2017

Changing the System Without Changing the System: How the National Popular Vote Interstate Compact Would Leave Non-Compacting States Without a Leg to Stand On

Jillian Robbins
Cardozo Law Review

CARDOZO LAW REVIEW
de•novo

CHANGING THE SYSTEM WITHOUT CHANGING THE SYSTEM: HOW THE NATIONAL POPULAR VOTE INTERSTATE COMPACT WOULD LEAVE NON-COMPACTING STATES WITHOUT A LEG TO STAND ON

Jillian Robbins[†]

"[Y]ou win some, you lose some. And then there's that little-known third category."[1]

TABLE OF CONTENTS

† Articles Editor, *Cardozo Law Review* Vol. 38. J.D. Candidate, Benjamin N. Cardozo School of Law, 2017; B.A., University of Michigan, 2014. I would like to thank Professor Kate Shaw for her guidance and expertise in helping me write this Note. I also would like to thank all of my friends and family for their constant support during the entire Note-writing process.

1 Al Gore, Former Vice President, Address at the Democratic National Convention (July 26, 2004) (referring to when he won the national popular vote but lost the presidency in the infamous 2000 presidential election).

INTRODUCTION

It is our duty and our privilege as American citizens to cast our vote for the next president of the United States.[2] But voters who live in populous but solid blue and red states feel as if their votes do not count; voters who live in less populated swing states get all of the attention from presidential candidates.[3] Every four years, with every presidential election, we are familiarized with this system the Founding Fathers put in place in 1787: the Electoral College.[4] A presidential candidate has won the national popular vote but not the Electoral College five times before.[5] It is one of the most criticized provisions of the Constitution, yet, even though there have been many challenges to it, there has been

---

[2] *See* U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

[3] *See infra* Section I.B.

[4] *See generally* William C. Kimberling, *The Electoral College*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/INFORMATION/INFORMATION/electcollege_history.php (last visited Sept. 8, 2015).

[5] Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 218 (2012); *see* D'Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG, http://www.factcheck.org/2008/03/presidents-winning-without-popular-vote (last updated Dec. 23, 2016); *infra* Section I.A.

no success in abolishing it.[6] The last time Congress came close to abolishing the Electoral College was in the late 1960s, following the 1968 Presidential Election between Richard Nixon and Hubert Humphrey.[7] But what if there was a way to change the system, without exactly changing the system?

The most recent attempt to change the Electoral College system is through the National Popular Vote Interstate Compact (NPVIC).[8] Eleven jurisdictions[9] have passed the NPVIC, and as a result, have agreed to appoint their electors to the presidential candidate that wins the national popular vote.[10] Proponents of the NPVIC believe the states are exercising their constitutional rights under the Electoral College provision,[11] but opponents of the NPVIC claim that it is unconstitutional under the Compact Clause, since there is no congressional approval.[12]

This Note will discuss the constitutional and legal implications of the NPVIC, and will explore the strengths and weaknesses of the arguments both for and against its implementation. It will argue that the NPVIC is constitutional, despite many opponents' views that it is not, because it does not encroach on federal supremacy or threaten the political relevance or rights of non-compacting states.[13] This Note

---

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

[7] Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 217 (2004).

[8] *See generally* NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com (last visited Sept. 7, 2015).

[9] The eleven jurisdictions that have passed the NPVIC are: California, District of Columbia, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New York, Rhode Island, Vermont, and Washington. *Status of National Popular Vote Bill in Each State*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/state-status (last visited Apr. 5, 2017). Together, these states have 165 electoral votes—61% of the 270 electoral votes needed to win the presidency, and the 270 votes needed to enact the NPVIC. *See id.*

[10] *See Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/written-explanation (last visited Apr. 5, 2017).

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

[12] "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." U.S. CONST. art. I, § 10, cl. 3.

[13] There are many political implications of the NPVIC, but this Note will not address those. Additionally, this Note will not argue that the Electoral College is unconstitutional under the Equal Protection Clause, as this principle was shot down by the Supreme Court in the wake of various actions following the infamous 2000 presidential election. The Court has stated that the "one person, one vote" doctrine is embodied in the Equal Protection Clause. *See* Rice v. Cayetano, 528 U.S. 495 (2000); Gray v. Sanders, 372 U.S. 368 (1963). However, the Eastern District of New York declined to extend this ruling to the Electoral College when a New Yorker claimed his vote was diluted because of the Electoral College system. *See* New v. Ashcroft, 293 F.Supp.2d 256 (E.D.N.Y. 2003). The Court explained that "'[n]either the Constitution nor the 'one person, one vote' doctrine vests a right in the citizens of this country to vote for Presidential

proposes that if a lawsuit between the states resulted from the enactment of the NPVIC, even if the merits of the claim are constitutional, the United States Supreme Court should dismiss these cases because the states bringing the suit would not have standing.[14] Finally, this Note concludes that since congressional approval is not required, and if a non-compacting state were to bring suit once the NPVIC goes into effect it would not have Article III or prudential standing, there is virtually nothing stopping the NPVIC's enactment in a state.

Part I describes the history of the Electoral College, how it came to be, and its implications since its enactment—including the times when it has worked, the times when it has not, and the differences between the state of the nation then and today.[15] It then argues that the Electoral College is a system no longer suitable for our government today, which is why the NPVIC is created by a more undivided and cooperative set of states than the states that created the Electoral College. It then describes the specific mechanisms of the NPVIC.[16]

Part II explains the constitutional debate that the NPVIC faces—that it may be consistent with Article II, Section 1 (the Electoral College), but may be unconstitutional under Article 1, Section 10 (the Compact Clause).[17] It then concludes that the NPVIC is constitutional under the Compact Clause and consistent with the Electoral College, since Article II, Section 1 gives state legislatures plenary power to appoint their electors in any manner they see fit, and that it does not require congressional consent under Article 1, Section 10.[18] Part II further analyzes why the NPVIC is constitutional—mainly because it does not encroach on federal supremacy, nor does it threaten the political power and rights of non-compacting sister states.[19] Part II will also respond to arguments that the NPVIC is unconstitutional under the Compact Clause and it will debunk common myths about the NPVIC.[20]

---

electors . . . or empowers the courts to overrule constitutionally mandated procedure in the event that the vote of the electors is contrary to the popular vote.'" *Id.* at 259 (citing Trinsey v. United States, No. CIV.A. 00-5700, 2000 WL 1871697, at *2 (E.D. Pa. Dec. 21, 2000)).

14 Courts in the United States are not permitted to issue advisory opinions, meaning there must be a dispute at issue, with specific parties related to that dispute in front of the court. *See infra* notes 220–21 and accompanying text. "The judicial Power shall extend to all Cases . . . [and] Controversies . . . ." U.S. CONST. art. III, § 2, cl. 1. There are two types of standing the plaintiff must have in order to proceed in a case against the defendant: Article III standing and prudential standing. *See infra* notes 216, 220. This Note explores both kinds of standing and concludes that the non-compacting sister state would have neither form of standing, and thus the case would be dismissed.

15 *See infra* Part I.

16 *See infra* Part I.

17 *See infra* Part II.

18 *See infra* Sections II.A and II.B.

19 *See infra* Section II.C.

20 *See infra* Section II.C.

Part III proposes that if enough states were to pass the NPVIC[21] and a non-compacting sister state and/or its citizens tried to bring suit in federal court, they would not have standing to do so because they would be asserting generalized grievances as opposed to a specific, direct, injury.[22] It will explain how courts would address the issues, how they would analyze and decide the various standing issues, and what the outcome would be based on a hypothetical case.[23]

Ultimately, this Note argues that the National Popular Vote Interstate Compact is constitutional due to the reasons stated above.[24] It will show that the NPVIC does not violate the Compact Clause (thus it does not need congressional consent), it is consistent with Article II Section 1 of the Constitution, and a non-compacting sister state would not have standing to bring suit to challenge it.[25] Thus, if enough states pass the NPVIC to bring it into effect, there would be virtually nothing stopping its enactment.[26]

I. A FRAGMENTED, NEW NATION CREATED THE ELECTORAL COLLEGE: HOW THE SYSTEM IS NOT SUITABLE TODAY

When the Constitutional Convention (Convention) met in 1787, the Founding Fathers had a peculiar situation to grapple with: how to elect a president of a newly formed, democratic, but not yet unified nation. The state of the nation those hundreds of years ago was, as one can imagine, vastly different than the nation we know today. The nation, then fresh out of the Revolutionary War, only had thirteen states—both large and small—that were not unified by any common ground[27], and that were apprehensive about the concept of a federal government.[28] Additionally, there were four million people spread out with barely any form of communication or transportation, and thus had no concrete way to keep

---

[21] This is a scenario that is not unrealistic, since the number of states that have passed the NPVIC have 61% of the total 270 electoral votes needed to elect the president, and the number of electoral votes needed to enact the NPVIC. *See generally* NATIONAL POPULAR VOTE, *supra* note 8. Additionally, while not expressly the National Popular Vote Interstate Compact, national popular vote legislation has been introduced in forty-seven states, which shows that states are seriously considering the idea that the Electoral College should be replaced with the national popular vote. *See generally id.*; Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218 (2008).

[22] *See infra* Part III.

[23] *See infra* Part III.

[24] *See infra* Conclusion.

[25] *See infra* Conclusion.

[26] *See infra* Conclusion.

[27] *See infra* notes 35–37 and accompanying text.

[28] *See* Kimberling, *supra* note 4.

them connected.[29] The Constitutional Convention had several options in deciding how to elect the next president;[30] however, in the end, the Framers selected the Electoral College. During this time, political parties did not nearly have the influence that they have today,[31] and there was no way for the Framers to predict just how influential political parties would become, and the effect they would have on the Electoral College.[32]

Much of the debate surrounding the method of electing the president during this time was between larger free states and smaller slave states: the former wanted a national popular vote, but the latter were concerned that their political voice would not be heard and they would run the risk of having to give up their slaves.[33] Thus, the Convention's goal was to appease southerners with slaveholding interests.[34] The South during this time wanted a guarantee that they would still dominate the nation and could continue to possess slaves; with a national popular vote, this would not be the case.[35]

Another reason the Convention rejected the idea of a national popular vote was because there would be little to no way for citizens to gain information about all the candidates and make an educated

---

[29] *Id.*

[30] The Constitutional Convention considered having Congress elect the president. However, it was rejected for many reasons, mainly because it would disturb the balance of power between the branches, would lead to too many "hard feelings" on Congress, and could potentially cause corruption. *Id*. Additionally, the Convention considered having state legislatures elect the president, but this was also rejected because a president would be too "beholden" to state legislatures. *Id*.; *see* Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND L. REV. 2099 (2001). Electoral College did not result from an overall vision for the nation by the Framers; it was a product of strenuous debate. *Id*.

[31] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313–15 (2006).

> The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. . . . Justice Jackson astutely recognized that the separation of powers no longer works as originally envisioned because interbranch dynamics have changed with the rise of political parties, which . . . ha[s] diminished the incentives of Congress to monitor and check the President. . . . [T]he degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by [a] political party.

Id.

[32] Herbst, *supra* note 5, at 221.

[33] Roberta A. Yard, Comment, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote"*, 42 SANTA CLARA L. REV. 185, 187 (2001).

[34] Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 202 (1994).

[35] *Id*. With the enactment of the 13th Amendment, to think that our current system of electing the President of our country was a result of appeasing slaveholder interests is something that is unimaginable, and something that demonstrates just how outdated the system is.

decision. Thus, they would be inclined to vote for the candidate from their own state, since that was all they knew, or they would be forced to make a completely uninformed decision.[36] James Madison himself said that the people would never be informed enough to be able to choose the executive properly.[37] All of this evidence shows that the Electoral College was implemented in a fragmented nation during a tumultuous time, with little to no communication between voters—all factors that are not applicable today.[38]

All of these issues bear the question: how did the original Electoral College turn into the winner-take-all system we see today? The rising prominence of political parties in the 19th century pushed the states to adopt the winner-take-all system; the last time a majority of states used the district-plan[39] instead of the winner-take-all plan was in 1800.[40] The rise of political parties meant that the Democrats and Republicans were feeling the pressure, both locally and nationally, to ensure that their party was in control—the winner-take-all system was the way to achieve this goal.[41]

Because the Electoral College's foundations are extremely outdated and inapplicable to how society looks today, the United States needs a new system.[42] The next section of this Note will further this analysis by exploring the instances in which the Electoral College has

---

[36] Connecticut delegate Roger Sherman said at the time that the "sense of the nation would be better expressed by the legislature, than by the people at large." Ky Fullerton, Comment, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717, 719 (2001); *see also* Herbst, *supra* note 5, at 221.

[37] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 306 (1966).

[38] As of 2013, a reported 116,291,000 households have Internet access. Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, UNITED STATES CENSUS BUREAU (2014), https://www.census.gov/history/pdf/acs-internet2013.pdf. A reported 69% of Americans get their news from their laptop or computer. *How Americans Get Their News*, AM. PRESS INST., (2014), http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news. This shows how Americans are more connected than ever before and they are capable of receiving news instantly at any time of day.

[39] The district-plan allocated a certain amount of electoral votes to each district within a state, rather than to each state. This made states more fragmented and thus the allocation of electoral votes more fragmented as well. Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. REV. 1523 (2012), Section III.C.

[40] *Id.*

[41] *Id.* The first president of the United States, George Washington, pleaded against political parties in general; fearing the effects they would have on the country. He stated in his farewell address:

> However [political parties] may now and then answer popular ends, they are likely . . . to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.

George Washington, Former President, Farewell Address (Sept. 17, 1796).

[42] *See supra* Part I.

failed us.

A. *The Electoral College Has Failed Us: Historical Considerations*

A presidential candidate has won the national popular vote but not the Electoral College, thus losing the presidency, five times in our nation's history: 1824, 1876, 1888, 2000, and 2016.[43]

In 1824, the Electoral College was deadlocked in the presidential election between Andrew Jackson and John Quincy Adams, so the House of Representatives acted as the tiebreaker vote to determine who the next president would be.[44] Ultimately, Adams prevailed in this election, but only after allegations of corruption that Adams created a secret deal with the House of Representatives in order to secure the presidency, and only after Jackson won 38,000 more votes in the national popular vote.

In 1876, the Democratic candidate, Samuel J. Tilden, won the national popular vote by 200,000 votes, but was one electoral vote short of winning the presidency—Republican candidate Rutherford B. Hayes ended up winning that election.[45] Hayes' supporters devised a plan to secure all the disputed electoral votes, which included promising a federal subsidy for the Texas and Pacific Railway Company to a Southern Congressman; in exchange, the Congressman abstained from the Democratic filibuster against the decision of the Electoral Commission, resulting in Hayes' victory.[46]

In 1888, no fraud was involved, but the Democratic candidate and then-president Grover Cleveland won the national popular vote by about 100,000 votes to Republican counterpart Benjamin Harrison, but Cleveland lost in the Electoral College.[47] Cleveland carried many small

---

[43] Herbst, *supra* note 5, at 229. Although only five times may not seem like many, there have been a total of fifty-eight presidential elections—so the Electoral College has failed us five out of fifty-eight times, or about 8%. *See id.*; *see also* Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 721 (2007). At the time of this writing in the Fall of 2015, the 2000 election was the last time a presidential candidate won the Electoral College but not the national popular vote. Since then, the 2016 election can be added to this list. Hillary Clinton beat Donald Trump by almost 2.9 million votes in the national popular vote, but Trump beat Clinton by seventy-four electoral votes. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count.

[44] *See* Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 L. LIBR. J. 297, 307 (1993); Fullerton, *supra* note 36, at 728.

[45] Anglim, *supra* note 44, at 309.

[46] *Id.*

[47] Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 442 (2008).

and mid-sized states by wide margins, but Harrison carried most of the large states by small margins, meaning that even though Harrison did not win the large states by much, he received all of the electoral votes because of the winner-take-all system, which is still in place today.[48]

Over a century later, the Electoral College failed us again, in the infamous 2000 election between George W. Bush and Al Gore[49]—the election that sparked the current movement to reform the presidential election process.[50] After a long back and forth series of both candidates winning different major states, and with no clear winner of the election in sight, it seemed as though one state's electoral votes would determine the outcome of the election: Florida.[51] In the end, Bush won the election by receiving 271 electoral votes—one more than needed—but Gore won the national popular vote: he had 50,999,897 votes whereas Bush had 50,456,002 votes—over 500,000 fewer.[52] As a consequence of this election, Gore filed a complaint, which made its way all the way to the Supreme Court.[53]

While the period between the second and third times the Electoral College failed us was over 100 years, the span between the third and fourth times was only sixteen years. In the 2016 election, perhaps the most controversial of them all, Republican candidate Donald Trump surpassed Democratic candidate Hillary Clinton by seventy-four Electoral College votes, whereas Clinton surpassed Donald Trump by 2.9 million votes in the national popular vote.[54]

B. *Common Criticisms of the Electoral College*

One criticism of the Electoral College is that it causes candidates to ignore the larger states with the largest populations in favor of less populous, but more "battleground," states.[55] For example, New York, California, and Texas are relatively solid Democratic, Democratic, and Republican states, respectively, and they also have three of the largest

---

48 *Id.* at 442–43.

49 *See 2000 Official Presidential General Election Results*, FED. ELECTION COMM'N, http://www.fec.gov/pubrec/2000presgeresults.htm (last updated Dec. 2001).

50 *See* Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2526 (2001).

51 Fullerton, *supra* note 36, at 729–30.

52 *See* FED. ELECTION COMM'N, *supra* note 49.

53 Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam). While this case does not have much to do with the Electoral College itself, it is an important piece of the story. The Supreme Court reversed the Florida Supreme Court's decision that Gore satisfied his burden of proof with respect to the County's failure to tabulate the 9,000 ballots that the machine did not detect a vote. *Id.* at 102.

54 *See* Krieg, *supra* note 43.

55 *See infra* note 57 and accompanying text.

populations in the entire nation.[56] However, in the 2012 presidential election, from June 2012 to Election Day, presidential candidates Barack Obama and Mitt Romney made only a combined total of thirty-six visits to California, thirty-four visits to New York, and fourteen visits to Texas, whereas they made a combined seventy-six visits to Ohio, a state with a population of only 11,550,839 in 2012—more than 26 million fewer people than California.[57] Additionally, vice presidential candidates Joe Biden and Paul Ryan made only a combined total of three visits to California, five visits to New York, and four visits to Texas, whereas they made a combined forty-eight visits to Ohio. This is a staggering difference.[58]

Another criticism of the Electoral College is that it discourages voter turnout.[59] For example, in 2012, voter turnout was 11% higher in battleground states than in the rest of the country.[60] In that election, voter turnout was 71.1% in Colorado—a battleground state—but only 59.4% in the rest of the nation.[61] The percentage of voters who participated in the 2004 election, as compared to the 2000 election, was almost 5% higher, but this increase is only due to the battleground states.[62] This shows that many people who do not live in large swing states—the majority of Americans[63]—feel as though their votes do not

---

56 *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU (2016), https://www.census.gov/data/tables/2016/demo/popest/state-total.html (click first Excel table). As of 2012, New York had an estimated population of 19,602,769 California had an estimated population of 38,011,074 and Texas had an estimated population of 26,071,655.

57 *Id.*; *Presidential Campaign Stops: Who's Going Where*, WASH. POST (Sept. 10, 2012), http://www.washingtonpost.com/wp-srv/special/politics/2012-presidential-campaign-visits (explaining that the presidential candidates made a combined thirty-five visits to Iowa and forty-seven visits to Virginia, but only fourteen visits to Texas). These statistics show that the Electoral College discourages candidates from visiting the states with the largest populations, but rather focuses the candidates on visiting "swing" states, even though they have significantly lower populations. As of September 2016, half of the 105 presidential campaign visits have only been in five states—Pennsylvania, Ohio, Florida, North Carolina, and Virginia. *Two-thirds of Presidential Campaign Is in Just 6 States*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/campaign-events-2016 (last visited Apr. 17, 2017). Since July 2016, thirty-one states have been ignored by the candidates. *Id.*

58 *Presidential Campaign Stops: Who's Going Where*, *supra* note 57.

59 JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 37–38 (4th ed. 2013). Additionally, after the infamous 2000 presidential election, the subsequent 2004 and 2008 presidential elections saw higher voter turnouts. *Voter Turnout in Presidential Elections: 1828–2012*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/turnout.php (last visited Apr. 17, 2017).

60 KOZA, *supra* note 59, at 37.

61 *Id.*

62 Pietro S. Nivola, *Thinking About Political Polarization*, BROOKINGS INST. (Jan. 1, 2005), http://www.brookings.edu/research/papers/2005/01/01politics-nivola (explaining that since the Electoral College has narrowed elections—like the 2000 presidential election—down to the final votes in one battleground state, voters elsewhere feel as if their votes do not matter).

63 There were only nine swing states in the 2012 election: Colorado, Florida, Iowa, Nevada,

count, since their state will almost definitely go a certain way.[64]

Yet another criticism is that the Electoral College system is unnecessarily complex. Instead of a direct national popular vote—where every vote is counted as one and added up—there are many complexities in the Electoral College.[65] Votes must be counted in every state, electoral votes need to be delegated, and the president has to be chosen through those electoral votes.[66] It is a far more complex system of voting than necessary for a democratic nation; a national popular vote would increase efficiency and would be much simpler.[67]

Another major problem with the Electoral College is the winner-take-all system it implements.[68] With this system, each state gives its entire slate of electoral votes to the winner of its statewide popular vote.[69] Disadvantages of this system include ignoring minority candidates, and creating the battleground states which garner so much of the presidential candidates' attention, leaving non-battleground states without any presidential candidate influence.[70] For example, if a candidate only has one more vote than another, they will win the entire slate of electoral votes, even though they only won by one vote.[71]

C. *Other Electoral College Reform Ideas That Fell Short*

Many of these common criticisms have led some (congressional representatives and others, alike) to propose various reforms to the system.[72] However, these proposals to reform the Electoral College involve completely changing the system and even the Constitution.

New Hampshire, North Carolina, Ohio, Virginia, and Wisconsin. Chris Cillizza, *The 9 Swing States of 2012*, WASH. POST (Apr. 16, 2012), https://www.washingtonpost.com/blogs/the-fix/post/the-9-swing-states-of-2012/2012/04/16/gIQABuXaLT_blog.html. As of September 2016, there are only eleven swing states in the 2016 election, the same swing states as 2012 plus Michigan and Pennsylvania. *The Battleground States Project*, POLITICO, http://www.politico.com/2016-election/swing-states (last visited Apr. 17, 2017).

64 Stanley Chang, Recent Development, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 218 (2007).

65 GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2d ed. 2011).

66 Elizabeth D. Lauzon, *Challenges to Presidential Electoral College and Electors*, 20 A.L.R. FED. 2d 183, Part I § 2 (2007).

67 *Id.*

68 This winner-take-all system has been in effect since 1836. Herbst, *supra* note 5, at 230. Forty-eight states currently use the winner-take-all system—the exceptions being Maine and Nebraska, which allocate their electoral votes by district. *Id.*

69 *Id.*

70 *Id.*

71 Lauzon, *supra* note 66.

72 *See infra* note 83 and accompanying text.

Thus, there is no feasible way these plans could go into effect.[73]

After the infamous 2000 election,[74] Senator Dick Durbin and Representative Ray LaHood advocated for a direct national popular vote plan, mainly proposing that a candidate must receive at least 40% of the whole number of votes in order to win the general election.[75] If neither candidate gets at least 40%, the candidates participate in a run-off election.[76] While there are many benefits to this system,[77] it would completely destroy the Electoral College in its entirety, which would require Congress to come to a decision to make a constitutional amendment—an unlikely scenario.[78]

Another commonly known proposal to reform the Electoral College is the district-plan.[79] This would involve giving electoral votes to each congressional district, rather than to states as a whole (much like the system Maine and Nebraska still use today)[80] and having the winner of each district get those electoral votes.[81] However, the main problem with this plan is that it does not necessarily guarantee the winner of the national popular vote the presidency—we could still run into the same problems that we have with the Electoral College. It is still the same winner-take-all system that the Electoral College implements except instead of a state winner-take-all, it is a district winner-take-all. This may break up the current Electoral College system into smaller pieces, but the same problems remain.[82]

D. *The NPVIC: An Overview*

There were many attempts to abolish the Electoral College in the

---

73 *See* Fullerton, *supra* note 36, at Part V.

74 *See supra* Section I.A.

75 S.J. Res. 56, 106th Cong. (2000); H.R.J. Res. 23, 106th Cong. (1999).

76 S.J. Res. 56, 106th Cong. (2000); H.R.J. Res. 23, 106th Cong. (1999).

77 Fullerton, *supra* note 36. For example, there would be no dispute as to which candidate wins the election—the candidate who wins the national popular vote wins.

78 The process to amend the Constitution is outlined in Article V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid . . . when ratified by the Legislatures of three fourths of the several States . . . ." U.S. CONST. art. V. Since the Constitution was enacted in the 18th century, there have been over 10,000 proposed amendments in Congress; only thirty-three survived two-thirds of both houses, and twenty-seven have been ratified. Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 165 (2005). These numbers show how difficult it is for the Constitution to be amended.

79 Fullerton, *supra* note 36, at 733; Herbst, *supra* note 5, at 238.

80 ME. REV. STAT. ANN. tit. 21-A, § 805(2) (West 2008); NEB. REV. STAT. ANN. § 32-714 (West 2009).

81 Fullerton, *supra* note 36, at 733.

82 *Id.* at 734.

past through congressional action[83] and some recent proposals,[84] but in 2006, John Koza co-authored a book proposing the National Popular Vote Interstate Compact.[85] He explains that his motivation was the lack of democratic elements in the current system of electing the president.[86] One year later, NPVIC legislation began to emerge in forty-two states.[87] Maryland became the first state to enact the legislation when Governor Martin O'Malley signed it into law on April 10, 2007.[88] In 2008, New Jersey, Illinois, and Hawaii followed suit and enacted the legislation.[89] One year later in 2009, Washington State enacted the legislation.[90] In 2010, Massachusetts and District of Columbia enacted the legislation.[91] Vermont and California followed suit in 2011,[92] Rhode Island in 2013,[93]

---

[83] Most notably, in the 1968 election between Richard Nixon and Hubert Humphrey, Nixon took a very small plurality of the national popular vote (43.3% to 42.7%), but won by a landslide in the Electoral College (301 to 191). Boudreaux, *supra* note 7, at 217. This election caused Senator Birch Bayh to propose a constitutional amendment to abolish the Electoral College in favor of a national popular vote. Symposium, *A Modern Father of our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 783 (2010). Ultimately, the resolution failed due to lack of votes to end the filibuster blocking the bill. *Id.* Additionally, Supreme Court justices have voiced their opinion when it comes to abolishing the Electoral College: "To abolish [the Electoral College] and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental processes." Ray v. Blair, 343 U.S. 214, 234 (1952) (Jackson, J., dissenting).

[84] *See supra* Section I.C.

[85] KOZA, *supra* note 59; *see e.g.*, *News History*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/news-history (last visited Apr. 5, 2017) (John Koza is the "originator of the plan."). When states pass this legislation, they are pledging to allocate all of their electoral votes to the winner of the national popular vote, no matter which way the state itself may go (Democratic or Republican) during a presidential election. *Id*.

[86] Koza first explains how anyone who does not live in a swing state has an irrelevant vote under the current system, and how voters in four-fifths of the states are ignored in presidential elections. KOZA, *supra* note 59, at 255. Additionally, he explains how in four out of fifty-six presidential elections, the Electoral College elected a president that did not win the national popular vote. *Id.* at 256.

[87] *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

[88] MD. CODE ANN. ELEC. LAW § 8-5A-01 (West 2013); *see* Associated Press, *Maryland Sidesteps Electoral College*, NBC NEWS (Apr. 11, 2007, 11:17 AM), http://www.nbcnews.com/id/18053715.

[89] N.J. STAT. ANN. § 19:36-4 (West 2014); 10 ILL. COMP. STAT. ANN. 20/1-10 (West 2015); HAW. REV. STAT. ANN. § 14D-1 (West 2008).

[90] WASH. REV. CODE ANN. § 29A.56.300 (West 2014); *see also* Brad Shannon, *State Joins Electoral College Pact*, THE OLYMPIAN (Apr. 29, 2009, 12:00 AM), http://www.theolympian.com/news/local/politics-government/election/article25232041.html.

[91] H.B. 4156, 186th Gen. Court, Reg. Sess. (Mass. 2009); *see also* Steve LeBlanc, *Massachusetts Governor Signs National Popular Vote Bill*, NATIONAL POPULAR VOTE (Aug. 4, 2010), http://archive.nationalpopularvote.com/pages/articles/washingtonexaminer_20100804.php; D.C. CODE ANN. § 1-1051.01 (West 2013).

[92] VT. STAT. ANN. tit. 17, § 2752 (West 2011); CAL. ELEC. CODE ANN. § 6921 (West 2012); Hendrik Hertzberg, *Electoral College Halfway Fixed!*, THE NEW YORKER (July 23, 2013), http://www.newyorker.com/news/hendrik-hertzberg/electoral-college-halfway-fixed.

[93] 17 R.I. GEN. LAWS ANN. § 17-4.2-1 (West 2013); Hertzberg, *supra* note 92.

and finally New York on April 14, 2014.[94]

The mechanisms of the NPVIC are relatively simple. First, the compact would not become effective until it is enacted by states that, in total, have 270 electoral votes—the majority necessary for electing the president in the Electoral College.[95] The compact would not change the overall scheme of the Electoral College—each state still retains its allotted number of electoral votes based on its amount of representation in Congress.[96] The NPVIC solely proposes that the states that pass the compact give their allotted electoral votes to the winner of the National Popular Vote, rather than the winner of the popular vote in the state.[97] Koza proposes that the NPVIC would *reform* the Electoral College in a way that retains the American federalist system of state control over elections, rather than *abolish* the Electoral College.[98]

The NPVIC bill itself is short and simple, outlining the mechanisms described above as well as other provisions.[99] Article III of the bill sets out the specific mechanisms of how the compact would work during a presidential election: the chief election official of each state determines the number of votes for each presidential slate in each state and adds the votes together to create a national popular vote and determines which candidate is the winner.[100] Each member state then makes a final determination of the number of popular votes cast in its state at least six days before the day fixed by law for the meeting and voting by the presidential electors; then, it communicates an "official statement of such determination" within twenty-four hours to the chief election official of every other member state.[101] The chief election official of each compacting state treats this official statement as

---

94 N.Y. ELEC. LAW § 12-402 (McKinney 2014); *see also* Hendrik Hertzberg, *National Popular Vote: New York State Climbs Aboard*, THE NEW YORKER (Apr. 16, 2014), http://www.newyorker.com/news/daily-comment/national-popular-vote-new-york-state-climbs-aboard.

95 KOZA, *supra* note 59, at 258.

96 *Id.*

97 *Id.*

98 *Id.*

99 Article I states that any state can become a member of the agreement by enacting the legislation. Article II states that "each member state shall conduct a statewide popular election for President and Vice President," which is the current system in place. KOZA, *supra* note 59, at 559–60; *The Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf (last visited Apr. 5, 2017). The majority of this Note will focus on Articles III and IV of the NPVIC. The entirety of the bill can be found at http://www.nationalpopularvote.com/pages/misc/888wordcompact.php.

100 *The Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/sites/default/files/eve-4th-ed-ch6-web-v1.pdf (last visited Apr. 5, 2017).

101 *Id.*

conclusive.[102] Once the number of popular votes is determined, each member state allocates its electoral votes to the projected winner of the national popular vote, regardless of the turnout in the state.[103] In the extremely rare event of a tie for the national popular vote winner, the allocated elector votes will go to the winner of the popular vote in that specific state rather than the winner of the national popular vote.[104]

Article IV of the bill outlines other miscellaneous provisions.[105] It reiterates that the agreement only goes into effect when the states that enacted it possess more than 270 total electoral votes.[106] It also explains that any member state can withdraw from the agreement, except a state cannot withdraw six months or less before the end of a president's term—this prevents states not being happy with how the presidential election may have turned out from being able to withdraw too close to Election Night.[107] Additionally, it explains that the chief executive of each member state shall notify the chief executive of all the other states of when the NPVIC has been enacted and has taken effect; it also articulates that the NPVIC will terminate if the Electoral College is abolished.[108] It concludes by determining that if any provision is held invalid, such invalidation will not affect the remaining provisions.[109]

The majority of this Note will focus on the constitutional implications of Article III and Article IV of the NPVIC. The next section of this Note will explore the constitutional implications of the NPVIC and how they can be resolved.

II. A CONSTITUTIONAL DEBATE—THE ELECTORAL COLLEGE VERSUS THE COMPACT CLAUSE

The National Popular Vote Interstate Compact presents a unique debate; it seems as though it is consistent with the Electoral College Clause, but could be unconstitutional under the Compact Clause. This Part will first explain why the NPVIC is consistent with the Electoral College Clause—since it allows states to exercise power they already have under Article II, Section 1.[110] It will then respond to common

---

102 *Id.*; *see also* KOZA, *supra* note 59.

103 KOZA, *supra* note 59.

104 *Id.*

105 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

106 *See generally id.*

107 This is specifically designed so if a state is not satisfied with the outcome of the election—i.e., if the candidate it believed would win the national popular vote did not—they cannot back out of the compact on Election Night, or too close beforehand. *See generally id.*

108 *See generally id.*

109 *See generally id.*

110 *See infra* Section II.A.

constitutionality concerns under the Compact Clause—since under the Constitution states cannot contract together without congressional consent[111]—and explain how these common criticisms can be defeated. It will mainly respond to arguments that the entirety of the NPVIC is unconstitutional under the Compact Clause.[112]

A. *The Electoral College: Article II, Section 1*

This Note previously explores the history of the Electoral College[113], but it is worth noting that during the Constitutional Convention, states' rights advocates were worried that a national popular vote would create a more powerful, partisan federal government, while leaving little role for state governments.[114] This is interesting, in hindsight, since the Electoral College ended up having this exact effect—the effect that, originally, states were concerned would be an effect of a national popular vote.[115]

Article II, Section 1 of the Constitution states, "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[116] This inherently means that the legislature of each state can choose the manner in which to appoint their electors—it does not say specifically how the number of electors should be appointed, only that it must be equal to the number of Senators and Representatives.

In *McPherson v. Blacker*,[117] the Supreme Court declared constitutional the challenged manner of the appointment of electors in the state of Michigan: the election of an elector and an alternate elector in each district, and of an elector and alternate elector at large in each of two districts.[118] While there are differences between this method of appointing electors and those set out in the NPVIC, the Court's reasoning in this case can be applied to the NPVIC. The Court reasoned:

---

111 *See infra* Section II.B.

112 Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007); *see* U.S. CONST. art. I, § 10, cl. 3.

113 *See supra* Section I.A.

114 Amanda Kelley Myers, Comment, *Importing Democracy: Can Lessons Learned from Germany, India, and Australia Help Reform the American Electoral System?*, 37 PEPP. L. REV. 1113, 1118 (2010) (quoting Martin J. Siegel, *Congressional Power Over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VT. L. REV. 373, 378 (2004)).

115 *See supra* Section I.B.

116 U.S. CONST. art II, § 1, cl. 2 (emphasis added).

117 146 U.S. 1 (1892).

118 *Id.* at 6, 23–24.

> [Article II, Section 1, Clause 2] does not read that the people or the citizens shall appoint, but that "each state shall[]" . . . . Hence the insertion of [the language, "in such manner as the legislature thereof may direct"], while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself. . . . [The Constitution] recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of [appointing electors]. . . . [I]t is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.[119]

This is a broad reading of the Electoral College clause that directly applies to the NPVIC; the states possess the plenary power to appoint electors how the legislatures see fit, and the people of that state exercise their rights through their elected officials.[120] The NPVIC does not seek to abolish the Electoral College system, or even change it at all, but rather to allocate their electoral votes differently—a right they explicitly have under the Constitution.[121] Some critics of the NPVIC contend that the only reason the Court allowed Michigan to change its electoral appointment plan from winner-take-all to district-based is because states had already done so in the past, so there was little to no risk in allowing some states to do that now.[122] However, this argument presumes that it is unrealistic for the Court to adopt a principle that has never been adopted before, which is not the case.[123] The Court has shown in the past that it is not afraid to go against years of precedent in the interest of justice; it is not far-fetched to say that the Court would be comfortable making a decision about the national popular vote in lieu of the Electoral College, a far less drastic issue than the ones previously cited.[124]

Over a century later—after the infamous 2000 presidential election—the Supreme Court upheld the same principles set out in

---

119 *Id.* at 25–27, 35.

120 *Id.*

121 U.S. CONST. art. II, § 1, cl. 2; Strunk v. U.S. House of Representatives, 24 F. App'x 21 (2d Cir. 2001) (explaining that when a New York voter tried to bring suit challenging the manner in which electors are selected, his case was moot because states are constitutionally empowered to determine how to select electors).

122 Williams, *supra* note 39, at 1581–82.

123 There have been many instances in American history where the Court overturned years of precedent and adopted policies that had never been seen before, and were in fact revolutionary. The Court is clearly comfortable with making these kinds of decisions. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

124 *See supra* note 123.

McPherson,[125] showing that it did not seek to overturn over 100 years of precedent regarding the Electoral College.[126] When evaluating Florida's manner of appointing electors, Chief Justice Rehnquist said in his concurring opinion, "[W]ith respect to a Presidential election, the court must be . . . mindful of the legislature's role under Article II in choosing the manner of appointing electors . . . ."[127] This shows that it is likely that the Court will give deference to a state's method of appointing electors; thus, as long as a state is following the Electoral College system but appointing the electors in a different way, the Court will give deference to a state's plenary power.[128] The NPVIC does exactly this;[129] it retains the federalist system of the Electoral College laid out in Article II, Section 1,[130] while allowing the states to appoint their electors in a different manner.

In order for a manner of electoral appointment to be considered unconstitutional, it must *offend* the Constitution.[131] This may seem like a broad standard, but the Eastern District of Virginia, in explaining why a general ticket system of electoral appointment does not offend the Constitution in such a way that deems it unconstitutional, stated that the general ticket system "is but another form of the unit rule"—the unit rule being Article II Section 1.[132] The court explains that the unit rule is the system already in place—the Electoral College.[133] The NPVIC is another form of the unit rule as well since it does not seek to abolish the Electoral College or any other constitutional provision, but rather changes the manner in which electors are appointed, a right that the states already possess.[134]

B. *The Compact Clause: Article I, Section 10*

The Compact Clause has British roots; during the colonial era, the Crown sought to resolve disputes between different colonies from across the Atlantic Ocean.[135] Once the Revolutionary War was over,

---

125 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).
126 *See id.*
127 *Id.* at 114 (Rehnquist, C.J., concurring).
128 *Id.*
129 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.
130 U.S. CONST. art. II, § 1.
131 Williams v. Virginia State Bd. of Elections, 288 F.Supp. 622 (E.D. Va. 1968).
132 *Id.* at 626–27.
133 *Id.*
134 *See* KOZA, *supra* note 59; U.S. CONST. art. II, § 1.
135 Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). Frankfurter and Landis explain that there were two modes of settling these kinds of disputes. *Id.* at 692.

many of these disputes were left unresolved, and the United States was under the Crown's reign, and the new United States needed to find a way to resolve these disputes on its own.[136] In the end, the Compact Clause of the Constitution was born during the Constitutional Convention.[137] The Framers created the Compact Clause so that the states could not come together to threaten the Union without congressional consent.[138] The Framers sought stronger language than that in the Articles of Confederation in order to ensure that state power would not endanger the Union.[139]

The Compact Clause in the Constitution states, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."[140] While this language may seem very restrictive, the Supreme Court has recognized that congressional consent is not feasible or necessary in every agreement between states, so it has held that congressional consent is only required when a compact encroaches on federal supremacy.[141] The Court reached this conclusion when it was resolving a border dispute between Virginia and Tennessee, and held that a border dispute between two states does not concern the federal interest.[142] Since *Virginia v. Tennessee* was decided, many courts have followed this proposition that congressional consent is not required unless the compact encroaches on federal supremacy.[143]

> If an agreement was reached, not infrequently after years of torturous discussion, the further approval of the Crown was required. If negotiations failed or in lieu of such direct settlement, the second mode of procedure . . . . was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission . . . . [which] bore the characteristics of a litigation.

Id. at 692–93.

136 *Id.* at 693.

137 *Id.* at 694.

138 Michael S. Greve, *The Heritage Guide to the Constitution, The Compact Clause*, THE HERITAGE FOUNDATION, http://www.heritage.org/constitution/#!/articles/1/essays/75/compact-clause (last visited Apr. 17, 2017).

139 *Id.*

140 U.S. CONST. art. I, § 10, cl. 3.

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

142 "The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition [of the Compact Clause]." *Id.* at 520.

143 *See, e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (In *U.S. Steel Corp.*, the Court held that the Multistate Tax Compact at issue was constitutional, since not all agreements between states are subject to the Compact Clause. In coming to this determination, the Court cites Justice Fields in *Virginia v. Tennessee*: "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.") (citing Virginia v. Tennessee, 148 U.S. at 519); *see also* Star Sci. Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002) (noting that in *U.S. Steel Corp.*, the Supreme Court upheld a compact resulting in reciprocal State legislation);

This Note argues that the NPVIC is constitutional under the Compact Clause because it does not encroach on said federal supremacy.

The Supreme Court in later cases followed the propositions set out in *Virginia*.[144] In *U.S. Steel Corp. v. Multistate Tax Commission*, [145] the Court expanded on the *Virginia* rule, by creating a test for compacts that are alleged violations of the Compact Clause.[146] The Court explained that the "test is whether the Compact enhances state power *quoad*[147] the National Government."[148] The Court ruled that the Multistate Tax Compact at issue was constitutional since it did not purport to authorize the member states to exercise any powers they otherwise could not have if there was no compact.[149] Additionally, the Court noted that many times in the past it had upheld a *variety* of interstate agreements that did not have congressional consent, and even those that resulted in reciprocal state legislation.[150] This logic applies to the NPVIC since it would result in reciprocal state legislation in the sense that other, originally non-compacting, states may choose to enact the NPVIC once it goes into effect.

Another factor the Court in *U.S. Steel Corp.* relies on is making sure that the compact at issue does not have an impact on "federal structure."[151] The definition of structure is, "[t]he arrangement of and relations between the parts or elements of something complex."[152] The definition of federal is, "[h]aving or relating to a system of government in which several states form a unity but remain independent in internal affairs."[153] Thus, when the two definitions are combined, it follows that federal structure inherently refers to the relations between the federal government. The NPVIC would not have an impact on federal structure since it does not purport to change the Constitution or any aspect of the federal government, nor does it seek to enhance states' power at the expense of the federal government;[154] it strictly has to do with states'

Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176 (1985) (holding that the state bank statute at issue was constitutional, since "[t]o the extent that the state statutes might conflict in a particular situation with other federal statutes . . . they would be pre-empted by those statutes, and therefore any Compact Clause argument would be academic[]").

144 *See supra* note 143.

145 434 U.S. 452 (1978).

146 *U.S. Steel Corp*., 434 U.S. 452.

147 The definition of quoad is "with respect to" or "regarding." *Quoad*, COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/quoad (last visited Apr. 17, 2017).

148 *U.S. Steel Corp*., 434 U.S. at 473.

149 *Id.*

150 *Id.* at 469–70.

151 *Id.* at 470–71.

152 *Structure*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2016).

153 *Federal*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2016).

154 *See infra* note 206.

rights.[155] The Court in multiple instances has deemed certain compacts, even those that result in reciprocal state legislation—a political effect—not to have an impact on the federal structure.[156]

C. *The NPVIC Does Not Encroach on Federal Supremacy, or on the Rights of Non-Compacting Sister States*

This section of the Note will directly respond to arguments against the NPVIC,[157] in which opponents primarily argue that the NPVIC is unconstitutional because it encroaches on federal supremacy and on the rights of non-compacting sister states.[158] This Note argues that these arguments are flawed and outdated, and that the NPVIC does not encroach on federal supremacy or on the rights of non-compacting sister states. The NPVIC does not concern federal supremacy or a federal interest because it would not change the system at all, and the NPVIC is not radical enough of a compact to overturn hundreds of years of Supreme Court precedent, since the Supreme Court has never invalidated a compact based upon the effect on non-compacting sister states.[159]

1. Federal Supremacy? No Encroachment.

In analyzing whether or not the NPVIC encroaches on federal supremacy, it is important to define what exactly federal supremacy means. This definition can be found in the Supremacy Clause of the Constitution.[160] The Supreme Court has interpreted this provision in many ways; one of the landmark cases is *M'Culloch v. Maryland*.[161] The Court held that the state of Maryland could not tax a federal bank because if it had the power to do so, it would have the power to destroy the federal institution, and that states would effectively become more powerful than the federal government.[162] This logic regarding the

---

155 U.S. CONST. art. II, § 1, cl. 2.

156 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978).

157 *See* Muller, *supra* note 112; Williams, *supra* note 39; Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 197 (2008); Tara Ross, *Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 37 (2010).

158 *See* Muller, *supra* note 112, at 372.

159 *See infra* note 188 and accompanying text.

160 "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

161 17 U.S. 316 (1819).

162 *See id*.

Supremacy Clause does not follow to the NPVIC—the NPVIC has no threat on the federal government, and it certainly does not make the states more powerful than the federal government.[163] The federal government has no control when it comes to presidential elections.[164] Thus, if the NPVIC were to be put into effect, there would be no disturbance in the balance of power—the states are simply exercising a right they already have under the Constitution, and that has no effect on federal authority.[165] There is no relationship between the states and the federal government here as there was in *M'Culloch*, when a state directly tried to lessen the power of the national federal government.[166] Additionally, if the Constitution is the supreme law of the land,[167] then the states' plenary power under Article II is included in the Supremacy Clause.[168] The states that have enacted the NPVIC do not seek to impose anything on the federal government; rather, they seek to exercise the power they already have under the Constitution.[169]

One opponent to the NPVIC claims that all political compacts need congressional consent, and that the Court in *Virginia* laid out all possible types of non-political compacts:[170] land purchases, contracting to use a canal, draining a disease-causing swamp, and uniting to resist pestilence.[171] However, this argument fails to take into account the time period in which *Virginia* was decided. This case was decided in 1893,[172] at which point there was no way for the Court to know the effect the Electoral College would have on American government, or that states would eventually want to compact to allocate their electoral votes differently.[173] There was no way for the Court in 1893 to be able to

---

163 The states would not have more power than the federal government if the NPVIC were to be enacted. It merely gives states a mechanism to enact electors in the manner they see fit, a right explicitly granted in the Constitution. U.S. CONST. art. II, § 1, cl. 2.

164 Except in the event of a tie, at which point the House of Representatives has the deciding vote. U.S. CONST. amend. XII.

165 *See supra* note 163.

166 *See M'Culloch*, 17 U.S. 316.

167 U.S. CONST. art. VI, cl. 2.

168 U.S. CONST. art. II, § 1, cl. 2.

169 *Id*.

170 "Non-political"—meaning that the compact at issue does not affect national sovereignty. Muller, *supra* note 112, at 382.

171 *Id.* at 383 (citing Virginia v. Tennessee, 148 U.S. 503, 518 (1893)).

172 *Virginia*, 148 U.S. 503.

173 1893 was over 100 years ago; needless to say the state of the country looked very different than it does today. This was right at the beginning of the Industrial Revolution. *See* EDWARD C. KIRKLAND, INDUSTRY COMES OF AGE, BUSINESS, LABOR, AND PUBLIC POLICY, 1860–1897 (1961). It was additionally during the woman's suffrage movement. *See* REBECCA J. MEAD, HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868–1914 (2006). Because of these historical differences, hindsight is not 20/20. For the Supreme Court in 1893 to imagine what the state of the country would be like today would be comparable to the Supreme Court now trying to imagine what the state of the country will be like in the year 2130.

create an exhaustive list of all non-political compacts.[174] The NPVIC is not a political compact, despite the fact that it may seem like one on its face. A political compact is not one that has to do with politics, but rather one that affects national sovereignty.[175]

Some argue that Article II of the Constitution does not give the states the plenary power suggested to appoint their electors in the manner they see fit—rather, although they have this power, it cannot be used in ways that change the structure of the federal government.[176] There have been attempts to compare the NPVIC to the congressional term limits at issue in *U.S. Term Limits, Inc. v. Thornton*,[177] but these are of no avail. First, a congressional term limit is incomparable to the Electoral College, since they are two completely different constitutional provisions.[178] Additionally, the states' power to impose congressional limits on Congress has nothing to do with the states' power to appoint electors in a presidential election—we are dealing with two completely different branches of government.[179] Opponents have attempted to argue that analogizing these two provisions is possible because the wording of the constitutional provisions can be compared. Thus, the Framers would believe that the NPVIC would irrevocably change the face of federal government, which is not what was intended.[180] However, this argument is flawed. The Constitution is structured to guarantee a separation of powers so there is no threat of tyranny to the federal government.[181] Nothing relating to the NPVIC suggests that there is a threat of tyranny[182]—if the Framers truly intended for these two provisions to be so similarly worded that they can be compared, it seems as though that these two provisions would at least be in the same section of the Constitution—or at least, relating to the same branch of government.[183]

---

174 1893 was right before the start of the Progressive Era—which lasted roughly from 1903–1917—a period of time in which the United States saw new forms of government regulation, bipartisanship, socialism, and collective action. *See* Elizabeth Sanders, Symposium, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281 (2011). With a time period like the Progressive Era on the Court's heels, it's difficult to imagine that the Court could find a way to create a list of all non-political compacts.

175 Muller, *supra* note 112.

176 Williams, *supra* note 39.

177 514 U.S. 779 (1995).

178 The two provisions are not even in the same Article of the Constitution. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4.

179 Article I of the Constitution deals with legislative powers, whereas Article II of the Constitution deals with executive powers. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. I, § 4.

180 *See* Williams, *supra* note 39; Ross, *supra* note 157.

181 *See* United States v. Nichols, 784 F.3d 666 (10th Cir. 2015).

182 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

183 This is especially true since, as analyzed above, the Electoral College was one of the most hotly debated topics during the Constitutional Convention. *See* Heather Green, Comment, *The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause*, 16 CHAP. L. REV. 211, 232–33 (2012); *supra* Part I.

Another argument is that even if the states do have the ability to exercise the rights laid out in Article II, the Guarantee Clause[184] would prevent the NPVIC's enactment, since the NPVIC does not guarantee a federal republic government.[185] Specifically, allowing a national popular vote without a constitutional amendment does not guarantee a republican form of government.[186] However, this is a flawed argument, because the Guarantee Clause protects a *representative democracy*, and a national popular vote election of the president is perhaps the most direct form of a representative democracy this nation has seen—each person being represented equally, more so than in the Electoral College.[187]

2. Non-Compacting Sister States' Rights? No Encroachment.

It is important to note that the Supreme Court has never invalidated a compact based on the effect on non-compacting sister states.[188] Thus, for the Court to do so, it would take an extremely invasive and radical compact for the Court to depart from hundreds of years of precedent.

Some opponents argue that the NPVIC seeks to make larger compacting states more powerful at the expense of smaller, non-compacting states.[189] They mistakenly attempt to compare a compact involving a border dispute to the NPVIC, and in the wake of *Virginia*, make a sweeping generalization that the Court "would" ultimately define a political compact as one that "aggrandiz[es] the political power of the compacting states[,]"[190] and conclude that if the Court were deciding on the NPVIC, it would deem it unconstitutional on these grounds.[191] This claim is a big jump from discussing compacts that deal with border disputes.[192] Additionally, this argument fails to take into consideration the fact that the NPVIC would not increase the political

184 U.S. CONST. art. IV, § 4.

185 *See* Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009).

186 *Id.* at 1444.

187 *See, e.g.*, Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941 (2012).

188 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978); Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) (determining that while non-compacting sister state interests are an important inquiry in evaluating whether or not a compact violates the Compact Clause, it is not dispositive).

189 Muller, *supra* note 112, at 385.

190 *Id.* at 384.

191 *Id.*

192 A compact dealing with border disputes has virtually nothing to do with a compact like the NPVIC—they are from two different realms.

power of compacting states.[193] While it is true that presidential candidates may visit these states more often if the NPVIC were to go into effect, this does not mean that their political power will be "aggrandized." More presidential candidate visits do not mean that a state's political power is increased.[194] The states are not seeking to increase the number of electoral votes they allocate; in fact, these states' political influence would arguably remain the same.[195]

Another argument opponents make is that since the NPVIC goes into effect when it has the majority number of electoral votes, if it were to go into effect, it would "guarantee" the winner of the presidential election by the national popular vote—thus, non-compacting minority states could lose their appointment of electors.[196] This is simply not the case. The NPVIC does not take away the constitutional rights of other non-compacting states to appoint their electors in the manner they see fit.[197] Nor does the NPVIC guarantee the winner of the presidential election by national popular vote—there have been times in the nation's history where the president won the election by only a narrow margin of national popular vote votes.[198] Thus, this argument does not show that non-compacting sister states would become irrelevant, unless opponents want to claim that fewer presidential visits to states makes states completely irrelevant, which has no factual basis.[199] If this logic were to

---

193 KOZA, *supra* note 59, at 457 (explaining that smaller states are currently disadvantaged by the winner-take-all system and if smaller states were to compact, they would arguably have more political influence than they do now).

194 *Id.*

195 *Id.* at 473–74 (explaining that the equal representation of the states in the Senate is protected by the Constitution and cannot be changed by any kind of compact, and that the NPVIC does not affect this equal representation laid out in the Constitution—the mechanism that creates the Electoral College).

196 Muller, *supra* note 112, at 391.

197 U.S. CONST. art. II, § 1, cl. 2. Other scholars have also taken this approach. In an Article that was written in 2002 (before the NPVIC was formulated), Robert Bennett saw something like the NPVIC coming, and he determined that:

> [I]t is far from clear that 'compacting' states could be seen as 'enhancing' their political power. . . . A state's influence after the suggested change . . . is highly contingent and unpredictable, providing only the most fragile basis for making any 'enhancement' judgment. . . . [A] degree of state coordination in the move to a nationwide popular vote would likely survive a Compact Clause challenge.

Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2d 141, 145–46 (2002).

198 *See supra* Section I.A.

199 Presidential campaign visits do not equal political influence. The political influence a state has resides in the amount of electoral votes it has—for this is what ultimately decides the outcome of an election. U.S. CONST. art. II, § 1, cl. 2. Additionally, studies conducted have concluded that political campaigns generally have little influence on the outcome of the election. *See* Henry E. Brady, Richard Johnston & John Sides, *The Study of Political Campaigns*, http://home.gwu.edu/~jsides/study.pdf (last visited Nov. 20, 2015). It is generally very difficult to change a voter's mind once he has decided which candidate he is voting for, and campaigns won't

be applied to the Electoral College today, it can be said that large or battleground states take away the constitutional rights of small non-swing states, since the latter are disadvantaged by the actions of the former; if this logic were applied, there would be no solution to the problem of how to elect the president.

Justice White's dissent in *U.S. Steel Corp.*—regarding the expansion of the *Virginia* rule—says that groups of states cannot take action collectively even if they are permitted to do so individually.[200] However, proponents who use this argument fail to take into account that this is a dissenting opinion—thus, it is by no means law—and there is no other evidence to support this argument. In fact, state collective action can arguably be beneficial for both the federal government and its individuals.[201] They argue that the Compact Clause concerns the relationship of non-compacting sister states in addition to the general federal interest.[202] While the NPVIC may "concern" the relationship of non-compacting sister states, this concern alone is not sufficient to deem it an unconstitutional compact.[203] In addition, the NPVIC does not concern the federal interest—there would be absolutely no change in the federal system at all.[204]

In *U.S. Steel Corp.*, the Court held that the compact at issue (a tax compact) did not affect non-compacting sister states especially with regards to the Privileges and Immunities Clause,[205] since the pressure of the Multistate Tax Compact was not great enough to deem the rights of these states so affected.[206] In interpreting this section, scholars have noted that a secondary effect is not enough for a non-compacting sister

change that bias. *See id.* This shows that just because a presidential candidate makes a certain number of visits to certain states does not mean that particular states have greater political influence.

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

201 *See* Note, *State Collective Action*, 119 HARV. L. REV. 1855 (2006). Additionally, it can maximize social welfare by creating benefits and without imposing costs on others. *See id.*

202 Muller, *supra* note 112, at 385 (citing the opinion set out in Rhode Island v. Massachusetts, which said that the Compact Clause intended to "guard against the derangement of [the states'] federal relations with the other states of the Union, and the federal government . . . ." (Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1838))).

203 Since the NPVIC has not gone into effect yet, it is impossible to say what the effect on non-compacting sister states will be. *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

204 *See* KOZA, *supra* note 59; *see generally* NATIONAL POPULAR VOTE, *supra* note 8.

205 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

206 The Court stated, "Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause . . . it is not clear how [the] federal structure is implicated." U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978); *see* Bradley T. Turflinger, Note, *Fifty Republics and the National Popular Vote: How the Guarantee Clause Should Protect States Striving for Equal Protection in Presidential Elections*, 45 VAL. U. L. REV. 793, 812–13 (2011).

state to claim that its rights have been infringed upon due to the effect of a compact.[207] In the case of the NPVIC, non-compacting states would not suffer a secondary effect because the NPVIC does not take away any of their rights or attempt to diminish them in any way.[208] Just because an effect of the NPVIC may be that smaller states get less presidential candidate attention, this is not a primary, or even a secondary, effect.

In light of the relevant case law, constitutional provisions, and scholarly commentary, it is clear that the National Popular Vote Interstate Compact passes the Compact Clause tests set out by the Court since it does not encroach on federal supremacy and it does not so gravely encroach on the rights of non-compacting sister states.[209] The NPVIC passes both the *Virginia* and the *U.S. Steel Corp.* tests,[210] and the states are not exercising any constitutional right they would not have had.[211] It does not matter if the NPVIC is in place or not; states choosing to allocate their electoral votes in a different way is a power they have under Article II Section 1.[212]

III. IN THE CASE OF CITIZENS OF A NON-COMPACTING SISTER STATE VERSUS CITIZENS OF A COMPACTING STATE: THE FORMER IS LEFT WITHOUT A LEG TO STAND ON

This Part will provide an important solution to the problem set out in the preceding sections: since the NPVIC passes all Compact Clause tests—thus, it does not need congressional consent for its enactment—and the states have plenary power under Article II to appoint their electors in the manner they see fit, one of the only ways for the NPVIC to be challenged and/or abolished is if a non-compacting sister state chose to bring suit against a compacting state in order to get rid of the law. However, this Note argues that even if the merits of the claim are constitutional, courts should dismiss these cases because the non-compacting sister state would not have standing to bring such a suit.[213] Since the NPVIC does not require congressional consent and a lawsuit of this type would not survive, there is virtually nothing stopping the

---

207 Turflinger, *supra* note 206, at 833–34.

208 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

209 *See infra* Part III.

210 *See U.S. Steel Corp.*, 434 U.S. 452.

211 *See generally* U.S. CONST. art. II, § 1, cl. 2.

212 *Id.*

213 Standing is required for any litigant to bring a suit—this means that a party must have injury, causation, and redressability in order for the case to be heard. *See infra* notes 215–217 and accompanying text. This Note will further analyze these doctrines and conclude that a non-compacting sister state attempting to bring suit would have no standing in such a case.

NPVICs enactment if it were to acquire the necessary 270 electoral votes needed for it to pass.[214] Because the NPVIC passes all constitutional tests, a state could not go before a court and assert that the statute is unconstitutional—it would have to attempt to assert a different argument.

In order for a plaintiff to have Article III standing, it must show three elements: injury-in-fact (a specific injury—meaning that a plaintiff cannot simply go to court wanting to change the law), causation[215] (the law that is being challenged must have caused the injury and/or the defendant must have caused the injury), and redressability (the issue must be capable of being redressed by the court).[216] One of the most frequently litigated prongs that arise in cases is the injury-in-fact prong.[217] The United States Supreme Court has stated that in order to meet the standing requirements outlined in Article III,[218] a plaintiff must prove that he has a "personal stake" in the dispute and the alleged injury is particularized to him.[219]

Prudential standing issues arise when the plaintiff may have Article III standing, but a court still should not take the case whether it is for policy reasons, or that the dispute would be more effectively resolved with another branch of government.[220] One instance of when this

---

214 *See generally* NATIONAL POPULAR VOTE, *supra* note 8.

215 This Note will not evaluate the causation prong of constitutionally-required standing.

216 For example, when an issue is better suited with the legislature rather than with the court. *See* Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992) (holding that although the plaintiffs had constitutionally-required standing in challenging the actions of the Endangered Species Act of 1973, they did not have prudential standing because they were asserting a "generalized grievance" since they could not prove that they were directly affected by the statute at issue).

217 *See, e.g.*, Conservation Law Found. v. EPA, 964 F.Supp.2d 175, 186, 188 (D. Mass. 2013) (holding that citizens that petitioned the Environmental Protection Agency in order to change their policies on certain climate change issues did not have constitutionally-required standing because they did not allege a specific injury in fact that directly affected them); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 39–40 (1976) (holding that organizations that sought to promote health service access to the poor could not establish constitutionally-required standing simply by this goal alone). Courts have even determined that there are instances where State Senates do not have constitutionally-required standing. *See* Favors v. Cuomo, No. 11-cv-5632, 2013 WL 5818773 (E.D.N.Y. Oct. 29, 2013) (holding that the Senate Minority did not have a personal interest in alleging that a certain Senate plan violated the equal population requirement of the Fourteenth Amendment).

218 U.S. CONST. art. III, § 2.

219 *See* Raines v. Byrd, 521 U.S. 811, 818–19 (1997) (citing *Allen*, 468 U.S. 737); *see also* Coastal Outdoor Advert. Grp. v. Township of E. Hanover, 630 F.Supp.2d 446, 450 (D.N.J. 2009) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004)) ("In addition to the constitutionally-required standing factors, prudential factors also apply, which constitute 'judicially self-imposed limits on the exercise of federal jurisdiction.'").

220 "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

happens is when the plaintiff is asserting a "generalized grievance," rather than a specific injury.[221] In the case of the NPVIC, the plaintiffs in such a case would be asserting a generalized grievance, and would simply be going to the court to complain about how the political arena has arrayed itself, rather than alleging a specific, direct injury.[222] Additionally, the citizens of a non-compacting sister state would not be able to claim that they have standing because they are taxpayers of a state, since the Court has struck down this idea.[223] The rest of this Part will focus on how a hypothetical plaintiff in the case of the NPVIC would have neither constitutionally-required nor prudential standing to succeed in a case.

A. *Article III Standing Fails*

First, a non-compacting state seeking to bring suit would not have Article III standing because it would not have an injury-in-fact. As the Court in *Raines* said, the state would not be able to allege a specific, personal injury that is directly particularized.[224] For example, a state would go before a court asserting that the NPVIC has adversely affected them because they now do not have as much political influence, presidential candidates are not visiting their state as much, etc. However, as this Note previously explored, there is nothing to support these arguments and there is no evidence to suggest that presidential candidate visits are directly correlated with political influence.[225] In addition to not having an injury-in-fact, the plaintiffs would also not satisfy the redressability requirement of constitutionally-required standing.[226] If a suit such as this were to arise, the court would determine that it could not redress the injury that the plaintiff is

---

221 *Id.*; *see also Allen*, 468 U.S. 737 (explaining that parents of children in private segregated schools do not have standing because they are simply coming to the Court with a problem that the political area has arrayed itself). The Court explains that in order to solve this problem, the plaintiffs should have gone to the legislature. *Lujan*, 504 U.S. at 606. *But see* Flast v. Cohen, 392 U.S. 83 (1968) (explaining that the only exception in the generalized standing principle is when government expenditures are being challenged under the Establishment Clause of the Constitution). This is the only exception to standing that's been addressed by the Supreme Court, and the NPVIC does not fall within this exception. *Id.* at 105.

222 Since the party would not go to the Court asking for a change in the laws, that is not a specific injury; that is a proper question for the legislature, not the Court. *Allen*, 468 U.S. at 761.

223 United States v. Richardson, 418 U.S. 166 (1974) (holding that a taxpayer cannot go to the Court asking how the CIA spends tax dollars, since that is not a direct injury since all members of the public share the injury and the judiciary can't act as a "second guessing mechanism").

224 *Raines*, 521 U.S. at 829–30.

225 *See supra* note 199.

226 Additionally, the Ninth Circuit has defined redressability as requiring "an analysis of whether the court has the power to right or to prevent the claimed injury." Gonzales v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982).

claiming it has, since it is not certain whether or not the court's remedy would fix the plaintiff's injury.[227]

B. *Prudential Standing Fails*

Even in the rare occurrence that a court does determine that the plaintiff has constitutionally-required standing, it would still dismiss the case on the grounds that the plaintiff does not have prudential standing, meaning that the alleged injury is a generalized grievance that is more capable of being remedied by another branch of government—here, the legislature.[228] The plaintiff would have to allege something more than the "generalized interest of all citizens in constitutional governance."[229] There could not be a more perfect generalized grievance than the fact that the citizens of the non-compacting sister state do not like the law. Hypothetically, their argument would go something along the lines of the following: "The National Popular Vote Interstate Compact adversely impacts us as citizens because if it were to go into effect we would have less political influence in presidential elections than we do today under the Electoral College." The plaintiff would effectively be alleging that they did not like the law because of the effect it has on *all citizens*, which is prohibited under traditional prudential standing principles.[230]

Thus, the entire argument of citizens attempting to oppose the National Popular Vote Interstate Compact in court would first try to rely on Article III standing. This would fail since they would not be able to allege a specific injury-in-fact that directly affects the plaintiff alone, since they would not be able to successfully argue that their political influence would be diminished if the NPVIC were to go into effect. The plaintiffs would additionally not satisfy the redressability prong of constitutionally-required standing, since the issue is not capable of being redressed by the court and would be more appropriately by the legislature.[231] Next, even if a court were to find that the plaintiff did have Article III standing, the plaintiff would not have prudential

---

[227] *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (holding that the "mental displeasure" injury alleged by the plaintiff is not capable of being redressed by the Court).

[228] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 761 (1984); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1387–89 (2014).

[229] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); *see, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974). "[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing." Hollingsworth v. Perry, 133 S.Ct. 2652, 2662 (2013).

[230] *Hollingsworth*, 133 S.Ct. at 2662.

[231] *See supra* note 220.

standing since it would be asserting a generalized grievance that affects "all citizens in constitutional governance."[232] A court would have no choice but to hold that, although the generalized grievance is sincere, the alleged injuries and the generalized grievances the plaintiffs allege do not amount to satisfy any prong of standing[233]—and the case would be dismissed.

C. *What About the Candidates?*

Another standing argument briefly worth addressing is, after the NPVIC gets enacted, what if a presidential candidate wins in a state using the Electoral College, but does not win the national popular vote? That is, the flip side of what happened in the infamous 2000 presidential election. This would mean that they would effectively have to give up their electoral votes. If that candidate were to bring a suit, would that candidate have standing, and would it be a successful suit? It is likely that a candidate would have a better argument for standing than a state would, considering they effectively lost the presidency because of the NPVIC—thus, a direct injury.[234] However, it would have to depend on the results of the election: if losing those electoral votes cost the candidate the election, there is a better argument for standing.

However, even if standing could be established, there will likely be no remedies available for such a candidate, and they would likely lose the suit, just as in 2000.[235] While the Court in 2000 did not specifically address the Electoral College issue, the result was the same in that the Electoral College system remained unchanged, and Gore did not assume the presidency as a result of this case.[236]

CONCLUSION

It is no secret that the Electoral College is one of the most controversial and one of the most challenged constitutional provisions in the Constitution.[237] After the infamous 2000 election, this became even more so—people were appalled that a presidential election could turn out this way, voters felt as if their votes did not count, and people

---

232 *See supra* Section III.B.
233 *See supra* Sections III.A. & B.
234 *See supra* note 217.
235 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).
236 *See id.*
237 *See supra* Part II.

sought reform.[238] There have been many attempts to abolish the amendment[239]—all unsuccessful—and there have been many proposed solutions to the problem—all unavailing or impossible to enact.[240] The National Popular Vote Interstate Compact is leading the way—a compact that would change the system, without changing the system.[241]

The most common criticism of the NPVIC is that it is an unconstitutional compact since it does not have congressional consent.[242] However, as this Note shows, congressional consent is not needed in the case of the NPVIC because it does not encroach on federal supremacy[243] or on the rights of non-compacting sister states.[244] As it passes both the *Virginia* and *U.S. Steel Corp.* compact tests, congressional consent is not necessary.[245]

With all of this in mind, the next avenue opponents of the NPVIC could attempt to travel down is seeking a remedy from a court. However, it would quickly be determined that citizens of non-compacting sister states do not have a leg to stand on—they have neither constitutionally-required nor prudential standing to bring such a suit.[246] They would not be able to allege a specific injury in fact capable of redressability by a court (since lesser political influence should not be considered an injury), and their assertion of a generalized grievance would further reinforce the fact that the courts are not the place for these citizens to be challenging the NPVIC.[247]

Since the National Popular Vote Interstate Compact is not an unconstitutional compact because it does not require congressional consent and it does not encroach on federal supremacy or the rights of non-compacting sister states, and since citizens of non-compacting sister states would not have standing to bring suit, there is virtually nothing stopping the NPVICs enactment. This is not harmful or threatening to democracy since the NPVIC would be wholly more democratic than the Electoral College system today. Once the number of states that enact the compact electoral votes reaches 270, the National Popular Vote Interstate Compact will largely determine the outcome of the election of the president of the United States.

---

238 *See supra* Section II.C.
239 *See supra* Section II.A.
240 *See supra* Section II.C.
241 *See* KOZA, *supra* note 59; *see generally* NATIONAL POPULAR VOTE, *supra* note 8.
242 *See supra* Part II.
243 *See supra* Section II.C.1.
244 *See supra* Section II.C.2.
245 *See* Virginia v. Tennessee, 148 U.S. 503 (1893); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978); *supra* Section II.C.
246 *See supra* Part III.
247 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); *supra* Section III.B.