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INTRODUCTION

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[1]

In 1786, a group composed of ex-military and farmers sought to take over the seat of government in Massachusetts in a coup later known as Shays's Rebellion.[2] This distressing event occurred because the people in rural areas of Massachusetts felt that they were not properly represented by the "elites" in more densely populated areas.[3] Before that group, small, radical groups of Colonists led a rebellion against Britain's vast empire for mainly the same reasons.[4] The phrase "no taxation without

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 4, 6, 18 (2003).

3. *Id.* at 6.

4. *See* RAY RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION: HOW COMMON PEOPLE SHAPED THE FIGHT FOR INDEPENDENCE 5, 14-17 (Howard Zinn ed., The New Press rev. ed. 2016). *See also* THE DECLARATION OF INDEPENDENCE para. 5 (U.S.

representation" is undoubtedly an idiomatic motif of the Colonists' purpose.[5] This quaint but markedly gruesome rebellion later became known as the American Revolution.[6] After both events had come and gone, the victors took measures to ensure appropriate representation for their constituents.[7] Likewise, both incidents required radical changes to their respective structures of government. Given that Americans have always gone to great lengths to seek adequate representation, it is unsurprising that the national popular vote movement exists.

That being said, this Comment aims to prove why the national popular vote—and in particular the iteration referred to as the National Popular Vote Interstate Compact (NPVIC)—is unconstitutional, ineffective, and potentially disastrous. While there has been much scholarly debate about the validity of a national popular vote interstate compact, many works have focused only on the Compact Clause requirements. The articles that have shifted focus away from the compact aspect of the popular vote system either fail to incorporate the Compact Clause materials at all or do not have the benefit of new Supreme Court decisions outlining the States' near plenary power to control their electors.

This Comment aims to provide a holistic picture of the NPVIC and any closely related compacts through updated precedent. This Comment will first look at what a national popular vote might entail and explicitly lays out the most prominent popular vote movement, the NPVIC. This Comment will then focus on the NPVIC's Compact Clause element to determine whether congressional approval is required before this compact can go into effect. Next, this Comment will address the

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1776) (saying one justification for the revolution was the deterioration of "the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only").

5. *See, e.g.*, RAPHAEL, *supra* note 4, at 16-17 (saying the American Revolution did not spawn from mere class warfare and was in fact instigated in part by "[m]any merchants, lawyers, and other colonists of comfortable means object[ing] only to the abuse of power by the British Parliament").

6. *See id.* at 24 (saying the lead up to the American Revolution was carried out by small, unorganized movements, not a heroic call to arms by any founding father).

7. *See* ARTICLES OF CONFEDERATION of 1781, art. V, para. 2; *see also* U.S. CONST. art. I, § 1.

potential legal challenges to the NPVIC that would exist despite congressional approval. In discussing that post-approval claim, the potential procedural bars to a case against the NPVIC will be addressed, then the substantive challenges of any potential case.[8] Finally, this Comment will close on the national popular vote movement's purpose and some healthy alternatives to safely and practically reach that same goal. In conclusion, this Comment will advocate one alternative above the rest for its constitutional consistency, compliance with social reformation demands, and structural integrity.

I. DEFINING A NATIONAL POPULAR VOTE

In determining a national popular vote's constitutionality, it is necessary to first define, in a concise manner, what a national popular vote is. Luckily, since 2006, many States have proposed and adopted a uniform interstate compact, the NPVIC, to achieve that very thing.[9] While none of the NPVIC statutes have gone into effect as of this Comment's writing, their activation has been looming year after year and will do so in perpetuity.[10] This perpetual possibility stems from the fact that, once adopted, there is no action necessary except to wait for the triggering event—the addition of more member States.[11] As a result, States that have already adopted the NPVIC can renew this measure without end and with an unlimited time to garner support.[12] This Comment will focus on the NPVIC alone because it appears to have the most wind beneath its wings, compared to other national popular vote proposals.[13] After the 2016 presidential election, the NPVIC

8. The substantive challenges will be predicated on the plain text of the Constitution, the thoughts and opinions of the founding fathers during the convention, and the current social and political arguments against a national popular vote and the NPVIC specifically.

9. THOMAS H. NEALE, CONG. RSCH. SERV., NPV—THE NATIONAL POPULAR VOTE INITIATIVE: PROPOSING DIRECT ELECTION OF THE PRESIDENT THROUGH AN INTERSTATE COMPACT 2 (2019).

10. *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, [https://perma.cc/MM4U-PDEQ] (last visited Jan. 28, 2021).

11. *See* NEALE, *supra* note 9, at 1.

12. *See id.*

13. Eric T. Tollar & Spencer H. Kimball, *A More Perfect Electoral College: Challenging Winner-Takes-All Provisions Under the Twelfth Amendment*, 9 LEGIS. & POL'Y BRIEF 4, 28 (2020).

found renewed support, which generated the most positive movement towards a national popular vote since the idea's inception.[14] That being said, this Comment's analysis and conclusions can be extended to any similar proposal so long as no material changes have occurred. After reviewing other proposals, it appears the general principles of a national popular vote system remain more or less unchanged in any iteration of the proposal.[15]

So, what system does the NPVIC set out? First and most critically, it will, as the name implies, nationalize the election processes of member States.[16] In other words, it will eradicate any distinction between State lines when determining which candidate the State electors should vote for. Upon the first presidential election's occurrence after the compact goes into effect, the NPVIC would instead instruct member States to conduct their statewide popular votes as they would absent the compact.[17] The States would then add up each of the statewide popular votes, and the "chief election official" of each State would determine the nationwide popular vote's outcome.[18] At this point, the chief election official would submit the outcome of the national popular vote to the members of that State's Electoral College.[19] The electors would then cast their ballots, conforming to the national popular vote's results, regardless of what results their State yielded.[20] The "election official" designation belongs to either the State's governor or the mayor in the District of Columbia.[21] Coupled with the wording of some State statutes that bind electors to their party's primary candidate, the NPVIC's process would effectively restrict the electors to vote only for the candidate who won the nationwide popular vote.[22]

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14. *Id.*

15. *See, e.g.*, Ralph M. Goldman, *Hubert Humphrey's S. J. 152: A New Proposal for Electoral College Reform*, 2 MIDWEST J. POL. SCI. 89, 90 (1958); H.R.J. Res. 109, 108th Cong. (2004).

16. N.M. STAT. ANN. § 1-15-4.1 (2019).

17. 10 ILL. COMP. STAT. 20/5 (2009).

18. COLO. REV. STAT. § 24-60-4002 (2019).

19. D.C. CODE § 1-1051.01 (2010).

20. D.C. CODE § 1-1051.01.

21. WASH. REV. CODE § 29A.56.300 (2009).

22. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2323-24 (2020) (saying states have absolute control of their electors); ARIZ. REV. STAT. ANN. § 16-212 (1979) (voiding faithless votes); CAL. ELEC. CODE §§ 6906, 18002 (1994) (imposing a penalty for a faithless vote).

The NPVIC will take effect when a sufficient number of States join the compact.[23] The number of federally delegated electoral votes each State has determines the number of necessary States.[24] Before the compact can take effect, the total number of electoral votes collectively possessed by member States must equal 270 or more, so that this compact and its members alone can secure the presidential seat.[25] As of this Comment's writing, the NPVIC member States' combined electoral votes equal 195, only 75 shy of their 270 goal.[26] Despite the NPVIC's adoption by more than a dozen States, it does not appear that this compact has been proffered for congressional approval.[27] The following section will discuss why congressional approval is necessary, but not sufficient, for the compact to be effective in a constitutional manner.

II. WHY A COMPACT OF THIS NATURE WOULD NEED CONGRESSIONAL APPROVAL

The Compact Clause of the Constitution is found in Article I, Section 10, Clause 3. The pertinent language in that mandate is as follows: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."[28] While this seems straightforward, the Supreme Court has varied significantly in determining what is required by this clause.[29] The irony with this clause's inconsistent treatment is that both accepted definitions are allegedly based on textualist interpretations of the Constitution.[30] The broader of the two definitions would place a bar on any interstate agreement made without congressional consent, regardless of the nature of such agreement.[31] Under this interpretation, the Court defines the

23. HAW. REV. STAT. § 14D-1 (2008).

24. OR. REV. STAT. § 248.355 (2001).

25. *See* 17 R.I. GEN. LAWS § 17-4.2-1 (2013).

26. *Status of National Popular Vote Bill in Each State*, *supra* note 10.

27. NEALE, *supra* note 9, at 2.

28. U.S. CONST. art. 1, § 10, cl. 3.

29. *Compare* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1978) (defining "agreements" and "compacts" narrowly), *with* Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (defining "agreements" and "compacts" broadly).

30. *U.S. Steel Corp.*, 434 U.S. at 460; Virginia v. Tennessee, 148 U.S. at 519.

31. *U.S. Steel Corp.*, 434 U.S. at 459.

terms "compact" and "agreement" as used in Article I, Section 10 broadly and synonymously.[32] This encompasses any activity that possibly interferes with the supremacy of the United States, and any activity that "the United States can have no possible objection [to] or have any interest in interfering with[.]"[33]

This plain text meaning of the Compact Clause, as laid out above, was previously said to be invalid when read in context by the proponents of the narrower definition.[34] While the Court did acknowledge that the two contrasting definitions were both predicated on the plain text of the Constitution, the first interpretation was nevertheless abandoned as the Court was reluctant to bar interstate agreements that "do not enhance state power to the detriment of federal supremacy."[35] In addition, the Supreme Court has indicated that Congress can implicitly approve of an interstate compact before it is fully furnished for any formal approval.[36] The Court also stressed that there are some instances where the States must act before Congress can determine whether its approval will be granted or not.[37] In sum, not every agreement entered into between States requires congressional approval.[38] The Court even went as far as to say that some agreements did not need congressional approval at all because the historical practice of seeking congressional approval for like compacts was merely out of caution and convenience for the associated states, rather than to prevent injury to the supremacy of the United States.[39] However, the Court did acknowledge that any negative impact to the supremacy of the United States was to be considered for its potential of and not actual injury.[40]

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32. Virginia v. Tennessee, 148 U.S. at 520.

33. *Id.* at 518.

34. *See id.* at 519.

35. *U.S. Steel Corp.*, 434 U.S. at 460.

36. Virginia v. Tennessee, 148 U.S. at 521 (finding that congressional approval may be implied in a number of ways including subsequent ratification and enforcement of the terms of a compact).

37. *See id.* at 521.

38. *See id*.

39. *U.S. Steel Corp.*, 434 U.S. at 471.

40. *Id.* at 472.

While there has been some pushback over the years to this laissez-faire rule—allowing significant interstate dealings without congressional approval[41]—the most important pushback to this rule (regarding a national popular vote) was the acknowledgment that the interference with the supremacy of the United States was not the only matter for consideration.[42] Instead, the Court recognized that an agreement would require congressional approval when such approval would guard against any potential adverse effect on any State not made a party to the agreement.[43] If there is an agreement that has the potential to injure another State, it is the right and duty of Congress to provide approval before the agreement goes into effect.[44] The Court eventually laid out four indicia that an agreement would be of the kind to require congressional approval due to its potential harm to another State. These indicators are: (1) the existence of a joint administrative body between the States, (2) the action of one member State being conditioned on the action of another member State, (3) the bar on any of the States to unilaterally and freely modify or repeal their acceptance of the agreement, and (4) the requirement of reciprocity in an agreement concerning limitations imposed on a member State's inherent powers.[45]

The general principles of the Compact Clause include possible interference with federal supremacy or a substantial impact on non-member States.[46] As a result, congressional approval is required here regardless of the indicators' existence, but that will be discussed later.[47]

Assuming, arguendo, that further proof is needed to determine whether congressional approval is required, the above test, when applied to the compact at hand, is satisfied with three out of the four indicators being present.[48] There does not appear

41. *See* New Hampshire v. Maine, 426 U.S. 363, 372 (1976) (White, J., dissenting).

42. *See* Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1854).

43. *Id.*

44. *Id.*

45. Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985).

46. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978); *see also* Florida v. Georgia, 58 U.S. (17 How.) at 494.

47. *See infra* Part II.

48. *See* NEALE, *supra* note 9, at 1-2.

to be any indication that the NPVIC will adopt an administrative body; thus, the first indicator is likely not met.[49] However, the rest of the indicators are blatantly present. Getting the ball rolling, the NPVIC meets the second indicator, which essentially looks to "whether [the compact's] effectiveness depends on the conduct of other members . . . ."[50] This is met because the NPVIC will come into effect only after "states cumulatively possessing a majority of the electoral votes" have enacted this agreement.[51] This means that every member State has only conditionally approved the compact, subject to action by other States.

Additionally, how a State directs the panel of electors to cast their electoral votes would be predicated on conducting a popular vote in each of the other member States.[52] *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System* (*Bancorp*) involved multiple States drafting a similar statute in each jurisdiction, and there was evidence suggesting that the State legislatures drafted the statutes together.[53] Nevertheless, the *Bancorp* Court found that no compact had been formed, let alone one that needed congressional approval.[54] This was largely because while an incentive structure was designed to entice more States to adopt the similarly-worded statute, the document was more akin to a model law than an agreement between States.[55]

In addition, the incentive structure found in that case was not a result of the proposed law itself, but rather the incentive originated from a federal law barring the interstate exchange of bank titles, absent a contrary State law permitting the transfer.[56] In essence, the law there was not reciprocal because the States

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49. *But see* JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 278 (National Popular Vote Press, 4th ed. 2013) ("These tasks could be simplified by the establishment of an administrative clearinghouse for these functions. The officials of the compacting states might themselves establish such a clearinghouse. Alternatively, such a clearinghouse might be established by federal law.").

50. Gillette Co. v. Franchise Tax Bd., 363 P.3d 94, 101 (Cal. 2015); *see also* COLO. REV. STAT. § 24-60-4002 (2019).

51. DEL. CODE ANN. tit. 15, § 4303A (2019); *see also* NEALE, *supra* note 9, at 1.

52. *See* COLO. REV. STAT. § 24-60-4002; S.P. 252, 129th Leg., Reg. Sess. (Me. 2019).

53. *See* 472 U.S. 159, 163-65, 173, 175 (1985).

54. *Id.* at 175.

55. *See id.* at 169.

56. *Id.*

were merely working together to reap the full benefits of an enacted federal law.[57] In that case, once one State adopted the statute it became valid and enforceable as to that State, independent from the actions of any other State.[58] In short, the statute at issue in *Bancorp* is vastly different from the NPVIC.[59]

To reiterate, the NPVIC requires other States to adopt the same law before it becomes effective.[60] While there is no mandated adoption or forced incentive structure built into the NPVIC,[61] there are other ramifications States may face if they do not play nice with the existing member States upon activation.[62] The States' selection of electors is expressly conditioned on a popular vote in the other member States.[63] In conclusion, the NPVIC's conditional adoption clause and how the compact functions make its effectiveness conditioned on other member States' actions.

Next, when a compact cannot freely and unilaterally be repealed, that indicates the compact will likely need prior congressional approval.[64] Customarily, a compact has the "distinguishing feature" of presumptively being interminable without the deliberate action of multiple member States and thus requires congressional approval.[65] The presumption of this norm's presence in compacts can only be overborne by "express provisions that permit withdrawal . . . ."[66] In fact, express permission to leave a compact is so necessary that "[t]he absence of comparable language in the Compact is significant and weighs against" the ability of a State to freely and unilaterally repeal a compact.[67] One State supreme court went as far as saying that not

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57. *Id.* at 164.

58. *Ne. Bancorp, Inc.*, 472 U.S. at 175.

59. *Compare* MASS. GEN. LAWS ch. 167A, § 2 (1996), *with* OR. REV. STAT. § 23.248 (2019).

60. *See, e.g.*, D.C. CODE § 1-1051.01 (2010).

61. *See* WASH. REV. CODE § 29A.56.300 (2009).

62. *See generally* ME. REV. STAT. ANN. tit. 34-A, § 9882 (2003).

63. HAW. REV. STAT. § 14D-1 (2008).

64. *See* Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985).

65. Waterfront Comm'n v. Murphy, 429 F. Supp. 3d 1, 11 (D.N.J. 2019), *vacated*, 961 F.3d 234, 242 (3d Cir. 2020) (vacating order for lack of jurisdiction).

66. *Id.* at 11.

67. *Id.* (citing Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 633-34 (2013)).

even the unequivocal ability to come and go as a State freely pleases (even when enumerated) is sufficiently dispositive of whether a compact would require congressional approval under this indicator.[68] Instead, the court there looked to the statute's history.[69]

While the member States are free to repeal the NPVIC, they have a limited duration to repeal the statute.[70] Otherwise, they will be bound by their initial pledge to appoint their electors based on the nationwide popular vote.[71] If they intend their refutation to be effective, the member States must repeal the NPVIC before the last six months of a president's term.[72] This, while not an absolute bar on the repeal of the agreement, sufficiently impacts a State's unilateral ability to withdraw.[73] There is no language indicating that States can freely repeal or modify the statute at their discretion.[74] Because the absence of express permission to freely and unilaterally repeal or modify a compact indicates the inability to do so,[75] the NPVIC would presumptively not allow member States to leave or modify willingly. In addition to the absence of such a provision, the express restriction on when a member State can effectively walk away[76] sufficiently satisfies this indicator.

Finally, and "[m]ost importantly," when a compact requires reciprocal obligations or limits to inherent State powers, the compact will need congressional approval.[77] This indicator essentially looks to whether the member State "ceded a portion of its own sovereignty in order to benefit from the collective action of multiple states . . . ."[78] All member States to the NPVIC give up their ability to direct their electors to vote under that State's

68. Gillette Co. v. Franchise Tax Bd., 363 P.3d 94, 101 (Cal. 2015).

69. *Id.* (finding "the history of the Compact is replete with examples of unilateral state action").

70. COLO. REV. STAT. § 24-60-4002 (2019).

71. D.C. CODE § 1-1051.01 (2010).

72. HAW. REV. STAT. § 14D-1 (2008).

73. HAW. REV. STAT. § 14D-1.

74. *See, e.g.*, D.C. CODE § 1-1051.01.

75. *See* Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 633-34 (2013).

76. HAW. REV. STAT. § 14D-1.

77. Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985).

78. Kimberly-Clark Corp. v. Comm'r of Revenue, 880 N.W.2d 844, 849 (Minn. 2016).

mandates.[79] This ability is undoubtedly a part of a State's sovereign power.[80] The restriction of such sovereign power so that all member States may expand their combined strength is precisely the kind of reciprocal obligation this indicator requires.[81] In sum, the most important indicator that a compact is of the kind that would require congressional approval also appears to be the most straightforward. It is undeniable that any State that enters into the NPVIC limits its ability to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[82] This is because member States will be relying on the chief election officials of other member States and the outcome of the national popular vote to allocate electoral votes—rather than the independent discretion of their respective legislatures.[83]

Admittedly, the *Bancorp* case has largely been cited for its commerce precedent and is rarely used to adjudicate challenges to the Compact Clause.[84] That being said, a return to the general Compact Clause principles will necessitate congressional approval, regardless of the indicators' presence. This is because the NPVIC compact is, on its face and by its text, a political matter undoubtedly capable of affecting the rights and power of other States as well as the federal government.[85] The compact states "[t]his article shall govern . . . in each member state,"[86] "to produce a national popular vote . . . [unless] the electoral college is abolished."[87] Additionally, the supporters of the NPVIC even

79. *See, e.g.*, 10 ILL. COMP. STAT. 20/5 (2009); s*ee also* Chiafalo v. Washington, 140 S. Ct. 2316, 2323-24 (2020) (indicating each State has a right to independently control its electors).

80. *See Chiafalo*, 140 S. Ct. at 2323-24; U.S. CONST. art. 2, § 1, cl. 2.

81. *Kimberly-Clark Corp.*, 880 N.W.2d at 849.

82. U.S. CONST. art. 2, § 1, cl. 2.

83. HAW. REV. STAT. § 14D-1 (2008).

84. *See, e.g.*, Indep. Cmty. Bankers Ass'n v. Bd. of Governors of Fed. Rsrv. Sys., 838 F.2d 969, 973 (8th Cir. 1988); Cont'l Ill. Corp. v. Lewis, 827 F.2d 1517, 1521 n.5 (11th Cir. 1987); Smith Setzer & Sons v. S.C. Procurement Rev. Panel, 20 F.3d 1311, 1322 (4th Cir. 1994); Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792, 793 n.16 (4th Cir. 1991).

85. *See* JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, 201 (Gaillard Hunt & James Brown Scott eds., Oxford Univ. Press 1920) [hereinafter MADISON, CONVENTION NOTES] (discussing the ramifications of various electoral schemes).

86. VT. STAT. ANN. tit. 17, § 2753 (2011).

87. Act of June 12, 2019, ch. 356, 2019 Or. Laws (internal quotation marks omitted).

admit, potentially obliviously so, that the compact would guarantee the presidency to the member States, that the compact's design is to "remedy" the laws in 48 States, and that the NPVIC intends to reshape how federal elections are campaigned for.[88]

Now turning a closer eye to these broad principles, it seems the NPVIC's potential impact could have a disastrous toll on the supremacy of the United States, as well as the sovereignty of other States. Regarding the impact on supremacy:

> the compact may not authorize member states to do anything collectively that they could not do individually. Second, member states must not delegate their sovereignty, but rather they must retain their freedom to withdraw from the compact at any time.[89]

Suppose member States engage in these practices—collective power enhancement, delegation of sovereignty, and conceding the ability to withdrawal—through a compact. In that case, that compact is said to be a potential threat to the supremacy of the United States and to non-member States, and that compact would require prior congressional approval.[90] These concerns are very similar to the four indicators previously stated, and thus this analysis will be brief. The NPVIC combines the member States' power to secure for its members the sole ability to determine the presidency.[91] Alone, no State could achieve this outcome. Again, the States are not free to withdraw without significant restrictions, and their withdrawal will potentially be deemed invalid—replete with eerily looming enforcement mechanisms left for speculation.[92] Finally, the sovereign powers of the member States have been partially subjugated to the NPVIC, exactly as

88. *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, [https://perma.cc/HSN2-QCV3] (last visited Jan. 26, 2021).

89. State v. Kurt, 802 S.W.2d 954, 955 (Mo. 1991) (citing U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978)).

90. *See* Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1854); Virginia v. Tennessee, 148 U.S. 503, 520 (1893).

91. 17 R.I. GEN. LAWS § 17-4.2-1 (2013).

92. *See* COLO. REV. STAT. § 24-60-4002 (2019); s*ee also supra* notes 65-77 and accompanying text (discussing how the member States to the NPVIC are not free to withdraw from the compact).

contemplated by the broad compact concerns when determining the necessity of congressional approval.[93]

Having determined that the NPVIC is an interstate compact of the kind that requires congressional approval (with or without the presence of the four indicia), the question that remains is what recourse a non-member State or the citizen of a member State could have if Congress did approve the NPVIC.

III. WHY A COMPACT OF THIS NATURE WOULD STILL FAIL TO BE CONSTITUTIONAL, DESPITE CONGRESSIONAL APPROVAL

There are a couple of different issues that must be discussed before approaching the merits of any potential case against the NPVIC. Both of these issues are theoretically dispositive of the case on procedural grounds. To get to the case's merits, the justiciability doctrine and jurisdiction must be satisfied.[94] Briefly addressing each concern now, there are no justiciability grounds that would dismiss this cause of action because it would be based on a non-political question, and most likely, non-member States would be filing this suit against the federal government (dismissing standing concerns).[95] Even if this were a suit against one State by another, it is likely to be valid.[96] Additionally, the Supreme Court may or may not have original jurisdiction to hear the complaint, but it could nevertheless reach the Supreme Court through appeals.[97]

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93. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2323-24 (2020) (saying States have near plenary power to dictate electors).

94. *See* Baker v. Carr, 369 U.S. 186, 198-99, 204 (1962).

95. *See id.* at 209; *see also infra* Section III.A.

96. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405-06 (1821) ("[The Eleventh Amendment] does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases and in these a State may still be sued."); *see also* Alabama v. Arizona, 291 U.S. 286, 291-92 (1934); *see also infra* Section III.A.

97. U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1257(a) (1988); 28 U.S.C. § 1254(1)-(2) (1988); *Cohens*, 19 U.S. (6 Wheat.) at 393, 399 ("If a State be a party, the jurisdiction of this Court is original . . . . The original jurisdiction of this Court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution . . . .").

Within the merits of the case, the Constitution plainly allots the power of elections to the individual States.[98] However, questions remain regarding the exclusivity of such power.[99] Looking to the Supreme Court's precedent, the States' power appears to be definitively exclusive, at the cost of federal and State interference.[100] This conclusion is further aided by the founding era's thoughts and examples.[101] Finally, if no legal argument is persuasive, the social and political reasons alone should be sufficient to halt the NPVIC.

A. Justiciability Concerns

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?[102]

It is a fundamental principle that the legislature's mere will cannot alter the Constitution absent amendment proceedings.[103] Likewise, the legislative branch cannot pass any laws or take any action repugnant to the Constitution.[104] Suppose the legislature engages in any activity that is thought to be unconstitutional. In that case, it is the Supreme Court's prerogative to adjudicate whether or not there has been legitimate infringement.[105] While these principles are no doubt ingrained in the hearts of every scholar of the law, these principles become increasingly murky when dealing with an interstate compact. Of course, the usual justiciability concerns are present with an interstate compact, just as with any potential case and controversy brought before the

98. U.S. CONST. art. II, § 1, cl. 2.

99. *See, e.g.*, Chiafalo v. Washington 140 S. Ct. 2316, 2318 (2020); Ray v. Blair, 343 U.S. 214, 225 (1952); McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("The question before us is not one of policy but of power . . . ."); *see also infra* Section III.B.1.

100. *See Chiafalo*, 140 S. Ct. at 2323-24; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985); *see also infra* Section III.B.1.

101. *See* MADISON, CONVENTION NOTES, *supra* note 85, at 57, 509; *see also infra* Section III.B.2.

102. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

103. *Id.* at 177.

104. *Id.*

105. *Id*. at 177-78.

Court.[106] However, the Compact Clause's mandates erect some peculiar obstacles to justiciability that need to be addressed.

The first of these, and most likely to prevent a suit, is the political question doctrine. The decision to approve or disprove an interstate compact is undoubtedly one of the legislature's political judgment, rather than one of constitutional judgment akin to that of the Supreme Court's.[107] The political question doctrine then would seemingly bar the Supreme Court's review of a claim alleging Congress improperly approved an interstate compact in violation of a constitutional principle.[108] This doctrine requires federal courts to determine whether, based on six independent factors, a matter is committed to another branch such that separation of powers precludes judicial review.[109] These factors are: (1) constitutional commitment of the issue to a different political branch, (2) the lack of judicially discoverable and manageable standards, (3) the need for an initial non-judicial policy decision, (4) the potential for any judicial decision to indicate a lack of respect to the coordinate branch, (5) the need to adhere to a political decision already made, or (6) the potential for embarrassment after multiple branches have resolved the issue differently.[110]

This bar is especially present when the claim is based on a violation of the Guarantee Clause, which the Court has explicitly labeled a political question.[111] The Guarantee Clause requires every State of the Union to be guaranteed a republican form of government.[112] In other words, some fashion of a representative

106. *See* Baker v. Carr, 369 U.S. 186, 199 (1962) (applying the justiciability standards to that case because it arose under the Federal Constitution); *see also* Virginia v. Tennessee, 148 U.S. 503, 517 (1893) (Compact Clause cases arise under the Federal Constitution).

107. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 485 (1978) (White, J., dissenting).

108. *See Baker*, 369 U.S. at 217.

109. *Id.* at 211, 217.

110. *Id.* at 217.

111. *Id.* at 224 ("[C]hallenges to congressional action on the ground of inconsistency with [the Guarantee Clause] present no justiciable question."). There is, however, some debate as to whether this bar still exists with the same force. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 71-72 (1988) (citing circuit court decisions as well as Supreme Court decisions that indicate the Guarantee Clause may still be used to adjudicate cases).

112. U.S. CONST. art. IV, § 4.

government must be present across the nation.[113] Here, it is abundantly clear that any claim against establishing a national popular vote would incorporate that very clause;[114] however, that may not be the only alleged constitutional violation possible. If a claim touches on the Guarantee Clause but also relies on the violation of another constitutional principle, the claim may still be heard assuming the alternative violation does not likewise fall under the Court's political question bar.[115]

Thus, it is necessary to determine what other constitutional principles might be violated by congressional approval if any suit is maintained against an interstate compact establishing a national popular vote. Although still potentially problematic, the requirement of a system of electors, also known as the Presidential Electors Clause, found in Article II, Section 1 and the Twelfth Amendment, would undoubtedly be violated with the establishment of a national popular vote.[116]

Additionally, the Supreme Court has held (although stepped back in more recent cases)[117] that the Constitution provides citizens an affirmative right to vote.[118] While not considered a natural, unalienable right, it is still considered fundamental.[119] Because of the fundamental nature of the right to vote,[120] the NPVIC could be subject to attack for equal protection and due process violations.[121] This would likely stem from individuals who felt they were now disenfranchised from their vote due to their State's sparse population. As the Supreme Court has said,

113. *See* THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 194 (Boston, Little, Brown, & Co. 1880) (defining republican government as "a government by representatives chosen by the people").

114. Bush v. Gore, 531 U.S. 98, 141 (2000) (Ginsburg, J., dissenting).

115. *Baker*, 369 U.S. at 227.

116. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII. The cause of such a violation will be discussed in more detail in Section III.B.

117. *E.g.*, *Bush*, 531 U.S. at 104 ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States . . . .").

118. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

119. *Id.*

120. *Id.*

121. *See Bush*, 531 U.S. at 104, 110.

"[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm."[122]

While it is important to note these additional means in which the NPVIC might be attacked, this Comment will only focus on the most ambiguous and challenging means of invalidating the NPVIC: the idea that the compact is a violation of the Presidential Electors Clause, which establishes the Electoral College.[123] This is partly because this Comment aims to avoid discussing individual rights and instead discusses the right of States as sovereign entities (which presumptively have no right to sue for due process/equal protection violations[124]).

The distinction between reliance on the Guarantee Clause for a potential suit versus the Presidential Electors Clause is admittedly sparse. Still, the distinction is nevertheless present in that the Guarantee Clause helps define a judicially enforceable requirement in the Constitution. The use of the Guarantee Clause to define the meaning of the electoral requirement is different from the Supreme Court's potential to "disrupt a State's republican regime" by enforcing a government system the Court deems more akin to a republic, which would violate the political question doctrine.[125] The Guarantee Clause will only be used here as a means of textual interpretation and not to determine what that clause alone requires of the States.

A suit against the NPVIC, predicated on the violation of the Presidential Electors clause, is not a political question. This is because the suit, although first requiring Congress to exercise its constitutionally committed judgment,[126] would be against a potential violation of the Constitution.[127] This case would only

122. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)).

123. U.S. CONST. art. II, § 1, cl. 2.

124. *See* South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966). *But see* Shelby Cnty. v. Alabama, 570 U.S. 529, 544 (2013).

125. *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting); Baker v. Carr, 369 U.S. 186, 217 (1962).

126. U.S. CONST. art. I, § 10, cl. 3.

127. U.S. CONST. art. II, § 1, cl. 2; *see also* McPherson v. Blacker, 146 U.S. 1, 23 (1892). The State of Michigan was sued for improperly appointing electoral members in violation of the Constitution. *McPherson*, 146 U.S. at 23. The Court found that it had jurisdiction to hear the case saying:

be brought after Congress gave its consent to the interstate compact, and "once Congress gives its consent, a compact between States—like any other federal statute—becomes the law of the land."[128]

When the question presented to the Court is whether congressional activity has violated the Constitution, the Supreme Court can hear the case regardless of potential political concerns.[129] The political question doctrine is not designed to prevent the Court from hearing legitimate constitutional questions.[130] Instead, the political question doctrine, under the guise that the Court does not have that power under the Constitution, is designed to bar the Court from hearing truly political matters and, in so doing, questioning coordinate branches' judgments or rationales.[131] This is the difference between asking whether a coordinate branch can do something versus whether it should do something. The former can be heard by the Court, whereas the latter is barred.[132]

The validity of Congress approving the NPVIC falls under that first category. Regardless of the NPVIC's potential merits, a suit against congressional approval would simply be asking whether such approval was an appropriate use of Congress's constitutional powers. In this respect, no deference is deserved, nor any embarrassment incurred by asking whether the Constitution was violated.[133]

> it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress. But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising . . . .

Id.

128. Texas v. New Mexico, 138 S. Ct. 954, 958 (2018).

129. *McPherson*, 146 U.S. at 23; Williams v. Rhodes, 393 U.S. 23, 28 (1968).

130. *See Baker*, 369 U.S. at 210-11, 217.

131. *Id.*

132. *Id.* at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action . . . exceeds constitutional authority.").

133. *See id.* at 218; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not. [B]ut it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because

Assuming for a moment that the violation of the mandate for the Electoral College is sufficient to state a claim, it must be agreed that the case would meet the other justiciability requirements exclusively on that alleged violation for the suit to commence absent subsequent equal protection or due process claims.

Given that any potential case brought to the Supreme Court after enacting the NPVIC likely cannot be directly contingent on the Guarantee Clause,[134] the remaining causes of action must provide a sufficiently justiciable case regarding standing. As discussed above, this Comment will only consider the Presidential Electors Clause.

The recent case brought by the Attorney General in Texas regarding the 2020 election may initially seem dispositive of this question; however, the two causes of action are irreconcilably different.[135] Standing generally requires injury, causation, and redressability.[136] Causation is essentially a given when "the plaintiff is himself an object of the action (or forgone action) at issue."[137] However, States have special standing, or relaxed standing, to bring suits to enforce their sovereign rights.[138] This level of standing alleviates the need to show injury.[139] More recent cases of State suits against the federal government fail to even contemplate State standing and tacitly accept the State's standing to sue.[140] Thus, the difference between a suit against the

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it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

134. *See Baker*, 369 U.S. at 227.

135. Texas v. Pennsylvania, 141 S. Ct. 1230 (2020).

136. *See, e.g.*, *Baker*, 369 U.S. at 204.

137. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

138. *See* Missouri v. Holland, 252 U.S. 416, 432 (1920) (allowing Missouri to bring suit against the United States for entering into a treaty in violation of Missouri's perceived regulatory rights, but ultimately rejecting the claim because no regulatory rights existed there).

139. *See* Colorado v. Toll, 268 U.S. 228, 230 (1925) (allowing a State suit against the federal government for violating the State's sovereign rights); Tarah Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 862 n.54 (2016) (discussing a State's special sovereignty).

140. *See* New York v. United States, 505 U.S. 144, 156 (1992) (immediately discussing the substantive rights of a State without first discussing any potential justiciability bars); South Dakota v. Dole, 483 U.S. 203, 205 (1987).

NPVIC and the suit launched by Texas, and what in turn makes the presented hypothetical suit sustainable, is that it is predicated on federal or state infringement of a State right, satisfying standing.[141]

However, it is possible that a suit against the NPVIC could also be launched (either by a member State or a non-member State) against a member State or multiple member States. If this were to be the case, it would initially seem that the standing concerns are the same as a suit against the federal government.[142] Despite those initial impressions, the Court has on occasion restricted the capacity of one State to sue another, requiring "absolute necessity" to exercise jurisdiction.[143] They have gone as far as to require "serious magnitude and imminent" injury be "clearly shown . . . ."[144] There is undoubtedly a more significant burden on a State to establish standing than that of a private individual in a suit against another State. However, this increased burden appears to be inconsequential given the gravity of the topic.

It is important to note that another underlying tenant of the justiciability doctrine is that the Court must have jurisdiction in the first place to hear the matter.[145] The Constitution provides original jurisdiction to the Supreme Court in cases where a State would be made a party as well as those in which the United States is a named party.[146] Congress cannot reduce this original jurisdiction.[147] That being said, the Court has been reluctant to exercise its original jurisdiction in specific cases.[148] If the Court's

141. *See* Grove, *supra* note 139, at 862 n.54. This distinction may apply less fervently in the case of a member State given that it sought this legislation voluntarily and thus is not afforded the same protection of the rights it ceded. *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985); Merritt, *supra* note 111, at 17-18.

142. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821) ("If [two or more States] be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 731 (1838).

143. Alabama v. Arizona, 291 U.S. 286, 291 (1934).

144. *Id.* at 292.

145. *See* Baker v. Carr, 369 U.S. 186, 199-200 (1962).

146. U.S. CONST. art. III, § 2, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

147. *Marbury*, 5 U.S. (1 Cranch) at 138.

148. Arizona v. New Mexico, 425 U.S. 794, 797 (1976) ("[T]he pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated.").

exercise of jurisdiction remains consistent, a post-congressional-approval case against the NPVIC likely will not be heard under original jurisdiction. Regardless though, this hypothetical case could still be heard at the federal level. It just may have to reach the Supreme Court as a course of appeals.[149]

While there is some question as to whether a State could sue a member State, alleging that the NPVIC violates the complaining State's rights, it is undoubtedly clear that there would be no question as to the possibility of a suit between a State and the United States. Having sufficiently determined that the justiciability concerns would not preclude review of an interstate compact after congressional approval, when a suit is based on a violation of the Presidential Electors Clause, the merits of the case remain.

B. Substantive Concerns

Assuming that the Supreme Court has not yet dismissed the case for want of procedural requirements, the case's merits must sufficiently justify a ruling against the NPVIC. The merits of the case will be discussed below by first looking into the plain text of the Constitution as well as the Court's interpretation of the same. Then this Comment will discuss both the founding era arguments against the NPVIC and the modern-day social and political arguments against the NPVIC.

1. Plain Text of the Constitution and Judicial Interpretation

The Constitution merely orders that each State must appoint electors equal to its number of representatives in Congress as directed by its State legislature.[150] These electors must meet in their respective States and vote via ballot for the President and Vice President separately.[151] Nowhere in the Constitution are electors of a State directed to vote based on specific criteria.[152] Despite the Founders' suggestion that the only criterion was to be

149. 28 U.S.C. §§ 1254, 1257(a) (1988).
150. U.S. CONST. art. II, § 1, cl. 2.
151. U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amend. XII.
152. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).

the electors' independent decision, and no vote was to be cast at the direction of any law,[153] this is simply not present on the face of the Constitution.[154] As a result of the lack of instruction in this matter, the requirement of an electoral body must first be defined by examining the totality of the document. If ambiguity persists, the practices at the time of ratification should prevail.[155]

Taking the entire Constitution into account, the States were intended to remain as several unionized sovereigns instead of forming a single sovereign entity.[156] In addition, the Constitution promises to these several States a "Republican Form of Government[.]"[157] This edict for a republican form of government modifies the establishment of an electorate system. However, there is no authoritative mandate in the text of the Constitution regarding federal interference with the States' exclusive ability to generate presidential electors pursuant to their independent form of a republican government. Therefore, a case predicated on such interference must rely on the Supreme Court's interpretation of what little is enumerated.

The Court has not always favored federalism. It has often received the tail end of the Court's generosity, if any attention at all.[158] This inattention was somewhat alleviated when the Court decided *National League of Cities v. Usery*.[159] In that case, the Supreme Court determined that there are, in fact, limitations to the federal government's power to regulate commerce.[160] These

153. *Id.*; THE FEDERALIST NO. 68, at 351 (Alexander Hamilton) (George W. Cary & James McClellan eds., 2001).

154. U.S. CONST. art. II, § 1, cl. 2.

155. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 579-92 (2008) (applying a textualist/originalist approach in interpreting the Constitution).

156. *See* U.S. CONST. art. IV, § 3, cl. 1. *See also* THE FEDERALIST NO. 39, at 196-97 (James Madison) (George W. Cary & James McClellan eds., 2001); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 720 (1838) (recognizing the States are "sovereign within their respective boundaries"); New Jersey v. New York, 283 U.S. 336, 342 (1931) (describing the States as "neighbors members of a single" or "*quasi*-sovereignties bound together in the Union"); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (saying the Eleventh Amendment exists to "confirm[]" the presumption that "each State is a sovereign entity in our federal system").

157. U.S. CONST. art. IV, § 4.

158. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937) (saying the federal power to regulate commerce is plenary in nature).

159. 426 U.S. 833, 845 (1976).

160. *Id.* at 842.

limitations are predicated on the belief that the several States retain some sovereignty.[161] The Court determined that the federal government could not legislatively displace areas deemed to be the traditional government functions of the States—such as the wages set for government employees—even when the power invoked by Congress was outlined in the Constitution.[162] It said this bar was found implicitly in the Tenth Amendment.[163]

While it would be refreshing to reinvigorate the Tenth Amendment in this way, the text of that Amendment simply does not contain any language to support this protection.[164] Additionally, the Court later found that the *National League of Cities* rule, barring the infringement on "traditional governmental function[s]," was unworkable and did not protect the sovereignty of States.[165] As a result of these two blunders, that case was summarily overturned.[166]

The case that replaced *National League of Cities* provided an equally ambiguous test to determine whether a particular State right existed and, if so, whether the federal government could regulate in that area or if State sovereignty barred its control.[167] That case was *Garcia v. San Antonio Metropolitan Transit Authority*, which also dealt with the Fair Labor Standards Act's (FLSA) minimum wage requirements concerning government employees.[168]

The Court there found that the Constitution provides both limits and avenues to impose federal control.[169] In so doing, the Court rejected alternative theories that had previously protected the States' rights, such as protection from federal infringement upon "'uniquely' governmental functions" or "'necessary' governmental services . . . ."[170] Instead, the Court provided that the Constitution's structure protects the States from federal

161. *Id.*
162. *See id.*
163. *Id.* at 842-43.
164. U.S. CONST. amend. X; *see also* Merritt, *supra* note 111, at 12.
165. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).
166. *Id*.
167. *See id.* at 556; *see also* Merritt, *supra* note 111, at 15.
168. 469 U.S. at 530.
169. *Id.* at 547.
170. *Id.* at 545.

infringement on their sovereignty.[171] It went on to say enumerated barriers in the Constitution must justify any restraint on federal power.[172] These barriers can be a double-edged sword cutting both for and against the sovereignty of the States.[173] The Court pointed out that the Constitution provides explicit areas that Congress may regulate in Article 1, Sections 8 and 10.[174] Paired with the Supremacy Clause, the Court held that the States' sovereignty was diminished upon ratification, but it is not gone.[175]

Since *Garcia*, additional precedent has shed light on the notion of State power to control elections. In *Shelby County v. Holder*, the Court not only upheld the premise of *Garcia*'s federalism construction, but also explicitly acknowledged Tenth Amendment protections for state-controlled elections.[176] Specifically, it said "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."[177] The Court also assured that the several States retained equal sovereignty.[178]

The rule presently regarding federalism is that the federal government may only regulate where it has been granted that express authority.[179] It is also important to reiterate that the States are, in fact, independent sovereigns, although they have surrendered some power by their status as members of the Union.[180] Much like a surgeon, the federal government may only operate in the areas in which it has previously been given informed consent.[181]

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171. *Id.* at 552.

172. *See id.* at 554.

173. *Garcia*, 469 U.S. at 548.

174. *Id.*

175. *Id.*

176. 570 U.S. 529, 543 (2013). This differs from *Nat'l League of Cities* in that the *Holder* Court relied on enumerated State safeguards.

177. *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991)).

178. *Id.* at 544.

179. *See Garcia*, 469 U.S. at 549; *Holder*, 570 U.S. at 543.

180. *See Garcia*, 469 U.S. at 549; *Holder*, 570 U.S. at 543.

181. Jon F. Merz & Baruch Fischhoff, *Informed Consent Does Not Mean Rational Consent: Cognitive Limitations on Decision-Making*, 11 J. LEGAL MED. 321, 322 (1990) ("[T]he law has placed upon physicians a duty to disclose information regarding diagnosis and treatment . . . ."); Chiafalo v. Washington, 140 S. Ct. 2316, 2333 (2020) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) ("The

Indeed, the *Garcia* Court quoted James Madison affirmatively when he said, "[i]f the power was not given, Congress could not exercise it . . . ."[182] The Court reasoned this constitutional protection is granted to the States as evidenced in part by the voting rights that the States retained, namely, the ability to elect the federal executive and legislative branches.[183] Indeed, the Court went on to say that, at least regarding the Commerce Clause, substantive restraints on federal power should be "tailored to compensate for possible failings in the national political process . . . ."[184] This has been interpreted broadly to apply to all potential federal interference with State sovereignty.[185] Additionally, the Tenth Amendment's protections for enumerated States' rights has recently been enforced.[186]

National League of Cities and *Garcia* provide an alternative mode of transportation for the Court to discuss federalism (an attempt at a pun). Still, they are nonetheless demonstrative of the federal government's ability to regulate the Electoral College.[187] Under this analytical regime, any interstate compact that creates a popular vote, as the NPVIC does, is an impermissible infringement on the States' sovereignty after being adopted by Congress.

As pointed out by the Supreme Court in *Garcia*, the way the United States' government is arranged explicitly recognizes the States' rights as sovereigns.[188] Phrased another way, the States'

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ultimate source of the Constitution's authority is the consent of the people of each individual State.")).

182. *Garcia*, 469 U.S. at 549.

183. *Id.* at 550-51.

184. *Id.* at 554.

185. Merritt, *supra* note 111, at 15; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (citing M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)) (establishing the "basic test to be applied" to determine the veracity of federal interference with State sovereignty). The Court in *Katzenbach* applied this test to an alleged violation of State sovereignty authorized by the Fifteenth Amendment despite the fact that the test originated from a potential federal violation predicated by the Commerce Clause. The use of this test shows the interchangeability of tests designed to determine federal overreaching despite the genesis of the federal government's actions.

186. *See* Shelby County v. Holder, 570 U.S. 529, 543, 556-57 (2013); *Chiafalo*, 140 S. Ct. at 2322-23, 2333.

187. *Garcia*, 469 U.S. at 557.

188. *Id.* at 549, 554.

sovereignty is found in the Constitution by the plain text of the Constitution (specifically that text which defines the structure of government).[189] Here, the cause of action being raised is predicated on the same State sovereignty evidenced by constitutional decree.[190] It could be argued that the Presidential Electors Clause is an explicit acknowledgment of State sovereignty in that area.[191] Indeed, that was argued in *Bush v. Palm Beach County Canvassing Board* when the Court, per curiam, said:

> [I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under [the Presidential Electors Clause].[192]

However, assuming that the Presidential Electors Clause alone is insufficient to show that control of the Electoral College is the exclusive right of the State, the *Garcia* Court went on to recognize that a crucial element of State sovereignty, implied by the way the Constitution created the governmental system, is the ability of the States to solely elect the president and congress.[193] Thus, the Constitution ordains the right to elect the President as a sovereign power of all the States.[194]

Additional evidence that the right to oversee the vote for President and the right to form the Electoral College is exclusively the right of the States can be found in *Chiafalo v. Washington*.[195] In that case, three electors from the State of

189. *See id.* at 554.

190. *See* U.S. CONST. art. 2, § 1, cl. 2.

191. *Chiafalo*, 140 S. Ct. at 2324 ("Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint.").

192. 531 U.S. 70, 76 (2000).

193. *Garcia*, 469 U.S. at 551 ("The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government.").

194. *Chiafalo*, 140 S. Ct. at 2324 ("[N]othing in the Constitution expressly prohibits States from [controlling] presidential electors' voting discretion . . . .").

195. *Id.* at 2319-20. For an even more recent acknowledgement of such State exclusivity, one need not look any further than the shambling mound of cases dismissed in favor of States' rights during and after the 2020 presidential election. *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. (forthcoming).

Washington voted against the candidate that won the statewide popular vote.[196] The Court upheld Washington's use of a civil sanction against these "faithless elector[s]," saying that, "[t]he Constitution's text and the Nation's history both support allowing a State to enforce . . . far-reaching authority over presidential electors . . . 'conveying the broadest power of determination' over . . . the power to appoint an elector (in any manner) includ[ing] power to condition his appointment[.]"[197]

Because the right of States to vote for President and control the Electoral College (the States' election rights) are exclusive, they cannot be infringed by federal regulation,[198] much like any other exclusive State power cannot be (the power to regulate the health and welfare of a State's citizenry for example).[199] While the Court has sometimes allowed federal infringement of States' rights when there exists a legitimate end for the interference, those instances are predicated on infringement of an implicit right of the States after the federal government was granted express permission to regulate there by the Constitution or subsequent amendments.[200] This case is the opposite of those. The Constitution explicitly authorizes States to appoint presidential electors as the legislature of that State sees fit.[201]

At best, there is only implicit power for the federal government to regulate the States' election rights. This implicit power could arguably spawn from the Civil War and other voting rights amendments' broad grants of regulatory authority, especially regarding elections.[202] However, this extension of authority is not infinite. Notably, this power extends only to the enforcement of those amendments.[203] No doubt some proponents

196. *Chiafalo*, 140 S. Ct. at 2322.

197. *Id.* at 2322, 2323-24.

198. *Id.*; *Garcia*, 469 U.S. at 551.

199. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (limiting congressional regulation to only those constitutionally expressed areas and barring regulation that would infringe on a State's law-making power for the health of its citizens).

200. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (citing to United States v. Raines, 362 U.S. 17 (1960)). *See also* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (discussing the inability of the State to tax instruments of the federal government).

201. U.S. CONST. art. II, § 1, cl. 2.

202. U.S. CONST. amends. XIV, XIX, XXIV, XXVI.

203. *Id.*

of the NPVIC claim a violation of those amendments is occurring under the existing electoral systems.[204] However, it is hard to fathom that such a systemic issue has existed for as long as it has without any substantial prior acknowledgement of such a heinous defect. If the Electoral College negatively impacts the individuals protected by those amendments, the Electoral College undoubtedly would be an ancient relic of the invidious past, just as literacy tests, poll taxes, white primaries, and abundant violence are.

To say that the Electoral College is in the same category as the aforementioned practices, and is thus subject to regulation by the same amendments, is mere convenient political jiggery-pokery. The Electoral College, assuredly being different in kind than what the voting and Civil War Amendments were conceived to protect, cannot be regulated by such methods. Even if regulation was permissible though, the NPVIC is a far cry from the rational basis of those noble causes, let alone the quasi-narrow tailoring required.[205]

The NPVIC would eradicate some States' abilities, and the values of others, to enforce their election rights. Any federal regulation, including the interstate compact's approval, interfering with these rights is not predicated on any express constitutional authorization of the federal government's power.[206] There is no conceivable basis in the Constitution or its amendments authorizing such federal insight into this exclusive State power. This would be an impermissible federal regulation of a State's constitutional powers under the Presidential Electors Clause,[207] and the Constitution generally.

The member States may have a more difficult time finding friendly litigation, given they sought out the surrendering of their rights voluntarily, but they are potentially not without recourse.[208] While the more modern precedent does trend toward procedurally

204. *See* Faith Karimi, *Why the Electoral College Has Long Been Controversial*, CABLE NEWS NETWORK, [https://perma.cc/XV9F-6J6G] (Oct. 10, 2020, 6:59 AM).

205. *See* Shelby County v. Holder, 570 U.S. 529, 542, 545 (2013).

206. *See generally* U.S. CONST. art. I (laying out the powers of Congress).

207. U.S. CONST. art. II, § 1, cl. 2.

208. *See* Vacco v. Quill, 521 U.S. 793, 798-99, 808 (1997); Washington v. Glucksberg, 521 U.S. 702, 720, 723 (1997).

barring State suits against other States,[209] a State is still capable of suing another for infringement on its sovereign powers.[210] This is true even after that infringement occurs pursuant to joint action.[211] If the merits of the case are heard, the just outcome in either instance (State v. State or State v. United States) favors the right of the State to freely exercise its sovereign powers without impediment from federal law or other State law.

To be as straightforward as possible: the right of the States to control their election procedures is exclusive, as defined under the *Garcia* framework.[212] Any exclusive right may only be abridged by the federal government if there is informed consent to do so (evidenced by a clause in the Constitution or its amendments).[213] While there are clauses granting such power to the federal government, these clauses are narrow and the powers implicit.[214] Moreover, the Electoral College is not at all related to what these clauses are designed to remedy. Additionally, there is no indication that the NPVIC can address these concerns; even if it is determined they are present with the Electoral College. To continue the medical analogy, there is at best informed consent for the federal government to conduct as minimally intrusive a procedure as possible to remedy an exceedingly unique condition. The Electoral College is not an etiology of that unique condition and the NPVIC is not that minimally intrusive procedure. If the plain language and interpretation thereof is not sufficient to bar the NPVIC, the legislative history of the Constitution and relevant clauses may be persuasive.

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209. *See* Louisiana v. Texas, 176 U.S. 1, 22-23 (1900); Connecticut v. Massachusetts, 282 U.S. 660, 669, 674 (1931); Missouri v. Illinois, 200 U.S. 496, 521 (1906).

210. Alabama v. Arizona, 291 U.S. 286, 291 (1934); South Carolina v. North Carolina, 558 U.S. 256, 268 (2010) ("That the standard for intervention in original actions by nonstate entities is high, however, does not mean that it is insurmountable.").

211. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821) ("If [two or more States] be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 731 (1838).

212. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

213. Chiafalo v. Washington, 140 S. Ct. 2316, 2334 (2020); *Garcia*, 469 U.S. at 549.

214. U.S. CONST. amends. XIV, XIX, XXIV, XXVI.

2. Founding Era Thoughts and Examples

How the citizens of each State would be represented in the federal government was discussed at length during the ratification of the Constitution.[215] Still, only a sparse mandate made it into the final draft.[216] Although it is the least desirable and most speculative course of action, the lack of definitive text may require a delving into the Founders' minds and those who followed. The framers defined the election powers of a republican system of government as not being comprised by the will of the people but rather the will of political bodies that represent the people.[217] This definition appears to be consistent with the common understanding around the time of ratification.[218] Beyond dictionary definitions, the understanding of a republican government's election can be demonstrated through the practical applications of such a system cited by the Founders, namely existing State constitutions at the time of ratification.[219]

For example, the Pennsylvania Constitution of 1776 established a method for choosing the president and vice-president of the State where the several counties of the State would elect members of the general assembly and council members.[220] Those elected officials would then choose the persons to fill the executive office of the State.[221] Similar processes of indirectly elected executives existed in every State at this time.[222] While these State examples of an executive

215. *See* MADISON, CONVENTION NOTES, *supra* note 85, at 284, 509.

216. *Compare id.*, *with* U.S. CONST. art. 2, § 1, cl. 2.

217. THE FEDERALIST NO. 39, *supra* note 156, at 198 (James Madison).

218. *Republican Government*, BLACK'S LAW DICTIONARY (1st ed. 1891) (defining Republican Government as "a government by representatives chosen by the people"); JOHN BOUVIER, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 2902 (8th ed. 1914).

219. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 580 n.6, 584-86 (2008); PA. CONST. of 1776, § 19; MD. CONST. of 1776 §§ 14, 25 (stating the governor of the State is elected by vote of both houses of the legislature with the senate being elected by county representatives and the general assembly being elected directly by the people); DEL. CONST. of 1776 art. 7 ("A president or chief magistrate shall be chosen by joint ballot of both houses . . . .").

220. PA. CONST. of 1776, § 19.

221. *Id.*

222. THE FEDERALIST NO. 39, *supra* note 156, at 195 (James Madison); *see, e.g.*, MD. CONST. of 1776 §§ 14, 25; DEL. CONST. of 1776 art. 7.

election process are engaged in by the legislative bodies,[223] the Founders of the Constitution felt that the selection of a President would be better assigned to an independent, single-purpose, electoral body (as opposed to an executive elected by the legislatures or the people directly).[224] This conclusion was reached after a full and frank discussion of the several election processes available, including the potential use of a popular vote.[225] The framers also indicated their decision was predicated on failed or failing foreign examples of direct democracies.[226]

The Founders' definition of the Presidential Electors Clause and the examples relied on to create the electoral system should be more than dispositive of what the Constitution requires. However, the philosophical ideas behind this portion of the Constitution may be necessary to convince the most ardent proponents of the NPVIC. The framers' arguments on behalf of the Electoral College generally entail three substantial areas.[227] These are the avoidance of cliques, the separation of coordinate branches, and electing the most competent executive officer.[228] While the separation of coordinate branches in electing a President is undoubtedly essential, in the context of a popular vote, the first and the last concerns are the most relevant. Under the first concern, the framers thought that a group or individual could elicit the support of many individuals and improperly seek out the presidency in a nationwide popular vote such that there

223. *See* MD. CONST. of 1776 §§ 14, 25; DEL. CONST. of 1776 art. 7; PA. CONST. of 1776, § 19.

224. MADISON, CONVENTION NOTES, *supra* note 85, at 509 (saying that an independent electoral system would avoid the "great evil of cabal" because each slate of electors would be states away from another).

225. *Id.* at 320-21.

226. *See, e.g.*, *id.* at 268 (looking to the election of an executive in Poland); THE FEDERALIST NO. 6, at 23-24 (Alexander Hamilton) (George W. Cary & James McClellan eds., 2001) (discussing Sparta, Athens, Rome, and Carthage—saying "[t]here have been, if I may so express it, almost as many popular as royal wars").

227. *See* Tollar & Kimball, *supra* note 13, at 9; THE FEDERALIST NO. 85, at 452-53 (Alexander Hamilton) (George W. Cary & James McClellan eds., 2001); MADISON, CONVENTION NOTES, *supra* note 85, at 268-69, 284.

228. *See* Tollar & Kimball, *supra* note 13, at 9; THE FEDERALIST NO. 85, *supra* note 227, at 452-53 (Alexander Hamilton); MADISON, CONVENTION NOTES, *supra* note 85, at 268-69, 284.

could be no counter to a powerful individual playing on the excitement of society.[229] Specifically, it was said that:

> The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan, consist chiefly in the restraints which the preservation of the union will impose upon local factions and insurrections, and upon the ambition of powerful individuals in single states, who might acquire credit and influence enough, from leaders and favourites, to become the despots of the people . . . .[230]

Or that the people "will be led by a few active and designing men."[231] This would be aided by the fact that the larger States would likely support a candidate from their State to the detriment of any small State who opposed them.[232] In essence, the fear of cliques was the fear that someone could seize control through force and fear, as individuals are more susceptible to radicalization than separate and detached institutions.[233] There are cliques that the framers discussed composed not of the people, but of the other coordinate branches.[234] Again, this is not in direct relation to the NPVIC.

The framers also feared that the people en masse would not be capable of selecting the most competent candidate.[235] This was in part due to the lack of reliable and easily obtainable information regarding national events.[236] Indeed, the framers

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229. MADISON, CONVENTION NOTES, *supra* note 85, at 268; THE FEDERALIST NO. 85, *supra* note 227, at 452-53 (Alexander Hamilton).

230. THE FEDERALIST NO. 85, *supra* note 227, at 452-53 (Alexander Hamilton).

231. MADISON, CONVENTION NOTES, *supra* note 85, at 268.

232. *Id*. at 268, 284.

233. THE FEDERALIST NO. 10, at 45 (James Madison) (George W. Cary & James McClellan eds., 2001); THE FEDERALIST NO. 48, at 257 (James Madison) (George W. Cary & James McClellan eds., 2001); THE FEDERALIST NO. 68, *supra* note 153, at 352 (Alexander Hamilton); MADISON, CONVENTION NOTES, *supra* note 85, at 268.

234. THE FEDERALIST NO. 68, *supra* note 153, at 353 (Alexander Hamilton); MADISON, CONVENTION NOTES, *supra* note 85, at 267 (describing Governor Morris's advocacy for a national popular vote to avoid an executive branch dependent on the will of the legislature).

235. THE FEDERALIST NO. 68, *supra* note 153, at 352 (Alexander Hamilton); THE FEDERALIST NO. 84, at 447 (Alexander Hamilton) (George W. Cary & James McClellan eds., 2001); MADISON, CONVENTION NOTES, *supra* note 85, at 267 (Mr. Sherman saying "[t]he [people] will never be sufficiently informed of characters").

236. THE FEDERALIST NO. 84, *supra* note 235, at 447-48 (Alexander Hamilton) (saying the people at large have no means to acquire personal observation of presidential

talked repeatedly about the need for the electoral group to be diverse enough to reference national issues as opposed to local issues.[237] The other half of this concern stemmed from the fact that even if the people as a whole had the opportunity to be informed, the information would not necessarily be accurate.[238] At best it is second-hand knowledge of a candidate and at worse it is akin to the game of telephone, even though a highly efficient game of telephone, with all the underlying inaccuracies. To this end, the framers said, "[a] small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation."[239]

The framers and indeed the generations that followed deemed, through implication of continued use despite significant criticism,[240] this system of election superior to a direct democracy.[241] However, the relevancy of their reasoning may differ in the modern world. To answer the relevancy question, it is necessary to look at the changes that have occurred since then that might impact the historic rationales.

3. Social and Political Arguments Against a Popular Vote

You have to remember one thing about the will of the people: It wasn't that long ago that we were swept away by the Macarena.[242]

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candidates and all information that is received is filtered through the lens of trusted individuals—albeit unelected—anyway); MADISON, CONVENTION NOTES, *supra* note 85, at 269 (Colonel Mason saying "it would be as unnatural to refer the choice of a proper character for [president] to the people, as it would, to refer a trial of colours to a blind man").

237. *See* THE FEDERALIST NO. 36, at 172-73 (Alexander Hamilton) (George W. Cary & James McClellan eds., 2001); MADISON, CONVENTION NOTES, *supra* note 85, at 269.

238. THE FEDERALIST NO. 68, *supra* note 153, at 352 (Alexander Hamilton).

239. *Id.*

240. Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 1 (1969) (saying that the Presidential Electors Clause "has probably been the subject of more proposed amendments than any other provision of the Constitution").

241. *See* U.S. CONST. art. 2, § 1, cl. 2; U.S. CONST. amend. XII (changing the selection process of Vice President but retaining the Electoral College).

242. Mark Dawidziak, *Jon Stewart Blurs the Lines Between Jester and Journalist*, THE PLAIN DEALER, [https://perma.cc/G22T-FJDA] (Mar. 28, 2019, 12:49 AM).

Some people in modern America may be taken aback by the previous section's idea that the general public is incapable of discerning a proper presidential candidate. To support this outrage, the speed at which news is provided could be noted. Likewise, the presidential candidates' coverage could be cited. Regardless of either argument, however, political society as a whole has not drastically changed, despite our increased access to media.[243] The presidential candidates do not visit or invest their campaigning into more than just a few States,[244] nor does the available media generally provide one-on-one access to the presidential candidates.[245] We may know more about the world around us now, but the accuracy of that information has remained essentially unchanged.[246] Some even argue that this surplus of

243. *Compare* Shawn Garvey, *A Positive Look at Negative Campaigns*, 8 LBJ J. PUB. AFFS. 13, 14 (1996) ("[W]hat his opposition claimed would result if Jefferson won the presidential election of 1800: 'Murder, robbery, rape, adultery and incest will be openly taught and practiced,' warned the Federalist press[,]" and "[t]he 1884 presidential race . . ." where "Cleveland, widely rumored to have fathered an illegitimate son, was targeted by a Republican campaign attack song: 'Ma, ma, where's my pa? Gone to Washington, ha, ha, ha'" and "[a] famous 1964 Lyndon Johnson campaign commercial began with a little girl plucking the petals from a daisy. Within seconds, a nuclear explosion erupted in the background, and a mushroom cloud enveloped the little girl."), *with* Gabriel Tate, *The Mud-Slingers: The Most Shocking Presidential Attack Ads Ever Aired*, THE GUARDIAN (Oct. 12, 2016), [https://perma.cc/NFR4-TPJS] (discussing a 1988 ad suggesting rapists and murders would be freed upon election of the ad's opponent and a 2016 ad suggesting that the ad's opponent lacked the fortitude to protect against "external threats to American security").

244. *94% of 2016 Presidential Campaign Was in Just 12 Closely Divided States*, NAT'L POPULAR VOTE, [https://perma.cc/E6CS-UVBN] (last visited Jan. 29, 2021); Tollar & Kimball, *supra* note 13, at 19-20 (discussing the history of presidential campaigning and how geographically limited said campaigning has been).

245. *Compare 1858 Debates*, THE COMM'N ON PRESIDENTIAL DEBATES, [https://perma.cc/AHC7-HSPL] (last visited Jan. 28, 2021) (stating that only 7 debates occurred, all in one State, spanning only 3 months, with no crowd involvement in the 1858 Lincoln-Douglas debates), *with 2000 Debates*, THE COMM'N ON PRESIDENTIAL DEBATES, [https://perma.cc/JD3J-NXCJ] (last visited Jan. 28, 2021) (explaining how only three presidential debates occurred in 2000, in one month's time, with minimal crowd involvement in one of the three debates), *and 2020 Debates*, THE COMM'N ON PRESIDENTIAL DEBATES, [https://perma.cc/754A-6RNW] (last visited Jan. 28, 2021) (describing how only two presidential debates occurred in 2020, with no crowd involvement).

246. Janet A. Hall, *When Political Campaigns Turn to Slime: Establishing a Virginia Fair Campaign Practices Committee*, 7 J.L. & POL. 353, 366 (1991) (stating that "[c]ampaign falsity statutes . . . are generally unenforced"); Maximilian J. Mescall, *Make Campaign Coverage Great Again: Presidential Campaigns, the Pres, and the Rights of Access*, 48 SETON HALL L. REV. 1653, 1653, 1657 (2018) (stating "more Americans follow the news" despite the fact that "journalists continue to act as moderators" as they did "[i]n early American History . . . as 'gatekeepers by adhering to a developed set of ethical

information makes discerning the quality information from the rubbish more difficult.[247]

That being said, it seems readily apparent that the current system simply cannot continue without some modification. Regardless of the system's merits, if the social outcry is substantial enough, the practical implementation becomes so frustrated as to exhaust all hope of success. Recent events have yielded a plethora of research into the average American's mindset and faith in the electoral process.[248] Generally, the verdict against the process is not pleasant.[249] The need for a trusted and reliable system of elections is arguably more important than the actual process that occurs.

In that vein, any proposed system must be consistently applicable and transparent. Likely, a successful system would not be subjected to potential manipulation by a single individual or small subset of society. Other concerns that have prevailed, despite the erosion of time, include the possibility that cliques will form and, as discussed above, the potential that the most

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norms'") (quoting Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 72 (2016)).

247. *See* Jean R. Sternlight & Jennifer K. Robbennolt, *Good Lawyers Should be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO STATE J. ON DISP. RESOL. 437, 449 (2008); Joan Deppa, *Media Coverage: Help or Hindrance Symposium: International Terrorism: Prevention and Remedies*, 22 SYRACUSE J. INT'L. L. & COM. 25, 28 (1996) (discussing how too much media coverage after terror events may violate the Universal Declaration of Human Rights, confuse the facts, and encourage further violence); Paul Carrington, *Too Much Publicity*, 27 TEX. BAR J. 75, 76 (1964) (explaining the "excess of publicity has been called a 'discredit to the American system of justice'").

248. *See Election 2020: Voters are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting*, PEW RSCH. CTR. (Aug. 13, 2020), [https://perma.cc/4WBF-GCA6] (researching the impact Covid-19 had on voter confidence) [hereinafter *Election 2020: Voters are Highly Engaged*]; Nick Laughlin & Peyton Shelburne, *How Voters' Trust in Elections Shifted in Response to Biden's Victory*, MORNING CONSULT (Jan. 19, 2021), [https://perma.cc/3V8H-VH4M] (polling the impacts of violence and voter fraud on voter confidence in the electoral system).

249. *See Election 2020: Voters are Highly Engaged*, *supra* note 248 (stating 49% of voters believed it would be difficult to vote in the 2020 elections); Laughlin & Shelburne, *supra* note 248 (stating only 27% of registered republicans "say they trust the United States' election system either 'a lot' or 'some'" as of January 10, 2021); *Deep Divisions in Views of the Election Process—and Whether It Will Be Clear Who Won*, PEW RSCH. CTR. (Oct. 14, 2020), [https://perma.cc/G8AR-QCWZ] (stating that only 22% of registered voters, polled from Sept 30 to Oct 5, 2020, are very confident that "[a]fter all the votes are counted, it will be clear which candidate won the election"); *Faith in Elections in Relatively Short Supply in U.S.,* GALLUP (Feb. 13, 2020), [https://perma.cc/ZX7Z-AGRJ] (stating that only 30% of Americans said they had confidence in the honesty of elections in 2016).

competent candidate will not prevail.[250] A foundation-era concern that was only slightly voiced then but is far more significant in modern times is voter suppression and the suffrage of all citizens.[251]

The NPVIC does not, and cannot, protect against these concerns. First, even if it practically does not achieve this outcome, the NPVIC will most likely be perceived by a significant portion of the Nation's voters as a way of disenfranchising their vote. This can be evidenced by the existing arguments launched against the NPVIC,[252] which can be expected to intensify upon its potential adoption. Likewise, the NPVIC cannot address the concerns for consistency and reliability required of any electoral system. For example, a vast exodus from or to a highly populous member-state could potentially drastically alter the outcome of the NPVIC's vote. This change would be substantial and could occur rapidly without any limitation on how frequently it could occur. This may seem far-fetched, but again, the primary concern with an election system is how trusted and reliable it is by the people, regardless of the actual capacity for it to be altered. To its credit, the NPVIC could likely end the impact of gerrymandering. It would do so by simply ignoring any sparse or minority populations—an ironic example of the idiom "the medicine is worse than the disease." Another of the major concerns that the founding fathers had was that cliques could be raised to change the results of an election forcibly.[253] This

250. *See* Tollar & Kimball, *supra* note 13, at 9; THE FEDERALIST NO. 85, *supra* note 227, at 452-53 (Alexander Hamilton); MADISON, CONVENTION NOTES, *supra* note 85, at 268-69, 284.

251. *See* MADISON, CONVENTION NOTES, *supra* note 85, at 286 ("There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes.").

252. Jonah Goldberg, *Column: Scrapping the Electoral College Is a Bad Idea*, CHI. TRIB. (Sept. 16, 2020), [https://perma.cc/D4HC-P2GR] (suggesting intentional polarization as the driving force behind the NPVIC and that it encourages populist control of a "handful of large, highly urbanized states"); *see also* Curtis Gans, *Why National Popular Vote Is a Bad Idea*, HUFFPOST (updated Mar. 7, 2012), [https://perma.cc/5QMK-HQS9] (suggesting the NPVIC will "diminish voter turnout" and warning of the legitimacy challenges to an NPVIC election); Chris Stirewalt, *The Electoral College Dodges Another Bullet*, FOX (Jul. 6, 2020), [https://perma.cc/R2VS-FJ5S] (warning "a national popular election in a nation so vast and diverse would be a demagogue's dream").

253. MADISON, CONVENTION NOTES, *supra* note 85, at 268.

concern was in part mitigated by the geographical distance that existed between the electors in each State.[254]

The NPVIC brings all the relevant electors/election officials into a significantly smaller geographic area and subjects them to the "great evil of cabal" associated with direct political pressure.[255] In addition, the creation of a new election official who seemingly has unfettered control to report the election results[256] likewise may establish cliques among these newly founded chief election officials.

Regarding the competency of presidential candidates, this concern has been launched with increasing frequency in modern times.[257] The NPVIC does not allow any enhanced observation or determination of a presidential candidate's competency other than what is presently in place. Thus, this concern is not better addressed after the enactment of the NPVIC.

Finally, the NPVIC does not address the disenfranchisement that is already being alleged under the present election system.[258] While this could be mitigated as an ancillary concern of any election system (to be addressed more directly outside of election law), at least one alternative to the NPVIC, proposed later, does in fact address this concern.

As a result, the NPVIC, while no better nor much worse than the current system in many ways, is almost assuredly not the best overall solution. In addition to these specific and identifiable concerns the NPVIC either fails to address or potentially brings about, there exist other, more ambiguous sovereignty concerns upon the NPVIC's adoption. One such concern is that the erosion of the distinction between the States reduces the ability to "try

254. *Id.* at 57, 509.

255. *Id.*

256. COLO. REV. STAT. § 24-60-4002 (2019).

257. Miles Parks & Mark Katkov, *What the 25th Amendment Says about Removing a Sitting President*, NAT'L PUB. RADIO (Jan. 7, 2021), [https://perma.cc/5LSN-N6TY]; Marianna Sotomayor & Mike Memoli, *Joe Biden Releases Medical Assessment, Described as 'Healthy, Vigorous'*, NBC NEWS, [https://perma.cc/7CY8-QSV2] (Sept. 16, 2021, 2:41 PM); Jeannie Suk Gersen, *We May Need the Twenty-fifth Amendment If Trump Loses*, THE NEW YORKER (Oct. 26, 2020), [https://perma.cc/UT95-4XQ8].

258. *Block the Vote: Voter Suppression in 2020*, AM. CIV. LIBERTIES UNION (Feb. 3, 2020), [https://perma.cc/SRD4-Z845]; *How to Put an End to Voter Disenfranchisement*, RUTGERS TODAY (Nov. 2, 2020), [https://perma.cc/5VP2-N4HR].

novel social and economic experiments without risk to the rest of the country."[259]

Given the general disdain that many Founders held for a national popular vote and the potential pitfalls of such a system that still exist today,[260] there must be a highly persuasive reason for the present idea that this system is necessary. The NPVIC's proponents suggest that something must be done. Regardless of why, their reasons should be addressed thoroughly and respectfully. The section below attempts to provide more appropriate alternatives than the NPVIC.

IV. WHY DOES THE POPULAR VOTE MOVEMENT EXIST AND WHAT ARE SOME ALTERNATIVES?

It appears that the popular vote is aimed at reconciling the disparity between the outcome of an election and the outcome of the people's desire.[261] After all, it is a cornerstone in our Constitutional Republic that the will of the people is controlling.[262] Additionally, the motivation of the NPVIC's proponents may also be to broaden the focus of presidential campaigning.[263] In achieving these goals, it has been proposed that the NPVIC is not an attempt to abolish the Electoral College writ large. Instead, it is primarily concerned with eradicating the winner-take-all provisions that presently prevail across the Nation.[264]

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259. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* FERC v. Mississippi, 456 U.S. 742, 788-89 (1982) (O'Connor, J., dissenting); Chandler v. Florida, 449 U.S. 560, 578-80 (1981); Roth v. United States, 354 U.S. 476, 505-06 (1957) (Harlan, J., dissenting).

260. *See* Tollar & Kimball, *supra* note 13, at 9; THE FEDERALIST NO. 85, *supra* note 227, at 452-53 (Alexander Hamilton); MADISON, CONVENTION NOTES, *supra* note 85, at 268-69, 284; *see also supra* Section III.B.2-3.

261. *See* Karimi, *supra* note 204; *5 of 45 Presidents Came into Office Without Winning the National Popular Vote*, NAT'L POPULAR VOTE, [https://perma.cc/3E9R-JVW5] (last visited Oct. 24, 2020).

262. THE FEDERALIST NO. 78, at 405-06 (Alexander Hamilton) (George W. Cary & James McClellan eds., 2001).

263. *How a Nationwide Presidential Campaign Would Be Run*, NAT'L POPULAR VOTE (Jun. 17, 2020), [https://perma.cc/ZU27-GNXT].

264. Michael Gonchar & Nicole Daniels, *Is the Electoral College a Problem? Does It Need to Be Fixed?*, N.Y. TIMES (Oct. 8, 2020), [https://perma.cc/X8W3-HGTE]; *see also Map of General-Election Campaign Events and TV Ad Spending by 2020 Presidential*

An advocate of the NPVIC more immersed in the nuances might also suggest that it would eliminate the disparity in voting power between the citizens of States based on population differences (e.g., an occupant of California accounts for one vote out of tens of millions in a State that only controls roughly nine times the electoral votes of Arkansas, where a citizen accounts for one vote among a few million).[265] This disparity is further exacerbated when comparing more disparate populations. Under this argument the NPVIC would more accurately reflect the one person one vote standard.

These motivations can be inferred from the direct words and publications of those that advocate for the NPVIC or similar national popular vote programs.[266] Regarding the first concern, several articles have been published admonishing the Electoral College and discussing how the outcome of a particular election did not reflect the popular vote when another candidate "won the national popular vote by 2,868,518 votes."[267] Finally, regarding the broadening of presidential campaigns, the NPVIC's proponents have said sullenly, "[t]he concentration of . . . campaign events in just a few battleground states is nothing new . . . ."[268] It is advocated that the NPVIC will be the solution to all these problems and more.

Now knowing the desires of those who advocate the NPVIC specifically, and more generally those that support some form of a popular vote, there must be a way to reconcile the Constitution's commands while simultaneously reaching the desires of its

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Candidates, NAT'L POPULAR VOTE, [https://perma.cc/BE48-GN7Y] (last visited Jan. 4, 2021) [hereinafter *Map of General-Election Campaign Events*] (blaming the winner-take-all laws for the lack of campaign diversity, among other qualms). Interestingly enough, the very winner-take-all system the NPVIC allegedly loathes would likely be the inevitable outcome of the NPVIC, except at a nationwide, rather than a statewide, scale—just a few populous States would control the entire presidential outcome as opposed to a few densely populated counties.

265. *Distribution of Electoral Votes*, THE U.S. NAT'L ARCHIVES & RECS. ADMIN., [https://perma.cc/6875-TQ37] (last updated Mar. 6, 2020).

266. *See, e.g.*, Goldman, *supra* note 15, at 93-94 ("The Humphrey method, however, would have modified the exaggerated Electoral College majorities . . . [and] would heighten the need for [a] co-ordinated and widely distributed presidential campaign effort on a national basis."); *How a Nationwide Presidential Campaign Would Be Run*, *supra* note 263.

267. *Nate Silver Calculates that a 3-Million Lead Only Gives Biden a 46%*, NAT'L POPULAR VOTE, [https://perma.cc/7NTG-AGKD] (last visited Jan. 4, 2021).

268. *See Map of General-Election Campaign Events*, *supra* note 264.

opposition. The systems proposed below also try to remedy the dangers of keeping the current system.

A. Ranked Choice Voting

Ranked-choice voting allows each present individual the opportunity to exercise his or her voting rights more than once.[269] This system is very similar to the way Iowa's presidential DNC Caucuses are conducted.[270] Because the Iowa caucus system is more developed, it will be the foundation for this section, and the Ranked Choice Voting System will be briefly discussed toward the end. The political parties of Iowa determine the presidential caucus rules of that State.[271] In the Iowa system, the voters will initially physically divide the room (or attempt to replicate this practice through technology) and locate themselves according to their desired candidate.[272] Then, if that candidate does not receive a sufficient percentage of the total votes (ranging from 15-25%), that same voter can realign to his or her next most preferred candidate.[273] This process is then used to select the political delegate to elect a primary candidate.[274]

Transferring this system to a general presidential election would essentially entail the same process. This process, however, is incompatible with the current electoral scheme, which only allots one vote per person.[275] This is undoubtedly a significant obstacle for this proposed election method. The only potential saving grace for this idea is that there is no explicit Constitutional mandate requiring one person one vote.[276] Instead, the Supreme Court has simply interpreted the Fifteenth, Seventeenth, and Nineteenth Amendments to require this.[277] The Court also said that this interpretation's main objective was to ensure "every

269. *See* IOWA DEMOCRATIC PARTY, IOWA DELEGATION SELECTION PLAN 3 (2020).
270. *Compare id.*, *with* ME. REV. STAT. ANN. tit. 21-A § 801 (2020).
271. IOWA CODE § 43.1 (1973).
272. IOWA DEMOCRATIC PARTY, *supra* note 269.
273. *Id.*
274. *Id.* at 6.
275. Gary v. Sanders, 372 U.S. 368, 381 (1963).
276. *See generally* U.S. CONST.; *see also* U.S. CONST. amend. XIV (requiring equal electoral representation but not limiting such representation to a specified quantity).
277. *Gary*, 372 U.S. at 381.

voter is equal to every other voter in his State[.]"[278] Thus, if this method was universally available to all eligible voters and carefully crafted to avoid disparate voting power, there appears to be no violation. This could also be likened to the runoff election procedures, which have been deemed to comply with the one person one vote mandate.[279]

However, it is for this complication alone that this proposed system does not present a viable alternative to the Electoral College as it stands now. Nevertheless, it is still a possible and popular[280] contender to the NPVIC, and thus, States could potentially impose new laws in compliance with and recognition of this system. Indeed, many States have already shown a desire to radically change the electoral system in their respective jurisdictions, as evidenced by the acceptance of the NPVIC and its originating legislation.[281]

As previously stated, one State has adopted a general presidential election model that mirrors the Iowa caucus system.[282] In Maine, as of November 2020, the candidates for president go through several rounds in the selection process.[283] After each round, the candidate with the smallest percentage of votes is removed from the running, and the next round begins.[284] This goes on until only two candidates remain, at which point the candidate with the most votes wins.[285] Each eligible voter receives at least five ranks to place the candidates on the ballot

278. *Id*. at 380.

279. Minn. Voters All. v. Minneapolis, 766 N.W.2d 683, 690 (Minn. 2009); Dudum v. Arntz 640 F.3d 1098, 1114, 1116 (9th Cir. 2011) (allowing runoffs, even when participation was restricted to only a few eligible voters, to prevail in the face of unequal voting power claims).

280. *See, e.g.*, *Ranked Choice Voting*, YANG2020, [https://perma.cc/866P-9ZLL] (last visited Jan. 28, 2021).

281. *See, e.g.*, N.M. STAT. ANN. § 1-15-4.1 (2019); COLO. REV. STAT. § 24-60-4002 (2019); D.C. CODE § 1-1051.01 (2010).

282. ME. REV. STAT. ANN. tit. 21-A, § 801 (2020).

283. ME. REV. STAT. ANN. tit. 21-A, § 801; ME. REV. STAT. ANN. tit. 21-A, § 723-A(2); *Timeline of Ranked choice Voting in Maine*, FAIR VOTE, [https://perma.cc/9TAV-L65G] (last visited Jan. 28, 2021) (Maine's ranked choice statutory scheme was adopted for State general elections in November 2016. Upon expansion to federal elections in 2018, it faced a veto referendum petition, which suspended its implementation until it passed again on the November 2020 ballot).

284. ME. REV. STAT. ANN. tit. 21-A, § 723-A(2).

285. ME. REV. STAT. ANN. tit. 21-A, § 723-A(2).

(this can be expanded, but the minimum is five).[286] Despite Rank Choice Voting already being unanimously ruled in violation of the Maine Constitution—because it violates the one person one vote rule expressly mandated within—it has, like a phoenix, or a cockroach, remained un-killable.[287]

Additional complaints have been launched against Ranked Choice Voting Systems, aside from any constitutional complaints that could be made.[288] These generally attack this system's practical implementation.[289] Many point to its implementation in the 2020 Iowa Democrat Primary as evidence that this system would be doomed from the beginning.[290] Indeed, there is strong credibility in the argument that the infrastructure necessary for this system is far from available, and what we do have seems less than capable. There is also the concern that an election system of this nature would all but disenfranchise a voter who did not have several hours to devote to an election.[291]

Given the aforementioned constitutional attacks a Rank Choice Voting System would be subject to, as well as the practical drawbacks of such a system, it is difficult to imagine this system being able to reach the fundamental goals of any election system. It provides no greater access to presidential candidates than the current system, with the exception that in the distant future there may be more candidates to choose from. As such, the people's opportunity to meet a candidate may be slightly increased. Again, this interaction would almost assuredly be brief and as

286. ME. REV. STAT. ANN. tit. 21-A, § 723-A(4).

287. *See* Op. of the Justs., 162 A.3d 188, 210-212 (Me. 2017).

288. *See, e.g.*, Maura Barrett & Ben Popken*, How the Iowa Caucus Fell Apart and Tarnished the Vote*, NBC NEWS (Feb. 21, 2020), [https://perma.cc/NL8L-ZDKL].

289. *See id.*; Hollie Russon Gilman, *The Democratic Party in Iowa Changes the Caucus Rules. There Could be Controversy,* WASH. POST (Jan. 31, 2020), [https://perma.cc/456E-FTRR] ("For instance, as my research finds, the wealthier, more educated and more able-bodied and -minded residents of Iowa are more likely to persuade their fellow caucus-goers. Furthermore, participating in caucuses requires time and resources. Even getting to the caucus—especially on a cold, snowy February night—can be challenging, skewing who shows up. Particularly excluded are those with disabilities, non-traditional work schedules and child-care responsibilities. Moreover, the Iowa caucuses have not always appeared to be transparent.").

290. Sara Morrison, *The Iowa Caucus Smartphone App Disaster, Explained*, VOX (Feb. 6, 2020), [https://perma.cc/9H76-MATC] (stating that "many precinct chairs didn't use the app at all, citing difficulty downloading or using it").

291. Gilman, *supra* note 289.

analytically meaningless as the shaking of hands (or bumping of elbows) that occurs presently. This system is also subject to manipulation simply by the inherent complexity. In that same vein, this system's trust and reliability have already been called into question,[292] and there has yet to even be a substantial implementation of a Rank Choice Voting System.

Because of the uniqueness of a Rank Choice Voting System and similar election processes, it is difficult to determine how this would specifically reach the goals sought by the NPVIC. That being said, thinking in the abstract, it would allow for a varied vote, with potentially lesser-known candidates having a larger constituency and greater potential to actually secure the presidency. This system would also almost certainly broaden the scope of campaigns given its ability to divert attention from the two major political parties in the United States. While there does not appear to be any numerical benefit to the voters' desire compared to the election's outcome, increased representation may nonetheless occur. It would be procured by giving the voters more opportunities to elect nuanced candidates and, in turn, would require candidates to give more attention to secure States if they stand a chance at winning. The electoral systems in place presently would largely remain unchanged (the Electoral College slate would still vote for the candidate who won the State's popular vote).[293]

As has been previously stated, this hypothetical alternative to the NPVIC is highly speculative at best. The practical impact of using an Iowa caucus/Ranked Choice model in the general presidential election would be just as unpredictable and possibly illegal as the NPVIC. However, this system has the distinct advantage of only requiring States to change their laws independently, which can be done according to the State's powers highlighted in *Chiafalo*.[294] Notably this means that no interstate compact is required.

Because of this model's ambiguity, it may best be retained only as a last resort. The proceeding systems are far more

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292. *See* Barrett & Popken, *supra* note 288; Morrison, *supra* note 290; Gilman, *supra* note 289.

293. *See, e.g.*, ARK. CODE ANN. § 7-8-302(2) (2021).

294. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2323-24 (2020).

concrete and seemingly reach the same goals as the NPVIC, but through legal means.

B. Proportional Electorate Systems

There have been several proposals over time that could potentially reduce the discrepancy between the outcome of a State's popular vote and the State's allocation of electoral votes. Most of these systems incorporate some kind of proportional distribution of a State's electoral votes based on each district's popular vote.[295] This section will specifically discuss the method employed by Nebraska as well as a new system coined by Eric T. Tollar and Spencer H. Kimball in their article, *A More Perfect Electoral College: Challenging Winner-Takes-All Provisions Under the Twelfth Amendment*.[296]

Both of these propositions are defined by their rejection of the Winner Takes All (WTA) provision existing across most States.[297] The WTA system requires all of a State's Electoral College votes to go to the candidate who won a majority of the State's popular vote.[298] Instead, the Nebraska system allocates each congressional district's electoral votes to the candidate that won the majority of the popular votes in that district.[299] Then the electoral votes that extend from that State's senate seats as opposed to their district/house of representative seats go to the State's overall winner.[300]

This electoral system has been criticized in large part for its susceptibility to gerrymandering.[301] It is proposed that another electoral system, while similar in function, gets around many of the deficiencies in the Nebraska system. This is the system developed by Eric T. Tollar and Spencer H. Kimball, called the Proportional Election Manner (PEM), where the State's electoral votes are divided based on the percentage each candidate received

295. Tollar & Kimball, *supra* note 13, at 25, 29.
296. *Id*. at 29.
297. *Id*. at 25, 29.
298. *Id*. at 20; *see, e.g.*, ARK. CODE ANN. § 7-8-302(2) (2021).
299. NEB. REV. STAT. § 32-714(2) (2015).
300. NEB. REV. STAT. § 32-714(2).
301. Tollar & Kimball, *supra* note 13, at 26.

in the State's popular vote.[302] When this results in a fraction of the electors, the number of electoral votes is rounded down to the nearest whole number, and the winner of the State's popular election overall is awarded the remainder.[303]

Both of these systems seek to meet the demands of the NPVIC in roughly the same way. In each process, the WTA system is replaced with a proportional vote,[304] and thus the people's vote theoretically becomes more influential in determining who their electoral representative votes for.

There is potential in both systems to alter the scope of presidential campaigning; however, the scope will not necessarily be broadened. Instead, the focus will simply change from swing States to the States that employ these methods. This can be evidenced by Nebraska's present attention (and Maine's historically, until the recent repulsion of this electoral system).[305] If every State of the Union were to adopt these same methods, the outcome would be similar to the NPVIC's adoption in this regard. In other words, a candidate would likely invest campaign resources into swing districts or other highly populated areas instead of a variety of States. The States adopting these solutions may see an increase in political importance or campaign coverage akin to swing States (assuming only a few States adopt these methods), but these proposed alternatives do not solve the problem of isolated campaign focus. In addition to meeting the concerns the NPVIC seeks to address, these proportional systems account for some, but not all, of the underlying goals of any election system.

For starters, they have no mechanism for providing the citizens increased interaction with presidential candidates aside from potentially broadening the campaign locations. However,

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302. *Id.* at 29.

303. *Id.*

304. *Id.* at 25; NEB. REV. STAT. § 32-714(2).

305. *See Map of General-Election Campaign Events*, *supra* note 264 ("The single visit to Nebraska and the 2 events to Maine were motivated by the fact that those states award electoral votes by congressional district. Although the statewide result is not in doubt in either state, the 2nd congressional district of Nebraska (the Omaha area) and the 2nd congressional of Maine (the northern half of the state) were closely divided. These campaign events were held in those particular districts, and the remainder of both states received no attention.").

these systems adequately address the trust, reliability, and transparency issues to the same extent the present electoral system does. Finally, they seemingly do not increase the risk of manipulating the electors or the risk of cliques forming. It should also be noted there is likely a practical bar to the implementation of these systems. That is, the dominant political party in each State has no incentive to relieve its State of its control, even partially, without the rest of the nation reciprocating the sacrifice. For this reason, it is unlikely these systems will slowly be tested State to State. Furthermore, if adopted all at once, the problems of overuse would quickly become apparent.

The systems above more or less maintain the current system's status quo. The changes they propose are substantial and could potentially alter presidential elections to address the grievances put forth by the NPVIC's proponents; however, many of these changes would likely lose all effectiveness shortly after implementation due to overuse. In addition, these proportional methods fail to stand toe-to-toe with yet another proposed method, as seen below.

C. A Second Look at the Source Material

Historically, each State's presidential electors were the only names on a presidential ballot, if the people's input was considered at all.[306] The elected individuals would then convene in their States to select the president on behalf of their constituents.[307] There was no decree contemplating who they were to vote for, nor any other mandatory indication except their

306. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020) ("In some States, legislatures chose the electors; in others, ordinary voters did."); Joel K. Goldstein, *Electoral College: Is it a Dinosaur that Should be Abolished or a Last Bastion of Democracy?*, 20 UPDATE ON L. RELATED EDUC. 34, 35 (1996); Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 906 (2017) ("Early in the nation's history, the political parties provided ballots to voters to cast in the election, and those early presidential ballots simply listed the names of the presidential electors pledged to vote for that party's presidential nominee."); Rosenthal, *supra* note 240, at 4.

307. U.S. CONST. art. 2, § 1; U.S. CONST. amend. XII; Rosenthal, *supra* note 240, at 4 ("[T]he electors are still chosen on a state-by-state basis, and in turn, they elect the President.").

perceptions and beliefs about the candidates.[308] Since that time, States have continually and gradually reduced the discretion that these electors have to cast their ballots.[309] This process largely began after the election of 1800 when the electors sought to disrupt the election of the president by spreading their votes between the president and vice president evenly such that the decision would be controlled by Congress, which at the time was composed of the electors' favorable political party.[310] The Twelfth Amendment wholly remedied this problem.[311]

Nevertheless, many statutory schemes are presently in place to prevent the exercise of discretion by electors.[312] This includes the WTA system, which directs all electors to vote for the candidate who won the statewide popular vote,[313] and faithless elector statutes, which bar deviation from the result of the statewide popular vote.[314] The NPVIC is yet another attempt to regulate electoral discretion but instead favors the national popular vote outcome.[315]

While electoral discretion is certainly not perfect, if it were to be allowed, as it once was—with the duly elected individuals having complete discretion[316]—it would likely meet many of the problems contemplated by the NPVIC, as well as other problems the NPVIC fails to address. For starters, the implementation of a

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308. Goldstein, *supra* note 306, at 35; Rosenthal, *supra* note 240, at 4 (stating that the lack of electoral discretion common today "would have been unrecognizable to the Framers"). *But see Chiafalo*, 140 S. Ct. at 2323 (suggesting that upon the advent of political parties, the electors of each State were under a strong expectation "to support the party nominees") (quoting Ray v. Blair, 343 U.S. 214, 228 (1952)); Whittington, *supra* note 306, at 911 (comparing the Electoral College and Presidential Electors Clause to "Chekov's gun" in the sense that it falsely indicates that electors are free to choose when they are in reality "instruments for expressing the will of those who selected them").

309. Rosenthal, *supra* note 240, at 14.

310. *Chiafalo*, 140 S. Ct. at 2327.

311. U.S. CONST. amend. XII (resolving the issue by dictating that if no candidate for the presidency received a majority of the votes, "then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.").

312. Rosenthal, *supra* note 240, at 22-23.

313. *See, e.g.*, ARK. CODE ANN. § 7-8-302(2) (1969).

314. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-212 (1979); CAL. ELEC. CODE §§ 6906, 18002 (1994).

315. 17 R.I. GEN. LAWS § 17-4.2-1 (2013).

316. Goldstein, *supra* note 306, at 35; Rosenthal, *supra* note 240, at 17. *But see Chiafalo*, 140 S. Ct. at 2323; Whittington, *supra* note 306, at 911.

direct election of electors rather than a direct election of the president would allow for the electors of a person's State to hold a more intimate connection with their constituents and to zealously advocate for the issues important to their people on the national stage. This would reduce the number of people vying for a candidate's attention by increasing focus on the chief issues in various States.

Paired with the newfound impossibility of the WTA system, electors could make independent and informed value judgments about candidates. In the process, this would also level the disparity of power between the single voters in each State. Functionally, that power would become indirect. Electors would be free to vote for the candidate they feel is the most representative of their constituency after having a personal connection with the people, as well as the candidate. This system allows the will of the people of every State to be explicitly heard through their liaison.

Additionally, the votes, occurring at a far more local level than state or nationwide scale, will almost certainly be more representative of the elector chosen to represent a specific district. This proportional representation is precisely what the Nebraska and PEM methods seek to accomplish.[317] This is because the people are voting as a specific district, which gives less of an opportunity for a densely populated area to overrule the rest of the State or the Nation.

This system also has the potential to alleviate even the most sinister gerrymandering by requiring the independent thought of an elector. No, the elector likely would not sway from his or her partisan affiliation, but the elector is at least subject to moral accountability. This system also reduces the incentive to gerrymander in the first place. Even a partisan sweep (occurring when every elector is from the same political party) cannot ensure a statewide victory for a single candidate, and the majority is no longer dispositive of the entire State's electors.

Likewise, a presidential candidate's campaigning will be broadened, albeit not geographically, but rather by the specific and targeted issues raised by the electors representing the entire

317. Tollar & Kimball, *supra* note 13, at 25, 29.

United States. The presidential candidates would no longer have to campaign or rally to mass crowds of thousands of people, greeting only ten or so before being shuffled away. Instead, a candidate could sit down with 538 people or less throughout a campaign, with each person chosen to be the best representative of their community's interests. Likely to be a televised event, this would almost assuredly be more representative of a candidate's actual capacity compared to a candidate addressing a partisan crowd chanting their name or waving their flags. While the electoral representative would undoubtedly be as partisan as the populations he or she represents, the decreased number of people would give the candidate time to address opposing views in an actual conversation instead of merely spouting the same rhetoric to a different crowd.

The American people commonly appoint representatives to control substantial aspects of their lives, including but not limited to a person's literal life and death. To think that presidential electors should be treated any differently is to ignore the foundations of the United States and to laugh in the face of the men and women who already see to it that the rights of the people reign eternal.

The potential adoption of this plan, it should also be noted, is more likely than any other proposal. This is because the adopting State's political party does not need to cede its control. The electors, now directly chosen by the people, will likely have similar, if not the same, partisan affiliations as they did before adoption. The difference is that they are no longer bound in the same way they were before. It is in no way realistic to expect members of a political party to uniformly abandon said party, except in the most abhorrent of circumstances. They will likely vote along the same partisan lines, but now for the candidate most acutely after their own district's heart. As a result, there is not the same incentive to shy away from this legislation by the dominant political party as there is with the other potential electoral systems. Likewise, to those States seeking to avoid the seemingly inevitable NPVIC, this system presents a viable alternative.

CONCLUSION

The national popular vote movement and, more specifically, the National Popular Vote Interstate Compact has been gaining attention.[318] It likely will continue to gain attention and support in the years following this Comment. The NPVIC requires congressional approval, which it has yet to receive, if it is constitutionally permissible.[319] However, even if congressional approval is tendered, it is unlikely that the compact can be sustained.[320] The States could challenge the federal government and the compact under the notion that the States have a right to participate in the federal election process.[321] Under the precedent set by the Supreme Court in *Garcia* and other cases, this right is evidenced by the structure of the Constitution and the explicit federalism concerns stated within.[322] This view is also compliant with the historical teachings recorded at the Nation's inception.[323] Additionally, there are practical social and political reasons not to implement the NPVIC or a similar election method.[324]

Despite the NPVIC's many faults, the motivation behind it is presumptively virtuous.[325] As a result, alternative methods to reach the same goals have been proposed.[326] Two of the proposed methods are better suited, right off the bat, for use in the United States, given their possible compliance with the Constitution.[327] With a third likely to avoid Constitutional preclusion until it is in practice. However, there are many other differences between the alternatives and the NPVIC.

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318. *Id.* at 28.

319. MADISON, CONVENTION NOTES, *supra* note 85, at 201; *see also supra* Part II and accompanying text.

320. *Chiafalo*, 140 S. Ct. at 2323-24; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985); *see also supra* Section III.B.1. and accompanying text.

321. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821); Alabama v. Arizona, 291 U.S. 286, 291-92 (1934); *see also supra* Section III.A. and accompanying text.

322. *See supra* Section III.B.1. and accompanying text.

323. *See supra* Section III.B.1. and accompanying text.

324. *See supra* Section III.B.2. and accompanying text.

325. *See supra* Part IV and accompanying text; Karimi, *supra* note 204; *5 of 45 Presidents Came into Office Without Winning the National Popular Vote*, *supra* note 261.

326. *See supra* Sections IV.A-C. and accompanying text.

327. *See generally* U.S. CONST; *see also* U.S. CONST. amend. XIV (requiring equal electoral representation but not limiting such representation to a specified quantity); Tollar & Kimball, *supra* note 13, at 25, 29.

Under the Rank Choice proposal, providing variety in campaigning and better representation would be achieved. That being said, this method is undeniably speculative, despite the minimal changes to state law that would be required for implementation. Proportional systems, of varying degree and kind, all adopt proportional representation of the Electoral College's votes and seemingly meet many of the proposed goals. However, they are mainly effective only when used by a few States. In other areas, they merely maintain the system, and all its faults, in place today.

Finally, a return to the original method of presidential elections would provide the people the most representation, would not require a significant change in existing laws, could be implemented effectively throughout the nation, and would secure the propriety of elections and the will of the people for centuries to come. If we are to truly accept that some truths are self-evident, we should strongly consider an election system that derives from the consent of the governed.