More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks

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Although the National Popular Vote Interstate Compact (NPV or Compact) may not have attracted serious attention when first proposed a few years ago, it has earned respect as it has passed state legislative bodies and confronted governors. My original article discussed the effect the Compact Clause might have upon the NPV.1 The Supreme Court has construed the Compact Clause broadly, under a theory I call the “Political Consent” Compact Clause, and thus permitted virtually all interstate agreements to avoid the constitutional requirement for congressional consent. The Court has never struck down a compact for lack of congressional consent, but it has suggested that “political compacts” would need consent. “Political compacts” are those that tend to enlarge the power of the compacting states at the expense of either the federal government or non-compacting sister states.

My article concluded that the NPV, a compact among several states constituting at least 270 electoral votes and effectively turning the Electoral College into a tally for the winner of the national popular vote, fell within this definition of “political compacts.” The NPV would require congressional consent because it would enlarge the power of compacting states at the expense of those states who appointed electors outside of the Compact. Until now, the literature regarding the NPV’s constitutionality under the Compact Clause either failed to address the issue2 or mentioned the issue only briefly in the context of a larger discussion.3

In this issue of the Election Law Journal, Professor Jennifer Hendricks has offered the most sustained argument in favor of the NPV against Compact Clause challenge.4 Here I briefly respond to three of the more salient issues noted

1 Derek T. Muller, The Compact Clause and the National Popular Vote Interstate Compact, 6 ELECTION L.J. 372 (2007).
3 See Adam Schleifer, Interstate Agreement for Electoral Reform, 40 AKRON L. REV. 717 (2007) (delving deeply into the compact, but briefly positing arguments on either side regarding the allocation of horizontal power before concluding that it “seems” that a compact would not need congressional support); Daniel P. Rathbun, Comment, Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008), <http://www.michiganlawreview.org/firstimpressions/vol106/rathbun.pdf> (discussing the implications under the Compact Clause as a result of shifts in vertical power between the states and the federal government); Martin G. Evans, Picking a President—Through the Constitution, BOSTON GLOBE, Jan. 22, 2008 (“[W]hen the political power of a state that does not sign the compact is encroached on, the court may rule that congressional approval of the compact is required.”).
by Professor Hendricks. First, I establish that the Supreme Court actually would enforce the requirement of congressional consent for the Compact under its current jurisprudence according to the “Political Consent” Compact Clause. Second, I define a “political compact,” not merely in terms of the topic or type of the compact, but in terms of its function as a compact that tends to enlarge the power of some states at the expense of others. Under this definition, the NPV is a political compact because it shifts political power among presidential electors across states. Third, I conclude that the Compact, which ostensibly designates the procedure that participating states will use to appoint their presidential electors, actually affects the political power of non-compacting states.

CONGRESSIONAL CONSENT FOR THE COMPACT

The original article relied upon Justice White’s dissent in U.S. Steel Corp. v. Multistate Tax Commission5 to argue that congressional consent would be required for the NPV. Professor Hendricks argues that Justice White’s dissent should not be followed because it contradicts the majority’s holding that the compact at issue in U.S. Steel—an interstate tax compact designed to promote uniformity in tax systems and standardize auditing procedures—did not authorize states to exercise any additional powers.6 Professor Hendricks errs because while the majority and dissent reached different conclusions regarding the application of the “non-compacting state interest” test under the Compact Clause, both believed that it was a valid test. Under the majority or the dissenting opinion, the test as articulated by the majority would apply to the NPV.

Both the majority and the dissent in U.S. Steel considered whether a compact may impair “the sovereign rights of nonmember States.”7 The majority concluded that the compact would not “redundant to the benefit of any particular group of states or to the harm of others.”8 It held any problems of “unfairness” to exist “independent of the Compact.”9 The majority further held that the mere existence of “economic pressure” is insufficient to impair the sovereignty of non-compacting states.10 Justice White’s dissent delved into greater detail about the potential for compacts to impair the sovereignty of non-compacting states, and his analysis, addressed briefly by the majority,11 provides the most “lucid[] statement[]” of the sister state interest, even though its conclusion was not adopted by the Court.12 While the dissent is just a dissent, the majority’s holding still acknowledged the validity of the interest of non-compacting states and did not reject the language from the dissent that I rely upon here.

The NPV contains enforcement mechanisms far more significant than those at work in U.S. Steel. The tax compact in U.S. Steel permitted states to withdraw at any time, and, according to the majority, it did not “purport to authorize the member States to exercise any powers they could not exercise in its absence.”13 While Justice White certainly disagreed with this conclusion,14 it is important to distinguish that dispute from a consideration of the enforcement mechanisms present in the NPV. The Compact, in fact, does authorize behavior that states cannot exercise in absence of the Compact: the power to enforce the Compact under its terms, an element missing from U.S. Steel.15 The NPV

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6 Hendricks, supra note 4, at 225.
8 Impairing the rights of non-compacting states is not the sole concern of the Compact Clause. U.S. Steel makes clear that compacts may affect either the sovereignty of non-compacting states (horizontal power), or the sovereignty of the federal government (vertical power). See Muller, supra note 1, at 384–85. Some articles have considered the implications of the NPV impairing “vertical power,” such as the power of the House of Representatives to decide an electoral tie or the federal powers under the Twelfth Amendment. See Schleifer, supra note 3, at 739–40; Rathbun, supra note 3, at 118; cf. Muller, supra note 1, at 391 n.168 and accompanying text. While compacts that affect vertical power fall under the Compact Clause, the Court’s references to concerns of horizontal power render such concerns the focus of this article’s analysis. See Muller, supra note 1, at Part II.A.
9 U.S. Steel, 434 U.S. at 477.
10 Id. at 478.
11 Id.
12 Muller, supra note 1, at 386; cf. Hendricks, supra note 4, at 225.
13 U.S. Steel, 434 U.S. at 473.
14 Justice White acknowledged that the enforcement-oriented arbitration provision, which would empower compacting states in relation to each other, no longer existed.
15 See U.S. Steel, 434 U.S. at 457 (noting that parties could withdraw from the compact unilaterally); see also Schleifer, supra note 3, at 741 and n.121 (conceding possibility that a compact like the National Popular Vote goes farther than the compact in U.S. Steel).
does not permit a state to withdraw at any time it chooses. If a state has enacted the Compact at least six months before the presidential inauguration date and has not withdrawn by July 20, then it is bound to comply with its terms. If a state attempts to withdraw from the Compact after July 20 preceding a presidential election, or if a state legislature chooses to allocate its electors in some other fashion and ignore the Compact, another state could sue to enforce the Compact.16

Despite these enforcement mechanisms, their effect on the NPV in relation to the Compact Clause hardly has been considered, and proponents emphasize that the Compact merely encourages cooperation among the states and prevents “unilateral disarmament” or giving up electoral votes without some assurance that others will do the same. But the National Popular Vote involves more than mutual disarmament, because it requires states to appoint their electors in a particular way and forbids them from changing their method after a certain date. It demands compliance, and non-compliance may be remedied by court order.17 In this way, the NPV moves from states merely exercising their own powers to states exercising collective power and enforcement.18

Although the majority and the dissent disagreed about the extent to which the tax compact affected the rights of non-compacting sister states, the majority’s opinion in U.S. Steel illustrates further crucial differences between an interstate tax compact, deemed non-political, and the NPV, and the majority’s opinion in U.S. Steel indicates that the NPV would fail under its analysis. The majority in U.S. Steel held that the disputed interstate tax agreement merely exerted “economic pressure,” which was insufficient to affect state sovereignty. The majority relied heavily upon the fact that sovereignty could not be impaired in a case in which a non-compacting state could merely adopt its own auditing procedures.19 The NPV, however, results in the effective removal20 of the power of non-compacting states to participate in the presidential election, which is an actual shift in power, not merely “pressure” upon non-compacting states. It actually alters the effectiveness of presidential electors and the nature of the Electoral College.

The U.S. Steel majority’s relatively cursory examination of the tax compact focused on bare economic disparity, which did not “touch[] upon constitutional strictures.”21 The holding in U.S. Steel that the tax compact did not affect state sovereignty relied heavily upon the economic analysis, and does not imply that the Court would similarly uphold a political compact implicating federal presidential elections and the Electoral College.

DEFINING “POLITICAL COMPACTS”

Of course, if the Compact Clause requires that Congress consent only to “political compacts,” the definition of “political compacts” becomes the focal point of discussion. Professor Hendricks emphasizes that the Court has adopted a “functional approach” to compacts, and the Court has not categorically determined whether compacts are “political” or “non-political.”22 Perhaps my original article veered too closely to characterizing “political” as a mere topic of a compact. In majority opinions, however, the Supreme Court has cited political power as a primary concern of the Compact

16 Of course, the possibility of “faithless electors” remains, at least in the theory (if not in the history) of the Electoral College. See Schleifer, supra note 3, at 726–27.
17 John R. Koza et al., Every Vote Equal § 5.13 (2006). One of the primary purposes behind the July 20 deadline is to ensure stability in the electoral process. That way, candidates do not risk campaigning in a particular way only to have the rules changed days before election day by states entering or leaving the Compact.
18 An intriguing similarity may be found in antitrust law. Conscious parallelism, or competitors who make consciously parallel decisions, without more, do not enter into an “agreement” under Section 1 of the Sherman Act. Interdependence, however, or competitors whose decisions are consistent with individual self-interest only if all the competitors behave the same way, is more likely to be found to be an “agreement.” See Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).
19 U.S. Steel, 434 U.S. at 477.
20 For further discussion of the “effective” removal of political power, see infra at 231.
22 Hendricks, supra note 4, at 225.
Compacts involving elections are not categorically “political” compacts in this sense, but they may, perhaps frequently, be. Black’s Law Dictionary defines “political power” as “the capacity to influence the activities of the body politic.” The Court has defined “political power” under the Compact Clause in relation to non-compacting states’ interests as whether a compact will “redound to the benefit of any particular group of states or to the harm of others.” A coordinated effort to allocate electoral votes falls under this definition of “political power,” even if not all election-related agreements constitute political compacts.

For instance, suppose several states wish to avoid presidential controversies in which media outlets project election winners on the East Coast before many voters have had a chance to visit the polls on the West Coast, project the winner of a state before all the polls in that state have closed, or mistakenly announce that the polls in a state have closed when polls remain open in a portion of the state in a different time zone. Suppose several states enter a compact to agree that all polling places will remain open for an identical period of time across time zones to ensure that no network television stations affect voter turnout. It is possible to argue that the compact would alter the balance of political power in some way, such as by shifting power to western states and western geographic regions or by seeking to minimize the influence of media reports. Nonetheless, it is difficult to make a plausible argument that this election-related compact would benefit or impair the interests of any group of states. It might even incidentally empower non-compacting states whose polls close before the compacting states’ polls. The tangible benefits accruing to the compacting states at the expense of the non-compacting states, if they even exist, appear impossible to assess.

Contrast that hypothetical compact with the NPV. If we define “political power” as “the capacity to influence the activities of the body politic,” or, in the Court’s language, a power shift that would “redound to the benefit of any particular group of states or to the harm of others,” we see how significant the Compact is. The compacting states have predetermined who will win the presidency: the winner of the popular vote. They can guarantee that winner because they have secured a majority of electoral votes. The electoral votes of the non-compacting states are irrelevant.

### THE BALANCE OF POLITICAL POWER AMONG THE STATES

My original article stated carefully that the removal of the political power of non-compacting states is an “effective” removal; that is, states still maintain their formal political power to appoint electors, but non-compacting states no longer have electors that play any role in the election system. The compacting states have enough electors among them to elect the President regardless of what the non-compacting states do.

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24 Similarly, although many areas of law may appear non-political topically, such as civil procedure, they may very well have political elements in them. See Jay Tidmarsh, Pound’s Century, and Ours, 81 Notre Dame L. Rev. 513, 533–34 (2006) (discussing the political aspects of civil procedure in the hands of individual judges).


26 U.S. Steel, 434 U.S. at 477.

27 In 2000, the Voter News Service projected that Vice President Al Gore had won Florida at approximately 7:50 p.m. Eastern Standard Time. Most polls in Florida closed at 7 p.m., but those in the Panhandle region closed at 8 p.m. Eastern because they were in the Central Standard Time zone. Governor George W. Bush protested, and the media ultimately retracted the call. James Poniewozik, TV Makes a Too-Close Call, TIME, Nov. 20, 2000. Media sources also stated at 7 p.m. that the polls had closed statewide when the polls in the Panhandle were still open. At least some studies, perhaps without adequate evidence, suggested that a significant number of Panhandle voters did not vote because of the early prediction or the news announcing that the polls were closed. Deborah Orin, Poll: TV’s Early Call for Gore Fried Bush, N.Y. Post, Nov. 20, 2000; John Fund, Close Call, WALL ST. J., May 4, 2001.

28 This hypothetical assumes that the compact does not interfere with Article II’s requirement that “Congress may determine the time of choosing the electors.”

29 See Muller, supra note 1, at 391 (“The non-compacting minority states effectively lose their appointment of electors by the agreement of as few as 11 states.”).
Professor Hendricks argues that “[c]omplaining that some of those choices will not count because the NPV states have enough votes to control the Electoral College is akin to current complaints that Democratic votes in Texas or Republican votes in California ‘don’t count.’ ”30 This argument is the basis for the NPV in the first place—bringing political power to those individual voters who otherwise would not have it. Professor Hendricks continues: “Being in the minority does not mean that your vote is not counted; it just means that you lose.”31 Yet the current electoral system and the proposed Compact differ in an important respect. The difference is one of ex ante and ex post political influence. In the current system, we can claim that a state “loses” only ex post, looking back to the results of the election and determining whether the state held any influence in appointing its electors. Under the Compact, however, we find that all non-compacting states “lose” ex ante, regardless of how they choose to allocate their electors. Political influence extends only as far as states comprising at least 270 electoral votes choose a candidate; beyond that, any allocation of electors for any candidate is meaningless.

In the current system, a state may potentially “lose,” or at least lack influence in using, its political power if it appoints electors who vote for the losing candidate. Additionally, it may lack an effective political voice if it appoints electors who vote for the winning candidate, but those electors’ votes are not necessary to help the winner achieve victory. Taking the 1984 election as an example, Wisconsin’s 11 electoral votes for President Ronald Reagan were unnecessary for Reagan to achieve victory, given that he won 525 electoral votes and only needed 270. Had Wisconsin given its electoral votes to someone else, or to no one at all, its electoral votes, standing alone, were “worthless.” In the same way, Minnesota’s 10 electoral votes for former Vice President Walter Mondale were also “worthless,” given that Mondale only won 13 electoral votes.

Thus, we utilize an ex post perspective to determine whether individual (or several) states actually, or effectively, exercised political power. No individual state had the incremental “power” to influence the election in 1984 (although the Reagan-voting states in the aggregate held the power to influence the election), but this determination of political power occurs only by looking retrospectively. A similar analysis could take place for the election of 2000, where President George W. Bush won 271 electoral votes, and every individual state appointing electors for Bush bore effective political power, even those with only three electoral votes. Looking retrospectively, we see that every state appointing electors for Bush wielded effective political power.

Contrast these ex post situations with the NPV. As of July 20 in an election year, it would be clear that the electors representing the compacting states, whichever states they may be, would effectively decide the presidential election. The non-compacting states’ electors would have absolutely no influence in deciding the election—the bloc of electors from the compacting states would always have sufficient incremental power to elect the President, regardless of what non-compacting states did. Non-compacting states’ electors could neither add nor take away from the ability of a presidential candidate to win. In ex ante analysis, it is clear that the non-compacting states wield no effective political power in deciding the election. While the ultimate outcome of the election may not be pre-determined, the ability of states to participate in the political process with effective electoral votes and to wield political power has been pre-determined. Non-compacting states and their electors are left on the outside.

In this manner, the analogy that losing states “just lose” fails to acknowledge that the Compact Clause is concerned with the political power of states, specifically the power to appoint electors. It is not a bare power to appoint electors qua electors sine potente; it is a power to appoint electors whose role is to elect the President of the United States. Hendricks overstates her case with the statement that “the

30 Hendricks, supra note 4, at 226. Or, perhaps more accurately than individual votes, Democratic electors from the District of Columbia when a Republican wins the presidency, or Republican electors from Utah when a Democrat wins the presidency. See McPherson v. Blacker, 146 U.S. 1, 13 (1892); Muller, supra note 1, at 393.
31 Hendricks, supra note 4, at 226.
power to choose electors is a means to choosing the president, not an end in itself.”32 While it is true that the power to choose electors is a means to choosing a president, the power those electors possess is a different matter.33 It is obviously true that each state, compacting or non-compacting, still possesses the power to appoint electors. Yet the means chosen by the compacting states have deprived the non-compacting states of something quite beyond the means of choosing electors; they have deprived those states ex ante of the power for their electors to bear any political influence in the presidential election.

Political power under the NPV shifts not merely by the means states employ to choose electors. Instead, the political power those electors possess shifts to compacting states and away from non-compacting states. At first blush, this argument seems to empower the Presidential Electors Clause with far greater meaning than it actually possesses. After all, the Clause only grants states the authority to appoint electors without a guarantee of their political power. But the prohibition on political power shifts embodied in the Compact Clause is not concerned solely with political power that the Constitution affirmatively and specifically grants. Instead, it is concerned with any shift in power that would “redound to the benefit of any particular group of states or to the harm of others,” even incidentally. Thus, the NPV shifts the ex ante political power so significantly that it rises to the level of a “political compact.”

It may be argued that the compacting states have not benefited because they do not know which candidate will receive their electors; they merely agree on principle to appoint electors after the national popular vote has been tallied. Yet it is not a shift in political power toward a specific candidate that matters. Instead, it is the political power for a group of states to decide how electors should be appointed, as a collective group, to the exclusion of non-compacting states. Because the NPV shifts power toward compacting states and away from non-compacting states, the Constitution requires that Congress consent to the Compact.

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32 Hendricks, supra note 4, at 226.
33 My original article emphasized the “right of states to appoint electors as they see fit,” but it placed that right in the context of the fact that the Compact means that “non-compacting states in the minority become irrelevant in pledging electors” and that they “effectively lose their appointment of electors.” Muller, supra note 1, at 391.