

The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact

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The National Popular Vote Compact requires member states to appoint their presidential electors based on the outcome of the national popular vote in presidential elections. It enters into force when states holding a total of 270 electoral votes adopt it. The Compact has already progressed more than two-thirds of the way toward that goal. If it becomes effective, the Compact will fundamentally change the nature of presidential elections, without a constitutional amendment.

The Compact suffers from numerous constitutional flaws that have not been addressed in the literature. By requiring member states to appoint presidential electors based on national vote tallies, the Compact violates the right to vote of those states' citizens. Votes cast by a member state's eligible voters are unconstitutionally diluted or even overwhelmed by votes of other states' citizens, who are ineligible to vote in that member state's elections under its state constitution. The Compact also violates the Equal Protection Clause as applied in Bush v. Gore. It requires all votes cast throughout the nation in the presidential election to be tallied together, even though they were cast under fifty-one different electoral systems, with materially differing voter qualification standards, opportunities for casting ballots, voter identification requirements, rules for counting and recounting ballots, and even policies on whether ranked-choice voting is permitted.

The Compact also violates the Constitution's implicit structural protections for federalism. It undermines the special protection that the Electoral College affords smaller states, allowing their citizens' voices to be overwhelmed by votes from states with large populations. More fundamentally, it enables a cabal of states to decide among themselves whom the President will be, rendering other states' electoral votes irrelevant. Finally, the Compact violates the Presidential Electors Clause by purporting to limit the inalienable plenary authority that the U.S. Constitution confers directly on state legislatures to determine the manner in which the state will choose its electors.

Even if the Compact were constitutionally valid, prudential and practical considerations counsel strongly against it. The Electoral College allows a presidential election to be resolved as a series of fifty-one discrete, independent contests, rather than a single national election involving over 136 million votes cast at thousands of locations. The Electoral College's compartmentalization makes the system manageable, confines the scope of recounts or post-election litigation, and limits the consequences of any natural disasters, mistakes, or even fraud that may occur. Due to the geographical breadth of our modern nation and size of our population, the ability to elect a national leader through dozens of smaller, limited elections has become a largely inadvertent gift from the Framers that we should not squander.

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INTRODUCTION

Over the past few years, the United States has moved closer to choosing the President based on the national popular vote in the presidential election. Sixteen states, collectively holding a total of 196 electoral votes, have voted to adopt an interstate compact called the “Agreement Among the States to Elect the President by National Popular Vote” (colloquially, the “National Popular Vote Compact” or “Compact”).¹ In 2019 alone, Colorado,² Dela-

¹ See CAL. ELEC. CODE § 6921 (West, Westlaw through ch. 9 of 2021 Reg. Sess.) (fifty-five electoral votes); COLO. REV. STAT. ANN. § 24-60-4002 (West, Westlaw through legis. effective Apr. 1, 2020 of 2020 Reg. Sess.) (nine electoral votes); CONN. GEN. STAT. ANN. § 9-175a (West, Westlaw through 2020 Reg. Sess.) (seven electoral votes); DEL. CODE ANN. tit. 15, § 4300A (West, Westlaw through ch. 7 of 151st Gen. Assemb. (2021-2022)) (three electoral votes); D.C. CODE ANN. § 1-1051.01 (West, Westlaw through Aug. 6, 2020) (three electoral votes); HAW. REV. STAT. ANN. § 14D-1 (West, Westlaw through 2020 Reg. Sess.) (4 electoral votes); 10 ILL. COMP. STAT. ANN. 20/5 (West, Westlaw through P.A. 101-629) (twenty electoral votes); MD. CODE ANN., ELEC. LAW § 8-5A-01 (West, Westlaw through chs. 1 to 11 from 2020 Reg. Sess. of Gen. Assemb.) (ten electoral votes); 2010 MASS. ACTS 933-34 (eleven electoral votes); N.J. STAT. ANN. § 19:36-4 (West, Westlaw through L.2019, ch. 518 and J.R. No. 33) (fourteen electoral votes); N.M. STAT. ANN. § 1-15-4 (West, Westlaw through ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020)) (five electoral votes); N.Y. ELEC. LAW § 12-402 (McKinney, Westlaw through L.2019, ch. 758 & L.2020, ch. 25) (twenty-nine electoral votes); 2019 OR. LAWS ch. 356 (seven electoral votes); R.I. GEN. LAWS § 17-4.2-1 (West, Westlaw through ch. 20-6 of 2020 2nd Reg. Sess.) (four electoral votes); VT. STAT. ANN. tit. 17, § 2751 (West, Westlaw through Acts 1 through 2 of Reg. Sess. of 2021-2022 Vt. Gen. Assemb. (2021)) (three electoral votes); WASH. REV. CODE ANN. § 29A.56.300 (West, Westlaw through 2020 Reg. Sess. of Wash. Leg.) (twelve electoral votes). Colorado held a statewide referendum in 2020 in which the voters reaffirmed the state’s approval of the Compact. See Colo. Sec’y of State, Official Results, Proposition 113 (Statutory), <https://results.enr.clarityelections.com/CO/105975/web.264614/#/detail/1126> [<https://perma.cc/CL8T-FW7A>]; see also John Aguilar, *Now that Prop 113 Has Passed, Colorado Waits for Other States to Join the National Popular Vote Movement*, DENVER POST (Nov. 3, 2020, 3:00 PM).

ware,³ New Mexico,⁴ and Oregon⁵ joined the Compact. That year, the Nevada legislature voted to adopt the measure, but the Governor vetoed the bill,⁶ it passed the Minnesota House of Representatives, but died in the state senate.⁷

The Compact does not enter into effect until states collectively holding 270 electoral votes have adopted it. This requirement ensures that member states are not required to potentially override their citizens' preferences in presidential elections until enough states have joined the agreement to guarantee that the national popular vote will determine the next President.⁸ Some surveys peg popular support for selecting the President based on the national popular vote as high as seventy percent.⁹

Numerous prominent legal scholars have endorsed the Compact in some form, including Bruce Ackerman,¹⁰ Vikram David Amar,¹¹ Akhil Reed Amar,¹² Robert W. Bennett,¹³ Lawrence Lessig,¹⁴ Sanford Levinson,¹⁵ and

Because the Twenty-Third Amendment effectively treats the District of Columbia as a state for purposes of the Electoral College, this Article will use the term "state" to include the District unless context dictates otherwise. See U.S. CONST. amend. XXIII, § 1.

² See S.B. 42, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (codified at COLO. REV. STAT. ANN. §§ 24-60-4001 to -4004 (West, Westlaw through legis. effective Apr. 1, 2020 of 2020 Reg. Sess.)); see also Aguilar, *supra* note 1 (discussing referendum that approved S.B. 42).

³ See S.B. 22, 150th Gen. Assemb., 1st Reg. Sess. (Del. 2019) (codified at DEL. CODE ANN. tit. 15, § 4300A (West, Westlaw through ch. 7 of 151st Gen. Assemb. (2021-2022))).

⁴ See H.B. 55, 54th Leg., 1st Reg. Sess. (N.M. 2019) (codified at N.M. STAT. ANN. § 1-15-4 (West, Westlaw through ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020))).

⁵ See S.B. 870, 80th Legis. Assemb., Reg. Sess. (Or. 2019) (codified at 2019 Or. Laws ch. 356).

⁶ See Assemb. B. 186, 80th Sess. (Nev. 2019); Letter from Steve Sisolak, Governor, Nev., to Jason Frierson, Speaker, Nev. State Assembly (May 30, 2019), http://gov.nv.gov/uploaded/Files/govnewnv.gov/Content/2019-05-30_AB186.pdf [<https://perma.cc/GEW8-SQJY>].

⁷ See S. File 2227, 91st Leg. (Minn. 2019); SF 2227, MINN. OFF. REVISOR STATUTES, <https://www.revisor.mn.gov/bills/bill.php?b=senate&f=SF2227&ssn=0&xy=2019> [<https://perma.cc/JNK5-SLG8>].

⁸ See James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87, 98 (2014).

⁹ See *Polls Show More Than 70% Support for a Nationwide Vote for President*, NAT'L POPULAR VOTE (July 22, 2019), <https://www.nationalpopularvote.com/polls> [<https://perma.cc/HZ59-J3TV>]; see also Jennifer Karr, Note, *Proportional Union or Paper Confederacy?*, 48 CONN. L. REV. 595, 628 (2015) ("In a survey taken seven years after the 2000 election, seventy-two percent of respondents said they would support abolishing the Electoral College in favor of a national popular vote.").

¹⁰ See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 136-37 (2010).

¹¹ See Vikram David Amar, *Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities*, 69 ARK. L. REV. 253, 262-65 (2016).

¹² See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 457 (2012); Akhil Reed Amar, *Electoral College Reform, Lincoln-Style*, 112 NW. U. L. REV. 63, 76-77 (2017) [hereinafter Amar, *Electoral College Reform*] (proposing Compact and alternative); Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 476-80 (2007) [hereinafter Amar, *Some Thoughts*] (same).

¹³ Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241 (2001).

¹⁴ LAWRENCE LESSIG, *THEY DON'T REPRESENT US: RECLAIMING OUR DEMOCRACY* (2019) (arguing that the Electoral College should be reformed).

Jack Balkin.¹⁶ John Koza's book *Every Vote Equal* presents a forceful and comprehensive case in favor of the Compact.¹⁷ The most thorough critical analysis in the scholarly literature¹⁸ appears in a debate between Professors

¹⁵ See Sanford Levinson & Jack Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 292 (2016) (“[S]tates can bargain around the Electoral College through an interstate compact ratified by Congress.”).

¹⁶ See *id.*

¹⁷ See generally JOHN KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (2006).

¹⁸ Some student pieces provide histories of the issue and varying normative perspectives. See, e.g., Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 229 (2007) (arguing that the Compact's benefits outweigh its costs); Rami Fakhouri, Comment, *The Most Dangerous Blot in Our Constitution: Retiring the Flawed Electoral College “Contingent Procedure,”* 104 NW. U. L. REV. 705, 730 (2010) (arguing for a variation of the Compact to require electors to cast their votes based on the national popular vote only when the electoral vote would otherwise be tied); Dennis A. Leinhardt, Jr., Note, *The Electoral College: An Analysis of Reform Proposals Through the Lens of Past Presidential Elections*, 61 WAYNE L. REV. 439, 447–53, 459–60 (2016) (contrasting the Compact with other potential election reforms and endorsing it). One particularly noteworthy piece, which *Shelby County v. Holder*, 570 U.S. 529 (2013), has subsequently partly undermined, is David Gringer, Note, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 219 (2008), which argues that the Compact violates Sections 2 and 5 of the Voting Rights Act; cf. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 941 (1996) (arguing that states' current winner-take-all systems, which allocate all of a state's presidential electors to whichever presidential candidate wins a statewide plurality, violates Section 2 of the Voting Rights Act). Another equally compelling piece, Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009), outlines a potential Guarantee Clause challenge to the Compact, which this piece briefly discusses below. See *infra* note 117.

A series of online essays, including a symposium in *Michigan Law Review First Impressions*, also examines various aspects of the issue. See, e.g., Alexander S. Belenky, *The Good, the Bad, and the Ugly: Three Proposals to Introduce the Nationwide Popular Vote in U.S. Presidential Elections*, 106 MICH. L. REV. FIRST IMPRESSIONS 110, 113–15 (2008) (critiquing the Compact); Thomas W. Hiltachk, *Reforming the Electoral College One State at a Time*, 106 MICH. L. REV. FIRST IMPRESSIONS 90 (2008) (defending the Electoral College); Daniel P. Rathbun, Comment, *Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118–19 (2008) (arguing that the Compact does not impose true majoritarian rule because states' votes in the Electoral College are not fully proportionate to their populations); see also Geoffrey Calderaro, *Promoting Democracy While Preserving Federalism: The Electoral College, the National Popular Vote, and the Federal District Popular Vote Allocation Alternative*, 82 MISS. L.J. SUPRA 287, 289 (2013) (arguing that states should allocate electoral votes by congressional district rather than adopting the Compact); Jillian Robbins, *Changing the System Without Changing the System: How the National Popular Vote Interstate Compact Would Leave Non-Compacting States Without a Leg to Stand On*, 2017 CARDOZO L. REV. DE NOVO 1, 21 (arguing that the Compact is constitutional and does not require congressional consent).

Some pieces also discuss the Compact briefly in the course of broader arguments. See, e.g., Jack M. Beerman, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 736–37 (2014) (questioning the constitutionality of the Compact); Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE W. RES. L. REV. 317, 382–83 (2017) (arguing that the Compact is one of several potential solutions to replace winner-take-all allocations of states' electoral votes); William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 667 n.249 (2009) (recommending a revised version of the Compact); James Sample, *The Electorate as More Than Afterthought*, 2015 U. CHI. LEGAL F. 383, 424 (supporting the Compact, along with many other measures, as a way of benefiting voters); Robert A. Sedler, *Our Eighteenth Century Constitu-*

Norman Williams¹⁹ and Vikram David Amar²⁰ in the *Georgetown Law Journal*. Professor Derek Muller has also written an insightful piece explaining how the Electoral College promotes what he calls “invisible federalism,” by protecting the prerogative of each state to determine its own voter qualifications without pressure to artificially enhance its share of control over presidential elections’ outcomes.²¹ Several recent articles concerning the validity of interstate compacts assess the Compact’s validity under their proposed frameworks.²²

This Article bolsters existing critiques of the Compact by identifying a range of constitutional flaws that have received scant attention in the academic literature and public debate. It also contends that one of the main benefits of the Electoral College is that it alleviates the need to calculate the national popular vote. Our current system allows us to conduct a presidential election as a series of fifty-one independent smaller contests, rather than a single nationwide event involving over 136 million participants. This approach limits the scope of any problems, emergencies, and post-election disputes, and makes it easier to reach an accurate outcome, bolstering the legitimacy of the process.

Part I begins by briefly explaining the current structure and operation of the Electoral College, as well as the major objections to it. This part then surveys the key provisions of the Compact, which supporters advocate as the most convenient means of circumventing the Electoral College.

Part II rebuts one common constitutional objection to the Compact, demonstrating that it is unlikely to require congressional consent under the

tion, the Electoral College, and Congressional Reapportionment: A Response to Professor Daniel Tokaji, 34 OHIO N.U. L. REV. 361, 366–69 (2008) (rejecting the Compact because our current method of electing the President is “an integral part of the American political system”); see also Jerry Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 988–90 (2016) (endorsing the Compact as a possible reform).

¹⁹ See Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011) [hereinafter, Williams, *Reforming the Electoral College*]; see also Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1526–27 (2012) [hereinafter, Williams, *National Vote Compact*] (arguing that the Compact violates the Presidential Electors Clause).

²⁰ See Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237 (2011). For a transcript of a written debate among other law professors concerning the issue, see Sanford Levinson et al., *Debate: Should We Dispense with the Electoral College?*, 156 U. PA. L. REV. PENNUMBRA 10 (2007).

²¹ Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1278 (2012). An influential Note in the *Harvard Law Review* does not expressly discuss the Compact, but calls for replacement of the Electoral College and is frequently cited in academic debates over the Compact. See Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526 (2001).

²² See Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the “Federal Structure,”* 44 N.M. L. REV. 383, 429 (2014) (arguing that the Compact requires congressional approval); Derek Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 387–393 (2007); see also *infra* notes 148–51 and accompanying text.

Compact Clause of the Constitution.²³ The Supreme Court's current standard for requiring congressional approval of interstate agreements is very lax. The Court focuses on whether a compact would aggrandize member states' authority at the expense of the federal government, ignoring the compact's horizontal impact on non-member states.²⁴ Though a strong argument can be made that the Court should modify its Compact Clause jurisprudence, under current doctrine the Compact probably does not need congressional assent. Moreover, even if the Compact Clause applied, it would be merely a temporary roadblock since an ideologically sympathetic Congress could approve the Compact at any time.

Part III explains that, regardless of congressional approval, the Compact likely violates the Constitution in four ways. *First*, the Compact infringes the Fourteenth Amendment right to vote.²⁵ The Supreme Court has held that this right includes not only the right to cast a ballot, but to have that ballot be counted and given full effect without being diluted or cancelled out by ballots from ineligible people.²⁶ Nearly every state constitution in the nation specifies that, to be eligible to vote in elections for that state's public offices, a person must be a citizen of that state.²⁷ Yet the Compact requires each member state to appoint its presidential electors based on the outcome of the national popular vote. In this way, the Compact allows the votes of a member state's eligible voters to be unconstitutionally diluted and potentially even overridden by the votes of other states' citizens, who are ineligible to participate in that state's elections. Appointing a state's presidential electors based primarily on the votes of ineligible voters violates not only the state constitution's voter qualification requirements, but the federally protected right to vote, as well.

Second, the Compact violates the Fourteenth Amendment's Equal Protection Clause.²⁸ In *Bush v. Gore*, the U.S. Supreme Court held that the Equal Protection Clause requires states to apply a uniform standard to determine the validity of all ballots cast by members of the relevant electorate in an election.²⁹ By requiring member states to appoint presidential electors based on the outcome of the national popular vote, the Compact makes the entire nation the relevant electorate for equal protection purposes. The Compact treats presidential votes from all states as fungible, aggregating them together to determine the slate of electors that each member state must appoint. Yet each state has very different electoral rules, including different

²³ See U.S. CONST. art. I, § 10, cl. 3.

²⁴ See, e.g., *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 471-72 (1978).

²⁵ See U.S. CONST. amend. XIV, § 1; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[The] political franchise of voting is . . . a fundamental political right, because preservative of all rights.”); see also *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . .”).

²⁶ See *infra* note 182 and accompanying text.

²⁷ See *infra* note 184 and accompanying text.

²⁸ See U.S. CONST. amend. XIV, § 1.

²⁹ See 531 U.S. at 104-05.

voter qualifications, registration deadlines, absentee ballot restrictions, voter identification requirements and, most importantly, standards for determining what constitutes a legally valid vote.³⁰ Votes that would be deemed valid in one jurisdiction may be rejected under other jurisdictions' standards. Applying such disparate standards to voters from across the nation who are effectively participating in the same election would violate the Equal Protection Clause as interpreted in *Bush v. Gore*.

Third, the Compact violates several of the Constitution's structural, federalism-based restrictions. Most obviously, it eliminates the structural protection that the Electoral College provides for small states. The Electoral College amplifies their voters' voices so they are not completely drowned out by the voters of the nation's most populous states. More disturbingly, through the Compact, a cabal of states collectively possessing enough electoral votes to determine the outcome of a presidential election determines in advance that its members will cast their ballots for the same candidate, based on the same criterion. This agreement renders the electoral votes of non-member states irrelevant. The Constitution must be read to implicitly prohibit a subset of states from exerting a stranglehold over the Presidency in this manner—even if those states collectively adopt the national popular vote as their criterion for choosing their respective presidential electors.

Finally, the Compact violates the Presidential Electors Clause, which empowers states to appoint presidential electors.³¹ The Clause is part of the constitutional framework that establishes the Electoral College as the mechanism for selecting the President. The Framers expressly adopted the Electoral College as an alternative to a national popular vote. The Clause cannot reasonably be construed as authorizing states to adopt the very alternative that the Framers specifically rejected.

Perhaps more importantly, the Supreme Court held in *McPherson v. Blacker*³² that the Clause gives state legislatures plenary authority over the appointment of presidential electors that “can neither be taken away nor abdicated,” even by a state constitution.³³ One of the Compact's key provisions, however, specifies that a member state cannot withdraw from the Compact—in other words, a member state cannot change its method of selecting presidential electors—within six months of a presidential election.³⁴ The Compact cannot validly limit a state legislature's plenary, inalienable authority under the U.S. Constitution to determine how the state's presidential electors will be appointed. And that six-month deadline is an integral, inseverable part of the Compact that prevents member states from reneging at the

³⁰ See *infra* notes 213–22 and accompanying text.

³¹ See U.S. CONST. art. II, § 1, cl. 2.

³² 146 U.S. 1 (1892).

³³ *Id.* at 35 (quoting S. REP. NO. 43-395, at 9 (1874)).

³⁴ See, e.g., CAL. ELEC. CODE § 6921, art. IV, para. 2 (West, Westlaw through ch. 9 of 2021 Reg. Sess.). Since all parties to the Compact have adopted it in materially identical form, this Article cites the Compact as it appears in the California Election Code for convenience.

last minute if they do not like how presidential polls are trending. Without that lynchpin, the entire Compact collapses.

Part IV emphasizes the enormous practical problems that the Compact would create in close elections. If the outcomes of presidential elections were based on national popular vote tallies, candidates in tight races would have a compelling incentive to seek fifty-one simultaneous recounts and potentially pursue up to fifty-one separate election contests in a compressed timeframe across the nation. The past two decades have demonstrated that such post-election maneuvers will inevitably be accompanied by a raft of simultaneous state and federal constitutional challenges, litigated in accelerated emergency proceedings. Particularly if state supreme courts or U.S. Courts of Appeals resolved similar issues in different ways, a contentious resolution by the U.S. Supreme Court or even the chambers of Congress themselves might be necessary.³⁵ *Bush v. Gore*, which was limited to ballots and election officials in the state of Florida, was traumatic enough for the nation.³⁶ *Bush v. Gore* occurring simultaneously in fifty-one different jurisdictions throughout the nation would irrevocably undermine public faith in the electoral process.

Moreover, by turning a presidential election into a single national contest, the Compact would eliminate the Electoral College's inherent firewalls, allowing problems in a single jurisdiction to impact the rest of the country. Under the Compact, a natural disaster, terrorist attack, mistake, or even fraud within a state would not only potentially affect that state's slate of electors, but reverberate across all of the Compact's member states as well. Additionally, because the national popular vote tally is impacted by every problem that happens in every state across the nation, the overall accuracy of a presidential election's results would be much more dubious than under current law. Our current system treats each jurisdiction's election as an isolated event; problems in one race do not spill over to impact other states' outcomes. The Compact blithely eliminates these structural safeguards.

The article briefly concludes by explaining that the Electoral College is one of the Framers' most important inadvertent gifts, performing valuable functions that the Framers themselves could not have anticipated. Allowing a presidential election to be resolved as a series of fifty-one discrete, parallel contests, rather than a single national election involving over 136 million votes, makes the system more manageable, cabins the scope of any post-election administrative proceedings or judicial challenges, and limits the potential consequences of any natural disasters, terrorist attacks, fraud, mistakes, or other difficulties that arise. Considering both the vast geographic extent of our nation and the size of our population, the ability that the Elec-

³⁵ See U.S. CONST. amend. XII (discussing Congress's role in counting electoral votes).

³⁶ See *2000 Year-End Report on the Federal Judiciary*, SUPREME COURT (2001), <https://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.aspx> [<https://perma.cc/83TJ-VST7>] (noting that the 2000 election "tested our constitutional system in ways it had never been tested before," and both federal and state courts "became involved in a way that one hopes will seldom, if ever, be necessary in the future").

toral College provides to elect a national leader through dozens of limited, distinct elections is a near-miraculous gift that we should not squander.

I. BACKGROUND ON THE ELECTORAL COLLEGE AND NATIONAL POPULAR VOTE COMPACT

The Compact is a mechanism for electing a President through a national popular vote without amending the Constitution to eliminate the Electoral College. This part begins by discussing the constitutional structure of the Electoral College, then analyzes some of the major objections to this arrangement. It concludes by explaining how the Compact would operate within the confines of the Electoral College to elect the President based on the national popular vote.

A. *The Electoral College and Its Critics*

The Framers adopted the Electoral College as the primary constitutional mechanism for selecting a President,³⁷ rather than allowing either Congress to appoint the President³⁸ or the people to vote for the office directly.³⁹ The Constitution allots each state a number of presidential electors equal to the number of Senators and Representatives in that state's congressional delegation.⁴⁰ Because each state has at least one representative and two senators,⁴¹ it is entitled to at least three presidential electors. Thus, a state's influence in the Electoral College is roughly proportionate to its population, but this proportionality is tempered by the guaranteed allotment of three electors for sparsely populated states.

The U.S. Constitution's Presidential Electors Clause empowers each state's legislature to decide how its electors will be appointed.⁴² Legislatures

³⁷ As discussed below, if no candidate wins a majority of votes in the Electoral College, the U.S. House of Representatives selects the President. *See infra* notes 63–64 and accompanying text. Many commentators explain that the Framers originally intended the Electoral College to function as a primary election, winnowing the list of viable presidential candidates from which the House would make the final selection. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1520–21 (2014); Williams, *National Vote Compact*, *supra* note 19, at 1569.

³⁸ *See* William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 152–53 (1996).

³⁹ *See infra* notes 262–64 and accompanying text.

⁴⁰ *See* U.S. CONST. art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3 (2018).

⁴¹ *See* U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 3, cl. 1; *id.* amend. XVII. The Twenty-Third Amendment grants the District of Columbia three electoral votes, as well, despite its lack of voting representation in Congress. *See id.* amend. XXIII, § 1.

⁴² *See id.* art. II, § 1, cl. 2. Congress, however, “may determine the time of choosing the electors.” *Id.* art. II, § 1, cl. 4. It has exercised this power by requiring states to choose electors either on Election Day, or on a later date if a state holds an election on Election Day but “fail[s] to make a choice.” 3 U.S.C. §§ 1–2 (2018).

Commentators debate the implications of the Constitution's delegation of authority over the appointment of presidential electors specifically to the legislature of each state, rather than to the state as a whole. Most notably, throughout the nineteenth century, several state supreme

have virtually plenary power over the issue, so long as they do not violate other federal constitutional provisions.⁴³ For example, electors may not be Senators, Representatives, or anyone else holding an “Office of Trust or Profit Under the United States.”⁴⁴ Historically, states chose electors in a variety of ways, including direct appointment by the legislature itself, election of individual electors on a district-by-district basis, and statewide elections for the state’s full slate of electors on a winner-take-all basis (also referred to as the “unit rule”).⁴⁵ Forty-nine jurisdictions presently use a winner-take-all or unit-rule system.⁴⁶ Under this approach, when a presidential candidate wins the popular vote within a state, the candidates for presidential elector associated with that person are appointed to that state’s seats in the Electoral College.⁴⁷ Maine⁴⁸ and Nebraska,⁴⁹ in contrast, award most of their electors

courts, the chambers of Congress, and some leading commentators concluded that, when state legislatures exercise their authority under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, or Presidential Electors Clause, *id.* art. II, § 1, cl. 2, to regulate federal elections, they are bound only by the substantive constraints set forth in the U.S. Constitution and federal law, and not state constitutions, as well. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2021). But see Hayward Smith, *History of the Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 733 (2001) (rejecting this interpretation of the Presidential Electors Clause).

Likewise, the Presidential Electors Clause’s use of the term “Legislature” could be read to mean that laws governing presidential elections may not be enacted through public initiative or referendum, see Richard L. Hasen, *When “Legislature” May Mean More Than Legislature: Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599, 601 (2008) (concluding that “[t]here are reasonable policy arguments to be made on both sides of the question”), but the Supreme Court rejected this argument in the analogous context of the Elections Clause, see *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808–09 (2015); see also Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631, 641 (2008). Commentators also disagree over whether to read *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76–78 (2000) (per curiam), as requiring courts to construe state laws regulating federal elections according to a super-strong plain-meaning canon. Compare Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1262 (2002) (“Article II of the Constitution appears on its face to forbid . . . judicial reshaping of the law in connection with the appointment of presidential electors.”), and RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 155–56 (2001), with Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 LOY. U. CHI. L.J. 89, 98 (2002) (arguing that presidential elections are governed by the “usual interplay of state statutes, the state constitution, and judicial interpretations”).

⁴³ See *McPherson v. Blacker*, 146 U.S. 1, 25, 27 (1892). The *McPherson* Court asserted in dicta that state legislatures are not bound by their state constitutions when regulating federal elections, *id.* at 34–35 (quoting S. REP. NO. 43-395, at 2 (1874)), but in recent years the Court has rejected that premise, *Ariz. State Legislature*, 576 U.S. at 818–19; cf. Morley, *supra* note 42, at 8–9 (explaining that state legislatures regulate federal elections through a grant of authority directly from the U.S. Constitution and are not subject to substantive restrictions in state constitutions when exercising that power).

⁴⁴ U.S. CONST. art. II, § 1, cl. 3.

⁴⁵ See EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE* 20 (2020).

⁴⁶ See Josephson & Ross, *supra* note 38, at 160.

⁴⁷ A political party that wishes to have its presidential nominee appear on a state’s ballot generally must nominate a slate of people to serve as presidential electors in the event that nominee wins the state’s popular vote. Similarly, independent candidates are typically required

based on the popular vote within each of their congressional districts, with the winner of the statewide popular vote receiving two additional elector positions (corresponding to the state's Senators).

The Twelfth Amendment provides that electors must meet within their respective states to cast their electoral votes.⁵⁰ Federal law specifies that these meetings must occur on “the first Monday after the second Wednesday in December” following the election.⁵¹ Each elector casts one vote for President and another vote for Vice President; the candidates an elector chooses may not both be from the same state.⁵² Over three-fifths of states have laws requiring their electors to cast their electoral votes for the presidential and vice-presidential candidates of the political party that nominated them.⁵³ The enforcement mechanisms for these measures vary greatly, however. Many states lack any express means of enforcing their “elector binding” requirements.⁵⁴ Some impose sanctions on electors who vote the “wrong”

to file their own slates of electors to be appointed in the event they receive a plurality of the statewide popular vote. *See, e.g.*, FLA. STAT. ANN. §§ 103.021(3), 103.022 (West, Westlaw through ch. 18 of the 2020 Second Reg. Sess. of the 26th Leg.).

⁴⁸ *See* ME. REV. STAT. ANN. tit. 21-A, § 802 (West, Westlaw through 2019 2nd Reg. Sess. of 129th Leg.).

⁴⁹ *See* NEB. REV. STAT. ANN. § 32-710 (West, Westlaw through legis. effective Mar. 26, 2020, of 2nd Reg. Sess. of 106th Leg. (2020)).

⁵⁰ *See* U.S. CONST. amend. XII.

⁵¹ 3 U.S.C. § 7 (2018); *see also* U.S. CONST. art. II, § 1, cl. 4 (empowering Congress to “determine . . . the day on which [presidential electors] shall give their votes”). The Constitution further specifies that electors must cast their electoral votes on “the same [day] throughout the United States.” U.S. CONST. art. II, § 1, cl. 4.

⁵² *See* U.S. CONST. amend. XII; *see also* 3 U.S.C. § 8 (2018) (requiring electors to cast their votes “in the manner directed by the Constitution”).

⁵³ *See* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS 1–29 (2016), <https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf> [<https://perma.cc/Z7S5-KRBW>]; *see also* *Faithless Elector State Laws*, FAIRVOTE, https://www.fairvote.org/faithless_elector_state_laws (last updated July 7, 2020) [<https://perma.cc/SNU4-EM4>].

⁵⁴ *See, e.g.*, ALA. CODE § 17-14-31 (West, Westlaw through Act 2020-2060); ALASKA STAT. ANN. § 15.30.090 (West, Westlaw through ch. 32 of 2020 2nd Reg. Sess. of 31st Leg.); CONN. GEN. STAT. ANN. § 9-176 (West, Westlaw through 2020 Reg. Sess.); DEL. CODE ANN. tit. 15, § 4303(b) (West, Westlaw through ch. 7 of 151st Gen. Assemb. (2021-2022)); D.C. CODE ANN. § 1-1001.08(g) (West, Westlaw through Aug. 6, 2020); FLA. STAT. ANN. § 103.021(1) (West, Westlaw through chs. from 2020 Second Reg. Sess. of 26th Leg. in effect through July 1, 2020); HAW. REV. STAT. ANN. § 14-28 (West, Westlaw through 2020 Reg. Sess.); MD. CODE ANN., ELEC. LAW § 8-505 (West, Westlaw through chs. 1 to 11 from 2020 Reg. Sess. of Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 53, § 8 (West, Westlaw through ch. 129 of 2020 2nd Annual Sess.); MISS. CODE ANN. § 23-15-785 (West, Westlaw through laws from 2020 Reg. Sess. effective upon passage as approved through Aug. 21, 2020); OHIO REV. CODE ANN. § 3505.40 (West, Westlaw through File 40 of 133rd Gen. Assemb. (2019-2020)); OR. REV. STAT. ANN. § 248.355(2) (West, Westlaw through 2020 Reg. Sess. of 80th Legis. Assemb.); TENN. CODE ANN. § 2-15-104(c) (West, Westlaw through laws from 2020 First Reg. Sess. of 111th Tenn. Gen. Assemb., effective through Sept. 1, 2020); VT. STAT. ANN. tit. 17, § 2732 (West, Westlaw through Acts 1 through 2 of Reg. Sess. of 2021-2022 Vt. Gen. Assemb. (2021)); VA. CODE ANN. § 24.2-204 (West, Westlaw through end of 2020 Reg. Sess.); WIS. STAT. ANN. § 7.75(2) (West, Westlaw through 2019 Act 186, published Apr. 18, 2020); WYO. STAT. ANN. § 22-19-108 (West, Westlaw through 2020 Budget Sess. of Wyo. Leg.).

way,⁵⁵ others allow them to be removed from office and replaced with alternates,⁵⁶ and a few jurisdictions do both.⁵⁷ The Supreme Court recently affirmed the constitutionality of such measures.⁵⁸

After a state's electors cast their electoral votes, the state tallies, certifies, and transmits them to the President of the U.S. Senate.⁵⁹ On the following January 6, Congress meets in joint session and the Senate President opens each state's certificate to count its votes.⁶⁰ If members object to particular votes, the chambers re-convene separately to decide whether to count them.⁶¹ A candidate becomes President or Vice President if he or she receives electoral votes from a majority of electors appointed.⁶² If no one receives a majority of votes for President, then the House of Representatives chooses the President from among the three candidates who received the most electoral votes for that office.⁶³ When choosing the President, each state's House delegation votes as a unit, casting a single vote; a candidate must win a majority of states' votes in the House to become President.⁶⁴

⁵⁵ See, e.g., N.M. STAT. ANN. § 1-15-9 (West, Westlaw through ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020)); S.C. CODE ANN. § 7-19-80 (West, Westlaw through 2020 Act No. 142).

⁵⁶ See, e.g., ARIZ. REV. STAT. ANN. § 16-212 (West, Westlaw through Second Reg. Sess. of 54th Leg. (2020)); CAL. ELEC. CODE § 6906 (West, Westlaw through ch. 10 of 2021 Reg. Sess.); COLO. REV. STAT. ANN. § 1-4-304 (West, Westlaw through legis. effective Apr. 1, 2020 of 2020 Reg. Sess.); IND. CODE ANN. §§ 3-10-4-1.7, 3-10-4-9 (West, Westlaw through all legis. of 2020 Second Reg. Sess. of 121st Gen. Assemb.); ME. REV. STAT. ANN. tit. 21-A, § 805(2) (West, Westlaw through 2019 2nd Reg. Sess. of 129th Leg.); MICH. COMP. LAWS ANN. § 168.47 (West, Westlaw through P.A.2020, No. 149, of 2020 Reg. Sess., 100th Leg.); MINN. STAT. ANN. § 208.46 (West, Westlaw through 2020 Reg. Sess. and 1st, 2nd, and 3rd Spec. Sess.); MONT. CODE ANN. § 13-25-307 (West, Westlaw through 2019 Sess.); NEB. REV. STAT. ANN. § 32-713(2) (West, Westlaw through legis. effective Mar. 26, 2020, of 2nd Reg. Sess. of 106th Leg. (2020)); NEV. REV. STAT. ANN. § 298.045 (West, Westlaw through end of both 31st and 32nd Spec. Sess. (2020)); UTAH CODE ANN. § 20A-13-304 (West, Westlaw through 2020 Fifth Spec. Sess.); WASH. REV. CODE ANN. § 29A.56.090 (West, Westlaw through 2020 Reg. Sess. of Wash. Leg.).

⁵⁷ See N.C. GEN. STAT. ANN. § 163-212 (West, Westlaw through S.L. 2020-57 of 2020 Reg. Sess. of Gen. Assemb.); OKLA. STAT. ANN. tit. 26, §§ 10-102, -108 (West, Westlaw through legis. effective through Sept. 1, 2020 of Second Reg. Sess. of 57th Leg. (2020)).

⁵⁸ See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020); *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (mem.).

⁵⁹ See U.S. CONST. amend. XII; see also 3 U.S.C. §§ 9-11 (2018).

⁶⁰ See U.S. CONST. amend. XII; 3 U.S.C. § 15 (2018).

⁶¹ See 3 U.S.C. § 15 (2018). An objection is in order only if it is submitted in writing and signed by at least one Member of the House of Representatives and one Senator. See *id.*

⁶² See U.S. CONST. amend. XII. If an elector abstains from voting for President or Vice President, it appears that person would still be counted in determining the number of electoral votes that constitutes a majority.

⁶³ See *id.*

⁶⁴ See *id.* The House of Representatives has resolved only two presidential elections, in 1800 and 1824. The election of 1800 was conducted under the original rules set forth in the Constitution of 1789, before the Twelfth Amendment was adopted. Each elector cast two electoral votes, without distinguishing between the offices of President and Vice President. See U.S. CONST. art. II, § 1, cl. 3. The candidate who received the most votes, so long as it was a majority, became President, and the candidate who received the second-greatest number of votes became Vice President. See *id.* Because the Democratic-Republican electors supported the Jefferson-Burr ticket, they all cast their electoral votes for both candidates. As a result, Jefferson and Burr received the same number of electoral votes. The election was thrown to the

Similarly, if no candidate receives electoral votes for Vice President from a majority of electors, the Senate chooses the winner from between the two candidates with the most electoral votes for that office.⁶⁵ A candidate must receive a majority of votes in the Senate to prevail.⁶⁶

While commentators have attacked the Electoral College on a wide variety of grounds, there are four main critiques. The primary objection to the Electoral College is that it is antidemocratic because it allows a candidate to win the Presidency without receiving a majority, or even plurality, of the popular vote. Throughout American history, we have had five Presidents elected without winning a plurality of the popular vote.⁶⁷

TABLE 1: PRESIDENTS ELECTED WITHOUT A PLURALITY OF THE POPULAR VOTE

Year	Prevailing Candidate	Popular Vote	Electoral Votes	Other Candidate(s)	Popular Votes	Electoral Vote	Comment
1824	John Quincy Adams (Democratic-Republican)	113,122 (30.92%) <i>lost by 38,149 votes</i>	84 (32.18%)	Andrew Jackson William H. Crawford Henry Clay (all Democratic-Republicans)	151,271 (41.35%) 40,856 (11.17%) 47,531 (12.99%)	99 (37.93%) 41 (15.71%) 37 (14.18%)	Election decided by U.S. House (Adams won 13 out of 23 states)
1876	Rutherford B. Hayes (Republican)	4,033,497 (47.95%) <i>lost by 254,694 votes</i>	185 (50.14%)	Samuel Tilden (Democrat)	4,288,191 (50.98%)	184 (49.86%)	Electoral votes from four states decided by commission
1888	Benjamin Harrison (Republican)	5,449,825 (47.82%) <i>lost by 89,293 votes</i>	233 (58.10%)	Grover Cleveland (Democrat)	5,539,118 (48.61%)	168 (41.90%)	
2000	George W. Bush (Republican)	50,455,156 (47.87%) <i>lost by 537,179 votes</i>	271 (50.37%)	Albert Gore, Jr. (Democrat)	50,992,335 (48.38%)	266 (49.44%)	Florida recount halted by U.S. Supreme Court
2016	Donald Trump (Republican)	62,984,828 (46.09%) <i>lost by 2,868,686 votes</i>	304 (56.51%)	Hillary Clinton (Democrat)	65,853,514 (48.18%)	227 (42.19%)	

House of Representatives, which selected Jefferson after dozens of rounds of voting. *See* S. DOC. NO. 113-1, at 1340 (2014); Josephson, *supra* note 18, at 623–25. The House was forced to resolve the election of 1824 because electoral votes were split among four candidates—all Democratic-Republicans—none of whom received a majority. *See* S. DOC. NO. 113-1, at 1343. The House ultimately selected John Quincy Adams as President, even though he had lost both the national popular vote and the electoral vote. *See* Fakhouri, *supra* note 18, at 718–22.

⁶⁵ *See* U.S. CONST. amend. XII.

⁶⁶ *See id.*

⁶⁷ Statistics are from FED. ELECTION COMM'N, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 6 (2017), <https://www.fec.gov/resources/cms-content/documents/federalections2016.pdf> [<https://perma.cc/5SLW-UD26>]; 1 CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 755, 768, 771, 799 (Deborah Kalb ed., 7th ed. 2016); *see also* Levinson, *supra* note 20, at 10 (statement of Levinson) (critiquing the Electoral College because it “regularly sends to the White House persons who did not receive a majority of the popular vote,” or even a plurality).

Democracy can take “many possible forms” however; there are “many different institutional embodiments of democratic politics.”⁶⁸ As Professors Rick Pildes and Elizabeth Anderson argue, “[n]o uniquely ‘rational’ institutional architecture exists” for determining the will of the people, because “no such collective will exists” independent of the political institutions and electoral processes used to ascertain and implement it.⁶⁹ The Constitution itself embodies the notion that the will of the people can be measured and applied both directly and indirectly through different mechanisms in order to promote government stability. The Electoral College enables the President to be elected on both a national and federal basis, taking into account the will of the people intermediated through the states that comprise our constitutional structure.⁷⁰ Thus, the democracy-based critique of the Electoral College is rooted in the somewhat tautological assumption that a national popular vote is the only, or most legitimate, way of ascertaining the popular will. Moreover, it overlooks the fact that the Framers specifically declined to adopt a purely democratic system in order to ensure the nation’s long-term stability and prevent the government from degenerating into mob rule.⁷¹

Relatedly, critics also contend that the Electoral College violates one-person, one-vote principles.⁷² They argue that, because each state receives at least three electoral votes no matter how small its population, the Electoral College gives greater weight to votes from sparsely populated states than more populous ones.⁷³ This equality-based challenge to the Electoral College may be overstated, however. In addition to artificially inflating the weight of small states’ votes, the Electoral College also allows large states to “amplify” the effects of their citizens’ preferences by awarding electoral votes on a winner-take-all basis.⁷⁴

In most states, the candidate who receives a plurality of the statewide popular vote is awarded all of that state’s electors.⁷⁵ In this way, nearly every state throws all of its voting power in the Electoral College behind a candidate supported by only a fraction—not necessarily even a majority—of its

⁶⁸ SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 1 (5th ed. 2016).

⁶⁹ Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197–98 (1990).

⁷⁰ See THE FEDERALIST NO. 39, at 251 (James Madison).

⁷¹ See, e.g., James Madison, Journal (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 31 (Max Farrand ed., 1966) [hereinafter FARRAND’S RECORDS] (statement of George Mason); James Madison, Journal (Aug. 7, 1787), in *id.* at 193, 203–04 (statement of James Madison); see also Aaron T. Knapp, *Law’s Revolutionary: James Wilson and the Birthplace of American Jurisprudence*, 29 J.L. & POL. 189, 211 n.95 (2014) (collecting quotes from the Constitutional Convention).

⁷² See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

⁷³ See Levinson, *supra* note 20, at 12 (statement of Levinson); see also Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 906–07 (2017) (explaining how the structure of the Electoral College creates disparities between the size of a state’s population and the number of electoral votes allotted to it).

⁷⁴ *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, *supra* note 21, at 2537–38.

⁷⁵ See *supra* notes 46–47 and accompanying text.

voters. A large state has more electoral votes than smaller states with which to artificially enhance the support of the candidate who wins its statewide popular vote. Some commentators have concluded that this “winner-take-all bias” in favor of large states generally outweighs the advantages that the Electoral College confers on small states,⁷⁶ while Professor Akhil Amar suggests that these competing biases generally cancel each other out.⁷⁷

Professor Derek Muller also points out that presidential elections are not unique in according somewhat differing degrees of voting power to people in different jurisdictions.⁷⁸ Despite the Supreme Court’s “one-person, one-vote” case law, states generally draw their congressional districts so as to equalize each district’s total population, rather than the number of eligible, likely, or actual voters.⁷⁹ As a result, each voter in a district where voters comprise a relatively lower percentage of the overall population has greater power to determine a congressional election’s outcome than voters in districts comprised of higher percentages of voters.⁸⁰ Thus, voters in different congressional districts exercise differing proportions of power to determine who their respective representatives will be. The presidential election process, Muller argues, imposes similarly tolerable minor disparities in the relative ability of voters in different states to affect the election’s outcome.⁸¹

Critics also maintain that the Electoral College leads candidates to focus their attention on only a few “swing” states,⁸² distorting not only the policies they propose, but even Executive Branch decision-making in the months leading up to presidential elections.⁸³ States’ winner-take-all systems encourage this selective focus. Once a candidate wins a plurality of votes within a state, any additional votes he or she receives there are effectively wasted; a candidate may not use them to offset deficits in other states. Thus, rather than focusing resources on increasing public support or voter turnout in “safe” states which they are overwhelmingly likely to win—or, conversely,

⁷⁶ *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, *supra* note 21, at 2538 (citing Joseph E. Kallenbach, *Our Electoral College Gerrymander*, 4 *MIDWEST J. POL. SCI.* 162, 175 (1960); Carleton W. Sterling, *The Electoral College Biases Revealed: The Conventional Wisdom and Game Theory Models Notwithstanding*, 31 *W. POL. Q.* 159, 170 (1978)).

⁷⁷ See Amar, *Some Thoughts*, *supra* note 12, at 472.

⁷⁸ See Muller, *supra* note 21, at 1258–59, 1262.

⁷⁹ See *id.* at 1257 (citing *Gray v. Sanders*, 372 U.S. 368, 371 (1963)); see also *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130 (2016) (“Consistent with constitutional history, this Court’s past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations.”).

⁸⁰ Cf. *Reynolds v. Sims*, 377 U.S. 533, 562–63 (1964) (holding that “state legislative districting schemes which give the same number of representatives to unequal numbers of constituents” effectively afford greater weight to certain people’s votes than others).

⁸¹ See Muller, *supra* note 21, at 1258–59, 1262.

⁸² See Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 *HOFSTRA L. REV.* 217, 234–37 (2012).

⁸³ See Douglas Kriner & Andrew Reeves, *Has the Constitution Exacerbated the Crisis of Governance? The Electoral College and Presidential Particularism*, 94 *B.U. L. REV.* 741, 746 (2014) (arguing that the Electoral College leads Presidents to “pursue policies that disproportionately benefit voters in swing states at the expense of a fair and economically optimal distribution of federal resources”).

seeking to mitigate the extent of their loss in states that are virtually impossible to win—presidential candidates tend to focus almost exclusively on a dozen or so states in which the plurality winner is unpredictable.⁸⁴

Moving to a national popular vote system would only change the nature of this problem, however. Rather than focusing on a relatively diverse range of swing states—jurisdictions like Florida, Virginia, Pennsylvania, and Nevada—a national popular vote system would instead create strong incentives for candidates to focus their efforts primarily on high-population states, and especially high-density population centers.⁸⁵ Compact supporters reject such concerns, pointing out that candidates in statewide elections do not disproportionately focus their time or resources only on major cities.⁸⁶ But presidential candidates must campaign across the entire nation within an election cycle of the same duration. The geographic breadth of the nation and sheer size of the population will inevitably compel them to concentrate their resources on major population centers to a much greater extent than statewide candidates.

Finally, some commentators, including Professor Akhil Amar, have also condemned the Electoral College as a vestige of slavery,⁸⁷ since the number of electoral votes to which each state originally was entitled was based in part on the Three-Fifths Clause.⁸⁸ A main piece of evidence frequently cited in support of this argument is a statement that James Madison made during the Constitutional Convention. He declared that the delegates would never agree to elect the President based on a national popular vote because “[t]he right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes.”⁸⁹

Historian Sean Wilentz has recently challenged this narrative.⁹⁰ He points out that the most likely alternative to the Electoral College at the

⁸⁴ See Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 246 (2004); Calderaro, *supra* note 18, at 297–301; see also Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President By National Popular Vote*, 54 LOY. L. REV. 419, 459 (2008).

⁸⁵ See Calderaro, *supra* note 18, at 302–05; Richard F. Duncan, *Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus*, 96 NEB. L. REV. 799, 816 (2018); Ross & Hardaway, *supra* note 22, at 393–94; see also Yen-Tu Su, *Retracing Political Antitrust: A Genealogy and its Lessons*, 27 J.L. & POL. 1, 43 (2011).

⁸⁶ See KOZA ET AL., *supra* note 17, at 451.

⁸⁷ See Amar, *Electoral College Reform*, *supra* note 12, at 67; Amar, *Some Thoughts*, *supra* note 12, at 470; Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1147 (2002) (arguing that “the connection between slavery and the electoral college was deliberate”); Juan F. Perea, *How Slavery’s Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1086–91 (2018).

⁸⁸ See U.S. CONST. art. II, § 1, cl. 3.

⁸⁹ James Madison, Journal (July 19, 1787), in 2 FARRAND’S RECORDS, *supra* note 71, at 50, 56–57, quoted in Amar, *Electoral College Reform*, *supra* note 12, at 69–70.

⁹⁰ See SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING 70–71 (2019); see also Sean Wilentz, *The Electoral College Was Not a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/04/opinion/the-electoral-college-slavery-myth.html> [https://perma.cc/WZN6-Q3VE].

Convention was not direct election of the President, but rather appointment by Congress, which was also elected in part based on the Three-Fifths Clause.⁹¹ Moreover, many slaveholding states opposed the Electoral College, with North Carolina, South Carolina, and Georgia voting against it.⁹² Rather than a compromise between Northern and Southern states, or free and slave states, the Electoral College may best be viewed as a compromise primarily between large and small states.⁹³

Even upon its implementation, the Electoral College did not artificially bolster slave states' ability to win the Presidency. Wilentz contends that, following the 1790 census, slave states controlled approximately 42% of the electoral votes and had 41% of the nation's total white population; their influence in selecting the President would have been roughly equivalent whether elections occurred through the Electoral College or a national popular vote.⁹⁴ In addition, over time, any advantage that slave states may have hoped to gain from the Electoral College dissipated. "[S]ettlement of migrants and new immigrants" in the early nineteenth century "disproportionately favored the North."⁹⁵

The Electoral College facilitated the election of anti-slavery President John Quincy Adams, who lost the national popular vote but was ultimately elected by the House of Representatives.⁹⁶ As Professor Akhil Amar explains, by the time of the Civil War, the Electoral College actually gave a structural advantage to free states.⁹⁷ Due to winner-take-all rules and the "enormous population of the antislavery North in 1860," the Electoral College "tip[ped] decisively against slavery."⁹⁸

Moreover, regardless of why some Framers originally might have supported the Electoral College, the Reconstruction Amendments extirpated any connection it may have had to slavery. The Thirteenth Amendment abolished slavery.⁹⁹ The Fourteenth Amendment superseded the Three-Fifths Clause.¹⁰⁰ And the Fifteenth Amendment prohibited racial discrimination concerning voting rights.¹⁰¹ Thus, we should neither repudiate the Electoral College nor relinquish the important benefits it provides today based on debates over the extent to which its origins might have had a connection to our nation's shameful history of slavery.¹⁰²

⁹¹ See WILENTZ, *supra* note 90, at 70-71.

⁹² See Wilentz, *supra* note 90; see also WILENTZ, *supra* note 90, at 294 n.42 (discussing "opposition to the [electoral] college from the lower South states").

⁹³ See MICHAEL KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 231 (2016) (explaining how the Framers crafted the Electoral College to balance the interests of large and small states).

⁹⁴ See Wilentz, *supra* note 90.

⁹⁵ WILENTZ, *supra* note 90, at 187.

⁹⁶ See Wilentz, *supra* note 90; see also *supra* notes 64, 67, and accompanying text.

⁹⁷ See Amar, *Electoral College Reform*, *supra* note 12, at 65.

⁹⁸ See *id.*

⁹⁹ See U.S. CONST. amend. XIII, § 1.

¹⁰⁰ See *id.* amend. XIV, § 2.

¹⁰¹ See *id.* amend. XV, § 1.

¹⁰² Some commentators defend the Electoral College on the grounds that it increases the likelihood that the prevailing candidate in a presidential election will emerge with a "clear

B. *The National Popular Vote Compact*

The National Popular Vote Compact is an agreement among states that, upon entering into effect, would result in the President being chosen based on the outcome of the national popular vote, even without a constitutional amendment abolishing the Electoral College.¹⁰³ It requires member states to hold “statewide popular elections” for President and Vice President, as all states presently do.¹⁰⁴ Following the election, each member state’s chief election official must tally the presidential candidates’ vote totals from each state and the District of Columbia—including from states that did not join the Compact—to calculate the candidates’ “national popular vote total[s].”¹⁰⁵ Each member state must then appoint the slate of presidential electors associated with the presidential candidate who won the national popular vote.¹⁰⁶

Member states must resolve any disputes concerning their respective elections and make a “final determination” of their electors at least six days before the date in mid-December on which federal law requires electors to cast their electoral votes.¹⁰⁷ This requirement ensures that member states’ electors are chosen by the federal “safe harbor” deadline, protecting them from potential challenges during the joint session of Congress in which electoral votes are counted.¹⁰⁸ Likewise, if a dispute arises concerning candidates’

mandate,” enhancing his or her perceived legitimacy. See Levinson, *supra* note 20, at 18 (statement of McGinnis) (“[T]he Electoral College tends to magnify the winner’s margin of victory. Particularly among the general public . . . this greater margin bestows a greater legitimacy. The sense of legitimacy is especially important for the president because in our system the president is . . . the head of state, unifying the nation in times of crisis.”); Stephen M. Sheppard, *A Case for the Electoral College and for Its Faithless Elector*, 2015 WIS. L. REV. FORWARD 1, 5; cf. Beerman, *supra* note 18, at 735–36 (“The only saving grace of the Electoral College is that it can make a close election look less close. Even a close popular vote can result in a decisive margin in the Electoral College. In my view, this is an insufficient virtue to save the Electoral College . . .”). It is unclear, however, that the general public knows presidential candidates’ electoral vote tallies. Moreover, since the media often focuses on the results of the national popular vote, it is unlikely that a major electoral college victory would enhance a candidate’s legitimacy following a narrow win—or especially a loss—in the national popular vote. If the Electoral College bolstered the legitimacy of winning candidates’ mandates in generations past, it no longer appears to do so effectively today.

¹⁰³ See Anthony J. Gaughan, *Ramsbackle Federalism: American’s Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1038 (2016); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POLITICS 665, 667 n.1 (1996).

¹⁰⁴ CAL. ELEC. CODE § 6921, art. II (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

¹⁰⁵ *Id.* art. III, para. 1. Member states are required to publicly disclose “all vote counts or statements of votes as they are determined or obtained.” *Id.* art. III, para. 8. The Compact does not provide a means of taking into account the preferences of citizens in a state whose legislature directly appoints presidential electors without holding a popular vote. See Williams, *Reforming the Electoral College*, *supra* note 19, at 209–10. Since no state currently uses this method of selecting presidential electors, that problem is purely hypothetical.

¹⁰⁶ See CAL. ELEC. CODE § 6921, art. III, para. 1 (West, Westlaw through ch. 9 of 2021 Reg. Sess.). In the unlikely event of a tie in the national popular vote, each member state would appoint the slate of electors associated with the candidate who won the statewide popular vote in that jurisdiction. *Id.* art. III, para. 6.

¹⁰⁷ *Id.* art. III, para. 4.

¹⁰⁸ 3 U.S.C. § 5 (2018). The Electoral Count Act of 1887 requires Congress to accept as “conclusive” a state’s “final determination” of any controversies concerning the appointment of

vote tallies in a particular state, member states must “treat as conclusive” any official statement that the state issues concerning its returns by the federal safe harbor deadline.¹⁰⁹

The Compact enters into effect when states cumulatively possessing a majority of electoral votes—in other words, at least 270 electoral votes—have adopted it.¹¹⁰ States may withdraw from the agreement, but any attempted withdrawal that occurs within six months of a presidential election does not take effect until after the election is over.¹¹¹

Though numerous arguments have been raised in support of the Compact, the main rationales for it are the intertwined notions of promoting democracy¹¹² and ensuring the equality of all people's votes.¹¹³ Some supporters also maintain that the Compact will increase voter turnout, since people in “safe” states will feel that their votes now matter.¹¹⁴ By making the entire nation the relevant electorate, however, the Compact would dramatically dilute the weight of each person's vote.¹¹⁵ Each vote would become one out of a nationwide total of over 136 million, rather than one out of a statewide total of a few hundred thousand, or even a few million.¹¹⁶ Thus, to the extent voters are motivated by the possibility that their votes may impact the election's outcome, the Compact may fail to induce safe-state voters to vote, while simultaneously reducing the incentive for swing-state voters to do so.¹¹⁷

its electors so long as, among other things, that determination is made “at least six days before the time fixed for the meeting of electors.” *Id.* Electors are required to meet to cast their electoral votes on the first Monday after the second Wednesday in the December following their appointment. *See id.* § 7. The safe harbor deadline is therefore the day before the second Wednesday in December.

¹⁰⁹ CAL. ELEC. CODE § 6921, art. III, para. 5 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

¹¹⁰ *See id.* art. III, para. 9; *id.* art. IV, para. 1.

¹¹¹ *See id.* art. IV, para. 2; *see infra* Section III.D.2.

¹¹² *See* Amar, *Some Thoughts*, *supra* note 12, at 467; *see also* Beerman, *supra* note 18, at 736 (claiming that the Electoral College poses a “grave threat to democracy”); Robb, *supra* note 84, at 464; Zachary J. Shapiro, Note & Comment, *The Constitutionality of Methods that Influence a Presidential Elector's Ability to Exercise Personal Judgment*, 26 J.L. & POL'Y 395, 437 (2018); *cf. supra* note 67 and accompanying text (explaining that the Electoral College has allowed Presidents to be elected without winning a plurality of the popular vote).

¹¹³ *See, e.g.,* Chang, *supra* note 18, at 229; *see also* Birch Bayh, *Foreword to KOZA ET AL.*, *supra* note 17, at xix, xxi; *cf. supra* notes 72–73 and accompanying text (discussing the equality-based objection to the Electoral College).

¹¹⁴ *See* Alexander Keyssar, *The Right to Vote and Election 2000*, in *THE UNFINISHED ELECTION OF 2000*, at 75, 96 (Jack N. Rakove ed., 2001).

¹¹⁵ *See* John A. Zadrozny, Comment, *The Myth of Discretion: Why Presidential Electors Do Not Receive First Amendment Protection*, 11 *COMMLAW CONSPECTUS* 165, 182 (2003) (“Defenders of the electoral college, however, note that . . . the smaller voting pool within a given state, and the value of that state's electoral votes, make it more likely that voters will show up at the polls because of the recognition of their increased voting power.”).

¹¹⁶ *See* FED. ELECTION COMM'N, *supra* note 67, at 6.

¹¹⁷ Some critics charge that the Compact will encourage more third-party candidacies, which in turn may allow candidates to win the Presidency with only a small plurality of the national popular vote. *See* Williams, *Reforming the Electoral College*, *supra* note 19, at 203. It is difficult to assess the validity of such empirical predictions. There have already been many serious third-party candidacies, as well as plurality winners, under the Electoral College. And a

II. PROCEDURAL CONCERNS: CONGRESSIONAL CONSENT UNDER THE COMPACT CLAUSE

Perhaps the most obvious objection to the National Popular Vote Compact is that it is invalid under the Compact Clause¹¹⁸ unless and until Congress consents to it.¹¹⁹ Under the Court's longstanding interpretation of the Clause, however, congressional approval is likely unnecessary. In any event, if states collectively holding 270 or more electoral votes joined the Compact, Congress would likely grant its approval at some point, perhaps when Democrats controlled both Congress and the Presidency. Thus, at most, the Compact Clause reflects a potential constitutional speed bump, not an impenetrable barrier. Regardless, it is necessary to determine whether congressional consent is required, or if instead the Compact may immediately enter into force when enough states have adopted it.

Interstate compacts were originally used "to resolve disputes between small numbers of states concerning boundary issues, water rights, and other similar local issues,"¹²⁰ often without congressional consent.¹²¹ In the twentieth century, interstate compacts evolved into "a tool for dealing with a wide range of social, environmental, and political issues."¹²² Interstate agreements have sometimes even created new administrative agencies transcending state boundaries.¹²³ The forty-six-state tobacco Master Settlement Agreement¹²⁴

national popular vote may enhance the advantages that party-backed candidates enjoy under a plurality-based system. *Cf.* MAURICE DUVERGER, *POLITICAL PARTIES* 217 (1954).

Other opponents argue that the Compact violates the Guarantee Clause, U.S. CONST. art. IV, § 4, which requires each state to provide a republican form of government. *See* Feeley, *supra* note 18, at 1444; *see also* Ross & Hardaway, *supra* note 22, at 431. The Guarantee Clause, however, is non-justiciable. *See* *Luther v. Borden*, 48 U.S. (7 How.) 1, 28 (1849). Moreover, since states are not constitutionally required to allow their citizens to participate in selecting presidential electors at all, *see* U.S. CONST., art. II, § 1, cl. 2; *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*), appointing them based on the national popular vote would probably not violate the clause. In addition, since the Compact does not affect the election of state legislators or governors, its changes concerning presidential electors are unlikely to impact whether a state's form of government is sufficiently "republican." *See* Robbins, *supra* note 18, at 24.

¹¹⁸ *See* U.S. CONST. art. I, § 10, cl. 1.

¹¹⁹ As with any legislative action by Congress, a bill or joint resolution approving an interstate compact would be subject to a presidential veto. *See* U.S. CONST. art. I, § 7; Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 319 n.138 (2003); *see, e.g.*, H.R. DOC. NO. 77-690, at 2 (1942) (President Franklin D. Roosevelt's veto of the Republican River Compact, H.R. 5945, 77th Cong. (1942)).

¹²⁰ Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 515 (2009); *see also* Eric T. Tollar, Note, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK U. L. REV. 695, 702 (2018).

¹²¹ *See* Pincus, *supra* note 120, at 517 (citing Felix Frankfurter & James Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 749–54 (1928)).

¹²² *Id.* at 516.

¹²³ *See* Agreement of N.Y. and N.J. establishing Port of N.Y. Auth., ch. 77, art. II, 42 Stat. 174, 175 (1921).

and the Regional Greenhouse Gas Initiative,¹²⁵ which established a cap-and-trade system for carbon offsets among ten states, are among the most elaborate interstate agreements that have entered into effect without congressional consent. The Council on State Governments reports that nearly 200 interstate compacts currently exist.¹²⁶ The Compact is the only active or pending agreement, however, that deals with elections.¹²⁷

The Compact Clause of the U.S. Constitution provides, “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power”¹²⁸ Perhaps because the Articles of Confederation contained a similar provision,¹²⁹ it did not attract attention at the Constitutional Convention¹³⁰ or during the ratification debates.¹³¹ Although the Clause’s plain text suggests that a state’s compacts with other states are subject to the same constraints as compacts with foreign nations,¹³² the Supreme Court has treated those two types of agreements very differently. The Court has granted states far greater flexibility to enter into interstate compacts than foreign agreements.¹³³

In the 1893 case *Virginia v. Tennessee*,¹³⁴ the Court recognized that the terms “agreement” and “compact” in the Clause are “sufficiently comprehen-

¹²⁴ See *Star Sci., Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002) (“[T]he Master Settlement Agreement does not increase the power of the States at the expense of federal supremacy and . . . therefore, it is not an interstate compact requiring congressional approval under the Compact Clause.”).

¹²⁵ See Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1959–60 (2007).

¹²⁶ See *Compact Search Results*, NAT’L CENTER FOR INTERSTATE COMPACTS, <https://apps.csg.org/ncic/SearchResults.aspx> [<https://perma.cc/JVD7-YNDE>].

¹²⁷ See *Compact Search Results: Elections*, NAT’L CENTER FOR INTERSTATE COMPACTS, <https://apps.csg.org/ncic/SearchResults.aspx?&category=26> [<https://perma.cc/HMH2-GB4B>].

¹²⁸ U.S. CONST. art. I, § 10, cl. 3. The Constitution also provides, “No State shall enter into any Treaty, Alliance, or Confederation.” *Id.* art. I, § 10, cl. 1. Unlike the Compact Clause, that provision is an absolute prohibition. Thus, Article I, Section 10 contemplates a distinction between treaties, which states may never execute, and compacts, which states may create only with congressional consent. For over a century, however, the Court has declined to apply the treaty provision to agreements among states. And, despite the plain text of the Compact Clause, the Court does not require congressional consent for all agreements between or among states. See *Virginia v. Tennessee*, 148 U.S. 503, 517–18 (1893).

¹²⁹ See ARTICLES OF CONFEDERATION of 1781, art. VI (“No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into and how long it shall continue.”).

¹³⁰ See James Madison, *Journal* (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 71, at 177, 177–89; James Madison, *Journal* (Sept. 12, 1787), in *id.* at 585, 585–89.

¹³¹ The *Federalist Papers* declared that the Compact Clause was “a part of the existing articles of Union” and retained in the Constitution due to “reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.” THE FEDERALIST NO. 44, *supra* note 70, at 299, 302 (James Madison).

¹³² See Ross & Hardaway, *supra* note 22, at 420 (noting that the Constitution’s language does not distinguish between foreign and domestic agreements).

¹³³ See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 572 (1840) (opinion of Taney, C.J.); see also Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 760–61 (2010).

¹³⁴ 148 U.S. 503 (1893).

sive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects.”¹³⁵ Adopting the reasoning of Justice Joseph Story’s *Commentaries on the Constitution*, however, it went on to reject a textualist interpretation of the Clause and instead adopted a purposivist one.¹³⁶ The Court held that congressional consent is required only for interstate agreements that either enhance the contracting states’ “political influence” at the expense of the national government’s supremacy, or interfere with the government’s “rightful management” of issues under its exclusive control.¹³⁷ Such consent is unnecessary for compacts that affect only the contracting states themselves, such as contracts for the sale of small parcels of land, ordinary commercial transactions, or joint ventures for public works projects within their borders.¹³⁸

The Court reaffirmed this standard nearly a century later in *U.S. Steel Corp. v. Multistate Tax Commission*, holding that congressional consent is required only when a compact potentially impacts either “the federal structure” or federal supremacy.¹³⁹ Over twenty states had joined the Multistate Tax Compact (“MTC”), which governed the taxation of multistate corporations.¹⁴⁰ The MTC established a Multistate Tax Commission with subpoena power that any member state could have audit taxpayer companies within its borders.¹⁴¹ The Court held that congressional consent was not required, even though the MTC created a new administrative agency to which states had delegated a degree of sovereign power.¹⁴² The Court reasoned that the MTC did not enhance state power at the expense of the federal government because it did not purport to grant member states any new powers that they otherwise lacked.¹⁴³ The Court emphasized that states could reject any pro-

¹³⁵ *Id.* at 517–18.

¹³⁶ *See id.* at 519 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397, at 271–72 (Hilliard, Gray and Co. 1833)) (interpreting the Compact Clause by “looking at the object of the constitutional provision, and construing the terms ‘agreement’ and ‘compact’ by reference to it”); *see also* *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459 (1978) (declining to read the Compact Clause “literally”).

¹³⁷ *Virginia*, 148 U.S. at 518; *see also* *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (reiterating that congressional consent is required only for compacts “tending to increase the political power of the States, which may encroach upon or interfere with the just supremacy of the United States”); *cf.* *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (recognizing that interstate agreements for “political purposes . . . can scarcely fail to interfere with the general purpose and intent of the constitution”).

¹³⁸ *See Virginia*, 148 U.S. at 518; *see also* *New Hampshire v. Maine*, 426 U.S. 363, 369–70 (1976) (holding that congressional consent was not required for a consent decree between states construing the meaning of terms in an instrument from 1740 identifying their borders).

¹³⁹ 434 U.S. at 471–72 (1978); *cf.* *New York v. United States*, 505 U.S. 144, 182–83 (1992) (holding that a “departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials,” particularly when it impacts “the Constitution’s intergovernmental allocation of authority”).

¹⁴⁰ *See U.S. Steel*, 434 U.S. at 471–72.

¹⁴¹ *See id.* at 457.

¹⁴² *See id.* at 472.

¹⁴³ *See id.* at 473.

posed regulations that the Commission recommended or even withdraw from the MTC at any time.¹⁴⁴

Even when an interstate compact requires congressional approval, the Court has recognized that Congress may consent implicitly.¹⁴⁵ In *Virginia v. Tennessee*, for example, the Court held that Congress had implicitly approved an agreement resolving a boundary dispute between the contracting states by using the agreement's boundaries when legislating "for judicial and revenue purposes" and dealing with federal elections and appointments.¹⁴⁶ While legislating consistently with an interstate compact on a single occasion would not necessarily constitute implicit approval, such treatment "for a long succession of years, without question or dispute from any quarter," constitutes "conclusive proof of assent."¹⁴⁷

Professor Michael Greve has cogently critiqued the *U.S. Steel* test because it focuses exclusively on an interstate compact's effects on the federal government's power, rather than its impact on other, non-signatory states.¹⁴⁸ Felix Frankfurter and James Landis likewise argued for a broader interpretation of the Compact Clause, framing the issue in terms of externalities.¹⁴⁹ They argued that Congress should be able to "safeguard[] the national interest" by "exercis[ing] national supervision" over any agreement that "affect[s] the interests of States other than those parties to [it]."¹⁵⁰ As Justice White pointed out in his *U.S. Steel* dissent, the Court's construction of the Compact Clause renders it superfluous.¹⁵¹ By requiring congressional consent only for interstate agreements that infringe on Congress' constitutional authority, the Compact Clause imposes constraints that Congress could establish under its other powers.

¹⁴⁴ See *id.*

¹⁴⁵ See *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) (holding that consent is "always to be implied when [C]ongress adopts the particular act by sanctioning its objects and aiding in enforcing them").

¹⁴⁶ See *id.* at 522.

¹⁴⁷ *Id.* at 522; cf. *United States v. Florida*, 363 U.S. 121, 138 (1960) (Harlan, J., dissenting) (declining to infer that Congress had implicitly approved a change in Florida's boundaries when it allowed Florida to rejoin the Union following the Civil War).

¹⁴⁸ See Greve, *supra* note 119, at 380; see also *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 495 (1978) (White, J., dissenting); Heather Green, Comment, *The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause*, 16 CHAP. L. REV. 211, 238 (2012) ("While the necessity of consent in instances of horizontal encroachment is unclear from Supreme Court precedent, such compacts harm the balance of power between states, posing a risk to the entire federal system.").

¹⁴⁹ See Frankfurter & Landis, *supra* note 121, at 695.

¹⁵⁰ *Id.*

¹⁵¹ See *U.S. Steel*, 434 U.S. at 452 (White, J., dissenting) (arguing that the Clause should prohibit certain agreements concerning "actions which would be permissible for individual States to undertake"); see also Pincus, *supra* note 120, at 528, 537 (arguing that *U.S. Steel* "empties the Compact Clause of all of its independent meaning and reduces it to a provision that simply serves to recapitulate the other provisions of the Constitution," and that congressional approval should be required for interstate compacts regarding issues that extend beyond areas of traditional state concern).

Despite the shortcomings of the *U.S. Steel* approach, the Court is likely to apply this interpretation of the Compact Clause to determine the validity of the National Popular Vote Compact. Under *U.S. Steel*, there are three possible rationales for requiring Congress to approve the Compact, but none is ultimately persuasive. First, the Compact allows member states to reduce the scope of the federal government's power by structurally precluding the U.S. House of Representatives and Senate from ever being able to exercise their prerogative to select the President and Vice President, respectively, when no candidate wins a majority of votes in the Electoral College.¹⁵² The Compact enters into effect when states possessing at least 270 electoral votes sign on.¹⁵³ Once that occurs, the Compact provides that whichever candidate wins the national popular vote will receive all of those electoral votes, guaranteeing that person the Presidency.¹⁵⁴ So long as the Compact remains in force, the House of Representatives and Senate will be completely precluded from ever selecting the President or Vice President.

It is unclear how seriously the Supreme Court would take this concern. The House of Representatives has selected the President only twice, in 1800 and 1824.¹⁵⁵ The first occasion pre-dated the Twelfth Amendment and arose from the fact that electors did not cast separate ballots for President and Vice President—a problem the Twelfth Amendment corrected.¹⁵⁶ The Election of 1824, in contrast, occurred prior to the development of the modern political convention system and involved four major candidates, all of the same party. Over the subsequent two centuries, the U.S. House has not exercised its constitutional authority to resolve a presidential election.¹⁵⁷ Similarly, the Senate has chosen a Vice President only once, nearly two centuries ago, in 1836.¹⁵⁸

Moreover, the power of the House and Senate to elect winners is not an absolute prerogative, but rather is contingent on the failure of any candidate to win a majority in the Electoral College. Although the Framers expected

¹⁵² Cf. Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 739–40 (2007); see also Ross & Hardaway, *supra* note 22, at 426.

¹⁵³ See CAL. ELEC. CODE § 6921, art. III, para. 9 (West, Westlaw through ch. 9 of 2021 Reg. Sess.); *id.* art. IV, para. 1.

¹⁵⁴ See *id.* art. III, para. 1. Of course, one or more “faithless electors” from member states may attempt to cast their electoral votes for candidates other than the one who won the national popular vote. Many states require electors to cast their electoral votes for the presidential candidate with which they are associated, however. See *supra* notes 53–58 and accompanying text.

¹⁵⁵ See *supra* note 64.

¹⁵⁶ See *id.* Under the Twelfth Amendment, electors now cast separate votes for President and Vice President. The candidate who receives the highest number of electoral votes for each office wins, so long as that figure constitutes a majority of the total number of electors appointed. U.S. CONST. amend. XII.

¹⁵⁷ In the Hayes-Tilden election of 1876, Congress formed a joint commission to determine the validity of contested electoral votes, alleviating the need for the U.S. House to select the President. See WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 115 (2004).

¹⁵⁸ See Williams, *National Vote Compact*, *supra* note 19, at 1532 n.34.

the chambers of Congress would exercise this power regularly,¹⁵⁹ the Constitution does not guarantee they will be able to do so. From a modern perspective, preventing elections from being “thrown” to the House or Senate seems like a feature, not a bug, of the Compact. Thus, the Compact does not leave the national government with less power than it has exercised for nearly the past two centuries.

A second, more abstract, argument is that the Compact requires congressional approval because it “impact[s] . . . the federal structure.”¹⁶⁰ It allows a group of states to select the President among themselves, rendering other states’ electoral votes irrelevant.¹⁶¹ As an initial matter, however, *U.S. Steel* provides that an interstate compact “impact[s] the federal structure” for purposes of the Compact Clause only if it infringes upon the federal government’s authority. In other words, *U.S. Steel*’s reference to compacts that “impact the federal structure” does not create a new category of compacts requiring congressional approval. Instead, it is simply another way of referring to agreements that “enhance[] . . . state power at the expense of federal supremacy.”¹⁶²

Viewed from this vertical perspective, the Compact does not impact federal supremacy.¹⁶³ Apart from precluding the House and Senate from exercising their contingent authority to select the President and Vice President,¹⁶⁴ the Compact does not allow states to intrude upon the constitutional powers of Congress or the President.¹⁶⁵ To the contrary, it simply dictates the slates of presidential electors that member states must appoint. State legislatures have plenary discretion concerning the appointment of electors;¹⁶⁶ the matter is outside the federal government’s control. As Professor Akhil Amar explains, “[T]he cooperating states acting together would be exercising no more power than they are entitled to wield individually.”¹⁶⁷ Thus, the Compact does not affect the federal structure in a way that would require congressional approval under the Compact Clause.

A final potential objection is that the Compact empowers member states to collectively select the President without input from other states’

¹⁵⁹ See LAWRENCE D. LONGLEY & NEAL R. PIERCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 25 (1999).

¹⁶⁰ *U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452, 471–72 (1978); cf. Ross & Hardaway, *supra* note 22, at 424 (“The compact unilaterally changes the nature of the election system at a national level.”).

¹⁶¹ See Ross & Hardaway, *supra* note 22, at 404–05.

¹⁶² *U.S. Steel*, 434 U.S. at 470.

¹⁶³ Cf. Muller, *supra* note 22, at 384–85.

¹⁶⁴ See *supra* notes 154–58 and accompanying text.

¹⁶⁵ See Sample, *supra* note 18, at 421–23; Robbins, *supra* note 18, at 22 (“[I]f the [Compact] were to be put into effect, there would be no disturbance in the balance of power—the states are simply exercising a right they already have under the Constitution, and that has no effect on federal authority.”).

¹⁶⁶ See U.S. CONST. art. II, § 1, cl. 2; see also *McPherson v. Blacker*, 146 U.S. 1, 34–35 (1892).

¹⁶⁷ Amar, *Some Thoughts*, *supra* note 12, at 478.

electors. In other words, rather than enhancing member states' authority at the expense of the federal government, it does so at the expense of other states.¹⁶⁸ *U.S. Steel*, however, does not take into account a compact's horizontal impact on non-member states.¹⁶⁹ Moreover, that case strongly suggests that a compact which requires member states to take actions which they already have the authority to perform individually does not inflict legally cognizable harm upon non-member states.¹⁷⁰

Furthermore, the impact of this argument depends on the level of generality at which one assesses the Compact. On its face, the Compact does not exclude non-member states from the process of selecting a President. To the contrary, the preferences of those states' citizens are taken into account twice. Each non-member state remains free to appoint presidential electors however it prefers, including based solely on its own citizens' votes. Those electors retain the same share of influence within the Electoral College that they would otherwise wield in the absence of the Compact. Perhaps more importantly, member states also take into account the preferences of non-member states' citizens as part of the national popular vote. Thus, if the Court focuses on the specific manner in which the Compact is implemented, the metric by which member states have agreed to appoint their presidential electors does not diminish other states' constitutionally delegated powers.¹⁷¹

Considered at a higher level of generality, however, the Compact is far more troubling. The Compact allows a cabal of states holding enough electoral votes to select the President on their own to adopt a uniform metric with which they will appoint a dispositive number of electors. Even though the Compact requires member states to select the President based on the national popular vote, the fact remains that a subset of states should not be able to assert such a formal stranglehold over the Presidency. The Compact could be a precedent for an agreement in which states holding 270 electoral votes decide to award those votes based only on the popular vote within those member states themselves,¹⁷² completely excluding non-member states from any meaningful participation in the presidential election.¹⁷³ While the

¹⁶⁸ See Muller, *supra* note 22, at 385–87; Derek Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 ELECTION L.J. 227, 231 (2008); Ross & Hardaway, *supra* note 22, at 427–28.

¹⁶⁹ See Greve, *supra* note 119, at 335; see also Schleifer, *supra* note 152, at 740–41. *But see* Florida v. Georgia, 58 U.S. 478, 494 (1854) (holding that the Compact Clause “prevent[s] any compact or agreement between any two [s]tates, which might affect injuriously the interests of the others”); Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1838) (holding that the Compact Clause protects against “derangement of [states’] federal relations with the other states of the Union, and the federal government”).

¹⁷⁰ See *U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1978).

¹⁷¹ See Robbins, *supra* note 18, at 25–26.

¹⁷² See Williams, *National Vote Compact*, *supra* note 19, at 1528; see also Feeley, *supra* note 18, at 1430.

¹⁷³ One can imagine more outlandish metrics by which member states could decide to award their electoral votes: a coin flip, a vote of the United Nations General Assembly, or the candidate who received the second-greatest number of votes in the national popular vote. *Cf.* Beerman, *supra* note 18, at 737 n.106; Hiltachk, *supra* note 18, at 93. Some commentators

notion of choosing a President based on the national popular vote may make the Compact seem less threatening, any agreement among certain states to select the President in a way that renders other states' electoral votes irrelevant is troubling. Even so, *U.S. Steel* does not require congressional consent for agreements that redistribute power horizontally among states or generate negative externalities for non-member states. Such concerns are best addressed on other constitutional grounds.¹⁷⁴ Thus, under current doctrine, the Compact likely does not require congressional approval under the Compact Clause.¹⁷⁵

III. SUBSTANTIVE CONSTITUTIONAL OBJECTIONS

The Compact raises several serious constitutional concerns that congressional approval would not remedy, regardless of whether the Compact Clause applies to it. First, the Compact likely violates the right to vote of a member state's citizens by allowing their votes to be diluted or even overridden by the votes of other states' citizens, who are ineligible under that member state's constitution to vote in its elections. Second, the Compact likely violates the Equal Protection Clause as construed in *Bush v. Gore*¹⁷⁶ because it requires votes from all fifty-one jurisdictions to be aggregated, even though they were cast and counted under differing voter qualification standards, electoral rules, and ballot-validity regulations.

Third, the Compact also likely violates the Constitution's structural federalism-based restrictions that the Supreme Court has recognized over the past several decades. Finally, by nullifying several key characteristics of the Electoral College, the Compact may violate implicit restrictions in the Presidential Electors Clause.¹⁷⁷ In particular, one of the Compact's key provisions purports to prohibit member states from withdrawing and changing their method of appointing electors—for example, by returning to a state-wide vote—within six months of a presidential election. The Supreme Court has held, however, that any attempt to limit a state legislature's plenary authority under the Presidential Electors Clause is unenforceable.¹⁷⁸

have rejected such hypotheticals, arguing that courts can distinguish between defensible and irrational grounds for appointing electors. See Sample, *supra* note 18, at 420–21.

¹⁷⁴ See *infra* Section III.C (discussing structural constitutional arguments against the Compact).

¹⁷⁵ See Goldfeder, *supra* note 18, at 990 n.147. Matthew Pincus argues that the Compact should be subject to congressional approval because it has “the capacity to produce wide scale national change,” but he recognizes that his reasoning does not reflect the current constitutional standard under *U.S. Steel*. Pincus, *supra* note 120, at 543.

¹⁷⁶ 531 U.S. 98 (2000) (per curiam).

¹⁷⁷ Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–34 (1994) (inferring implicit restrictions on the scope of the authority that the Elections Clause—a provision read *in pari materia* with the Presidential Electors Clause—delegates to state legislatures to regulate congressional elections).

¹⁷⁸ See *McPherson v. Blacker*, 146 U.S. 1, 34–35 (1892).

A. *The Right to Vote*

The Compact likely requires most member states to violate their citizens' right to vote under the U.S. Constitution. The Presidential Electors Clause grants each state legislature broad discretion to determine the "Manner" in which its state will select its presidential electors.¹⁷⁹ In *Bush v. Gore*, the Supreme Court held that, when a state chooses to appoint its electors based on popular elections, the Constitution's protections for voting rights are triggered.¹⁸⁰ The constitutional right to vote, most basically, refers to the right of "the designated electors" to "choose representatives . . . by some form of election."¹⁸¹ It includes the right of eligible voters to have their validly cast ballots be counted and given full weight and effect, without being diluted by improper or fraudulent votes.¹⁸² The Court has expressly recognized, "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."¹⁸³ Thus, the right to vote protected by the U.S. Constitution requires states to ensure that their elections are limited to eligible voters—even though eligibility is largely a state-law issue.

Every state constitution in the nation contains a voter qualification clause, specifying the eligibility requirements that a person must satisfy to be a qualified voter of that state.¹⁸⁴ These provisions generally require, among

¹⁷⁹ See U.S. CONST. art. II, § 1, cl. 2; see also *infra* notes 255–56 and accompanying text.

¹⁸⁰ See *Bush*, 531 U.S. at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . .").

¹⁸¹ *United States v. Classic*, 313 U.S. 299, 318 (1941) (emphasis added).

¹⁸² See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote cannot be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (citations omitted)); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (holding that the right to cast a ballot and have it be counted can neither be "denied outright" nor "be destroyed by alteration of ballots, or diluted by stuffing of the ballot box" (citations omitted)); *Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts; or by a stuffing of the ballot box." (citations omitted)); *Classic*, 313 U.S. at 322 (holding that the Constitution protects the "right of the voter to have his vote counted in both the general election and in the primary election, where the latter is a part of the election machinery"); see also Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2068–70 (2018) (discussing the "defensive right to vote").

¹⁸³ *Reynolds*, 377 U.S. at 555; accord *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

¹⁸⁴ Numerous state constitutions specify that residents of the state are eligible to vote in its elections. ARK. CONST. art. 3, § 1; CAL. CONST. art. II, § 2; FLA. CONST. art. VI, § 2; LA. CONST. art. I, § 10 ("[C]itizen[s] of the state . . ."); MO. CONST. art. VIII, § 2; N.H. CONST. pt. I, art. 11; N.D. CONST. art. II, § 1; OKLA. CONST. art. III, § 1; S.C. CONST. art. II, § 4; UTAH CONST. art. IV, § 2; see also CONN. CONST. art. VI, § 1 (requiring residence in a town); KAN. CONST. art. 5, § 1 (requiring residence in "the voting area" in which the person seeks to vote and specifying that Kansas will follow federal laws concerning presidential elections); VA. CONST. art. II, § 1 (specifying that "each voter shall be a resident of the Commonwealth and of the precinct where he votes," and that "[t]he General Assembly may also provide, in elections for President . . . alternatives to registration for new residents").

Many state constitutions provide that a person must be a state resident for a time period prescribed by law. See ALA. CONST. amend. 579; COLO. CONST. art. VII, § 1; IDAHO

other things, that a person be a resident of the state to be eligible to vote in elections there.¹⁸⁵ These residency requirements are usually construed to mean that only people domiciled within the state are eligible voters; the state must be their permanent home.¹⁸⁶

CONST. art. VI, § 2; MONT. CONST. art. IV, § 2; NEB. CONST. art. VI, § 1; N.M. CONST. art. VII, § 1; OHIO CONST. art. V, § 1; TENN. CONST. art. IV, § 1; *see also* GA. CONST. art. II, § I, para. II (guaranteeing right to vote to “resident[s] of Georgia as defined by law”); S.D. CONST. art. VII, § 2 (extending right to vote to citizens who have “met all residency . . . requirements”); UTAH CONST. art. IV, § 2 (granting right to vote to citizens “who make[] proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law”); VT. CONST. ch. II, § 42; WYO. CONST. art. 6, § 2.

Others expressly set forth the required residency period. *See* HAW. CONST. art. II, § 1; KY. CONST. § 145; MD. CONST. art. I, § 1 (requiring residency “as of the time for the closing of registration” for an election to vote in it); N.J. CONST. art. II, § I, para. 3; N.Y. CONST. art. II, §§ 1, 9; PA. CONST. art. VII, § 1; R.I. CONST. art. II, § 1; WASH. CONST. art. VI, § 1; W. VA. CONST. art. IV, § 1; *see also* IND. CONST. art. 2, § 2 (requiring residency in a precinct within the state for at least 30 days before the election); MINN. CONST. art. VII, § 1 (same); MISS. CONST. art. 12, § 241 (specifying that a person must be a state resident for a specified period of time to vote, and that a person “shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector”). Many of the residency periods specified by state constitutions are unenforceable, however, because they violate the U.S. Constitution. *See* *Dunn v. Blumstein*, 405 U.S. 330, 348-49 (1972) (invalidating lengthy residency requirement while affirming validity of 30-day registration requirement).

Several state constitutions allow the legislature to shorten or otherwise establish the residency requirements for presidential elections. *See* ALASKA CONST. art. V, § 1 (specifying that “residency requirements” for presidential elections may be “prescribed by law”); ILL. CONST. art. III, § 1 (“The General Assembly by law may establish shorter residence requirements for voting for President”); MICH. CONST. art. II, §§ 1, 3 (providing that, for presidential elections, “the legislature may by law establish lesser residence requirements for citizens who have resided in this state for less than six months and may waive residence requirements for former citizens of this state who have removed herefrom”); N.C. CONST. art. VI, § 2 (“The General Assembly may reduce the time of residence for persons voting in presidential elections.”); OR. CONST. art. II, § 2 (“[P]rovision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President.”); *see also* DEL. CONST. art. V, §§ 2-2B (allowing the legislature to allow certain people who move shortly before a presidential election to vote in that election, even though they do not satisfy residency requirements); IOWA CONST. art. II, § 1 (“The general assembly may provide by law for different periods of residence . . . in order to vote in various elections.”); TEX. CONST. art. VI, § 2 (allowing the legislature to create exceptions to the general residency requirement for voting in presidential elections for certain people who fail to satisfy it).

Two states grant the legislature even broader discretion to set voter qualifications for presidential elections. ARIZ. CONST. art. VII, § 2 (“[Q]ualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law.”); *see also* NEV. CONST. art. 2, § 1 (“The legislature may provide by law the conditions under which a citizen of the United States who does not have the status of an elector in another state and who does not meet the residence requirements of this section may vote in this state for President.”). And the constitutions of two other states—Maine and Massachusetts—do not appear to expressly address qualifications for voting in presidential elections at all. *See* ME. CONST. art. II, § 1 (establishing requirements to be “an elector for Governor, Senators and Representatives”); MASS. CONST. art. of amend. III (establishing qualifications to vote for “governor, lieutenant governor, senators, or representatives”). *See generally* Derek T. Muller, *Complexity Confronting State Judges and the Right to Vote*, 77 OHIO ST. L.J. FURTHERMORE 65, 71 (2016).

¹⁸⁵ *See supra* note 184.

¹⁸⁶ *See* Muller, *supra* note 184, at 71; *see, e.g.*, *Horwitz v. Kirby*, 197 So. 3d 943, 950 (Ala. 2015) (agreeing that “the terms ‘legally resides,’ ‘inhabitant,’ ‘resident,’ etc., when used in con-

The Compact requires each member state to hold a statewide presidential election, but then appoint the slate of electors for the presidential candidate who wins the national popular vote, rather than that state's statewide popular vote.¹⁸⁷ Thus, the Compact will often require a member state to appoint a slate of electors that did not receive a plurality of votes within that state in the presidential election, but rather was rejected by that state's citizens. The Compact allows votes cast by a state's eligible voters to be diluted and overridden by votes cast throughout the rest of the nation by people who are ineligible under the state constitution to vote in that state's elections,¹⁸⁸ including for state officials such as presidential electors.¹⁸⁹ For a state to appoint presidential electors who did not win the election within that state based on the votes of non-residents who are ineligible to vote there appears to violate not only the state constitution's voter qualification provisions, but the right to vote—more specifically, the right to cast an undiluted vote—under the U.S. Constitution, as well.¹⁹⁰

United States v. Classic bolsters this argument. *Classic* held that even though states are not required to hold primary elections, when they choose to do so, the primary “is by law made an integral part of the election machinery.”¹⁹¹ At that point, the fundamental right to vote attaches, and the state may not disregard the choice of its “designated electors”—meaning its voters.¹⁹² As the *Classic* Court declared, “From time immemorial an election to public office has been in point of substance no more and no less than the expression *by qualified [voters]* of their choice of candidates.”¹⁹³ This same reasoning applies to presidential elections. By appointing presidential electors based on the outcome of the national popular vote rather than its statewide vote, a state impermissibly allows the votes of its citizens—whom the

nection with political rights are synonymous with domicile” (quoting *Mitchell v. Kinney*, 5 So. 2d 788 (Ala. 1942)); *Walters v. Weed*, 752 P.2d 443, 445–46 (Cal. 1988) (explaining that California law construes the state constitution's reference to a voter's residence as referring to domicile); *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 240 n.8 (Md. 2003) (“It is firmly settled that the word ‘residence’ in Article I means ‘domicile.’”); *Young v. Stevens*, 968 So. 2d 1260, 1263 (Miss. 2007) (“In Mississippi, residence and domicile are synonymous for election purposes.”).

¹⁸⁷ See CAL. ELEC. CODE § 6921, art. III, para. 3 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

¹⁸⁸ Cf. *supra* note 182 (explaining how a person's right to vote is violated if the weight of their vote is diluted by the inclusion of ballots from ineligible people in the final vote tallies).

¹⁸⁹ See *Ray v. Blair*, 343 U.S. 214, 224–25 (1952) (“The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents . . . They act by authority of the state that in turn receives its authority from the Federal Constitution.”); *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *In re Green*, 134 U.S. 377, 378 (1890).

¹⁹⁰ See also *Beerman*, *supra* note 18, at 737 (claiming that awarding all of a state's electors to a candidate who lost the popular vote within that state “presents a serious constitutional question”).

¹⁹¹ *United States v. Classic*, 313 U.S. 299, 318 (1941).

¹⁹² *Id.*

¹⁹³ *Id.* (emphasis added).

state constitution designates as its eligible voters—to be diluted and even overridden by people other than its “designated electors.”¹⁹⁴

States may be able to circumvent this objection and avoid violating their citizens' right to vote under the U.S. Constitution by amending their state constitutions to recognize out-of-state citizens as eligible voters who may vote for presidential electors.¹⁹⁵ If the pool of eligible voters under the state constitution encompassed all voters across the nation, a state's citizens would no longer be able to complain that their votes were being diluted by ballots from ineligible people. Such an extreme measure may exacerbate other constitutional problems of the Compact,¹⁹⁶ and would yield the anomalous result that each citizen is an eligible voter in up to fifty-one different jurisdictions, at least for the office of presidential elector. Without such reforms, however, the Compact likely violates state constitutions' voter qualification clauses and, by extension, the right to vote as protected by the U.S. Constitution.

B. *Equal Protection and Election Administration*

The Compact also likely violates *Bush v. Gore's* equal protection principles, because it calls for the aggregation of all votes cast across the nation, despite the fact that voters in different states are subject to very different regulatory regimes. *Bush v. Gore* held that, once states decide to appoint presidential electors based on a popular vote, the election must be held in

¹⁹⁴ *Id.*

¹⁹⁵ One might also object that the independent state legislature doctrine allows state legislatures to regulate federal elections without regard to substantive constraints in their state constitutions. See Morley, *supra* note 42, at 8–9. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 817–18 (2015), a majority of the Court tersely rejected that notion, albeit arguably in dicta. Moreover, with regard to congressional elections, the doctrine historically did not extend to issues concerning voter qualifications. Morley, *supra* note 42, at 18. Because the Constitution contains provisions expressly specifying who is eligible to vote in congressional elections, see U.S. CONST., art. I, § 2, cl. 1; *id.* amend. XVII, the Elections Clause's grant of authority to legislatures to regulate the “Manner” of congressional elections does not extend to that issue, Morley, *supra* note 42, at 66–69; see also *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013). Consequently, even if the independent state legislature doctrine is valid, legislatures are bound by state constitutional provisions governing voter qualifications for *congressional* elections.

The issue is a bit more complicated with regard to presidential elections. The Constitution does not contain any voter qualification clauses for presidential elections, because states are not required to even hold such elections in the first place. It is therefore possible that this restriction on the independent state legislature doctrine might not carry over to presidential elections. That is, the doctrine might allow legislatures to override or ignore state constitutional provisions establishing voter qualifications in the context of presidential elections. However, the Elections Clause and Presidential Electors Clause are typically construed *in pari materia*, including with regard to issues where their language differs (such as the scope of Congress' authority). See Morley, *supra* note 42, at 20 n.70. Thus, if the modern Court were to recognize and enforce the independent state legislature doctrine, state legislatures would likely still be bound by state constitutional provisions governing voter qualifications when legislating with regard to presidential elections.

¹⁹⁶ See *infra* Sections III.C–III.D.

accordance with equal protection principles.¹⁹⁷ “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”¹⁹⁸

The Court held that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause because election officials were not applying uniform rules for determining which ballots should count as valid votes.¹⁹⁹ State law required officials to ascertain “the intent of the voter,” but they were applying that vague principle in disparate ways.²⁰⁰ “[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”²⁰¹ The Florida Supreme Court also irrationally discriminated among voters by upholding manual recounts of overvotes from only a few counties.²⁰²

The Court emphasized that its holding was limited to the particular fact pattern before it: the “special instance of a statewide recount under the authority of a single state judicial officer.”²⁰³ Over the ensuing two decades, however, lower federal courts have applied these equal protection principles more broadly to the general conduct of elections as well.²⁰⁴ Compact supporters might contend that *Bush v. Gore*’s Uniformity Principle is nevertheless inapplicable to differences among various states’ laws governing presidential elections. They would likely point out that courts have consistently rejected equal protection challenges to the Electoral College on the grounds that it affords different weight to the votes of different states’ citi-

¹⁹⁷ See 531 U.S. 98, 104 (2000) (per curiam) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”).

¹⁹⁸ *Id.*; see also *id.* at 107 (reiterating that the Constitution prohibits “arbitrary and disparate treatment” of voters in different counties within the state (citing *Gray v. Sanders*, 372 U.S. 368 (1963))).

¹⁹⁹ See *id.* at 105–06.

²⁰⁰ *Id.* at 105 (quoting *Gore v. Harris*, 779 So. 2d 270, 270 (Fla. 2000)).

²⁰¹ *Id.* at 106.

²⁰² See *id.* at 107. An “overvote” is a ballot which an automated tally machine rejects because it detects more than the legal number of votes.

²⁰³ *Id.* at 109. The Court added that it was not addressing “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Id.* Rather, the Court attempted to limit its holding to situations “[w]here a court orders a statewide remedy.” *Id.*

²⁰⁴ See *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012); *League of Women Voters v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). For a more detailed description of lower federal courts’ far-reaching applications of *Bush v. Gore*, see Morley, *supra* note 182, at 2089–108; see also Edward B. Foley, *Election Administration: Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035, 1037 (2007) (“[N]otwithstanding its limiting language, *Bush v. Gore* contains a ruling capable of principled explication”); Daniel H. Lowenstein, *Election Administration: The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007) (identifying various contexts in which *Bush v. Gore*’s equal protection principle applies); Michael T. Morley, *Bush v. Gore’s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 230–31 (2020) (“The *Bush* Court’s insistence on uniform treatment of voters—call it *Bush*’s Uniformity Principle—raises challenging questions for the traditional structure of election administration.”).

zens.²⁰⁵ And in *Gray v. Sanders*, the Supreme Court expressly identified the Electoral College as an exception to the Constitution's general requirement of equal treatment of voters.²⁰⁶

Both *Gray* and subsequent cases rejecting equal protection challenges to the Electoral College, however, grappled with its current structure: presidential electors appointed as the result of fifty-one separate statewide elections by different groups of voters. The Compact, in contrast, requires each member state to appoint its electors based on the outcome of the national popular vote.²⁰⁷ *Gray* itself declared that, under the Equal Protection Clause, "Once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit."²⁰⁸ Under the Compact, the relevant "geographic unit" is the nation, not individual states. Each member state tallies together all votes from across the country to determine which slate of electors to appoint; votes from each state are treated as fungible. It is extremely likely that *Bush v. Gore*'s equal protection principles would require that voters throughout the country be treated substantially equally.²⁰⁹

By way of analogy, imagine if Maine had adopted a law stating that, for the Governor's race, people in northern Maine could cast ranked-choice ballots,²¹⁰ but people in southern Maine were required to cast standard, one-candidate-only ballots. Such a statute would violate equal protection principles. Different voters within the relevant electorate—the state—would be treated materially differently with regard to their fundamental right to vote. The chance to cast a ranked-choice ballot gives some voters the opportunity to shift their vote among multiple candidates and have their lower-order preferences taken into account in ways unavailable to people casting standard ballots.

The Compact suffers from the same defect. When the Compact enters into effect, it will require member states to appoint electors based on the outcome of the national popular vote. The entire nation therefore becomes the relevant electorate for purposes of equal protection analysis. If only Maine voters may cast ranked-choice ballots,²¹¹ they are unfairly able to exercise more expansive voting rights than other voters participating in the same

²⁰⁵ See *New v. Ashcroft*, 293 F. Supp. 2d 256, 259 (E.D.N.Y. 2003); see also *New v. Pelosi*, No. 08 Civ. 9055 (AKH), 2008 U.S. Dist. LEXIS 87447, at *4–6 (S.D.N.Y. Oct. 29, 2008).

²⁰⁶ See 372 U.S. 368, 377–78 (1963).

²⁰⁷ See CAL. ELEC. CODE § 6921, art. III, para. 3 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

²⁰⁸ *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

²⁰⁹ See also *Ross & Hardaway*, *supra* note 22, at 430 ("NPV creates one new, national electorate, even as it leaves in place fifty-one sets of state election laws to govern that single election pool.").

²¹⁰ For an explanation of ranked-choice voting, see Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 334 (2006).

²¹¹ See ME. REV. STAT. ANN. tit. 21-A, § 805 (West, Westlaw through 2019 2nd Reg. Sess., 129th Leg.).

nationwide election. Such a scenario raises the same equal protection problems as in the hypothetical gubernatorial election discussed above. Importantly, these problems exist regardless of whether Maine is among the compacting states. The Equal Protection Clause violation arises from the fact that only certain voters whose ballots are included in the nationwide tally have the opportunity to cast ranked-choice ballots.²¹²

Adopting the Compact would violate the Equal Protection Clause because states administer presidential elections very differently from each other in virtually every respect.²¹³ Most basically, states' voter qualifications differ, especially with regard to restrictions on felon voting.²¹⁴ Similarly, although the National Voter Registration Act establishes minimum federal requirements for voter registration for federal elections,²¹⁵ states apply substantially different approaches to updating their voter registration databases and ensuring the accuracy of information within them.²¹⁶ And, as explained above, Maine's recent decision to adopt ranked-choice voting for presidential elections would likely raise especially serious equal protection concerns under the Compact.²¹⁷

Moreover, substantial differences among states' absentee and early voting laws afford their residents widely varying opportunities to vote, as well.²¹⁸ States also have different voter identification requirements, polling place

²¹² These equal protection concerns do not arise from Maine's use of ranked-choice voting in presidential elections outside the context of the Compact. Currently, Maine relies only on its own citizens' votes to determine who its presidential electors will be, and all Maine voters have the opportunity to cast ranked-choice ballots. *See id.* Moreover, no other state takes Maine's popular vote into account when conducting its presidential election. Consequently, Maine's decision to use ranked-choice ballots in presidential elections does not presently violate the Equal Protection Clause.

²¹³ *See* Muller, *supra* note 21, at 1253 (recognizing states' broad discretion in regulating all aspects of their respective elections for presidential electors); Williams, *Reforming the Electoral College*, *supra* note 19, at 223–26 (describing differences among states' election laws and procedures); *see also* Amar, *supra* note 20, at 249 (acknowledging that “the nonuniformity among the various states as to voter eligibility, voting machinery, and vote-count and vote-recount rules, present[s] a different set of challenges, and they are serious”).

²¹⁴ *See* Jean Chung, *Sentencing Project, Felony Disenfranchisement: A Primer*, SENTENCING PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/A7YB-YF57>]; *see also* Beth A. Colgan, *Wealth-Based Felon Disenfranchisement*, 72 VAND. L. REV. 55, 149–54 (2019) (discussing states' varying mechanisms for restoring felons' right to vote); Muller, *supra* note 21, at 1291 (recognizing that differences among states' policies concerning felon voting make it difficult to craft a uniform national standard for voter qualifications).

²¹⁵ *See* 52 U.S.C. §§ 20503–20507 (2018).

²¹⁶ *See, e.g.*, *Brunner v. Ohio Republican Party*, 555 U.S. 5, 5–6 (2008) (per curiam) (holding that a federal court could not consider the plaintiff's claim that the Ohio Secretary of State was violating the Help America Vote Act by refusing to compare voter registration records with the Social Security database, because that law did not create a private right of action).

²¹⁷ *See* ME. REV. STAT. ANN. tit. 21-A, § 805 (West, Westlaw through 2019 2nd Reg. Sess., 129th Leg.).

²¹⁸ *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/TR4B-7P9X>]. Federal law imposes minimum requirements for absentee voting in presidential elections, *see* 52 U.S.C. § 10502(d) (2018), but many states go far beyond them.

hours, and provisional ballot rules, all of which can impact a voter's ability to participate in an election. And, most obviously, states' vote-counting procedures—including their regulations for determining when to count incompletely, ambiguously, or erroneously filled out absentee ballots—vary, which would directly violate *Bush v. Gore's* core equal protection principle.²¹⁹ State laws concerning the availability of recounts similarly differ, giving each state's voters substantially different odds of having identically marked ballots counted—another major red flag under *Bush v. Gore*.²²⁰ Important distinctions likewise exist in the extent to which various states' officials are empowered to respond to election-related emergencies that impede people's ability to vote.²²¹

In short, the substantial disuniformity across jurisdictions concerning the administration of presidential elections²²² makes states' reliance on nationwide vote tallies deeply problematic under *Bush v. Gore*. Congress could eliminate many of these equal protection problems by passing federal laws regulating the manner in which presidential elections are held.²²³ Such laws would be a dramatic departure from our nation's tradition of allowing states to decide for themselves how to conduct most aspects of federal elections.²²⁴ Moreover, states often seek to minimize administrative costs and burdens by applying the same rules to elections for offices at all levels of government.²²⁵ Any uniform federal standards would therefore likely wind up governing state and local elections, as well. It is highly debatable whether Congress could establish uniform voter qualifications for presidential elections, however, beyond enforcing restrictions imposed by the Equal Protection Clause

²¹⁹ See 531 U.S. 98, 105–07 (2000) (per curiam).

²²⁰ Cf. *id.* at 107.

²²¹ See Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 610–13 (2018) (surveying the diverse range of states' election emergency laws).

²²² Professor Vikram David Amar also points out that states may adopt idiosyncratic ballot-access requirements for presidential candidates. See Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401, 427 (2018). California, for example, enacted a law requiring presidential candidates to disclose their tax returns as a condition of appearing on the primary ballot, though that measure was invalidated. See *Patterson v. Padilla*, 451 P.3d 1171 (Cal. 2019); see also *Griffin v. Padilla*, 417 F. Supp. 3d 1291, 1308 (E.D. Cal. 2019), *vacated and dismissed as moot*, No. 19-17000, 2019 U.S. App. LEXIS 38890, at *3 (9th Cir. Dec. 16, 2019).

²²³ The Supreme Court has held that, despite the differences in constitutional text, Congress has the same near-plenary power over presidential elections as the Elections Clause grants it over congressional elections. See *Burroughs v. United States*, 290 U.S. 534, 545 (1934); see also *Buckley v. Valeo*, 424 U.S. 1, 13 n.16, 90, 132 (1976) (per curiam); *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970) (opinion of Black, J.).

²²⁴ See Nathaniel Persily, "Celebrating" the Tenth Anniversary of the 2000 Election Controversy: *What the World Can Learn from the Recent History of Election Dysfunction in the United States*, 44 IND. L. REV. 85, 85 (2010) (emphasizing "the extreme decentralization of administrative responsibilities and policymaking" within the American electoral system).

²²⁵ See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 111 (2017).

and other voting rights amendments,²²⁶ since it lacks such power to establish voter qualifications for congressional elections.²²⁷

Alternatively, if all fifty-one jurisdictions joined the compact and voluntarily adopted identical standards for voter qualifications; voter registration databases; absentee and early voting; provisional ballots; voting machines; voter identification; responding to election emergencies; counting ballots; and holding recounts, they likely could avoid equal protection concerns. That outcome is extremely unlikely to occur, however. And if even a few states refused to join the Compact and retained materially different election laws, including their vote tallies within the national popular vote total would likely violate the Equal Protection Clause. In short, *Bush v. Gore* held that it was unconstitutional for a state to apply different standards to different voters participating in an election when determining whether to count incorrectly marked ballots. Such a rigorous application of equal protection principles—endorsed by seven out of nine Justices²²⁸—makes it virtually impossible to combine the results of fifty-one separate elections, held under materially different sets of rules, into a single nationwide total.

C. Structural Federalism

A third serious constitutional concern is that the Compact is in tension with structural, federalism-based limitations that the Supreme Court has read into the Constitution over the past few decades. The Court has held that the nation's constitutional structure protects states' prerogatives as independent sovereigns within the federal system.²²⁹ This structural principle has led the Court to recognize numerous federalism-based protections for states that do not appear in the plain text of the Constitution. For example, the Court has enforced sovereign immunity protections for state governments²³⁰ extending far beyond the Eleventh Amendment's text;²³¹ limited state legislatures' power to interfere with other states' sovereignty by legislating extra-territorially;²³² restricted state courts' ability to assert personal jurisdiction

²²⁶ See *supra* note 195 and accompanying text; see also Morley, *supra* note 182, at 2089–108 (discussing the evolution of voter eligibility rights under the Equal Protection Clause). But see *Oregon*, 400 U.S. at 118 (opinion of Black, J., announcing the judgment of the Court) (upholding provision of the Voting Rights Act setting the minimum voting age for federal elections to eighteen years old).

²²⁷ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013); see also THE FEDERALIST NO. 60, *supra* note 70, at 403, 409 (Alexander Hamilton).

²²⁸ See *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam).

²²⁹ See *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (recognizing that many constitutional doctrines “are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice”).

²³⁰ See *id.* at 1499; *Alden v. Maine*, 527 U.S. 706, 728 (1999) (“[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890).

²³¹ See U.S. CONST. amend. XI.

²³² See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”); Hunt-

over people outside their borders;²³³ established anti-commandeering protections for state legislatures²³⁴ and officials;²³⁵ and protected states' authority to regulate their elections.²³⁶

As the Court's limitations on states' power to legislative extraterritorially²³⁷ and exercise jurisdiction over non-residents²³⁸ demonstrate, the "equal sovereignty" of the states²³⁹ "imply[s] . . . limitation[s]" on each state's power to interfere with other states' ability to exercise their sovereign authority.²⁴⁰ Another core component of state sovereignty within our federal system is each "state government's responsibility to represent and be accountable to the citizens of the State."²⁴¹ The Compact appears to violate these structural constitutional principles in three distinct ways.

First, the Compact eliminates the structural protection that the Electoral College affords to small states. If the President were elected based on the national popular vote, each state's influence over the outcome of a presidential election would be directly proportionate to its share of the electorate, giving more populous states a natural advantage. The Electoral College, in contrast, was deliberately structured to temper the advantage that large states would receive by virtue of their large populations.²⁴² Combining elements of majoritarianism and federalism,²⁴³ the Electoral College assigns each state a number of presidential electors equal to the size of its congressional delegation. The Constitution guarantees that each state's delegation will include at least one House member and two Senators, no matter how small its population.²⁴⁴ In this way, the structure of the Electoral College allows smaller states to play a larger role in electing a President than they would under a

ington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

²³³ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

²³⁴ See *New York v. United States*, 505 U.S. 144, 162 (1992) (holding that Congress may not "require the States to govern according to Congress' instructions").

²³⁵ See *Printz v. United States*, 521 U.S. 898, 931–32 (1997).

²³⁶ See *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

²³⁷ See *Campbell*, 538 U.S. at 421.

²³⁸ See *World-Wide Volkswagen*, 444 U.S. at 293.

²³⁹ *N.W. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)); accord *Shelby Cty.*, 570 U.S. at 544; see also *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

²⁴⁰ *World-Wide Volkswagen*, 444 U.S. at 293.

²⁴¹ *New York v. United States*, 505 U.S. 144, 177 (1992) (emphasis added).

²⁴² See James Madison, *Journal* (Aug. 24, 1787), in 2 FARRAND'S RECORDS, *supra* note 71, at 400, 403 (statement of Madison); see also Whittington, *supra* note 73, at 925.

²⁴³ See Williams, *Reforming the Electoral College*, *supra* note 19, at 192; see also Duncan, *supra* note 85, at 815 (explaining that presidential elections are "federally democratic").

²⁴⁴ See *supra* notes 40–41 and accompanying text; see also Williams, *National Vote Compact*, *supra* note 19, at 1560–61. The contingent procedure through which the House of Representatives selects a President when no candidate wins a majority in the Electoral College further protects small states' interests. When the House chooses a President, each state's delegation casts a single vote, regardless of the delegation's size. See U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII. This procedure prevents large states with numerous Representatives from dominating the process. See *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, *supra* note 21, at 2529.

purely majoritarian system. In the Electoral College, for example, “California enjoys only eighteen times the voting power of Wyoming, rather than sixty-six times the strength of Wyoming under the [Compact].”²⁴⁵ By eliminating the relative advantage that the Constitution guarantees small states in selecting a President, the Compact changes a fundamental structural component of the Constitution—and without a constitutional amendment.²⁴⁶

Second, and perhaps more fundamentally, the Electoral College was structured to give all states a meaningful opportunity to participate in the selection of the President. The Compact, however, is an agreement among a subset of states to select the President themselves, based exclusively on criteria that they collectively decide upon, without the involvement of electors from non-member states. The Compact enters into effect only when member states collectively holding at least 270 electoral votes have joined.²⁴⁷ Once that threshold is reached, other states’ electors will be unable to influence a presidential election’s outcome. An agreement among a subset of states to exert a perpetual stranglehold over the Presidency, neutralizing the electoral votes of non-member states’ electors, violates the equality among states and their electors underlying the Electoral College. The fact that member states have chosen to award their electoral votes to the presidential candidate who wins the national popular vote does not remediate the more fundamental concern that no subset of states should be in a position to collectively decide among themselves the dispositive criterion for selecting a President.

Some critics respond that the Electoral College currently does not give all states a meaningful opportunity to participate in the presidential election, since most of the candidates’ attention is focused on a handful of swing states.²⁴⁸ Such criticisms conflate indeterminacy with importance. Presidential candidates need electoral votes from so-called “safe” states—solidly Democratic or Republican states—to win just as much as they need electoral votes from battleground states. Indeed, the only way that battleground states’ electoral votes can help a candidate prevail is if they are combined with votes from safe states. The fact that it is typically easy to predict how safe states will vote in a presidential election does not undermine either the legal power of their electoral votes or the political necessity for them. The Compact, in contrast, renders the electoral votes of non-member states completely irrele-

²⁴⁵ Calderaro, *supra* note 18, at 308.

²⁴⁶ See Feeley, *supra* note 18, at 1446–47 (“Switching to a popular vote by enacting a statute in a handful of states deprives the rest of the nation of the compromises the Framers struck between a confederate system and a national system in creating a compound republic. . . . [A] movement to a national popular vote erases the advantage that small states gain from the fact that the number of electors each state receives is its number of senators plus its number of representatives.”); cf. Ross & Hardaway, *supra* note 22, at 431 (arguing that the Compact prevents presidential elections from being conducted based in part on principles of federalism, and converts it into a purely democratic process).

²⁴⁷ See CAL. ELEC. CODE § 6921, art. III, para. 9 (West, Westlaw through ch. 9 of 2021 Reg. Sess.); *id.* art. IV, para. 1.

²⁴⁸ See, e.g., Robbins, *supra* note 18, at 1 (“[V]oters who live in populous but solid blue and red states feel as if their votes do not count . . .”).

vant, because member states have enough electoral votes among themselves to elect a President on their own.

Third, the structure of our federal system ensures that each state's officials, including presidential electors, are selected by and accountable to the citizens of that state, either directly or through their representatives.²⁴⁹ The Compact violates this structural principle by requiring member states to appoint electors based on the outcome of the national popular vote, rather than the results of the presidential election within that state. As Professor Norman Williams argues, "The Constitution's delegation of power to the state legislature must . . . be read in light of this uniform, uncontested understanding that states are required to select electors in accordance with popular sentiment of voters in the state or the districts within it."²⁵⁰

It is important to recognize, however, that these structural objections might be more formalist than substantive, since states could achieve substantively the same outcome without a Compact. For example, a state legislature could use its plenary power to appoint the slate of presidential electors for whichever presidential candidate wins the national popular vote without entering into a Compact. And it could hold a presidential straw poll within the state so that its citizens' views could be taken into account in determining the national popular vote. The Supreme Court would be extremely unlikely to invalidate a legislature's direct appointment of electors based on concerns about legislators' subjective motivations or intentions (with the possible exception of constitutionally prohibited discrimination).

The fact that a state may achieve a desired outcome through certain mechanisms (for example, by independently deciding to appoint electors based on a national popular vote), however, does not necessarily imply that it is free to do so through any means it chooses (such as by joining the Compact).²⁵¹ While each individual state legislature is free to select presidential electors based on any criteria it chooses, an agreement among legislatures that collectively wield a majority of electoral votes to appoint electors based on the same criteria probably violates the Electoral College's structure. Such an agreement would eliminate the special protection that the Electoral College affords to small states, the equal ability of all states' electors to participate effectively in the President's election, and the accountability of a state's electors specifically to that state's electorate.²⁵²

²⁴⁹ See *New York v. United States*, 505 U.S. 144, 177 (1992); Williams, *National Vote Compact*, *supra* note 19, at 1561.

²⁵⁰ Williams, *National Vote Compact*, *supra* note 19, at 1527.

²⁵¹ Cf. 15 U.S.C. § 1 (2018) (prohibiting agreements in restraint of trade, even if the participants could independently choose to take the actions involved).

²⁵² Professor Derek Muller makes a different structural argument, that the Electoral College empowers states based primarily on their total population, which includes children and non-citizens, rather than just the relative proportion of votes that a state's citizens cast, which is necessarily limited by the number of adult citizens in the state's population. Muller, *supra* note 21, at 1243.

D. *The Presidential Electors Clause*1. *Violation of the Clause's Implicit Restrictions*

Finally, the Compact may violate implicit limits within the Presidential Electors Clause itself.²⁵³ The clause provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors."²⁵⁴ It does not expressly limit legislatures' authority over the selection of presidential electors. The Supreme Court has held that the clause "leaves it to the legislature exclusively to define the method" of choosing electors,²⁵⁵ granting the legislature "plenary" authority.²⁵⁶

The Clause's phrasing, however, is similar to the Elections Clause, which specifies that the "Time, Place, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."²⁵⁷ The Court has construed this provision *in pari materia* with the Presidential Electors Clause, as granting legislatures "authority to provide a complete code for congressional elections."²⁵⁸ In *U.S. Term Limits, Inc. v. Thornton*, the Court nevertheless held that this express grant of power implicitly prohibits states from enacting laws concerning congressional elections "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."²⁵⁹ The Court applied this principle in *Cook v. Gralike*, holding that a state may not disadvantage certain congressional candidates by specifying on the ballot whether they complied, or promised to comply, with voter instructions regarding congressional term limits.²⁶⁰

The Presidential Electors Clause might similarly be construed as implicitly limiting state legislatures' discretion, preventing them from under-

²⁵³ Cf. Williams, *National Vote Compact*, *supra* note 19, at 1527 ("Although Article II, Section 1 of the U.S. Constitution entrusts to the state legislatures the power to determine the manner in which presidential electors are selected, that power is not plenary in the customary sense."). Professor Keith Whittington offers a different argument, based on historical liquidation. He contends that, even though the Constitution's text does not prescribe how electors must cast their votes, historical practice has given rise to a constitutional construction requiring electors to vote in accordance with their state's popular vote. See Whittington, *supra* note 73, at 943 ("In a context in which it is inconceivable that [faithless] electors could have won office while openly announcing their plans, it would seem to be the worst of all possible worlds for the electors to instead make the attempt through subterfuge.").

²⁵⁴ U.S. CONST., art. II, § 1, cl. 2.

²⁵⁵ *McPherson v. Blacker*, 146 U.S. 1, 29 (1892); see also *id.* at 35 ("[T]he appointment and mode of appointment of electors belong exclusively to the states . . .").

²⁵⁶ *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

²⁵⁷ U.S. CONST., art. I, § 4, cl. 1.

²⁵⁸ *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

²⁵⁹ 514 U.S. 779, 833-34 (1995); *accord* *Cook v. Gralike*, 531 U.S. 510, 523 (2001); see also *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (noting that states may enact "generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

²⁶⁰ See *Cook*, 531 U.S. at 525 (concluding that the state's ballot notations "attempt[] to 'dictate electoral outcomes'" and that "[s]uch 'regulation' of congressional elections simply is not authorized by the Elections Clause" (citation omitted)).

mining or circumventing the accommodations reached at the Constitutional Convention, particularly concerning the Electoral College's key characteristics.²⁶¹ Most basically, Article II reflects the Framers' decision that the President would not be selected based on the national popular vote—a possibility they considered and expressly rejected.²⁶² Some Framers objected that the people would not know enough potential candidates, particularly from other states, to identify the best person to serve.²⁶³ Others feared that the people could be easily swayed by popular passions or misled by “designing men.”²⁶⁴

The *Federalist Papers* explain that, to alleviate such concerns, the Framers decided to select the President through a mixed system involving “at least as many federal as national features.”²⁶⁵ Each state's influence is determined partly by its population and partly by its status as a co-equal sovereign.²⁶⁶ And the Constitution requires electors to meet separately, within their respective states, to prevent them from forming cabals with each other or being corrupted by foreign powers.²⁶⁷ Building on *U.S. Term Limits*,²⁶⁸ the Court might reasonably construe the Presidential Electors Clause as preventing states from fundamentally changing these aspects of the Electoral College's intended operation and functioning.²⁶⁹

2. *Invalid Limitation of Legislatures' Plenary Authority*

Perhaps more importantly, the Compact specifies that, if a state attempts to withdraw from the agreement within six months of a presidential election, the withdrawal will not take effect until after the new President is selected.²⁷⁰ The Supreme Court has held that a state may not limit the plenary authority that the Presidential Electors Clause confers on the legislature to determine the manner in which the state's electors are appointed.²⁷¹

²⁶¹ See Schleifer, *supra* note 152, at 746–47; Williams, *National Vote Compact*, *supra* note 19, at 1560, 1573.

²⁶² See James Madison, Journal (July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 71, at 25, 30–31.

²⁶³ See, e.g., *id.* at 29 (statement of Roger Sherman); *id.* at 31 (statement of George Mason).

²⁶⁴ *Id.* at 30 (statement of Pinckney); see also James Madison, Journal (July 19, 1787), in 2 FARRAND'S RECORDS, *supra* note 71, at 50, 57 (statement of Gerry).

²⁶⁵ THE FEDERALIST NO. 39, *supra* note 70, at 250, 255 (James Madison).

²⁶⁶ See *id.* (“The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society.”).

²⁶⁷ See James Madison, Journal (Sept. 4, 1787), in 2 FARRAND'S RECORDS, *supra* note 71, at 493, 494, 500; see also JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 264 (1996); THE FEDERALIST NO. 68, *supra* note 70, at 457, 459 (Alexander Hamilton). Professor Norman Williams offers a variation of this argument, contending that the Presidential Electors Clause implicitly prohibits states from appointing electors “on the basis of citizens outside the state's jurisdiction.” Williams, *National Vote Compact*, *supra* note 19, at 1527.

²⁶⁸ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995).

²⁶⁹ Cf. Williams, *National Vote Compact*, *supra* note 19, at 1577–78.

²⁷⁰ See CAL. ELEC. CODE § 6921, art. IV, para. 2 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

²⁷¹ See *McPherson v. Blacker*, 146 U.S. 1, 34–35 (1892) (quoting S. REP. NO. 43-395, at 9 (1874)).

Rather, a legislature's power over the appointment of presidential electors "can neither be taken away *nor abdicated*."²⁷²

Since the Clause's six-month prohibition on withdrawal flatly contradicts the Supreme Court's interpretation of the Presidential Electors Clause in *McPherson*, it is unconstitutional. And that provision is the lynchpin of the entire Compact. Without it, states could withdraw from the Compact based on polling in the days leading up to Election Day, or conceivably even after the election is held and the results are known. Notwithstanding abstract support for respecting the national popular vote, legislators would likely face tremendous pressure from their constituents to prevent the election of a political opponent—particularly one who had convincingly lost that state's statewide vote.²⁷³

Member states' conduct confirms the importance of the Compact's prohibition on immediate unilateral withdrawals. Any state currently may amend its laws to appoint its presidential electors based on the national popular vote. Yet even states which support that method of choosing a President refuse to do so unless enough other states similarly agree to abide by the national popular vote. In other words, member states' willingness to appoint electors based on the national popular vote is contingent on their ability to ensure that other states do so as well. If a member state could completely withdraw from the Compact at any time, other states would be unwilling to surrender their right to appoint electors based on their respective statewide vote tallies. Because of its centrality, the Compact's invalid limitation on withdrawal must be regarded as inseverable from the rest of the agreement. Thus, under *McPherson's* interpretation of the Presidential Electors Clause, the entire Compact is invalid.

IV. PRACTICAL OBJECTIONS TO A NATIONAL PRESIDENTIAL ELECTION

Putting aside the Compact's serious constitutional vulnerabilities, one of the most compelling practical reasons for states to reject the Compact is to alleviate the need to accurately determine presidential candidates' national popular vote totals. A presidential election is currently conducted as a series of fifty-one independent contests.²⁷⁴ When results within a particular state are close, any recounts, election contests, or other post-election litigation are limited to that state and do not require post-election proceedings anywhere else.²⁷⁵ Likewise, when post-election litigation results in changes to vote-

²⁷² *Id.* at 35 (emphasis added).

²⁷³ As Professor Williams explains, had the Compact "been in force in Massachusetts in 2004, for example, Massachusetts would have been forced to appoint electors committed to George W. Bush, even though native son John Kerry won the state's popular vote by over 25 percentage points—a prospect that would surely trouble that state's heavily Democratic legislature." Williams, *Reforming the Electoral College*, *supra* note 19, at 215.

²⁷⁴ See Muller, *supra* note 21, at 1264.

²⁷⁵ See Williams, *Reforming the Electoral College*, *supra* note 19, at 233.

counting rules or the validity of certain ballots,²⁷⁶ such relief is confined to a single state and does not call into question vote tallies throughout the rest of the nation.

Under the Compact, in contrast, recounts, litigation, and post-election proceedings would occur on a nationwide basis. Over 130 million ballots were cast in the 2016 presidential election.²⁷⁷ At that scale, even if a candidate were to prevail by as many as 1.3 million votes, such a margin would constitute only one percent of the ballots cast and likely be insufficient to deter the trailing candidate from pursuing simultaneous, hurried recounts and lawsuits in as many states as possible. Florida's chaotic experience with hotly contested emergency legal challenges following the 2000 presidential election,²⁷⁸ as well as its 2018 U.S. Senate²⁷⁹ and gubernatorial elections,²⁸⁰

²⁷⁶ See, e.g., *Democratic Exec. Comm. v. Detzner*, 347 F. Supp. 3d 1017, 1032–33 (N.D. Fla. 2018).

²⁷⁷ See U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY 2016 COMPREHENSIVE REPORT: A REPORT TO THE 115TH CONGRESS 21 (2017), https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf [<https://perma.cc/L3A9-UTDK>].

²⁷⁸ See, e.g., *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317 (N.D. Fla. 2000), *aff'd*, 235 F.3d 578 (11th Cir. 2000); *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), *rev'd sub nom.* *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam), *on remand sub nom.* *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000); *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

²⁷⁹ See, e.g., *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019) (challenging the constitutionality of Florida's signature-match requirement for absentee ballots); *League of Women Voters of Fla., Inc. v. Scott*, 366 F. Supp. 3d 1311, 1318 (N.D. Fla. 2018) (denying preliminary injunction requiring Governor Scott to recuse himself from his election-related responsibilities as Governor on the grounds he was also a Senate candidate); *Democratic Senatorial Campaign Comm. v. Detzner*, 347 F. Supp. 3d 1033, 1039 (N.D. Fla. 2018) (denying preliminary injunction against state laws for determining voter intent when voters fill out their ballots incorrectly); *Democratic Senatorial Campaign Comm. v. Detzner*, No. 4:18-CV-528-MW/CAS, slip op. at 1–2 (N.D. Fla. Nov. 15, 2018) (affirming denial of temporary restraining order seeking extension of recount deadlines, because election officials would be able to meet them); *Nat'l Republican Senatorial Comm. v. Snipes*, No. CACE-18-026364 (25), slip op. at 2–4 (Fla. Cir. Ct. Nov. 14, 2018) (ordering County Supervisor of Elections to immediately comply with a public records request to reveal the number of absentee ballots cast in the election and the number remaining to be counted); see also *Caldwell v. Snipes*, No. CACE-18-026464 (07), slip op. at 1–2 (Fla. Cir. Ct. Nov. 15, 2018) (same).

²⁸⁰ See, e.g., *VoteVets Action Fund v. Detzner*, No. 4:18-CV-524-MW-CAS, slip op. at 8–9 (N.D. Fla. Nov. 16, 2018) (denying preliminary injunction that would have extended the deadline for election officials to receive vote-by-mail ballots from domestic voters, even though ballots from overseas military voters would be accepted up to ten days after Election Day); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1225 (N.D. Fla. 2018) (issuing preliminary injunction requiring the Secretary of State to re-interpret state law to allow the establishment of polling locations on college campuses); *Fla. Democratic Party v. Detzner*, No. 4:18-CV-463-RH-CAS, 2018 U.S. Dist. LEXIS 174528, at *3 (N.D. Fla. Oct. 10, 2018) (rejecting temporary restraining order in a challenge to the adequacy of the state's adjustments to the rules governing the impending election due to Hurricane Michael).

Georgia's 2018 gubernatorial election provoked almost as much litigation. *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1292 (N.D. Ga. 2019) (granting in part and denying in part Defendant's motion to dismiss a complaint alleging that Georgia adopted unconstitutional voting processes and policies during the 2018 election); *Common Cause of Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1301 (N.D. Ga. 2018) (granting in part a temporary

provides a stark, cautionary example of what would happen in a close election under the Compact—except on a nationwide basis. Professor Bradley Smith calculates that recounts would have been necessary in at least six presidential elections since 1880 if they had been based on the national popular vote.²⁸¹

Limiting the geographic scope of post-election proceedings is especially beneficial due to the fundamentally bureaucratic nature of modern elections. Over 130 million ballots are cast by a sweepingly diverse array of voters, including people with language barriers, mental or physical disabilities, and limited experience with the electoral process who frequently face additional challenges in casting valid ballots.²⁸² Ballots are accepted and counted by tens of thousands of election officials throughout the nation, many of whom hold those positions on a part-time basis and have limited training. Moreover, in a nation as vast as the United States, natural disasters or extreme weather that impact impending or ongoing elections are also reasonably likely.²⁸³

In a complex process of this magnitude, with so many people and discrete tasks involved, numerous errors will inevitably occur. When elections are conducted as fifty-one hermetically sealed contests, any problems or mistakes are limited to the particular jurisdictions in which they arise and cannot be aggregated across states. Difficulties in one jurisdiction do not impact results in others. Consequently, mistakes, unexpected crises, lost or misplaced ballots, statutory violations, or even malfeasance in most states will generally be irrelevant to the ultimate outcome of the presidential election. In most cases, either the winning candidate's margin within that state will be

restraining order enjoining the state from immediately certifying the 2018 election results and ordering the Secretary of State to direct county election superintendents to review the eligibility of voters who cast provisional ballots); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1347 (N.D. Ga. 2018) (granting in part a request for a preliminary injunction enjoining Georgia's Secretary of State from certifying the 2018 elections until he confirmed that absentee ballots with incorrect or missing birth dates were counted, but refusing to extend the cure period or require election officials to count absentee ballots cast outside a voter's county of residence); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018) (granting a preliminary injunction mandating that absentee ballots with signature mismatches be counted in Georgia's 2018 election), *stay denied sub nom. Ga. Muslim Voter Project v. Kemp*, No. 18-14502-GG, 2018 WL 7822108, at *1 (11th Cir. Nov. 2, 2018); *Ga. Coalition for People's Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1296 (N.D. Ga. 2018) (granting a preliminary injunction requiring the Secretary of State to allow people who have been flagged as noncitizens to vote if they provide proof of citizenship); *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1327–28 (N.D. Ga. 2018) (refusing to enjoin the state's use of electronic voting machines), *aff'd in part and appeal dismissed in part sub nom. Curling v. Worley*, 761 F. App'x 927, 935 (11th Cir. 2019).

²⁸¹ See Bradley Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 207 (2008).

²⁸² The law attempts to help voters overcome many of these obstacles. See, e.g., 52 U.S.C. § 10503 (2018) (requiring election officials to provide voting-related materials in foreign languages under certain circumstances); Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (Sept. 28, 1984) (codified at 52 U.S.C. §§ 20101–20107 (2018)) (requiring that polling places be accessible to elderly and disabled voters). These provisions are imperfectly enforced and insufficient to help all voters, however.

²⁸³ See Morley, *supra* note 221, at 553–86 (exploring case studies of election emergencies).

too great to be affected by such problems, or that state's electoral votes will be insufficient to change the results in the Electoral College.

Moreover, when problems do arise in a close election in a swing state that will be dispositive in the Electoral College, their scope is naturally confined. The numbers of ballots at issue and polling locations or recount sites involved is limited. Candidates, the media, and the public can focus their attention on one or a few states, ensuring that the necessary processes are conducted properly. Under the Compact, in contrast, even when results are close in only a handful of swing states, candidates would have an incentive to scrounge additional votes from wherever else they could throughout the nation.²⁸⁴ Over the days and weeks following the election, vote tallies from throughout the nation would likely fluctuate on a near-daily basis,²⁸⁵ continuously impacting the national popular vote and making the process appear far less determinate, accurate, and legitimate to the public. Post-election proceedings in any particular jurisdiction would receive far less attention from either the public or candidates, enhancing the possibility for mistakes or even manipulation, as well as the appearance of overall indeterminacy.

The Compact also enhances the importance of provisional ballots. The Help America Vote Act (HAVA) requires states to allow people to cast provisional ballots when they claim to be entitled to vote, but are not listed in registration records or otherwise cannot demonstrate their eligibility (for example, because their signature at the polling place does not match the one on record, or they do not have proper identification with them).²⁸⁶ In the 2016 election, 2,460,421 provisional ballots were cast.²⁸⁷ Depending on the jurisdiction, voters have up to ten days after the election to cure any defects or demonstrate their eligibility to election officials so that their provisional ballots will be counted. Under the Compact, in a close presidential election, election officials in potentially hundreds of locations across the country simultaneously (or within a few days of each other) would review and determine the validity of provisional ballots on a voter-by-voter basis, with full knowledge of the publicly announced results from election night. Election contests and other litigation would be virtually certain to ensue. The current structure of the presidential election process, in contrast, largely eliminates

²⁸⁴ See JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* 193–94 (1975); see also Ross & Hardaway, *supra* note 22, at 402.

²⁸⁵ See Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 J.L. & POL. 501, 505 (2013) (explaining how, in recent years, Democratic candidates have become more likely to gain additional votes after Election Night due to late-cast absentee ballots and post-election adjudication of provisional ballots). In Arizona's 2018 U.S. Senate race, Republican Martha McSally was in the lead on Election Night, but Democrat Kyrsten Sinema was ultimately declared the winner after election officials finished counting absentee and provisional ballots. See James Arkin, *Sinema Wins Arizona Senate Race*, POLITICO (Nov. 12, 2018, 4:42 PM), <https://www.politico.com/story/2018/11/12/2018-arizona-senate-election-sinema-mcsally-984928> [<https://perma.cc/4U9S-B24N>].

²⁸⁶ See 52 U.S.C. § 21082(a) (2018).

²⁸⁷ See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 277, at 29.

candidates' incentives to contest every individual provisional ballot across the nation.

In short, the Compact's supporters appear to underestimate the layers of complexity that switching to a national popular vote model would introduce into the system. Appointing electors based on the national popular vote expands the scope of any recounts or election contests exponentially, from a few hundred thousand or even a few million votes to over 136 million votes, and from scores of counting sites within a state to thousands across the nation. The introduction of so many ballots, election officials, conflicting laws, and avenues for judicial review risks chaos. Opportunities for mistake or even malfeasance unavoidably multiply, while public confidence in the accuracy of the outcome is likely to correspondingly diminish. The Electoral College's greatest advantage—the Framers' unintended gift to future generations to promote the peaceful transfer of power and protect the public legitimacy of the electoral process—is its limitation of the scope of post-election proceedings.

The Compact's provisions concerning post-election litigation create legal problems, as well.²⁸⁸ The Compact requires member states to treat as “conclusive” the presidential candidates' national popular vote totals as of the “safe harbor” date set forth in federal law.²⁸⁹ It does not address the possibility that a federal or state court may order a state to change its vote total, on constitutional or other grounds, after that deadline. Indeed, in *Bush v. Gore*, the Florida Supreme Court ordered a recount that would have extended past that deadline.²⁹⁰ And there is always a chance that states—particularly non-member states—will not finish counting or canvassing their ballots or certify their results until after the safe harbor deadline. Thus, the Compact requires member states to base their nationwide vote tallies on results that might not only be interim, but unconstitutional.

Relatedly, these provisions could also lead to disparities among member states' calculations of the national popular vote total. If a member state's chief election official certifies, or a court orders the certification or recertification of, a state's final vote tally after the Compact's deadline, that state would have to include that updated tally in its calculation of the national popular vote. The Compact requires other member states, in contrast, to ignore such belated updates and instead apply the vote tallies as they stood on the safe harbor deadline. In a close election, different member states

²⁸⁸ Professor Williams raises the possibility that non-member states could decline to publicly announce their statewide vote tallies in the presidential election until after the federal safe harbor deadline. See Williams, *Reforming the Electoral College*, *supra* note 19, at 212–13. Such anomalous extreme measures, however, would be inconsistent with both states' treatment of election results for other offices, as well as the transparency at the heart of most modern electoral systems. That theoretical possibility appears unrealistic.

²⁸⁹ CAL. ELEC. CODE § 6921, art. III, paras. 4–5 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

²⁹⁰ See *Gore v. Harris*, 772 So. 2d 1243, 1261–62 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

could have different national vote tallies, potentially leading them to conclude that different presidential candidates won the national popular vote.

The fundamental problem is that the Compact, as a state law, cannot limit the ability of federal courts to adjudicate and remedy violations of the U.S. Constitution or federal statutes that occur in the course of a state's presidential election. And state courts may feel similarly free to adjudicate alleged violations of the federal or state constitutions, or even statutes, notwithstanding the Compact's deadline. Thus, any attempt to require all member states to treat as dispositive states' vote tallies as they stand on a certain date will run into serious difficulties.

CONCLUSION

The Compact is what Mark Tushnet calls a constitutional workaround:²⁹¹ a method of "achiev[ing] results inconsistent with one constitutional provision by taking advantage of the opportunities provided by other constitutional provisions."²⁹² Historically, however, workarounds have been unnecessary to adopt needed democratic reforms. Although Article V's requirements are typically seen as virtually insurmountable barriers to formal constitutional amendments,²⁹³ this has not been the case with regard to changes impacting the electoral process. The Constitution's provisions concerning presidential elections have already been amended three times;²⁹⁴ the method for electing U.S. Senators has been fundamentally changed, from appointment by state legislatures to direct election by the people;²⁹⁵ and almost half of the amendments since the Bill of Rights was ratified have expanded voting rights.²⁹⁶ In short, the people have repeatedly succeeded in amending the Constitution to reflect changes in public norms concerning

²⁹¹ See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1500 (2009); see also Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 480–81 (2015) ("[A]lthough the Constitution contemplates a President elected according to the votes of the Electoral College, states could ensure that the President was elected by a national popular majority by directing their electors to vote for the person who wins the national popular vote.").

²⁹² Tushnet, *supra* note 291, at 1506.

²⁹³ See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 160 (2006); Richard H. Fallon, Jr., *American Constitutionalism, Almost (But Not Quite) Version 2.0*, 65 ME. L. REV. 77, 92 (2012) ("[T]he requirement that three-fourths of the states must ratify constitutional amendments makes it nearly impossible to achieve significant change in our written Constitution through the Article V process.").

²⁹⁴ See U.S. CONST. amend. XII (reforming procedure for casting electoral votes); *id.* amend. XX (changing start of presidential term); *id.* amend. XXII (imposing term limits for President).

²⁹⁵ See *id.* amend. XVII.

²⁹⁶ See *id.* amend. XIV, § 2 (recognizing affirmative right to vote); *id.* amend. XV (prohibiting racial discrimination in voting); amend. XVII (establishing direct election of Senators); *id.* amend. XIX (prohibiting sex-based discrimination in voting); *id.* amend. XXIII (granting electoral votes to the District of Columbia); *id.* amend. XXIV (prohibiting poll taxes in federal elections); *id.* amend. XXVI (prohibiting discrimination based on age concerning voting rights for people at least eighteen years old).

voting and the electoral process. Accordingly, we should be especially skeptical of attempts to circumvent the Article V amendment process with regard to those fields.²⁹⁷ More specifically, we should reject the Compact's attempt to manipulate the Electoral College to elect the President through a national popular vote.

The Electoral College is an inadvertent gift from the Framers that protects our nation in ways they probably did not imagine. This gift is all the more extraordinary because it is extremely unlikely that the Electoral College would be adopted as part of the Constitution today. It achieves the remarkable, perhaps unique feat of allowing a national leader to be elected in a limited timeframe, and under intense public scrutiny and political pressure, without the need to ensure completely consistent treatment or even precisely accurate counting of over 136 million votes across the nation. The Electoral College instead establishes a system of fifty-one more limited and manageable independent elections, most of which involve margins of victory sufficiently large that the winning candidate is beyond reasonable challenge.²⁹⁸ It cabins the scope of any recounts or litigation, as well as the consequences of any election emergencies, irregularities, mistakes, accidents, or fraud. By limiting the geographic scope of, and number of ballots at issue in, post-election disputes, the Electoral College as currently implemented enhances the accuracy of the electoral process and bolsters its public legitimacy.

²⁹⁷ Cf. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (declining to interpret the Constitution to include a right against political gerrymandering).

²⁹⁸ Cf. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005) (discussing the "margin of litigation").