.¹⁷⁴ A fair criticism of the NPVC is that it undermines the autonomy of non-signatory states in a similar manner to how the state of Maryland undermined federal autonomy by taxing the Bank of the United States.¹⁷⁵ In *McCulloch v. Maryland*, Chief Justice Marshall held that even though Maryland was not forcing the federal government to adopt any particular legislation, the tax on the Bank infringed on a domain that was wholly within the federal government’s power.¹⁷⁶ Using *McCulloch* as a basis for saying how NPVC signatory states are horizontally disrupting a non-signatory state’s republican form of gov-

¹⁶⁸ Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 22–23 (1988).

¹⁶⁹ *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793).

¹⁷⁰ *Luther v. Borden*, 48 U.S. 1, 42 (1849).

¹⁷¹ *Id.*

¹⁷² *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

¹⁷³ See Rolat, *supra* note 159, at 7 (“Regardless of what other states may choose to do, every state remains free to appoint its own presidential electors however it sees fit, even if the NPV[C] compact were adopted. Nothing in the Guarantee Clause prohibits this arrangement.”).

¹⁷⁴ Feeney, *supra* note 141, at 1448 (explaining that a distinction between the NPVC and a system in which states change their method of allocation to a proportional system revolves around whether “[the] states are still making their decisions independently and as states”).

¹⁷⁵ *McCulloch v. Maryland*, 17 U.S. 316, 432 (1819).

¹⁷⁶ *Id.* at 436.

ernment is, at best, difficult to articulate, but could potentially come into play.¹⁷⁷

One scholar argues that the NPVC would violate the Guarantee Clause because it “blurs important federal lines.”¹⁷⁸ However, signatory states already have the plenary power to blur state lines by acting without a compact, so the coordinated state action should not be dispositive of the NPVC’s constitutionality or lack thereof.¹⁷⁹ The NPVC does not determine what method the non-compacting states decide to choose, as “it is still the prerogative of each state legislature to choose its own method.”¹⁸⁰ Though individuals in non-signatory states might be disappointed in the result that follows from the NPVC’s enactment, their state legislatures will always have the means to decide how to appoint its electors.¹⁸¹ Simply put, “[b]eing in the minority does not mean that your vote is not counted; it just means that you lose.”¹⁸² Even in the context of state autonomy, the Guarantee Clause likely would not be invoked absent some federal constraint on non-signatory states.¹⁸³

D. A STATE’S PLENARY ARTICLE II POWER IN PROPERTY LINGO

Another method of articulating whether state sovereignty has been infringed by the NPVC is to analogize the coordinated state actions to property terms. Guido Calabresi and Douglas Melamed’s framework of distinguishing property, liability, and inalienability rules¹⁸⁴ can be helpful in determining if individual states can give up this power to a compact and if the non-signatory’s powers are infringed because of it. By vesting state legislatures with the plenary power to decide their respective state’s method of allocation, the Constitution has effectively given each state legislature an entitlement to that power.¹⁸⁵ Under this theoretical analogy, a non-signatory state could try to counter this argument by saying that even though the allocation power is plenary within the individual states, the delegation of that power to an interstate compact (or to anything else for that matter) inflicts negative externalities on the non-signatory states and thus requires congressional consent.¹⁸⁶

¹⁷⁷ See Feeney, *supra* note 141.

¹⁷⁸ *Id.* at 1444.

¹⁷⁹ See Rolat, *supra* note 159.

¹⁸⁰ *See id.*

¹⁸¹ Hendricks, *supra* note 143, at 226.

¹⁸² *Id.*

¹⁸³ See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator*, 65 U. COLO. L. REV. 749, 754–55 (1994) (discussing the Guarantee Clause’s limits on federal restructuring of state governments).

¹⁸⁴ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁸⁵ Each state legislature has essentially been vested with a property right in deciding its method of allocation. *Id.* at 1092 (providing an overview of how entitlements operate).

¹⁸⁶ *Id.* at 1111 (providing an illustration of how externalities operate).

If a property rule applies to each state's plenary power, then a given state legislature's "entitlement" of choosing its preferred method of allocation cannot be taken away unless the legislature effectively gives it up.¹⁸⁷ The state's selected method of appointing electors would come with the full bundle of property rights—the most important of which would be the right to transfer. An NPVC signatory state legislature's entitlement would even prevent citizens from within that state from claiming that the legislature has impermissibly delegated away their right to vote in a statewide-only form of election.¹⁸⁸ Because citizens get the right to vote only as a result of state legislation, the state legislatures can compact around whatever existing voting rights those citizens may have previously been entitled to.¹⁸⁹

If property rules govern a state legislature's power in a particular area, then that power is inherent in a state's sovereign powers under the Eleventh Amendment.¹⁹⁰ If a liability rule applies to each state's plenary power, then a non-signatory state legislature's entitlement can be "taken" or, more appropriately, marginalized, so long as the body or thing infringing on that entitlement appropriately compensates that state's legislature.¹⁹¹ If an inalienability rule applies, then a given state legislature's entitlement simply cannot be bargained away.¹⁹² At the vertical dimension of federalism, if states have a property rule to protect their entitlements qua states, local autonomy benefits in the sense

¹⁸⁷ *Id.* at 1105 ("No one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property.").

¹⁸⁸ See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (holding that a compact to equitably apportion water rights on between Colorado and New Mexico on the La Plata River was binding upon a corporation that had been previously granted irrigation rights). *Hinderlider* is significant not for articulating any standard whereby a compact requires congressional consent, but for its explanation that a compact has the effect of binding private parties within a state, even if that state has previously granted rights in conflict with the provisions of the compact. *Id.* at 106. The Court's opinion supports the proposition that in enacting a compact, a state, as an abstract political entity, might have greater rights than that of its citizens. *Id.* at 109. Furthermore, the Court said that the taking away of a vested right would require a burdensome showing by the private individual effected, requiring him to show a "vitiating infirmity" on the part of the state in making its decision to enter and enforce the compact. *Id.* at 108–09.

¹⁸⁹ For an articulation of this principle, see *Ouellette v. International Paper Company*, 666 F. Supp. 58, 61 n.1 (D. Vt. 1987) (differentiating rights that are derivative from the state from those that are not).

¹⁹⁰ For NPVC purposes, the question then becomes whether it is acceptable for a state to delegate its Article II powers in the same manner that it would waive sovereign immunity under the Eleventh Amendment. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))).

¹⁹¹ See *Calabresi & Melamed*, *supra* note 184, at 1108–1110 (explaining how a property rule works).

¹⁹² *Id.* at 1111–1115 (explaining how an inalienability rule works).

that local government can be more responsive to its constituents.¹⁹³ A state legislature loses bargaining power with its constituents if it is limited in its responsiveness to pressing concerns; this bargaining power is further decreased if an inalienability rule attaches to a state's entitlement.¹⁹⁴ Consequently, American federalism is better served if a property rule protects a state's plenary Article II power.¹⁹⁵

The seminal case that best illustrates this principle is *New York v. United States*, where the Supreme Court held that the state of New York could not consent to federal legislation that incentivized states to either comply with a federal directive or else face a penalty by "tak[ing] title" to radioactive waste within their states and incurring liability for any damages flowing from that waste.¹⁹⁶ In examining this relationship of vertical federalism, the Court concluded that even though state officials might be incentivized to allow Congress to expand its powers beyond those enumerated in the Constitution, state officials were nevertheless prohibited from such acquiescence.¹⁹⁷ More to the point, the Court explained that the New York state government could not consent to congressional enlargement of power because the federal structure set up by the Constitution was designed to protect *individuals*, not the states themselves.¹⁹⁸

Though the *New York* Court made this determination on Tenth Amendment grounds, it suggested that the outcome might be different if the "take title" provision were composed by way of an interstate compact.¹⁹⁹ Thus, a state power that would be inalienable if conveyed under the guise of federal commandeering might nevertheless be transferrable²⁰⁰ if done by way of an interstate compact.²⁰¹ However, because each state's plenary power is not a reserved power, but rather a positive

¹⁹³ Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 13 (2010) ("[A] property rule approach would better serve the federalism values of local autonomy (locating decisional authority at the local level), interjurisdictional innovation (allowing for the diversity of response that engenders the federalism 'laboratory of ideas'), and problem-solving synergy (fostering intergovernmental partnerships to cope with interjurisdictional problems))." See also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (explaining how the federalism allows for greater government responsiveness).

¹⁹⁴ See Ryan, *supra* note 193, at 13–14.

¹⁹⁵ *Id.* at 14 ("A pro-bargaining property rule would be more consistent with the rest of the Court's federalism jurisprudence, more faithful to the full panoply of values that undergird American federalism, and better for state and federal governance in the gray area.").

¹⁹⁶ *New York v. United States*, 505 U.S. 144, 174–75, 182–83 (1992).

¹⁹⁷ *Id.* at 182 ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.") (emphasis added).

¹⁹⁸ *Id.* at 181.

¹⁹⁹ *Id.* at 183 ("New York has never joined a regional radioactive waste compact. Any estoppel implications that might flow from membership in a compact . . . thus do not concern us here.")

²⁰⁰ A power might be transferrable if it is protected by a property rule.

²⁰¹ See Ryan, *supra* note 193, at 88–89.

grant of authority from the Constitution,²⁰² *New York* would only support an attack on the NPVC for its general propositions of federalism. If a litigant used *New York* to explain how the NPVC is unconstitutional, a court would have decided whether the framers designed the Electoral College system for the benefit of individuals or for the protection of states.²⁰³ Those against the NPVC cannot argue that compacting states are giving up a power that the Constitution mandates they cannot give away.²⁰⁴ The Electoral College sets up a system that “encourages candidates to view states as distinct states, not simply masses of individual voters.”²⁰⁵ However, no individual state has a right to disrupt the overall scheme of the Electoral College.²⁰⁶ Even though signatory state legislatures are arguably delegating their ability to pick electors to the fancies of the national will, such a delegation is permissible since each state is making an intelligible policy decision about how it wants to allocate electors.²⁰⁷ Regardless of what analogy is applied to a state’s plenary power, non-signatory states never had any power to choose electors other than that of their own state and cannot claim that the NPVC has stripped them of any “property right” in their decision on how to allocate electors.

E. IN THE ALTERNATIVE: WITHDRAWAL CONCERNS AND THE LACK OF A BINDING MECHANISM

In potential NPVC litigation, another heavily debated issue within the second prong of the *U.S. Steel* test would be the potentially destructive nature of a signatory state’s unilateral withdrawal from the compact.²⁰⁸ The *U.S. Steel* Court concluded that withdrawal capabilities of signatories was a highly relevant, but not dispositive, factor in con-

²⁰² *Bush v. Palm Beach County Canvassing Bd.* 531 U.S. 70, 76 (2000) (*per curiam*) (unanimous opinion) (“[T]he legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United State Constitution.”)

²⁰³ See *New York v. United States*, 505 U.S. 144, 181 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”)

²⁰⁴ Cf. *Stone v. State of Mississippi*, 101 U.S. 814, 819 (1879) (“No legislature can bargain away the public health or the public morals.”)

²⁰⁵ Paul Boudreaux, *The Electoral College and its Meager Federalism*, 88 MARQ. L. REV. 195, 225 (2004).

²⁰⁶ *Id.* (“[The Electoral College] does not give states themselves any right to exercise independent sovereignty.”). Bradley Smith thinks that “[t]he biggest federalism effect of the College may be simply to remind both candidates and voters of the role of states in our larger federal system.” Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELEC. L. J. 196, 206 (2008).

²⁰⁷ 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, 254 n.79 (2011).

²⁰⁸ Williams, *supra* note 2, at 215–22.

sidering whether an interstate agreement runs afoul of the Compact Clause.²⁰⁹ The concern with the NPVC's self-imposed July 20th blackout date²¹⁰ is that signatory state legislatures could be pressured to change their systems back to an allocation based only on statewide vote if an unfavorable outcome appears imminent.²¹¹ For example, if the NPVC had been enacted in 2004, Massachusetts's Democratic legislature would have had to award its delegates to Republican George W. Bush, despite John Kerry's overwhelming victory in the statewide vote.²¹² Presumably though, signatory states, and the citizens within those states, have already conceded the possibility that their electors might have to cast votes adverse to the political will of their respective states.

The Supreme Court has also determined that once a state has signed on to a compact, it does not retain any independent authority to interpret whether it can withdraw, as other member states will have built up a reliance interest in the process.²¹³ In the nation's early Compact Clause jurisprudence, the Court explained that a compact had the same effect as a contract, and thus a state could not impair its own contract by trying to pass laws that would alter or undermine it.²¹⁴ Unless the terms of the compact allow for such an exit, a state may not terminate the agreement.²¹⁵ Because a compact is an enforceable legal contract, a state's withdrawal from a compact would effectively amount to state legislative action that impairs a contractual obligation, violating the Contract Clause of the Constitution.²¹⁶

Non-signatory states could interfere with the NPVC by failing to comply with the Congressional safe harbor date for counting electoral votes²¹⁷ and by eliminating a true "popular" vote altogether from their state.²¹⁸ Specifically, a non-signatory state could vest the appointment of

²⁰⁹ *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 457, 473 (1978). It is not crystal clear from the opinion whether the "withdrawal" factor is relevant only to the federal supremacy prong of the Compact Clause test or if it applies to the entire Compact Clause inquiry.

²¹⁰ See *supra* note 10.

²¹¹ Williams, *supra* note 2, at 215.

²¹² *Id.*

²¹³ *West Virginia ex. Rel. Dyer v. Sims*, 341 U.S. 22, 28 (1950) ("[The compact] requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States."). See also *id.* at 36 (Jackson, J., concurring) (explaining that because the other member states of the compact developed a reliance interest when West Virginia signed the compact, West Virginia should be estopped from exiting the compact).

²¹⁴ *Green v. Biddle*, 21 U.S. 1, 92–93 (1823) ("[A] State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.").

²¹⁵ The *U.S. Steel* Court found this feature to be explicitly covered by Article X of the Multistate Tax Compact. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 457 (1978).

²¹⁶ U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

²¹⁷ 3 U.S.C. § 5 (2011).

²¹⁸ Williams, *supra* note 2, at 209–15.

electors back to the state legislature, eliminating any popular vote tabulation within that state and absolving all of its voters from figuring into the total votes that would be counted by the signatory states.²¹⁹ While that type of action would be highly unlikely to occur, it would make a mockery of the NPVC, whose member states would count only those votes that were cast in a “statewide popular election.”²²⁰ The enactment of the NPVC might incentivize states to behave in such an irresponsible manner, but the discussion of such a problem is relevant only to the remedies of an untimely withdrawal, not whether the Compact Clause has itself been violated. Moreover, as Congress has Article II authority to handle some of the housekeeping measures of the Electoral College, it could pass a statute that requires states to set a reasonable time for changing its method of allocation once one has been selected.²²¹

NPVC proponents might run into trouble under that criterion, considering the compact’s July 20th deadline for compacting states to withdraw in an election year if the NPVC is in effect.²²² This self-imposed blackout date was not contemplated in the Amar brothers’ original plan, with the two professors even going so far as to rely on a state’s ability to withdraw from the compact as being a significant reason for why the compact would not require congressional consent.²²³ However, wiggle room could be in the level of generality applied to the term “withdrawal.” Signatory states could argue that even though they cannot withdraw *as states* past the July 20th blackout date, the electors from states that do not have binding statutory provisions maintain personal voting discretion and thus individually retain withdrawal power *on behalf* of the state.

The diminished significance of electors was acknowledged not long after the introduction of political parties.²²⁴ Faithless electors are rare, and no “well-understood rules” govern their conduct.²²⁵ On a strict reading of the NPVC, one might conclude that the legislation effectively does nothing to bind electors, as it imposes a mandate only on state legislatures.²²⁶ Consequently, in order for these electors in signatory states to be bound, a court would have to explicitly acknowledge that the meeting of the electors is a mere formality. If a court

²¹⁹ *Id.* at 215–16.

²²⁰ See *National Popular Vote Compact*, *supra* note 8.

²²¹ Amar, *supra* note 225, at 261 n.80.

²²² See *National Popular Vote Compact*, *supra* note 8.

²²³ Amar & Amar, *supra* note 3. (“[E]ach state would retain complete unilateral freedom to switch back to its older system for any future election, and the coordinated law creates no new interstate governmental apparatus.”).

²²⁴ See 1 THOMAS BENTON, THIRTY YEARS’ VIEW; OR A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850 37 (D. Appleton & Co. 1854).

²²⁵ BENNETT, *supra* note 53, at 121 (explaining that no rules actually explain an elector’s obligation, but that some statutes acknowledge the existence of some kind of obligation).

²²⁶ See *National Popular Vote Compact*, *supra* note 8.

determined that electors maintain their independent voting discretion at the Electoral College,²²⁷ the NPVC could potentially certify faithless electors, allowing signatory states to pressure electors into “withdrawing” for them.

Though the Supreme Court has not made a definitive holding on the roles of electors at the Electoral College, it held in *Ray v. Blair* that the Chairman of the Alabama Executive Committee of the Democratic Party could refuse to certify an elector who refused to pledge his support to the eventual Democratic candidate for president.²²⁸ The *Ray* dissent thought that by allowing the party chairman to refuse certification, the majority had “elevate[d] the perversion of the forefathers’ plan into a constitutional principle.”²²⁹ The Court did not reach the issue of whether an elector has a constitutional obligation to vote for the party he or she is pledged to, merely saying that the Twelfth Amendment did not serve as a bar to a political party’s requirement that a pledge vote for the party’s eventual national nominee.²³⁰ Significantly, for NPVC purposes, the *Ray* Court never explained what would happen if an elector chose to violate his pledge.²³¹ Even if an elector were to be enjoined from voting for a particular candidate but did so anyway, the subsequent legal proceedings might affect that elector individually, yet still be of no consequence to the Electoral College.²³² The faithless elector could run away with his vote even if the political party he was pledged to vote in accordance with sought to enjoin him.

A layer of delegates in-between the people and the actual casting of votes was initially viewed as both as important to both the preservation of the country’s republican structure and the fear that the swaying power of educated men would result in the public making poor choices.²³³ The Electoral College was introduced to its first faithless elector in 1796, when Pennsylvania delegate Samuel Miles, who was expected to cast his vote for John Adams, broke with his expected Federalist

²²⁷ The NPVC’s text does not suggest otherwise. As a baseline for defining the roles of electors, NPVC supporters could look back to original interpretations. See THE FEDERALIST No. 68, *supra* note 48, at 410-13.

²²⁸ *Ray v. Blair*, 343 U.S. 214, 228-231 (1952). The Court had briefly mentioned the roles of electors 62 years earlier, but did not address the issue of an elector’s obligation to the party he is pledged to. *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (“The sole function of the presidential electors is to cast, certify, and transmit the vote of the state for president and vice-president of the nation.”).

²²⁹ *Ray*, 343 U.S. at 234 (Jackson, J., dissenting). See also *id.* at 233 (Jackson, J., dissenting) (“It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice.”)

²³⁰ See *id.* at 231 (Jackson, J., dissenting).

²³¹ James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 L. & CONTEMP. PROBLEMS 495, 509 (1962).

²³² *Id.*

²³³ Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 676 (1996). See also MADISON, *supra* note 15.

endorsement and placed his vote for Thomas Jefferson.²³⁴ Some state courts have also acknowledged the practical responsibilities of electors yet refrained from imposing any responsibility on the electors absent a legislative mandate.²³⁵ Other state courts have recognized a delegate's legal duty to carry out his vote in accordance with the party he is nominated to.²³⁶ Older cases seem to weigh a balancing of the mere formality proposition, but ultimately conclude that state law cannot fetter an elector's discretion to vote as he so chooses.²³⁷ The problem is hardly a current one, and the diminished significance of electors was acknowledged not long after the introduction of political parties.²³⁸ While often never considered by the voting public, the possibility and awareness of faithless electors is quite real.²³⁹ As recently as 2000, George W. Bush's campaign team was considering potential strategies on how to persuade delegates to change their votes from Gore to Bush in the event that Gore won the Electoral College and Bush won the popular vote.²⁴⁰ Prior to Election Day, the Bush campaign was planning a media blitz in which it would prepare "talking points about the Electoral College's essential unfairness," trying to pressure Gore delegates to switch their votes.²⁴¹

At least twenty-eight states and the District of Columbia have enacted some form of statute that binds pledged delegates to vote for

²³⁴ PEIRCE & LONGLEY, *supra* note 21, at 36. The *United States Gazette* later quoted a Federalist as saying, "What, do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think." *Id.*

²³⁵ See, e.g., *Wallace v. Thornton*, 162 S.E.2d 273, 275 (S.C. 1968) ("Theoretically, the electors go to the electoral college and exercise an independent judgment in choosing a President. In actuality they go committed to vote for a certain candidate.").

²³⁶ E.g., *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924) ("They are in effect no more than messengers whose sole duty it is to certify and transmit the election returns."); *Thomas v. Cohen*, 262 N.Y.S. 320, 326 (N.Y. Sup. Ct. 1933) ("[T]he trust that was originally conferred upon the electors by the people, to express their will by the selections they make, has, over these many years, ripened into a bounden duty -- as binding upon them as if it were written into the organic law."). See also *State v. Wait*, 138 N.W. 159, 163 (Neb. 1912).

²³⁷ See, e.g., *Bridenthal v. Edwards*, 46 P. 469, 470 (Kan. 1896) (finding no legal obligation for electors to vote for any particular candidate and concluding that neither the secretary of state nor the courts can interfere with an elector's discretion).

²³⁸ See BENTON, *supra* note 224.

²³⁹ See BENNETT, *supra* note 53, at 122.

²⁴⁰ Michael Kramer, *Bush Set to Fight An Electoral College Loss*, N.Y. TIMES (Nov. 1, 2000), http://articles.nydailynews.com/2000-11-01/news/18145743_1_electoral-votes-popular-vote-bush-aide.

²⁴¹ *Id.*

the candidate that they have been pledged to.²⁴² Two NPVC signatory states, Illinois and New Jersey, have not enacted any such statutes.²⁴³ Some states impose financial²⁴⁴ or criminal²⁴⁵ penalties for failure to vote in accordance with the party that nominated the elector. Some states even see a benefit in maintaining elector discretion in the event that a candidate dies between Election Day and the date the Electoral College vote is set for. For example, Wisconsin and Tennessee bind their electors to vote in accordance with the party that nominated them to be delegates, but if the candidate to whom those delegates are pledged has died before the Electoral College convenes, then those delegates retain electoral discretion.²⁴⁶ The flexibility that flows from the maintenance of elector discretion allows the avoidance of House contingency elections in the event that independent candidates prevent any one candidate from receiving a majority of votes and the election of winning candidates who are later found to be “totalitarian or corrupt.”²⁴⁷ South Carolina, for example, allows for a party to relieve an elector of his pledge if in the party’s opinion, “it would not be in the best interest of the State for the elector to cast his ballot for such a candidate.”²⁴⁸

For purposes of a Compact Clause analysis, the determination of the electors’ roles is crucial, particularly when considering the NPVC from an *ex ante* perspective. When viewed *ex post*, the NPVC looks unconstitutional, as the exact effect contemplated by those who argue against the NPVC does, in fact, occur. That is, pledged delegates vote for the winner of the national popular vote, the winner of that vote becomes president, and the non-signatory states will have had no say

²⁴² ALA. CODE § 17-14-31 (West 2011); ALASKA STAT. § 15.30.090 (2011); CAL. ELEC. CODE § 6906 (West 2011); COLO. REV. STAT. ANN. § 1-4-304(5) (West 2011); CONN. GEN. STAT. ANN. § 9-176 (West 2011); DEL. CODE ANN., tit. 15, § 4303(b) (West 2011); D.C. CODE § 1-1001.08(g)(2) (West 2010); FLA. STAT. ANN. § 103.021(1) (West 2011); HAW. REV. STAT. § 14-28 (West 2011); ME. REV. STAT. ANN. tit. 21-A, § 805(2) (West 2010); MD. CODE ANN., ELEC. LAW § 8-505(c) (West 2011); MICH. COMP. LAWS ANN. § 168.47 (West 2011); MISS. CODE ANN. § 23-15-785 (West 2011); MONT. CODE ANN. § 13-25-104(c) (West 2011); MASS. GEN. LAWS ch. 53, § 8 (West 2011); NEB. REV. STAT. §§ 32-714, 298.050 (West 2011); N.M. STAT. § 1-15-9 (West 2011); N.C. GEN. STAT. § 163-212 (West 2011); OHIO REV. CODE ANN. § 3505.40 (West 2011); OKLA. STAT. tit. 26, § 26-10-102 (West 2011); OR. REV. STAT. § 248.355(2); S.C. CODE ANN. § 7-19-80 (West 2011); TENN. CODE ANN. § 2-15-104(c) (West 2011); UTAH CODE ANN. § 20A-13-304 (West 2011); VT. STAT. ANN. tit. 17, § 2732 (West 2011); VA. CODE ANN. § 24.2-203 (West 2011); WASH. REV. CODE ANN. § 29A.56.320 (West 2011); WIS. STAT. ANN. § 7.75(2) (West 2011); WYO. STAT. ANN. § 22-19-108 (West 2011).

²⁴³ See 10 ILL. COMP. STAT. ANN. 20 (West 2011); N.J. STAT. ANN. § 19:36-4 (West 2011). Neither of these statutes makes any mention of binding electors.

²⁴⁴ See, e.g., N.C. Gen. Stat. Ann. § 163-212 (West 2011) (requiring that delegates pay a \$500 fine if they vote for a candidate in a party that he was not nominated by).

²⁴⁵ See, e.g., N.M. STAT. ANN. § 1-15-9(B) (West 2011) (“Any presidential elector who casts his ballot in violation of the provisions contained in Subsection A of this section is guilty of a fourth degree felony.”).

²⁴⁶ WIS. STAT. ANN. § 7.75(2) (West 2011); TENN. CODE ANN. § 2-15-104 (West 2011).

²⁴⁷ Ross & Josephson. *supra* note 233.

²⁴⁸ S.C. CODE ANN. § 7-19-80 (West) (2010).

in deciding how the president should be determined.²⁴⁹ However, when viewed *ex ante*, the NPVC's text appears to be doing something far different, as it has no binding mechanism on the *actual electors*, but only on the state legislatures.²⁵⁰ In the New Jersey Assembly Appropriations Committee's Statement that follows that state's version of the NPVC, the legislature presumes that the bill "requires" electors from signatory states to vote for the national popular vote winner.²⁵¹ However, the bill's text itself does not provide for any penalties if electors choose to vote differently.²⁵² Any binding mechanism on the actual electors comes from the state enforcement statutes, and likely would survive federal preemption.²⁵³

As the *Ray* Court made clear, neither the Constitution nor any federal statute mandates that the electors vote for the candidate whom they are pledged for.²⁵⁴ Only custom has made such the practice.²⁵⁵ Thus, under an *ex ante* framing of the NPVC, the agreement to allocate electors in a uniform manner only gives the signatory states a *chance* to control the Electoral College, not a definitive guarantee that they *will* control it.²⁵⁶ However, if all the signatory states subsequently adopt criminal penalties or other statutes that bind the electors, then the *ex ante* perspective might not have as much bite.²⁵⁷ While the NPVC as a whole might be ripe for a court to evaluate prior to an election,²⁵⁸ the constitutionality of a pledged delegate's lack of adherence to the NPVC and/or state enforcement statutes might present different questions

²⁴⁹ See Muller, *supra* note 80.

²⁵⁰ *National Popular Vote Compact*, *supra* note 8 ("The presidential elector certifying official of each member state shall certify the *appointment* in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.") (emphasis added).

²⁵¹ N.J. STAT. ANN. § 19:36-4 (West 2011).

²⁵² *Id.*

²⁵³ State enforcement statutes likely would not be preempted since the NPVC does not govern the conduct of electors, even though it would have the force of federal law. See *supra* note 69.

²⁵⁴ *Ray v. Blair*, 343 U.S. 214, 228–31 (1952).

²⁵⁵ *Id.* at 228–30.

²⁵⁶ Even with such a framing of the NPVC, it would still nonetheless be regarded as a compact, and supporters would likely be wasting time trying to argue that the NPVC should not even be evaluated under the Compact Clause. See, e.g., *Breest v. Moran*, 571 F. Supp. 343, 345 (D.R.I. 1983) ("[N]ot every agreement between the states (howsoever entitled) is a 'compact' *within the meaning and intent of the Compact Clause*.").

²⁵⁷ Even at this point, the electors would not necessarily be bound to vote for the particular candidate, but rather would only suffer penalties if they chose to cast their vote for another candidate. In the event that an elector broke the law, the Constitution is silent on whether his or her vote would still count. See BENTON, *supra* note 224, at 115 ("The Constitution requires that a candidate receive a majority of the votes of "appointed" electors in order to avoid the House selection procedure, and a faithless elector could then deprive a candidate of the necessary majority and throw the process into the House.").

²⁵⁸ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967) (discussing the "ripeness doctrine.").

either independent of the NPVC or determinative of the NPVC's constitutionality.²⁵⁹

Under this “lack of a binding mechanism” argument, the strongest line of support for the NPVC is that while it is not airtight in all of the possible areas of constitutional analysis, it can survive on the grounds that it is not asking for its pledged electors to do anything more than they are constitutionally permitted (and, arguably, mandated) to do. As the Constitution is silent on the roles of the electors themselves, the precise moment that a transfer of power occurs under the second prong of the Compact Clause will not be clear until after a candidate has been officially elected.²⁶⁰

CONCLUSION

In short, assessing the constitutionality of the NPVC is a difficult exercise. Not only are the controlling precedents arcane and outdated, but the applicable constitutional provisions and principles are also dense and difficult to articulate.

The Compact Clause presents a number of hurdles for both supporters and detractors of the NPVC. The most difficult component of a Compact Clause inquiry is defining what power, if any, is being infringed on.²⁶¹ That exercise calls for the analysis of deep philosophical questions of the rights that come with state sovereignty, making it challenging to ascertain whether, or even if, the NPVC runs afoul of the many principles of federalism that have already been established. While the Compact Clause will likely be at the center of the debate if the constitutionality of the NPVC is ever presented to a court, the NPVC can pass constitutional muster even if it encroaches on the sovereignty of non-member states. Because the role of electors has yet to be defined by a court, those electors retain independent withdrawal power on behalf of compacting states.

The irony of the NPVC debate is that when enacted, the NPVC would have little substantive change on the end result of who gets elected.²⁶² The change, if any, would likely come in campaign strategy, as population centers, rather than swing states, will become the new targets of campaign stops. The political ramifications of the NPVC, though only tangentially related to an assessment of its constitution-

²⁵⁹ See BENTON, *supra* note 224., at 115 (“Courts only grapple with interpretational problems after controversy has gelled and a lawsuit has been filed. In the case of a faithless electoral vote that seems to change the outcome of a presidential election, that will be awfully late in the game.”).

²⁶⁰ See Muller, *supra* note 80.

²⁶¹ See *supra*, Part IV. C-E.

²⁶² While candidates might campaign differently with the enactment of the NPVC, the actual vote totals probably would not change significantly. See Brian P. Janiskee, “The Multiplier Effect,” http://www.claremont.org/publications/pubid.376/pub_detail.asp (last visited Dec. 29, 2012) (explaining how the national vote usually tracks the Electoral College vote).

ality, would undoubtedly figure into the Supreme Court's calculus, should a case about the NPVC ever get that far. Regardless of what comes of NPVC litigation, constitutional scrutiny of it is a healthy exercise for the country, allowing scholars to focus on the merits of seldom-discussed constitutional clauses, the roles of electors, and the purposes of the Electoral College.