Federalism & Separation of Powers

Legal and Logistical Ramifications of the National Popular Vote Plan

*By Tara Ross**

The nation's attention has been focused on several potential crises in the past few months: The economy. Health care. Troubled auto companies. The manner in which America addresses any one of these issues could impact the identity of the country for decades to come. Will America be a country of individual freedom and private entrepreneurship? Or will Americans rely more heavily on their government for sustenance? The issues to be decided are many and important. Why turn attention now to other, less exciting topics such as the Electoral College? Surely that discussion can be saved for another day. Or can it?

The answer, unfortunately, is "no." Americans must focus on this issue now, or they will find that they've missed the opportunity to influence a matter currently being considered by state legislators. These legislators are being lobbied to pass an idea promoted by a California-based group, National Popular Vote Inc. (NPV).[1] If the legislation is approved, the Electoral College will essentially be eliminated, replaced with a nationwide popular election.

NPV disputes such a characterization of its legislation. The genius of the plan, one of its advocates notes, is "that it offers America a way to reach true democracy in our presidential elections not by eliminating the Electoral College but by reforming our use of it."[2] NPV relies heavily on the states' role in our system. The Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[3] Currently, most states allocate their electors to the winner of the statewide popular vote. NPV proposes, instead, that each state should allocate its electors to the winner of the national popular vote. If states with a majority of electors (currently 270) agree to the plan, the presidential election system will operate as a national popular referendum rather than a federalist, state-by-state process. To ensure that no state is left alone in its decision, NPV operates through an interstate compact. The compact goes into effect only when a critical mass of states agrees to join.

As this piece goes to press, five states have agreed to join the compact: Hawaii, Illinois, Maryland, New Jersey, and Washington (sixty-one electoral votes total).[4] Three other state legislatures approved the plan, but the governors vetoed it: California, Rhode Island, and Vermont (sixty-two electoral votes total). The Rhode Island legislature subsequently reconsidered the NPV plan, but House members apparently had a change of heart. The second time around, NPV was voted down before reaching the governor's desk.

In their book, *Every Vote Equal*,[5] NPV's founders argue that their plan is necessary because every vote is not equal under our current system. They contend that votes cast outside of battleground states are "worthless," causing some voters to be ignored. They dislike the fact that national popular vote losers can be elected to the presidency, and they feel that the Electoral College generates artificial election crises. NPV, they argue, will cure these inequities even as it leaves each state's current internal procedures intact. They dismiss the concerns of Electoral College advocates that the current system serves valuable purposes in a republic—especially one as large and diverse as America.

This author has argued elsewhere that the benefits of the Electoral College far outweigh its disadvantages and that it continues to serve these purposes even when a popular vote loser is elected to the presidency.[6] This article will not re-debate those points. Instead, it will discuss several practical and legal issues that have often been left unaddressed when state legislatures consider NPV: What ramifications follow if one allegedly national election is conducted under fifty-one different sets of local election laws? Does NPV's use of an interstate compact require congressional approval? Does Article V of the Constitution provide any impediment to NPV? How does the definition of "Legislature" in Article II impact the manner in which NPV may be enacted? These issues would not exist if anti-Electoral College advocates pursued their plan through a constitutional amendment, rather than the interstate compact that they have proposed. Indeed, some of the consequences of NPV are so serious that Professor Akhil Amar—among the first to imagine a NPV-like scenario—once stated that the logistical ramifications "could be a real nightmare."[7]

This is one nightmare that America should strive to avoid at all costs.

Logistical Issues Involved in the NPV Plan

The current presidential election process is a unique blend of federalist and democratic principles. America holds fifty-one completely separate, purely democratic elections each presidential election year (one in each of the states, plus one in the District of Columbia). Local election laws impact the manner in which any one of these elections is held, but any differences among the states' election codes don't matter. The unique laws of any particular state impact only voters within that state. The country holds fifty-one completely separate presidential elections, and it achieves fifty-one different sets of results. Each state's single goal is to select a slate of electors that will represent it in the later, national election among the states. NPV would entirely change this system. America would still hold fifty-one completely separate elections, but NPV would attempt to derive one single result from these various election processes. Suddenly, internal variances among states' processes—previously irrelevant—would begin to matter

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a great deal. NPV could avoid these problems if it instead sought change through a constitutional amendment. Such an amendment would help establish one set of national laws to govern one national election.

Without this amendment, a few logistical problems will be unavoidable. Among the biggest of these will be the chaotic recounts that are virtually certain to ensue.[8] States have different criteria for what does (or does not) trigger recounts within their borders. These differences can and will cause many problems.

NPV's interstate compact requires the chief election official in each member state to "determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election."[9] These votes are to be added together to determine which candidate won the "largest national popular vote total."[10] The official then certifies the appointment of the slate of electors associated with that "national popular vote winner."[11]

Sounds easy enough, but what if this calculation reveals that the national total is close—close enough to warrant a recount—but a recount can't be conducted because the margins in individual states are not close? Or perhaps a recount can be conducted in two or three states, but wide margins in the remaining states prevent the others from also participating in the recount. The three states conducting recounts may each have a different idea of how to count a hanging chad. Perhaps a fourth state would see what is going on and choose to conduct a recount that its statutes previously deemed optional. Maybe this fourth state has a different definition of "hanging chad," and its sole goal is to counteract the efforts of the other states. Logistically, such a situation is problematic. Legally, the situation might create equal protection claims. Some voters could be disenfranchised by the widely differing ideas of how to count a vote.[12]

NPV brushes off these serious questions. If a recount is needed, the authors of *Every Vote Equal* note, "the personnel and procedures for a nationwide recount are already in place because every state is always prepared to conduct a statewide recount after any election."[13] NPV has not addressed the problem inherent within its own statement. True, states have personnel and procedures in place for recounts—fifty-one of them. Fifty-one different statutory schemes can't govern one (allegedly) national election. The authors do not address this problem and instead assume that recounts won't be needed very often anyway. *Every Vote Equal* contends that "there would be less opportunity for a close election under nationwide popular election of the President than under the prevailing statewide winner-take-all system" because a "a close outcome is less likely in a single pool of 122,000,000 popular votes than in 51 separate pools each averaging 2,392,159 votes."[14] NPV may regret jumping to this conclusion so quickly. It is not safe to assume that recounts will be few and far between with a national popular vote system in place. To the contrary, there are at least two reasons to believe that recounts will become more frequent.

First, America's presidential campaigns would certainly change if the rules of the game change. In any game, rule changes regularly impact strategy, motivations, and incentives. In presidential elections, the changed rules of the game would almost certainly lead to the end of America's stable, two-party system.[15] Without the Electoral College and the winner-take-all allocation of electoral votes within states, there is a dramatically reduced disincentive to vote for third party candidates. A vote for Ross Perot or Ralph Nader is no longer "wasted." Instead, presidential campaigns would devolve into European-style, multi-candidate races. In the context of recounts, this is important. As more candidates enter the field, individual votes will necessarily be divided among an ever-increasing number of candidates. The result will be lower vote totals per candidate and an increased likelihood that two or more candidates will have close popular vote totals.

Second, the authors of *Every Vote Equal* do not adequately address the historical record. Even assuming, *arguendo*, that America maintains its relatively stable two-party system, past election results show that recounts would be more likely without the Electoral College. Popular vote totals are usually closer than electoral vote totals.[16] Of the twenty-eight elections held between 1900 and 2008, seventeen Presidents have been elected after winning the electoral vote by a margin of two hundred votes or more. (Only three elections during the same time period were won by fifty electoral votes or less.) These consistently wide margins of victory have come about despite the fact that the margin between the top two candidates in the popular vote was less than ten percent in sixteen of the twenty-eight elections held since 1900—and less than five percent in seven of these elections. Indeed, former FEC chairman Bradley Smith points out that recounts may have been necessary in as many as six presidential elections since 1880, if a national popular vote system had been in place.[17] That's nearly one out of every six elections! It is not safe to assume that recounts will be a rarity once NPV is in place.

Unfortunately, recounts are just the tip of the iceberg. NPV's member states can't force the other states to take any particular action—including a run-off if it is needed. Thus, note that NPV's compact awards the presidency to the candidate winning the "*largest* national popular vote total."[18] The compact does not require a majority winner. It does not even require a minimum plurality. Practically speaking, it cannot. Thus, with the NPV compact in place, a candidate could win with even a very small plurality, for example, fifteen or twenty percent of the nationwide vote.

But the logistical difficulties could get even worse. A participating state could be forced to award its entire slate of electors to a candidate who was not on its own ballot. Imagine, for instance, that Ron Paul qualifies for the ballot in Texas and obtains a winning plurality solely from Texas voters. Paul did not bother to qualify for the ballot in a place like New Jersey. Voters in that state did not have the chance to vote for—or against—him. Yet New Jersey would be forced to award its entire slate of electors to the choice of Texas voters. New Jersey probably did not nominate a slate of electors for Paul because he was not on its ballot. NPV's compact offers a solution, but it is doubtful that voters in New Jersey will like it. Paul would be entitled to personally appoint the fifteen electors who will represent New Jersey in the Electoral College vote.[19] In all

likelihood, he would select Texans to represent New Jersey in the presidential election so that he would not be undermined by a "faithless" elector who was determined to vote for the choice of New Jersey's voters.

There are other inconsistencies among states' ballots that would skew the election results. Some states allow felons to vote. Others do not. States differ in their requirements to qualify for the ballot. Inevitably, each state would have to abide by national election results derived from policies with which it disagrees. Moreover, states may differ in how they do (or don't) list electors on the ballot, and these differences can become irresolvable when attempting to produce one national tally. In 1960, for instance, Alabama voters cast ballots for individual electors, rather than presidential candidates. To make matters more confusing, the Democratic Party in Alabama nominated a split slate of electors. Five electors were pledged to vote for the eventual Democratic nominee, John Kennedy, but six electors were unpledged. (They ultimately cast their ballots for Harry F. Byrd.) Voters could not vote for eleven Kennedy electors, even if they wanted to. But they could vote for a pledged Kennedy elector and an unpledged Democratic elector simultaneously. Given the situation, the popular vote total in Alabama would have been impossible to definitively tabulate if NPV had been in place that year.

In fact, a state today could attempt to undermine NPV by deliberately recreating the 1960 situation.[20] Its legislature would simply replace the state's winner-take-all system with direct elections for individual electors. Just as in 1960, the NPV states would be unable to say which candidate won the "most" votes in that state. Their compact should fail because the national popular vote total is unknowable—although NPV advocates could conceivably seek to explicitly exclude such a state from the presidential election. Presumably, it would be politically difficult for them to take such action, however.

These or other problems could cause one state to pull out of the compact in violation of its terms. How would compliance be enforced? How much litigation would ensue before the presidential election could be resolved? Even if compliance can be enforced when a presidential election is pending, the compact allows states to withdraw before July 20 in a presidential election year.[21] Potentially, a wavering state or states could cause NPV's compact to bounce back and forth—in effect one year, but not the next. Perhaps the state would opt in and out based on its perception of whether the compact would play to its benefit in that particular presidential election year.[22] Consistency in America's presidential election system is impossible in such circumstances.

NPV proponents act as if they can successfully avoid the constitutional amendment process through their interstate compact. Their idea was admittedly imaginative, but it would create a whole host of logistical problems. These problems have as yet to be seriously addressed. Instead, NPV supporters continue to act as if one internally consistent nationwide outcome can be derived from fifty-one separate state and local processes.

The Use of an Interstate Compact

The legislation proposed by NPV relies on its use of an interstate compact. Approval of the legislation commits a state to the terms of the compact, but not until states holding a majority of electoral votes (270) have agreed to sign. Until then, each state maintains its status quo—usually a winner-take-all system within the state.

The compact grants comfort to those state legislators who generally like the idea of a national popular vote, but who don't want their states left out in the cold if other state legislatures choose not to join in the effort—or if they join, but then change their minds later. The compact ensures that participating states can act only when they are guaranteed the ability to do so in concert with other states.

Even NPV proponents sometimes concede that their use of a compact is a potential hindrance from a constitutional perspective. Article I, Section 10 of the Constitution provides that "No State shall enter into any Treaty, Alliance, or Confederation" and "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State."[23] The text would seem to be clear that some agreements (treaties) are completely forbidden and that others (agreements and compacts) are permissible only with congressional approval, but the Supreme Court has held otherwise. In the space of two written opinions, the Court changed the focus of the clause. Rather than evaluating permissibility v. non-permissibility, the Court now effectively assumes that all agreements among states are permissible. It considers only whether congressional approval is required.

The 1893 case of *Virginia v. Tennessee* was the first step down this road.[24] Virginia brought an action against Tennessee, seeking to have a boundary agreement nullified. Virginia claimed that Congress had never approved the agreement. The Court ultimately disagreed, finding that the agreement had indeed received congressional approval. It probably should have stopped there, but Justice Field, writing for the Court, decided to first expound on the meaning of the Compact Clause. His dictum eventually became the basis for modern jurisprudence on interstate compacts.

Justice Field reasoned that the constitutional provision could not possibly mean "*every* possible compact or agreement between one State and another."[25] What about a simple sale of land? Or the transportation of goods purchased? Or a joint effort to combat the outbreak of some disease? Thus, instead of looking to the text, the Justice decided that it would be better to look to the "object of the constitutional provision."[26] "[I]t is evident," he concluded, "that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[27] With a few short words, Justice Field thus changed the direction of Compact Clause jurisprudence. Rather than requiring congressional approval for any agreement between states, the Court would require approval only for certain political agreements. His dictum was converted into constitutional law in the 1978 case of *United States Steel Corp. v. Multistate Tax Commission*.[28]

The plaintiffs in *U.S. Steel* sought to overturn an interstate compact that established the Multistate Tax Commission. The agreement had been submitted to Congress, but never approved. "On its face," Justice Powell wrote for the Court, "the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States."[29] He admitted that there may be "some incremental increase in the bargaining power of the member States quoad the corporations," but "the test is whether the Compact enhances state power quoad the National Government."[30] Emphasizing that the agreement did not "authorize the member States to exercise any powers they could not exercise in its absence," no sovereign power had been delegated to the Commission, and "each State is free to withdraw at any time,"[31] Justice Powell found that congressional approval was not required.

Importantly, the Court briefly turned to an analysis of the impact of the compact on non-participating states—a matter that had received bare mention in *Virginia v. Tennessee*.[32] Powell deemed any "[r]isks of unfairness and double taxation" to be "independent of the Compact," at least in this case.[33] He left open the possibility that a compact implicating the "federal structure" could be problematic, but in the case of the Commission, he concluded, "it is not explained how any economic pressure that does exist is an affront to the sovereignty of nonmember States."[34]

In the wake of *Virginia v. Tennessee* and *U.S. Steel*, how would the Court assess the impact of NPV on the federal government and non-participating states? On the one hand, the Court has greatly weakened its Compact Clause jurisprudence.[35] Despite paying lip service to the importance of protecting federal and state sovereignty, it has never struck down a compact, as NPV proponents are quick to note.[36] Indeed, constitutional scholar Michael Greve once wrote of the "emasculation of the Compact Clause,"[37] noting that "[a]fter *U.S. Steel*, one can hardly imagine a state compact that would run afoul of the Compact Clause without first, or at least also, running afoul of other, independent constitutional obstacles."[38]

Yet reasonable arguments can be made that the compact *does* run afoul of other constitutional obstacles, as will be discussed below. (Indeed, these and other obstacles may be serious enough that, even if the compact is submitted, Congress arguably can't consent to it.) Moreover, even relying solely on the standards laid out in *U.S. Steel*, the impact of NPV on the federal and state governments is simply too great to be ignored.

The federal government has at least one important interest at stake.[39] As Professor Judith Best has noted, the federal government has a vested interest in protecting its constitutional amendment process.[40] If the NPV compact goes into effect, its proponents will have effectively changed the presidential election procedure described in the Constitution, without the bother of obtaining a constitutional amendment. Indeed, NPV proponents cite the relative ease of enacting the compact as a selling point. The compact could be implemented with the consent of as few as eleven states, whereas an amendment requires the ratification of thirty-eight states. But supermajority requirements for certain actions provide important protections for Americans' freedom, and it is the prerogative of the federal government to protect the Constitution's amendment process.

Non-compacting states have equally important interests. First, NPV deprives these states of their opportunity, under the Constitution's amendment process, to participate in any decision made about changing the nation's presidential election system. They are also deprived of the protections provided by the supermajority requirements of Article V. Second, the compact grants new authority for some states to control other states in certain situations: Specifically, if a member state changes its mind about joining the compact, other member states may sometimes be able to force compliance, thus compromising that state legislature's broad authority to determine the manner of elector allocation. Finally, the voting power of states relative to other states is changed. NPV is the first to bemoan the fact that "every vote is not equal" in the presidential election and that the weight of a voters' ballot depends on the state in which he lives. In equalizing voting power, NPV is by definition increasing the political power of some states and decreasing the political power of other states.[41]

NPV contends that non-compacting states are not impacted and that every state is treated equally under its plan because all votes are counted and given equal weight—even those cast in non-participating states.[42] And, proponents add, the compacting states are merely doing something that they are entitled to do anyway.[43] The Court has held that "the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself."[44] If some states want to allocate their electors to the winner of the national popular vote, then why shouldn't they?

NPV's position leads to a serious, unanswered constitutional question: Is this power of state legislators *completely* unrestricted?[45] If it is, then Rhode Island could decide to allocate its electors to the winner of the Vermont election. In a more extreme move, New York could allocate its electors to the United Nations. Florida could decide that Fidel Castro always appoints its electors. Arguably, the Constitution presupposes that the electors belong to each individual state and the state may not delegate this responsibility outside of state borders.[46] Such an argument gives state legislatures great discretion in allocating their electors, but not completely unfettered discretion.

NPV's best counter-argument is that none of these scenarios ever occurred to the Founders, and they thus did not place sufficient restrictions on the legislature's discretion. Members of the founding generation were distrustful of other states and the national government, and they almost certainly could not conceive that future state legislators would so thoughtlessly betray their own states' interests. In this scenario, NPV is the opposite of what the Founders wanted, but failure of imagination prevented the Founders from explicitly prohibiting this particular manner of allocating electors.

But even if NPV has found a loophole and proves that states could take such action alone, Article I, Section 10 forbids them from doing so jointly unless they first submit their

compact to Congress. If ever a compact encroached on federal and state sovereignty, this is it.

NPV's Constitutional Issues

NPV relies on the "plenary" power of state legislatures to select the manner in which its state will appoint electors.[47] However, as discussed above, a reasonable argument can be made that this power, while sweeping, is not without limit. Justice Thomas acknowledged as much in *U.S. Term Limits, Inc. v. Thornton*. "States may establish qualifications for their delegates to the electoral college," he noted, "as long as those qualifications pass muster under other constitutional provisions."[48] His comment was made in dissent, but the other justices did not dispute him on this particular point.

Does NPV "pass muster" under Article V, which does not allow constitutional provisions to be altered without approval by "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof"?[49] NPV argues "yes." Its proposal does not technically alter the text of Article II and the Twelfth Amendment. Instead, it asks state legislatures to use the text in a unique way. As discussed above, the argument is not without merit, but it is at best a loophole—a scenario completely unanticipated (and thus not explicitly prohibited) by the Founders. Moreover, such an assessment of NPV seems a bit disingenuous. As Cato scholar John Samples has observed: "NPV offers a way to institute a means of electing the president that was rejected by the Framers of the Constitution. It does so while circumventing the Constitution's amendment procedures."[50] If NPV is enacted, a court will almost certainly be asked to decide if it unconstitutionally alters America's presidential election process without first obtaining approval from the requisite number of states.

In two notable cases, the Court struck down statutes that were said to upset the compromises struck and the delicate balances achieved during the Constitutional Convention. The 1998 case of *Clinton v. New York* invalidated the federal Line Item Veto Act.[51] Writing for the majority, Justice Stevens emphasized the "great debates and compromises that produced the Constitution itself,"[52] and he found that the Act could not stand because it disrupted "the 'finely wrought' procedure that the Framers designed."[53] NPV thumbs its nose at the Founders and the painstaking process that they went through to create a Union acceptable both to small and to large states. The delegates to the Constitutional Convention rejected direct national election of the President. They instead created a process that would allow majorities to rule, but that would also slightly inflate the voice of small states (both in the Electoral College vote and in the House contingent election). The Court could reasonably determine that NPV destroys these compromises and that it disrupts the "finely wrought" procedures found in the Constitution—not only in Article II and the Twelfth Amendment, but also in Article V.

The Court would find support for such a holding in *U.S. Term Limits*. That case held that the Qualifications Clauses of the Constitution prevented an individual state from attempting to impose term limits on its own senators and congressmen. Justice Stevens's majority opinion seemed wary of statutes that attempt to evade the Constitution's requirements. Stevens wrote that a state provision "with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses . . . cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded."[54] Allowing such action, he concluded:

> trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[55]

Stevens's concerns echo the statements of Electoral College supporters who worry that NPV is simply an "end run" around the constitutional amendment process. The Founders spent months debating the appropriate presidential election process for the new American nation. Can a handful of states now "easily evade" the compromises and provisions that resulted from that debate?

Justice Kennedy's concurrence in *U.S. Term Limits* further buttresses an argument for declaring NPV unconstitutional on its face. "Federalism was our Nation's own discovery," Kennedy began.[56] "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[57] Federalists often speak of the importance of defending the states from incursions by the federal government, but Kennedy remarked upon the need to protect the federal government from "collateral interference by the States."[58] He concluded, "That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States."[59] His comments may have important implications for the legitimacy of the NPV compact. The states can't unilaterally override the federal constitutional amendment process. A court could reasonably find that NPV does just that.

Electoral College supporters often refer to the NPV plan as an "end-run" around the constitutional amendment process. NPV proponents deny this characterization of their efforts, claiming that they are merely using old constitutional provisions in new and innovative ways. But their arguments fall flat. Their compact is more than a creative way to use the Electoral College. It turns the current presidential election system on its head. The Court may treat it as such. The Constitution was the product of much give and take among the delegates. It is dangerous to forget that it would never have been ratified, at least by the small states, but for these compromises.

The Definition of "Legislature"

Article II, Section 1 of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[60] The precise definition of "Legislature" could influence if and when NPV goes into effect because of its impact on two questions: First,

must the legislature itself approve the NPV plan or can it be adopted by citizen initiative? Second, if a governor vetoes the plan, is the veto legally binding? If "Legislature" refers specifically to the lawmaking body and not to a state's lawmaking process, then the answer to both of these questions is "no." Three state governors have already vetoed NPV, so litigation on this matter is already a possibility.

No Supreme Court case definitively addresses this Article II use of "Legislature," and legal scholars remain split on how it should be interpreted. From a purely textualist perspective, the provision should be read as a reference to the lawmaking body, not the lawmaking process. Article II distinguishes between the responsibility of the state (to "appoint") and the legislature (to "direct"). Why delineate separate responsibilities if the general state lawmaking process could regulate the entire process of appointing electors? Indeed, Justices Rehnquist, Scalia, and Thomas seem to have come down on this side of the issue in their *Bush v. Gore* concurrence. That case, of course, sprung from the controversial Florida recount during the 2000 presidential election. The Florida Supreme Court had ordered a recount that would ultimately violate the Florida legislature's expressed wish to ensure that Florida electors are appointed before the federal "safe harbor" provision. "If we are to respect the legislature's Article II powers," Rehnquist argued, "we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor.'"[61] In short, the judiciary cannot take action that trumps legislative decision-making when the legislature is exercising its Article II duties. "This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*," Rehnquist wrote.[62] The opinion was not controlling, however, and four Justices strongly rejected Rehnquist's opinion. Two other Justices expressed no opinion on this aspect of Article II.[63]

While the cases are not directly on point, the Court has also addressed the definition of "Legislature" in the context of Article I, Section 4 and Article V. In these cases, it has come down on both sides of the issue.

Article I provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[64] Importantly, it immediately qualifies the delegation of power: "but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[65] The qualification of power has proven to be critical. In *Ohio ex rel. Davis v. Hildebrant*, the Court was asked to decide if the people, by referendum, could repeal a redistricting plan that had been approved by the Ohio state legislature. Congress had passed a law requiring that "redistricting should be made by a State 'in the manner provided by the laws thereof.'"[66] The Court found the repeal by referendum to be valid because the "referendum constituted a part of the state constitution and laws and was contained within the legislative power."[67] The Court reached a similar decision in *Smiley v. Holm*. Minnesota's governor had vetoed the legislature's redistricting plan, and the Court was asked to decide if gubernatorial approval was necessary. Yes, the Court found, because "the function contemplated by Article I, section 4, is that of making laws."[68] Such a conclusion, the Court found, is

> confirmed by the second clause of Article I, section 4, which provides that "the Congress may at any time by law make or alter such regulations." . . . Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character.[69]

Thus, the Court concluded, redistricting must comply with the normal lawmaking process in a state.

The decision in *Smiley* sharply contrasted with the Court's decision in *Hawke v. Smith*.[70] In the latter case, the Court considered the meaning of the word "Legislature" in the context of Article V, dealing with constitutional amendments. Petitioners sought to prevent a referendum vote on the proposed Eighteenth Amendment to the Constitution, which had already been approved by the state's legislature. The Court found that the legislature is not acting in its lawmaking capacity when it approves an amendment. To the contrary, "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."[71] Indeed, the state ratification process, the Court noted, is parallel to the congressional approval process of an amendment, which does not require action by the President.

Despite the language in *Bush* and *Hawke*, NPV makes some reasonable arguments for accepting the broader definition of "Legislature," as found in the Article I, Section 4 line of cases. *Every Vote Equal* notes that two states had gubernatorial vetoes at the time the Constitution was adopted. During early presidential elections, both states considered the elector appointment issue just as they would have any other piece of legislation, including submitting their bills for gubernatorial action.[72] Such action indicates that these two state legislatures understood the word "Legislature" to mean "lawmaking process." *Every Vote Equal* also reasonably notes a statement made in *U.S. Term Limits*. In the majority opinion, Justice Stevens off-handedly remarked that the Article I legislative duty "parallels the duty under Article II."[73] However, Stevens was not discussing the definition of legislature. Instead, he was discussing which powers have been delegated to the states and which powers have been reserved by them.[74]

It would be ironic if NPV's point ends up carrying the day, requiring that the Article II use of "Legislature" be defined as "lawmaking process." NPV's objective in making such arguments was to ensure that its plan could be enacted through initiative. But winning that argument would also necessitate acceptance of the gubernatorial vetoes in California, Rhode Island, and Vermont. NPV would lose sixty-two votes that could otherwise have been used to help implement its interstate compact.

Closing Thoughts

This article has addressed several problems that will inevitably be the subject of litigation if a significant number of states approve the NPV compact. Any one of these questions requires serious thought and discussion (to say nothing of the lengthy litigation that would result). But this list is by no means exhaustive. Creative lawyers are likely to come up with even

more potential questions.[75] Matters could also get interesting if one state were to try and defend itself against the NPV compact, as discussed above.

The Article V constitutional amendment process exists for important reasons. American liberty is protected when that process is respected. The NPV debate, which is occurring largely behind the scenes and in only a handful of states, is not healthy for the country. Those who wish to eliminate the Electoral College would serve their country better if they instead introduced a constitutional amendment to that effect. The national discussion and education that would ensue would be healthy for this country.

Endnotes

1 *See* http://www.nationalpopularvote.com.

2 Jamin B. Raskin, *Neither the Red States nor the Blue States but the United States: The National Popular Vote and American Political Democracy*, 7 Election L.J. 188, 189 (2008).

3 U.S. Const. art. II, § 1, cl. 2.

4 Shortly before this piece went to press, the Massachusetts House approved NPV, sending it to the state Senate for consideration. The New York State Senate also passed the bill. A few other states could feasibly take action on the bill before publication of this article, although most state legislatures are unlikely to consider the bill before 2011.

5 John R. Koza et al., Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote (2d ed. 2008).

6 *See* Tara Ross, Enlightened Democracy: The Case for the Electoral College (2004).

7 Videotape: The Electoral College Experts Debate and Audience Dialogue (Part 4) (MIT Conference, To keep or not to keep the Electoral College: New Approaches to Electoral Reform 2008), *available at* http://mitworld.mit.edu/video/631 [hereinafter MIT Conference].

8 *See, e.g.*, Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 Election L.J. 196, 207-08 (2008). NPV's member states could presumably seek agreement on one statutory scheme for conducting recounts, but they could not force non-participating states to adopt such laws.

9 Koza et al., *supra* note 5, at 248.

10 *Id.*

11 *Id.*

12 *See, e.g.*, Smith, *supra* note 8, at 207.

13 Koza et al., *supra* note 5, at 364.

14 *Id.* at 361.

15 *See* Ross, *supra* note 6, at 96-100; *see also* Judith A. Best, The Choice of the People? Debating the Electoral College 55-58 (1996); Robert M. Hardaway, The Electoral College and the Constitution: The Case for Preserving Federalism 20-21 (1994).

16 *See* Ross, *supra* note 6, at 102-06.

17 Smith, *supra* note 8, at 207.

18 Koza et al., *supra* note 5, at 248 (emphasis added).

19 *Id.*

20 *See* Alexander S. Belenky, *Reasons to Kill Popular-Vote Plan*, Providence J.-Bull., April 11, 2009, at 4.

21 Koza et al., *supra* note 5, at 249.

22 *See, e.g.*, David Gringer, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 Colum. L. Rev. 182, 224, 230 (2008).

23 U.S. Const. art. I, § 10, cls. 1 & 3.

24 148 U.S. 503 (1893).

25 *Id.* at 518 (emphasis added).

26 *Id.* at 519; *see also* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 285, 300 (2003).

27 148 U.S. at 519.

28 434 U.S. 452 (1978).

29 *Id.* at 472.

30 *Id.* at 472-73.

31 *Id.* at 473.

32 *See* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 Election L.J. 372, 385 (2007) (arguing that "[e]very Compact Clause case, from *Virginia v. Tennessee* to the modern cases, considers not simply the federal sovereignty interest, but also the interests of non-compacting sister states").

33 434 U.S. at 478.

34 *Id.*

35 If the Court were to completely reevaluate its Compact Clause jurisprudence, it could feasibly find the compact to be a treaty, completely forbidden by Article I, Section 10 of the Constitution. Such a scenario seems unlikely, though. Greve has written a persuasive article arguing that, even in that case, Congress is the appropriate body to determine the difference between a treaty and a compact. Greve, *supra* note 26, at 308-14.

36 Koza et al., *supra* note 5, at 229.

37 Greve, *supra* note 26, at 288.

38 *Id.* at 308.

39 The federal government might also argue that NPV affects the balance of power between federal and state governments because the House's role in presidential elections will be effectively removed. Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 Akron L. Rev. 717, 739-40 (2007). Currently, the House of Representatives selects the president if no candidate obtains a majority of electoral votes. U.S. Const. amend. XII. NPV eliminates this possibility.

40 MIT conference, *supra* note 7.

41 *See* John Samples, Cato Institute, A Critique of the National Popular Vote Plan for Electing the President (2008).

42 Koza et al., *supra* note 5, at 339.

43 *Id.* at 372-74.

44 Bush v. Gore, 531 U.S. 98, 104 (2000).

45 Thanks to a conversation with Michael Greve in which he pointed out some of the scenarios in this paragraph, this author has come to the conclusion that she has perhaps been a bit too glib about this matter in the past. She has, for instance, been known to joke that states have "plenary" power and can appoint Mickey Mouse as an elector, if they so choose. They probably could appoint Mickey Mouse—or at least the individual who puts on the mouse suit—but upon considering the ways in which such a principle could be abused, it was perhaps better not to make such loose statements, even in jest.

46 *Cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 251 (1992) (arguing that the "fundamental allocation of authority among states is territorial" although the principle "is largely implicit, so obvious that the Founders neglected to state it").

47 *Bush*, 531 U.S. at 104.

48 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting).

49 U.S. Const. art. V.

50 Samples, *supra* note 40, at 13-14.

51 Clinton v. New York, 524 U.S. 417 (1998).

52 *Id.* at 439.

53 *Id.* at 440.

54 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 831 (1995).

55 *Id.* (citation omitted).

56 *Id.* at 838 (Kennedy, J., concurring).

57 *Id.*

58 *Id.* at 841.

59 *Id.*

60 U.S. Const. art. II, § 1, cl. 2.

61 Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, CJ., concurring).

62 *Id.* at 115.

63 *See also* 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, 610-16 (2008).

64 U.S. Const. art. I, § 4, cl.1.

65 *Id.*

66 Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568 (1916).

67 *Id.*

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

69 *Id.* at 366-67.

70 Hawke v. Smith, 253 U.S. 221 (1920).

71 *Id.* at 229.

72 Koza et al., *supra* note 5, at 317-20.

73 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995).

74 *Id.* at 804-05.

75 For instance, does NPV violate Section 2 of the Voting Rights Act? Is preclearance required under Section 5? *See generally* Gringer, *supra* note 22. Another author has made the tougher argument that NPV violates the Guarantee Clause. *See* Kristin Feeley, *Guaranteeing a Federally Elected President*, 103 Nw. U. L. Rev. 1427 (2009).