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# The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause

Heather Green \*

## INTRODUCTION

On August 8, 2011, California became the ninth United States jurisdiction to pass the “Agreement Among the States to Elect the President by National Popular Vote” (NPV agreement).<sup>1</sup> Once the NPV agreement receives the equivalent of at least 270 electoral votes,<sup>2</sup> the traditional Electoral College will be overhauled in favor of a national popular vote for the President of the United States.<sup>3</sup> Specifically, member states like California will be bound to abandon the widely used practice of selecting electors based on the outcome of the statewide vote.<sup>4</sup> Instead, state electors will be chosen in favor of the candidate winning the most votes nationally.<sup>5</sup> Until August of 2011, the NPV agreement had obtained less than thirty percent of the 270 vote total.<sup>6</sup> With the addition of California’s fifty-five electors, the agreement now has nearly fifty percent of the votes required to become effective.<sup>7</sup>

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<sup>1</sup> See 2011 Cal. Legis. Serv. Ch. 188 (West); see also Ben Boychuk & Pia Lopez, *Head to Head: Has the Time Come for the States to Help Fix the Electoral College?*, SACRAMENTO BEE, Aug. 10, 2011, <http://www.sacbee.com/2011/08/10/3827460/head-to-head-has-the-time-come.html> (reporting that California joined “seven other states and the District of Columbia in the National Popular Vote compact”).

<sup>2</sup> See *infra* text accompanying note 33 (discussing when the NPV becomes effective).

<sup>3</sup> See JOHN R. KOZA ET AL., EVERY VOTE EQUAL: ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 248 (2011) (indicating that Article III of the NPV agreement requires that the election official from 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”).

<sup>4</sup> See *infra* text accompanying note 160.

<sup>5</sup> See KOZA ET AL., *supra* note 3, at 248 (explaining that under Article III of the NPV agreement, member states must base their choice of electors on the “national popular vote total” determined by the “number of votes for each presidential slate in each State of the United States and in the District of Columbia”).

<sup>6</sup> See David Siders, *Jerry Brown Signs Popular Vote Bill*, SACRAMENTO BEE, Aug. 8, 2011, <http://blogs.sacbee.com/capitolalert/latest/2011/08/jerry-brown-signs-popular-vote.html> (reporting that before California passed the NPV agreement, the seven other states and the District of Columbia, which had already passed NPV legislation, committed seventy-four of the 270 total electoral votes needed).

<sup>7</sup> See *id.* (explaining that California added fifty-five electoral votes to the NPV agreement when

Although all past attempts to implement popular or direct presidential elections have failed to obtain the support needed for a successful constitutional amendment,<sup>8</sup> the NPV agreement presents an alternative means of achieving electoral reform. Relying on the power given to the states under Article II of the Constitution,<sup>9</sup> the NPV agreement avoids the amendment requirements by regulating the selection of electors at the state level.<sup>10</sup> Proponents believe that the NPV agreement will make every vote in every state equally important,<sup>11</sup> increasing the significance of uncompetitive states like California that are largely ignored in presidential elections.<sup>12</sup> The creators also intended that the NPV agreement would avoid situations in which presidential candidates win the presidential election without winning the popular vote.<sup>13</sup> However, the NPV agreement will also radically alter both the traditional method for electing the President and the distribution of voting power among the states.<sup>14</sup>

This comment focuses on the validity of the NPV agreement under the Compact Clause.<sup>15</sup> The text of the Clause requires that, in order to be valid, interstate agreements and compacts must obtain the consent of Congress.<sup>16</sup> The Supreme Court's interpretation has narrowed the Clause,

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it passed the NPV legislation in August 2011).

<sup>8</sup> See NEAL R. PEIRCE, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE* 151 (1968) (noting that there have been over 500 attempts in Congress to amend the constitutional provision for the Electoral College); Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of the President*, 73 AM. HIST. 35, 35 (1986) ("Close to seven hundred proposals to amend the Electoral College scheme have been introduced into Congress since the Constitution was inaugurated in 1789."); L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL 30804, *THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS* 17 (2004) (indicating that most of the proposed amendments "had minimal legislative activity," but some failed due to "insufficient legislative support"); see, also, Lodge-Gossett Amendment, S.J. Res. 200, 80th Cong. (1948) (proposing proportional allocation of electoral votes based on the number of votes cast in each state, but failing to pass the House). A successful constitutional amendment requires the support of two-thirds of both the House and the Senate. See U.S. CONST. art. V.

<sup>9</sup> See U.S. CONST. art. II, § 1, cl. 2 (allowing state legislatures to appoint electors in any way they may choose).

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See KOZA ET AL., *supra* note 3, at 245 (indicating that a national popular vote is the only electoral approach that achieves equality in voting).

<sup>12</sup> Siders, *supra* note 6 (reporting that "proponents say the agreement would make California more relevant in presidential elections"); Ralph Z. Hallow, *GOP Factions Unite Against Presidential Popular Vote Push*, WASHINGTON TIMES, Aug. 2, 2011, <http://www.washingtontimes.com/news/2011/aug/2/gop-factions-unite-against-president-popular-vote/?page=all> (indicating that supporters believe that the NPV agreement "would 'guarantee that every vote matters'").

<sup>13</sup> See *California: Brown Signs Electoral College Revision*, N.Y. TIMES, Aug. 8, 2011, available at <http://www.nytimes.com/2011/08/09/us/09brfsBROWNSIGNSELBRF.html?r=1&ref=electoralcollege> (reporting that the "National Popular Vote[] seeks to prevent a repeat of 2000, when Al Gore won the popular vote[,] but George W. Bush won the electoral vote"); KOZA ET AL., *supra* note 3, at 245 (positing that the NPV agreement would "ensure the election to the Presidency of the candidate with the most popular votes nationwide").

<sup>14</sup> See *infra* Part II.C.

<sup>15</sup> See U.S. CONST. art. I, § 10, cl. 3 (defining the Compact Clause).

<sup>16</sup> *Id.*

requiring congressional approval only when an interstate compact encroaches on the power of the federal government.<sup>17</sup> However, the question of whether the NPV agreement requires congressional consent is unclear. While it does not involve federal encroachment, it does interfere with the voting power of nonmember states, an issue which has never been squarely decided by the Supreme Court.<sup>18</sup> In addition, the power given to states under Article II of the United States Constitution to determine the method by which electors are selected is not subject to congressional interference.<sup>19</sup> Thus, a conflict between the two constitutional provisions leaves the legitimacy of the NPV agreement open to debate.

In Part I, this comment explores the provisions of the NPV agreement, its history, and the rationale behind it.<sup>20</sup> Part II addresses the need for congressional consent under the text of the Compact Clause, the Supreme Court's narrower interpretation of the Clause, and the absence of a conclusive decision from the Court regarding encroachment on nonmember states.<sup>21</sup> Part III then investigates the conflict between Article II and the Compact Clause regarding the proper role of Congress in determining the validity of the NPV agreement.<sup>22</sup> Part III concludes that the NPV agreement is subject to congressional approval. The NPV agreement not only increases the voting power of signatory states while encroaching upon the power of nonmember states, but also falls within the plain meaning of the Compact Clause.<sup>23</sup>

## I. THE NATIONAL POPULAR VOTE AGREEMENT

The NPV agreement is unique in its state level approach. Instead of abolishing the Electoral College, it avoids the difficulties in passing an amendment by enacting popular vote legislation to individual state legislatures, and regulates the state's Article II power to determine how electors are selected.<sup>24</sup> Section A examines the provisions of the NPV legislation introduced, and in some cases, passed by state legislatures. Section B investigates the origins of the NPV agreement and its adoption in a number of states. In Section C, the rationale behind the NPV agreement and why it has been embraced in particular states is discussed.

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<sup>17</sup> See *infra* Part II.B.

<sup>18</sup> See *infra* Part II.C.

<sup>19</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>20</sup> See *infra* Part I.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part III.B.

<sup>24</sup> See Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 218 (2008) (indicating that the NPV agreement relies on state power over selection of electors to establish a "state-by-state path to a National Popular Vote").

### A. The Mechanics of the NPV Agreement

The NPV does not eliminate the Electoral College, but it does significantly change how the electors are chosen.<sup>25</sup> The Constitution grants the states the power to determine the method by which electors are chosen,<sup>26</sup> and traditionally, states have chosen to select electors based on the outcome of a statewide popular vote.<sup>27</sup> The NPV agreement, on the other hand, lays out a number of provisions requiring that signatory states select presidential electors based on the outcome of the popular vote at the national level.<sup>28</sup>

These provisions would require that each state conduct a statewide popular vote similar to that under the current Electoral College system.<sup>29</sup> Then the votes from the individual states would be counted and combined by election officials in each member state to produce an official national popular vote total.<sup>30</sup> Each of those states that have adopted the NPV agreement would be bound to choose electors based on this total.<sup>31</sup> In the event of a tie in the national vote, each signatory state would revert to choosing its electors based on the winner of the statewide popular vote.<sup>32</sup>

The NPV agreement does not immediately bind the choices of the signatory states, however. Instead, it will become effective only after enough states approve it to make up at least 270 electoral votes, or a majority of the Electoral College.<sup>33</sup> In addition, an important limitation is

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<sup>25</sup> See KOZA ET AL., *supra* note 3, at 247 (explaining that while “[t]he Electoral College would remain intact under the proposed compact,” it would change it to “a body that reflects the voters’ nationwide choice”).

<sup>26</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>27</sup> See *infra* text accompanying note 53 (defining this method as the unit rule); see also note 160 (describing the use of the unit rule by nearly every state and the District of Columbia).

<sup>28</sup> See KOZA ET AL., *supra* note 3, at 248 (indicating that Article III of the NPV agreement requires that the election official from 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).

<sup>29</sup> See *id.* at 250 (requiring that “[e]ach member state shall conduct a statewide popular election for the President and Vice President of the United States.”).

<sup>30</sup> See *id.* at 252–53 (“[T]he chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes 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.”).

<sup>31</sup> See *id.* at 250 (describing states as the members to the “Agreement Among the States to Elect the President by National Popular Vote” which “mandates a popular election for President and Vice President”).

<sup>32</sup> See *id.* at 248.

<sup>33</sup> See *id.* at 249 (reporting that under Article IV of the agreement, the agreement “shall take effect when states cumulatively possessing a majority of the electoral votes have enacted [the] [a]greement in substantially the same form”); Press Release, John Buchanan, Congressman, Prepared Remarks for Initial Press Conference of National Popular Vote at National Press Club in Washington (Feb 23, 2006) (on file with National Popular Vote) (indicating that the laws will only “come to life” once “identical laws have been enacted by states collectively possessing a majority of the electoral votes”); Hendrik Hertzberg, *Count ‘Em*, THE NEW YORKER, Mar. 6, 2006, <http://www.newyorker.com/archive/2006/03/06/060306tatkertberg> (“The compact would take effect only when enough states had joined it to elect a President . . .”).

placed upon each signatory state's ability to repeal the NPV agreement. In an effort to prevent states from freely withdrawing solely to select electors in a way "better suited [to] their political preferences,"<sup>34</sup> the NPV agreement creates a "blackout" period.<sup>35</sup> Any withdrawal from the NPV agreement taking place within the six months before the end of a President's term is not effective until after the election for the next presidential term has concluded.<sup>36</sup> Thus, if a state wishes to vote for a candidate who better represents its interests but is likely to lose in the national popular vote, it must repeal the NPV legislation before July 20 of an election year.<sup>37</sup> If it misses this deadline, that state may not repeal the NPV legislation until after inauguration day.<sup>38</sup>

#### B. The History and State Approval of the NPV Agreement

Law professor Robert W. Bennett introduced the proposal for a state-implemented shift from the electoral system to a national popular vote without the burdens of a constitutional amendment in the wake of the highly controversial 2000 presidential election.<sup>39</sup> In 2005, entrepreneur John R. Koza founded the National Popular Vote Movement to advocate for the legislative adoption of Bennett's proposal.<sup>40</sup> By 2008, the NPV agreement was introduced in forty-seven state legislatures.<sup>41</sup> Maryland was

<sup>34</sup> *Question Concerning Withdrawal from the National Popular Vote Compact*, NATIONAL POPULAR VOTE (Mar. 13, 2010) <http://www.nationalpopularvote.com/resources/Withdrawal-V6-2010-3-13.pdf>; see also KOZA ET AL., *supra* note 3, at 266 (indicating that the purpose of the withdrawal provision is to prevent states from withdrawing in the middle of a campaign for possibly partisan purposes).

<sup>35</sup> See KOZA ET AL., *supra* note 3, at 265 (explaining that the NPV agreement "permits a state to withdraw from the compact but provides for a 'blackout' period (of approximately six months) restricting withdrawals").

<sup>36</sup> See *id.* at 266 (describing the purpose of the withdrawal limitation as an attempt to prevent withdrawal for "partisan political purposes"); see also *id.* at 249 (indicating that Article IV of the agreement prevents withdrawal "occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term"); Paul Casey, *Is It Time For Electoral Reform?*, WICKED LOCAL STONEHAM (Sept. 24, 2007, 3:35 PM) <http://www.wickedlocal.com/stoneham/opinion/x775330870#axzz1cww2X6WA> ("[S]tates could withdraw from the agreement at any time except during a six-month window between July 20 of an election year and inauguration day.").

<sup>37</sup> See KOZA ET AL., *supra* note 3, at 266 ("The blackout period starts July 20 of a presidential election year . . .").

<sup>38</sup> See *id.* (explaining that the blackout period "would normally end on January 20 of the following year (the scheduled inauguration date)").

<sup>39</sup> See Robert W. Bennett, *Popular Election of the President without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 241 (2001).

<sup>40</sup> See Andrew Ferguson, *The Head Counter: John Koza has an Ingenious Plan to Put the Electoral College Out of Business*, FORTUNE, July 21, 2008, at 119, available at <http://money.cnn.com/magazines/fortune/fortunearchive/2008/07/21>; Rick Lyman, *Innovator Devises End Run Around Electoral College*, N.Y. TIMES, Sept. 22, 2006, <http://www.nytimes.com/2006/09/22/us/politics/22electoral.html>; Stevenson Swanson, *Turning Election into Popularity Race*, CHI. TRIB., July 21, 2008, at A18, available at <http://articles.chicagotribune.com/2008-07-21/news>.

<sup>41</sup> *Maryland Sidesteps Electoral College*, MSNBC (Apr. 10, 2007, 11:17 AM) <http://www.msnbc.msn.com/id/18053715/ns/politics/t/maryland-sidesteps-electoral-college/#.TwfNHZxVujY>.

the first state to formally adopt the NPV agreement in 2007,<sup>42</sup> followed by New Jersey,<sup>43</sup> Illinois,<sup>44</sup> and Hawaii in 2008,<sup>45</sup> Washington in 2009,<sup>46</sup> Massachusetts<sup>47</sup> and the District of Columbia in 2010,<sup>48</sup> and Vermont<sup>49</sup> and California in 2011.<sup>50</sup> With the addition of California's fifty-five electoral votes, the agreement has successfully obtained 132 of the 270 electoral votes needed for the agreement to become effective.<sup>51</sup>

### C. Rationale Behind the Agreement and State Approval

The advocates for the NPV agreement cite three main reasons for national popular vote election as opposed to traditional election by the Electoral College.<sup>52</sup> First, they believe that under the unit rule system,<sup>53</sup> individual votes are virtually worthless unless the voter lives in a highly contested state where an individual vote could tip the scale toward one candidate or another.<sup>54</sup> Second, the unit rule has been seen as the cause of candidates spending a disproportionate amount of time and resources in competitive states while the remaining states are largely ignored.<sup>55</sup> Finally, national popular vote advocates often cite the ability of the traditional

<sup>42</sup> See MD. CODE ANN., ELEC. LAW § 8-5A-01 (LexisNexis 2007).

<sup>43</sup> See N.J. STAT. ANN. § 19:36-4 (West 2008).

<sup>44</sup> See 10 ILL. COMP. STAT. ANN. 20/1 (West 2009).

<sup>45</sup> See HAW. REV. STAT. ANN. § 14D-1 (LexisNexis 2008).

<sup>46</sup> See WASH. REV. CODE ANN. § 29A.56.300 (West 2009).

<sup>47</sup> See 2010 Mass. Acts 229.

<sup>48</sup> See D.C. CODE § 1-1051.01 (LexisNexis 2010).

<sup>49</sup> See VT. STAT. ANN. tit. 17, § 2751 (2011).

<sup>50</sup> See CAL. ELEC. CODE § 6921 (West 2011).

<sup>51</sup> See Nate Silver, *Pa. Electoral College Plan Could Backfire on G.O.P.*, N.Y. TIMES, (Sept. 15, 2011, 11:56 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/09/15/pennsylvania-electoral-college-plan-could-backfire-on-g-o-p>.

<sup>52</sup> The creators of the NPV agreement identify "accuracy," "competitiveness," and "equality" as the three criteria by which they analyze both the Electoral College and the NPV agreement. See KOZA ET AL., *supra* note 3, at 245. "Accuracy" is defined as the ability to "ensure the election to the Presidency of the candidate with the most popular votes nationwide." *Id.* "Competitiveness" is the ability of the electoral method to "improve upon the current situation in which voters in two-thirds of the states are ignored because they live in presidentially non-competitive states." *Id.* "Equality" is defined as the ability of the method to make "every vote . . . equal." *Id.* The creators argue that the NPV agreement is the only method that meets all three criteria. *Id.*

<sup>53</sup> The unit rule describes the state initiated practice of "aggregating a state's electoral votes as a unit" on a general ticket. See Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2124 (2001) (describing the origination of the unit rule in the presidential election of 1800); see also *infra* text accompanying note 160 (explaining the nearly universal use of the unit rule by states today).

<sup>54</sup> KOZA ET AL., *supra* note 3, at 243.

<sup>55</sup> See Jack N. Rakove, *Presidential Selection: Electoral Fallacies*, 119 POL. SCI. Q. 21, 23 (2004) (noting that under the current electoral system, candidates are able to focus their scarce resources on a "relatively small number of electoral units that are in serious contention"); Brenden J. Doherty, *Elections: The Politics of the Permanent Campaign: Presidential Travel and the Electoral College, 1977-2004*, 37 PRESIDENTIAL STUDIES Q. 749, 750 (2007) (recognizing the assumption made by some that candidates, specifically incumbents, are "single-minded seekers of reelection" who will inherently spend more time in the states with the most political value); Daron R. Shaw, *The Methods behind the Madness: Presidential Electoral College Strategies, 1988-1996*, 61 J. POL. 893, 911 (1999) (positing that candidates allocate resources based on systematic planning and strategy under the electoral college).

Electoral College system to elect a President who failed to win the nationwide popular vote, as inconsistent with democratic ideology.<sup>56</sup>

State legislatures have recognized similar rationale. Those that have passed the NPV legislation have especially emphasized campaign attention and the power of individual voters as justification for enactment of the NPV agreement.<sup>57</sup> Indeed, the importance of these factors is supported by an examination of the states that have passed the NPV legislation.<sup>58</sup> So far, none of the signatory states are currently considered “battleground” states thought to receive the most resources and voting power.<sup>59</sup> Instead, many of them are thought to be “spectator” states receiving the least amount of campaign attention and where the statewide vote is typically not competitive.<sup>60</sup>

## II. THE NPV AGREEMENT AND CONGRESSIONAL APPROVAL

The NPV agreement has been challenged and extensively analyzed by critics on various grounds including the Voting Rights Act<sup>61</sup> and the Guaranty Clause.<sup>62</sup> This comment focuses on the most serious constitutional objection facing the NPV agreement: whether it requires

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<sup>56</sup> See Keena Lipsitz, *The Consequences of Battleground and “Spectator” State Residency for Political Participation*, 31 POL. BEHAV. 187, 187–88 (2008) (noting that “George W. Bush’s ability to win the 2000 presidential election without winning the popular vote reinvigorated calls for abolishing the Electoral College” and that those dissatisfied with the Electoral College have begun to support a national popular vote); see also Randall E. Adkins & Kent A. Kirwan, *What Role Does the “Federalism Bonus” Play in Presidential Selection?*, 32 PUBLIS: J. OF FEDERALISM 71, 71 (2002) (observing that after close election in 2000, politicians began advocating elimination or revision of the Electoral College); Bonnie J. Johnson, *Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?*, 35 PUBLIS: J. OF FEDERALISM 337, 337–38 (2005) (indicating that both the 2000 election of George W. Bush and the very narrow 1888 election of Benjamin Harrison triggered questions about the validity of the Electoral College and that under a national democracy, the President should be elected by popular vote).

<sup>57</sup> See H.R. REP. NO. 111-5599, at 1 (2009) (identifying the fact that “[t]he current system forces candidates to focus only on a few states” and the supporters’ belief that the agreement “will involve more citizens in presidential campaigns”); MD. DEPT. OF LEGIS. SERVS., *Md. Fiscal and Policy Note*, H.R. 148, 2007 Sess., at 1 (2007) (discussing the “concentration of campaigning in a minority of closely divided states and the ability of a candidate to win the presidency without winning the national popular vote”); ASSEMB. APPROPRIATIONS COMM., NEW JERSEY ASSEMBLY COMMITTEE STATEMENT, Leg., 212, A.B. 4225 (2007) (“This agreement ensures that all states are competitive in presidential elections, makes all votes important and equal . . .”).

<sup>58</sup> See *supra* text accompanying notes 42–50 (listing the states that have successfully passed the NPV agreement).

<sup>59</sup> See Johnson *supra* note 56, at 337 (defining competitive states as those with “margins of victory of less than [five] percentage points”); see also *Election Results 2008*, N.Y. TIMES (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/president/map.html> (reporting that the margins of victory for the eight states and the District of Columbia, which approved the agreement, ranged from a low of fifteen to a high of ninety-four percentage points).

<sup>60</sup> See Doherty, *supra* note 55, at 766 (concluding that closer voting margins are among the factors that contribute to the number of campaign events in a given state, with closer margins leading, on average, to more events).

<sup>61</sup> See David Gringer, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 183 (2008).

<sup>62</sup> See Kristin Feeley, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1434 (2009).



congressional approval under the Compact Clause. Unlike other possible constitutional challenges, a Compact Clause challenge to the NPV agreement highlights a tension between the Article II power of states on one hand to select presidential electors and the power of Congress on the other hand to approve interstate compacts.<sup>63</sup>

The text of the Compact Clause states that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”<sup>64</sup> This clause applies, on its face, to all compacts or agreements made between states, but the Supreme Court has held that the Clause only applies to agreements found to encroach upon federal power.<sup>65</sup> The Supreme Court recognized that interstate agreements can be helpful or even necessary to solve interstate problems, and to require congressional consent for all such compacts would be unwise.<sup>66</sup> The Court has not, however, squarely considered the need for congressional consent when interstate compacts horizontally encroach or interfere with the power of other nonmember states.<sup>67</sup> This Part explores the NPV agreement under the original meaning of the Compact Clause and the Court’s interpretation, and examines the possible need for congressional consent due to the agreement’s effects on non-signatory states. Section A addresses whether the NPV agreement qualifies as a compact or agreement within the meaning of the Compact Clause. Section B then examines the need for congressional consent under the accepted federal encroachment test. Finally, Section C considers a possible horizontal encroachment test.

#### A. The NPV Agreement is a Compact

Before the Compact Clause may be applied, it must first be determined whether the NPV agreement qualifies as a compact or agreement within the meaning of the Clause. The Constitution does not clearly define these terms.<sup>68</sup> For instance, there was no discussion at the

<sup>63</sup> See *infra* Part III.

<sup>64</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>65</sup> See *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (“The application of the Compact Clause is limited to agreements that are ‘[d]irected to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.’” (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893))).

<sup>66</sup> See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 470 (1978) (finding that the Constitution “is not to be construed to limit the variety of arrangements which are not possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution” (quoting *New York v. O’Neill*, 359 U.S. 1, 6 (1959))).

<sup>67</sup> See *infra* Part II.B.

<sup>68</sup> See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925) (“The records of the Constitutional Convention furnish no light as to the source and scope of this compact provision of Article I, Section 10. Nor does the Federalist help.”). Because the Clause largely mirrors that used under the Articles of Confederation, the Court has found that the purpose of the Clause is to protect the federal government from competing state political power. See *infra* Part II.B. This argument is bolstered by the text of the Clause which places the same limitations on interstate compacts as “keep[ing] Troops” and “engag[ing] in War,” powers specifically granted as enumerated powers of the federal government. U.S. CONST. art. I, § 10 (describing the state’s limited ability to enter into interstate compacts); U.S. CONST. art. I, § 8

Constitutional Convention of the use of the phrase “agreement or compact” rather than the “treaty, confederation, or alliance” phrase used in the Articles of Confederation to describe interstate agreements allowed with congressional consent.<sup>69</sup> James Madison declared that the purpose of the inclusion of the Clause was so obvious that it required no discussion.<sup>70</sup> Therefore, the best indication of the original meaning of these terms may be found in the earliest edition of the Webster’s Dictionary.<sup>71</sup> It defines a compact as “an agreement [or] a contract between parties; a word that may be applied, in a general sense, to any covenant or contract between individuals, but it is more generally applied to agreements between nations and states, as treaties and confederacies.”<sup>72</sup> It defines agreement as a “[u]nion of minds in regard to a transfer of interest; bargain; compact; contract; stipulation.”<sup>73</sup> Under these definitions, to qualify as an agreement or compact, the NPV agreement must be a kind of contract between individual states.<sup>74</sup>

To be a valid and enforceable contract, an agreement must involve a “bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”<sup>75</sup> Mutual assent requires that the parties to an agreement either “make a promise or begin or render a performance.”<sup>76</sup> Finally, to satisfy the consideration requirement, parties to a contract must give “performance or return promise [that] is bargained for.”<sup>77</sup> In applying contract law to interstate compacts, courts have found that presentation of

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(describing the enumerated powers of Congress including the ability to “declare War,” “raise and support Armies” and “provide and maintain a Navy”).

<sup>69</sup> See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 761 (2010) (explaining that “agreement or compact” was introduced in a draft of the Constitution and then continued to be used without any discussion).

<sup>70</sup> See THE FEDERALIST NO. 44, at 783 (James Madison) (explaining that with the exception of the limitations upon state power over imports and exports, “the remaining particulars of [Article I, Section 10] . . . are either so obvious, or have been so fully developed, that they may be passed over without remark”).

<sup>71</sup> AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1828).

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> Courts have also recognized compacts as contracts between signatory states. See *Tex. v. N.M.*, 482 U.S. 124, 128 (1987) (“[A] Compact is, after all, a contract.” (quoting *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 285 (1959))); *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 105 (3d Cir. 2008) (finding that “[i]nterstate compacts are formal agreements between states, and hence, are contracts subject to the principles of contract law.”); *Spence-Parker v. Del. River & Bay Auth.*, 616 F. Supp. 2d 509, 515 (D.N.J. 2009) (finding that “[t]he terms of a state’s surrender of a portion of its sovereignty to a compact clause entity are found in the compact agreement itself, which is a ‘contract[ ] subject to the principles of contract law.’” (quoting *Doe*, 513 F.3d at 105)); *Aveline v. Pa. Bd. of Prob. & Parole*, 729 A.2d 1254, 1257 (Pa. Commw. Ct. 1999) (finding that “[b]ecause interstate compacts are agreements enacted into state law, they function simultaneously as contracts between states and as statutes within those states.”). In applying contract law to interstate compacts, it has been found that the presentation of reciprocal legislation represents an offer, approval by the state legislature represents acceptance, and “the settlement of a dispute or the creation of a regulatory scheme” satisfies consideration. *Doe*, 513 F.3d at 105.

<sup>75</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

<sup>76</sup> *Id.* § 18.

<sup>77</sup> *Id.* § 71(2).

reciprocal legislation is an offer, approval by the state legislature represents acceptance, and the regulation or settlement of a dispute by the states satisfies consideration.<sup>78</sup>

By considering and formally enacting the NPV legislation, state legislatures meet the requirement for manifestation of mutual assent.<sup>79</sup> Also, when enough states enact the legislation, each state promises not only to abide by the terms of the agreement in selecting state electors based on the outcome of a national popular vote, but also to sacrifice its ability to withdraw from the agreement during the six months preceding the inauguration of the President, establishing consideration for the agreement.<sup>80</sup> Therefore, the NPV agreement qualifies as a compact within the meaning of the Compact Clause under contract law and the original meaning of the term.

The Supreme Court has used a set of factors to determine if an interstate agreement comes within the meaning of the Compact Clause. The Court has looked to (1) mandated reciprocity or regional limitation, (2) whether state legislation depends upon the actions of another state, or (3) whether a state's representatives or officials cooperate with those of other signatory states.<sup>81</sup>

The NPV agreement satisfies the test for a compact within the meaning of the Clause. As far as reciprocity or regional limitation, the NPV agreement is national rather than regional in nature,<sup>82</sup> and each state's NPV legislation depends on the actions of other states as it becomes effective only after a specific number of states have enacted similar legislation.<sup>83</sup> Finally, as far as cooperation among state officials, the NPV agreement requires that the "chief election official[s]" of each state are to "communicate an official statement of [the number of votes cast in the state

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<sup>78</sup> See *Doe*, 513 F.3d at 105.

<sup>79</sup> See *id.*

<sup>80</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (indicating that consideration is a "performance or return promise [that] is bargained for" which includes "a forbearance").

<sup>81</sup> See *Ne. Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 175 (1985) (expressing doubt as to whether an interstate agreement that allowed regional banking amounted to a compact under the factor test). A set of "classic indicia" was also used by the Court in recent cases in evaluating whether an agreement amounted to a compact under the Clause. See *id.* The same indicia were introduced in earlier cases in applying the federal encroachment test because the Court defined a compact as an agreement encroaching on federal power, effectively collapsing compact analysis and the federal encroachment test into this single set of factors. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472–73 (1978) (indicating that to determine whether an agreement was a compact to which the Compact Clause would apply is based on "whether the Compact enhances state power *quoad* the National Government"); *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (disagreeing with the contention that a marine boundary agreement was an "Agreement or Compact" under the Compact Clause due to its failure to meet the federal encroachment test).

<sup>82</sup> See *KOZA ET AL.*, *supra* note 3, at 248 (stating that the text of the NPV agreement provides that "any State in the United States and the District of Columbia may become a member of [the NPV] agreement by enacting [the NPV] agreement"). The states that adopted the legislation are not confined to any particular region of the country. See *supra* text accompanying notes 42–50.

<sup>83</sup> See *supra* text accompanying note 33.

for each presidential slate] . . . to the chief election official of each other member state.”<sup>84</sup> Because the NPV agreement meets all of the factors, the NPV agreement would likely be found to be an interstate compact within the meaning of the Compact Clause.

#### B. The Vertical Federal Encroachment Test

Although the language of the Compact Clause seems to require broad application,<sup>85</sup> the Supreme Court has held that not every interstate compact requires congressional consent.<sup>86</sup> Instead, the Court has determined the need for congressional consent using a test first introduced in *Virginia v. Tennessee*.<sup>87</sup> The Court considered a compact used to settle a state boundary dispute and found that the compact did not violate the Compact Clause because congressional consent could be implied from subsequent recognition of the boundary.<sup>88</sup> More importantly, Justice Field posited that because “[t]here are many matters upon which different States may agree that can in no respect concern the United States,” congressional approval should only be required for “the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”<sup>89</sup> Thus, interstate compacts only require congressional consent if they encroach upon the power of the federal government.<sup>90</sup>

<sup>84</sup> See *id.*; KOZA ET AL., *supra* note 3, at 248 (describing the terms of the agreement).

<sup>85</sup> See U.S. CONST. art. I, § 10, cl. 3 (requiring congressional approval for “any” interstate compact or agreement); *Virginia v. Tennessee*, 148 U.S. 503, 517–18 (1893) (acknowledging that “[t]he terms ‘agreement’ or ‘compact’ taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects.”).

<sup>86</sup> See *Wharton v. Wise*, 153 U.S. 155, 169 (1894) (holding that “the terms ‘compact’ or ‘agreement’ in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained.” (quoting *Virginia*, 148 U.S. at 518)); *U.S. Steel*, 434 U.S. at 469 (holding that “not all agreements between States are subject to the strictures of the Compact Clause.”). The Supreme Court found that a literal reading of the Compact Clause could not have been intended because it provided no benefit to the federal government. See *Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co.*, 14 Ga. 327, 340 (1853) (explaining that if the court was required to follow the exact language of the Compact Clause, it “must hold that a State, without the consent of Congress, can make no sort of contract, whatever, with another State,” but concluded that it was not meant to apply to every agreement between states because there is “no advantage to be gained by, or benefit in such a provision”).

<sup>87</sup> 148 U.S. 503 (1893).

<sup>88</sup> See *id.* at 522 (finding that “[t]he line established was treated by [Congress] as the true boundary between the States” for elections, federal appointments, and judicial and revenue purposes).

<sup>89</sup> See *id.* at 518–19; see also *Ne. Bancorp, Inc.*, 472 U.S. at 175–76 (citing Justice Field’s test when deciding the status of a regional banking agreement under the Compact Clause); *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471 (1978) (finding that the federal supremacy test proposed in *Va. v. Tenn.* “states the proper balance between federal and state power with respect to compacts and agreements among States”); *N.H. v. Me.*, 426 U.S. 363, 369–70 (1976) (applying the test to evaluate a compact regarding the marine boundary between the two states); *Stearns v. Minn.*, 179 U.S. 223, 246–47 (1900) (referring to the *Virginia v. Tennessee* rule in reviewing the validity of an agreement between states regarding railroad taxation); *La. v. Tex.*, 176 U.S. 1, 17 (1900) (citing the test in evaluating an interstate railroad agreement).

<sup>90</sup> See *N.H.*, 426 U.S. at 369–70 (finding that whether a state boundary dispute fell under the congressional approval requirement of the Compact Clause depended upon whether it “encroach[ed] . . . upon the full and free exercise of Federal authority” (quoting *Va. v. Tenn.*, 148 U.S. at 520)).

The Court has developed a factor test for determining federal encroachment by an interstate compact. It looks to (1) whether the agreement gives states power they would not otherwise have, (2) whether the agreement delegates state power to an outside body, (3) the ability of each participating state to withdraw at will, or (4) whether the statute is “conditioned on action by the other state[s].”<sup>91</sup> Under these factors, the NPV agreement does not involve federal encroachment. Article II gives the federal government no power to determine the manner by which the states choose electors.<sup>92</sup> Instead, it leaves that choice to the states.<sup>93</sup> Therefore, an interstate agreement concerning the selection of electors does not give states any power they would not have otherwise and does not encroach upon the power of the federal government. The power to use reciprocal legislation to choose electors is not included in the language of Article II, but collective action alone is not enough to prove federal encroachment.<sup>94</sup> In addition, the NPV agreement does not give regulating power to any outside body or commission.<sup>95</sup> Instead, an election official from each participating state is given the duty to tally the popular votes within the state for each candidate, report the vote totals to all other participating states, and select electors for the state based on the final outcome of the national popular vote.<sup>96</sup>

Although the last two factors weigh against the NPV agreement, they are unlikely to prove conclusive in finding federal encroachment. First, because repeal of the NPV agreement by participating states is prevented during the six-month blackout period, states are not free to withdraw at any time.<sup>97</sup> Second, the fact that it becomes effective only after acquiring 270 electoral votes establishes that the NPV legislation in each state is conditioned upon legislation in other states.<sup>98</sup> However, these factors seem

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<sup>91</sup> See *U.S. Steel*, 434 U.S. at 473 (identifying the factors as the “test [to analyze] whether the Compact enhances state power *quoad* the National Government”). These factors have also been used in more recent decisions to determine whether an agreement amounts to a compact. See also cases cited *supra* note 74.

<sup>92</sup> See *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (noting that 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 [appointment of electors]”).

<sup>93</sup> See *id.*; U.S. CONST. art. II, § 1, cl. 2 (granting state legislatures the power to select presidential electors in any way they choose).

<sup>94</sup> See *N.Y. v. O’Neill*, 359 U.S. 1, 11 (1959) (indicating that not all interstate compacts necessarily encroach on federal power because “[t]he Constitution of the United States does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate”).

<sup>95</sup> See *KOZA ET AL.*, *supra* note 3, at 247 (“The proposed compact does not change a state’s internal procedures for operating a presidential election. After the [fifty] states and the District of Columbia certify their popular vote counts for President in the usual way, a grand total of popular votes would be calculated by adding up the popular vote count from all 51 jurisdictions.”).

<sup>96</sup> See *id.* at 248 (indicating that the mechanics of the agreement are the duty of the chief election official in each participating state).

<sup>97</sup> See *supra* Part I.A.

<sup>98</sup> See *id.*

to only address the NPV agreement's status as a compact rather than whether it encroaches on the power of the federal government. The fact that the states are not given any additional power beyond that already retained under Article II and in no way "interfere with [the federal government's] rightful management of particular subjects placed under their entire control" decisively forecloses the need for congressional approval under the federal encroachment test.<sup>99</sup>

### C. Horizontal Encroachment and the Compact Clause

The NPV agreement presents an issue separate from federal encroachment: whether congressional consent is required for interstate compacts that encroach on state power. NPV advocates believe that under the traditional unit rule system, voters in a majority of states are disregarded during presidential elections in favor of the more influential competitive states.<sup>100</sup> The NPV agreement seeks to remedy this problem by replacing unit voting with a national popular vote.<sup>101</sup> Under this system, voting power is expected to shift in favor of those states believed to be ignored in current presidential elections.<sup>102</sup> Indeed, many of the states that have enacted the NPV legislation cited its ability to increase campaign attention within those states in future elections.<sup>103</sup> Thus, rather than affecting the vertical distribution of power between the states and the federal government, the NPV agreement affects the horizontal distribution of power, benefitting safe states at the expense of the competitive, non-signatory states that benefit from traditional presidential elections.

To analyze the voting power of the states, researchers have looked to the amount of campaign time and resources spent in each state during a presidential election.<sup>104</sup> This method takes into account the basic

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<sup>99</sup> See *Va. v. Tenn.*, 148 U.S. 503, 517–18 (1893).

<sup>100</sup> See KOZA ET AL., *supra* note 3, at xxiv (arguing that "[w]ith the number of battleground states steadily shrinking, we see candidates and their campaigns focused on fewer and fewer states" and that the candidates in the 2004 election "completely ignored three-quarters of the states").

<sup>101</sup> See *supra* Part I.A.

<sup>102</sup> See 125 Cong. Rec. 309 (1979) (statement of Sen. Robert E. Dole) (postulating that if the country switched to the direct election of the President, each vote would "carr[y] equal importance" and "would give candidates incentive to campaign in States that are perceived to be single party States").

<sup>103</sup> See MD. DEP'T OF LEGIS. SERVICES, *Md. Fiscal and Policy Note*, S.B. 634, 2007 Sess., at 3 (2007) (reporting that the NPV agreement is "aimed at changing [certain] aspects of the current system of electing the President, including the concentration of campaigning in a minority of closely divided states"); N.J. ASSEMB. COMM. STATEMENT, A.B. 4225 (2007) ("This agreement ensures that all states are competitive in presidential elections, [and] makes all votes important and equal."); SB 5599, 2009 Leg. (Wash. 2009) (stating that "two-thirds of the campaign spending and visits in the last election were focused only on five 'swing' states" and that "[t]his bill will allow *all* voters to count in a presidential election").

<sup>104</sup> See Steven J. Brams & Morton D. Davis, *The 3/2's Rule in Presidential Campaigning*, 68 AM. POL. SCI. REV. 113, 113 (1974) (analyzing how the Electoral College "induces candidates to allocate campaign resources" so as to "create[] a peculiar bias in presidential campaigns that makes the largest states the most attractive campaign targets to the candidates, even out of proportion to their size" while a popular vote "would tend to relieve the candidates of the necessity of making some of the manipulative strategic calculations that are endemic to the present system"); Shaw, *supra* note 55, at

assumption that a candidate's time and resources are limited.<sup>105</sup> Consequently, they are expected to invest the most in the states likely to yield the greatest vote return.<sup>106</sup> The states in which candidates invest the most are assumed to be the states with the most voting power.<sup>107</sup>

Under the unit rule system, candidates have been found to focus mainly on large, competitive states that are more likely to be pivotal in any given presidential election.<sup>108</sup> Because the number of electors given to each state depends upon the number of seats that state has in Congress,<sup>109</sup> large states possess more electoral votes, increasing their chance of casting the decisive vote.<sup>110</sup> If a large state is also competitive, it becomes even more powerful under the unit rule because it is more likely to tip the electoral vote scale toward one candidate or another.<sup>111</sup> At the other end of the spectrum, the less populous, noncompetitive states are the least likely to receive campaign time and resources. These states benefit from the

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894 (describing how "electoral college strategies . . . can lead to discrepancies in the allocation of campaign resources even among the battleground states"); John R. Wright, *Pivotal states in the Electoral College, 1880 to 2004*, 139 PUB. CHOICE 21, 22 (2009) (finding that a state's "pivot position" was a "significant predictor of presidential candidates' media buys and travel decisions in the last two presidential elections"); Doherty, *supra* note 55, at 753 (hypothesizing that presidents' "patterns of travel should favor populous, electorally competitive states"); Lipsitz, *supra* note 56, at 188 (examining whether the allocation of campaign resources in presidential campaigns affects political participation of voters within competitive and noncompetitive states).

<sup>105</sup> See Darshan J. Goux & David A. Hopkins, *The Empirical Implications of Electoral College Reform*, 36 AM. POL. RES. 857, 869 (2008) (finding that "[r]esources, principally time and money, would remain limited" even under a direct vote); Doherty, *supra* note 55, at 754 (positing that where the President decides to campaign is revealing because "time is perhaps his scarcest resource").

<sup>106</sup> See Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College*, 123 PUB. CHOICE 1, 8 (2005) (assuming that "campaigners invest resources in influencing voters so as to equalize the expected marginal gain in the probability of their winning the Electoral College"); Wright, *supra* note 104, at 33 (arguing that "[s]ince candidates must win the pivotal state" to win the election, his or her resources "will probably be distributed around the pivotal state").

<sup>107</sup> See Brams & Davis, *supra* note 104, at 117 (examining the amount of campaign time spent in each state in relation to the population size of that state and finding that candidates target and favor the states which will "maximiz[e] [his or her] expected electoral vote").

<sup>108</sup> See Wright, *supra* note 104, at 35 ("[B]oth size and competitiveness exert indirect effects via pivot position on candidates' decisions about where to campaign."); Brams & Davis, *supra* note 104, at 131 ("Insofar as polls indicate the largest states to be the toss-up states, candidates who act on this information and concentrate almost all of their resources in these states will magnify even the large-state bias . . .").

<sup>109</sup> See U.S. CONST. art. II, § 1, cl. 2 (instructing that the number of electors in each state should be equal to "the whole Number of Senators and Representatives to which the State may be entitled in the Congress").

<sup>110</sup> See John F. Banzhaf III, *One Man, 3,312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 313 (1968) (finding that "[t]he present Electoral College system, in conjunction with state imposed unit-vote ('winner take all') laws . . . greatly favors the citizens of the most populous states and deprives citizens of the less populous states of an equal chance to affect the election of the President."); Brams & Davis, *supra* note 104, at 122 ("[W]hile an individual voter has a reduced chance of influencing the outcome in a large state because of the greater number of people voting, this reduction is more than offset by the larger number of electoral votes he can potentially influence.").

<sup>111</sup> See Brams & Davis, *supra* note 104, at 123 (finding that "greater potential voting power of voters in large states . . . makes them more attractive as campaign targets to the candidates" because the state's larger number of electoral votes provide a higher likelihood that it will affect the outcome of a presidential election).

“federalism bonus” which provides at least two electors to each state regardless of its population.<sup>112</sup> Nevertheless, they have relatively few electoral votes and are less likely to play a significant role in the outcome of the election.<sup>113</sup> Moreover, if the state is uncompetitive, candidates may also be hesitant to give it any appreciable campaign attention because it is unlikely to provide additional votes.<sup>114</sup>

Although some researchers believe that a direct vote, like that proposed in the NPV agreement, will eliminate power disparities between individual voters and states,<sup>115</sup> candidates’ limited resources will likely continue to encourage uneven resource allocation.<sup>116</sup> Candidates would have to alter their campaign strategies to obtain the largest number of individual votes on a national scale.<sup>117</sup> The focus of campaign resources would be adjusted from politically competitive states to both competitive and uncompetitive states with areas of high population.<sup>118</sup> Thus, spectator states are more likely to pass the NPV agreement because they may gain power under a national popular vote.

On the other hand, this implies that smaller competitive states would likely lose power under the national popular vote. Candidates would not expect as great of a return on their investment of resources in sparsely populated regions and would likely reduce the amount of campaign attention afforded to them.<sup>119</sup> These states would be harmed by a national

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<sup>112</sup> The “federalism bonus” is the grant of two electors assigned to each state based not on population, but on the number of Senate seats held by each state. *See* Adkins & Kirwan, *supra* note 56, at 72–73. The idea was carried over to the Electoral College from the Great Compromise regarding the composition of the Congress during the Constitutional Convention and reflects the founder’s effort to balance political power between large and small states. *Id.* at 74–75; *see also* Lawrence D. Longley & James D. Dana, Jr., *The Biases of the Electoral College in the 1990s*, 25 *POLITY* 123, 133 (1992) (recognizing the increased voting power of residents of small states which “stems from the two electoral votes that are not based on population”).

<sup>113</sup> *See* Banzhaf, *supra* note 110, at 313 (“Citizens of the small and medium-sized states are severely deprived of voting power in comparison with the residents of the few very populous states . . .”).

<sup>114</sup> *See* Doherty, *supra* note 55, at 766 (finding that during campaign years, a closer margin of victory in the previous election is a “statistically significant predictor[]” of more “presidential events”).

<sup>115</sup> *See* Longley & Dana, *supra* note 112, at 137 (finding that because under a direct vote “each citizen’s voting power is, by definition, equal,” it would be less biased than the “present electoral college”); Banzhaf, *supra* note 110, at 321–22 (arguing that because “no distinction whatever is made between votes cast by residents of different states,” the votes in each state would be of equal weight under a direct vote).

<sup>116</sup> *See* Goux & Hopkins, *supra* note 105, at 869 (arguing that “[c]andidates cannot realistically compete everywhere or engage every voter; inevitably, each campaign would decide, just as now, to direct resources toward some identifiable populations and not others.”).

<sup>117</sup> *See id.* (suggesting that “[u]nder a system of direct popular election, candidates no longer have reason to acknowledge state boundaries”).

<sup>118</sup> *See* Eric M. Uslaner, *Spatial Models of the Electoral College: Distribution Assumptions and Biases of the System*, 3 *POL. METHODOLOGY* 355, 361 (1976) (“The larger states would be favored under direct election simply because they have more voters than smaller states.”).

<sup>119</sup> *See* Goux & Hopkins, *supra* note 105, at 870 (examining the cost of campaign advertising and finding that “[e]vidence indicates that [candidates under a popular vote] would follow much the same strategy as they do today: attempt to maximize the number of persuadable, or swing, voters targeted per dollar of advertising cost”).



popular vote and would be the least likely to approve NPV legislation. Further, if the NPV agreement reaches 270 electoral votes, the signatory states alone will have enough electoral votes to successfully elect the President regardless of the remaining states.<sup>120</sup> While candidates would still be concerned with obtaining the votes of individuals within these nonmember states, voters in these states would effectively lose the protections of the Electoral College including the federalism bonus.<sup>121</sup> Therefore, by both altering strategy incentives and eliminating protections for voting power under the Electoral College, the NPV agreement horizontally encroaches on the power of non-signatory states while increasing the voting power of member states.

The Supreme Court has never squarely decided Congress's role when compacts involve horizontal encroachment on the power of non-signatory states.<sup>122</sup> In *U.S. Steel Corp. v. Multistate Tax Commission*,<sup>123</sup> a compact between states that regulated the taxing of multistate taxpayers was challenged on constitutional grounds.<sup>124</sup> The appellants sought injunctive relief, arguing that the compact failed to receive congressional approval and was thus invalid.<sup>125</sup> Appellants also asserted that the compact "impair[ed] the . . . rights of nonmember States" by "exert[ing] undue pressure to join" the compact.<sup>126</sup> The Court found insufficient support for encroachment on nonmember states.<sup>127</sup> Further, it held that the compact did not require congressional consent because, based on *Virginia v. Tennessee*,<sup>128</sup> the compact did not "threaten[] federal supremacy."<sup>129</sup>

Similarly, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,<sup>130</sup> the Court considered the constitutionality of an interstate compact that would lift the federal ban on interstate acquisitions

<sup>120</sup> See *supra* Part I.A; see also *supra* text accompanying note 30 (describing the provision that requires a majority of electoral votes before the agreement becomes effective).

<sup>121</sup> See Adkins & Kirwan, *supra* note 56, at 84 (noting that due to the federalism bonus, "the smaller states are well represented in the electoral college" and would likely oppose a shift to a direct form of election).

<sup>122</sup> Horizontal encroachment occurs when an interstate compact or agreement negatively affects the power of states that are not parties to the agreement or compact. Under the *Virginia v. Tennessee* test, the potential effect of compacts on nonmember states is ignored. See *Va. v. Tenn.*, 148 U.S. 503, 519–20 (1893).

<sup>123</sup> 434 U.S. 452 (1978).

<sup>124</sup> See *id.* at 456, 458 (indicating that the appellants brought claims under both the Compact Clause and Commerce Clause).

<sup>125</sup> *Id.* at 458.

<sup>126</sup> *Id.* at 477.

<sup>127</sup> *Id.* at 477–78 ("It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods will redound to the benefit of any particular group of States or to the harm of others. . . . Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist.").

<sup>128</sup> *Va.*, 148 U.S. at 503.

<sup>129</sup> See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 476 (1978) (holding that "[a]ppellees make no showing that increased effectiveness in the administration of state tax laws, promoted by [the compact], threatens federal supremacy.").

<sup>130</sup> *Ne. Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 159 (1985).

of banks.<sup>131</sup> Petitioners claimed that the compact was invalid for a lack of congressional approval,<sup>132</sup> and that it “impermissibly offend[ed] the sovereignty of sister States.”<sup>133</sup> The Court held that the compact was incapable of interfering with federal power because any state law conflicting with the federal ban would be preempted regardless of its standing under the Compact Clause.<sup>134</sup> The Court also found that the petitioners failed to show encroachment upon the power of other states.<sup>135</sup>

There have been justices on the Court, though, that have supported the need for congressional consent when a compact interferes with the power of nonmember states. Justice White argued in his dissenting opinion in *U.S. Steel*, “[a] proper understanding of what would encroach upon federal authority . . . must also incorporate encroachments on the authority and power of non-Compact States.”<sup>136</sup> The opinion relied on pre-*Virginia v. Tennessee*<sup>137</sup> reasoning for inclusion of horizontal encroachment under the Compact Clause,<sup>138</sup> and the belief that “[a]s 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 . . . .”<sup>139</sup> It is possible, then, that if faced with an interstate compact which alters the distribution of power among states as the NPV agreement does, the Court may be persuaded to require congressional approval in cases of horizontal encroachment.

### III. CHOOSING A THEORY OF ENCROACHMENT

In determining whether the NPV agreement should require congressional consent, a constitutional conflict arises between Article II and the Compact Clause. On the one hand, Article II gives Congress no power to oversee the method by which states choose electors.<sup>140</sup> On the other hand, the Compact Clause requires congressional consent for all interstate compacts.<sup>141</sup> Because the NPV agreement involves both the

<sup>131</sup> See *id.* at 163–64 (explaining that several New England states passed reciprocal legislation within their region allowing interstate bank acquisitions).

<sup>132</sup> *Id.* at 175 (reporting that the petitioners argued that the compact “violate[d] the Compact Clause . . . because Congress has not specifically approved it”).

<sup>133</sup> *Id.* at 176.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* (“We do not see how the statutes in question either enhance the *political* power of the . . . States at the expense of other States or have an ‘impact on our federal structure.’” (quoting *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471 (1978))).

<sup>136</sup> *U.S. Steel*, 434 U.S. at 494 (White, J., dissenting).

<sup>137</sup> *Va. v. Tenn.*, 148 U.S. 503, 503 (1893).

<sup>138</sup> See *U.S. Steel*, 434 U.S. at 494 (“[T]his Court held that the purpose of requiring the submission to Congress of a compact . . . between two States was ‘to guard against the derangement of their federal relations with the other states of the Union, and the federal government . . . .’” (quoting *R.I. v. Mass.*, 12 Pet. 657, 726 (1838))).

<sup>139</sup> See *id.* at 496.

<sup>140</sup> See U.S. CONST. art. II, § 1 (giving Congress the power to decide the day and time for the selection of electors in each state, but giving the power to determine the method of selecting the electors to the states alone).

<sup>141</sup> See U.S. CONST. art. I, § 10, cl. 3 (prohibiting states, “without the Consent of Congress,” from

selection of electors and an interstate compact, the proper role of Congress is uncertain. This Part explores this conflict and ultimately proposes a resolution. Section A below discusses the argument in favor of maintaining the exclusive Article II power of the states. Then Section B explores the counter argument for requiring congressional approval under the Compact Clause. In the end, because the NPV agreement involves both meaningful encroachment on the power of nonmember states and fits under the broad language of the Compact Clause, it should require congressional approval before becoming a valid and enforceable interstate compact.

#### A. State Power Under Article II

Article II provides that state legislatures may appoint state electors in any manner that they may choose.<sup>142</sup> Proponents of the NPV agreement argue that this provision allows individual states to constitutionally select electors through an interstate compact without congressional consent.<sup>143</sup> An examination of both the intent of the Framers and judicial interpretation reveal that Article II does grant states broad power to select their electors, subject only to time and qualification limitations.

The election of the executive was among the most contentious issues facing the Framers in constructing the United States Constitution.<sup>144</sup> With regard to federal legislative power, compromise was reached between large and small states by the creation of a bicameral legislature designed to protect smaller states from being overwhelmed by the more populous states.<sup>145</sup> A similar issue arose with regard to the election of the executive.<sup>146</sup> Unlike the bicameral legislature, there was no clear way to balance the interests of large and small states when electing a single person charged with representing all citizens.<sup>147</sup> Three methods were proposed

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entering into any agreement or compact with another state).

<sup>142</sup> See U.S. CONST. art. II, § 1, cl. 2.

<sup>143</sup> See KOZA ET AL., *supra* note 3, at 285; Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 521 (2009) (“The NPV’s proponents emphasize that Congressional consent is not required for the compact to be found valid by the courts.”).

<sup>144</sup> See LEONARD W. LEVY & DENNIS J. MAHONEY, *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 129 (1987) (“[T]he Committee of Unfinished Business (or on Postponed Parts) untangled the convention’s last remaining snarls, the knottiest of which was certainly the long-debated question of a sound executive.”); see also PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* 114 (2010) (noting that when asked, James Wilson, a representative from Pennsylvania, indicated that the issue of election of the President was the most difficult for the Framers to resolve).

<sup>145</sup> See LEVY & MAHONEY, *supra* note 144, at 129. (“[Large and small states] each secured supremacy in one house of the Congress.”).

<sup>146</sup> See Slonim, *supra* note 8, at 37 (explaining that “at the very outset of the convention, the large and small states were at loggerheads over the method of selecting the executive no less than they were over the composition of the legislature” because both plans called for election of the executive by the legislature).

<sup>147</sup> See LEVY & MAHONEY, *supra* note 144, at 129 (indicating that “both the small and the large states had proved determined not to give the other a predominant advantage in selecting the chief magistrate” and “fear of an elective monarchy and strong objections to election either by the people or

and considered by the Framers: election by the national legislature; popular vote; and election by state electors.<sup>148</sup>

First, election by the legislature was proposed as a national reflection of the common practice in the states permitting the state legislatures to elect individuals for public office and because it allowed the most knowledgeable citizens to choose the executive.<sup>149</sup> It was rejected, however, due to concerns for separation of powers and presidential independence.<sup>150</sup> The members of the Convention favored election by the people.<sup>151</sup> Nonetheless, the popular vote was ultimately dismissed because, as Virginia delegate George Mason explained, “[t]he extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.”<sup>152</sup>

The Electoral College was ultimately selected, though not without controversy.<sup>153</sup> The plan had the benefit of preserving the independence of

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the states had brought the meeting to an impasse”).

<sup>148</sup> See JACK. N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 259 (1997); KOZA ET AL., *supra* note 3, at 38 (“The Constitutional Convention considered a variety of methods for electing the President and Vice President . . .”).

<sup>149</sup> See Slonim, *supra* note 8, at 37 (discussing the fact that both the New Jersey Plan and the Virginia Plan proposed election by the legislature, “as was the practice in all but three of the states”); RAKOVE, *supra* note 148, at 259 (describing election by the legislature as “[t]he most obvious alternative” for the Framers because it “plac[ed] the decision in the nation’s most knowledgeable leaders”); SAUL K. PADOVER, *TO SECURE THESE BLESSINGS: THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787* 349 (1962) (“[T]he sense of the nation would be better expressed by the legislature than by the people at large.”).

<sup>150</sup> FORREST McDONALD, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 28 (1986) (“Having Congress elect the president would be a convenient way, but that would make the executive branch dependent upon the legislative.”). The Framers feared that this plan would result in the President becoming a mere puppet of the legislature. RAKOVE, *supra* note 148, at 259 (acknowledging that one of the fundamental concerns of the Framers was to “enable the executive to resist legislative encroachments,” and election by the national legislature would “produce a pliable official”). The President’s re-eligibility for office was also of concern to many of the Framers under the legislative option. LEVY & MAHONEY, *supra* note 144, at 129 (“[T]he desire to make it possible for the executive to succeed himself, had seriously discredited appointment by the Congress.”); Slonim, *supra* note 8, at 37–38 (explaining that the issue of reelection of the President was one of three concerns regarding election of the executive that “formed a sort of tripod where an imbalance on one side disrupted the balance of the whole”).

<sup>151</sup> PADOVER, *supra* note 149, at 346–47 (noting that Wilson, the first to voice his opinion on the matter of electing the President, supported election by the people); RAKOVE, *supra* note 148, at 259 (“Morris, Wilson, and Madison boldly endorsed [election by the people] on principle.”).

<sup>152</sup> See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 31 (Max Ferrand ed., 1911). The Framers also feared that the people would “naturally prefer citizens from their own states,” preventing a popular vote from ever producing the requisite majority. RAKOVE, *supra* note 148, at 259; see also PADOVER, *supra* note 149, at 349. In addition, direct election by the people had the potential to create instability in the national government and would necessarily favor the North as there would be far more eligible voters from the North than from the South. LEVY & MAHONEY, *supra* note 144, at 128–29 (“The vigor and stability demanded by the Pennsylvanians seemed incompatible to some with popular election . . .”); see also WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 188–89 (2007) (discussing James Madison’s belief that the electoral system gave southern states more weight because slaves would be counted to determine the number of state electors while a direct election by the people would include only white voters, leaving southern states without this extra weight).

<sup>153</sup> Some of the Framers feared that a meeting of the electors would be impractical. See RAKOVE, *supra* note 148, at 260 (indicating that the Framers “questioned the inconvenience and expense of

the presidency from the Legislature, alleviating concerns over separation of powers.<sup>154</sup> The Framers were also able to preserve the balance of power between large and small states by incorporating the benefits of the Great Compromise.<sup>155</sup> Like the election of Senators and Representatives,<sup>156</sup> the selection of electors was left to the states.<sup>157</sup> The Electoral College was unique, however, in that the method for electing the electors was left to each state.<sup>158</sup> It has been argued that the Framers expected that states would select electors on a district-wide basis.<sup>159</sup> Today, all but two states choose electors under a winner-take-all unit rule based on the outcome of a

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gathering electors from distant states”). Others argued that selection by the Senate, as was originally contemplated in the event of a tie in the Electoral College, favored small states at the expense of larger states. *See* LEVY & MAHONEY, *supra* note 144, at 130 (noting that the larger states proposed that the power of the Senate to choose the President should be limited due to the disproportionate power given to the small states under the proposed plan). Still others worried that the plan would produce separation of powers issues between the executive and the legislative branches if the Senate were allowed to choose the President in the event of a tie. *See id.* (noting that because the Senate and executive shared the power to enter into treaties and make appointments, allowing the Senate to determine the outcome of the election might “encourage these two branches to combine against the lower house”).

<sup>154</sup> *See* THE FEDERALIST NO. 68, at 375 (Alexander Hamilton) (noting that the Framers desired that “the Executive should be independent for his continuance in office, on all, but the people themselves” and that this would be accomplished by “making his re-election to depend on a special body of Representatives, deputed by the society for the single purpose of making the important choice”); *see also* LEVY & MAHONEY, *supra* note 144, at 129–30 (discussing the Framers’ belief that “[r]eliance on electors . . . would ‘get rid of the ineligibility’ for reelection, which had seemed inseparable from an election by Congress”); Kevin J. Coleman et al., *The Election Process in the United States*, in *THE ELECTION PROCESS IN THE UNITED STATES* 1, 41 (Albert Nicosia ed., 2003) (noting that preventing Congress from interfering in elections “was intended to preserve the independence of the Presidency”); RAKOVE, *supra* note 148, at 259–60 (positing that some Framers favored this plan due to “the support it gave to those who thought that eligibility for reelection would give the executive an important incentive to maintain his independence” and due to the plan’s prevention of the executive becoming “toady” to Congress’ demands).

<sup>155</sup> *See* U.S. CONST. art. II, § 1, cl. 2 (instructing that the number of electors appointed by each state be “equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”); THE FEDERALIST NO. 68, at 375 (Alexander Hamilton) (“[E]ach state shall choose a number of persons as electors, equal to the number of Senators and Representatives of such State in the National Government, who shall assemble within the State, and vote for some fit person as President.”). The Great Compromise sought to balance legislative power between the large and small states by combining two plans proposed at the Constitutional Convention. The Virginia Plan benefitted large states through proportional representation in the legislature, while the New Jersey Plan protected the interests of small states by providing only one vote per state for equal representation. *See* Slonim, *supra* note 8, at 37. In the end, the Framers adopted a bicameral legislature in which the members of the lower house would be chosen through proportional representation and each state would be given an equal vote in the upper house. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 29 (Max Ferrand, ed., 1966).

<sup>156</sup> *See* U.S. CONST. art. I, § 2, cl. 1 (requiring that members of the House of Representatives be “chosen every second Year by the People of the several States”); U.S. CONST. art. XVII (commanding that Senators be elected by the people from each state).

<sup>157</sup> *See* U.S. CONST. art. II, § 1, cl. 2 (indicating that “each State shall appoint” the electors allotted to it).

<sup>158</sup> *See* U.S. CONST. art. II, § 1, cl. 2 (allowing each state to select its electors in “such Manner as [it] may direct”).

<sup>159</sup> *See* Letter from James Madison to George Hay (Aug. 23, 1823), in *THE FOUNDERS’ CONSTITUTION* 556, 557 (Phillip B. Kurland & Ralph Lerner eds., 1986) (indicating that “[t]he district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular States which had set the example.”).

statewide vote.<sup>160</sup> The Framers also expected that the electors would act independently once selected to vote for the candidates they found to be the most qualified.<sup>161</sup> However, electors generally choose candidates based solely on party loyalty.<sup>162</sup>

Courts have interpreted Article II to give states the power to select electors free from congressional oversight.<sup>163</sup> In *McPherson v. Blacker*,<sup>164</sup> presidential nominees challenged a Michigan law regarding selection of electors to the Electoral College.<sup>165</sup> The law provided that each congressional district would elect one elector and one alternate elector.<sup>166</sup> The two remaining electors allotted to the state and their alternates were to be chosen by the electors elected from the congressional districts making up the eastern and western Electoral Districts.<sup>167</sup> The Court held that the legislation was valid because “Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes . . . but otherwise the power and jurisdiction of the State is exclusive.”<sup>168</sup> The Court also held that this power did not cease to exist simply because the mode adopted had not followed the original expectations of the Framers.<sup>169</sup>

Nevertheless, in more recent decisions, the Court has consistently held that the broad powers granted under Article II are limited by the other

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<sup>160</sup> See Festa, *supra* note 53, at 2126 (noting that currently, “forty-eight states plus the District of Columbia use the unit rule”). Maine and Nebraska use a district system in which voters in each of the state’s congressional districts vote for one elector, with the remaining electors chosen based on the statewide plurality winner. See Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 222 (2009) (finding that the unit-rule voting system is used in every state except Maine and Nebraska, which use district voting); ME. REV. STAT. ANN. tit. 21-A, § 802 (1964); NEB. REV. STAT. ANN. § 32-1038 (LexisNexis 1994).

<sup>161</sup> See THE FEDERALIST NO. 64 (Alexander Hamilton) (postulating that because electors “will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues”); see also KOZA ET AL., *supra* note 3, at 43 (indicating that the Framers believed the electors would “exercise independent and detached judgment” in choosing a President and Vice President).

<sup>162</sup> See KOZA ET AL., *supra* note 3, at 44 (reporting that from the very first contested presidential election, electors have been chosen “to register the will of the appointing power” (quoting *McPherson v. Blacker*, 146 U.S. 1, 36 (1892))).

<sup>163</sup> See *supra* text accompanying note 92.

<sup>164</sup> *McPherson*, 146 U.S. at 1.

<sup>165</sup> See *id.* at 2–4 (identifying the plaintiffs as presidential nominees seeking to nullify the state legislation outlining the method for selecting Michigan electors).

<sup>166</sup> See *id.* at 5 (indicating that each district would elect one “district elector” and one “alternate district elector” (quoting 1891 Mich. Pub. Acts 50)).

<sup>167</sup> See *id.* at 4 (“There shall be elected by the electors of the districts hereinafter defined one elector of President and Vice President of the United States in each district . . . there shall also be elected in like manner two alternate electors of President and Vice President . . .” (quoting 1891 Mich. Pub. Acts 50)).

<sup>168</sup> *Id.* at 35.

<sup>169</sup> See *id.* at 36 (“[W]e can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created.”).

provisions of the Constitution.<sup>170</sup> In *Williams v. Rhodes*, the Court considered an Ohio law requiring new parties to obtain petitions from enough supporters to equal fifteen percent of the voters in the previous gubernatorial election.<sup>171</sup> The Ohio American Independent Party and the Socialist Labor Party claimed that the law denied the parties and their supporters the equal protection of the laws by effectively preventing new parties from appearing on the ballot.<sup>172</sup> The Court held that although Article II “grant[s] extensive power to the States to pass laws regulating the selection of electors . . . these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”<sup>173</sup> Thus, the power of the states to choose electors is not unlimited.

Based on the text of Article II and the Framers’s intent, the NPV agreement seems to be a valid exercise of state power free from congressional interference. The Framers specifically rejected legislative selection of the President, wishing to preserve separation of powers between the executive and legislative branches.<sup>174</sup> Instead, the Constitutional Convention approved the exclusive state power embodied in Article II, due, in large part, to its ability to preserve the independence of the President from Congress.<sup>175</sup> It is clear, then, that were signatory states to select electors based on a national popular vote of their own, Congress would have no power to oversee that decision under Article II.<sup>176</sup> The NPV

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<sup>170</sup> See *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (holding that the power of the states to select electors could not “be exercised in such a way as to violate express constitutional commands”). Specifically, the Court has limited the power of states to choose electors in a manner that denies its residents equal protection of the laws. See *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (reasoning that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another” (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966))); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (using a balancing test that weighs the “character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against state interests which “make it necessary to burden the plaintiff’s rights”); *Bullock v. Carter*, 405 U.S. 134, 141 (1972) (applying the rule that the state’s power over elections “must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment” (citing *Rhodes*, 393 U.S. at 89)); *Hitson v. Baggett*, 446 F. Supp. 674, 676 (M.D. Ala. 1978) (holding that “a state is free, under the Constitution, to conduct elections on a statewide or at-large basis so long as the electoral system it establishes does not ‘operate to minimize or cancel out the voting strength of [minority voters].’” (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

<sup>171</sup> See *Rhodes*, 393 U.S. at 24–25 (describing the requirements for parties to join the presidential race under § 3517.01 of the Ohio Revised Code).

<sup>172</sup> See *id.* at 25 (finding that the Ohio law made it “virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties”).

<sup>173</sup> *Id.* at 29.

<sup>174</sup> See *supra* text accompanying notes 168–169.

<sup>175</sup> See *supra* text accompanying note 173.

<sup>176</sup> See U.S. CONST. art II, § 1, cl. 2 (granting state legislatures the power to choose electors “in such Manner as [they] . . . may direct”); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (describing the power of the states to choose electors as exclusive and “so framed [in the Constitution] that Congressional and Federal influence might be excluded”); see also *infra* text accompanying notes 186–187 (describing the states’ power over the mode for selecting electors as plenary).

agreement, proponents argue, is only an exercise of states' Article II powers.<sup>177</sup>

Under *Williams*, however, the NPV agreement must not violate any other constitutional provisions.<sup>178</sup> Therefore, the broad power given to states by Article II does not preclude application of the Compact Clause to the selection of electors under the NPV agreement.

#### B. The Compact Clause and Limitations on State Power

The Compact Clause, in contrast to Article II, gives Congress the power to oversee states' ability to enter into enforceable agreements or compacts.<sup>179</sup> Whether the NPV agreement requires congressional approval is an open question. The historical context of the Clause suggests that compacts with no appreciable effect on nonparties should be accepted.<sup>180</sup> But when a compact involves meaningful encroachment, the text of the Clause may require the consent of Congress.

Interstate compacts have been subject to government regulation since colonial times.<sup>181</sup> Under British rule, colonies could enter into agreements with one another with the approval of the Crown.<sup>182</sup> If an agreement could not be reached, the colonies could litigate the matter before a Royal Commission appointed by the Crown.<sup>183</sup> The framers of the Articles of Confederation were also suspicious of interstate agreements, fearing they might create entities destructive or capable of competing with the Confederation.<sup>184</sup> Therefore, states could not "enter into any treaty,

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<sup>177</sup> See KOZA ET AL., *supra* note 3, at 284–85 (arguing that because the Constitution gives "each state the power to select the manner of appointing its presidential electors . . . the subject matter of the [NPV agreement] is a state power and an appropriate subject for an interstate compact").

<sup>178</sup> See *infra* text accompanying note 192.

<sup>179</sup> See U.S. CONST. art. I, § 10, cl. 3 (requiring congressional approval for any interstate compact or agreement).

<sup>180</sup> See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 688 (1925) (indicating that compacts are useful in resolving disputes that "transcend State lines," are "beyond the power of Congress and where . . . diversity of treatment is an interstate evil"); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 739 (2007) (indicating that an interstate agreement has not been invalidated by courts for lack of congressional consent in over 100 years because they have not been found to be "within the ambit of the Compact Clause").

<sup>181</sup> See Frankfurter & Landis, *supra* note 180, at 692 ("[T]he Compact Clause has its roots deep in colonial history. It is part and parcel of the long and familiar story of colonial boundary controversies."); see also Hollis, *supra* note 69, at 760 (explaining that colonies resolved boundary disputes through intercolonial agreements "more than one hundred years before the American Revolution").

<sup>182</sup> See Frankfurter & Landis, *supra* note 180, at 692–93 n.29 (indicating that the Massachusetts officials were required to submit an agreement with New York to the King for approval); Hollis, *supra* note 69, at 760 (indicating that intercolonial agreements required the Crown's approval).

<sup>183</sup> See Frankfurter & Landis, *supra* note 180, at 692–93 ("If negotiations failed . . . [there] was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission. In effect such a controversy before a Royal Commission bore the characteristics of a litigation.")

<sup>184</sup> See *id.* at 693–94 (indicating that the interstate compact provision in the Articles of Confederation limited the power of the states to "protect the new Union of States").



confederation or alliance whatever between them, without the consent of the United States in congress assembled.”<sup>185</sup>

The Constitution is unique from its predecessors in that it differentiates between a “treaty, confederations or alliance” and an “agreement or compact.”<sup>186</sup> The former are completely forbidden to states under the Constitution.<sup>187</sup> The latter, however, mirror the British model. Rather than requiring approval of the Crown, agreements and compacts between states require congressional approval, and like the Royal Commissions, disputes that cannot be resolved may be heard by the Supreme Court.<sup>188</sup> However, since the ratification of the Constitution, many interstate compacts have been accepted despite a lack of congressional approval.<sup>189</sup> Until 1921, Congress had approved only thirty-six compacts,<sup>190</sup> and those that were approved, often involved disputes similar in kind to those which were accepted despite a lack of consent.<sup>191</sup> In addition, since the Supreme Court’s 1893 decision in *Virginia v. Tennessee*, no interstate compact has been successfully challenged for lack of congressional consent.<sup>192</sup>

There are strong arguments for accepting interstate compacts that can have no meaningful effect on nonmember states.<sup>193</sup> In a 1925 study of the rising use of interstate compacts, Frankfurter and Landis argued that compacts have been useful in resolving interstate disputes that are difficult or impossible to litigate.<sup>194</sup> For example, on-going interstate conflicts like

<sup>185</sup> See 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 purpose for which the same is to be entered into, and how long it shall continue.”).

<sup>186</sup> See Schleifer, *supra* note 180, at 729 (indicating that the Constitution creates a dichotomy between “treaties, alliances, and federations” and “agreements and compacts”); see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1st ed. 1833) (speculating that the Framers, through the two sets of terms, sought to distinguish political treaties from agreements that are “mere private rights of sovereignty”).

<sup>187</sup> See U.S. CONST. art. I, § 10, cl. 1 (“No state shall enter into any Treaty, Alliance, or Confederation . . . .”); Hollis, *supra* note 69, at 761 (indicating that treaties, confederation or alliance between states are “prohibit[ed] entirely” under the Constitution).

<sup>188</sup> See U.S. CONST. art. I, § 10, cl. 3 (discussing the congressional approval requirement for interstate agreements or compacts); U.S. CONST. art. III, § 2 (granting original jurisdiction to the Supreme Court in resolving any dispute in which a state is a party); see also Frankfurter & Landis, *supra* note 180, at 694 (“Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the republican transformation of the needed approval by the Crown.”).

<sup>189</sup> See Frankfurter & Landis, *supra* note 180, at 749–55 (describing eleven interstate compacts between 1803 and 1909 which never received the consent of Congress, but were accepted as valid).

<sup>190</sup> See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 288 (2003).

<sup>191</sup> See Frankfurter & Landis, *supra* note 180, at 735–55 (summarizing both compacts receiving congressional consent and those that were accepted without consent prior to 1925).

<sup>192</sup> See Greve, *supra* note 190, at 289.

<sup>193</sup> See, e.g., Frankfurter & Landis, *supra* note 180, at 729 (“The imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions.”).

<sup>194</sup> See *id.* at 704–05 (identifying two areas in which compacts have proven useful: when the

waste disposal and boundary disputes require a kind of “[c]ontinuous and creative administration” which the courts are unable to provide.<sup>195</sup> Frankfurter and Landis also acknowledged the fact that states can use compacts to deal with regional issues.<sup>196</sup> Because these conflicts involve a specific group of states, resolution would require action by more than a single state.<sup>197</sup> Alternatively, federal legislation would be burdensome and excessive because it would require only regional enforcement.<sup>198</sup> These findings suggest that if they affect only member states, interstate compacts may present an efficient and often necessary alternative method of state regulation and should not require congressional interference.

However, compacts affecting the power of nonmember states should require congressional consent. While the necessity of consent in instances of horizontal encroachment is unclear from Supreme Court precedent, such compacts harm the balance of power between states, posing a risk to the entire federal system.<sup>199</sup> In these cases, congressional approval can be used to protect the interests of both the federal government and the nation as a whole.<sup>200</sup> The NPV agreement represents this kind of compact.<sup>201</sup> Under the NPV agreement, candidates will be forced to reduce the attention given to sparsely populated states and increase the amount of time and resources spent in areas of high population.<sup>202</sup> In addition, competitive states previously favored in traditional presidential campaigns will lose voting power as candidates will have greater incentive to broaden their campaigns in order to reach a larger number of individual voters.<sup>203</sup> Thus, congressional consent is required to preserve the balance of state power in presidential elections.

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“range, the intricacy, [or] the technicality of the facts [ ] make a court a very ill-adapted instrument for settlement,” and when the dispute is “wholly beyond the process of adjudication”).

<sup>195</sup> See *id.* at 707.

<sup>196</sup> See *id.* (arguing that “most questions of interstate concern are beyond the jurisdiction of the Supreme Court” because “regions, like the Southwest clustering about the Colorado River, or the States dependent upon the Delaware for water,” are “less than the nation and are greater than any one State”).

<sup>197</sup> See *id.* (finding that a solution to regional issues must “be greater than that at the disposal of a single State”).

<sup>198</sup> See *id.* at 708 (noting that while national action may be an alternative to action by a single state, the “regional interests, regional cultures and regional interdependencies . . . produce regional problems calling for regional solutions” and “a gratuitous burden would thereby be cast upon Congress and the national administration” in an effort to control the issue).

<sup>199</sup> See FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 23 (1976) (noting that although they could find no examples, “compacts which might be said to have a discriminatory effect upon nonparty states could be described as affecting the political balance of the federal system”); see also Frankfurter & Landis, *supra* note 180, at 695 (arguing that interstate agreements or compacts “may affect the interests of States other than those parties to the agreement,” thus “national, and not merely regional, interest may be involved”).

<sup>200</sup> See Frankfurter & Landis, *supra* note 180, at 695 (arguing that in the case of horizontal encroachment, “Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions”).

<sup>201</sup> See *supra* Part II.C.

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

## CONCLUSION

There is no doubt that Article II grants state legislatures broad control over the selection of presidential electors largely free from federal intervention. It is equally clear from the text of the Compact Clause that any agreement or compact between states must receive the consent of Congress. The NPV agreement involves both provisions, highlighting a constitutional conflict that leaves the proper role of Congress and the validity of the agreement in question. This issue is further complicated by the lack of guidance from the Supreme Court regarding the necessity of congressional consent when a compact like the NPV agreement horizontally encroaches upon the power of nonmember states. While these questions remain open, this article has argued that because it will upset the balance of voting power between the states and thus threaten the federal structure designed by the Framers, the NPV agreement must receive congressional approval before becoming effective.