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## Fifty Republics and the National Popular Vote: How the Guarantee Clause Should Protect States Striving for Equal Protection in Presidential Elections

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# FIFTY REPUBLICS AND THE NATIONAL POPULAR VOTE: HOW THE GUARANTEE CLAUSE SHOULD PROTECT STATES STRIVING FOR EQUAL PROTECTION IN PRESIDENTIAL ELECTIONS

## I. INTRODUCTION

Today's American representative democracy is a story of epic proportion, centuries in the making, told at the expense of countless martyrs carrying forth the Promethean torch that lights the way of progress. Revolutionaries, writers, heroes working the Underground Railroad, daring statesmen, courageous women, and many others have together sacrificed for and contributed to the ideal that is universal suffrage. The Tree of Liberty has borne fruit that can be seen and heard throughout the land. From the Liberty Bell and Lady Liberty to children reciting "[L]iberty and justice for all!", it is our shared belief that "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."<sup>1</sup> Ours is an amazing story because we, the people of the world's arguably greatest nation in all of history, choose our leader. The leader of not only the United States of America, but of the "Free World," is elected by the people! Maybe the words have been said so often that they have lost their full import, but "leader of the free world" is an amazing concept. That this position is not filled through divine right, by conquest, or by aristocratic appointment is a historical anomaly.

How amazing the path is that took the world from feudalism and monarchy to freedom and this moment, where the people of the United States collectively vote, as one people, for the President. And who is the President but the only official that represents the entire American people, each and every one of us regardless of gender, color, or place of birth; why should we not vote directly for her and have our votes counted directly for her?<sup>2</sup> Through the outstanding principle of equal protection, women and minorities share in making such a monumental decision as who their leader will be, something that is nothing less than an exercise in personal freedom. It cannot be said enough – this kind of freedom is a historical abnormality!

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<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

<sup>2</sup> See Tom Wicker, *Foreword* to NEAL R. PEIRCE, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE* 9, 13 (1968) (echoing this same sentiment).

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The only problem is that this story is a bit fictional.

Through the Constitution, states—not people—reserve the power of collectively choosing, by their electoral votes, who will become the President.<sup>3</sup> For many years, states have chosen through their legislative bodies to hold popular statewide elections as the means for determining how they will exercise their constitutional prerogative to appoint presidential electors.<sup>4</sup> However, states are constitutionally free to appoint their electors in many ways, including ways that do not include elections. Pursuant to this freedom to choose how to appoint electors, some state legislatures have recently decided that the honor of electing the only official that represents the entire American people should belong to the American people—not the states; these states (six states and the District of Columbia with a combined seventy-four electoral votes) have ratified the National Popular Vote Agreement (“NPV”).<sup>5</sup> Once enough states have ratified the NPV, they will together appoint all of their presidential electors according to which presidential candidate wins the national popular vote for president, not who wins their respective statewide popular votes.<sup>6</sup>

The NPV, by correlating the presidential election to the national popular vote, would fundamentally change the political landscape of the United States. Not surprisingly, the NPV has met opposition among scholars and within the media.<sup>7</sup> One specific critique is that this agreement would violate the Compact Clause of the United States Constitution.<sup>8</sup> A ripe Compact Clause challenge to the NPV, brought only after enough states have ratified the NPV, would pit the power the Constitution affords states in one clause against the power afforded to them in another clause. This is a fascinating story because these two constitutional provisions—the Electoral College of Article II, section one,

<sup>3</sup> U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII.

<sup>4</sup> See *infra* text accompanying note 29 (discussing same).

<sup>5</sup> See *infra* Part II.B (discussing the NPV). The six states are Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and Washington. See 57 D.C. Reg. 9869 (Dec. 24, 2010); HAW. REV. STAT. § 14D-1 (2009); 10 ILL. COMP. STAT. 20/1-10 (West 2010); MD. CODE ANN., ELEC. LAW § 8-5A-01 (West 2010); 2010 Mass. Acts Ch. 229; N.J. STAT. ANN. § 19:36-4 (West Supp. 2010); WASH. REV. CODE ANN. § 29A.56.300 (West Supp. 2011). When Mayor Adrian Fenty signed bill 18-0769 on October 12, 2010, the District of Columbia became the most recent (at the time of this Note’s publication) to pass NPV legislation. See *Washington DC*, NAT’L POPULAR VOTE (Oct. 12, 2010), <http://www.nationalpopularvote.com/pages/states.php?s=DC>.

<sup>6</sup> See *infra* Part II.B (discussing the NPV).

<sup>7</sup> See *infra* notes 86–89 and accompanying text (discussing policy and legal arguments against the NPV).

<sup>8</sup> U.S. CONST. art. I, § 10.

paragraph two and the Compact Clause—have never before been set in opposition by adversaries with standing.

To add intrigue, consider that if congressional approval were required per the Compact Clause before states could ratify the NPV, states would essentially lose all political control; by taking away the power of state legislators to appoint presidential electors in a manner of their own choosing, state governments would no longer be accountable to their citizens, but to the federal government. This would violate yet another provision lurking in the Constitution, the Guarantee Clause, which was ratified in order to prevent, among other perils, encroachment by Congress into the sovereignty of the state governments.<sup>9</sup>

This Note explores the guarantee of republican government proffered by the Guarantee Clause in relation to the Compact Clause and the plenary power that states exercise when determining how to appoint presidential electors. Part II will explore the history of and explicate the current understanding of the Electoral College, the NPV, the Compact Clause, and the Guarantee Clause.<sup>10</sup> Part III will analyze the interplay of the NPV, Article II, and the Compact Clause in contemporary Supreme Court jurisprudence.<sup>11</sup> The Guarantee Clause has been dormant for almost a century, a situation this Note will address in Part IV by advocating for the awakening of this “sleeping giant” when and if the NPV is challenged under the Compact Clause (or any other clause).<sup>12</sup>

## II. BACKGROUND

This section explores the history and current perceptions of the Electoral College, the NPV, and the Guarantee Clause of the U.S. Constitution. The first Part will explain the mechanics of the Electoral College.<sup>13</sup> It will then draw attention to some of the methods exercised through, as well as the scope of, state legislative power in choosing presidential electors.<sup>14</sup> Next, this Note examines what the NPV is and does and the preeminent challenge to NPV legislation: the Compact

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<sup>9</sup> U.S. CONST. art. IV, § 4.

<sup>10</sup> See *infra* Part II (discussing the background of the Electoral College, the NPV, the Compact Clause, and the Guarantee Clause).

<sup>11</sup> See *infra* Part III (discussing the same).

<sup>12</sup> WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 290 (1972) (quoting Charles Sumner); see also *infra* Part IV (discussing the same).

<sup>13</sup> See *infra* Part II.A.1 (discussing how the Electoral College works).

<sup>14</sup> See *infra* Part II.A.2 (discussing how state legislatures have chosen presidential electors).

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Clause.<sup>15</sup> This section concludes with a history of the Guarantee Clause, which assures to the states a “Republican Form of Government.”<sup>16</sup>

A. “The Electoral College”

1. Basic Mechanics of the Electoral College

Although the term electoral college cannot be found in the Constitution, the electoral machinery alluded to by the phrase is treated by Article II as a power expressly reserved for the states.<sup>17</sup> The relevant text reads:

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; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.<sup>18</sup>

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<sup>15</sup> See *infra* Part II.B (discussing the same); *infra* Part II.C (discussing the same).

<sup>16</sup> U.S. CONST. art. IV, § 4; see also *infra* Part II.D (discussing the same).

<sup>17</sup> U.S. Electoral College Frequently Asked Questions, ARCHIVES.GOV, <http://www.archives.gov/federal-register/electoral-college/faq.html#history> (last visited Dec. 23, 2010); see also U.S. CONST. art. II, § 1, cl. 2. “Electors,” which is found within the Constitution, was a concept borrowed from the Holy Roman Empire to refer to those princes who could participate in electing the German king—a person who usually became Emperor. “College” means a group of people acting as a unit. U.S. Electoral College Frequently Asked Questions, *supra*. “Electoral College” came into popular use in the early 1800s and today, “college of electors” can be found in 3 U.S.C. § 4. *Id.*

An express reservation of power within the National Constitution for state legislatures is not rare; there are eleven such grants. JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 292 (2d ed., 2008). The other state legislative powers are the following: “choosing the manner of electing U.S. Representatives and U.S. Senators; . . . choosing the manner of conducting a popular election to fill a U.S. Senate vacancy; empowering the state’s governor to fill a U.S. Senate vacancy temporarily . . . ; consenting to the purchase of enclaves by the federal government . . . ; consenting to the formation of new states from territory of existing state(s);” and “ratifying a proposed federal constitutional amendment; making an application to Congress for a federal constitutional convention; [and] requesting federal assistance to quell domestic violence.” *Id.*

<sup>18</sup> U.S. CONST. art. II, § 1, cl. 2.

The Electoral College currently consists of 538 potential members.<sup>19</sup> One hundred members of the College correlate to the two Senators representing each state in Congress, while 435 of its members mirror each state's proportional-to-population representation in the House of Representatives.<sup>20</sup> An additional three electors are allocated to the District of Columbia.<sup>21</sup>

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<sup>19</sup> *A Procedural Guide to the Electoral College*, ARCHIVES.GOV, [http://www.archives.gov/federal-register/electoral-college/procedural\\_guide.html](http://www.archives.gov/federal-register/electoral-college/procedural_guide.html) (last visited Nov. 23, 2009). This site is maintained by the National Archivist who has several mandates pursuant to federal law regarding the Electoral College. See 3 U.S.C. §§ 6, 11–13. The number 538 is determined by: the U.S. Census pursuant to 2 U.S.C. § 2a (governing the election of Senators and Representatives); 3 U.S.C. § 3 (2006), which says, “[t]he number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled,” and the Twenty-Third Amendment of the U.S. Constitution (granting presidential electives, but not congressional representatives to Washington D.C.).

The term “potential” is appropriate as a state could fail to properly appoint its electors, resulting in a decrease in the overall number of the College. See, e.g., *McPherson v. Blacker*, 146 U.S. 1, 30 (1892) (recounting how the New York legislature did not appoint its electors in the first presidential election because it could not agree on how to choose the electors). That the number of electors in the College is only a *potential* number matters because the Twelfth Amendment—and paragraph three of Article II which it superseded—recognizes as President the candidate with a majority of the votes out of the whole number of Electors *appointed*. U.S. CONST. amend. XII. This means that if all 538 potential electors are appointed, then 270 electoral votes are required for a nominee to become President. *Id.* If no candidate receives a majority of the electoral votes, then Congress is given the role of selecting the President. *Id.* In this event, the House chooses the President through state voting whereby each state delegation gets one vote, and the Senate chooses the Vice President with each Senator getting a vote. *Id.*

<sup>20</sup> U.S. CONST. art. II, § 1 cl. 2. Pursuant to the 2000 Census, California had fifty-five electors in the 2008 Presidential election while seven states and the District of Columbia each had three electors. *Distribution of 2008 Electoral Votes*, ARCHIVES.GOV, <http://www.archives.gov/federal-register/electoral-college/2008/allocation.html> (last visited Dec. 23, 2010). Congressional representation—the system upon which the number of electors is allocated—is a result of the Connecticut Compromise (“the Great Compromise”) at the Constitutional Convention between the Virginia Plan (which favored representation in Congress based upon population) and the New Jersey Plan (favored by small states wanting equal state representation). PEIRCE, *supra* note 2, at 34–37, 262.

During the National Convention, Southern states were threatened by the prospect of being in the minority in both houses; their fears were assuaged by the three-fifths compromise which allowed their slave population to contribute to their representation in the House without giving slaves the right to vote. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 72–74 (1996); see also KOZA ET AL., *supra* note 17, at xxvi (highlighting that ninety percent of the slave population lived in the South). Madison said that slavery was the biggest obstacle to direct elections for the President. PEIRCE, *supra* note 2, at 39. However, the debate about presidential elections took place two months after the debate about congressional representation had occurred, and the Great Compromise was added only as an afterthought. *Id.* at 261–62. Small states did not see their true advantage in the Electoral College, which gave them proportionally a bigger vote than large states, but instead in the House contingency plan triggered when no candidate received a majority of the vote and where each state receives

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Presidential electors are officers of the state, not the federal government.<sup>22</sup> The presidential electors are chosen on the first Tuesday after the first Monday in November, a day commonly perceived as a presidential election day.<sup>23</sup> On Election Day, citizens of the United States do not directly cast votes for President of the United States; instead, they are acting in their capacity as agents of their state legislatures—their votes are the means by which state legislatures exercise their Article II mandate to appoint presidential electors “in such [a] Manner” as they may direct.<sup>24</sup> The electors who have been appointed by virtue of each state’s popular vote on Election Day do not actually vote for President until “the first Monday after the second Wednesday in December next following their appointment;” at that time, the presidential electors gather in their respective states to carry out their charge and cast their votes for President of the United States.<sup>25</sup> After this act, the Electoral College ceases to exist until the next presidential election.<sup>26</sup> It is not until January 6th of the following year at a joint session of Congress that the votes cast by the now disbanded electors are actually counted.<sup>27</sup> This

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only one vote regardless of population. *Id.* at 262. Some Framers believed that most presidential elections would end up utilizing the House contingency plan. See RAKOVE, *supra*, at 90. James Madison wrote that the Electoral College was “the result of compromise between the larger and smaller states, giving to the latter the advantage of selecting a President from the candidates, in consideration of the former in selecting the candidates from the people.” PEIRCE, *supra* note 2, at 37.

<sup>21</sup> U.S. CONST. amend. XXIII.

<sup>22</sup> See *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (holding that a state has jurisdiction over an elector for election fraud because an elector is a state official); see also *Bush v. Gore*, 531 U.S. 98, 112 (2000) (“[P]residential electors are not officers or agents of the federal government.”).

<sup>23</sup> See, e.g., Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 4, 2008, at A1 (announcing the victor of the election by publishing this article on the first Tuesday after the first Monday in November 2008 when the votes had yet to be officially counted by Congress in January).

<sup>24</sup> U.S. CONST. art. II, § 1, cl. 2; see also, e.g., MINN. STAT. ANN. § 208.02 (West 2009) (“Presidential electors shall be chosen at the state general election held in the year preceding the expiration of the term of the president of the United States.”). Colorado is the only state that constitutionally mandates that its residents be allowed to vote for presidential electors. KOZA ET AL., *supra* note 17, at 57.

<sup>25</sup> 3 U.S.C. § 7 (2006).

<sup>26</sup> THOMAS H. NEALE, CONG. RESEARCH SERV., RS 20273, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 5 (2003), available at <http://fpc.state.gov/documents/organization/28109.pdf>.

<sup>27</sup> *Id.* at 5–6. The congressional act of counting these votes has been the object of national controversy in times past, most notably in the 1876 presidential election between Democrat Samuel J. Tilden and Republican Rutherford B. Hayes. See generally PEIRCE, *supra* note 2, at 86–92. In that election cycle, four states sent different sets of elector returns and Congress was tasked with deciphering which were legitimate and which were not. *Id.* at 88–89. A temporary body—the Electoral Commission—convened to determine the presidential

may seem confusing, which highlights the discrepancy between the popular conception of a November presidential election and the legal nicety holding that the next President is undetermined until January; this discrepancy is to most people pedantic, an illustration of form over substance.<sup>28</sup>

The discrepancy may seem pedantic because all states have for some time designated popular elections by state voters, to the exclusion of other constitutionally permissible means, as the process for appointing electors.<sup>29</sup> Forty-eight states use a winner-take-all, or general ticket method for these popular elections.<sup>30</sup> Under the winner-take-all system, a vote for a presidential candidate is actually a vote cast for a slate, or a ticket, consisting of a group of candidates for electors that has been nominated prior to Election Day, usually by the state political parties.<sup>31</sup> The slate that gets the most votes earns all of the state's electors.<sup>32</sup> Further, all states make use of a short ballot wherein only the names of the presidential candidates and their running mates are revealed, not the names of the presidential electors for whom the populace is technically casting their ballots.<sup>33</sup>

To illustrate the winner-take-all and short ballot, consider the following: A Minnesotan who went to the polls on November 2, 2004 (November 1 was the first Monday of November) to cast a vote for George W. Bush and Dick Cheney filled in a bubble next to "George W. Bush and Dick Cheney, Republican" because Minnesota uses a short-

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winner. *Id.* at 89. In the aftermath, the Electoral Count Act of 1887 was passed in order to prevent the same crisis from reoccurring; a provision from this Act, the safe-harbor provision, was at the center of the dispute in the 2000 presidential election. *See infra* notes 50-56 and accompanying text (discussing the safe-harbor provision and the 2000 presidential election).

<sup>28</sup> *See* ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 3 (2006). As Chief Justice Rehnquist noted, "the vot[e by] the electors is a formality, predetermined by the popular vote cast in each state on [election day]." *Id.* (quoting WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 3 (2004)).

<sup>29</sup> NEALE, *supra* note 26, at 3. State legislatures can constitutionally use any number of methods to appoint electors. *See infra* Part II.A.2 (discussing the various methods used).

<sup>30</sup> KOZA ET AL., *supra* note 17, at 53-54.

<sup>31</sup> *See, e.g.*, MINN. STAT. ANN. §§ 208.03-05 (West 2009) (laying out the process by which the state's major political parties nominate their respective presidential electors at state conventions prior to election day). Thus, the presidential slate winner of California's general election would really be an appointment by the California legislature of fifty-five electors who have pledged to vote for the Presidential slate winner. The nomination of the electors prior to Election Day is often done during the state's political party conventions. KOZA ET AL., *supra* note 17, at 59. Twenty-nine states nominate electors in like fashion. *Id.* In six states and the District of Columbia, state party committees nominate the electors, while in Pennsylvania the Presidential nominee nominates the potential electors. *Id.*

<sup>32</sup> KOZA ET AL., *supra* note 17, at 5.

<sup>33</sup> *Id.* at 55-56. The short ballot is exemplified by the Minnesota ballot. *Id.*



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ballot that lists only the presidential candidates' names, not the names of the presidential electors.<sup>34</sup> However, that Minnesotan actually cast a ballot for George Cable, Jeff Carnes, Ronald Eibensteiner, Angie Erhard, Eileen Fiore, Walter Klaus, Michelle Rifenberg, Julie Rosendahl, Lyall Schwarzkopf, and Armin Tesch, all of whom together made up the Republican "ticket" or "slate."<sup>35</sup> There are ten people named because Minnesota has two U.S. Senators and eight Representatives in the House for a total of ten possible presidential electors.<sup>36</sup> Likewise, each of the other presidential candidates on the Minnesota short ballot had ten presidential electors for whom Minnesotans were actually voting. Because Minnesota uses a winner-take-all system, and because only 1,346,695 people marked bubbles next to "George W. Bush and Dick Cheney, Republican" as opposed to the 1,445,014 people who marked bubbles next to "John F. Kerry and John Edwards, Democratic-Farmer-Labor," none of the Republican slate of presidential electors were actually appointed by Minnesota.<sup>37</sup> Instead, on December 13, 2004, ten other people who constituted the Democratic-Farmer-Labor slate cast their votes for John Kerry and John Edwards.<sup>38</sup> These votes were not actually seen or counted until January 6, 2005, when a joint session of Congress officially counted them.<sup>39</sup>

A consequence of the nearly ubiquitous winner-take-all system is the confusion and frustration created by the now-televised, unofficial, and legally void national popular vote tally for President.<sup>40</sup> As the 2000 presidential election between George W. Bush and Al Gore illustrated, it is possible for a presidential candidate to win the popular vote and still lose the presidency.<sup>41</sup> Out of fifty-six U.S. presidential elections, only a handful ended with divergent results between the popular vote and the

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<sup>34</sup> *Id.* at 57-58.

<sup>35</sup> *Id.* at 58, 66.

<sup>36</sup> *See supra* note 20 and accompanying text (discussing how states are apportioned their number of electors).

<sup>37</sup> KOZA ET AL., *supra* note 17, at 64-67.

<sup>38</sup> *See supra* notes 30-33 and accompanying text (explaining the general ticket and short ballot).

<sup>39</sup> *Supra* text accompanying note 27.

<sup>40</sup> *See, e.g.,* David Stout, *The 2000 Campaign: The Electoral College; How Winner of the Popular Vote Could Lose After All*, N.Y. TIMES, Nov. 3, 2008, <http://www.nytimes.com/2000/11/03/us/2000-campaign-electoral-college-winner-popular-vote-could-lose-after-all.html> (citing Representative Ray LaHood as saying, "[i]t would be a travesty if the winner of the popular vote on Nov. 7 did not become president because of the Electoral College").

<sup>41</sup> *See, e.g.,* Ronald Brownstein, *Polls Show Victory Could Come Without Winning Popular Vote*, L.A. TIMES, Nov. 3, 2000, at A1 (quoting law professor Erwin Chemerinsky).

Electoral College count.<sup>42</sup> More often, there have been “hairbreadth” elections in which a strategic shift in less than one percent of the popular vote would have changed the outcome in the Electoral College without changing the winner of the popular vote.<sup>43</sup> Yet, despite its infrequency, this kind of result has galvanized some who seek to abolish the Electoral College; nearly ten percent of all congressionally proposed amendments to the U.S. Constitution have concerned Electoral College reform.<sup>44</sup> Others, recognizing the political challenge of abolishing the Electoral College, point with urgency to the benefit of reforming specific aspects of

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<sup>42</sup> TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 168–69 (2005). Depending on who is counting, there are only two to four elections with different results. The four presidents who could be characterized as winning the Electoral College while losing the popular vote are John Quincy Adams (1824), Rutherford B. Hayes (1876), Benjamin Harrison (1888), and George W. Bush (2000). *Id.* at 168. Tara Ross argues that only the 1888 and 2000 elections can accurately be characterized as elections wherein the clear winner of the popular vote lost the presidency. *Id.* at 170. She points out that in 1824, presidential electors were not chosen by popular elections in many states, but by state legislators, and so there is no accurate count of the real national popular vote from that election. *Id.* at 168. The 1876 election could be dismissed for similar reasons—in this case because elections in the South were not “fair and free.” *Id.* at 168–69. Others see the 1876 election as a clear example of discrepancy between the popular vote and the Electoral College vote. *See, e.g.,* BENNETT, *supra* note 28, at 209 n.96 (citing to Chief Justice Rehnquist). Robert Bennett also denotes the 1960 Kennedy-Nixon election as a debatable example—debatable because it is uncertain who won the popular vote in that election due to a combination of how Alabama ballots were configured and a complex political situation in Alabama at the time. *Id.*

<sup>43</sup> PEIRCE, *supra* note 2, at 317–21. In the 1828 election, a shift of 11,517 votes in five states would have changed the outcome. *Id.* at 318. In 1836, a shift in 14,061 votes in New York would have changed the outcome. *Id.* In 1840, a change in 8386 votes in four states would have changed the outcome. *Id.* In 1844, a change of 2555 votes in New York would have changed the outcome. *Id.* In 1848, a shift of 3227 votes in three states would have changed the outcome. *Id.* In 1856, a shift in 17,427 votes (out of 4,030,137 total votes cast) would have changed the outcome. *Id.* In 1860, a shift of 18,050 votes (out of 3,838,290 total votes cast) in four states would have changed the outcome. *Id.* at 319. In 1864, a shift of 38,111 votes (out of a total of 4,024,425 total votes cast) in seven states would have changed the outcome. *Id.* In 1868, a change of 29,862 votes in seven states would have altered the outcome. *Id.* In 1880, a shift of 10,517 votes in New York would have altered the outcome. *Id.* In 1884, a shift in 575 votes in New York would have changed the outcome. *Id.* at 320. In 1892, a change in 37,364 votes in five states would have changed the outcome. *Id.* In 1896, 20,296 votes in six states would have changed the outcome. *Id.* In 1900, a shift in 74,755 votes (out of 13,577,988 total votes cast) in seven states would have changed the outcome. *Id.* In 1908, a shift in 75,041 votes in eight states would have changed the outcome. *Id.* In 1916, a shift of 1983 votes in California would have changed the outcome. *Id.* at 321. In 1948, a shift in 29,294 votes (out of 46,170,636 total votes cast) in three states would have changed the outcome. *Id.*

<sup>44</sup> Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2526 (2001); *see also* KOZA ET AL., *supra* note 17, at 275 (citing Gallup News Service which indicated between 65% and 81% public support for nationwide popular election of the president during the years 1944 to 1980).

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the Electoral College.<sup>45</sup> Calls for reform or constitutional amendments are answered by supporters of the Electoral College who maintain that it prevents the tyranny of direct democracies, magnifies both minority concerns and presidential mandates, encourages national coalition building, decreases the possibility of fraud, fortifies the two-party

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<sup>45</sup> See generally, e.g., BENNETT, *supra* note 28, at ch. 5-8 (describing the need for reform of the contingent procedure for selection of the president by the House of Representatives and for the problem of “faithless electors”). The contingent procedure occurs when a presidential candidate receives a plurality of the electoral vote, i.e. when no presidential candidate receives a majority of the votes. *Id.* at 74; see also *supra* note 19 (explaining the Framers’ intent regarding the House contingency plan). This process, originally governed by Article II of the U.S. Constitution, is now governed by the Twelfth Amendment. See BENNETT, *supra* note 28, at 23. Prior to the Twelfth Amendment, electors did not vote for vice president; instead, the person receiving the second highest number of votes would become vice president. *Id.* The Twelfth Amendment was drafted and ratified after the 1800 presidential election when Thomas Jefferson and Aaron Burr—both members of the same party who had run as a ticket together—received the same number of votes, all votes being cast only for president. *Id.* at 22-23. Congress had to decide which of the two would be president and which would be vice president despite Jefferson having been the presidential candidate and Burr the vice presidential candidate. *Id.* In shrewd political maneuvering, the party of John Adams, Jefferson’s original opponent, supported Aaron Burr against Jefferson so that there was a deadlock. *Id.* at 22. Jefferson eventually won, but the debacle prompted passage of the Twelfth Amendment, which separates presidential and vice-presidential candidates. *Id.* at 23. It also, for purposes of the contingency plan when there is not a majority winner, gives the House the top three vote getters in the election and not the top five as Article II had dictated. *Id.*

Today, the thought that the House could determine the president of the United States is considered by some otherwise proponents of the Electoral College as horrible for democracy. See ROSS, *supra* note 42, at 127 (elucidating that the House contingency plan could “degenerate into self-interested deal-making among representatives[, making the President feel] indebted” and damaging our system of government, “which values separation of powers among the branches”). The “faithless elector” problem is the result of presidential electors being able to cast votes in opposition to voters’ expectations. *Id.* at 113. Alexander Hamilton argued for the Electoral College by pointing to electors as “men most capable of analyzing [sic] the qualities adapted to the station [of President].” THE FEDERALIST No. 68 (Alexander Hamilton). Hamilton says that the electors will have the requisite information for investigation, will deliberate, and be able to discern who could be the best President. *Id.* Hamilton further says the electors—being so close to the people—will have a “sense” for their desires, but this did not mean electors would necessarily vote for the candidates wanted by a provincial people possibly swayed by the “little arts of popularity.” *Id.* at 344, 346.

Historically, only a dozen or so electors have cast votes contrary to their instructions. BENNETT, *supra* note 28, at 96. Today, while electors may pledge to vote for specific candidates, they retain the power to vote for whomever they desire, or even abstain from voting altogether. ROSS, *supra* note 42, at 113-14. For example, three “faithless” votes could have given Al Gore the election in 2000 and a change in two electoral votes would have deprived Bush of a majority, requiring the House contingency plan to take effect. *Id.* at 113. Tara Ross, who is a strong advocate of maintaining the Electoral College largely as-is, says, “[i]f any change is to be made to the presidential election system, it should be to eliminate the role of elector and automate the process of casting the states’ electoral votes.” *Id.* at 114.

system, and preserves a necessary component of the separation of powers—federalism.<sup>46</sup>

Despite the prevalence of the winner-take-all system, two states, Maine and Nebraska, apportion their electors according to which presidential team wins each congressional district, while the two remaining electors correlating to the two Senate seats are designated according to the state's popular vote.<sup>47</sup> These states "are reminders of the flexibility that the Founders built into the U.S. Constitution."<sup>48</sup> It is to this flexibility that this Note now turns.<sup>49</sup>

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<sup>46</sup> *E.g.*, ROSS, *supra* note 42, at 34, 39, 41, 58, 110, 170. Tyranny of the majority is understood as, in a direct democracy, the capability of fifty-one percent of the people to rule over the other forty-nine percent because representatives are merely purveyors of the public will. *Id.* at 34. The magnification of minority interests is exemplified by the Jewish vote in New York carrying more influence than it would in a national vote, or as in Strom Thurmond's presidential bid in 1948, which garnered an insignificant 2.4% popular vote but thirty-nine electoral votes (7.3%). *Id.* at 41, 212. Magnifying a presidential mandate to govern is illustrated by John F. Kennedy's tiny popular vote win in 1960— .2%—which was magnified into an eighty-two vote win in the Electoral College; only two elections since 1804 were won by fewer than a twenty electoral vote margin. *Id.* at 103–04.

By encouraging national coalition building, a proponent of the Electoral College means that presidential campaigns must be national in character and cannot focus on, for example, only rural areas or only urban areas, nor can small states be excluded. *Id.* at 87–88; *see also* George F. Will, *From Schwarzenegger, a Veto for Voters' Good*, WASH. POST, Oct. 12, 2006, at A27 (arguing that the coalition building required by the Electoral College requires a "politics of accommodation" that prevents narrowly defined majorities). *But see* KOZA ET AL., *supra* note 17, at 10, 11 (listing seventeen states in the 2004 presidential election that received ninety-nine percent of advertising expenditures—five states of these receiving seventy-two percent of the funds—and sixteen states which received ninety-two percent of all presidential and vice-presidential visits during the campaign).

The Electoral College is also said to minimize fraud by isolating allegations of fraud to states where a recount is necessary only if the vote is close; in a direct popular vote system, suspected fraud could trigger national recounts at great cost. ROSS, *supra* note 42, at 110. State rights are also intricately woven into the Electoral College, the Great Compromise—which gave to small states equal representation in the Senate and to big states more representation in the House—being the basis for how many electoral votes each state gets to cast. *Id.* at 50. The Electoral College also helps to prevent fractious third-party candidates from dividing the nation. *See* Will, *supra* (using Ross Perot's 1992 presidential bid, wherein he received 18.9% of the popular vote but no electoral votes, to show how the Electoral College prevented the fragmentation inherent in a direct popular vote). The federal electoral system also helps protect the country itself by muting extremist interests and dangerous factions who, for want of a national platform, are unable to appeal to the people at large and are instead forced to moderate themselves as they attempt to build coalitions with other groups in other states. ROSS, *supra* note 42, at 58.

<sup>47</sup> KOZA ET AL., *supra* note 17, at 7.

<sup>48</sup> *Id.*

<sup>49</sup> There are many more technical and mechanical aspects involved in the Electoral College which are beyond the scope of this Note. *See generally* 3 U.S.C. ch. 1 (2006 & Supp. II 2008) (codifying the many procedures involved in counting electoral votes, certification of electors, the steps to take in the event of vacancies, etc.). *See also* Stephen Siegel, *The*

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## 2. The Scope and Methods by Which States Have Historically Appointed Electors

The United States Supreme Court's per curiam opinion in *Bush v. Gore* is rich in recognition of a state's plenary power in choosing presidential electors pursuant to Article II of the United States Constitution.<sup>50</sup> Set against the backdrop of the 2000 presidential election between Al Gore and George W. Bush, the central dispute in *Bush* was the applicability of the "safe harbor" provision found in 3 U.S.C. § 5, which holds that "[i]f any State shall have provided . . . for its final determination of . . . the appointment of all or any of the electors . . . at least six days before the time fixed for the meeting of the electors, such determination . . . shall be conclusive."<sup>51</sup> This provision means that Congress cannot challenge how a state chooses its electors so long as they are chosen by the allotted time.<sup>52</sup> After Florida's popular election to choose its presidential electors, Gore alleged that legal votes had not been counted and asked for a recount.<sup>53</sup> Determining that a recount that satisfied equal protection parameters could not be completed in time to meet the safe-harbor deadline, the Court had to decide which branch of Florida's government ultimately controlled the appointment of presidential electors: the judicial branch or the legislative branch.<sup>54</sup> If

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*Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004) (expounding upon the Electoral Count Act of 1887).

<sup>50</sup> See generally *Bush v. Gore*, 531 U.S. 98 (2000) (maintaining throughout the case the assumption that the Court's role was to determine which part of Florida's government had supreme authority over appointing presidential electors).

<sup>51</sup> 3 U.S.C. § 5 (2006); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 960-63 (2d ed. 2005).

<sup>52</sup> 3 U.S.C. § 5.

<sup>53</sup> CHEMERINSKY, *supra* note 51, at 962. In the Florida trial court, Al Gore challenged the certification of vote counts in several Florida counties, arguing that according to Florida statute, legal votes had not been counted. *Id.* The Florida trial court denied Gore relief. *Id.* On appeal, the matter was certified to the Florida Supreme Court, which found that there were indeed legal, uncounted votes. *Id.* The Florida Supreme Court ordered a manual recount. *Id.* at 963.

<sup>54</sup> *Bush*, 531 U.S. at 111-13 (Rehnquist, C.J., concurring). Pursuant to 3 U.S.C. § 5, the Florida statute required vote counts be given by canvassing boards to the Florida secretary of state by a specified date so as to take advantage of the federal safe-harbor provision, a date which could not have been met if the manual recount had taken place. *Id.* at 111. Thus, there were two Florida statutes in conflict with one another—the statute under which Gore had asked for a recount and the statute under which the secretary of state mandated a return of the votes by a specified date in order to take advantage of the safe-harbor provision. CHEMERINSKY, *supra* note 51, at 961. The Florida Supreme Court believed it was exercising its constitutionally mandated power of statutory interpretation by harmonizing the two conflicting statutes. *Id.* It decided to give those manually recounting the votes enough time to do so, therefore permitting a recount that would have extended beyond the date allowing Florida to take advantage of the safe-harbor provision. *Id.* The U.S. Supreme Court's per curiam opinion found that the Florida statute favoring 3 U.S.C. § 5—the safe-

the legislative branch had ultimate control, then its intent to honor the safe-harbor provision meant that if a recount could not be done before December 12, then there could be no recount.<sup>55</sup> If the judicial branch had ultimate control, then its decision to proceed with a recount that could not be finished by December 12 would stand.<sup>56</sup> In reaching its conclusion that the Florida legislature was not bound by the Florida Constitution when exercising its Article II powers to appoint presidential electors, the per curiam opinion cited *McPherson v. Blacker* to declare that the “the state legislature’s power to select the manner for appointing electors is plenary.”<sup>57</sup>

*McPherson* itself offers concrete historical examples of the flexibility of state power in appointing electors.<sup>58</sup> The appointment of electors in the first presidential election was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina.<sup>59</sup> Pennsylvania had a general ticket election.<sup>60</sup> Maryland also had a general election but with the stipulation that five of the electors be from the Western Shore and three from the Eastern Shore.<sup>61</sup> New York failed to appoint any electors because of a disagreement between the New York

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harbor provision—controlled as an application of the state legislature’s U.S. Constitution Article II power, which permitted Florida to appoint electors in whatever manner its legislature determined. *Id.* at 111-12. Thus, the Florida Supreme Court overreached by infringing the Florida legislature’s prerogative to take advantage of 3 U.S.C. § 5. *Id.* For more on the safe-harbor provision, see *supra* note 27.

<sup>55</sup> CHEMERINSKY, *supra* note 51, at 961.

<sup>56</sup> *Id.*

<sup>57</sup> *Bush*, 531 U.S. at 104 (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)).

<sup>58</sup> *McPherson*, 146 U.S. at 29. *McPherson* involved a political drama that took place in Michigan, a microcosm of the incessant political wrangling between Republicans and Democrats that still occurs on the national level. See KOZA ET AL., *supra* note 17, at 53-54. In the 1888 presidential election, President Grover Cleveland won the national popular vote but lost his presidential bid within the Electoral College framework. *Id.* at 53. At that time, most states had winner-take-all elections, including Michigan, prior to 1890. *Id.* While Michigan was primarily a Republican-dominated state at the time, the Democrats won control of the Michigan legislature in the 1890 midterm elections. *Id.* Expecting that Michigan’s electoral votes would again go to the Republican nominee in the 1892 presidential election, the newly elected Democrats changed Michigan from winner-take-all to state congressional district voting with each of the two senatorial electors chosen from a combined half of the congressional districts. *Id.* In this fashion, in the 1892 presidential election, Michigan would be able to contribute some electoral votes to the Democratic presidential nominee. *Id.* The Supreme Court ruled that the Michigan legislature had the power to act as it did in restricting presidential elector appointments. *Id.* at 53. The outcome of the Michigan legislature’s act and subsequent affirmation by the Supreme Court resulted in five of fourteen Michigan electoral votes going for Democratic presidential nominee Grover Cleveland. *Id.* at 53-54.

<sup>59</sup> *McPherson*, 146 U.S. at 29.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 29-30.

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assembly and the New York Senate over how many electors each chamber would get to choose.<sup>62</sup> Virginia had elections for the electors by districts other than the districts used for electing Representatives to the House.<sup>63</sup> Massachusetts had a two-tiered system wherein voters voted in their congressional districts for electors and the top two candidates in each district were then voted upon, district by district, by the Massachusetts legislature with two additional at-large electors also being voted for by the legislature.<sup>64</sup> In the fourth presidential election, in Tennessee, by an Act of its legislature in 1799, delegates were selected by the legislature who then voted for the electors.<sup>65</sup>

In *McPherson*, after continuing its exposé of electoral appointment through subsequent elections, the Court, quoting Justice Story, articulated that power is different than policy and that while many “ingenious minds” may take offense at the arbitrary nature of the Electoral College, until there is a constitutional amendment, the power remains vested in the state legislature.<sup>66</sup> Citing to *McPherson*, the per curiam opinion in *Bush* reaffirmed the Court’s recognition of this state power when it said, “[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.”<sup>67</sup>

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<sup>62</sup> *Id.* at 30.

<sup>63</sup> *Id.* at 29.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 33, 35–36. The Court continued:

Mr. Justice Story, in considering the subject in his Commentaries on the Constitution, and writing nearly fifty years after the adoption of that instrument, after stating that “in some states the legislatures have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole State; and in others, by the people by electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district,” adds: “No question has ever arisen as to the constitutionality of either mode, except that by a direct choice by the legislature. But this, though often doubted by able and ingenious minds, has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it.” And he remarks that “it has been thought desirable by many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people.”

*Id.* at 33 (internal citations omitted).

<sup>67</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000). The Court quotes a single line from *McPherson* that reads, “[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.” *Id.* (quoting *McPherson*, 146 U.S. at 35). The full text from which this section was taken reads as follows:

There is one caveat to the states' plenary power in appointing electors: when a state via its legislature charges its people to appoint electors through a popular election, equal weight must be afforded to each vote and equal dignity is owed to each voter.<sup>68</sup> In other words, when utilizing popular elections, states are confined to constitutionally mandated equal protection parameters regarding voter qualifications.<sup>69</sup> The Fourteenth Amendment expressly recognizes the popular vote as a means for appointing presidential electors by warning that state representative apportionment in Congress will be "reduced in the proportion" to the eligible male voters denied the vote for presidential electors.<sup>70</sup> Subsequent amendments took away most state discretion for determining who can vote in popular elections by mandating that the franchise be extended to blacks, women, and all U.S. citizens eighteen years of age or older; further, no citizen can be denied the right to vote for a presidential elector for failure to pay any tax.<sup>71</sup>

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The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

*McPherson*, 146 U.S. at 34–35 (emphasis added) (quoting S. REP. NO. 43-395 (1874)).

<sup>68</sup> *E.g.*, *Bush*, 531 U.S. at 104–05 (articulating the same).

<sup>69</sup> *See, e.g., id.* (articulating the obligation of states to ensure equal protection for popular elections).

<sup>70</sup> U.S. CONST. amend. XIV, § 2. Thus, the black male population would not be included in a state's total population for means of allotting House seats to that state if black males over twenty-one years of age were not entitled to vote. *Id.* The relevance of this section of the Fourteenth Amendment has been nullified by the Fifteenth Amendment, which mandates that voters may not be denied the franchise because of race or color. U.S. CONST. amend. XV.

<sup>71</sup> U.S. CONST. amend. XXVI (1971); U.S. CONST. amend. XXIV (1964); U.S. CONST. amend. XIX (1920); U.S. CONST. amend. XV (1870); *see also* *Gray v. Sanders*, 372 U.S. 368, 380–81 (1963) (holding that statewide elections cannot use a system which weighs some votes more than others).



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Recognizing that states have plenary power limited only by constitutional grants of equal protection in determining which agents shall appoint its electors, several states, taking advantage of the flexibility offered by Article II of the Constitution, have ratified the NPV legislation that is, as of now, yet to be executed.<sup>72</sup> This Note now turns to this legislation.

*B. National Popular Vote Legislation*

Currently, six states and the District of Columbia have ratified the National Popular Vote Bill.<sup>73</sup> The impetus of these statutes was the 2000 Presidential Election in which George W. Bush lost to Al Gore in the national popular vote but won the Electoral College Vote and thus the Presidency.<sup>74</sup> In February 2006, the organization National Popular Vote held its initial press conference.<sup>75</sup>

<sup>72</sup> *Infra* note 73 and accompanying text.

<sup>73</sup> NATIONAL POPULAR VOTE, <http://www.nationalpopularvote.com> (last visited Dec. 23, 2010) [hereinafter NPV MAIN]. The six states are Illinois, Hawaii, Maryland, New Jersey, Massachusetts, and Washington (with a total of seventy-four electoral votes when combined with those of the District of Columbia). *Id.* Most recently, the District of Columbia enacted the National Popular Vote Bill on October 12, 2010. NATIONAL POPULAR VOTE, <http://www.nationalpopularvote.com/pages/states.php?s=DC> (Oct. 12, 2010) [hereinafter NPV D.C.]. Beyond these six states, the legislation has passed both chambers in four other states, one house in ten other states, and has been introduced in eleven other states. *Id.* The text of the agreement provides that any state of the United States and the District of Columbia may become a member of the agreement by its enactment and that each member state shall conduct a statewide popular election for President and Vice President of the United States. *E.g.*, 10 ILL. COMP. STAT. 20/5 art. II-III (2010). The agreement requires each member state's chief election official to immediately convey its own state popular vote total and then to add together the popular vote of every other state conducting a statewide popular vote (regardless if the state conducting the vote has ratified the agreement) and the District of Columbia in order to determine the national popular vote count. *Id.* at art. III. The agreement provides that in the nearly impossible case of a tie, each state's electors shall pledge their votes to that state's popular vote winner. *Id.* The agreement is to take effect in any year in which the agreement has been ratified by states cumulatively possessing a majority of the electoral votes—270—and no later than July 20 of that year. *Id.* When it takes effect, each state's electors shall cast their votes in accordance with the aggregated popular vote tally of all the states combined and the winner will be designated the national popular vote winner. *Id.* The agreement allows member states to withdraw from the agreement, but requires this to be done before the final six months of the current president's term of office. *Id.* at art. IV. The agreement also provides that it will terminate if the Electoral College is abolished. *Id.*

<sup>74</sup> Robert Bennett produced vague outlines of the idea in the spring of 2001. Robert Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 241 (2001). The plan was further developed by Bennett in subsequent publications and then by Akhil Reed Amar and Vikram David Amar, who are also considered the idea's founders. KOZA ET AL., *supra* note 17, at 270-71. The 2000 election represents only the newest incarnation of dissatisfaction of some with how the Electoral College seems to work. *E.g.*, McPherson v. Blacker, 146 U.S. 1, 33 (1892) (“[I]t has been thought desirable by

The NPV works in the following way. Utilizing the plenary power of state presidential elector appointment, ratifying states predetermine that their presidential electoral ballots be cast in accordance with the winner of the national popular vote when enough states have ratified the legislation so that their total combined electoral votes number 270—the amount required to avoid the House contingency plan if all 538 members cast electoral ballots.<sup>76</sup> The House contingency plan originates from the Twelfth Amendment, which gives Congress the power to vote for President if no candidate receives a majority of the electoral votes cast.<sup>77</sup> Until such a time when enough states have passed the NPV, it will remain inoperative.<sup>78</sup> While the NPV cannot compel non-ratifying states to hold statewide popular elections, it does require each ratifying state to hold a statewide popular election.<sup>79</sup> This mandate helps to establish a necessary precondition for the agreement—that there will be popular votes to count.<sup>80</sup>

Following election-Tuesday, the chief election officer of every state, usually the secretary of state, is to obtain statements from all states, regardless of if they have adopted the NPV, designating the number of popular votes cast for each candidate.<sup>81</sup> The NPV requires use of the short ballot so that votes from all ratifying states can be easily added together.<sup>82</sup> The authors of the legislation recognize that if a non-member state decided to take the presidential vote away from its people, or if a non-member state removed the names of the presidential candidates, there would be no votes to count from that state.<sup>83</sup> In this event, the national popular vote would be determined by all member states and

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many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people.” (quoting Justice Story).

<sup>75</sup> Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 511 (2009).

<sup>76</sup> *E.g.*, 10 ILL. COMP. STAT. 20/5 art. II–III.

<sup>77</sup> U.S. CONST. amend. XII. The House votes, each state having only one vote, for president from the three candidates who receive the most electoral votes. *Id.* The Senate votes for the vice president, each Senator having one vote. *Id.* It is possible under this contingency plan for the Congress to elect a President and Vice President from two different political parties. *Id.* For more on the House contingency plan, see *supra* notes 19 and 45.

<sup>78</sup> *E.g.*, 10 ILL. COMP. STAT. 20/5 art. II–III.

<sup>79</sup> *See, e.g., id.* (“Each member state shall conduct a statewide popular election for President and Vice President of the United States.”).

<sup>80</sup> KOZA ET AL., *supra* note 17, at 250.

<sup>81</sup> *Id.* at 253.

<sup>82</sup> *Id.* at 252. The short ballot is used in order to permit “the aggregation, from state to state, of the popular votes that have been cast for various presidential slates.” *Id.* For an explanation of the short ballot, see *supra* text accompanying note 33.

<sup>83</sup> KOZA ET AL., *supra* note 17, at 253–54.

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non-member states holding popular elections with presidential names on the ballots.<sup>84</sup> The winner of the largest number of popular votes across the nation shall be designated the “national popular vote winner.”<sup>85</sup>

The NPV has sparked criticism laced with policy reasons critical of the legislation; most of these arguments being the same as those used in support of the Electoral College.<sup>86</sup> The NPV has been called simple minded and “[a]n [e]nd [r]un [a]round the Constitution” because it is perceived as changing the Electoral College without amending the Constitution.<sup>87</sup> NPV promoters offer their own slew of policy rationale in support of the plan, from the Electoral College’s shameful birth in the slave-driven Connecticut Compromise to the disparity in the weight accorded individual votes from different states.<sup>88</sup> Policy reasons aside, several legal arguments against the NPV have concentrated on the Compact Clause of the U.S. Constitution.<sup>89</sup>

C. *The “Compact Clause” Challenge to the National Popular Vote*

Several recent law review articles conclude that the NPV would, upon its execution when enough states ratify it, be a violation of the Compact Clause.<sup>90</sup> The Compact Clause is contained in Article I, section

<sup>84</sup> *Id.* at 254.

<sup>85</sup> *E.g.*, 10 ILL. COMP. STAT 20/5. art. III (2010).

<sup>86</sup> *E.g.*, *About Us*, SAVE OUR STATES, <http://www.saveourstates.com/about/> (last visited Dec. 23, 2010) (arguing against the NPV by citing the strengths of the Electoral College). Likewise, those arguing for the NPV cite reasons why the Electoral College is harmful or outdated. *E.g.*, Birch Bayh, *Forward* in KOZA ET AL., *supra* note 17, at xxv (stating that the Electoral College has outlived any positive role it once played and that the NPV is a good strategy for overcoming the shortcomings of the Electoral College).

<sup>87</sup> See David S. Broder, *An End Run Around the Constitution*, WASH. POST, Mar. 26, 2006, at B07 (arguing that the NPV is an end run around the Constitution because it seeks to change the Electoral College without utilizing the necessary amendment process); Julia Silverman, *Oregon, Other States Consider End Run Around Electoral College*, SEATTLE TIMES (Jan. 28, 2007, 8:01 PM), [http://seattletimes.nwsources.com/html/localnews/2003545454\\_webelectoral28.html](http://seattletimes.nwsources.com/html/localnews/2003545454_webelectoral28.html); Will, *supra* note 46 (praising California governor Arnold Schwarzenegger after he vetoed the NPV legislation which, had it become law, “would have imparted dangerous momentum to a recurring simple-mindedness”). David Broder argues that NPV advocates ignore the NPV’s impact on “two of the fundamental characteristics of the American scheme of government: the federal system and the two-party system.” Broder, *supra*.

<sup>88</sup> KOZA ET AL., *supra* note 17, at xxiii, xxvi, 21, 22.

<sup>89</sup> See *infra* note 90 (discussing the same).

<sup>90</sup> *E.g.*, Charles S. Duskow & David A. Sonner, *Vox Populi: Is It Time to Reform the Electoral College?*, 55 FED. LAW. 33 (2008); Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007). But see Pincus, *supra* note 75, at 511 (arguing that although the NPV would not violate the Compact Clause, the Court should revisit the Compact Clause so that the NPV does violate the clause); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 749 (2007) (posing the possibility that the NPV is viable under current Compact Clause jurisprudence, but that

10, clause 3 of the U.S. Constitution and in relevant part reads: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”<sup>91</sup> Because the NPV is an agreement which, as written and ratified, requires several states to have ratified the plan before it takes effect, it has been posited that such an agreement would require the consent of Congress, without which the agreement would be rendered unconstitutional.<sup>92</sup> The overarching concern of this Note is addressing how this challenge to the NPV implicates each state’s republican form of government.<sup>93</sup>

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it may be the straw that breaks the camel’s back).

For a general argument against the current viability of the Court’s interpretation of the Compact Clause, see Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003). Several law review articles have specifically addressed state coordination for popularly electing the president and have concluded that this would not violate the Compact Clause. *E.g.*, Bennett, *supra* note 74, at 170–71; Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218 (2008); Jennings “Jay” Wilson, Note, *Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way*, 5 ELECTION L.J. 384, 402–03 (2006) (explicating that the agreement is not an agreement under the Court’s understanding; that if it is an agreement, such an agreement still does not fall within the purview of the Court; and finally, that because there is no case law addressing this issue, there is no way of knowing if the Court would entertain a challenge to the NPV under the Compact Clause). Other proponents of a national popular vote utilizing the Electoral College have also dismissed the Compact Clause as inapplicable. *E.g.*, KOZA ET AL., *supra* note 17, at 187–241; Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution: Part Three of a Three-Part Series on the 2000 Election and the Electoral College*, FINDLAW.COM, <http://writ.news.findlaw.com/amar/20011228.html> (Dec. 28, 2001). Akhil Reed Amar and Vikram David Amar ponder:

Should expressly coordinated state laws of the sort we are imagining be deemed an implicit interstate agreement requiring congressional blessing under Article I, section 10 of the Constitution? Probably not. After all, each state would retain complete unilateral freedom to switch back to its older system for any future election, and the coordinated law creates no new interstate governmental apparatus. Indeed, the cooperating states acting together would be exercising no more power than they are entitled to wield individually. (The matter might be different if the coordinating states had sought to freeze other states out—say, by agreeing to back the candidate winning the most total votes within the coordinating states as a collective bloc, as opposed to the most total votes nationwide.)

*Id.*

<sup>91</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>92</sup> Muller, *supra* note 90, at 373. Muller also considers the NPV unconstitutional under the Compact Clause because states are restrained from withdrawing from it for a specific period and because non-member states are too negatively affected. *Id.* But see Hendricks, *supra* note 90, at 225–26 (responding specifically to Muller’s article and concluding that the NPV does not violate the Compact Clause).

<sup>93</sup> See *infra* Part IV (concluding that requiring congressional consent for the NPV would violate the Guarantee Clause of the U.S. Constitution).

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The first case to reach the Supreme Court that specifically addressed this clause was *Virginia v. Tennessee*.<sup>94</sup> Compact Clause analysis is currently guided by *U.S. Steel Corp. v. Multistate Tax Commission*.<sup>95</sup> Both *Virginia* and *U.S. Steel Corp.* offer the same conclusion: the clause is meant to prevent the “formation of any combination tending to . . . encroach upon or interfere with the just supremacy of the United States.”<sup>96</sup> *U.S. Steel* affirmed *Virginia’s* holding, which the Court must consider if the compact in question “enhances state power *quoad* the National Government.”<sup>97</sup> Further, the Court in *U.S. Steel* looked to actual infringement on federal sovereignty as opposed to *Virginia’s* emphasis on potential infringement.<sup>98</sup>

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<sup>94</sup> 148 U.S. 503 (1893). This case involved a boundary dispute between the two named parties. *Id.* at 504. The states settled the dispute by a compact or agreement after a joint-commissioned study determined what was thought to be the proper boundary. *Id.* at 514–17. Congress never expressly consented to the compact that recognized the boundary. *Id.* at 517. Later, Virginia decided that the boundary established by the agreement was not correct and sought to invalidate the agreement under the Compact Clause because there had been no express consent by Congress. *Id.* The Court held that Congress had implied its consent and that the Compact Clause applies to alliances between states that might infringe on the power of the federal government. *Id.* at 525.

<sup>95</sup> See 434 U.S. 452, 478–79 (1978) (holding that not all agreements between states are subject to strictures of the Compact Clause but that instead only those agreements that are directed to the formation of any combination tending to increase the political power in the states and which may encroach on or interfere with the just supremacy of the United States).

The Multistate Tax Compact was drafted in 1966 and had twenty-one state members in 1978 at the time this case was heard. *Id.* at 454. It was created to streamline tax liability and payments for people owing taxes in multiple states. *Id.* at 452. *U.S. Steel* brought a suit after being threatened with an audit by the Multistate Tax Commission. *Id.* *U.S. Steel* wanted the compact to be invalidated under the Compact Clause because it had not received the consent of Congress. *Id.*

<sup>96</sup> *U.S. Steel*, 434 U.S. at 471; *Virginia*, 148 U.S. at 519. Further:

Quoting with approval Justice Story’s *Commentaries on the Constitution of the United States*, the Court held that while “the consent of Congress may be properly required, in order to check any infringement of the rights of the national government,” nonetheless, “a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.” For this reason, the Court concluded, the Compact Clause cannot have been intended to apply to all interstate agreements. Rather, “looking at the object of the constitutional provision,” the Court determined that the Compact Clause’s “prohibition is directed to the formation of any combination tending to . . . encroach upon or interfere with the just supremacy of the United States.

Pincus, *supra* note 75, at 523 (footnotes omitted).

<sup>97</sup> *U.S. Steel*, 434 U.S. at 473.

<sup>98</sup> Greve, *supra* note 90, at 306–07.

How or whether an interstate compact potentially or actually infringes on federal power is a vertical analysis; the Court has abandoned any horizontal analysis of whether an interstate compact infringes on the rights of non-member states.<sup>99</sup> While most interstate compacts operate with congressional approval, there are no instances of interstate compacts between states being invalidated by the Court due to a lack of congressional approval.<sup>100</sup> The Multistate Tax Agreement and the more recent Master Settlement Agreement, which ended litigation against giant tobacco companies, are two instances of compacts established without congressional consent but upheld by federal courts in the face of Compact Clause challenges.<sup>101</sup>

The Council of State Governments has classified twenty-one types of interstate compacts, but no interstate compact has ever addressed elections.<sup>102</sup> As the current Compact Clause regime stands under *U.S. Steel*, non-member states may suffer secondary effects of an interstate compact without the compact violating the Compact Clause, so long as the sovereignty of the non-member states is not threatened.<sup>103</sup> This Note now turns to the nature of state sovereignty under the Constitution's Guarantee Clause.

#### D. "The Guarantee Clause"

The exact denotation of "republican form of government" is impossible to pin down.<sup>104</sup> Its seminal origins as a textual reference within American law lie in Thomas Jefferson's 1776 rough drafts of

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 285, 288-89. Examples of subject matter covered by interstate compacts include: agriculture, boundaries, crime control and corrections, education, energy, facilities, fisheries, flood-control, marketing and development, motor-vehicles, etc. *KOZA ET AL., supra* note 17, at 192-200; *see also What Is the National Center for Interstate Compacts?*, COUNCIL OF ST. GOVERNMENTS, <http://www.csg.org/programs/policyprograms/NCIC/default.aspx> (last visited Nov. 16, 2009) ("The National Center for Interstate Compacts (NCIC) is designed to be an information clearinghouse, . . . a primary facilitator in assisting states review, revise and create new interstate compacts to solve multi-state problems or provide alternatives to federal pre-emption.").

<sup>101</sup> *Greve, supra* note 90, at 289. The Master Settlement Agreement was a deal reached between the attorneys general of forty-six states and U.S. tobacco manufacturers, providing for payment in damages to the states. *Id.* at 287. No state legislator ever voted for the agreement, which amounts to a tax on smokers, nor did Congress ever approve the agreement. *Id.* Federal courts have uniformly rejected Compact Clause claims against the Master Settlement Agreement. *Id.*

<sup>102</sup> *Muller, supra* note 90, at 390. The Council of State Governments is a body that monitors all current interstate compacts. *Id.*

<sup>103</sup> *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 477 (1978).

<sup>104</sup> *WIECEK, supra* note 12, at 18; *see also infra* notes 105-24 and accompanying text.

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Virginia's constitution.<sup>105</sup> The intellectual origins of republican government run much deeper, from Ancient Greece to sixteenth-century Florence, to seventeenth century England.<sup>106</sup> Article IV, section 4 of the U.S. Constitution, which contains the Guarantee Clause, provides that: "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."<sup>107</sup>

What exactly the expansive language "republican form of government" means has been the focus of debate since the Guarantee

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<sup>105</sup> WIECEK, *supra* note 12, at 15. Jefferson recognized that territory claimed by Virginia would eventually become independent. *Id.* According to Jefferson, a requisite for the formation of new colonies was "that the States so formed shall be distinct Republican States and be admitted Members of the Federal Union having the same Rights of Sovereignty Freedom and Independence as the other States." *Id.* at 16. Jefferson also drafted a later-aborted ordinance for the Northwest Territory that required its "respective governments [to] be in republican forms, and shall admit no person to be a citizen who holds any hereditary title." *Id.* Subsequently, a republican government clause found its way into the Northwest Ordinance drafted by Nathan Dane for the Confederation Congress, which granted a "broad guarantee of civil liberty" and required that "the constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles." *Id.* at 17. This broad grant of liberty included civil and religious liberty, "which form the basis whereon these republics[,] their laws and constitutions, are erected." *Id.* Further, Confederation Congress included in the ordinance habeas corpus, jury trial, due process, inviolability of contracts, public schools, just dealings with Indians, federal supremacy, and exclusion of slavery. *Id.* However, this broad definition of republican government was not necessarily accepted by all colonial Americans and was not the universally perceived basis for the inclusion of the Guarantee Clause in the U.S. Constitution. *See infra* notes 107-24 (discussing the various understandings of republican government).

<sup>106</sup> *See generally* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975). Madison found inspiration in David Hume's contemplation of a "republican form of government" in his essay, *Idea of Perfect Commonwealth*. RAKOVE, *supra* note 20, at 19. Concerning representation, David Hume says:

The lower sort of people and small proprietors are good judges enough of one not very distant from them in rank or habitation; and therefore, in their parochial meetings, will probably chuse the best, or nearly the best representative: But they are wholly unfit for county-meetings, and for electing into the higher offices of the republic. Their ignorance gives the grantees an opportunity of deceiving them.

David Hume, *Idea of a Perfect Commonwealth*, in *ESSAYS MORAL, POLITICAL, AND LITERARY* VOL. 2 487 (1882).

<sup>107</sup> The full text of Article IV, section 4 reads: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4. This article contains three clauses: the "Guarantee Clause," the "Invasion Clause," and the "Domestic Violence" clause. *Id.* The Guarantee Clause is distinct from the other two clauses, and yet, its narrative has been tied to them in its common law history by their proximity. *See, e.g.*, WIECEK, *supra* note 12, at 104, 109 (relating how President John Tyler would only interfere with a threat to Rhode Island if there was armed insurrection).

Clause's inception.<sup>108</sup> John Adams admitted in 1807 that he did not believe any man would ever understand the Guarantee Clause.<sup>109</sup> Maybe the clearest explanation of republican government was articulated by James Madison in the *Federalist Papers* as a representative democracy with an absolute prohibition on titles of nobility.<sup>110</sup> "[R]epublic" elicits the welfare of the people—the public good—as the object of primary concern for rulers; a republic is a state that belongs to the people, not the crown.<sup>111</sup> The federal government was not to be a monarchy; the power to govern would not remain with vested interests transmitted through time to those with familial or related interests.<sup>112</sup> The dread of a monarchy was so pervasive that when rumors circulated during the Convention that a European family might be given power or George Washington made King, the convention broke its silence to the outside world to reassure that they were definitely not considering a king.<sup>113</sup>

While Americans generally agreed that republican government meant the absence of monarchy or hereditary rule, it also meant the absence of direct democracy to those organizing the federal

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<sup>108</sup> Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988); see also Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1436–37 (2009) (footnotes omitted) (“The Guarantee Clause has been read to prohibit direct democracy, require campaign finance reform, protect individual rights, protect political rights, mandate wealth redistribution[,]...limit governmental power, and require a system of checks and balances.”).

<sup>109</sup> WIECEK, *supra* note 12, at 72 (quoting Letter from John Adams to Mercy Warren (July 20, 1807)). The quote continues, “[t]he word [republic] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness.” *Id.*

<sup>110</sup> THE FEDERALIST NO. 39, at 191 (James Madison).

<sup>111</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 55–56 (1969) (quoting Thomas Paine and Edmund Pendleton).

<sup>112</sup> See, e.g., JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 320–22 (1987) (recounting the concern that an “enterprising Citizen” would establish a monarchy and spread his ideas from state to state and the consequent need for the Guarantee Clause); *North Carolina Ratification Convention Journal (July 30, 1788)*, CONSOURCE, <http://www.consource.org/index.asp?bid=582&documentid=72849> (last visited Oct. 21, 2010) (discussing the Guarantee Clause as a means of preventing any state from establishing a monarchy or aristocracy).

<sup>113</sup> PEIRCE, *supra* note 2, at 14. *But see* Letter, *Thomas Jefferson to James Madison* 15 Mar. 1879, *THE FOUNDERS’ CONSTITUTION*, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s49.html> (last visited Dec. 23, 2010) (discussing the impossibility of a monarchy ever being established in the states because the younger generation was so learned in republicanism).



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government.<sup>114</sup> In Federalist No. 10, James Madison argued that a republican government would protect encroachment upon minority rights by majority rule.<sup>115</sup> It would do this by having people elect representatives who would make the laws.<sup>116</sup> Thus, while the “fundamental maxim of republican government . . . requires that the sense of the majority should prevail,” popular sovereignty would be channeled through an agency concept of government: “the people are the principals, their elected representatives the agents chosen to carry out the popular will.”<sup>117</sup> A republican government, while deriving all of its power from “the great body of people,” was to be a “government of laws, not of men.”<sup>118</sup> In this light, the Guarantee Clause would also, beyond preventing monarchy, help to prevent popular uprisings that might threaten the stability of a state government under attack.<sup>119</sup>

The meaning of the Guarantee Clause takes on a different hue from the perspective of someone hesitant to ratify a new National Constitution

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<sup>114</sup> WIECEK, *supra* note 12, at 18 (“Republican government was thought to be an alternative to these extremes, a middle course between the Scylla of tyranny and the Charybdis of anarchy.”).

<sup>115</sup> Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994).

<sup>116</sup> *Id.*

<sup>117</sup> THE FEDERALIST NO. 22 (Alexander Hamilton); WIECEK, *supra* note 12, at 23. Embodied in the Virginia Declaration of Rights was the notion that “[a]ll power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.” *Id.*

<sup>118</sup> THE FEDERALIST NO. 39 (James Madison); WIECEK, *supra* note 12, at 25. Furthermore, [o]n the principles of government, a broad consensus reigned. Government existed for the good of the many, and to protect the liberty, property, and equal rights of the citizen. The idea that representation would help the government to determine the common good was commonplace, and so was the belief that the separation of powers was essential to the protection of rights.

RAKOVE, *supra* note 20, at 19.

<sup>119</sup> See, e.g., *Draft Sketch of Constitution by Edmund Randolph (July 26, 1787)*, CONSOURCE, <http://www.consource.org/index.asp?bid=582&documentid=69084> (last visited Jan. 10, 2010) (“The guarantee is . . . to prevent the establishment of any government, not republican; . . . to protect each state against internal commotion; and . . . against external invasion. . . . But this guarantee shall not operate (in the last Case) without an application from the legislature of a state.”); see also Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 241–42, n.280 (2003) (discussing Shay’s Rebellion and other popular uprisings by debtors and the poor as a motivation for the rich landowners to hold a convention that would allow for a strong central government to be established in order to protect their property interests; “Shays’ Rebellion confirm[ed] [the constitutional delegates’] worst fears about the populace”) (citing Michael Parenti, *The Constitution as an Elitist Document*, in HOW DEMOCRATIC IS THE CONSTITUTION? 39, 43 (1980)). The Virginia Plan for a Constitution incorporated a guarantee of republican government in response to two fears sweeping the nation: rebellious popular mobs and monarchy. Merritt, *supra* note 108, at 29.

that would greatly change the political landscape by taking away powers formerly held by each of the states.<sup>120</sup> In the Pennsylvania ratification convention, the alarm expressed by some delegates that an all-powerful federal government would quash state sovereignty was pacified by reference to the Guarantee Clause.<sup>121</sup> In Massachusetts, in response to similar fears, it was said that, “as the United States guarantee to each State a Republican form of government; the State governments were as effectually secured, as though this Constitution should never be in force.”<sup>122</sup> The same scenario, fears of a tyrannical federal government assuaged by the Guarantee Clause, played out in Maryland, New Jersey, and New York.<sup>123</sup> While the National Constitution enshrined republican principles for the federal government, the stability of the new nation was seen as dependent on its member states freely exercising these same principles.<sup>124</sup>

The ambiguity surrounding the clause and the expansive notion of republicanism prevents contemporary academics from completely unpacking its full meaning.<sup>125</sup> What is true for scholarly works has been and remains true for the Supreme Court.<sup>126</sup> In *New York v. United States*,

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<sup>120</sup> See RAKOVE, *supra* note 20, at 16 (“It is entirely possible—even probable, indeed almost certain—that the intentions of the framers and the understandings of the ratifiers and their electors diverged in numerous ways, on points both major and minor.”).

<sup>121</sup> See, e.g., Jasper Yeates’ *Notes of the Pennsylvania Ratification Convention (November 30, 1787)*, CONSOURCE, <http://www.consource.org/index.asp?bid=582&documentid=1891> (last visited Jan. 10, 2010) (stating that the objection was made that the constitution would “vest Congress with too large and dangerous state powers”). The answer to this objection was:

Candor and the character of the Federal Convention forbid the idea. The work does not justify the remark. But it has been shown if the state governments fail, so must the federal government. The Representatives must be chosen by persons voting for the most numerous branch of the state legislature. The state legislatures must choose the Senate and appoint Electors to choose a President. The judicial power depends on the Senate. The 4th section of the 4th Article guarantees a republican form of government to each state (read it).

*Id.*

<sup>122</sup> *Newspaper Report of the Massachusetts Ratification Convention (January 24, 1788)*, CONSOURCE, <http://www.consource.org/index.asp?bid=582&documentid=5038> (last visited Jan. 10, 2010).

<sup>123</sup> Merritt, *supra* note 108, at 33–35.

<sup>124</sup> See THE FEDERALIST NO. 39 (James Madison) (pointing to the guarantee of republican government for the states as decisive proof of the republican nature of the National Constitution).

<sup>125</sup> See Merritt, *supra* note 108, at 23 (“[N]o single scholarly work can capture the full meaning of ‘republican government.’”).

<sup>126</sup> See *infra* text accompanying notes 127–39 (giving the history of Supreme Court jurisprudence regarding the Guarantee Clause).

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Justice O'Connor highlighted that the Guarantee Clause has not often been cited in Supreme Court holdings.<sup>127</sup> This is largely because of the political question doctrine that has been entwined with the Guarantee Clause ever since *Luther v. Borden* in 1849 where the Court refused to decide which of two Rhode Island governments was legitimate.<sup>128</sup> The political question doctrine holds that some questions of constitutional

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<sup>127</sup> 505 U.S. 144, 185 (1992) (holding that the Constitution's Guarantee Clause was not violated by provisions of the Low-Level Radioactive Waste Policy Act, which provided monetary incentives for compliance by states with a federal regulatory scheme and also provided for denial of access to disposal sites for failure to meet deadlines; under both provisions, states retained the ability to set their legislative agendas and state government officials remained accountable to local electorate).

<sup>128</sup> 48 U.S. (7 How.) 1, 1-2 (1849); see also CHEMERINSKY, *supra* note 51, at 78 (recounting the facts of *Luther* and the Court's approach to the case). In 1842, the people of Rhode Island had not yet drafted or ratified their own state constitution, but were instead legally governed by a royal charter granted by King Charles II in 1663. WIECEK, *supra* note 12, at 86. The charter restricted suffrage to freeholders—those owning \$134 of real property—and determined the number of representatives each town could have. *Id.* Urbanization and population growth had created disenfranchisement and malapportionment, which were in turn aggravated by ethnic and religious tensions. *Id.* at 87-88. The Rhode Island General Assembly operating under the Charter would not concede to demanded changes and so a "People's Convention" was held. *Id.* at 90-91. Both the People's Convention and the General Assembly submitted constitutions for ratification; the People's was ratified 14,000 to 52 and the Assembly's was rejected 8689 to 8013. *Id.* at 91. A crisis soon emerged and the General Assembly passed a law outlawing participation in the Dorrite government. *Id.* at 95. When Martin Luther broke the law by serving as a moderator for Dorrite Elections, Luther Borden—a freeholder—and other freeholders broke into Martin Luther's home. *Id.* at 113-15. Luther filed a trespass action against Borden which the Court framed as an issue about which government was legitimate. *Id.* By the time Chief Justice Taney published his decision, the Dorrite government had been defunct for seven years. *Id.* at 123-24. Any Rhode Islanders who might have once supported the now defunct Dorrite government had long since acquiesced to life under the Freeholder government and had recognized it as exclusively legitimate. *Id.* at 118-19. If the Court were to have ruled that the Freeholder government was illegitimate, then all of the laws passed by it, all of the taxes collected by it, all of the salaries paid by it, all of the criminals sentenced, and every act done by it would have been illegal. *Id.* In dicta, Chief Justice Taney addressed the Guarantee Clause:

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

WIECEK, *supra* note 12, at 121-22. Although this was dicta, it was cited as the holding by subsequent courts. *Id.* at 122.

law are non-justiciable because they are best resolved by the political branches of government.<sup>129</sup> This Note does not address the legal arguments in support of applying the political question doctrine, but instead presumes what the Court has said in times past: it should be the “province and duty of the judicial department to say what the law is.”<sup>130</sup>

It has been argued that in *Luther*, Justice Taney did not utilize the Guarantee Clause in his holding, but only in dicta.<sup>131</sup> Regardless, Justice Taney’s dicta has been rendered into *Luther*’s holding by subsequent courts with the result that all Guarantee Clause suits were held categorically non-justiciable for over fifty years.<sup>132</sup> In 1910, one year before *Luther*’s holding gutted Guarantee Clause jurisprudence, the Court recognized the Guarantee Clause as protecting state sovereignty when it ruled in *Coyle v. Smith* that Congress could not restrict Oklahoma’s placement of its capital.<sup>133</sup> The Court said that locating a capital is “essentially and peculiarly [a] state power[.]”<sup>134</sup>

In the early 1960s, the Court removed the absolute barrier to cases brought under the Guarantee Clause, but the Court did not employ the clause in any of its holdings.<sup>135</sup> In 1991, the Court decided *Gregory v.*

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<sup>129</sup> Martin H. Redish, *Judicial Review and the ‘Political Question’*, 79 NW. U. L. REV. 1031, 1031 (1984). Erwin Chemerinsky notes that the Court usually dismisses Guarantee Clause claims with single sentences such as, “[a]s to the guaranty to every state of a republican form of government, it is well settled that the questions arising under [this clause] are political, not judicial, in character, and thus for the consideration of the Congress and not the courts.” Chemerinsky, *supra* note 115, at 849. Beyond the Guarantee Clause, the political question doctrine has applied to only five other areas: the process for ratifying constitutional amendments, impeachment and removal of officials from office, foreign policy decision making, the training of state national guards, and decisions of national political parties. *Id.* at 853.

<sup>130</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>131</sup> WIECEK, *supra* note 12, at 120. The Court held the Freeholder government legitimate by virtue of the Rhode Island judicial system’s ratification through conduct—since the Rhode Island courts had “construed the laws and the constitution of the state, it was binding on federal courts.” *Id.*

<sup>132</sup> *Luther*, 48 U.S. at 42 (holding claims brought under the Guarantee Clause non-justiciable). It was over fifty years later in 1912 in *Pacific States Telephone & Telegraph Co. v. Oregon* that the Court definitively interpreted *Luther* as barring actions brought under the Guarantee Clause. 223 U.S. 118, 149 (1911); Chemerinsky, *supra* note 115, at 862. Fifty years later, this absolute barrier was removed. *Baker v. Carr*, 369 U.S. 186, 198 (1962) (removing the absolute barrier to justiciability formerly posed by the political question doctrine).

<sup>133</sup> 221 U.S. 559, 568 (1910).

<sup>134</sup> *Id.* at 565.

<sup>135</sup> *Reynolds v. Sims*, 377 U.S. 533, 556 (1964); *Baker*, 369 U.S. at 228–29 (removing the absolute barrier to justiciability formerly posed by the political question doctrine). While removing the political question doctrine from actions challenging the constitutionality of state actions, the Court refrained from applying the Guarantee Clause but instead upheld a Fourteenth Amendment equal protection challenge. Redish, *supra* note 129, at 1031 n.1, 1033. In *New York v. United States*, Justice O’Connor recognized that *Reynolds* opened the

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*Ashcroft* wherein Justice O'Connor bolstered the Court's opinion in dicta with the Guarantee Clause by upholding Missouri's determination of qualifications for government officials.<sup>136</sup> She said that

States [have the authority] to determine the qualifications of their most important government officials. It is an authority that lies at "the heart of representative government." It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."<sup>137</sup>

In *New York v. United States*, also decided in 1991, Justice O'Connor again recognized the possible viability of the Guarantee Clause; she set out two criteria by which the federal government may violate the Guarantee Clause: (1) if the states lose the ability to set their legislative agendas, and (2) if state government officials can no longer remain accountable to the local electorate.<sup>138</sup> This test had not been met in *New York*, so the Court instead relied in its ruling upon the Tenth Amendment.<sup>139</sup>

As of the writing of this Note, Guarantee Clause jurisprudence is in stasis; there are no absolute barriers to its use by the political question doctrine, but years of disuse have made it a functional nullity.<sup>140</sup> It is

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way for some cases brought under the Guarantee Clause to be justiciable. 505 U.S. 144, 186 (1992).

<sup>136</sup> 501 U.S. 452, 463 (1991) (holding that Missouri's mandatory retirement requirement for judges does not violate the Age Discrimination in Employment Act of 1967). The Court said that a federal law will only be applicable to important state government activities if Congress makes clear that it intended such. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 323 (3d 2006) [hereinafter PRINCIPLES].

<sup>137</sup> *Gregory*, 501 U.S. at 463 (citations omitted).

<sup>138</sup> *New York*, 505 U.S. at 185-86.

<sup>139</sup> *Id.* The Tenth Amendment holds that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Court similarly used the Tenth Amendment in the case *Printz v. United States*, 521 U.S. 898, 935-36 (1997) (holding that under the Tenth Amendment, Congress cannot utilize state executive officers for its own purposes). Subsequently, the Court heard *Reno v. Condon* in which it upheld a federal law in the face of a Tenth Amendment challenge. 528 U.S. 141, 151 (2000). The Court distinguished this case from *New York* and *Printz* because the law in question, the Drivers Privacy Protection Act, was a "prohibition of conduct, not an affirmative mandate." PRINCIPLES, *supra* note 136, at 325-26. This case follows Tenth Amendment jurisprudence established in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), a case that has never been overruled. *Id.* at 322, 326.

<sup>140</sup> See *supra* note 135 and accompanying text.

possible that a challenge to NPV legislation may arouse this “sleeping giant,” a possibility that is contextually explored in the following analysis.<sup>141</sup>

### III. ANALYSIS

If enough states legislatively adopt the NPV, the Supreme Court will face the unique challenge of having to reconcile two previously unassociated constitutional provisions.<sup>142</sup> These two constitutional provisions, immediately at play when enough states have adopted the NPV, are Article II, section 1, paragraph 2, and the Compact Clause.<sup>143</sup> Within that context, this Analysis demonstrates that the text of Article II in an unsophisticated and very blunt way eschews federal interference.<sup>144</sup> Before proffering an exposition of congressional impotence in determining how states choose their electors, this Part concludes that while policy arguments have no bearing on the legal arguments at play, when considered, policy rationale supports the NPV.<sup>145</sup> Specifically, this Analysis will examine, as a policy argument, the single caveat to state plenary power—the notion of equal protection (a principle that is constitutionally precluded by Article II from being fully applied by the federal government to the presidential election) and conclude that a paradox antithetical to the moving spirit behind and within the Constitution would arise by federal interference with states wishing to enable one person one vote through the NPV.<sup>146</sup> Finally, this Analysis will consider the possibility that the Court will modify current Compact Clause jurisprudence in a way that the NPV could face heightened scrutiny.<sup>147</sup> With this backdrop, the Contribution tackles the question of the Guarantee Clause’s viability for settling the differences between Article II, section 1 and the Compact Clause.<sup>148</sup>

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<sup>141</sup> WIECEK, *supra* note 12, at 290.

<sup>142</sup> *See* Muller, *supra* note 90, at 390 (discussing that there has never been an interstate compact regarding presidential elections because they are governed by Article II, section 1).

<sup>143</sup> *Id.*

<sup>144</sup> *See infra* Part III.A (discussing the same).

<sup>145</sup> *See infra* Part III.B–C (discussing the same).

<sup>146</sup> *See infra* Part III.C (discussing the same). In other words, one person, one vote cannot be implemented and enforced by the federal government in an interstate manner; only within each state is one person, one vote applicable. *Id.*

<sup>147</sup> *See infra* Part III.D (discussing the same).

<sup>148</sup> *See infra* Part IV (discussing the same).

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A. *Article II, Section 1 Gives the States Complete, Unqualified, Absolute, and Full Plenary Power*

If James Madison's notes on the Constitutional Convention are accurate, there was no debate about how state legislatures would appoint electors.<sup>149</sup> Instead of giving the states policy guidelines or a rationale to consider or follow, the Framers elected to give the states a power through which state legislatures could exercise their own discretion.<sup>150</sup> The lack of guidelines in Article II's grant of power to the state legislatures and the derivative flexibility bestowed as a consequence have borne the test of time rather well despite many efforts to change it; the presidential election process has only been amended once with passage of the Twelfth Amendment.<sup>151</sup> The Twelfth

<sup>149</sup> PEIRCE, *supra* note 2, at 45. The Framers did not debate whether state legislatures "would appoint the electors themselves, require that they be chosen by popular vote in districts, or provide for popular vote statewide." *Id.* Further, the Framers did not even debate the real role of electors. *Id.* The biggest debate at the convention about presidential elections concerned the contingency plan. *Id.* at 47. Initially, the Senate was to choose the president if no candidate received a majority of the electoral votes, but some delegates feared the power that this would give to the Senate whose members were then chosen by state legislators. *Id.* at 48.

<sup>150</sup> See *McPherson v. Blacker*, 146 U.S. 1, 28 (1892). Regarding this power, Chief Justice Fuller said:

The Journal of the Convention discloses that propositions that the President should be elected by "the citizens of the United States," or by the "people," or "by electors to be chosen by the people of the several states," instead of by the Congress, were voted down, as was the proposition that the President should be "chosen by electors appointed for that purpose by the legislatures of the States," . . . . The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.

*Id.* (emphasis added) (citations omitted).

<sup>151</sup> U.S. CONST. amend. XII; see also *supra* text accompanying note 44 (explaining that ten percent of all proposed amendments are for Electoral College reform); *supra* note 45 (explaining the passage of the Twelfth Amendment). With passage of the Twelfth Amendment, "any semblance" of electors acting as independent agents disappeared, but not their constitutional prerogative to act independently. PEIRCE, *supra* note 2, at 121. The fact that the Electoral College has been so adaptable despite changes in how states choose electors is a point often made by proponents of the Electoral College. BENNETT, *supra* note 28, at 58; see also, e.g., Martin Diamond, *The Electoral College and the American Idea of Conspiracy*, in AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE 44, 46 (rev. ed., Walter Berns ed., 1992) ("Not only is [the electoral college] not at all archaic, but one might say that it is the very model of up-to-date constitutional flexibility. Perhaps no other feature of the Constitution has had a greater capacity for dynamic historical adaptiveness."); George Will, *Forward* to ROSS, *supra* note 42, at x ("And today's electoral-vote system is not an 18th-century anachronism. It has evolved, shaping and being shaped by a large development the Constitution's Framers did not foresee—the two party

Amendment did nothing to change the role of electors or the role of state legislatures in choosing those electors, despite evidence that electors were not acting independently as had been hoped for by some of the Framers.<sup>152</sup>

The opinion in *Bush v. Gore* reiterates the long-standing plenary principle of Article II that is unequivocally accepted by the Court.<sup>153</sup> While custom may have changed the electoral process from what the Framers had personally envisioned to popular statewide winner-take-all elections for electors that may have removed all discretion from electors and turned the presidential election from a process of wise deliberations into popular pageantry, custom alone does not have a force capable of overriding the Constitution: “The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.”<sup>154</sup>

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system.”).

The only other significant change to the electoral-vote process was The Electoral Count Act of 1887, which provided for a more efficient transmission of electoral votes by a state’s chief election officer to Congress and which laid out rules for Congress regarding how to count the electoral votes; again, there was no change in how states can choose their electors. BENNETT, *supra* note 28, at 36–37, 116.

<sup>152</sup> See *supra* note 45 (explaining the passage of the Twelfth Amendment). In Federalist No. 68, Alexander Hamilton, in arguing for adoption of the new constitution, pointed to the desirability of the immediate election of the president by “men most capable of analyzing [sic] the qualities adapted to the station [of president].” THE FEDERALIST NO. 68 (Alexander Hamilton). He reasoned that, “[a] small number of persons, . . . will be most likely to possess the information and discernment requisite to so complicated an investigation.” *Id.* By the third election, however, electors were already voting along party lines. BENNETT, *supra* note 28, at 23–24. By the time of the passage of the Twelfth Amendment, it was evident that “rather than exercising any real discretion informed by discussion among electors,” electors were instead “often” casting votes in accordance with prior commitments. *Id.* at 23. Even in the first presidential election, Massachusetts electors cast ballots pursuant to a predetermined vote. “[T]hey had not come to discuss, deliberate and negotiate.” *Id.* at 201 n.61 (quoting TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT 31 (1994)). Today, “the voting of the electors is a formality, predetermined by the popular vote cast in each state on [election day].” WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 3 (2004).

<sup>153</sup> 531 U.S. 98, 105 (2000). “Whether the electoral college and winner-take-all casting of electoral votes is a good idea or not has no bearing on the law. Article II, section 1 and the Twelfth Amendment are the Constitution we have.” *Porter v. Bowen*, 518 F.3d 1181, 1183–84 (9th Cir. 2008) (Kleinfeld, J. dissenting).

<sup>154</sup> *Bush*, 531 U.S. at 104. The Court explained that state legislators used to choose the electors but “[h]istory has now favored the voter.” *Id.*; see also THE FEDERALIST NO. 68, at 345 (Alexander Hamilton) (arguing that the benefit of the Electoral College is the process of wise deliberations). Some Framers feared popular elections; among the rationale for not codifying a popular national election in the Constitution, there was a fear of the ignorance of the American people at large, of how easily they could be manipulated by, for instance, the Order of the Cincinnati. PEIRCE, *supra* note 2, at 42.



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There is nothing ambiguous about the plenary power given to state legislatures and there is no sophisticated argument to make concerning this power beyond the fact that they have full power.<sup>155</sup> State legislatures can choose any agent as the means of selecting state electors.<sup>156</sup> Literally any method within the scope of federal equal protection law can be chosen by state legislatures; governors could be designated to choose electors, a state's supreme court could be given the honor, or even a game of chance might be drawn up—chimps could be given darts and a board of nominees covered with the pictures of potential electors.<sup>157</sup> That there is currently no great variety in the methods used by state legislators to choose electors—popular elections are used in every state—merely supports the proposition that state legislators are self-interested individuals belonging to political parties comprised of interests and agendas.<sup>158</sup> Legislators are politicians who want to stay in office and who will maintain popular voting because they are ultimately accountable to the people.<sup>159</sup> Ruling political parties will maintain the winner-take-all system out of a sense of “political self-preservation.”<sup>160</sup>

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<sup>155</sup> See *supra* text accompanying note 57 (stating that state legislatures have plenary power when choosing electors).

<sup>156</sup> See *supra* text accompanying note 57 (noting that the state legislature has plenary power when choosing its electors).

<sup>157</sup> See, e.g., KOZA ET AL., *supra* note 17, at 38 (quoting the Colorado Constitution, which guarantees the right of the people to vote for presidential electors). State constitutions, however, may limit or preclude some, any, or all of these methods. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

<sup>158</sup> PEIRCE, *supra* note 2, at 77. Peirce posits two reasons for the prevalence of a popular vote under a general ticket system. *Id.* First, over time, American sentiment has favored direct participation where the people, rather than state legislatures, would have the privilege of choosing presidential electors. *Id.* Secondly, the general ticket system favored the ruling political class by allowing them to secure all the state's electoral votes for the national candidate in consideration for power, prestige, and patronage. *Id.* On the other hand, minority interests in the state legislature preferred a district system to protect their voice in the process, but were impotent to implement such a plan. *Id.*; see also, e.g., *supra* notes 30–32 and accompanying text (discussing the general ticket or winner-take-all system); *infra* note 172 (introducing Thomas Jefferson's argument that choosing electors by district would be best only when all states choose this method).

<sup>159</sup> See PEIRCE, *supra* note 2, at 77 (explaining that the advancement of democratic ideals in the general populace means that state legislators elected by the populace have to allow for the popular vote in presidential elections).

<sup>160</sup> *Id.* at 78. It has been noted that Maine and Nebraska do in fact utilize the district system. *Supra* text accompanying note 47. “In all 13 presidential elections in which the district system has been used by Maine and Nebraska, the presidential candidate carrying the state has carried all of the state's congressional districts.” KOZA ET AL., *supra* note 17, at 7 n.17. Maine and Nebraska have respectively only two and three districts, which is to say that they are small. *Id.* Being small, they are more easily dominated by a single party, which makes their district system the functional equivalent of a winner-take-all system. *Id.*

*Bush v. Gore* illustrated the power of the legislature to appoint Florida's electors.<sup>161</sup> According to the Court, so great was the power granted to the state legislature for exercising its Article II task, not even the Florida Supreme Court's interpretation of the Florida constitution could take away the power of the legislature.<sup>162</sup> If Justice Stevens' dissenting interpretation prevailed, it would not be the Florida legislature that has full authority in Electoral College matters, but the State of Florida as defined by Florida's constitution.<sup>163</sup> Either the Florida legislature has plenary power or Florida's legislature is constrained only by the Florida Supreme Court's interpretation of the Florida Constitution; either way, Congress does not have the power to interfere in this process because it is the State of Florida that has ultimate authority in exercising its Article II prerogative.<sup>164</sup>

Florida's ultimate authority in this arena is tempered by only one mainstay of the American justice system: equal protection.<sup>165</sup> But equal protection and one person, one vote is foreclosed from being fully employed in the presidential election process by the federal government because of Article II, which means invoking equal protection is tantamount to making a policy argument, not a legal argument.<sup>166</sup> The next Part discusses what bearing, if any, policy arguments should have on state adoption of the NPV.

*B. Policy Arguments Have No Bearing on the Constitutional Exercise by State Legislatures of Their Plenary Power, However Comma . . .*

Another way of saying that states have plenary power regarding the Electoral College is to say that fairness is of no consequence, legal policies do not matter, and the original intent of our Founders does not necessarily carry much weight.<sup>167</sup> For example, a consequence of the winner-take-all system is that states do not choose to appoint electors in a way favorable to many Founders' opinions of what constituted republican government.<sup>168</sup> Madison wrote that "the district system was

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<sup>161</sup> *Bush v. Gore*, 531 U.S. 98, 112-13 (2000).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 123 (Stevens, J. dissenting).

<sup>164</sup> *See supra* text accompanying notes 66-67 (explicating the difference between policy and power, and the fact that states have the power when choosing electors regardless of policy considerations).

<sup>165</sup> *See infra* Part III.C (discussing equal protection as it pertains to voting).

<sup>166</sup> *See infra* Part III.C (providing a discussion of equal protection as it pertains to voting).

<sup>167</sup> *See supra* notes 66-67 and accompanying text (discussing the same); *infra* note 172 (highlighting how Thomas Jefferson's conception of how the Electoral College should work does not match the reality of how it does in fact work).

<sup>168</sup> PEIRCE, *supra* note 2, at 76.

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mostly, if not exclusively, in view when the Constitution was framed and adopted.”<sup>169</sup> This view was personally supported by such constitutional architects as Jefferson, Madison, and Hamilton.<sup>170</sup> Politicians themselves, the Framers had a difficult time agreeing on a system that could withstand corruption, but they thought they had settled on something worthy of the task; Alexander Hamilton proclaimed that corruption in the presidential election process would be impossible due in large part to the “transient existence” of the electors.<sup>171</sup>

Despite their beliefs that the Electoral College foreclosed corruption and that the district system was best, Jefferson and Madison both adopted a Machiavellian approach to Virginia’s electoral votes in order to vanquish their political foes.<sup>172</sup> Jefferson and Madison, while not favoring the role politics and the emerging two parties were playing in the appointment of electors, recognized that a state’s interest would be emasculated by adhering to the district system in the face of other states using the less democratic winner-take-all system.<sup>173</sup> They maneuvered to change Virginia’s system temporarily, believing that a constitutional amendment giving uniformity to the presidential elector process would pass sooner than later.<sup>174</sup> The tenor of these comments, that the Electoral College does not produce results consistent with higher ideals but must be accepted until there is a constitutional amendment, has played out through America’s history.<sup>175</sup> Of particular concern has been the

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<sup>169</sup> *Id.* (quoting James Madison).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 52. The most frequently cited argument in favor of the Electoral College during the ratification debates was that it would prevent “heats and ferments . . . tumult and disorder . . . cabal, intrigue and corruption.” *Id.* (quoting Alexander Hamilton). For example, the President was not to be chosen by Congress—an idea approved four separate times during the Convention—because of the fear of “a temptation on the side of the executive to intrigue with the legislature for a reappointment.” *Id.* at 33, 39–40. Those favoring executive independence did not want the president to be the mere instrument of Congress. *Id.* at 40. Further, if Congress chose the president, foreign powers would more easily intrigue and hold sway over American politics. *Id.*

<sup>172</sup> *Id.* at 66. Jefferson said, “[a]ll agree that an election by districts would be best if it could be general, but while ten states choose either by their legislatures or by a general ticket, it is folly or worse for the other six not to follow.” *Id.* Jefferson wrote this in connection to Madison’s bill to change the Virginia electoral system where Federalists had made inroads. *Id.*

<sup>173</sup> *Id.* at 66.

<sup>174</sup> *Id.*

<sup>175</sup> See, e.g., *New v. Pelosi*, No. 08 Civ. 9055(AKH), 2008 WL 4755414 (S.D.N.Y. Oct. 29, 2008) (“Whatever the merits, Plaintiff’s remedy lies in the constitutional amendment process, not the courts.”); *McPherson v. Blacker*, 146 U.S. 1, 44–45 (1892) (holding that Michigan’s legislature could change Michigan’s presidential electoral process regardless of any political motivations underlying the decision); see also *supra* note 45 (highlighting the problems of the House contingency plan and the faithless elector).

influence that states, by the methods they utilize to choose their electors, have on other states desiring to use alternative methods for choosing electors.<sup>176</sup> Justice Story addressed this in observing, “it has been thought desirable by many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people.”<sup>177</sup>

As a consequence, any and all non-constitutional arguments against the NPV, i.e. any and all policy arguments against the NPV, are non-sequiturs.<sup>178</sup> However, policy arguments against the NPV cannot be completely ignored. One argument posits that the NPV could allow eleven states acting in concert to determine the President.<sup>179</sup> This argument presumes the NPV is contrary to the interests of small states and that the Electoral College as it now operates helps to protect those interests.<sup>180</sup> However, with the small state of Hawaii (four electoral votes), as well as Maryland (ten votes), having already ratified the NPV, the plan will now require at the bare minimum thirteen states as of this writing before it can take effect.<sup>181</sup> A student Note in the Harvard Law Review amply demonstrates that the nearly ubiquitous winner-take-all system does not clearly benefit small or large states.<sup>182</sup> On the contrary, the Electoral College already allows for the far-out possibility that a mere twenty-seven percent of the population could determine the next President.<sup>183</sup>

Another policy argument against the NPV is that using the constitutional amendment process would be more democratic.<sup>184</sup> This would produce a permanent change and would ultimately be more

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<sup>176</sup> See PEIRCE *supra* note 2, at 132.

<sup>177</sup> *McPherson*, 146 U.S. at 33 (quoting Justice Story).

<sup>178</sup> See *supra* notes 57–67 (explaining the plenary power inherent to state legislators regarding presidential elector appointments).

<sup>179</sup> See KOZA ET AL., *supra* note 17, at 380 (citing Tara Ross’ critique that “11 colluding states” could impose the NPV on the country).

<sup>180</sup> *Top National Popular Vote (Koza) Myths: Top Six Myths Upon Which the Koza Scheme Is Based*, THE AMY OLIVER SHOW (Mar. 26, 2009), <http://blog.amyolivershow.com/top-national-popular-vote-koza-myths/>; Bob Williams, *In Defense of the Electoral College: The National Popular Vote Movement Threatens a Vital Part of Our Republic*, ALEC POLICY FORUM, [http://www.alec.org/am/pdf/Electoral\\_College\\_Defense.pdf](http://www.alec.org/am/pdf/Electoral_College_Defense.pdf) (last visited Dec. 23, 2010).

<sup>181</sup> See *supra* note 73 (delineating the states who have adopted the NPV); *2008 Presidential Election*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/2008/election-results.html> (last visited Oct. 22, 2010) (providing data on the popular and electoral vote in 2008).

<sup>182</sup> See *Rethinking the Electoral College Debate*, *supra* note 44, at 2526 (using statistics to clearly demonstrate that the winner-take-all system does not benefit large states or small states).

<sup>183</sup> *Id.* at 2532. Alternatively, the eleven biggest states, home to fifty-six percent of the population, could theoretically determine the President under the current regime. KOZA ET AL., *supra* note 17, at 380.

<sup>184</sup> KOZA ET AL., *supra* note 17, at 379.

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damaging to the Electoral College because it would be legislation binding on all states, whereas adoption of the NPV is within the discretion of each individual state.<sup>185</sup> Yet another argument suggests that the NPV would work against our two-party system.<sup>186</sup> Although the wisdom of a two-party system is debatable, it is not something that is constitutionally prescribed.<sup>187</sup>

There are practical concerns regarding the NPV.<sup>188</sup> These include that the NPV would result in recount chaos, which would prolong the resolution of a presidential election.<sup>189</sup> Also, only big urban centers would matter, candidates would campaign only in media markets, and campaign spending would skyrocket.<sup>190</sup> These are all worthy concerns, and as of now, unknowns.

While there is no precedent allowing for either Congress or the Supreme Court to invalidate the NPV through policy considerations, policy arguments certainly have a role in influencing state legislators who may have to vote for or against the NPV. Assuming that some of these problems would really manifest themselves, they then become logistical concerns that should be weighed against policy rationale in support of the NPV. There is one over-arching policy rationale in favor of the NPV—equal protection, which is discussed next.<sup>191</sup>

C. *Equal Protection Is in All Instances but One a Legal Argument, and Thus a Strong Policy Argument*

There is one and only one caveat to the specific plenary power reserved for the states in Article II, section 1, regarding elections, a limitation which has been described by the Court in the following way:

“When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.” The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the

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<sup>185</sup> *Id.* at 381.

<sup>186</sup> Broder, *supra* note 87.

<sup>187</sup> *See generally* U.S. CONST. (stating nowhere the constitutional requirement of a two-party system).

<sup>188</sup> *See infra* text accompanying notes 189–90 (discussing the same).

<sup>189</sup> Williams, *supra* note 180.

<sup>190</sup> *Id.*

<sup>191</sup> *See infra* Part III.C (discussing the same).

Fifteenth, Seventeenth, and Nineteenth Amendments  
can mean only one thing – one person, one vote.<sup>192</sup>

In the instance of voting, federally protected rights have been almost exclusively concerned with equal protection.<sup>193</sup> The only constitutional duty owed by a state legislature when designating the people as its agent to choose its presidential electors is that of extending equal protection to those voters of its own state.<sup>194</sup>

To say that equal protection is the only constitutional duty a state has when implementing popular voting procedures is also to say that equal protection is extremely important in our modern understanding of representative democracy – it is the only exception to state power in this arena.<sup>195</sup> The equal protection now currently afforded voters has not always existed.<sup>196</sup> Time and forces have changed our understanding of

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<sup>192</sup> Gray v. Sanders, 372 U.S. 368, 381 (1963) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

<sup>193</sup> See *Introduction to Federal Voting Rights Laws*, U.S. DEP'T JUSTICE: C.R. DIVISION, <http://www.justice.gov/crt/voting/intro/intro.php> (last visited Dec. 23, 2010). Other laws enforced address voter registration when citizens obtain drivers licenses, voter registration for overseas citizens, and minimum standards for voting. *The Statutes We Enforce*, UNITED STATES DEP'T JUSTICE, C.R. DIVISION, <http://www.justice.gov/crt/voting/overview.php> (last visited Dec. 23, 2010). The Federal Election Commission handles campaign finance laws. *Administering and Enforcing Campaign Finance Laws*, FED. ELECTION COMMISSION, <http://www.fec.gov/> (last visited Dec. 23, 2010).

<sup>194</sup> Bush v. Gore, 531 U.S. 98, 104–05 (2000). Also included in equal protection, i.e. non-discrimination, is the freedom of association for minority parties, a right guaranteed under the First Amendment. See King v. Willis, 333 F. Supp. 670, 675 (D. Del. 1971) (articulating that the right to vote can be burdened by undue burdens being placed upon political parties seeking to register presidential elector candidates); see also *supra* text accompanying notes 68–71 (highlighting the importance of equal protection in presidential elections).

<sup>195</sup> See *supra* notes 68–71 and accompanying text (articulating the same).

<sup>196</sup> See *supra* notes 70–71 (listing amendments that guarantee equal protection, which had theretofore been unprotected). Voting at the time of the revolution was determined by property ownership; each state had different requirements for how much value/net yield the land was required to have. PEIRCE, *supra* note 2, at 37. Some states required a certain amount of taxes to be paid. *Id.* Vermont was the first state to allow all adult males to vote in 1791 – some time before the Constitution mandated such with passage of the Fifteenth Amendment in 1870. *Id.* Meanwhile, all adult women could vote in Wyoming as early as 1869 – sixty-one years before passage of the Nineteenth Amendment. *State Suffrage Laws*, LAW LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/awhhtml/awlaw3/suffrage.html> (last visited Dec. 23, 2010) (providing a .jpg version of “An Act to Grant the Women of Wyoming Territory the Right of Suffrage, and to Hold Office,” which was approved on December 10, 1869). States, having the power to choose qualifications for the franchise in state elections, were also given the same power in choosing qualifications for those who would vote for House Representatives. PEIRCE, *supra* note 2, at 38. So, for example, all adult males in Vermont would vote for Representatives in the House (the state legislator chose the state’s Senators), while only males owning property would vote for Representatives from Virginia. *Id.*

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equality and the franchise so that the Court can conclude that “the philosophy behind the electoral college . . . belongs to a bygone day.”<sup>197</sup> The effective result is that the Electoral College is an exception to the exception, a caveat to the caveat; the Court will not hear equal protection challenges to the Electoral College from individuals or small states or anybody.<sup>198</sup> This is because the fundamental principle of equal

<sup>197</sup> *Gray*, 372 U.S. at 379 n.8.

<sup>198</sup> See e.g., *New v. Pelosi*, No. 08 Civ. 9055(AKH), 2008 WL 4755414 (S.D.N.Y. Oct. 29, 2008) (dismissing summarily plaintiff’s civil rights 42 U.S.C. § 1983 claim that the Electoral College diluted the votes of citizens of big states and the votes of women). The pro se plaintiff presented a sophisticated argument as conceded by the court’s opinion:

Plaintiff argues that the electoral college process created by Article II, Section 1 and the Twelfth Amendment to the Constitution favors states with smaller populations by granting to their citizens greater influence, per electoral vote, on the outcome of presidential elections than it grants to citizens of larger states. For example, by dividing South Dakota’s number of electoral votes (3) by its 2000 census population (rounded to 755,000), Plaintiff asserts that a South Dakotan’s vote has a “value” of 0.0000039, while a New Yorker’s vote, by similar calculation, has a “value” of 0.0000017. Plaintiff then groups the states into three regions (“Northern/Western liberal/moderate states,” “Farm/Great Plains states,” and “Southern conservative states”), calculates the average “value” of votes cast in each region, and concludes that the two more politically conservative regions wield a “leveraged advantage” in voting power over the “Northern/Western liberal/moderate states.” Plaintiff argues that the electoral college, by creating this advantage, violates the Thirteenth and Fifteenth Amendments because it derives from a constitutional bargain to benefit Southern, slaveholding states. Plaintiff further argues that the electoral college violates the Nineteenth Amendment because, in penalizing states that tend to vote for Democratic candidates, it disfavors the voting power of women, who tend to vote Democratic. Plaintiff seeks injunctive relief in the form of an order that restrains the Congress from counting electoral college votes pursuant to 3 U.S.C. § 1 *et seq.* and instead mandates a national popular vote. Because all of Plaintiff’s claims rest on the existence and effects of mathematical vote dilution, I interpret the complaint to allege that the electoral college violates the “one person, one vote” principle of the Fourteenth Amendment . . . .

*Id.*

In 1966, in *Delaware v. New York*, twelve small states brought a suit against the other thirty-seven states claiming that the winner-take-all method violated the Equal Protection clause. Motion for Leave to File Complaint, Complaint and Brief, ¶ XX 385 U.S. 895 (1966) (No. 28, Original), 1966 WL 100407. The attorney general for Delaware made sophisticated arguments, two of which were contained in paragraphs six and seven of the complaint:

6. In its actual functioning the state unit system of electing the President and Vice President is part of an integrated national process. The interlocking and interdependent features of this national electoral system cause each state’s methods to be affected by all others and give each state and its citizens a real interest in the electoral methods of

protection under the Fourteenth Amendment, through which the Court has extended protection, does not give the Court power to strike out any other part of the Constitution, including Article II, section 1.<sup>199</sup>

If the NPV were successfully challenged in the Supreme Court under the Compact Clause and if Congress chose not to give its consent, this would put state legislatures that adopt the NPV in a unique position; these states would be constitutionally mandated to implement one person, one vote for all local elections while simultaneously being prohibited from individually deciding to act in unison to embrace one person, one vote.<sup>200</sup> This is a paradox ultimately antithetical to the spirit of the Constitution. The majority of amendments to the Post Bill of Rights Constitution were enacted by the impetus of equal protection.<sup>201</sup> Courts have correctly foreclosed equal protection challenges by individuals regarding the presidential vote.<sup>202</sup> And yet by requiring congressional approval for the NPV, the spirit of equality so prevalent in the Constitution would fall prey to the gravity of a legal void where

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every state. Each state's electoral votes and each individual's popular vote are subject to impairment, debasement, and dilution by the methods and procedures of other states.

7. In every election the state unit system abridges the political rights of substantial numbers of persons by arbitrarily awarding all of the electoral votes of their state to the candidate receiving a bare plurality of its popular votes. This occurs without regard to the number of votes cast for an opponent. 435 of the total of 538 electoral votes correspond to Representatives and are allocated to states because of their numbers of persons. Nonetheless, the state unit system frequently allows all of a state's votes to be cast for a candidate opposed by as many as 49% of its voters. Votes cast for the losing candidate within a particular state are not only discarded at an intermediate stage of the elective process but are effectively treated as if they had been cast for an opponent. The barest popular vote plurality and the overwhelming landslide are converted alike into a unanimous state vote in the national election. This arbitrary misappropriation of the elective power of substantial political minorities denies them due process of law and equal protection of the laws in violation of the Fourteenth Amendment.

*Id.* at \*7-8.

<sup>199</sup> See *New*, 2008 WL 4755414 at \*1 (summarily dismissing plaintiff's complaint based upon Fourteenth Amendment claim that the electoral college violated plaintiff's equal protection rights).

<sup>200</sup> See *supra* notes 161-65 and accompanying text (discussing the same).

<sup>201</sup> See *supra* notes 70-71 (listing the Amendments that relate to equal protection and the right to vote).

<sup>202</sup> See, e.g., *New*, 2008 WL 4755414 (summarily dismissing plaintiff's complaint based upon the Fourteenth Amendment claim that the electoral college violated plaintiff's equal protection rights).



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nothing short of a constitutional amendment would permit states to fully implement equal protection.<sup>203</sup>

Allowing only one avenue – the constitutional amendment process – for full implementation of one person, one vote is a constraint on the sovereignty of individual states.<sup>204</sup> Equal protection is in all cases but this one a legal argument; here it is a policy argument. But, considering the legal force equal protection has in all other franchise realms and that equal protection is only foreclosed by Article II and nothing else, it is a very strong policy argument in favor of allowing states to enact the NPV.<sup>205</sup> Poignantly, representative democracy is severely discredited when state legislators are no longer accountable to their constituents.<sup>206</sup> In this situation, the federal government would transgress its constitutional confines by infringing on state sovereignty all the while acting to contravene the premise that all men and women are born equal.<sup>207</sup>

Not all arguments against the NPV are policy arguments.<sup>208</sup> One argument, the challenge of the Compact Clause, is explicitly constitutional; another argument implicates the overall nature of the Constitution by claiming that the NPV threatens the federalism inherent therein.<sup>209</sup> There have never been interstate agreements involving the Electoral College, nor has the Compact Clause ever been applied to issues involving this Article II power.<sup>210</sup> Thus, the NPV and a challenge to it via the Compact Clause would be unprecedented in Supreme Court

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<sup>203</sup> See Broder, *supra* note 87 (arguing that the NPV is an end run around the constitutional amendment process). It logically follows that if the NPV is held to be unconstitutional, there are no other means of fully implementing one person, one vote outside the amendment process.

<sup>204</sup> *Cf.* *New York v. United States*, 505 U.S. 144, 168 (1992) (iterating that when the federal government compels states to regulate, the accountability of elected state representatives is diminished).

<sup>205</sup> U.S. CONST. art. II, § 2; *c.f.* *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (holding that the superficial resemblance between state apportionment plans and the legislative representation scheme of the Federal Congress affords no proper basis for sustaining that plan, since the historical circumstances which gave rise to the congressional system of representation, arising out of compromise among sovereign States, are unique and without relevance to the allocation of seats in state legislatures).

<sup>206</sup> See, e.g., *New York*, 505 U.S. at 168 (arguing the same).

<sup>207</sup> *Cf. id.*; *Reynolds*, 377 U.S. at 587 (holding that weighting votes differently according to where citizens happen to reside is discriminatory).

<sup>208</sup> E.g., Muller, *supra* note 90 (discussing the Compact Clause).

<sup>209</sup> See Broder, *supra* note 87 (arguing that the NPV ignores the fundamental characteristics of American government: federalism and the two party system); Muller, *supra* note 90 (concluding that the NPV violates the Compact Clause). One author posits that the Guarantee Clause actually guarantees a federally elected President. Feeley, *supra* note 108, at 1428.

<sup>210</sup> *Supra* text accompanying notes 99–101.

history.<sup>211</sup> The next Part of this Note addresses how these two constitutional clauses, potentially colliding for the first time, measure up to each other.

*D. The Compact Clause v. Article II*

In one corner, there is the Article II plenary power of the states establishing the Electoral College.<sup>212</sup> This constitutional provision is limited by the principle of equal protection, but only for locally held popular elections.<sup>213</sup> The states are not required to hold popular elections for presidential electors.<sup>214</sup> The states can designate any method for determining who its presidential electors will be.<sup>215</sup> No state has ever designated the American people at large to choose its presidential electors, but there is no Supreme Court precedent prohibiting states from deciding to choose the American people at large for this constitutionally mandated task.<sup>216</sup>

In the other corner, there is the Compact Clause.<sup>217</sup> Under current Compact Clause jurisprudence, the Court looks primarily to actual, not possible, encroachment on federal sovereignty by compacting states.<sup>218</sup> The Court has also said that non-compacting states may suffer detrimental secondary effects without the Compact Clause necessarily being violated.<sup>219</sup> As Compact Clause jurisprudence now stands, it seems likely that the NPV would be held constitutional in spite of any Compact Clause challenge because the NPV does not encroach on the power of the federal government.<sup>220</sup>

If the Court decided to apply a horizontal analysis to determine whether the NPV infringes upon the sovereignty of non-compacting states, it would likely find that non-compacting states still retain the

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<sup>211</sup> See *supra* note 101 (logically stipulating that in the absence of prior compacts regarding elections, a Compact Clause challenge to NPV would be an issue of first impression for the Court).

<sup>212</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>213</sup> See *supra* Part III.C (exploring the principle of equal protection as it applies to the Article II plenary power of the states).

<sup>214</sup> See *supra* Part III.A (discussing the flexibility state legislatures have in deciding how to choose presidential electors).

<sup>215</sup> See *supra* Part III.A (describing the broad power possessed by the state legislature).

<sup>216</sup> See *supra* Part III.A (noting the broad authority state legislatures maintain over selecting presidential electors).

<sup>217</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>218</sup> *Supra* text accompanying note 96.

<sup>219</sup> *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 477 (1978).

<sup>220</sup> See U.S. CONST. art. II, § 1, par. 2 (giving to state legislatures the power to choose presidential electors).

ability to choose presidential electors in whichever manner they desire.<sup>221</sup> That these non-compacting states might suffer secondary effects would not necessarily suffice to invalidate the NPV.<sup>222</sup> The Constitution guarantees to the states the power to choose presidential electors, but it does not guarantee that a state's presidential electors will have their candidate elected President.<sup>223</sup>

Regardless of this initial analysis, Congress could attempt to interfere by passing a resolution against the NPV, or a state could ask the Court to invalidate the NPV under a modified Compact Clause jurisprudence because there is no congressional consent.<sup>224</sup> Congress or the Court might determine that the secondary effects bearing on non-compacting states are egregious enough to seriously consider a Compact

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<sup>221</sup> See *supra* Part II.B (discussing the NPV which is not legislation requiring action of non-compacting states).

<sup>222</sup> *Supra* text accompanying note 103. Even a horizontal analysis that looks to how such an agreement affects non-member states could not pass muster. See *U.S. Steel Corp.*, 434 U.S. at 477 (stating that the risk of unfairness is independent of the nature and legitimacy of the compact in question). Non-member state presidential electors who cast their votes contrary to the national popular vote would merely be in the minority, but that does not mean their votes would not be counted; it only means that they would lose. See *Hendricks*, *supra* note 90, at 226. State legislatures do not need the NPV to choose the national popular vote as the method for appointing presidential electors; the NPV does not give states a power they do not already have, it only provides a litmus test by which to gauge when a state can appoint presidential electors without potentially nullifying any or all of its political clout. See U.S. CONST. art. II, § 1, cl. 2 (giving to states the power to appoint presidential electors). That there is pressure upon non-member states is decisive of nothing when it comes to a constitutional analysis. *Hendricks*, *supra* note 90, at 224; *c.f.* *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 478 (1978). The Supreme Court stated the following:

Moreover, it is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States. Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, it is not clear how our federal structure is implicated. Appellants do not argue that an individual State's decision to apportion nonbusiness income—or to define business income broadly, as the regulations of the Commission actually do—touches upon constitutional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission's recommendation.

*Id.* (citation omitted). Thus, it follows that unless the pressure on non-member states transgresses some other constitutional bounds, there is no cause of action.

<sup>223</sup> See U.S. CONST. art. II, § 1 cl. 2 (giving state legislatures the power to choose presidential electors).

<sup>224</sup> *Schleifer*, *supra* note 90, at 749. The NPV could be the straw that breaks the camel's back, the camel being current Compact Clause jurisprudence. *Id.*

Clause challenge.<sup>225</sup> Thus, if Compact Clause jurisprudence is revised, the Compact and Guarantee Clauses might appear more evenly matched.

It is certain that if Congress tried to interfere with state legislative adoption of the NPV, there would be a Tenth Amendment argument, as set out in *New York v. United States*, that Congress cannot compel states to legislate in a certain manner.<sup>226</sup> In *Gregory v. Ashcroft*, the Court had recourse to the Tenth Amendment.<sup>227</sup> The Tenth Amendment was also invoked in *New York v. United States* and again in *Printz v. United States*.<sup>228</sup> Many federalism cases, if not most, involve the Commerce Clause of the U.S. Constitution and the Fourteenth Amendment.<sup>229</sup> However, Tenth Amendment jurisprudence is both erratic and beyond the scope of this Note.<sup>230</sup>

While it is true that if the Court relied on the Tenth Amendment to find the NPV constitutional, there would be no need to look any further, nothing regarding the Tenth Amendment can be so certain.<sup>231</sup> If the Court were asked to invalidate the NPV and Congress had not moved to counteract the NPV legislation, then the Tenth Amendment would not be an applicable defense for states that have adopted NPV legislation.<sup>232</sup> This is so because there would have been no federal government intrusion into any state's legislative process or commandeering of any state's executive branch. This Note will leave a more sophisticated Tenth

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<sup>225</sup> *Id.*

<sup>226</sup> See Chemerinsky, *supra* note 115, at 877 (arguing that Congress would run into serious problems if it acted to command a state to adopt any certain legislation).

<sup>227</sup> 501 U.S. 452, 452 (1991).

<sup>228</sup> *New York v. United States*, 505 U.S. 144, 145 (1992); *Printz v. United States*, 521 U.S. 898, 935–36 (1997) (O'Connor, J., concurring).

<sup>229</sup> See *Gonzales v. Raich*, 545 U.S. 1, 1 (2005) (holding that provisions of the Controlled Substances Act, which criminalized the manufacture, distribution, or possession of marijuana for interstate growers and users of marijuana for medical purposes, does not violate the Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that 42 U.S.C. § 13981—a federal civil remedy for victims of gender related violence—cannot stand under either the Commerce Clause or section five of the Fourteenth Amendment); *New York*, 505 U.S. at 185–86 (holding that the Commerce Clause precluded a Guarantee Clause claim).

<sup>230</sup> See PRINCIPLES, *supra* note 136, at 312–26 (recounting the history of Tenth Amendment jurisprudence). The Court has taken two approaches to Tenth Amendment jurisprudence that are inconsistent. *Id.* at 313.

<sup>231</sup> See *id.* at 326 (“[I]t will take many years and further decisions for the Supreme Court to clarify the content of the new federalism which has emerged in the past decade.”).

<sup>232</sup> See *id.* (noting that current Tenth Amendment jurisprudence may allow congressional prohibitions on state conduct so long as Congress does not affirmatively mandate state action).

Amendment analysis for another writer, and instead turn to Article IV's guarantee of republican government.<sup>233</sup>

Assuming, once again, the juxtaposition of two evenly matched constitutional provisions—Article II, which establishes the Electoral College, and the Compact Clause—this Note contends that the Guarantee Clause should be the determinative factor, thus ensuring the constitutionality of the NPV.<sup>234</sup> In recent years the Court has flirted with the Guarantee Clause by invoking its name in several cases concerning federalism, but the Court's fidelity to the Tenth Amendment has prevented the Court from relying on the Guarantee Clause in any of its holdings.<sup>235</sup> What exactly would an argument in defense of the constitutionality of the NPV pursuant to the Guarantee Clause look like if presented before the Supreme Court? The following Contribution outlines such an argument.

#### IV. CONTRIBUTION

The Guarantee Clause has not been employed by the Supreme Court in nearly one hundred years. Thus, it is expected that the Court would approach use of the Guarantee Clause with trepidation. This Part seeks to allay such fears. The Contribution posits that the Guarantee Clause is perfectly applicable to the exceptionally unique legal circumstances presented by a Compact Clause challenge to states enacting the NPV pursuant to their Article II powers. In concluding that the Guarantee Clause should be implicated in a constitutional challenge to state legislative adoption of the NPV, the Contribution will evoke the clause's highly relevant historical narrative as a foundation.<sup>236</sup> Next, the Contribution will offer a policy argument in favor of applying the Guarantee Clause in the unique situation explored by this Note pitting Article II against the Compact Clause.<sup>237</sup> Finally, this Part will conclude

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<sup>233</sup> See *infra* Part V.

<sup>234</sup> See *infra* Part V.

<sup>235</sup> See *New York v. United States*, 505 U.S. 144, 183–84 (1992) (stating that because a provision in question was invalidated under the Tenth Amendment, there was no need for the Court to evaluate the same provision in light of the Guarantee Clause); *Gregory v. Ashcroft*, 501 U.S. 452, 461–63 (1991) (discussing the importance for states to determine the qualifications of their government officials underneath both the Tenth Amendment and the Guarantee Clause); see also *Bush v. Gore*, 531 U.S. 98, 141 (2000) (Ginsberg, J. dissenting) (“In light of the constitutional guarantee to States of a ‘Republican Form of Government,’ U.S. Const. Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State’s republican regime.”).

<sup>236</sup> See *infra* Part IV.A.

<sup>237</sup> See *infra* Part IV.B.

with the legal argument in support of activating this clause, which has been inactive for almost a century.<sup>238</sup>

*A. Important Historical Considerations for the Guarantee Clause*

The Guarantee Clause has been called a “sleeping giant,” but the import of the clause was very much awake with meaning over two hundred years ago.<sup>239</sup> The view that the Guarantee Clause protects states from undue interference by Congress is embodied in the ratification of the National Constitution. James Madison remarked that the drafters of the Constitution created a draft that was “nothing but a dead letter” until the state ratification conventions breathed life and validity into it.<sup>240</sup> In the state ratification conventions, concerns about growing federal power leading to only nominally sovereign states were placated by explicit reference to the Guarantee Clause.<sup>241</sup>

When this giant was put to sleep, it was for practical and very circumstantial, if not far-sighted, reasons and has remained asleep because, like any good giant, it is powerful.<sup>242</sup> Justice Taney’s 1849 opinion in *Luther* has influenced Guarantee Clause jurisprudence to this day, thus imbuing some importance into the extra-legal factors framing his decision.<sup>243</sup> Practical considerations shaped his opinion more than “immutable principles embedded in the Constitution[;]” specifically, if Justice Taney had ruled otherwise, seven years of government activity would have been completely nullified.<sup>244</sup>

*B. Policy Rationale for Use of the Guarantee Clause in This Unique Situation*

As a sleeping giant, the Guarantee Clause should not be stirred recklessly. However, utilizing the Guarantee Clause to reinforce that

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<sup>238</sup> See *infra* Part IV.C.

<sup>239</sup> WIECEK, *supra* note 12, at 290 (quoting Charles Sumner); see *supra* note 108 (outlining the various causes that have elicited legal support from the Guarantee Clause).

<sup>240</sup> RAKOVE, *supra* note 20, at 17.

<sup>241</sup> See *supra* notes 120–24 and accompanying text (discussing concerns by the states about growing federal power).

<sup>242</sup> WIECEK, *supra* note 12, at 295; see also Feeley, *supra* note 108, at 1436 (listing a variety of causes for which the Guarantee Clause has been invoked).

<sup>243</sup> See WIECEK, *supra* note 12, at 118 (stating that Justice Taney’s rationale has continuing pertinence).

<sup>244</sup> *Id.* at 120. Taney’s opinion also considered the Domestic Violence clause and the 1792 Militia Act—an exercise of legislative power—which had given power to the President when facing rebellions. *Id.* at 85. Rebellions in 1798, 1832, and 1838 handled by the Domestic Violence Act (as articulated through the 1792 Militia Act) gave credence to Taney’s use of the Guarantee Clause as derivative of the need to maintain peace and tranquility. *Id.*; see also Merritt, *supra* note 108, at 79 (recounting the facts of *Luther v. Borden*, 48 U.S. 1 (1849)).

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which was given exclusively to the states does not open a Pandora's box. No interstate compact has ever dealt with election law and few compacts as provocative are visible on the horizon. There are no floodgates to open by use of the Clause in these circumstances.

While the Court in *Luther v. Borden* understood "United States" to mean "Congress" in striking down a Guarantee Clause challenge so that Congress was charged with guaranteeing to states a republican government, this is not the same as the contemporary understanding of "United States."<sup>245</sup> The "United States" denotes the three co-equal branches of government.<sup>246</sup> One interpretation of the Guarantee Clause provides that it prevents most federal intervention in a state's affairs.<sup>247</sup> This interpretation works only if the "United States" is thought of as three co-equal branches balancing and checking each other.<sup>248</sup> Thus, if Congress overreached by interfering with the federal scheme—if Congress decided to commandeer state officials or attempted to control state legislation so as to determine how that state could choose its electors, for example a presidential elector—the United States through the Supreme Court would be charged with protecting the state's fundamental republican nature.<sup>249</sup> If Congress were to successfully interfere, then state legislators would no longer be responsive to their constituents as required in republican government, but instead to an outside agency: the federal government.<sup>250</sup>

Further, even a narrower approach to the Guarantee Clause, one that sees it as merely concerned with monarchy and aristocracy, would still be implicated by congressional interference with state NPV legislation. This is because in a monarchy

citizens do not get to choose their rulers, power is fixed and inherited; in a republican form of government, the people ultimately retain sovereignty and choose their officeholders. In other words, the key features of a

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<sup>245</sup> WIECEK, *supra* note 12, at 301.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 294.

<sup>248</sup> *Id.* at 301.

<sup>249</sup> *C.f.* *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that under the Tenth Amendment, the federal government cannot take control of a state's chief enforcement officers); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress cannot legislate for state legislatures).

<sup>250</sup> *See* Merritt, *supra* note 108, at 41 (explicating that in republican government, states have control over their internal governmental machinery).

republican form of government are a right to vote and a right to political participation.<sup>251</sup>

It could be argued that the two chief political parties in the United States have hereditary powers and a stranglehold on the entire political process, but nowhere in the National Constitution is there a mandate for a two-party political system.<sup>252</sup> The only caveat to the otherwise absolute plenary power states have regarding holding popular elections—equal protection in the political process, as mandated by the Fourteenth Amendment and subsequent amendments—is perfectly in line with the notion that the Guarantee Clause is primarily about the right of the individual to political participation.<sup>253</sup> It is not states qua states that are protected from congressional overreach, but the living, breathing people residing in the states.<sup>254</sup> Deborah Jones Merritt quips that “the citizens of a state cannot operate a republican government, ‘choos[ing] their own officials’ and ‘enact[ing] their own laws,’ if their government is beholden to Washington.”<sup>255</sup> For the Court not to rule would mean that Congress or the President is left to enforce and/or interpret the Guarantee Clause. However, the “members of Congress [may] have a direct personal interest implicated.”<sup>256</sup>

It is viable to consider that just as policy considerations carry little weight regarding a state’s plenary power to appoint under Article II, there is little room for policy considerations about the Guarantee Clause’s protection of the independence of state governments. As Merritt has noted, “[t]he only ‘policy determination’ demanded . . . is that states should maintain a ‘separate and independent existence.’ That policy decision, however, has already been made by the Constitution.”<sup>257</sup>

### C. *The Legal Argument for Use of the Guarantee Clause*

By utilizing Justice O’Connor’s criteria for the Guarantee Clause, announced in *New York v. United States*, application of the clause to the conflict between Article II and the Compact Clause will not

<sup>251</sup> Chemerinsky, *supra* note 115, at 868 (footnote omitted).

<sup>252</sup> See generally U.S. CONST. (indicating nowhere the requirement of a two-party system).

<sup>253</sup> Chemerinsky, *supra* note 115, at 868.

<sup>254</sup> See U.S. CONST. pmbl. (“We the people . . .”); see also WIECEK, *supra* note 12, at 301 (“Most Americans no longer consider the states to be anthropomorphic entities capable of having rights or enjoying the benefits of the guarantee [of a republican form of government].”).

<sup>255</sup> Merritt, *supra* note 108, at 25 (quoting in part from THE FEDERALIST NO. 39 (James Madison)).

<sup>256</sup> Chemerinsky, *supra* note 115, at 876.

<sup>257</sup> Merritt, *supra* note 108, at 76.



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unnecessarily extend the scope of the clause into dangerous territory. Her two-part conjunctive test posited that the federal government violates the Guarantee Clause if states lose their ability to set their legislative agendas and if state government officials can no longer remain accountable to the local electorate.<sup>258</sup>

Any interference in a state legislative process by the federal government is potentially a violation of a state's sovereignty and the principle of federalism itself, unless the federal government is carrying out a constitutionally specified task.<sup>259</sup> The very ideal of federalism is protected by the plenary power given states in Article II.<sup>260</sup> This is because Article II is a part of the constitutional scheme, whereby states are assured a role in the selection of the executive branch and they are insured against Congress overreaching when states exercise their role in the election of the executive and the legislative branches of the federal government.<sup>261</sup> The Court can reinforce this principle by affirming that states have control over local elections, a key aspect of republican government, and that constitutionally, popular elections for presidential electors are local elections.<sup>262</sup>

Presidential electors are agents of the states, not of the federal government.<sup>263</sup> They are officers in fifty distinct representative democracies—in republics. Control over state representatives is an essential component of state sovereignty and republican government.<sup>264</sup>

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<sup>258</sup> *New York v. United States*, 505 U.S. 144, 185–86 (1991).

<sup>259</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549–50 (1985). In this case, the Court adopted the view that “the political process gives the states their primary protection against destructive federal intrusions.” *Merritt*, *supra* note 108, at 1.

<sup>260</sup> *Merritt*, *supra* note 108, at 1.

<sup>261</sup> *Id.* at 14–15. States were given indirect influence over elections for the House. *Id.* There is nothing indirect about their power over presidential elections. U.S. CONST. art. II, § 1, par. 3.

<sup>262</sup> *See Merritt*, *supra* note 108, at 38 (arguing that state control over local elections is intrinsic to republican government).

<sup>263</sup> *Supra* text accompanying note 22.

<sup>264</sup> *Merritt*, *supra* note 108, at 36. Poignantly,

[c]ontrol over the franchise is a hallmark of republican government. Montesquieu observed that “it is as important to regulate in a republic, in what manner, by whom, to whom, and concerning what suffrages are to be given, as it is in a monarchy to know who is the prince, and after what manner he ought to govern.” James Madison echoed this thought, declaring in *The Federalist* that “[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government.” In order to establish a government responsive to its electorate, a state must first define that electorate. The power to define the franchise for a state and local elections, therefore, is one of the powers that the guarantee clause originally reserved to the states.

*Id.* (footnotes omitted).

The Court has shown extra deference in approaching state authority over officers and legislatures.<sup>265</sup> Congress cannot legislate for states or take command of state officers, two components over which control is necessary for a state exercising its Article II power. Explicitly, the Court has said:

Just as “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,” [e]ach State has the power to prescribe the qualifications of its officers and *the manner in which they shall be chosen*. . . . [O]fficers who participate directly in the . . . execution . . . of broad public policy perform functions that go to the heart of *representative government*.<sup>266</sup>

As in *Coyle v. Smith*, a claim based on a congressionally imposed limitation upon the power of the state should be actionable under the Guarantee Clause.<sup>267</sup> If a state loses its ability to set its legislative agenda, including adopting principles of equal protection when its citizens act in concert with citizens from other states to elect the President, and if a state’s government officials can no longer remain accountable to the local electorate (i.e., if state representatives are impotent to execute the laws passed), and if this situation arises from interference by the federal government, then there would be a violation of the Guarantee Clause.<sup>268</sup> More succinctly stated, a congressional

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<sup>265</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot utilize state officers for its own purposes); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that federal legislation cannot be used to commandeer the state legislative process).

<sup>266</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (emphasis added) (citations omitted); see also *Merritt*, *supra* note 108, at 50. “It is obviously essential to the independence of the states . . . that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.” *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900). The Guarantee Clause does not protect states from federal infringement in determining qualifications for all local officials, or even most state employees. See *Merritt*, *supra* note 108, at 52 (distinguishing a small number of state employees that promote the ends of republican government).

<sup>267</sup> See 221 U.S. 559, 568 (1911) (holding that Congress could not restrict Oklahoma’s placement of its capitol).

<sup>268</sup> See *Merritt*, *supra* note 108, at 23 (arguing that the Guarantee Clause protects states from federal government interference); see also *Chemerinsky*, *supra* note 115, at 868 (arguing that the Guarantee Clause protects individual liberties). If *Merritt*’s proposition that the Guarantee Clause protects states from the Federal Government is true and if states attempt to extend a policy of equal protection via the NPV, would individuals then have justiciable

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challenge to the NPV would implicate the Guarantee Clause because Article II is power reserved for the states that cuts to the heart of republican government.

## V. CONCLUSION

It has been written by one of its detractors that the National Popular Vote is intended to revolutionize the Electoral College.<sup>269</sup> But consider that “[Thomas] Jefferson said every generation needs its own revolution.”<sup>270</sup> Revolution need not mean a bloody overthrow of one’s government. “Revolution” can mean “a very important change in the way that people do things.”<sup>271</sup> Change can occur within a constitutional framework. See, for example, the Eleventh through Twenty-Seventh Amendments to the U.S. Constitution. Change within a constitutional framework does not require the amendment process, as demonstrated by *Marbury v. Madison*, *Shelley v. Kraemer*, *Brown v. Board of Education*, the Clean Air Act Amendments of 1990, or President Lincoln’s Emancipation Proclamation.<sup>272</sup> What the author is contemplating here is Democracy as an ongoing experiment, an experiment that requires education, measured assessment, and a generation making its constitution its own within the flexible framework offered to posterity by the Framers of the Constitution. Strikingly, no revolution is needed in order for the NPV to take effect because it operates completely within the framework of the Constitution. It is not the Constitution that would bar the NPV. There are no originalist arguments or policy arguments strong enough to prevent Article II from working in unison with the Constitution’s guarantee of a republican form of government. Only a blind adherence to custom, fear, or the ill-intentioned self-interest of political incumbents and their affiliates could stop the NPV once and if enough states have ratified it. The result of finding the NPV unconstitutional would be a pair of absurdities: first, state legislatures would be barred from fully embracing the ideal of equal protection in choosing their electors; and second, the only way to protect state sovereignty in the federal system

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individual liberty claims against the federal government under Chemerinsky’s conception of the Guarantee Clause?

<sup>269</sup> Pincus, *supra* note 75, at 512.

<sup>270</sup> David Lawsky, *History Lessons: Would Federalists Like Their Fans?*, N.Y. TIMES, Feb. 12, 1995, at 43 (quoting Newt Gingrich).

<sup>271</sup> *Cambridge Advanced Learner’s Dictionary*, CAMBRIDGE: DICTIONARIES ONLINE, [http://dictionary.cambridge.org/dictionary/british/revolution\\_2](http://dictionary.cambridge.org/dictionary/british/revolution_2) (last visited Oct. 23, 2010).

<sup>272</sup> For more creative changes within the U.S. constitutional framework, see Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 WHITTIER L. REV. 119 (2008).

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would be for Congress to legislate for states by mandating that they cannot embrace equal protection. With the NPV and the guarantee of state republics, the fiction of a leader of the free people could be made a reality.

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