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SO GOES THE NATION: THE CONSTITUTION, THE COMPACT, AND WHAT THE AMERICAN WEST CAN TELL US ABOUT HOW WE’LL CHOOSE THE PRESIDENT IN 2020 AND BEYOND

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INTRODUCTION

The Electoral College has resulted in the loser of the national popular vote winning the presidency five times in our history, including twice in the past two decades. Over the course of more than two centuries, it has become one of the two most popular subjects for constitutional amendment proposals.¹ But because of the difficulty involved in amending the U.S. Constitution,² many of those opposed to the way we choose the President have become resigned to the status quo. However, others have been persuaded to pursue reform without resorting to the amendment process set forth in Article V.³ Specifically, reformers have

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1. John R. Vile, 1 *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–2002*, at 159 (2d ed. 2003) (“No amendment effort has been more consistent than that for reform of the electoral college. More than 850 proposals have been offered in Congress, making this topic second in overall numbers only to the equal rights amendment.”).

2. See, e.g., Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 238–74 (Sanford Levinson ed., 1995) (using a “systematic, comparative, and, to the extent possible, empirical” method that reveals the U.S. Constitution is among the world’s most difficult to amend).

3. U.S. Const. art. V. Article V, in relevant part, reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the

rallied around the National Popular Vote Interstate Compact, a plan that seeks to elect the presidential candidate receiving the most votes nationwide by leveraging states' power over the Electoral College.

This Piece describes the National Popular Vote Interstate Compact (NPVC) movement, particularly in light of recent political victories in the western states that have brought success within advocates' reach. It then puts the campaign in a historical context, comparing it to an earlier effort to secure democracy reform, also popularized in the American West: the direct election of U.S. senators. This Piece then discusses three potential challenges facing the NPVC: two recent decisions issued by courts in western states, which may impact the operation of the Electoral College; a mounting political campaign to have one western state withdraw its support for the plan; and an attack from conservative legal commentators arguing that the plan is unconstitutional. This Piece concludes with a brief note of cautious optimism for advocates of the plan, namely that they can prevail if they build on the campaign's present momentum while heeding the aforementioned obstacles, which I believe to be surmountable.

I. THE NATIONAL POPULAR VOTE INTERSTATE COMPACT, TWELVE YEARS STRONG

In 2019, a few western states were in the news for taking on the Electoral College. When the Oregon State Legislature passed S.B. 870,⁴ and Governor Kate Brown signed it into law,⁵ the Beaver State became the third state west of the Mississippi—and the fourth state overall—to join the NPVC last year. The action by lawmakers in Oregon, in addition to Colorado, New Mexico, and Delaware, means that fifteen states and the District of Columbia are now signatories to the NPVC.⁶

Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

Id.

4. Relating to the Agreement Among the States to Elect the President by National Popular Vote, S.B. 870, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

5. Oregon Latest State to Join National Popular Vote Agreement, KGW (June 12, 2019), <https://www.kgw.com/article/news/politics/oregon-latest-state-to-join-national-popular-vote-agreement/283-e1fb120d-7aa3-4e49-8ca6-0fdb34d944b> [<https://perma.cc/Y389-LCKS>] (last updated June 13, 2019).

6. Colorado, Nat'l Popular Vote, <https://www.nationalpopularvote.com/state/co> [<https://perma.cc/2VZ6-3YC8>] (last visited Nov. 1, 2019) (signed March 15, 2019); Delaware, Nat'l Popular Vote, <https://www.nationalpopularvote.com/state/de> [<https://perma.cc/3PZF-HM39>] (last visited Nov. 1, 2019) (signed March 28, 2019); New Mexico, Nat'l Popular Vote, <https://www.nationalpopularvote.com/state/nm> [<https://perma.cc/S4QC-QEELM>] (last visited Nov. 1, 2019) (signed April 3, 2019). Twelve other jurisdictions (California, Connecticut, District of Columbia, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New York, Rhode Island,

The NPVC is an innovative, state-based plan that seeks to ensure that future presidents are elected with a majority in both the national popular vote *and* the Electoral College. Party states agree to allocate their electoral votes to the presidential candidate winning the greatest number of votes cast nationwide. When states entitled to 270 total electoral votes pass similar legislation—enough to determine the presidency—the NPVC will take effect. The flurry of activity over the last year means that the plan needs sign-on from states accounting for just 74 more electoral votes.⁷

The genius of the NPVC is that it works within our current constitutional design. While the Constitution never mentions the term “Electoral College,” its basic structure is set forth in Article II. In Section 1 of that Article, the Constitution instructs “each state” to select its allotment of presidential electors “in such manner as the Legislature thereof may direct.”⁸ The text is unambiguous. It empowers state lawmakers to decide how their state’s share of electors are chosen. The Supreme Court affirmed this reading as early as 1892. In *McPherson v. Blacker*, the Court minced no words in holding that “the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.”⁹ The Court reiterated this well-settled point more than a century later in its otherwise controversial *Bush v. Gore* decision.¹⁰ When Florida’s electoral votes—and the presidency—remained in limbo, five Justices ruled that “the state legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself.”¹¹

Most state legislatures have used this authority to pass legislation that awards their electors to the presidential candidate winning the popular vote in their state.¹² Maine and Nebraska have used it to buck the trend of the other 48 states and Washington, D.C.; the outlier pair split their electoral votes, awarding two to the candidate winning the greatest number of votes in the state overall, and the rest to the winner of each

Vermont, and Washington) signed onto the NPVC before last year. See Status of National Popular Vote Bill in Each State, Nat’l Popular Vote, <https://www.nationalpopularvote.com/state-status> [<https://perma.cc/4Y2B-4L8Q>] (last visited Nov. 1, 2019).

7. KGW, *supra* note 5.

8. U.S. Const. art. II, § 1.

9. 146 U.S. 1, 35 (1892).

10. 531 U.S. 98, 104 (2000); see also Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 28–33 (2006) (describing the inappropriate role of Florida’s then-Secretary of State Katherine Harris as an example of a referee playing favorites).

11. *Bush*, 531 U.S. at 104. One expert explained the extent of this plenary power, comically noting that “any state[] could pass a law to appoint its electors using a basketball tournament, scratch-off lottery cards, or at the sole discretion of the Governor.” Victoria Bassetti, *Electoral Disfunction: A Survival Manual for American Voters* 77 (2012).

12. See Alex Cohen, *The National Popular Vote, Explained*, Brennan Ctr. for Justice (Mar. 14, 2019), <https://www.brennancenter.org/blog/national-popular-vote-explained> [<https://perma.cc/54BW-JDS9>].

congressional district.¹³ This is why, in 2016, Donald Trump was awarded one of Maine’s four electoral votes, and in 2008, Barack Obama was awarded one of Nebraska’s five.¹⁴ Likewise, the states that have enacted the NPVC legislation have done so in accordance with this “plenary power.” That is, these states have decided that, once enough states follow their lead, they will use this constitutional authority to award their electors to the winner of the most votes nationwide—even if it is not the candidate winning the most votes within their states’ boundaries.

II. REFORMING THE SENATE: FROM “TREASON” TO TRIUMPH

Western states like Oregon and Colorado may not be the NPVC’s trailblazers—Maryland earned that honor back in 2007.¹⁵ But they do have a distinctive history of leading the charge on this type of reform to expand democracy. The “Oregon Plan” was part of an earlier effort to reform another calcified branch of the federal government: the Senate.¹⁶ Under the original Constitution, state legislatures not only had discretion to choose presidential electors however they deemed fit, they also selected U.S. Senators.¹⁷ Yet over time, this part of the Framers’ grand design proved deeply flawed. Senate seats remained vacant—for years, in some

13. Me. Rev. Stat. Ann. tit. 21-A, § 805(2) (2020) (first implemented in the 1972 presidential election); Neb. Rev. Stat. § 32-714 (2020) (first implemented in the 1996 presidential election).

14. Mitch Smith, *Blue Dot for Obama Prompts Red Nebraska to Revisit Electoral College Rules*, N.Y. Times (Jan. 31, 2015), <https://www.nytimes.com/2015/02/01/us/politics/blue-dot-for-obama-prompts-red-nebraska-to-revisit-electoral-college-rules.html> [<https://perma.cc/BQ3W-CU4W>]; Drew Desilver, *Trump’s Victory Another Example of How Electoral College Wins Are Bigger than Popular Vote Ones*, Pew Research Ctr. (Dec. 20, 2016), <https://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/> [<https://perma.cc/Z7EU-5DMZ>] (noting that Donald Trump was awarded an electoral vote in Maine).

15. Md. Code Ann., Elec. Law § 8-5A-01 (West 2019) (“The State of Maryland hereby enters the agreement among the states to elect the President by national popular vote”); Bill Schneider, *Dropping Out of the Electoral College*, CNN (Apr. 10, 2007), <https://www.cnn.com/2007/POLITICS/04/10/schneider.electoral/index.html> [<https://perma.cc/538G-2Y3A>].

16. Landmark Legislation: The Seventeenth Amendment to the Constitution, U.S. Senate, <https://www.senate.gov/artandhistory/history/common/generic/SeventeenthAmendmen.htm> [<https://perma.cc/529E-ZTBT>] (last visited Oct. 31, 2019) (noting that Oregon implemented measures in the early twentieth century “allowing voters to express their choice for senator” and that other states followed this plan).

17. U.S. Const. art. I, § 3, cl. 1, amended by U.S. Const. amend. XVII (“The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.”); see also William Howard Taft, *Can Ratification of an Amendment to the Constitution Be Made to Defend on a Referendum*, 29 Yale L.J. 821, 823 (1920) (“[T]he election of President and Senators [by the legislature] . . . was, in the judgment of those who made and ratified the Constitution, a sufficient submission to the will of the people under the principles of popular representative government.”).

instances¹⁸—as state legislatures deadlocked and were unable to fill them. This vacancy problem persisted despite the enactment of federal legislation to address it,¹⁹ and it even plagued states whose legislatures were under single-party control.²⁰ In the face of impasse, the selection of senators began to occupy an increasingly large portion of states' legislative agenda. As a result, Americans faced a double crisis: Their elected officials in the state capitals—where the bulk of policy was made²¹—sacrificed legislative resources to address the problem, and still they lacked adequate representation in the nation's capital.²²

Actually, the Senate had presented a third crisis: During the period following the Civil War, the chamber became a morass of corruption.²³ With the “widening scope of federal power over commerce, tariff policy, and the battle over the monetary standard,”²⁴ the foot soldiers of corporate interests descended upon senators, and the state legislators that appointed them, to exert their influence. Not only did plutocrats buy state lawmakers to get their industry's guy into the Senate,²⁵ but members of that chamber

18. Delaware's United States Senators, U.S. Senate, <http://www.senate.gov/states/DE/senators.htm> [<https://perma.cc/H7E6-M7M3>] (last visited Oct. 31, 2019) (noting five instances of vacancies because of the failure of the legislature to elect, three of which lasted for more than a year).

19. Act of July 25, 1866, ch. 245, 14 Stat. 243 (providing a deadline to state legislatures for filling Senate vacancies); Russell L. Caplan, *Constitutional Brinkmanship: Amending the Constitution by National Convention* 62 (1988) (“Between 1891 and 1905, forty-five deadlocks occurred nationwide.”).

20. Wendy J. Schiller, Charles Stewart III & Benjamin Xiong, *U.S. Senate Elections Before the 17th Amendment: Political Party Cohesion and Conflict 1871–1913*, 75 *J. Pol.* 835, 839–40 (2013) (“Another Senate election from that same year in Kentucky provides the counterexample of a majority caucus unable to resolve internal divisions, ultimately leaving the Senate seat vacant.”).

21. Stephen M. Griffith, *American Constitutionalism: From Politics to Theory* 34 (1996) (“The states had primary responsibility for tasks of government—they pursued mercantilist policies to stimulate economic development, set money and banking policies, subsidized transportation, and dealt with crime, poverty, and various religious and moral issues.”).

22. Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 *Nw. U. L. Rev.* 1181, 1189 (2013) (“Reformers stressed that the legislative selection of senators consumed state legislative agendas with national issues at the expense of local concerns . . .”).

23. Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 *Vand. L. Rev.* 1347, 1353 (1996) [hereinafter Amar, *Indirect Effects*] (“State legislative corruption and special interest group control were perhaps the greatest evils associated with indirect election.”); Daniel T. Shedd, Note, *Money for Senate Seats and Other Seventeenth Amendment Politicking: How to Amend the Constitution to Prevent Political Scandal During the Filling of Senate Vacancies*, 79 *Geo. Wash. L. Rev.* 960, 966 (2011) (noting six investigations from 1866 to 1906 into senate bribery scandals, including one involving \$1 million).

24. Schiller et al., *supra* note 20, at 837.

25. Akhil Reed Amar, *America's Constitution: A Biography* 412–13 (2005) [hereinafter Amar, *America's Constitution*] (noting that “large corporations, monopolies, trusts, and other special-interest groups” corruptly influenced the Senate election process); Alan P.

also understood the market value of their new office. While wealthier incoming senators used their role to preserve and grow their riches, those of more limited means leveraged their appointment as an opportunity to fraternize among the business elite and well connected to establish their own fortunes.²⁶ As the growing “factionalization” within state parties combined with the “outside pressure of influential campaign contributors and bribery itself, any expectations that constituents had about who their state legislators would eventually elect to the U.S. Senate [were] generally tenuous, at best.”²⁷ There was a growing chasm between Americans and the senators who were supposed to be representing them (even if indirectly) in Washington.²⁸

In justifying their creation of the Senate, the Framers argued that it would consist of a “temperate and respectable body of citizens” who would protect it during times when they are “stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men.”²⁹ In the lead up to the twentieth century, however, it was clear that their prediction—“that the federal Senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body”³⁰—could not have been further off the mark.³¹

Nevertheless, the Framers had put in place a backstop for an errant Senate: bicameralism. They argued that “the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles.”³² For decades, the House of Representatives tried to intercede, pushing for a constitutional

Grimes, *Democracy and the Amendments to the Constitution 75–76* (1978) (describing the process by which “political bosses” influenced Senate elections).

26. Schiller et al., *supra* note 20, at 837.

27. *Id.* at 838.

28. Clopton & Art, *supra* note 22, at 1190 (noting that states’ popular representation is thwarted when “infighting among larger parties” results in a senator being selected from a minority party, or when gerrymandering of state legislative districts “prevent[s] equal representation in the state legislature,” thus producing a senator who failed to “represent the entire state”).

29. *The Federalist* No. 63, at 320 (James Madison) (Ian Shapiro ed., 2009).

30. *Id.* at 324.

31. David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 *Hastings L.J.* 1043, 1080 (2014) (describing how proponents of direct elections, including legal historian Herman Ames, thought they were more democratic, less likely to lead to corrupt or undeserving candidates, would end deadlocks, and would lessen the effect of national affairs on state and local politics (citing Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History 62–63* (1897))); Schiller et al., *supra* note 20, at 846 (concluding that “[t]he Framers would have been disappointed by . . . indirect U.S. Senate elections,” which “combined with inexperienced and short-term state legislators,” encouraged corruption, thwarted representative choices for the Senate, and left Senate seats vacant “far more frequently than under direct elections”).

32. Madison, *supra* note 29, at 324.

amendment for the direct election of senators. In fact, on at least half a dozen occasions between 1893 and 1912, a resolution to amend the Constitution passed the House.³³ At one point, William Randolph Hearst, the media titan famed for his newspapers' radically disruptive and sensationalist approach to reporting (who was also a congressman at the time), tried his outsized hand at making the Senate's grift public.³⁴ In 1906, the Hearst Corporation funded the muckraking David Graham Phillips to pen *The Treason of the Senate*, a series of exposés that graphically depicted the body as "a club of corrupt millionaires."³⁵ All of this was to no avail. The Senate stood in the way, unsurprisingly. Its refusal to vote on the House measures demonstrated the weakness in yet another of the Framers' contingencies.

The status quo was wholly unacceptable. The situation was dire, but reformers in the states were unwilling to remain idle spectators to the dissolution of the democratic form of government promised to them more than a century earlier. And in their darkest hour came clarity, inspiration, and creativity that directed them to the Framers' fail-safe: "the people themselves."³⁶

Around the turn of the century, as states were increasingly adopting populist and Progressive Era policies, many began to experiment with a novel federal election reform.³⁷ The states had been called upon to conduct various forms of advisory elections to determine the people's

33. 24 Cong. Rec. 618 (1893); 26 Cong. Rec. 7782 (1894); 31 Cong. Rec. 4825 (1898); 33 Cong. Rec. 4128 (1900); 35 Cong. Rec. 1722 (1902); 48 Cong. Rec. 6367 (1912).

34. See Matthew Schneirov, *Popular Magazines, New Liberal Discourse and American Democracy, 1890s–1914*, 16 *J. Gilded Age & Progressive Era* 121, 133 (2017) (noting that Hearst's radical journalists' "central muckraking themes of mobilizing public opinion to combat corporate corruption of public life and more broadly the corruption of social institutions . . . resonated with a middle-class public"); *id.* at 135 ("Hearst was the most prominent publisher in bringing a core of radical journalists to national attention, including prominent members of the Socialist Party.").

35. Schleicher, *supra* note 31, at 1056; see also Clopton & Art, *supra* note 22, at 1191 (referring to *The Treason of the Senate* as one of the famous examples of the press attempting "to provoke (and perhaps reflect) the public desire to elect senators"); Schneirov, *supra* note 34, at 135 ("Various authors exposed the horrors of child labor (Edward Markham's *Hoe-Man in the Making*), nefarious plutocrats (Alfred Henry Lewis's on Andrew Carnegie) and the corruption of the U.S. Senate by business interests (David Graham Phillip's *Treason of the Senate*).").

36. Madison, *supra* note 29, at 325; cf. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 108 (2004) ("From the perspective of the 1790s, however, an idea of 'the people' as a collective body capable of acting independently from within the political system was more serviceable [P]olitics was the proper forum, the people were the proper agent, and 'political-legal' devices were the proper means."); *id.* at 109 (describing the "social and political developments in the 1790s" that "vastly enlarged the role and importance of an emerging democratic public sphere" and led various forms of popular engagement in constitutional politics).

37. Schleicher, *supra* note 31, at 1055 ("Scholars usually date the beginning of the national movement in favor of direct elections to the 1870s, when advocates introduced the first real efforts to amend the Constitution in Congress.").

preference for the U.S. Senate. As candidates campaigned for seats in the state legislature, voters pressed them to honor the advisory poll. Soon, candidates were pledging to support whomever won the informal balloting.³⁸ And while many states embraced this approach, Oregon went further: Its eponymous plan, adopted through an amendment to its own constitution, bound state legislators to pick the Senate candidates winning the greatest voter support.³⁹ It was a state-based solution to democratize and “purify” the Senate.⁴⁰ Reformers had achieved a popular mode of electing their senators that was permitted by the U.S. Constitution, but “accord[ed] better with the democratic ideals on which the Constitution was founded.”⁴¹ By the time the Senate finally approved the Seventeenth Amendment in 1912 (which, when ratified a year later, enshrined the right of the people to elect their senators directly), well over half of the country had already been selecting their senators.⁴² In the end, the reform not only eliminated the deadlock crisis and helped to lessen public corruption, it had the added benefit of creating greater parity among individual citizens’ voting power and inducing candidates to expand their mobilization and outreach efforts.⁴³

What today’s NPVC advocates are now trying to do for presidential elections is what their kindred spirits, the supporters of the Oregon Plan, accomplished some 100 years ago: reform the method of selecting their political leaders by working *within* the current system until enough pressure exists to *change* that system. Much like the original Senate, the Electoral College fails to operate in line with the Framers’ vision. It no longer consists of “men most capable of analyzing the qualities adapted to the station,”⁴⁴ and it neither fosters “circumstances favorable to deliberation,”⁴⁵ nor “to a judicious combination of all the reasons and

38. Amar, *America’s Constitution*, supra note 25, at 411; Grimes, supra note 25, at 76.

39. Amar, *America’s Constitution*, supra note 25, at 411; Amar, *Indirect Effects*, supra note 23, at 1354 (referring to the Oregon Plan as “[t]he most sophisticated and effective device” for “limiting state legislators’ discretion in their choice of Senators”).

40. Amar, *Indirect Effects*, supra note 23, at 1353.

41. *Id.* at 1354.

42. Grimes, supra note 25, at 76; Schleicher, supra note 31, at 1056 (“By 1908, twenty-eight of the forty-five states used the Oregon system or some other form of direct elections, some adopted through the initiative process and others through legislative action.”); see also 45 Cong. Rec. 7109–20 (1910).

43. Amar, *America’s Constitution*, supra note 25, at 413 (noting that “a modest reduction in *state* governmental corruption” and “the impact of state malapportionment and gerrymandering” were among “the bigger effects of the” Seventeenth Amendment).

44. *The Federalist* No. 68, at 344 (Alexander Hamilton) (Ian Shapiro ed., 2009) [hereinafter *Hamilton, Federalist No. 68*]. But cf. Bassetti, supra note 11, at 75–76, 80 (2012) (describing how the nineteen-year-old son of a party insider became a state’s presidential elector in 2008).

45. *Hamilton, Federalist No. 68*, supra note 44, at 344. But cf. Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 *Ariz. L. Rev.* 903, 913–18 (2017) (describing the lobbying and harassment of electors in the aftermath of the 2016 presidential election in an attempt to have them change their vote);

inducements which were proper to govern their choice.”⁴⁶ Nor is the Electoral College still needed to overcome the difficulty of obtaining the information requisite to making informed political judgments.⁴⁷ In these respects, circumstances have obviated the need for an intermediary between the people and the presidential candidates. Maintaining the anachronistic institution for selecting the President seems more of a salute to the hyperelitist notion that the people cannot be trusted to decide the question for themselves⁴⁸ (a notion that was bandied about at the Constitutional Convention).⁴⁹ Also like the original Senate, the Electoral College distorts political and public policy decisionmaking, while diminishing the level of public accountability. It encourages presidential candidates to concentrate election spending⁵⁰ and campaign appearances⁵¹ in a handful of battleground states, while permitting them to ignore virtually the other seventy-five percent of the country.⁵² Once chosen, presidents have warped reelection incentives—fostered by the Electoral College’s campaign structure—to govern in the interest of the residents in those same few states at the expense of the rest of the country.⁵³

id. at 917 (“The public effort to mobilize a lobbying campaign to influence the electoral vote has led to an unprecedented level of harassment of the individuals who serve in that role.”).

46. Hamilton, Federalist No. 68, *supra* note 44, at 344. But cf. Whittington, *supra* note 45, at 936 (“But with the rise of political parties and electioneering, the electors became superfluous and by common societal agreement lost the right to exercise discretion in choosing a president . . . They were to be clerks, not kingmakers.”).

47. See, e.g., 2 *The Records of the Federal Convention of 1787*, at 29 (Max Farrand ed., 1991) (statement of Roger Sherman) (claiming that “the people at large . . . will never be sufficiently informed of characters” of the candidates for election).

48. Indeed, even getting to this point was a mark of progress. It reflected a change in the operation of the Electoral College over the nineteenth century, when state legislators relinquished their right to choose electors, instead allowing state residents to vote for who would be appointed as electors. See Grimes, *supra* note 25, at 76.

49. See, e.g., 2 *The Records of the Federal Convention of 1787*, *supra* note 47, at 30 (statement of George Mason) (“[I]t would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man.”); id. at 114 (statement of Elbridge Gerry) (“A popular election in this case is radically vicious. The ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in Concert to delude them into any appointment.”).

50. Lawrence Lessig, *Electoral College Confusions*, Hill (Oct. 31, 2018), <https://thehill.com/blogs/congress-blog/politics/413998-electoral-college-confusions> [<https://perma.cc/Q497-ZB4L>].

51. *Two-Thirds of Presidential Campaign Is in Just 6 States, Nat’l Popular Vote*, <https://www.nationalpopularvote.com/campaign-events-2016> [<https://perma.cc/QLC4-SCVM>] (last visited Nov. 2, 2019).

52. Paul Schumaker & Burdett A. Loomis, *Choosing a President: The Electoral College and Beyond 102–03* (2002) (“Presidential campaigns have a clear tendency to concentrate their resources on a relatively small number of competitive states . . . while ignoring states that appear solidly to favor one camp or the other.”).

53. Brian M. Faughnan & John Hudak, *Presidential Pandering: How Elections Determine the Exercise of Executive Power in the U.S. and Colombia*, *Issues in Governance*

Most importantly, however, the Electoral College, like the original Senate, has become an anathema to our professed American values. It allows some votes to count more than others, which is hostile to the fundamental principle that in a fair and just society, every person's vote should be worth the same.⁵⁴ When Nevada's governor vetoed his state's NPVC bill earlier this year, he tweeted his reasoning: "Once effective, the National Popular Vote Interstate Compact could diminish the role of smaller states like Nevada in national electoral contests and force Nevada's electors to side with whoever wins the nationwide popular vote, rather than the candidate Nevadans choose."⁵⁵ The Governor's tweet makes a subtle, unwritten point: Under the current system, Americans residing in his state have a greater say in choosing the President because their votes are given more weight than are the votes of other Americans. Recently, there has been no shortage of commentary about this phenomenon and whether it renders the United States a democracy or a republic.⁵⁶ In fact, this only causes needless confusion. Just as in a democracy,⁵⁷ "the fundamental maxim of republican government . . . requires that the sense of the

Stud., Nov. 2012, at 1, 4 ("Incumbent presidents use campaign resources to help achieve electoral success, but they can also use the powers of their office to do the same. As a result, policy outcomes often aim to benefit key constituencies in critical states.").

54. See, e.g., Wilfred Codrington III, *The Electoral College's Racist Origins*, Atlantic (Nov. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/> [<https://perma.cc/9JR9-DGGK>] ("[M]ore than two centuries after it was designed to empower southern whites, the Electoral College continues to do just that. The current system has a distinct, adverse impact on black voters, diluting their political power.").

55. Steve Sisolak (@GovSisolak), Twitter (May 30, 2019), <https://twitter.com/GovSisolak/status/1134148586734702593> [<https://perma.cc/7VEF-H6NP>].

56. See, e.g., Dan Crenshaw (@DanCrenshawTX), Twitter (Aug. 24, 2019), <https://twitter.com/dancrenshawtx/status/1165403952411750401?s=21> [<https://perma.cc/583Z-RK4Q>] ("Abolishing the electoral college means that politicians will only campaign in (and listen to) urban areas. That is not a representative democracy. We live in a republic, which means 51% of the population doesn't get to boss around the other 49%."); see also Janelle Bouie, *Alexandria Ocasio-Cortez Understands Democracy Better than Republicans Do*, N.Y. Times (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/opinion/aoc-crenshaw-republicans-democracy.html> (on file with the *Columbia Law Review*). In response to President Trump's call to retain the Electoral College, Representative Alexandria Ocasio-Cortez publicized a 2012 tweet from Donald Trump that criticized the Electoral College. Alexandria Ocasio-Cortez (@AOC), Twitter (Aug. 27, 2019), <https://twitter.com/AOC/status/1166495294776893440> [<https://perma.cc/2JQS-HJST>] ("I'm so glad the President and I agree that the Electoral College has got to go."); see also Jack Holmes, *Alexandria Ocasio-Cortez Brought the Receipts on Donald Trump and the Electoral College*, Esquire (Aug. 28, 2019), <https://www.esquire.com/news-politics/a28842736/alexandria-ocasio-cortez-electoral-college-donald-trump-campaign/> (on file with the *Columbia Law Review*).

57. Bassetti, *supra* note 11, at 77 ("After all, in a democracy, the majority rules. But the Electoral College works differently."); see also Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 285 (2000) (explaining the Supreme Court's justification for invalidating malapportioned legislative districts because they "violated not only the equal protection clause, but the very notion of equality undergirding American democracy").

majority should prevail.”⁵⁸ Weighing some votes more heavily than others is a defining characteristic of neither a democracy nor a republic, but a system of minority rule. And it is contrary to twenty-first century American values.⁵⁹ The NPVC seeks to meet the Electoral College on its terms and mitigate some of its gravest ills.

III. THREE (FINAL?) CHALLENGES

A. *Article II and the Twelfth Amendment: Keeping the Faith?*

Recently, two courts out West decided cases that raise important questions about how the Electoral College functions—or malfunctions. Neither case involves the NPVC directly but, rather, states’ control over electors. The more recent decision, *Baca v. Colorado Department of State*, comes out of the Tenth Circuit.⁶⁰ In that case, Michael Baca, one of Colorado’s electors, ignored his vow to vote for Hillary Clinton and was subsequently replaced as an elector. The court concluded the state’s action to replace Mr. Baca was unconstitutional because, “while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere once voting begins”⁶¹ Article II and the Twelfth Amendment neither permit the state to remove an elector, nor to direct other electors to disregard the defecting elector’s vote, nor to appoint a new elector in his stead.⁶²

Three months earlier, the Washington State Supreme Court issued its opinion in another case, *In re Guerra*.⁶³ That court held that it was lawful for the state to impose a financial penalty on Mr. Guerra and his fellow electors who violated their pledges. The court observed that, implicit in the state’s “absolute authority” to appoint electors is the power “to impose a fine on electors for failing to uphold their pledge, and that fine does not interfere with any federal function” of the elector under the Constitution.⁶⁴ Article II and the Twelfth Amendment afford the state discretion to set conditions for the appointment of electors, which, in turn, permits them to impose penalties on electors who defy those conditions—including the requirement that they vote in a predetermined manner.

58. The Federalist No. 22, at 109 (Alexander Hamilton) (Ian Shapiro ed., 2009).

59. Indeed, it was against eighteenth-century American values. See *id.* (giving a political advantage to less populous states goes against “[e]very idea of proportion and every rule of fair representation”).

60. 935 F.3d 887 (10th Cir. 2019).

61. *Id.* at 943.

62. *Id.*

63. 441 P.3d 807 (Wash. 2019).

64. *Id.* at 814.

On January 17, 2020, the Court granted certiorari in these cases.⁶⁵ Together they present three critical legal questions,⁶⁶ but in essence, they boil down to one larger question: How much independence does the Constitution afford to electors once they are appointed? In answering this, the Court has three options that stand out. It can rule that states may: (1) sanction and remove faithless electors to enforce the will of voters; (2) sanction but not remove faithless electors; or (3) neither sanction nor remove electors, thus freeing them to exercise discretion. Notably, the Court's ultimate decision would impact the current system of choosing the President and the NPVC equally. Both systems are based on the assumption that electors will honor their pledges and vote according to state law. Whether the state law requires them to vote for the candidate

65. *Colo. Dep't of State v. Baca*, cert. granted No. 19-518, 2020 WL 254162 (U.S. Jan. 17, 2020); see also Order List: 589 U.S. (Jan. 17, 2020), https://www.supremecourt.gov/orders/courtorders/011720zr_h31j.pdf [<https://perma.cc/XL96-SRBB>] (granting certiorari). Despite the Supreme Court's decision to grant cert, the lower courts' rulings could have been reconciled substantively. The Colorado case asks whether a state's power to appoint electors also implies the power to remove them. In the Washington case, however, the state supreme court did not address the state's purported removal authority, only the narrower power to fine defiant electors. All of this is evident from the ultimate conduct of those states' electors in 2016. Mr. Baca, Colorado's "Hamiltonian" or "faithless" elector, was removed and replaced with someone else who voted for Hillary Clinton in compliance with the pledge. Certificate of Filing Presidential Elector Vacancy, State of Colo. Dep't of State (Dec. 19, 2019), <https://www.archives.gov/federal-register/electoral-college/2016-certificates/pdfs/vote-washington.pdf> [<https://perma.cc/7L2X-SM9C>]. Notwithstanding the lack of inherent tension, the Court's decision to intercede was probably the prudent one, given that thirty-two states and the District of Columbia mandate electors to take a pledge, and eleven actually call for defiant electors to be removed. Faithless Elector State Laws, FairVote, https://www.fairvote.org/faithless_elector_state_laws [<https://perma.cc/84CL-76B7>] (last visited Nov. 3, 2019) ("There are 32 states (plus the District of Columbia) that require electors to vote for a pledged candidate. Most of those states (17 plus DC) nonetheless do not provide for any penalty or any mechanism to prevent the deviant vote."). By granting cert, the Court has the opportunity to address the question before a post-Election Day frenzy and can prevent the presidency from being thrown in limbo for the second time in two decades.

66. These questions are framed as follows:

Whether a presidential elector who is prevented by their appointing state from casting an electoral-college ballot that violates state law lacks standing to sue their appointing state because they hold no constitutionally protected right to exercise discretion; [w]hether Article II or the 12th Amendment forbids a state from requiring its presidential electors to follow the state's popular vote when casting their electoral-college ballots; and [w]hether enforcement of a Washington state law that threatens a fine for presidential electors who vote contrary to how the law directs is unconstitutional because a state has no power to legally enforce how a presidential elector casts his or her ballot and a state penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.

Colorado Department of State v. Baca, Scotus Blog, <https://www.scotusblog.com/case-files/cases/colorado-department-of-state-v-baca/> [<https://perma.cc/GX9F-CV6J>] (last visited Mar. 15, 2020); *Chiafalo v. Washington*, Scotus Blog, <https://www.scotusblog.com/case-files/cases/chiafalo-v-washington/> [<https://perma.cc/8GKL-3WVH>] (last visited Mar. 15, 2020).

receiving the most votes within the state or the one receiving the greatest number of votes nationally is irrelevant.

If the Court reaches the merits of either case,⁶⁷ it's not clear that the decision—even one finding that electors have unfettered discretion to exercise independent judgment—will have a significant impact on the outcome of presidential elections. Historically, the vast majority of presidential electors have voted for their party's nominee, and those that have defected have typically been electors for the party that *lost* the electoral vote.⁶⁸ Even then, they switch their vote not to the other major party candidate, but to a third-party or protest candidate. While past conduct is not necessarily a predictor of future conduct, there is no reason to believe the electors chosen from the winning party will want to “throw” the contest either to the other candidate or to the House of Representatives to decide in a contingent election.⁶⁹ Likewise, in the event of such a ruling, the state political parties (which largely choose electors on behalf of the state legislatures) would almost certainly tighten their elector selection rules to limit the likelihood of defection; they might go so far as to adopt the Pennsylvania model, which permits the presidential nominee to select the electors.⁷⁰ Of course, if the Court rules that states have constitutional authority to penalize and even remove electors, the decision will only impact the rare would-be rogue elector.⁷¹ If anything, the Colorado and Washington cases just expose the flaws of the Electoral

67. The Court would have yet another option: It could punt on the question altogether. By reversing the Tenth Circuit decision on the standing question, it would be able to enforce the status quo without addressing the merits of the case. See, e.g., Richard L. Hasen, *The Coming Reckoning over the Electoral College*, *Slate* (Sept. 4, 2019), <https://slate.com/news-and-politics/2019/09/electoral-college-supreme-court-lessig-faithless-electors.html> [<https://perma.cc/7SYX-EHEE>] (noting that one of the judges did not reach the merits of the Tenth Circuit decision on jurisdictional grounds); *19-518 Colorado Department of State v. Baca*, U.S. Supreme Court, <https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00518qp.pdf> [<https://perma.cc/JUY9-M8ZS>] (last visited Jan. 20, 2020) (docket) (framing the question presented as “[w]hether a presidential elector who is prevented by their appointing State from casting an Electoral College ballot that violates state law lacks standing to sue their appointing State because they hold no constitutionally protected right to exercise discretion”).

68. Lily Rothman, *Hillary Clinton Isn't Alone. Losing Candidates Often Have Faithless Electors.*, *Time* (Dec. 20, 2016), <https://time.com/4607933/clinton-trump-faithless-electors-precedent/> [<https://perma.cc/C52L-CTD9>] (describing the tendency of “faithless electors” to accompany losing candidates and serve as protest votes).

69. See Derek T. Muller, *Why “Faithless Electors” Have Little Power to Change the Winner of Presidential Elections*, *Excess of Democracy Blog* (Oct. 14, 2019), <https://excessofdemocracy.com/blog/2019/10/why-faithless-electors-have-little-power-to-change-the-winner-of-presidential-elections> [<https://perma.cc/X3LJ-43UK>] (arguing that electors' historical voting patterns provide little reason to believe that they will swing the election).

70. 25 Pa. Consol. Stat. § 2878 (2019) (“The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled to.”).

71. See *supra* note 69 and accompanying text.

College; they demonstrate that uncertainty and the *potential* for chaos are the consequences of maintaining a system that trusts 538 political insiders to select the Commander in Chief instead of allowing some 140 million American voters to choose for themselves.

B. *The NPVC Repeal Effort: A Brief (but Serious) Political Interlude*

The Colorado and Washington cases aside, the NPVC is being flanked, facing assaults from at least two directions. Coincidentally, the more immediate battle also involves Colorado. The state is now grappling with a well-funded countereffort to have its NPVC legislation rescinded.⁷² Conservative political operatives have obtained a record-breaking number of petition signatures to force a referendum on the measure's repeal, and the Secretary of State's office has certified the question to appear on the 2020 ballot.⁷³ A successful repeal campaign would be a devastating blow for democracy reforms—landing a one-two combo that could have dire consequences for political reform efforts in Colorado as well as the larger NPVC movement. On the one hand, repeal could encourage a deluge of corporate money to fund ballot measures in the state to supplant thoughtful reform policies enacted by elected lawmakers.⁷⁴ On the other, the repeal of Colorado's law would cost the NPVC nine of its committed electoral votes and the loss of a purple state. And given this critical

72. Referendum Petition for Senate Bill #19-042 (National Popular Vote), Colo. Sec'y of State, <https://www.sos.state.co.us/pubs/elections/referendumPetitions.html> [<https://perma.cc/C9CZ-LXEJ>] (last visited Nov. 3, 2019); see also Marianne Goodland, Drive to Repeal National Popular Vote Compact Makes Colorado's 2020 Ballot, Colo. Pol. (Aug. 29, 2019), https://www.coloradopolitics.com/news/drive-to-repeal-national-popular-vote-compact-makes-colorado-s/article_c533bed0-ca76-11e9-9459-e3bdeca6799c.html [<https://perma.cc/KN7Q-KB7W>].

73. Reid Wilson, National Popular Vote Initiative Will Appear on Colorado Ballot, Hill (Aug. 29, 2019), <https://thehill.com/homenews/state-watch/459300-national-popular-vote-initiative-will-appear-on-colorado-ballot> [<https://perma.cc/DFL6-NS6S>].

74. Corporate money from both in and out of state has already flooded into state ballot campaigns, which in many states, do not have the contribution limits and regulation of candidate campaigns. See Marianne Goodland, National Popular Vote Campaign in Colorado Gets Strong Fundraising Support — from California, Colo. Pol. (Oct 31, 2019), https://www.coloradopolitics.com/news/national-popular-vote-campaign-in-colorado-gets-strong-fundraising-support/article_9643c010-fc04-11e9-ba4c-07c175558a78.html [<https://perma.cc/RSB7-WAA9>] (noting that the bulk of the funds raised by the pro-NPV campaign came from consisted of contributions from outside of Colorado, and the biggest contributions to date for the anti-NPV effort have come through dark money groups that do not disclose their donors); Elaine S. Povich, Big Money Pours into State Ballot Issue Campaigns, Pew Charitable Trusts Stateline (Sept. 23, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/23/big-money-pours-into-state-ballot-issue-campaigns> [<https://perma.cc/7NZU-2NAJ>] (“State ballot campaigns this year are attracting millions of dollars from corporations, unions, wealthy individuals and special interest groups, as referendums increasingly replace legislatures as a battleground for people who want to make state policy, on issues . . .”).

junction for the NPVC—again, just 74 electoral votes away from taking effect—a change in the narrative would itself be a setback.⁷⁵

C. *The Constitution Post-2020*

The NPVC movement has also been facing stealth attacks from another front. There are some within conservative legal circles who claim that the NPVC is unconstitutional.⁷⁶ Their arguments largely hinge on two provisions of the Constitution—the Interstate Compact Clause⁷⁷ and Article V.⁷⁸ The contention based on the former provision is that, absent approval from Congress, the NPVC would violate the Constitution because it would establish “cartels, collusion, and combinations” among party states.⁷⁹ As to the latter provision, the argument against the NPVC is that it would run afoul of the Constitution for, in effect, changing it without going through the formal amending process.⁸⁰ Both contentions are weak. While the *Guerra* and *Baca* cases are bound to resolve the elector discretion issue and, therefore, the meaning of Article II and the Twelfth Amendment, there are clear and well-established understandings of both the Compact Clause and Article V, both of which should remain unaltered.

1. *Article I: Keeping the Compact Clause Compact.* — The Interstate Compact Clause argument is a textual argument.⁸¹ It stems from Article I

75. See, e.g., Eli Watkins, Nevada Governor Rejects Effort to Join Popular Vote Compact, CNN (May 30, 2019), <https://www.cnn.com/2019/05/30/politics/nevada-popular-vote-veto-sisolak/> [<https://perma.cc/AGW2-FKV7>] (describing Governor Sisolak’s veto as “a blow to the movement” to elect the president by popular vote, which has otherwise made great progress).

76. See, e.g., Kristin Feeley, Guaranteeing a Federally Elected President, 103 Nw. U. L. Rev. 1427, 1444–52 (2009) (arguing that the NPVC may violate the Guarantee Clause); Derek T. Muller, The Compact Clause and the National Popular Vote Interstate Compact, 6 Election L.J. 372, 389–93 (2007) [hereinafter Muller, *The Compact Clause*] (arguing that the NPVC violates the Compact Clause); Norman R. Williams, Why the National Popular Vote Compact Is Unconstitutional, 2012 BYU L. Rev. 1523, 1540, 1581 (2012) (arguing that the NPVC is unconstitutional because it violates Article II of the Constitution); David Gringer, Note, Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College, 108 Colum. L. Rev. 182, 226 (2008) (describing debate over characterization of the NPVC as an interstate compact, and whether congressional approval is required).

77. U.S. Const. art. I, § 10, cl. 3.

78. *Id.* art. V.

79. See, e.g., Muller, *The Compact Clause*, supra note 76, at 386 (quoting Michael S. Greve, *Compacts, Cartels, and Congressional Intent*, 68 Mo. L. Rev. 285, 310 (2003)); see also *id.* at 372 (“[B]ecause the Clause is concerned with a shift in political power among the states, the diminished political effectiveness of the non-compacting states’ electoral votes is a sufficient interest to invoke the procedural safeguard of congressional consent and render the Interstate Compact unconstitutional in the absence of that consent.”).

80. See, e.g., Williams, supra note 76, at 1581 (calling it “inconceivable that a Constitution that specifies how the President is to be elected and that lays out a process for amending its requirements would permit a group of states to alter so fundamental a part of our constitutional structure”).

81. Gringer, supra note 76, at 226 (“By the terms of Article I, Section 10 of the Constitution, congressional approval would then be required.”).

language providing, in part, that “no state shall, without the consent of Congress, . . . enter into any agreement or compact with another state”⁸² On its face, the clause reads as an outright prohibition on compacts that lack sanction from federal lawmakers. Were that the rule, federal lawmakers representing NPVC member states could introduce legislation to that end and advocate for its passage.⁸³ Indeed, the Court has explained that Congress can give its imprimatur to compacts *ex ante* or *ex post*,⁸⁴ and, in fact, that compacts can be lawful even if they only have Congress’s implied consent.⁸⁵

But the argument that federal lawmakers would even have to give their consent assumes that the NPVC is the type of compact that needs congressional sanction. It is not. The claim that the NPVC falls into that family of compacts is a superficial one that relies on a wishful, but incorrect, understanding of the legal doctrine relating to the otherwise obscure constitutional provision.

In *Virginia v. Tennessee*, the prevailing authority on the Compact Clause, the Supreme Court not only explained which types of agreements fall within the Clause’s ambit, it also laid out the basic test for when such an agreement would require congressional approval.⁸⁶ As to the Compact Clause, the Court wrote:

[T]he latter clause, “compacts and agreement,” might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of

82. U.S. Const. art. I, § 10, cl. 3.

83. Notably, Akhil and Vikram Amar argue that the NPVC would “[p]robably not” be understood as “an implicit interstate agreement requiring congressional blessing under Article I, section 10 of the Constitution[.]” Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FindLaw (Dec. 28, 2001), <https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html> [<https://perma.cc/Z57E-7G9P>]. For the sake of argument, I assume that it is such an agreement.

84. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) (holding that consent to a compact “may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them”).

85. *Id.* at 527 (“The compact of the two States, establishing the line adopted by their commissioners, and to which Congress impliedly assented after its execution, is binding upon both States and their citizens.”).

86. *Id.*; see Jacob Finkel, Note, *Stranger in the Land of Federalism: A Defense of the Compact Clause*, 71 *Stan. L. Rev.* 1575, 1583–85 (2019) (describing *Virginia v. Tennessee* as the “blow” to a textualist reading of the Compact Clause “that reverberates today”). Notably, in an earlier case, the Court suggested it might apply a stricter reading of the Compact Clause. *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1854) (“And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of congress.”). However, this language was included in dicta, and the Court rejected the approach in *Virginia v. Tennessee* and a series of later cases. See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978); *New Hampshire v. Maine*, 426 U.S. 363 (1976); *The Tap Line Cases*, 234 U.S. 1 (1914); *St. Louis & S.F. Ry. Co. v. James*, 161 U.S. 545 (1896).

boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.⁸⁷

According to the opinion, the Compact Clause governs agreements that involve a state's "private rights of sovereignty" vis-à-vis its sister states.⁸⁸ The Court then offered two exemplar interstate compacts: those that relate to "questions of boundary" and those that implicate states' "interests in land situate in the territory of each other."⁸⁹ Taken together, the language of the test and the examples suggest the "private rights of sovereignty" are generally the sort of rights that are essential to establishing and maintaining a common respect among the states for the territorial integrity of others. The residual language, which states that the doctrine governs "other internal regulations for *the mutual comfort and convenience of states bordering on each other*,"⁹⁰ provides further indication that compacts subject to the clause will include some component that relates to a state's physical dimensions.

This reading comports with both the Constitution's structure and the relevant case law. It accords with the structure because the Constitution was designed with the expectation that the federal authorities would need to weigh in to resolve state disputes, as their spillover effects could have negative consequences for the nation.⁹¹ It thus makes sense that the Constitution would entrust federal lawmakers with the authority to validate or reject interstate agreements that might have ramifications for national power. This understanding also comports with the Court's historical use of the Compact Clause. Indeed, the overwhelming majority of cases in which the Clause has been invoked have involved the Court refereeing state geographical boundary disputes.⁹² In context, it becomes

87. *Virginia*, 148 U.S. at 519 (quoting Joseph Story, Commentaries on the Constitution § 1403 (1833)); see also *U.S. Steel Corp.*, 434 U.S. at 452 (applying the *Virginia v. Tennessee* test and concluding that the interstate tax compact at issue did not violate the Compact Clause because it did not infringe on federal power); Finkel, *supra* note 86, at 1588 ("[A]fter *U.S. Steel*, the Compact Clause holds little independent meaning.").

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

89. *Id.*

90. *Id.* (emphasis added).

91. U.S. Const. art. I, § 8, cl. 3 (giving Congress the power "to regulate commerce . . . among the several states"); *id.* art. III, § 2 (extending federal court jurisdiction "to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states"); see also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *Yale L.J.* 685, 691 (1925) (calling the Constitution's grant of federal court "jurisdiction over 'Controversies between two or more States'" a principal "mode[] of adjustment").

92. Frankfurter & Landis, *supra* note 91, at 692 ("In fact, however, the Compact Clause has its roots deep in colonial history. It is part and parcel of the long and familiar story of colonial boundary controversies."). The other cases involve matters like taxation and utilities, which have broader national implications. See *id.* at 695–96 ("Difficulties in the

clear that the federal government was given the responsibility for ensuring mutual respect for states' "private rights of sovereignty"—most notably their geographical boundaries—for the benefit of the nation on a whole.

Nevertheless, the Compact Clause doctrine has been applied to more than just these types of cases.⁹³ Assume, then, that it applies to the NPVC. Were this so, the NPVC would still not require congressional approval under the prevailing test. Laying out the applicable test in *Virginia v. Tennessee*, the Court explained:

Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, *which may encroach upon or interfere with the just supremacy of the United States*.⁹⁴

The Court then rearticulated this test in the context of disputed state borders. It stated that whether "[t]he compact or agreement will then be within the prohibition of the Constitution," and therefore requiring congressional approval, depends on whether "the establishment of the boundary line may lead . . . to the increase of the political power or influence of the states affected *and thus encroach or not upon the full and free exercise of federal authority*."⁹⁵

A cursory read of the language could certainly leave one with the impression that the doctrine is concerned with agreements that would augment the political clout of the states that are party to them. Yet the pivotal language, which rests in the succeeding clause, specifies that its focus is much narrower. The Compact Clause does require congressional approval for agreements that would result in an "increase of political power in the states," but only to the extent that the increase itself would result in an "encroach[ment] upon or "interfere[nce] with the just supremacy of the United States."⁹⁶ Thus, the test does not just ask one question here, but two. First, do states stand to benefit politically from entering the agreement? Second, would that agreement somehow impair the exercise of federal power? This two-step analysis is discernable from

following fields of legislation have elicited application of the Compact Clause: (1) Boundaries and cessions of territory. (2) Control and improvement of navigation. (3) Penal jurisdiction. (4) Uniformity of legislation. (5) Interstate accounting. (6) Conservation of natural resources. (7) Utility regulation. (8) Taxation.").

93. See *id.*

94. 148 U.S. at 519 (emphasis added).

95. *Id.* at 520 (emphasis added); see also *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460 (1978) ("At this late date, we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.").

96. *Virginia*, 148 U.S. at 519; see also Ronak Patel, Chapter 188: Forget College, You're Popular! A Review of the National Popular Vote Interstate Compact, 43 *McGeorge L. Rev.* 645, 648 (2012) ("The Supreme Court has interpreted this political power limitation to mean that compacts that potentially threaten federal supremacy require congressional approval." (citing *U.S. Steel Corp.*, 434 U.S. at 471)).

the syntax of both iterations of the *Virginia v. Tennessee* test. According to the test's initial phrasing, "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" requires consent from federal lawmakers to come into effect.⁹⁷ The concern is clearly any reallocation of power to the states that also diminishes national sovereignty. This construction mirrors the second articulation of the test, which demands that Congress approve of pacts that lead to "the increase of the political power or influence *of the states* affected *and thus* encroach or not upon the full and free exercise of federal authority."⁹⁸ The Court's rule here is clear: If there is no encroachment on national supremacy, there is no constitutional concern.

This raises an obvious question. How would the NPVC increase the political power of its member states to the detriment of national sovereignty? The only federal authority at issue with the NPVC is the selection of presidential electors—a power that is uniquely confined to the states.⁹⁹ The argument against the NPVC, then, proceeds in two stages:

(1) When enough states agree to the NPVC, they will have amassed enough political power to ensure that their preferred candidate—the winner of the national popular vote—prevails in the Electoral College.

(2) By determining the outcome of the presidency irrespective of what the remaining states desire, the NPVC states would, in effect, eliminate the constitutional role of the nonparty states.¹⁰⁰

At first glance, the critique may seem cogent. Unfortunately for its proponents, however, its soundness depends on a sleight of hand. One might accept the premise that the NPVC increases the political power of some states by allowing them to determine the occupant of the White House. But there is a significant logical leap from that premise to the contention that NPVC states "effectively remove the ability of non-compacting sister states to appoint their electors as they see fit" as required by the Constitution.¹⁰¹ In fact, this claim is just patently wrong because the

97. *Virginia*, 148 U.S. at 519 (emphasis added).

98. *Id.* at 520 (emphasis added).

99. U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ."); see also *Bush v. Gore*, 531 U.S. 98, 104 (2000) (relying on *McPherson* for the proposition that states' power to select electors is absolute); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.").

100. See, e.g., Muller, *The Compact Clause*, *supra* note 76, at 391 ("Once states constituting a majority of the Electoral College have compacted to allocate their vote as a group to one candidate, non-compacting states' electoral votes are politically ineffective.").

101. *Contra id.* (arguing that the NPVC violates the Constitution because it allows the state to politically organize in a manner that nullifies individual states' power to select electors in presidential contests).

NPVC is indifferent as to how the other states exercise their power to appoint presidential electors.

The argument also fails because there is no demonstration that the NPVC meets the other, key requirement of the test set out in *Virginia v. Tennessee*. Any shift in political power to the NPVC states would not come at the expense of “the just supremacy of the United States”; in fact, it *cannot* come at the expense of national supremacy.¹⁰² The Constitution grants state legislatures the *exclusive power* to appoint electors precisely so that they can decide who holds this national office.¹⁰³ It thus defies logic to claim that state legislatures would impair national supremacy by exercising a power that is fully committed to them. Herein lies the sleight of hand: The argument against the NPVC shifts the focus from its impact on the “supremacy of the United States,” which is nonexistent, to its alleged consequences for “the rights of non-compacting states, [an] infringement upon their sovereignty[,]” which is not an element of the Court’s own Compact Clause test.¹⁰⁴

So, then, what type of interstate agreement would lead to an increase in state political power at the expense of federal authority? The Court in *Virginia v. Tennessee* sought to illustrate the legal test with an example (that, notably, involves a dispute over state boundaries):

If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary, and to an agreement for the running of such a boundary, or

102. See *Virginia*, 148 U.S. at 519; Patel, *supra* note 96, at 653 (noting that just because the NPVC will affect states’ influence on presidential elections, it is “unlikely to trigger a political-power limitation” because “it relates to the power among the states, not to the federal government’s power over any given state”).

103. See *supra* note 99 and accompanying text.

104. *Contra* Muller, *The Compact Clause*, *supra* note 76, at 391 (stressing that the relevant power granted to the states by the Presidential Electors clause is the “right of states to appoint electors as they see fit,” and that a relative loss of political influence compared to other states undercuts that right). It is noteworthy, however, that the Court invoked the Compact Clause in a recent decision allowing the federal government to intervene in a dispute between two states. See *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). Worryingly, the Court signaled that it could potentially resuscitate Taney’s approach—explicitly citing the dicta from his opinion—and incorporate it as a consideration in the existing Compact Clause test. *Id.* at 958 (“Congress’s approval serves to ‘prevent any compact or agreement between any two States, which might affect injuriously the interests of the others.’” (quoting *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855))). According to the Court’s analysis, however, at least four considerations weighed in favor of granting the government’s application to intervene, including that the interstate compact dispute was “inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” to which the government is a party, and that it implicated “the federal government’s ability to satisfy its treaty obligations.” *Id.* at 959. Given the weight of these considerations, it is curious why the Court took this balancing test approach to grant the federal government’s motion to intervene as opposed to authorizing it as a right or, at a minimum, permissively.

rather for its adoption afterwards, the consent of Congress may well be required.¹⁰⁵

One could imagine a situation that both adheres to these facts and could impair national sovereignty. Suppose the terms of a compact call for altering state lines and results in the enlarged state (State A) acquiring a segment of the encumbered state's (State B) population. Suppose further that the shift in population was so drastic that it would constitutionally entitle State A to one or more additional seats in Congress, and State B (and perhaps others) to fewer seats. By changing the state boundaries and the composition of Congress, the agreement would lead "to the increase of the political power or influence of the states affected and thus encroach . . . upon the full and free exercise of federal authority."¹⁰⁶

Of course, that is not what the NPVC would do. By its terms, the NPVC would neither result in a shift in state borders nor, more importantly, "any infringement of the rights of the national government"—far from it.¹⁰⁷ Rather, because the NPVC involves a power that the Constitution uniquely gives to the states—control to decide who will head this branch of the federal government—their use of that power cannot "encroach upon or interfere with the just supremacy of the United States."¹⁰⁸ The NPVC, like prior compacts upheld by the Court, "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."¹⁰⁹ To dismantle the NPVC on this basis, the Court would have to engage in an entirely ahistorical and dishonest reading of existing doctrine. It would have to reinterpret the case law on the obscure Article I provision and frustrate the clear legal authority governing the applicable and well-trodden provision in Article II. And the irony of such an outcome should not be overlooked: For the Supreme Court to invalidate the NPVC on the grounds that it increases the political power of a few states over the many, it would have to strip the states of their clear constitutional authority—authority that the Court reiterated was "plenary" in a decision resulting in the award of a state's Electoral College votes to the loser of the national popular vote¹¹⁰—specifically because the states seek to ensure that the political power of a few will not again dominate the choice of the many.

2. *Article V: The NPVC as the Phantom Amendment.* — The other argument against the NPVC is based on the claim that it would, in effect,

105. 148 U.S. at 520.

106. *Id.*; see also *Florida*, 58 U.S. at 495 (permitting the United States to intervene in a suit between two states to adduce evidence on behalf of the national government and the twenty-nine other states that might have an interest in an adjustment where 1.2 million acres of land were in dispute).

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

108. See *id.*; Finkel, *supra* note 86, at 1616 ("The subject matter of the NPVIC is not within the purview of Congress (which could not itself alter the constitutional framework to eradicate the Electoral College)—there is no congressional role to be supplanted here.").

109. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978).

110. See *Bush v. Gore*, 31 U.S. 98, 104 (2000).

abolish the Electoral College. The Electoral College, like other fixtures in the Constitution, can only be eliminated through Article V's amendment procedures. Because the NPVC allows member states "[t]o sidestep this difficulty"¹¹¹ or "'drop out' of the Electoral College,"¹¹² its operation would be tantamount to a constitutional amendment. Or so the argument goes.¹¹³ But it, too, suffers from at least two flaws.

One flaw, again, stems from the faultiness of the argument's premise. The NPVC states do not "sidestep" the Electoral College. To the contrary, they are affirmatively embracing the Electoral College because the NPVC cannot work without it. According to its terms, the NPVC requires party states to award their electoral votes to the winner of the national popular vote.¹¹⁴ If there were no electors and, therefore, no Electoral College, the NPVC would disintegrate. Indeed, the NPVC legislation explicitly states as much. It reads, "This agreement shall terminate if the electoral college is abolished."¹¹⁵ Admittedly, eliminating the use of the Electoral College can only be done through Article V's amendment process. However, eliminating the Electoral College is very different—conceptually and practically—from eliminating the need for the Electoral College. States may prefer a popular vote system. And for that reason, they may decide to work within the Electoral College system to achieve a result functionally equivalent to what they would get under a popular vote system. But it does not stand to reason that they are abolishing the very structure that they need to produce this outcome. Instead, by agreeing to the NPVC, states are embracing the Constitution's janky electoral system, to check the same.

The argument's other weakness seems almost too glaring to even address. Nevertheless, I will indulge. By no stretch of the imagination would the NPVC amend the Constitution. Well, perhaps by *some* stretch. In the legal academy, there are schools of thought devoted to contemplating how the Constitution might be amended without using the

111. Gringer, *supra* note 76, at 182 ("To sidestep this difficulty, a new movement known as the National Popular Vote Plan (NPV) has sought to abolish the electoral college without amending the Constitution.").

112. Feeley, *supra* note 76, at 1427 ("In 2007, Maryland became the first state to 'drop out' of the Electoral College.").

113. See, e.g., Williams, *supra* note 76, at 1581 ("[I]t seems inconceivable that a Constitution that specifies how the President is to be elected and that lays out a process for amending its requirements would permit a group of states to alter so fundamental a part of our constitutional structure.").

114. See Text of the National Popular Vote Compact Vote, Nat'l Popular Vote, <https://www.nationalpopularvote.com/bill-text> [<https://perma.cc/H39N-ZJHH>] (last visited Nov. 3, 2019).

115. E.g., Md. Code Ann., Elect. Law § 8-5A-01 (West 2007).

notoriously difficult amendment process,¹¹⁶ which is set out in Article V.¹¹⁷ The NPVC may have its origins in the legal academy,¹¹⁸ but fortunately it has not been confined to that realm. There is absolutely no truth to the claim that the agreement amounts to a constitutional amendment. This is just a positive assessment; one could readily evaluate it through observation. In practice, should enough states breathe life into the NPVC, the Electoral College—sadly—would remain embedded in Article II and the Twelfth and Twenty-Third Amendments.¹¹⁹ This “effective amendment” theory of constitutional change is certainly creative and interesting. But in the end, it’s just that—a theory.

116. See Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 *Ark. L. Rev.* 217, 217 (2016) (“On one hand, the United States Constitution stands apart from many foreign democratic constitutions: it is extraordinarily difficult to amend . . .”); Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 *Geo. Wash. L. Rev.* 438, 440 (2018) (“Article V of the U.S. Constitution, for example, is thought by some scholars to make the U.S. Constitution one of the most difficult in the world to amend.”). See generally Vicki C. Jackson, *The (Myth of un)Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 *Int’l J. Const. L.* 575 (2015) (providing a survey of scholars’ assessment of the difficulty of amending the Constitution).

117. See, e.g., Bruce Ackerman, *We the People: Foundations* (1991); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendments* 89, 89–115 (Sanford Levinson ed., 1995); Sanford Levinson, *Accounting for Constitution Change (Or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) All of the Above)*, 8 *Const. Comment.* 409, 417 (1991); Sanford Levinson, *The Political Implications of Amending Clauses*, 13 *Const. Comment.* 107, 113–15 (1996).

118. See, e.g., Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 *Green Bag* 241 (2001), http://www.greenbag.org/v4n3/v4n3_articles_bennett.pdf [<https://perma.cc/T3LN-84F9>]; Amar & Amar, *supra* note 83; see also Thomas H. Neale & Andrew Nolan, *Cong. Research Serv.*, R43823, *The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compact 6* (2019), <https://fas.org/sgp/crs/misc/R43823.pdf> [<https://perma.cc/TJY9-5W3H>] (“Law professors Robert W. Bennett of Northwestern University, Vikram Amar of the University of California Davis, and Akhil Amar of Yale University School of Law are generally credited as the intellectual godparents of the concept that ultimately evolved into the National Popular Vote Interstate Compact . . .”).

119. One commentator makes an argument along the same lines. However, instead of claiming that the NPVC would amend the Electoral College, he argues that it would eliminate the contingent election process, the auxiliary procedure that gives the House of Representatives the obligation to choose the president should a candidate not obtain a majority of the electoral votes. See Rob Natelson, *Why the “National Popular Vote” Scheme is Unconstitutional*, *Tenth Amendment Ctr.* (Feb. 9, 2019), <https://tenthamentendmentcenter.com/2019/02/09/why-the-national-public-vote-scheme-is-unconstitutional/> [<https://perma.cc/P4QD-EJPM>] (“Third, because NPV states would have a majority of votes in the Electoral College, NPV would effectively repeal the Constitution’s provision for run-off elections in the House of Representatives.”). The argument suffers from the very same fallacy that undercuts the broader argument. The NPVC does not actually amend the Constitution. Furthermore, the “contingent election” is triggered only if the electors are unable to choose a president. If, under a NPVC system, the electors could not agree on a candidate, the contingent election process would still come into play because, it, like the Electoral College, would still be embedded in the Constitution.

The chief constitutional arguments against the NPVC do not add up. They suffer from erroneous assumptions in their baseline premises and grave fallacies in the reasoning therefrom. If opponents of the NPVC could somehow use them to jump through the aforementioned hoops and stick the dismount, that would be quite the feat of legal gymnastics.

CONCLUSION

The NPVC certainly has some obstacles ahead of it. But just like the Senate of the early 1900s, there will always be those who want to frustrate the will of the people; there will always be a recalcitrant opposition to defend the status quo. Advocates for the NPVC have precious little time left to bask in the glory of the movement's 2019 success. For 2020 is here. And as the western states go, so goes the nation. (At least with respect to the changes in the Electoral College's operation.) Reformers should take the repeal effort in Colorado seriously, while keeping their eye on what happens to the recent court decisions and conservatives' faulty reading of the Constitution. It is often said that history does not repeat itself, but it rhymes. For anyone within earshot, it sounds like the western states may be humming a familiar tune.