The Compact Clause and the National Popular Vote Interstate Compact

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In 2000, the United States presidential election was decided according to the electoral vote, as the Constitution requires. For just the fourth time in history, however, the winner of a plurality of the popular vote did not carry the majority of the electoral vote. This event last happened in 1888, but the American memory had long forgotten it. Supporters of direct democracy bemoaned the fact that the Electoral College could yield such a bizarre result.

Historically, attempts to abolish the Electoral College at the federal level have failed. In the months following the 2000 election, several lawyers, politicians, and academics, now acting with renewed zeal, concocted a novel plan to abolish the College at the state level. The National Popular Vote Interstate Compact they devised would be enacted state by state, thereby avoiding the difficult constitutional amendment process, and it would require each enacting state to give its electoral votes to the winner of a plurality of the national popular vote.

This article evaluates the Interstate Compact under the Compact Clause of the Constitution, and it concludes that because the Clause is concerned with a shift in political power among the states, the diminished political effectiveness of the non-compacting states’ electoral votes is a sufficient interest to invoke the procedural safeguard of congressional consent and render the Interstate Compact unconstitutional in the absence of that consent. It does not attempt to address the merits or drawbacks of the system as a matter of policy or under alternative election law theories. Instead, Part I begins with a brief history of the Electoral College and how the Interstate Compact works.

In Part II, the article analyzes the Compact Clause, which appears in Article I, section 10, clause 3 of the United States Constitution. It first explores the history of the Clause, with origins found in the Articles of Confederation. It then looks to three different theories of interpretation of the Clause: the “Boundary” Compact Clause, the “Non-Political” Compact Clause, and the “Political Consent” Compact Clause.

1 The previous three instances were 1824, 1876, and 1888. Robert W. Bennett, Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy, 94 NW. U.L. Rev. 503, 547 n.170 (2000). The election of 1824 should be qualified, because not every state had popular voting for presidential electors, and the true popular vote tally remains uncertain. In 1960, similar uncertainties plagued the final tally of the popular vote. See Lawrence D. Longley & Neal R. Peirce, The Electoral College Primer 2000, at 48–51 (1999).


3 See, e.g., Christopher Duquette & David Schultz, One Person, One Vote, and the Constitutionality of the Winner-Take-All Allocation of Electoral College Votes, 2 Tenn. J.L. & Pol’Y 487 (2007) (arguing, through statistical analysis, that the Compact violates the “one person, one vote” principle of Reynolds v. Sims, 377 U.S. 533 (1964)).
Clause, which represent increasingly permissible definitions of the types of interstate compacts that do not need congressional consent. Under the “Political Consent” Compact Clause theory, the Supreme Court requires congressional consent to a Compact that increases state political power at the expense of federal supremacy. The Court also requires consent when a compact implicates the interests of non-compacting sister states. Although the Court has not emphasized this element as often as it has the federal sovereignty interest, this article concludes that the interests of non-compacting states are a fundamental concern of the Compact Clause alongside the interest of federal sovereignty.

Part III examines the National Popular Vote Interstate Compact and finds it constitutionally deficient. The Compact is actually a “compact” under the Compact Clause, because the Court has defined “compact” broadly. In particular, the Compact falls under constitutional scrutiny because the Compact is not effective until a certain number of states have enacted it, and because states are restrained from withdrawing from the Compact within a specified period of time before a presidential election. Additionally, the Compact addresses a political matter that affects the interests of non-compacting sister states, because the compacting states enhance their political power at the expense of other states. The article examines the various defenses of the Compact but finds none of them sufficient to negate the political interests of sister states. The Interstate Compact diminishes the political effectiveness of non-compacting sister states, and that shift in political power is forbidden under the Compact Clause. Therefore, barring congressional consent, the Interstate Compact would fail.

I. THE ELECTORAL COLLEGE AND THE POPULAR VOTE

The history of the Electoral College offers insight into the justifications offered in support of the Interstate Compact. The College has been the frequent target of federal constitutional amendment because of its state-based system that does not operate as originally anticipated.

The National Popular Vote Interstate Compact redirects the attack on the College by avoiding the amendment process and using an interstate compact of the sort described in the Compact Clause. The Interstate Compact would effectively shift the Electoral College to a national popular system.

The Founders created the Electoral College largely as a compromise at the original Constitutional Convention. States received as many electoral votes as their total number of Senators and Representatives in Congress, which guaranteed each state at least three electoral votes. More populated states received more electors, but the system protected the interests of smaller states:

[In a popular vote system, states with large populations would clearly be “king-makers”; although citizens of small states would play some role, their preferences would likely be overwhelmed. Establishing the Electoral College enabled the framers to ensure that all states played a role in the process. Clearly, they were less concerned with the equality of individual voters than with the relative influence of states as a whole.]

What would be an advantage to smaller states would naturally be a disadvantage to larger states.

The Constitution commits to each state the exclusive power to “appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” The Supreme Court has articulated sweeping pronouncements in order to protect the state legislature’s power to appoint

4 This article does not attempt to address whether several states may effectively circumvent the amendment process with the consent of Congress pursuant to the Compact Clause. Because the National Popular Vote Interstate Compact exists to avoid the federal process, see JOHN R. KOZA ET AL., EVERY VOTE EQUAL § 5.12 (2006) (“Compacts Not Requiring Congressional Consent”), the constitutional judgments assume the absence of congressional consent throughout this article.

5 Donald Haider-Markel et al., The Role of Federalism in Presidential Elections, in CHOOSING A PRESIDENT 54 (Paul D. Schumaker & Burdett A. Loomis eds., 2002).

6 Id. at 58.

7 U.S. CONST. art. II, § 1, cl. 2.
electors in any fashion it chooses. States for the most part originally appointed electors in the same fashion: the state legislature selected electors. By the mid-nineteenth century, nearly all states appointed their electors through popular elections in a winner-take-all system. One treatise noted that “the winner-take-all procedure insures state party leaders the largest possible group of votes.” Regardless of the motivation, the Court has specifically upheld the winner-take-all system under the Presidential Electors Clause.

Despite the long history of presidential elections decided by the Electoral College, it is fairly clear that the College operates in a fashion wholly unrelated to its envisioned role. Accordingly, it has been frequently criticized and made the target of many constitutional amendments. Of the 11,000 constitutional amendments proposed in Congress, over 1,000 of them have attempted to alter or eliminate the Electoral College. Former Senator Birch Bayh championed many of these amendments and ultimately would become the most vocal congressional champion of the popular vote movement. He called for a federal amendment that would replace the Electoral College with a pure national popular vote, where the winner of at least 40% of the vote would become President. If no candidate received 40% of the vote, the top two candidates would go to a runoff. Proponents of the popular vote argued that “[e]ssentially it would serve to strengthen the power of the national government and weaken that of the states in presidential election procedures,” “state borders would be irrelevant in aggregating the votes,” and “[t]he direct-vote plan would eliminate the authority a state government now has to decide what kind of presidential electoral system it will use.” Such amendments regularly failed.

Congress never passed an amendment to alter the Electoral College, in part because the amendment process is difficult. After all, “[a] constitutional amendment, if it is to be enacted, requires a broad consensus sufficient to overcome multiple hurdles; with support for reform dissipated among various alternatives, the formation of such a broad consensus is made impossible.”

8 Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam) (unanimous opinion) (“[T]he legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.”); McPherson v. Blacker, 146 U.S. 1, 13 (1892) (unanimous opinion) (“In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States.”).


11 The defense of the Electoral College in the Federalist Papers reads almost comically in the present. See The Federalist No. 68, at 363–64 (Alexander Hamilton) (J.R. Pole ed., 2005) (“The choice of several to form an intermediate body of electors, will be much less apt to convulse the community, with any extraordinary or violent movements, than the choice of one who was himself to be the final object of the public wishes. And as the electors, chosen in each state, are to assemble and vote in the state, in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.”).

12 Donald Lutz et al., The Electoral College in Historical and Philosophical Perspective 46, in CHOOSING A PRESIDENT, supra note 5.


14 Interestingly, though Abraham Lincoln won a majority of the Electoral College in 1860, he only won 39.8% of the popular vote and would have had to enter a runoff against runner-up Southern Democrat John Breckenridge. Sayre & Parris, supra note 9, at 30.

15 Id. at 86–87.


17 In the 1992 presidential election, for example, only Governor Bill Clinton received a majority in one state, his home state of Arkansas. The rest of the winner-take-all states allocated their votes to the plurality winner.

18 Maine and Nebraska are the two exceptions. A statewide vote selects two electors, and the rest are selected from the winner of each state’s congressional districts. Robert W. Bennett, State Coordination in Popular Election of the President Without a Constitutional Amendment, 5 GREEN BAG 2D 141, 141 n.2 (2002). Colorado recently rejected an alteration that would divide its electors proportionately to the outcome of the popular vote. Kirk Johnson, Electoral Vote Redistribution Is Defeated, N.Y. TIMES, November 3, 2004, at P9.
replace the Electoral College with a single national popular vote system.

After the 2000 presidential election, when Vice President Al Gore received a plurality of the popular vote but Governor George W. Bush received a majority of the electoral vote, and that only after 36 agonizing days of uncertainty and a pair of Supreme Court decisions, a renewed movement to abolish the Electoral College and implement a national popular vote quickly spread. This new plan, however, did not try to go through the usual amendment process. Instead of resisting state legislatures’ power to appoint electors, this plan would embrace their role. Through an interstate compact, several states would agree to appoint their electors to the winner of the national popular vote and effectively eliminate the Electoral College.

Professor Robert Bennett’s initial proposal in 2001 does not use the term “compact.” He argues that unilateral action could achieve the desired end, but, if states were reluctant, they could tie “their electoral votes to the nationwide popular vote only if a stated number of other states (or of states with a given number of electoral votes) followed suit.” Professors and brothers Akhil Reed Amar and Vikram David Amar defended the compact in an Internet article that year. They note that as few as eleven states would have the 270 electoral votes to create an electoral majority, and their agreement could effectively abolish the Electoral College. This “agreement” would alleviate the concern of “unilateral disarmament,” because states would be hesitant to yield their individual electors to the national popular vote if no other states were guaranteed to do so. Only when enough states agreed would the compact become enforceable. Professor Bennett’s subsequent article latches onto this “agreement” and notes that even as few as 100 compacted electoral votes may be sufficient to swing an election. Jay Wilson claims that even a compact between New York and Texas alone totaling 65 electoral votes could make the practical difference in a presidential election.

After the initial academic proposals of Bennett and the Amars, the National Popular Vote Interstate Compact was introduced into state legislatures. The Compact is effective only when 270 electoral votes have been committed. The Interstate Compact uses two constitutional features to achieve its end. First, it uses the Presidential Electors Clause, which allows each compacting state to determine the manner in which its electors are selected. Second, it creates an enforceable compact under the Compact Clause, Article I, section 10, clause 3. The Compact is only effective once states with at least 270 electoral votes among them have agreed to select their electors according to the winner of the national popular vote. A state may withdraw at any time, and if the total dips below 270 electoral votes, the compacting states are no longer obligated to give their electors to the winner of the national popular vote. If, however, a state withdraws after July 20 prior to a presidential election, the Compact remains in force for all the states until after the election in order to prevent last-minute scrambling or alterations to the nature of the presidential race.

Reaction to the Compact varied widely as it was introduced in a handful of states in 2006, then in nearly all of them in 2007. Some criticized the Electoral College as a “relic” and an “anachronism,” and “antiquated,” “obsolete,” and “dangerous.” Critics of the Compact,

20 Bennett, supra note 18, at 141–42.
22 Bennett, supra note 18, at 141–42.
23 Id. at 245.
24 Bennett, supra note 18, at 141–42.
however, were pleased to see the early failure of this “gimmick”\textsuperscript{30} of “recurring simple-mindedness”\textsuperscript{31} deemed an “urban power grab.”\textsuperscript{32} In 2006, California’s legislature became the first, and that year the only, state to pass the Compact. On September 30, 2006, Governor Arnold Schwarzenegger vetoed the bill. He concluded, “I cannot support . . . giving all our electoral votes to the candidate that a majority of Californians did not support.”\textsuperscript{33} In 2007, the Compact achieved its first success. Maryland, with its 10 electoral votes, became the first state to enact the Compact.\textsuperscript{34}

Regardless of the wisdom of the legislation as a matter of public policy, the Interstate Compact raises a serious constitutional issue: whether the Compact violates the express constitutional prohibition on any interstate compact or agreement without congressional consent.\textsuperscript{35} Few have seriously addressed this issue in the proposals to abolish the Electoral College, and all have reached the convenient conclusion that the Compact Clause would not apply.\textsuperscript{36} Yet the text and the underlying policy of the Compact Clause show that the Clause would render the Interstate Compact unconstitutional.

II. THE HISTORY OF THE COMPACT CLAUSE

The Compact Clause of the United States Constitution has a history that stretches back to the Articles of Confederation. The history of the Clause in the Articles shows why compacts, including the National Popular Vote Interstate Compact, need consent when they affect the interests of non-compacting sister states. The early drafters of the Articles were deeply concerned both with divisive interstate disputes and collusive interstate agreements, and the Articles of Confederation addressed both concerns. After the Founders modified the Articles and wrote the Constitution, the State Treaty Clause absolutely prohibited interstate treaties, and the Compact Clause permitted interstate compacts only upon congressional consent. A primary concern of the Compact Clause was to prevent interstate agreements detrimental both to the federal government and to non-compacting states.

This Part distinguishes compacts and treaties under the Constitution. The National Popular Vote Interstate Compact falls on the “compacts” side, and therefore the Compact Clause applies. Formerly, political agreements were more likely to be called “treaties” and flatly prohibited under the Constitution, while non-political agreements were “compacts” and permitted with congressional consent. Eventually, both political compacts and non-political agreements were called “compacts,” but only political compacts required congressional consent under the Compact Clause. This article examines the history of the Compact Clause, and it concludes that the National Popular Vote Interstate Compact is a political compact, which means that states cannot enact it without congressional consent.

Over time, the Supreme Court interpreted the Compact Clause more expansively. The early “Boundary” Compact Clause theory limited application of the Compact Clause to boundary agreements, and all other agreements were prohibited. The Court never seriously accepted this theory. Second, the “Non-Political” Compact Clause theory allowed non-political compacts to exist without congressional consent under the Compact Clause, but political agreements were prohibited under the State Treaty Clause. The Court considered this theory but finally rejected it for the third

\textsuperscript{30} A Bad Gimmick, CHI. TRIB., October 16, 2006, at 18.
\textsuperscript{31} George F. Will, From Schwarzenegger, a Veto for Voters’ Good, WASH. POST, October 12, 2006, at A27.
\textsuperscript{32} Pete Du Pont, Trash the “Compact,” WALL ST. J., August 28, 2006.
\textsuperscript{33} Veto message of Governor Arnold Schwarzenegger to the Members of the California State Assembly, AB 2948, September 30, 2006.
\textsuperscript{34} 2007 Md. Laws Ch. 44 (H.B. 148).
\textsuperscript{35} “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . .” U.S. CONST. art. I, § 10, cl. 3.
\textsuperscript{36} See, e.g., KOZA ET AL., supra note 4 (dedicating one chapter to the constitutional implications of the Interstate Compact, and primarily examining whether citizens may create the compact via referendum); Bennett, supra note 18 (citing three Supreme Court cases and concluding that “I doubt” approval would be required); Wilson, supra note 24 (allotting two pages in twenty to discussion of the Clause, largely oscillating between possible Court conclusions, and concluding that “[t]he only way to find out is to try”); Amar & Amar, supra note 22 (devoting one paragraph to the Compact Clause and concluding simply, “Probably not”).
theory. The “Political Consent” Compact Clause theory allows states freely to enter into non-political compacts, but requires political compacts—those that interfere with either federal or non-compacting state sovereignty interests—to receive congressional approval. Though the Court has emphasized the federal sovereignty interest, it has also affirmed the applicability of the sister state interest, and it is on this ground that the National Popular Vote Interstate Compact fails.

A. Articles of Confederation

The Compact Clause was not a novel addition to the United States Constitution in 1787; it first appeared in early drafts of the Articles of Confederation in 1776. Accordingly, the original concerns of the Clause revolved around the needs of the Confederacy, not the constitutional Republic. Unlike the federal Constitution, which strengthened the central government of the United States, the Articles of Confederation collected the colonies under a single compact to prevent interstate squabbles or contending alliances.

The early drafters of the Articles of Confederation realized that they should be “primarily concerned with removing possible sources of discord among the colonies.” The 1770s saw colonies frequently bickering with each other, primarily over land boundaries. Colonies were anxious to find foreign allies in order to secure their status as free states. Threats came from northern, central, and southern states, which each had different collective interests and threatened to divide the would-be nation into factions. A plan for unity, therefore, needed to address these concerns.

In 1776, John Dickinson presented his first comprehensive draft of the Articles of Confederation, and the draft recognized these concerns. In Dickinson’s draft, Article V of the Articles of Confederation stated, “No two or more Colonies shall enter into any Treaty, Confederation or Alliance whatever between them, without the previous and free Consent and Allowance of the United States assembled, specifying accurately the Purposes for which the same is to be entered into, and how long it shall continue.” He included a parallel provision forbidding treaties with foreign governments in his Article IV. Dickinson’s draft prohibited interstate agreements in order to maintain a unified confederacy without the risk of factions undermining it through competing alliances.

The final version of the Articles of Confederation closely resembled Dickinson’s proposal to prevent rival interstate alliances. The Journals of the Continental Congress record that Charles Thompson wrote “agreed” next to the proposed Dickinson Article V when it arrived for discussion. The ultimate draft included both the ban on foreign agreements and the ban on interstate agreements in Article VI of the Articles of Confederation. The Interstate Treaty Clause stated, “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 purposes for which the same is to be entered into, and how long it shall continue.” The drafters of the Articles of Confederation, however, were not concerned exclusively with interstate agreements; they also addressed interstate disputes. Article IX of the Articles of Confederation, the Interstate Dispute Clause, stated, “The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever. . . .” Peter Onuf described the balance: “The states had to agree not to seek alliances or resort to coercive means as individual states; in other words, they denied themselves the means of independently extending and enforcing their claims.”

In this way, the Articles allowed Congress to intervene both in interstate agreements under
the Interstate Treaty Clause and interstate disputes under the Interstate Dispute Clause.

In the following years, writers like former Massachusetts Governor Thomas Pownall emphasized that for the American experiment to succeed, it would need the separate states to treat each other in a civilized manner. After all, Europe consisted of “savage” squabbling states and lay in disunity. A successful civilization must avoid this bickering and enact a law that would unite the individual sovereign states. By the 1780s, however, it soon became clear that the Articles of Confederation were insufficient to prevent the states from creating factions and degenerating into separate nations. George Washington confessed that “[t]hirteen Sovereignties pulling against each other, and all tugging at the federal head will soon bring ruin on the whole.” The goal of the Articles of Confederation had not been attained. The “firm league of friendship” of the confederation was now unstable.

Beyond instability, the Articles of Confederation could have been dissolved at any time. “Fears that particular states or sections would gain preponderant power, or that a ‘consolidated empire’ would be erected on the ‘ruins of the present compact between the states,’ reflected recent American experience as well as the persistence of traditional patterns of thought.” The Articles’ primary intention to prevent contentiousness among the several states failed because the Articles did not provide for a strong central governing authority or for a permanent league of states. Accordingly, the Interstate Treaty Clause and the Interstate Dispute Clause addressed the concerns of squabbling among the states, but they did not achieve federal supremacy or permanency.

Alexander Hamilton in Federalist 15 expressed his concern, not that the states were aggrandizing themselves in relation to each other, but that states were flaunting the central authority of the Confederation. He noted that the Articles had become “mere recommendations which the States observe or disregard at their option.” No longer would a mere “league” be sufficient to protect the collective interests of the states. A stronger national government, Hamilton argued, must take the place of the Confederation.

Because the Interstate Treaty Clause only addressed the possibilities of interstate rivalries and not aggrandizement at the expense of the Confederation, it would be entirely appropriate for the Founders to include two types of clauses to restrain states in the new Constitution. First, the Constitution would include the restrictions on the states enumerated in the Articles of Confederation, those that would prevent interstate factions. Second, the Constitution would include additional prohibitions on the states, which would help preserve the new federal power granted to the central government.

Accordingly, the Founders adopted versions of the Interstate Treaty Clause and the Interstate Dispute Clause into the new Constitution. An early draft of the Constitution included a clause reading: “No State shall enter into any Treaty, Alliance [or] Confederation with any foreign Power nor witht. Const. of U. S. into any agreeemt. or compact . . . another State or Power. . . .” Interstate “agreements” and “compacts” would be forbidden without congressional consent. This drafted clause distinguished between some agreements that were absolutely prohibited (treaties, alliances, or confederations), and some agreements that were permitted with the consent of Congress (agreements or compacts). The absolutely-prohibited agreements only regarded foreign nations; the conditionally-permitted agreements only regarded interstate agreements. From the time of this early draft, the Founders were more

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48 Peter S. Onuf, Anarchy and the Crisis of Union, in To Form a More Perfect Union 276–78 (Herman Belz et al. eds., 1992).
49 Id. at 276–78.
50 Letter from George Washington to James Madison, November 5, 1786, in The Writings of George Washington from the Original Manuscript Sources, 1745–1799 (John C. Fitzpatrick ed.).
51 ARTICLES OF CONFEDERATION art. III.
52 ONUF, supra note 38, at 187.
53 The Federalist No. 15, supra note 11, at 77 (Alexander Hamilton).
54 Id.
55 2 FARRAND’S RECORDS OF THE FEDERAL CONVENTION 135 (Max Farrand ed., 1966). Certain words that had been deleted and are indicated in Farrand’s edition with strike-out lines are omitted from the quotation in the text.
56 For a discussion of what “agreement” and “compact” might mean, see infra notes 61–67 and accompanying text.
inclined to allow interstate than foreign agreements, as long as Congress had the right of consent.

John Rutledge presented the Constitutional Convention with a draft that included both a Treaties Clause and a Compacts Clause. Article XII stated, "No state shall . . . enter into any treaty, alliance, or confederation. . . . "57 Article XIII stated, "No state, without the consent of the legislature of the United States, shall . . . enter into any agreement or compact with another state, or with any foreign power. . . . "58 With little debate, the two Clauses were adopted as a part of the Constitution. The enacted State Treaty Clause stated, "No State shall enter into any Treaty, Alliance, or Confederation. . . . "59 The Compact Clause stated, "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . . "60 The two Clauses differed from the Articles of Confederation in two important respects. First, although treaties, alliances, or confederations had been previously permitted with the consent of Congress, either among states or with a foreign nation, they were now expressly forbidden. Second, agreements or compacts with sister states or with foreign nations were permitted only with the consent of Congress.

The precise meaning of the Compact Clause remains elusive, even under the most exacting historical scrutiny.61 For instance, Federalist 44 asserts that the Compacts Clause needs no explanation: "The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."62 Even though the precise meaning of the words in the Clauses has disappeared, the purpose of the Clauses, with their background counterparts in the Articles of Confederation, provides a contemporary context for their application to the National Popular Vote Interstate Compact.

Admittedly, the precise distinction between "treaty" and "compact" has effectively been lost over time.63 Nevertheless, the Founders determined that all agreements between states should be treated with caution. Interstate treaties would be flatly forbidden; interstate compacts could only exist with the authorization of Congress. The lingering concerns of the Confederacy had carried over into the Constitution, and agreements that may create competing alliances within the Union would be subject to federal examination. This underlying purpose has been articulated as the "non-compacting sister state" interest under which the Court has evaluated all interstate compacts to the present day.64

It appears, therefore, that the State Treaty Clause prohibited all interstate treaties, and the Compact Clause did one of two things (or both). The Compact Clause either did the work that the Interstate Dispute Clause had done before, or it separated "compacts" and "agreements" from the original prohibition on treaties, alliances, or confederations. States were now free to arrange their boundaries through compacts or agreements. Under the Interstate Dispute Clause, Congress had served in an appellate role for states adjusting land boundaries. Now, Congress would merely oversee the agreements that states might reach. Land disputes could still be adjudicated under the Supreme Court's original jurisdiction of Article III. From this limited historical context, three major theories of interpretation have arisen.

First, the "Boundary" Compact Clause theory states that the Clauses strengthened the national government by prohibiting external alliances. The Constitution allows boundary disputes, previously resolvable only through Congress under the Interstate Dispute Clause of the Articles of Confederation, to be resolved between the states independently and later

57 5 Elliot's Debates, the Debates in the Several State Conventions on the Adoption of the Federal Constitution 381, August 6, 1787 (James McClellan & M.E. Bradford eds., 1989).
58 Id.
59 U.S. Const. art. I, § 10, cl. 1.
60 Id. at cl. 3.
61 See Michael S. Greve, Compacts, Cartels, and Congressional Intent, 68 Mo. L. Rev. 285, 310 (2003) (exploring the historical record and, finding the Federalist Papers entirely unhelpful, quipping, "And to all a good night").
62 The Federalist No. 44, supra note 11, at 245 (James Madison).
63 See infra note 74 and accompanying text.
64 See infra Part II.D.2.
with the consent of Congress. Under this theory, agreements and compacts only address boundary disputes. Second, the “Non-Political” Compact Clause theory states that a non-political agreement under the heading “Agreement or Compact” may be entered into with the consent of Congress, but a political agreement under the State Treaty Clause is a “Treaty, Alliance, or Confederation” and expressly prohibited. Third, the “Political-Consent” Compact Clause theory states that “Treaty, Alliance, or Confederation” addressed the types of transactions generally reserved for foreign alliances, and agreements or compacts with sister states of any sort are permissible under the Compact Clause. While non-political agreements generally do not threaten the federal government or sister states, political agreements need express congressional consent. This article examines each theory in turn.

B. The “Boundary” Compact Clause theory

The “Boundary” Compact Clause theory states that only boundary agreements are permitted under the Compact Clause; all other subjects, political and non-political, are forbidden under the State Treaty Clause. David Engdahl was among the strongest proponents of this theory. He noted that once the Interstate Dispute Clause of the Articles of Confederation disappeared, the Compact Clause of the Constitution necessarily sprung up in its place. He relied heavily on contemporary definitions of “agreement” and “compact” to reach his conclusion.

Engdahl’s interpretation has strong historical support from the eminent international law theorist Emerich de Vattel, as discussed in commentary, and by the Supreme Court. According to Engdahl, “[i]t is understandable that mere boundary arrangements between particular states would not have been thought potentially harmful to other states.” He continues,

Congressional surveillance over “treaties” between sister states would have been necessary to assure that the parties did not use such arrangements as a device to violate their obligations to all other states. However, the term “agreements” was understood to include only dispositive arrangements, which in colonial practice had been utilized primarily in settlements affecting territorial boundaries and rights in boundary waters.

He also has historical legislative precedent for support: States did not really begin experimenting with compacts beyond settling boundary disputes until the 1920s. Accordingly, under the “Boundary” Compact Clause, the National Popular Vote Interstate Compact would be unconstitutional. Only land boundaries could be the subject of compacts under this theory, and even then only with congressional approval. The Compact would be classified as a “treaty” and be unconstitutional under the State Treaty Clause. Over time, however, the Compact Clause has been left largely devoid of this meaning primarily because of the loss in the precision of language. Indeed, Engdahl’s argument is little more than academic, because contemporary discussions about the Compact Clause assume that it may extend far beyond the mere bounds of boundary disputes. Even Chief Justice John Marshall conflated “treaty” and “compact” in early constitutional jurisprudence. The distinction between “treaty” and “compact” has not withstood the test of time. Instead, most ar-

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65 See infra Part II.B.
66 See infra Part II.C.
67 See infra Part II.D.
69 Abraham C. Weinfeld, What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?, 3 U. Chi. L. Rev. 453 (1936) (examining exhaustively the language of the Compact Clause in comparison to contemporary texts).
71 Engdahl, supra note 68, at 80.
72 Id. at 79–80.
74 Engdahl, supra note 68, at 81–84.
75 See, e.g., Greve, supra note 61 (attempting to return to an original understanding of the Compact Clause while conceding that the distinction between “compacts” and “treaties” has been largely lost).
Arguments focus on the purposes of the Compact Clause rather than its precise textual meaning, and the definition of “compact” now encompasses subjects far beyond boundary disputes.

C. The “Non-Political” Compact Clause theory

A more widely-accepted theory of the Compact Clause, the “Non-Political” Compact Clause theory, states that the Compact Clause applies to any non-political agreements between states. Treaties are deemed to be political compacts and flatly forbidden, but non-political agreements, which generally do not threaten the stability of the Union, are permitted with congressional consent. Under this theory, if the National Popular Vote Interstate Compact were deemed “political,” it would be a “treaty” and forbidden under the State Treaty Clause. If it were deemed “non-political,” it would be subject to congressional consent. A series of jurists advanced this theory, and the Supreme Court ostensibly adopted it in the early years of the nation, but the Court never seriously, or at least clearly, applied this test, and had rejected it by the late 20th century.

St. George Tucker, expounding upon Blackstone’s Commentaries in 1803, first distinguishes “treaty” from “compact” in the Constitution. He writes,

The former relate ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time; the power of making these is altogether prohibited to the individual states; but agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties, may still be entered into by the respective states, with the consent of congress.77

He draws a line between “great” and “transitory” agreements, as well as between “national” and “local.” Tucker’s explanation looks similar to the distinction, made by subsequent theorists, between “political” agreements that influence affairs beyond the borders of the compacting states, and “non-political” agreements that only concern the local affairs of the compacting states.

Justice Joseph Story adopts a similar line of reasoning when he analyzes the Compact Clause in significant detail. He speculates, with admittedly no foundation,78 that the State Treaty Clause addresses a political affair; the kind of “treaty, alliance, or confederation” that is prohibited includes “treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.”79 He then speculates that the Compact Clause addresses only “private rights of sovereignty,” which includes “questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of states, bordering on each other.”80 Accordingly, the Compact Clause permits any non-political agreement among states with congressional consent, and the State Treaty Clause prohibits any political agreement.

Chief Justice Marshall reaches an identical conclusion in Barron v. Baltimore81 when he examines the provisions of the Constitution that apply directly to the states.

A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they

78 Story wrote, “What precise distinction is here intended to be taken between treaties, and agreements, and compacts is nowhere explained; and has never as yet been subjected to any exact judicial, or other examination.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1397 (5th ed. 1994). He characterized his explanation with no more preface than “perhaps the language of the former clause may be more plausibly interpreted.” Id. § 1397. Already, the nuanced and precise language ostensibly derived from Emmerich de Vattel had been lost. See supra II.B.
79 Id.
80 Id.
interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution.82

He, too, looks at the State Treaty Clause as one controlling political power (while confusingly conflating the word “compact” with the terms used in the State Treaty Clause83). Finally, Justice Frankfurter’s influential 1925 article on the Compact Clause also defends this theory. He and co-author James Landis look at the long history of colonial boundary disputes, and they emphasize that “the methods evolved for settlement are of prime importance to the lawyer.”84 The Articles of Confederation not only sought to resolve interstate disputes but also to monitor interstate agreements.

While, therefore, provision had to be made for the settlement of boundary and other disputes, which now emerged between the new independent States, in case of failure of direct negotiations between them, it was perhaps even more important to protect the new Union of States established by the Articles of Confederation, from the destructive political combination of two or more states.85

They conclude that the Interstate Dispute and Interstate Treaty Clauses of the Articles primarily addressed political power, and then were included in the Constitution. “The absence of any powerful national capabilities on the part of the Confederacy, except in the conduct of foreign affairs, underlines the significance of these clauses as insurance against competing political power. This curb upon political combinations by the States was retained almost in haec verba by the Constitution.”86 Finally, Frankfurter and Landis acknowledge a distinction between non-political compacts that could be approved under the Compact Clause and political compacts that were forbidden under the State Treaty Clause: “But the Constitution also authorized agreements between the States with the consent of Congress. Obviously the framers contemplated adjustments among the States which did not involve political entanglements embarrassing to the national government.”87 The State Treaty Clause attempted to prevent conflicting interstate political alliances, according to Frankfurter, a position that aligns both with Justice Marshall and with the concerns of the Articles of Confederation.

Despite Frankfurter’s analysis, by 1925 the Supreme Court had already drifted away from this understanding of the relationship between the State Treaty Clause and the Compact Clause.88 Even with an interpretation of the Compact Clause more expansive that the original definitions of “agreement” and “compact” as understood by Vattel,89 the Court moved to a Compact Clause that would permit even political compacts. Accordingly, the State Treaty Clause no longer applies to the analysis of the National Popular Vote Interstate Compact, and the discussion of the Compact hinges upon whether it is political or non-political under the “Political Consent” Compact Clause theory.

D. The “Political Consent” Compact Clause theory

The final, and currently reigning, theory behind the Compact Clause, the “Political Consent” theory, states that both non-political and political agreements are controlled by the Clause in different ways. Non-political compacts may be entered without the consent of Congress, because they do not affect national sovereignty or concern the core meaning of the Compact Clause. Political compacts are permitted, but only with the consent of Congress.

82 Id. at 249 (emphasis added).
83 See supra note 76 and accompanying text.
85 Id. at 693.
86 Id. at 694.
87 Id.
88 This article is not concerned with which theory is most persuasive or historically sound, and therefore does not attempt to restate the excellent analysis of Michael Greve or the insight of David Engdahl. Instead, it accepts what the Court has accepted; namely, that any agreement, political or non-political, may be the subject of an interstate compact, discussed infra Part II.D.
89 See supra Part II.B.
In 1893, the Court’s influential decision in *Virginia v. Tennessee*, concerning a boundary line dispute, established this understanding of the Compact Clause that still controls today. It first rejected the “Boundary” Compact Clause theory and concluded that no difference existed between “compact” and “agreement” in practical terms, which typified the Court’s continued lack of precision in defining these words. The Court then interpreted the Compact Clause to include both non-political and political compacts:

The terms “agreement” or “compact,” taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as those which may tend to increase and build up the political influence of the contracting states, so as to enroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control.

In its description of “compacts,” the Court used sweeping language to embrace essentially all agreements of any sort between states. Accordingly, the Court rejected the interpretation promulgated by Story and Marshall and later explained by Frankfurter. Instead, compacts may now cover political matters.

The Court drifted from an original understanding to the furthest possible degree and now allowed any kind of agreement between states. Its new interpretation undercut the total prohibition on any “treaty, alliance, or confederation” under the State Treaty Clause, which ostensibly includes, at the very least, political agreements among states. But the Court has severely limited what states can do with foreign countries under both the State Treaty Clause and the Compact Clause. For instance, in *Holmes v. Jennison*, the Court construed the Compact Clause to prohibit virtually any state agreements with foreign countries. Accordingly, the prohibition in the Constitution extends “to any agreement whatever.”

As discussed previously, the Court never extended that flat prohibition nearly so far when construing the effect of interstate compacts. Further, the Court held that some compacts could receive implied support from Congress and did not need explicit Congressional authorization under the Compact Clause. Unlike the prohibition on foreign compacts, some domestic interstate compacts were permissible under implied consent if they “in no respect concern the United States.” According to *Virginia v. Tennessee*, such non-political compacts included a land purchase, a contract to use a canal, draining a disease-causing swamp, and uniting to resist pestilence. The Court could have resolved the dispute in *Virginia v. Tennessee* on narrower grounds, because the compact issue was non-political: the states had a land boundary dispute, and the Court should have stopped after it concluded that boundary disputes were non-political. Nevertheless, the Court chose to address the constitutionality of political agreements. The Court cited Story fa-

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90 148 U.S. 503 (1893).
91 Id. at 520.
92 Engdahl, supra note 68, at 81–84.
93 *Virginia*, 148 U.S. at 517–18 (emphasis added).
94 See id. at 520 (“The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it; for example, as made upon a similar declaration of the border or contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations.”); see also *Hardy*, supra note 73, at 2. (“An interstate compact is basically an agreement between two or more states, entered into for the purpose of dealing with a problem that transcends state lines.”). This language suggests that contingent legislation is sufficient to create a “compact” under the Compact Clause. See infra Part III.A.
96 Id. at 572–73.
97 Id. at 573–74.
98 See Virginia v. Tennessee, 148 U.S. 503, 521 (1893); see also U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 484–85 (1978) (White, J., dissenting); 3 *Story*, supra note 78, § 1399 (“But the consent of congress may also be implied; and, indeed, is always to be implied, when congress adopts the particular act by sanctioning its objects, and aiding in enforcing them.”).
99 *Virginia*, 148 U.S. at 518.
100 Id.
vorably, but it then expanded the Compact Clause to permit political compacts. Later cases by the Court quickly accepted this conclusion.

The Court would ultimately define “political compact” as a compact infringing upon federal or non-compacting state sovereignty by aggrandizing the political power of the compacting states. Because the Court has focused almost exclusively on compacts that infringe on federal sovereignty, the category of compacts affecting sister states has been neglected in discussions of the Compact Clause. This article concludes that the Compact Clause is concerned with the shift in political power, and because the National Popular Vote Interstate Compact impairs the political effectiveness of the non-compacting states’ electoral votes, those states’ interest is sufficient to require congressional consent. The following sections consider the federal sovereignty interest and the non-compacting sister state interest in turn.

1. Application to the federal interest. The Supreme Court has concluded that political compacts are permissible under the Compact Clause but require congressional consent if they encroach on federal power. When states entered non-political compacts, the Court in Virginia v. Tennessee concluded that it was not “essential for that state to obtain the consent of congress.” Political compacts, however, were a different matter. The Court stated, “The compact or agreement will then be within the prohibition of the constitution, or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of federal authority.” It concluded, in what would become an oft-repeated phrase, 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.” Accordingly, the Compact Clause primarily concerned federal supremacy, and interstate political compacts required congressional consent.

Even though the Court’s formulation has been stated in dicta, the principle would be affirmed in the later influential Compact Clause case of 1978, U.S. Steel Corp. v. Multistate Tax Commission. The Court analyzed a compact that had four primary purposes: to ensure proper allocation of tax liability, to promote uniformity, to provide taxpayer convenience, and to avoid double taxation. The district court had looked to Virginia v. Tennessee “in support of its holding that consent is necessary only in the case of a compact that enhances the political power of the member states in relation to the federal government. The District Court three-judge panel found neither enhancement of state political power nor encroachment upon federal supremacy.” The Supreme Court affirmed the lower court’s conclusion.

In U.S. Steel, the Court affirmed its holding in New Hampshire v. Maine, a land boundary dispute case, and the dictum in Virginia v. Tennessee. It recited Virginia v. Tennessee for the proposition that the Compact Clause addressed political compacts that interfered with federal supremacy. The Court conceded, There well may be some incremental increase in the bargaining power of the member states quoad the corporations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But the test is whether the Compact enhances state power quoad the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence.

101 Id. at 519.
102 See, e.g., U.S. Steel, 434 U.S. at 467 (1978) (majority opinion).
103 Virginia, 148 U.S. at 518.
104 Id. at 520.
106 Greve, supra note 61, at 304; see also supra notes 100–101 and accompanying text.
108 Id. at 456.
109 Id. at 459.
111 U.S. Steel, 434 U.S. at 471.
112 Id. at 472–73.
With that, the Supreme Court dispensed with the concern with encroachment upon federal supremacy. Because political concerns, which meant interference with federal interests, were not implicated, the compact did not require congressional authorization.

Justice Byron White dissented in *U.S. Steel* largely because he believed the compact did implicate federal interests. But White’s argument draws upon a second interest found within the Compact Clause: the interests of sister states that had not entered into the compact. White assumed that this interest, tracing back to the Articles of Confederation, should be sufficient to prevent an interstate compact even if a federal interest is lacking.

2. Application to the sister state interest. Every Compact Clause case, from *Virginia v. Tennessee*113 to the modern cases,114 considers not simply the federal sovereignty interest, but also the interests of non-compacting sister states. The history and the Court’s application of the Compact Clause show that interests can be “political” by reason of harm to non-compacting sister states. If the National Popular Vote Interstate Compact implicates this interest, congressional consent is needed.

The majority in *U.S. Steel* looked at three dangers the Compact Clause is intended to obviate: first, trampling upon federal supremacy; second, encroachment on federal relations with foreign powers; and third, often lost in contemporary analysis, impact on nonmember states. The Court devoted most of its opinion to discussing history to prove that the Compact Clause is primarily concerned with aggrandizement of state power at the expense of the federal government. Nevertheless, the Court noted that it is possible for a compact to run afoul of the Compact Clause if it “impairs the sovereign rights of nonmember states.”115

Justice White’s dissent ostensibly addresses the “federal interest” concern of the majority in *U.S. Steel*, but many of his arguments rely at least in part on interests of non-compacting sister states.116 He emphasizes, “A proper understanding of what would encroach upon federal authority, however, must also incorporate encroachments on the authority and power of non-Compact States.”117 White continues, “There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority, nor is that surprising in view of the Federal Government’s preeminent purpose to protect the rights of one State against another.”118

Justice White lays out the history of the Clause extending back to the Articles of Confederation, writing that in “framing the Constitution the new Republic was at pains to correct the divisive factors of the Government under the Articles. . . .”119 Groups of states may not simply take action collectively, even if they are permitted to take that action individually.120 The Congress must consider the interests of non-compacting sister states.121

An 1838 Supreme Court case, *Rhode Island v. Massachusetts*,122 anticipates Justice White’s view, and White cites it approvingly: the Compact Clause (in that case, regarding boundary disputes) intended “to guard against the rearrangement of [the states’] federal relations with the other states of the Union, and the federal government.”123 The Compact Clause, regardless of its extension to political compacts, necessar-

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113 148 U.S. 503, 517–18 (1893) (“The terms ‘agreement’ or ‘compact,’ taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation . . . which may tend to increase and build up the political influence of the contracting states, so as to . . . interfere with their rightful management of particular subjects placed under their entire control.”).
114 Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176 (1985) (“We do not see how the statutes in question . . . enhance the political power of the New England States at the expense of other States. . . .”); U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 477 (1978) (“It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods will rebound to the benefit of any particular group of States or to the harm of others.”).
115 *U.S. Steel*, 434 U.S. at 477 (majority opinion).
116 *Id.* at 484 (White, J., dissenting).
117 *Id.* at 494 (emphasis added).
118 *Id.* at 494–95.
119 *Id.* at 482–83.
120 *Id.* at 482.
121 *Id.* at 496.
ily concerns the relationship of non-compact-
ing sister states in addition to the general fed-
eral interest.

Even though the sister state interest of the
Compact Clause, most lucidly stated in Justice
White’s dissent,124 had long existed, the focus
of the Court’s attention in Compact cases ad-
mittedly has generally been upon the federal
interests. The *Virginia v. Tennessee* query
whether the compact “may encroach upon or
interfere with the just supremacy of the United
States”125 has dominated the discussion.

Yet the realities of the dangers of political
combinations of groups of states date back to
the Articles of Confederation, before the federal
sovereignty interest was even a concern.126 In-
deed, “[t]he Articles, while recognizing the cus-
tom [of interstate compacts], protected the
Confederation against possibly dangerous
combinations of its parts.”127 A primary moti-
vation for the Compact Clause in the Constitu-
tion was “to prevent undue injury to the in-
terest of non-compacting states.”128 As Michael
Greve elaborates:

Our own Constitution ameliorates the
specific risks of state compacts in two re-
lated ways. First, the congressional ap-
proval requirement guarantees that every
state will be informed of, and be heard on,
sister states’ agreements. In this manner,
the Compact Clause reduces the costs each
state would otherwise incur in monitoring
and countermanding cartels, collusion,
and combinations adverse to its own in-
terests. Second, supermajority require-
ments provide a measure of protection
against parochial state combinations to the
detriment of the non-consenting states.129

Congressional oversight is necessary to pro-
tect non-compacting states in order to prevent
the creation of “divergent allegiances.”130

In *U.S. Steel*, the Court did consider the im-
 pact on non-compacting sister states. It ulti-
mately concluded that non-compacting state
interests were not significantly implicated.131
The Court reached that conclusion in part be-
because individual taxpayers, and not states
themselves, had filed the lawsuit.132 It was
doubtful that the compact impaired states’ sov-
ereign interests because non-compacting states
chose not to contest the compact.

The Court then went on to examine what at-
tributes might make this agreement “political”
in violation of the Compact Clause. The Court
rejected the sister state interest claim because
of a lack of evidence that the compact would
“redound to the benefit of any particular group
of States or to the harm of others.”133 Addi-
tionally, the Compact must *cause* the harm or
the benefit.134 Because the states only claimed
incident economic harm from “a fiscal or ad-
ministrative policy,” and because no other area
of the Constitution was affected, the federal
structure was not implicated.135 The Court
stated, “Appellants do not argue that an in-
dividual State’s decision . . . touches upon con-
stitutional strictures. This being so, we are not
persuaded that the same decision becomes a
threat to the sovereignty of other States. . . . ”136
The Court also denied there was enhanced in-
fluence or “synergistic” power from the Com-
pact.137 Finally, the Court held, “Each member
State is free to adopt the auditing procedures
it thinks best, just as it could if the Compact did
not exist.”138 Though it rejected the argument

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124 See supra note 123 and accompanying text; see also U.S.
Steel, 434 U.S. at 494 n. 23 (White, J., dissenting) (citing
various sources for this proposition); United States v. To-
have interpreted the compact clause have confirmed these
statements, and established that Congress has a two-fold
duty: first, to prevent undue injury to the interests of non-
compacting states; second, to guard against interference
with the ‘rightful management’ by the National Govern-
ment of the substantive matters placed by the Constitu-
tion under its control.”) (citing *Rhode Island*, 37 U.S. (12
Pet.) 657), reversed, Tobin v. United States, 306 F.2d 270
(D.C. Cir. 1962).
126 See supra II.A.
127 RICHARD H. LEACH AND REDDING S. SUGG, JR., THE AD-
128 HARDY, supra note 73, at 13.
129 Greve, supra note 61, at 331.
130 Engdahl, supra note 68, at 79.
131 U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S.
132 Id. at 458 n.7.
133 Id. at 477.
134 Id.
135 Id. at 478.
136 Id.
137 Id. at 479 n.33.
138 Id. at 477–78.
as applied in the case before it, holding that the compact was not political because it did not affect sister states, the Court acknowledged that the sister state interest may render a compact unconstitutional.

The Court rejected a similar challenge in *Northeast Bancorp v. Board of Governors of Federal Reserve System*. A dispute arose over whether a group of state banks could acquire out-of-state banks without violating the Constitution, including the Compact Clause. State banking statutes excluded non-New England companies from regional banking. There, too, the Court considered the interests of non-compacting states. The Court concluded, Petitioners also assert that the alleged regional compact impermissibly offends the sovereignty of sister States outside of New England. We do not see how the statutes in question either enhance the political power of the New England States at the expense of other States or have an “impact on our federal structure.”

Again, the interests of non-compacting sister states were an important interest, though here insufficient, under the Compact Clause.

While political compacts are permitted under the Court’s interpretation of the Compact Clause, they must receive congressional consent if they implicate federal interests or the interests of non-compacting sister states. Violating one interest is sufficient to strike down a compact. Using the Court’s test, this article now considers the application of that test to the National Popular Vote Interstate Compact, and it concludes that because the Compact affects the interests of non-compacting sister states, the Compact is unconstitutional.

III. APPLICATION OF THE COMPACT CLAUSE TO THE NATIONAL POPULAR VOTE INTERSTATE COMPACT

The National Popular Vote Interstate Compact is based upon the premise that several states may appoint their presidential electors as a collective group through an interstate agreement. If that agreement is considered a “political compact” under the Compact Clause, then the Constitution requires congressional consent, and the Compact would need to go through the difficult process of receiving federal approval. Even though the power to appoint electors is exclusively granted to the states that power is still subject to other provisions of the Constitution. In *McPherson v. Blacker*, the Court still looked to see whether Michigan had violated the 14th and 15th Amendments. Accordingly, the Court must analyze the appointment of electors under other provisions of the Constitution, including the Compact Clause.

The Interstate Compact is a “compact” within the scope of the Compact Clause. The Court’s broad interpretation of “compact” and the specific traits of the Compact that condition the states’ action make this a “compact” under the Constitution. Additionally, because the Compact is a political compact that infringes upon the ability of other states to appoint their electors, and one that strengthens the political position of compacting states, the Compact is political in nature and requires congressional consent. This article considers each point in turn.

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142 See, e.g., id. at 160 (1985) (“Nor do the state statutes in question either enhance the political power of the New England States at the expense of other States or have an impact on our federal structure.”) (second emphasis added); *U. S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 477 (1978) (“Appellants’ final Compact Clause argument charges that the Compact impairs the sovereign rights of nonmember States. . . . We find no support for this conclusion.”); *see also Koza et al., supra* note 4, 5 § 5.12, at 229 (“Accordingly, it might be necessary to analyze the impact of a disputed compact on the power of the federal government and on the power of non-member states in order to determine whether Congressional consent is required for a particular compact.”).
143 See *U.S. Const. art. II, § 1, cl. 2*; see also *supra* note 8.
144 146 U.S. 1 (1892).
145 Id. at 11–12 (relying upon *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), to conclude that the system did not violate any of the Civil War Amendments).
A. The Compact is a compact

The first question is whether the National Popular Vote Interstate Compact is actually an “interstate compact” as defined by the Constitution. It may at first seem obvious that an Interstate Compact is an interstate compact, but calling something a Compact does not in itself make the thing a compact in the constitutional sense. Proponents of the Interstate Compact are therefore not out of bounds when they argue that it is not a constitutional “compact.”

Robert Bennett expressly denies that the Interstate Compact is actually a constitutional “compact.” He writes in an opinion piece,

[C]alling the measure an interstate compact is neither necessary nor wise. The constitution says that congressional approval is required for an “agreement or compact” among states. Though this requirement might not be applicable to the present effort, the chance should not be taken. Individual states could simply pass contingent legislation, providing that their electoral votes would go to the nationwide winner when and if the required quantum of electoral votes was similarly committed by other states.

The Amar brothers, writing before the introduction of the National Popular Vote Interstate Compact and therefore not able to take into account its details, elaborated on the grounds for rejecting the notion that the plan must be called a “compact.”

After all, each state would retain complete unilateral freedom to switch back to its older system for any future election, and the coordinated law creates no new interstate governmental apparatus. Indeed, the cooperating states acting together would be exercising no more power than they are entitled to wield individually. (The matter might be different if the coordinating states had sought to freeze other states out-say, by agreeing to back the candidate winning the most total votes within the coordinating states as a collective bloc, as opposed to the most total votes nationwide.)

They conclude that the arrangement avoids becoming a constitutional compact by reason of the lack of any sort of interstate council. The fact that the votes would be counted on a national level does not make this agreement a constitutional “compact.”

Unfortunately for Bennett’s and the Amars’ positions, the Supreme Court has construed the meaning of “compact” extremely broadly, capable of embracing even “mutual declarations” alone. As the Court held in Virginia v. Tennessee,

The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it; for example, as made upon a similar declaration of the border or contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations.

As if it were addressing the Bennett’s argument directly, the Court acknowledged that mutual declarations are enough to create the consideration necessary for a compact.

Indeed, the Court in Northeast Bancorp analyzed the agreement at issue as if it were a compact, reluctant to decline to apply the Compact Clause analysis on the basis of a narrow definition of “compact.” The statutes required reciprocity and had regional limitations. The statutes, however, did not create a joint body for regulation, did not condition any action, did not place any restrictions on repeal, and did not require reciprocity bound by a regional limitation. Nevertheless, despite the lack of these traits, the Court held that the Compact Clause, which implicates the “formation of any combination,” was applicable. Even Professor Bennett admits that Northeast Bancorp shows that the Supreme Court has been reluctant to find

146 At one point in constitutional law, “compact” and “agreement” held different meanings. Instead, “compact” now refers to all written arrangements between states, regardless of nature or duration. See supra note 74 and accompanying text.
147 Bennett, supra note 27.
148 Amar & Amar, supra note 22.
151 Id. at 175–76.
that any agreement lacks the “classic indicia of a compact.” Instead, the Court has focused primarily on whether that compact was political or non-political.

The objective traits of a “compact” are more clearly present in the Interstate Compact than they were in Northeast Bancorp. In that case, the compacting states required reciprocity, imposed a regional limitation, and cooperated with each other. The agreement, however, was not “conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally.” For the National Popular Vote Interstate Compact, some of these indicia lacking in Northeast Bancorp are present, rendering the Compact even more clearly subject to the Compact Clause.

The Interstate Compact is conditioned on the actions of other states that agree to appoint their electors to the winner of the national popular vote. Despite the Amar brothers’ recommendation, under the actual National Popular Vote Interstate Compact actually being proposed, a state does not have unilateral freedom to repeal the law—six months before Inauguration Day, every state is bound to maintain its electoral pledge to the winner of the national popular vote, which prevents last-minute alterations in the nature of the presidential race. The Compact meets and surpasses the threshold considerations articulated in Northeast Bancorp and is therefore a “compact.”

Justice White’s dissent in U.S. Steel gives additional definition to the term “compact.” He writes, “The Compact did not become effective in any of the ratifying States until at least seven States had adopted it. Thus, unlike reciprocal legislation, the Compact provided a means by which a State could assure itself that a certain number of other States would go along before committing itself. . . .” Additionally, “[a]s contracts, interstate compacts are binding on the party states in the same manner and with the same limits as any other contract entered into by an individual or a corporation.” Proposals for withdrawal and termination are included in the Interstate Compact and are characteristic elements of interstate compacts generally, which should “ensure adequate notice to the other parties and a time period which will not unreasonably jeopardize the work of the compact.” The Court’s generally sweeping language describing a constitutional compact as any “combination of the States,” and the title of the Compact itself conceding that it is in fact an “Interstate Compact,” further strengthen the conclusion that this compact does indeed create a constitutional “compact.”

B. The Compact violates the Compact Clause

Even though the Interstate Compact is a “compact,” it still may not need congressional consent under the Compact Clause. The Supreme Court has allowed interstate compacts to exist without congressional consent if they are non-political and fall outside the scope of the Compact Clause. The National Popular Vote Interstate Compact, however, is a constitutional compact that both enhances the political power of compacting states and diminishes the power of non-compacting states. Because it alters state political power based on involvement in the compact, it is unconstitutional.

If the Court approached the Interstate Compact according to a “Boundary” Compact Clause theory, the result would be simple: because the compact does not address a boundary dispute, it is an interstate treaty and therefore prohibited under the State Treaty Clause. The Court has never adopted this argument. Additionally, if the Court adhered to the “Non-Political” Compact Clause theory, either the Interstate Compact would be rejected for covering a political subject, a “treaty” expressly forbidden under the State Treaty Clause, or it would cover a non-political subject but be subject to congressional approval under the Compact Clause. Under either of these previously obsolete theories, the Compact would fail.

As we have seen, the Supreme Court in fact would consider the Compact under the “Polit-
ical Consent” Compact Clause theory. It would evaluate whether the Interstate Compact contained a political subject that affected federal interests or the interests of non-compacting sister states, in which case congressional consent is required. Proponents of the Interstate Compact argue that the compact does not actually interfere with non-compacting states and therefore may be formed without congressional approval. However, as this section will show, the Interstate Compact does interfere with non-compacting sister states’ political power and therefore violates the Compact Clause.

In the history of the United States, no interstate compact has ever addressed elections. One commentator identifies twenty-five types of compacts, none of them electoral in nature.¹⁶¹ The Council of State Governments, which keeps track of all current interstate compacts, has classified twenty-one types.¹⁶² Because no compacts challenged for want of congressional consent have ever been found to touch upon “political” matters—in the sense of treading either on federal interests or those of non-compacting states—the Supreme Court has never invalidated a compact under the Compact Clause.¹⁶³ It should be little surprise, however, given the fact that the Court has never faced a true political compact. Indeed, as Professor Bennett concedes, every case arising under the Compact Clause has concerned boundary, commercial, or regulatory compacts.¹⁶⁴ Perhaps the supporters of the Interstate Compact believe that any compact is presumptively valid because the Supreme Court has never rendered one unconstitutional for lack of congressional consent. But the Court has expressly and consistently stated that if a compact implicates federal interests or the interests of sister states, the compact requires congressional consent.¹⁶⁵

Proponents of the Interstate Compact argue that language from a concurrence by Justice Stewart contemplates the constitutionality of political interstate compacts. Stewart found that voter residency regulations may be created by Congress “[i]n the absence of a unanimous interstate compact.”¹⁶⁶ The passage is cited by proponents of the Compact for “the possibility of compacts involving elections” and that “the states are constitutionally permitted to use an interstate compact to specify the manner in which they choose their presidential electors.”¹⁶⁷ But Justice Stewart’s lone statement extends only to unanimous interstate compacts, which would effectively eviscerate the necessity of congressional consent on the grounds that it interfered with non-compacting sister states. After all, every state enters the compact together, and no state is an outsider to the influence of the compact. The decisive question is not whether a political compact is of a permissible subject, but whether it requires congressional consent. No one claims that an interstate compact approved by Congress would be void simply because it dealt with elections.

Of the two possible interests, the federal sovereignty interest and the non-compacting sister state interest, that make a compact “political,” it is doubtful that the federal interest component of the political compact theory would apply to the National Popular Vote Interstate Compact. While the stability of the Electoral College as a federal process or the preservation of the traditional amendment process may be laudable goals, it is uncertain that they rise to

¹⁶¹ JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 55–61 (2002) (classifying advisory, agricultural, boundary, civil defense, crime control and corrections, cultural, education, emergency management assistance, energy, facilities, fisheries, flood control, health, low-level radioactive waste, marketing and development, metropolitan problems, military, motor vehicle, natural resources, parks and recreation, regulatory, river basin, service, tax, and federal-interstate compacts).

¹⁶² WILLIAM KEVIN VOIT ET AL., INTERSTATE COMPACTS & AGENCIES, THE COUNCIL OF STATE GOVERNMENTS (2003) (classifying agriculture; boundary; bridges, navigation, and port authorities; building construction and safety; child welfare; conservation and environment; corrections and crime control; education; energy; gambling and lotteries; health; insurance; motor vehicles; parks and recreation; pest control; planning and development; property; public safety; taxation; transportation; and water compacts), available at <http://www.csg.org/pubs/Documents/2003_Compacts_Directory.pdf>.

¹⁶³ Engdahl, supra note 68, at 100 (“[Virginia v. Tennessee,] purporting to include within the compact clause only politically disruptive arrangements, of which not a single instance has been found in our history, is significant.”).

¹⁶⁴ Bennett, supra note 18, at 145.

¹⁶⁵ See supra note 142.


¹⁶⁷ KOZA ET AL., supra note 4, § 8.1, at 285.
actual interference with federal power. Furthermore, it is unclear that a federal interest could be implicated, because the power to appoint electors is exclusively granted to the states.

The other interest, the non-compacting sister state interest, applies to the National Popular Vote Interstate Compact. States have an interest in appointing their electors as they see fit, and the Presidential Electors Clause of the Constitution grants this exclusive authority to the states. Technically, the non-compacting sister states can still appoint electors, but the Interstate Compact makes such an appointment meaningless. The outcome of the Electoral College would be determined by an arranged collective agreement among compacting states, regardless of what non-compacting states do about it. The Compact Clause is concerned with the shift in political power, where one group of compacting states obtains political power at the expense of non-compacting states. Once states constituting a majority of the Electoral College have compacted to allocate their vote as a group to one candidate, non-compacting states’ electoral votes are politically ineffective. The evisceration of political effectiveness is a sufficient interest to invoke the constitutional safeguard of congressional consent.

The National Popular Vote Interstate Compact is precisely the type of political compact deemed problematic in the Articles of Confederation and the Constitution: States enter into compacts to give themselves an advantage at the expense of non-compacting sister states and engage in “collusive interstate exploitation.” The Compact gives compacting states their collective preferred electoral outcome by distributing their votes as a group at the expense of the preferences of non-compacting states. The Compact, therefore, gives additional political power to the compacting states and removes political power from the non-compacting states.

If several states compact to appoint their electors as a collective group, they effectively remove the ability of non-compacting sister states to appoint their electors as they see fit. Because the Interstate Compact only goes into effect when a majority of the electors have been pledged to the winner of the national popular vote, non-compacting states in the minority become irrelevant in pledging electors. The Compact “guarantees” a presidential winner by the national popular vote, regardless of whether non-compacting states wish to participate.

The non-compacting minority states effectively lose their appointment of electors by the agreement of as few as 11 states. Despite this shift in power, advocates argue that “both member and non-member states would be treated equally in that the popular votes of all 50 states and the District of Columbia would be added together to obtain a nationwide popular vote total for each presidential slate.” The Amar brothers and Bennett defend the proposal on similar grounds. But these proponents misconstrue the authority promulgated under the Presidential Electors Clause. That Clause does not guarantee equal treatment of individual voters, but the right of states to appoint electors as they see fit. Because the Interstate Compact undercuts the rights of non-compacting states, the infringement upon their sovereignty implicates the Compact Clause. It does not mat-

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168 Even the arguments regarding the amendment process are based upon State, not federal, protection. See Charles Pinckney, Observations on the Plan of Government, 1787, 3 FARRAND’S RECORDS, supra note 55, at 120–21 (noting that “the alterations that nine think necessary, ought not to be impeded by four”); 3 STORY, supra note 78, §§ 1821–24 (“They knew the pride and jealousy of state power in confederacies; and they wished to disarm them of their potency, by providing a safe means to break the force, if not wholly to ward off the blows, which would, from time to time, under the garb of patriotism, or a love of the people, be aimed at the constitution.”).

169 See U.S. CONST. art. II, § 1, cl. 2; see also supra note 8.

170 See supra Part II.A.

171 Greve, supra note 61, at 327.

172 KOZA ET AL., supra note 4, § 6.1, at 247.

173 Amar & Amar, supra note 22.

174 KOZA ET AL., supra note 4, at 339.

175 Amar & Amar, supra note 22.

176 Bennett, supra note 18, at 146.

177 Jay Wilson approaches the idea of implementing the national popular vote through a “bloc voting” system, whereby a bloc of compacting states would allocate the winner of their collective popular vote to their respective electors; his idea runs contrary to the actual National Popular Vote Interstate Compact. Wilson, supra note 24, at 402–03. It also offends against the non-compacting states even more obviously than the Interstate Compact does.

178 The Court has repeatedly rejected such claims from voters and from sister states. See Delaware v. New York, 385 U.S. 895 (1966); McPherson v. Blacker, 146 U.S. 1 (1892).
ter whether the votes of every state, including non-compacting states, are considered when compacting states appoint electors; the Compact Clause is concerned with whether the non-compacting state has had its political power infringed as a result of the compact. A state may wish to appoint its electors by its own popular vote without regard to the national total. It may wish to limit the qualifications of voters who participate in that process, such as offer particular restrictions for felons, for voter registration, for voter identification, and for polling place hours.179 With this Compact, however, a non-compacting state has lost political influence under the Presidential Electors Clause at the expense of compacting states.

In fact, some of the declared justifications for the Interstate Compact from state lawmakers have included political power-shifting arguments. Lawmakers in California expressly urged reforming the current electoral system at the expense of sparsely-populated states to increase political influence of heavily-populated states, most notably California.180 In Maryland, a national popular vote could bring attention and money by attracting presidential candidates who might otherwise bypass the state.181 Proponents of the Compact cite the mathematical fact that a Wyoming vote is “worth” 3.74 times as much as a California vote because of population disparities,182 and claim that only one-third of the states are actually “relevant” in political campaigns.183 As each of these justifications demonstrates, proponents endorse altering the Electoral College to improve the political position of some states at the expense of others.

Furthermore, proponents of the Compact claim that because the Supreme Court has never rejected a compact on the basis of the sister state interest, the National Popular Vote Interstate Compact is safe from judicial scrutiny. But the mere fact that the Supreme Court has rejected the argument in two other cases does not make the argument illegitimate.184 In both U.S. Steel and Northeast Bancorp,185 the Supreme Court applied the sister state interest test, which means that the sister state interest is in force but was rejected as a justification for overturning the compacts in those particular cases. Additionally, as indicated above, neither case involved an actual political compact; Bennett concedes that coordinated banking is “far afield from presidential selection.”186 Therefore, the mere fact that the Court has not invalidated a compact under the sister state interest does not mean that it does not apply in this instance.

Altering certain provisions of the Compact, such as imitating the plans Professors Bennett, Amar, and Amar suggested, would not cure the constitutional defects. For example, if the Compact became effective while states constituting fewer than 270 electoral votes were signed up, it would still increase the power of compacting states and diminish the power of non-compacting states. The outcome of the Electoral College would not be strictly predetermined, and the electoral votes of other states would still have some potential value, but the potential remaining influence of the non-compacting states would be insufficient. The entire point of the Compact Clause is to avoid any shift in political power, not merely a total shift. Indeed, the precise justification for shifting any bloc of electoral votes to the national popular vote is to affect the outcome of the Electoral College. To the extent that effect is brought about, it will

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179 One of the major differences in state-by-state electoral choice is felon voting. The laws vary widely, from two states that allow felon inmates to vote to states that forbid any convicted felons from ever voting. The Sentencing Project, Felony Disenfranchisement Laws in the United States, November 2006, available at <http://www.sentencingproject.org/pdfs/1046.pdf>. A state’s choice in who may cast a vote, within constitutional limits, is an important aspect of its political power.

180 See, e.g., Nancy Vogel, A Vote to Quit the Electoral College, L.A. TIMES, August 31, 2006, at B1 (Assemblyman Rick Keene stated, “Presidential candidates don’t bother to visit the largest state in the nation. . . . California is left out.”).

181 See, e.g., Lisa Rein, State Poised to Become First To Scuttle Electoral College, WASH. POST, April 3, 2007, at B2 (“The current system does not treat every vote equally,” Del. Jon S. Cardin (D-Baltimore County) said, ’Maryland has become a spectator state.’ ”); id. (“The fact is that all of [the candidates’] resources go into two or three states, and their votes have greater weight,” House Speaker Michael E. Busch (D-Anne Arundel) said.”).

182 KOZE ET AL., supra note 4, § 1.4, at 23 (criticizing but acknowledging the argument of varied State electoral “weight”).

183 Id. § 1.2.1.

184 Id. § 8.4 at 338.

185 See supra note 114.

186 Bennett, supra note 18, at 145.
operate to impair the interests of non-compacting states. Though non-compacting states would not be guaranteed exclusion from the political compact, their power would still be lessened, and therefore the compact would need congressional authorization.

The mere fact that the current Electoral College in many ways operates as a collective bargain has no bearing on whether the Interstate Compact requires congressional consent. States may unilaterally pass legislation regarding their appointment of electors in accord with the national popular vote. If Maryland had passed the Compact without making it contingent on enactment by states composing a majority of the Electoral College, then Congress would have nothing to say about it. Every state could do the same. But in order to avoid “unilateral disarmament,” the Compact is contingent on the action of other states so that a lone state is not forced to give up its electoral votes for the sake of the national popular vote and hope that others do so. The precise reason for having a Compact contingent upon the action of other states is to ensure a shift in political power when enough states have compacted. That agreement coupled with the shift in political power, and not the shift in political power alone, violates the Compact Clause.

Finally, Robert Bennett argues that the compacting states would not actually enhance their political power, but diminish it. After all, the voters of Florida, for instance, have diminished their influence as their vote is now pooled with votes nationally, not simply with fellow Floridians. But Bennett misconstrues the purpose of the Compact Clause: it is not concerned with enhancement of citizen power, but with state power; and the concern is not only with the enhancement of compacting states, but also the loss of power for non-compacting states. It is inevitable that non-compacting states have lost some power, namely, the power to appoint their electors as they see fit.

CONCLUSION

The National Popular Vote Interstate Compact has moved forward in state legislatures under a presumption of constitutionality, fueled by the novelty of the legislation and public enthusiasm for electoral reform. An examination of the Compact Clause, however, reveals that it protects the interests of non-compacting states from the political encroachments of compacting states, and that the Interstate Compact is this type of political encroachment. The Interstate Compact, even under the most permissive interpretation of the Compact Clause, is still unconstitutional without congressional approval. Without such approval, which of course is the precise type of federal action proponents want to avoid, the Electoral College simply cannot be undone by the contingent agreement of a group of states; therefore, the National Popular Vote Interstate Compact is unconstitutional under the Compact Clause.

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