Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact

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The National Popular Vote (NPV) interstate compact proposes to change the presidential election system from a state-based federal system to a national popular vote system. NPV proponents contend states can implement the compact without federal governmental authorization. This article addresses the constitutional questions of whether the NPV must obtain Congress's approval and whether Congress has the constitutional authority to grant such approval. In addressing these questions, I review U.S. Supreme Court precedents and constitutional history and find the NPV is the type of compact the Supreme Court would conclude requires congressional approval. Most importantly, I contend Congress is constitutionally unable to grant approval of this compact and the Supreme Court will play an integral role in making this determination.

The National Popular Vote (NPV) plan is an interstate compact that seeks to create a popular vote-based system of presidential election. It is expressly intended to circumvent the purported deficiency of the Electoral College system: allocating electoral votes to the winner of the popular vote within the state.¹ The Electoral College has been the subject of more constitutional amendment proposals than any other (Hardaway 1994). The NPV proponents have echoed earlier complaints, contending voters in two-thirds of the states are “effectively disenfranchised,” the Electoral College does not produce a “reliable reflection” of the national popular vote, and votes are not weighted equally throughout the nation. In short, NPV supporters believe the NPV compact will more accurately reflect actual voters’ preferences (Koza et al. 2013). The NPV compact will become effective for each state that has enacted the compact when the “states cumulatively possessing a majority of the total electoral votes have ratified the compact” (California Election Code 2012). To date, the nine enacting states (California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Rhode Island, Washington, and Vermont) and Washington, D.C., possess 136 of the 270 votes needed to win the Electoral College vote. The NPV proponents rightly claim they are almost “halfway” to their goal (National Popular Vote 2013). If the NPV is implemented it would likely

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dramatically alter the conduct and outcome of presidential elections. Accordingly, this compact presents a direct challenge to a fundamental federal institution (National Popular Vote 2013).

This article does not address the wisdom of the NPV as public policy; rather, it seeks to reveal the constitutional barriers facing the NPV through an analysis of historical and legal precedents. Most importantly, this article is concerned with state and federal governmental powers within the context of a constitutional institution, the Electoral College. The NPV plan has been the subject of multiple critiques by supporters and opponents (Brody 2013; Bennett 2001; Williams 2011; Amar 2011; Amar and Amar 2001; Muller 2007). The history of the plan’s origins and course of enactment have been thoroughly documented (Green 2012). As will be discussed below, NPV proponents contend the Supreme Court’s interpretation of the Compact Clause of Article I, Section 10 of the Constitution allows for interstate compacts like the NPV to be enacted and implemented by states without congressional approval (National Popular Vote 2013; Brody 2013).

The Scholarly Debate regarding the NPV Compact

The interstate compact method of altering the Electoral College has obvious appeal to its proponents who feel that adoption of the compact is easier to achieve than enactment of a constitutional amendment. A constitutional amendment would require not only approval by supermajorities in both houses of Congress, but also would need to be ratified by thirty-eight state legislatures. By comparison, the NPV’s terms require that participating states implement the law once states cumulatively possessing 270 electoral votes have enacted the NPV. This could theoretically be as few as the eleven most populous states (Amar and Amar 2001).

Some critics have challenged the political prudence of the NPV. For example, Norman R. Williams has contended the NPV is “an invitation to constitutional crisis and unending, politically motivated litigation” (Williams 2011). Williams contends the NPV likely violates the Equal Protection clause of the 14th Amendment since states would be obliged to count votes cast in other states under other states’ registration and recount standards. Others have claimed the NPV violates the Guarantee Clause because it eliminates the role of the states in selecting the president, legitimates states legislating for other states, and creates the threat of a minority-bloc deciding the presidency (Feeley 2009), or violates the Compact Clause because it benefits member states to the detriment of nonmember states and interferes with a federal interest or institution (Green 2012; Muller 2007, 2012). One scholar has argued the NPV violates Voting Rights Act of 1965 by diluting minorities’ ability to select the candidate of their choice (Gringer 2008).

In this article, I add a new element to the debate concerning the NPV. I build on constitutional arguments regarding the Compact Clause, but go further by
emphasizing the importance of the Supreme Court’s role in interpreting compacts and the limits of Congress’s power in approving compacts. The uniquely federal structure of the Electoral College is key to evaluating the NPV’s constitutionality. The next section addresses the constitutional status of the NPV in light of the Compact Clause. The third section addresses the constitutional propriety of congressional approval of the NPV. It is my contention that, although not all interstate compacts require congressional approval, the NPV’s distinct federal character and goals are dramatically different than any prior interstate compact. Accordingly, I contend that (1) states must submit the NPV to Congress and (2) Congress must approve the NPV in order for it to be constitutionally implemented. Therefore, implementation of the NPV by its member states without submission to Congress or congressional approval would be unconstitutional under the Compact Clause. Additionally, and most importantly, in the third section I argue that even if the NPV were submitted to Congress, as is required by the Compact Clause, it would be an unconstitutional act by Congress to approve the NPV. This latter contention is the most original contribution I make to the increasingly lengthy debate regarding the NPV.

I argue that Congress cannot approve the NPV because (1) the Constitution allows only states to decide the manner in which electors are selected and (2) the Constitution creates and mandates the Electoral College as an institution of the federal government, which Congress cannot simply sidestep or effectively abolish by statutory enactment. In short, I contend that Congress cannot execute via the Compact Clause what it could not do through a regular statutory enactment: eviscerate the Electoral College and replace it with a national popular vote system of presidential selection. My argument suggests NPV proponents appear to be caught in a catch-22 problem (Heller 1985): The Compact Clause requires the NPV to be submitted to Congress for approval, but Congress cannot constitutionally approve the compact. Accordingly, the only route left to NPV proponents is to change the Constitution pursuant to the amendment process of Article V.

The NPV and Compact Clause

Article I, Section 10 of the Constitution provides: “No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State.” This is popularly referred to as the Compact Clause. The constitutional meaning of the term “compact” has never been precise and the Supreme Court has shaped the clause’s interpretation. The original purpose of the Compact Clause appears to have been resolving inter-colonial boundary disputes (Zimmerman 2012). However, “compact” was included in the final constitutional draft without apparent discussion (Hollis 2010). Accordingly, it was left up to the federal government to interpret the clause, a task taken on by the Supreme Court, which has greatly
shaped the modern meaning of the clause (Broun et al. 2006). As the Court has defined the clause, states can form a compact on any matter that does not increase the political power of one state or multiple states over other states and thereby “encroach...upon the full and free exercise of federal authority” (Virginia v. Tennessee [1893]).

The Virginia v. Tennessee definition has remained the lodestar for determining whether an interstate agreement is within the Compact Clause. In the latter twentieth century, interstate compacts became tools for resolving or managing regional and national issues that were “‘supra-state, sub-federal’ in nature” (Broun et al. 2006). These multilateral compacts dealt with matters ranging from crime control (e.g., Interstate Compact for Adult Offender Supervision) to waste management (e.g., Ohio River Valley Sanitation Compact), and from urban issues (e.g., New York—New Jersey Port Authority Compact) to education (e.g., Midwestern Regional Higher Education Compact). As of June 1, 2011, Congress had approved 176 interstate compacts, although not all of these are currently active (Zimmerman 2012). Yet none of these was on the order of the NPV compact that seeks to fundamentally alter the Electoral College, an institution established by the Constitution. Federal authority remains unchallenged by the existing roster of compacts. Even for those compacts that potentially intrude upon federal Commerce Clause power or another power, such as extradition law, Congress’s approval of a compact is construed as acting within a constitutionally enumerated power (Broun et al. 2006, citing California v. Superior Court of California [1987] and Intake Water Company v. Yellowstone River Compact Commission [1983]). Also, the states are not entitled to congressional consent; rather the Court views Congress’s consent as a “gratuity” (Broun et al. 2006, citing College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board [1999]).

The Constitutional Character of the NPV

Opponents and proponents agree that the NPV is an interstate “Agreement or Compact” within the Compact Clause (National Popular Vote 2013; Zimmerman 2012; Muller 2007). The contingency clause, stipulating that the NPV only takes effect once a sufficient number of states have enacted the law in order to reach the compact’s specified goals, is common to many existing interstate agreements or compacts (Zimmerman 2012). For example, the Tri-State Lotto Compact, which created a multistate lottery to raise revenue for each participating state, only went into effect if Maine, New Hampshire, and Vermont enacted the law (Koza et al. 2013). As the U.S. Supreme Court stated in 1893, an “agreement or compact” is formed 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” (Virginia v. Tennessee [1893]). Thus, the NPV’s
contingency clause ("mutual declaration") supports the conclusion it falls within the Compact Clause.

The need for contingent implementation is premised upon the difficulty of achieving collective action goals. An effort by one state to allocate its votes according to the national popular vote, without any guarantee other states would follow suit, would be a virtual "unilateral disarmament" (Amar and Amar 2001). Accordingly, only a collective effort, whereby states are assured their electoral votes will be awarded to the national popular vote winner and that such winner will be the Electoral College winner, too, will be a plausible, practical resolution to the collective action dilemma.

In order to adjudge the constitutionality of the NPV, the Framers’ intentions regarding the establishment of the Electoral College in the Constitution must be understood. As scholars have noted, the Electoral College is a mal-apportioned manner of electing the president, but it reflects the federal structure of the Union (Williams 2011). The character of the Electoral College is a reflection of historically rooted concerns regarding the nature of large republics and the federal structure of the Union at the time of the proposal of the Constitution in 1787. In Spirit of the Laws (1748), Baron De Montesquieu argued republics were best suited to small territories because "the interest of the public is more obvious, better understood, and more within the reach of every citizen" (Montesquieu 1949). Alexander Hamilton claimed the state-allocated electors would be those "most capable of analizing [sic] the qualities adapted to the station" and "most likely to possess the information and discernment" needed for deciding the presidency (Hamilton 1961).

The Electoral College also reflects the federal character of the Union. The number of electors is correlative to the number of senators and representatives in each state and the states decide how the electors are selected. These facts alone make the power each state wields in selecting the president a power, or influence, uniquely correlated to the federal system, wherein institutions are premised upon the participation of states as governing entities.

Is Congressional Approval of the NPV Compact Required Under the Compact Clause?

NPV proponents contend congressional approval of the NPV compact is not required. This claim illustrates the important role that the U.S. Supreme Court will likely play in any resolution of the NPV’s legitimacy. Proponents rely on Virginia v. Tennessee (1893), involving a boundary resolution compact between Virginia and Tennessee that lacked formal congressional approval (Virginia v. Tennessee [1893]). After the U.S. Constitution was ratified, North Carolina ceded territory that became the state of Tennessee in 1796 (Powell 1989). Thereafter, Tennessee and Virginia appointed commissioners to settle the boundary and by 1803 both states had enacted laws that ratified their agreement on the boundary.
The U.S. Supreme Court had original jurisdiction over the dispute and in 1893 the Court heard Virginia’s complaint to set aside the decades-old boundary agreement. In a unanimous opinion authored by Justice Stephen Field the Court held that the interstate compact was valid, notwithstanding lack of congressional approval. In upholding the boundary agreement, the Court defined “Agreement or Compact,” which comprises:

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 to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control (Virginia v. Tennessee [1893]).

The Court reasoned that the Compact Clause did “not apply to every possible compact or agreement” because some compacts, such as agreements to transport materials along interstate waterways or to drain a disease-ridden swamp straddling state borders, “in no respect concern the United States.” The Court, citing former Justice Joseph Story’s interpretation of the Compact Clause in his Commentaries on the Constitution of the United States (1833), stated the clause requires congressional approval for compacts that produce an “increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.” The Court approved Justice Story’s conclusion that congressional authorization was required for agreements “of a political character; such as…treaties of confederation, in which the parties are leagued for mutual government, political cooperation, 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.”

The Court established a two-step inquiry for whether an interstate compact needs congressional approval: (1) Whether the compact increases the power of the compact member states vis-à-vis the nonmember states and (2) whether the compact alters or interferes with the “full and free exercise” of a federal function or authority (Virginia v. Tennessee [1893]). This standard allows Congress to fulfill the purpose of what Joseph F. Zimmerman has termed “protect[ing] the Union by controlling collective actions of the states” (Zimmerman 1996). The consent requirement makes Congress “a counterweight against potentially harmful collective state action that could erode the viability and sovereignty of the national government” (Broun et al. 2006).

Proponents of the NPV have stipulated “congressional consent provides a means of protecting the federal government from efforts by the states to encroach upon…federal supremacy.” However, the proponents, citing Virginia v. Tennessee,
claim congressional approval is unnecessary because states’ political power would allegedly remain unaffected and the NPV would not encroach upon federal authority (Koza et al. 2013). Even Joseph F. Zimmerman, author of a scholarly monograph on interstate agreements and a coauthor of the leading text supporting the NPV, has claimed the NPV is an “innovative” proposal that does not require Congress’s consent (Zimmerman 2012).

Comparative Enhancement of State Power

Yet the NPV would impinge upon both of the Court’s concerns in *Virginia v. Tennessee* (1893) and therefore must be submitted to Congress. First, the NPV would enhance the power of member states vis-à-vis nonmember states. The member states will be participating in a system that mandates the member states’ electoral votes will be allocated to the national popular vote winner. These states will be the de facto group that actually elects the president, since the total number of electoral votes allocated under the NPV system totals at least the 270 votes needed to win the Electoral College. Thus, the NPV compact “tend[s] to increase and build up the political influence of the contracting States” in relation to the non-contracting states (*Virginia v. Tennessee* [1893]). Simply put, the NPV compact is a new political arrangement, with the political power of the contracting states increased in opposition to the nonmember states in regard to selection of the president (Muller 2007).

States that do not enact the NPV, of course, will remain free to allocate their electors as they so choose (*McPherson v. Blacker* [1892]). Invariably some member states will find their electoral votes are allocated to a candidate that failed to win the popular vote within the state (Bennett 2001). Also, some states that are competitive under the current winner-take-all-*within-the-state* system will no longer retain their political importance to presidential candidates in a national popular vote system.

Federalism Concerns

Not only does the NPV enhance member states’ power in comparison to the nonmember states, but it also impacts the second concern of the Supreme Court in *Virginia v. Tennessee* (1893): “encroach[ing] … upon the full and free exercise of federal authority.” In 1949, Congress approved a compact that created a bridge commission between Missouri and Tennessee, which allowed for bridges to be constructed across the Mississippi River, but with the proviso that federal judicial and legislative power over navigable waters, interstate commerce, and federal taxation were not adversely affected (*Petty v. Tennessee-Missouri Bridge Comm’n* [1959]). While the *Petty* case illustrates Congress’s power over compacts it also highlights the difference between a traditional interstate compact (even of the
modern administrative entity variety) and the proposed NPV. The bridge
commission upheld in Petty had the potential—absent the conditions attached by
Congress—to interfere with powers granted to Congress under Article I. By
contrast, the NPV compact would change the Electoral College, which was
established not under federal governmental authority pursuant to Article I, Section
8, but under constitutional authority.

The Court’s concern in Virginia v. Tennessee (1893) about protecting
congressional enactments from “encroachment” by interstate compacts would
apply to fundamental constitutional institutions, which are superior to congres-
sional enactments under the Supremacy Clause. As John Marshall noted in Barron
v. Baltimore (1833), an interstate compact made for “political purposes... can
scarcely fail to interfere with the general purpose and intent of the constitution
[sic].” By definition and the intention of its supporters, the NPV “encroach[es]... upon the full and free exercise of federal authority” of the presidential election
system. That is, after all, the NPV’s raison d’être: to fundamentally reform national
politics through altering the Electoral College, which proponents view as defective
and unjust (Koza et al. 2013).

The Court has acknowledged, “[t]he electoral college [sic] was designed by men
who did not want the election of the President to be left to the people” (Gray v.
Sanders [1963]). The Court has also noted that fear of an ignorant and uneducated
citizenry “motivated the Framers’ decision not to provide for direct popular
election of the President” (Anderson v. Celebrezze [1983]), and has recognized the
Framers sought to give states a voice in the election of the president “in proportion
to their population” (Myers v. United States [1926]). These motives combine to
form an express recognition by the Court of the federal character of the Electoral
College and its state-oriented design. They also highlight how the proposed NPV
would fundamentally alter that character, turning what is a constitutionally
mandated, state-oriented institution into an institution of popular sovereignty,
subject to alteration by a minority of states acting collectively. Again, whether this
is a wise reform is an entirely different question than whether congressional
approval under the Compact Clause is required.

There does not appear to have been any scholarly work that has counted the
number of interstate compacts implemented without Congress’s consent. However,
there is data on compacts to which Congress has consented. As of 1925, Felix
Frankfurter and James M. Landis tallied thirty-two compacts to which Congress
had consented, and “[a]ll but seven established state boundaries.” As noted above,
Congress has approved 176 interstate compacts, although not all of these are
currently active (Zimmerman 2012). Since Virginia v. Tennessee (1893), the Court
has upheld multiple interstate compacts lacking congressional approval.

Yet, in none of those cases did the compact affect, much less threaten, a
constitutional institution. For example, in 1978 the Supreme Court reviewed a
compact between nineteen states to establish a “Multistate Tax Commission,” which would make tax collection on multistate businesses uniform among the member states and avoid duplicative taxation. The Supreme Court upheld the compact, notwithstanding the lack of congressional approval, because the member states’ power was not an “enhancement of state power at the expense of the federal supremacy.” Nevertheless, the test of whether federal supremacy has been burdened is “potential,” rather than actual, interference (United States Steel Corp. v. Multistate Tax Comm’n [1978] [hereinafter U.S. Steel]).

Additionally, changes to the federal structure of the Union are in the vein of threats to federal supremacy that so concerned the Court in Virginia v. Tennessee (1893). The majority in U.S. Steel entertained the possibility that burdens upon nonmember states could require congressional approval if a “threat to the sovereignty of other States” exists or the compact affects “the Federal structure” (U.S. Steel [1978]). The nineteen states that had joined the compact for the purpose of tax uniformity did not implicate the federal structure; rather, they were concerned with the collection of state-based taxes. By contrast, the NPV compact is expressly intended to alter not merely a federal structure, but a constitutionally mandated federal structure.

Michael Brody, a NPV supporter, has contended that the Court in U.S. Steel effectively dismissed NPV opponents’ concerns about threats to federal supremacy in footnote 33 of the majority opinion (Brody 2013). In that footnote, the majority noted that, “every state cooperative action touching interstate or foreign commerce implicates some federal interest” (U.S. Steel [1978]). Brody claims that, “if a compact implicates a federal interest, it does not necessarily follow that federal supremacy has also been implicated” (Brody 2013). Standing alone, this statement may be true, but the Court in U.S. Steel was concerned with whether the federal interest regarding commerce invoked by multistate taxation was a threat to federal supremacy. The Court held it was not. In same footnote the Court expressly confirmed that the Compact Clause’s standard is whether federal supremacy is threatened by an “encroachment or interference through enhanced state power” (U.S. Steel [1978]). The NPV is clearly a threat to federal supremacy since it would replace a federal institution established by the Constitution with a popular vote system. U.S. Steel is a precedent that reaffirms the federalism concerns the Court has voiced regarding interstate agreements since the late nineteenth century.

Another point of distinction regarding the U.S. Steel case is that the Court noted the importance of the member states’ ability to “withdraw at any time” from the compact (U.S. Steel [1978]). The terms of the NPV plan do not allow states to withdraw “at any time.” Rather, the NPV plan prohibits withdrawal within six months of the end of the president’s term (National Popular Vote). Vikram David Amar has tentatively suggested the Necessary and Proper Clause might allow Congress to create uniform withdrawal rules for states joining the NPV. Amar’s
suggestion depends upon the Court construing the Compact Clause as a grant of power to Congress and a correlative construction of the Necessary and Proper Clause as a basis for enacting withdrawal rules, which purportedly effectuate the Compact Clause’s approval “power” (Amar 2011). Although compacts are treated as contracts enforceable by federal courts (West Virginia ex rel. Dyer v. Sims [1951]), it is doubtful, as Norman Williams has ably demonstrated, that Congress or the federal courts could prohibit states from withdrawing at any time, since states’ constitutional power to select the manner of appointing electors is “plenary” (Williams 2011, citing McPherson v. Blacker [1892]). Nevertheless, such hypothetical federal withdrawal rules (aside from the question of their federal enforceability) would not reduce the disadvantages to nonmember states.

Horizontal Federalism Concerns

Several authors have concluded that the U.S. Steel case greatly reduces the scope of the Compact Clause, especially in regard to “horizontal federalism,” which is the area of state powers and relationships with other states within the federal system (Pincus 2009). These authors point to Justice Byron White’s dissent in U.S. Steel, in which he advocated a test that regarded the interests of noncompact states. Justice White argued that Congress must be “consulted” as “the proper body to evaluate the extent of harm being imposed on non-Compact States” (U.S. Steel [1978]). Justice White’s dissent was cited with approval three years later by a majority of the Court in Cuyler v. Adams (1981).

In Cuyler, the Court held two compacts—the Interstate Agreement on Detainers and the Uniform Criminal Extradition Act, both of which concerned interstate transfers of criminal defendants—had obtained congressional pre-approval from a prior federal law on the subject (Cuyler v. Adams [1981]). The majority opinion, citing Virginia v. Tennessee (1893), reaffirmed that a compact needs congressional approval if it creates greater political power in the member states and thereby threatens federal supremacy. The Court stated, “the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority” (Cuyler v. Adams [1981]). Importantly, in footnote 8, the Cuyler majority quoted with approval Justice White’s dissent in U.S. Steel, wherein he noted that disadvantages to nonmember states must be considered. Cuyler provides support for an argument that Congress must be given the opportunity to determine the character of the NPV. Also, the Cuyler majority’s favorable reference to Justice White’s horizontal federalism concerns in his U.S. Steel dissent strongly suggests the Court may be favorably disposed to considering not only whether the NPV threatens federal supremacy, but also whether the interests and powers of nonmember states are threatened. The NPV would clearly elevate importance of big urban centers and diminish that of small states and rural regions (Von Spakovsky 2011). The NPV
threatens federal supremacy by overturning the Constitution’s presidential election system and increasing the power of large-population states, or states with large urban areas, at the expense of small-population states. Accordingly, the NPV would negate national presidential campaigns, an original purpose of the Electoral College, and encourage big city-centric campaigns. The anticipated urbanization of campaigns under the NPV and the Court’s respect for horizontal federalism supports the contention that the NPV should be submitted to Congress.

What of the States’ “Plenary Power“?

A final issue exists regarding the power of states to act without congressional approval. Since the late nineteenth century, the Supreme Court has held that the states possess a “plenary power to prescribe the method of choosing electors” (McPherson v. Blacker [1892]). NPV proponents contend the states’ plenary power allows them to avoid submitting the NPV compact to Congress (Koza et al. 2013). Although the states individually have great latitude in choosing electors, the NPV proponents have chosen a specific constitutional tool for change: the interstate compact. Again, as Justice Field noted in Virginia v. Tennessee (1893), the issue regarding a compact is whether it threatens federal supremacy. The plenary power of individual states does not allow a collective end run around the congressional consent requirement of the Compact Clause.

At this point, it would appear that the NPV proponents simply need to proceed with advocating the enactment of the NPV in various states and engage in lobbying Congress for eventual approval of the compact, which can be granted either before or after the requisite states have enacted the law and triggered its implementation. The best political-cum-legal advice would probably be to submit the NPV compact to Congress after the NPV compact has been enacted in the requisite number of states, thereby demonstrating a degree of state legislative support for the compact. Regardless of the timing of submission, it appears that, contrary to the current position of NPV proponents, the NPV interstate compact must be submitted to Congress in order to be constitutionally enacted and implemented. However, as will be discussed below, there is an even greater barrier to the realization of the NPV. Although it is my contention that the NPV must be submitted to Congress in order to comply with the Compact Clause of the Constitution, it is extremely doubtful that Congress could constitutionally approve the NPV because such approval would, in itself, be an unconstitutional act by Congress.

The Insurmountable Barrier?—The “Law of the Union” Doctrine

In Cuyler v. Adams (1981) case, the Supreme Court reaffirmed an additional and, in the case of the NPV, potentially decisive constitutional rule: the “law of the Union” doctrine. In Cuyler the Court noted that congressional approval of
an interstate compact “transforms an interstate compact within [the Compact] Clause into a law of the United States.” The interstate compact in *Cuyler* had congressional approval and the Court noted the applicability of the “law of the Union” doctrine, stating: “One consequence of this metamorphosis [i.e., congressional approval] is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms” (*Texas v. New Mexico* [1983]). As stated in footnote 7 of the majority opinion, the law of the Union doctrine specifically creates a federal question for purposes of federal subject matter jurisdiction. This jurisdictional foundation is justified by an “underlying principle that congressional consent can transform interstate compacts into federal law” (*Cuyler v. Adams* [1983]; *Texas v. New Mexico* [1983]; *New Jersey v. New York* [1998]). Once Congress consents, “[t]he agreement is a congressionally sanctioned interstate compact within the Compact Clause and thus is a federal law subject to federal constructions” (*Carchman v. Nash* [1985]; *Alabama v. Bozeman* [2001]). As Joseph F. Zimmerman has correctly concluded, *Cuyler* “replaced the precedent [i.e., *U.S. Steel*] that only concordats [interstate compacts] encroaching on the powers of the federal government came under the interstate compact clause of the United States Constitution. The Cuyler Decision [sic] means any interstate agreement consented to by Congress automatically is covered by the [Compact] clause” (Zimmerman 2012).

As noted in *Cuyler*, the Court originally articulated the “law of the Union” doctrine in an 1852 case. In *Pennsylvania v. Wheeling & Belmont Bridge Co.* (1852) the state of Pennsylvania sued a private bridge owner in Ohio, claiming the erection of a bridge across the Ohio River was a nuisance that interfered with interstate commerce on the river. In 1789, Virginia passed a law proposing the state of Kentucky and particularly stipulating that the Ohio River would remain free for navigation by all U.S. citizens. The Supreme Court construed this law as a compact within the meaning of the Compact Clause of the Constitution. The bridge company claimed that no federal law had been enacted regulating constructions across the river; therefore, the bridge should have been allowed to remain. However, the Supreme Court rejected this argument by referring to Congress’s approval of the Virginia–Kentucky compact as federal law on the subject matter. The Court held the “compact, by the sanction of Congress, has become a law of the Union” (*Pennsylvania v. Wheeling & Belmont Bridge Company* [1852]).

In 1981, the *Cuyler* Court explained that the “law of the Union” doctrine was consistent with the Framers’ intent because the Compact Clause’s requirement of congressional consent “ensure[d] that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority” (*Cuyler v. Adams* [1981] [citing Frankfurter and Landis 1925]). The Court’s concerns about states “encroaching”
upon federal power, originally voiced by Joseph Story in his Commentaries, published the 1830s, and elevated to constitutional doctrine in Virginia v. Tennessee (1893), have been supported by holdings that Congress can reject compacts submitted to it and can conditionally approve compacts (James v. Dravo Contracting Company [1937]). As the Court has stated, “Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.” Under the Compact Clause, the Framers “allowed interstate adjustments but duly safeguarded the national interest” (Petty v. Tennessee-Missouri Bridge Commission [1959], quoting Frankfurter and Landis 1925). Accordingly, congressional approval is a transformative event. Not only does congressional approval vest federal courts with subject matter jurisdiction; more importantly for the purpose of reviewing the NPV, but it also converts the compact to a federal law (Wedding v. Meyler [1904]; Delaware River Joint Toll Bridge Commission v. Colburn [1940]; Petty v. Tennessee-Missouri Bridge Commission [1959]; Cuyler v. Adams [1981]).

The Law of the Union as Applied to the NPV

In light of the “law of the Union” doctrine, the pertinent question is whether Congress has the constitutional authority to approve the NPV. It is my contention that Congress can only approve an interstate compact (thereby making federal law under the “law of the Union” doctrine) if Congress already possesses the power to enact the agreement on its own initiative under the Article I, Section 8 powers granted to Congress, or another specific constitutional provision delegating such power to Congress, or if the terms of the compact are not otherwise unconstitutional. As noted above, the Supreme Court has given support to this view, describing the “metamorphosis” as binding upon the federal courts “unless” the compact to which Congress has consented is “somehow unconstitutional” (Texas v. New Mexico [1983]; New Jersey v. New York [1998]).

That caveat regarding constitutionality is key for understanding the power of Congress regarding interstate compacts. As with all questions regarding state power and federal governmental power, the Supremacy Clause of Article VI plays an important, often decisive, role. In the context of the Compact Clause, the Supremacy Clause is the foundation for determining whether a compact must be submitted to Congress for approval. In Cuyler v. Adams [1981] the Court noted that only compacts which may “interfere with the just supremacy of the United States” need to be submitted to Congress. Also, under the “law of the Union” doctrine any congressional action is federal in character, which gives rise to Article III jurisdiction (Broun et al. 2006, citing League to Save Lake Tahoe v. Tahoe Regional Planning Agency [1974]). “[A]ny [legal] rights or obligations granted by a congressionally sanctioned interstate compact are federal, not state, in character” (Broun et al. 2006, citing Bush v. Muncy [1981]). However, not only is a compact
sanctioned by Congress converted into federal law, subject to all constitutional restrictions upon federal law, but the actions of Congress are also subject to constitutional restrictions. That is, the Supremacy Clause limits Congress’s power to only those actions allowed under the Constitution (United States v. Germaine [1870]). This includes Congress’s power acting pursuant to the Compact Clause.

Two points are essential in understanding whether Congress has the power to approve the NPV. First, as noted above, the Electoral College is an institution created by the Constitution. As such, under the Supremacy Clause of Article VI any federal statute contrary to a constitutional provision is unconstitutional. Any congressional approval of a system that makes the election of the president—which is a separate branch of the federal government—an election determined by national popular vote is an alteration of the federal character of the Electoral College as established by the Constitution. Just as the states are prohibited from altering this uniquely federal institution, so too is Congress.

Second, Article II, Section 1, Clause 2 of the Constitution grants the states the power over the “Manner” of the appointment of presidential electors, while restricting the role of Congress. As Article II, Section 1 states and the Supreme Court has confirmed, Congress’s constitutional power regarding presidential electors is limited to determining the time when electors are chosen and the date when they must vote for president (McPherson v. Blacker [1892]). Otherwise, Congress lacks any constitutional power to alter the Electoral College or the states’ systems for allocating their electoral votes. The Court has long recognized that the Constitution assigns the “appointment and mode of appointment of electors . . . exclusively to the States” (McPherson v. Blacker [1892]).

The question of whether the states can combine through an interstate compact to alter the Electoral College is not a question of “states’ rights.” Article II’s assignment of the power to select electors to the states is not a recognition of preexisting state power; rather, as the Supreme Court has held, it is a “direct grant of authority” under Article II (Bush v. Palm Beach County Canvassing Bd. [2000]; Walker v. U.S. [1937]; Fitzgerald v. Green [1890]). That is, both the states and Congress are empowered by Article II to take specific actions regarding the implementing of the Electoral College, but neither is authorized to fundamentally alter the Electoral College’s structure or purpose. As the Third Circuit has held, in addition to the Cuyler holding that congressional consent transforms the compact into a “law of the Union,” the “subject matter” of the compact must be “appropriate for congressional legislation” (Doe v. Pennsylvania Bd. of Probation and Parole [2008]). Accordingly, Congress lacks any express or implied power under Articles I or II to enact a statute altering the Electoral College. Additionally, there is no case law supporting the proposition that Congress can enact into law a compact that would accomplish a goal for which Congress otherwise lacks constitutional power.
It must be remembered that the Framers intended for the Compact Clause to afford Congress a gatekeeper role over interstate collective action. Writing in 1925, Felix Frankfurter and James M. Landis argued that the Framers had “practical objectives” in requiring Congress’s review of interstate compacts. They noted the Framers’ intent regarding interstate compacts was that:

Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest (Frankfurter and Landis 1925).

The foregoing demonstrates how ill suited the NPV compact is to the functions of Congress under the Compact Clause. Article II, Section 1 prevents Congress from playing any “supervisory” role or exercising any “legal control” over the states or the Electoral College, other than setting the time when electors are chosen and the date when they must vote for president (McPherson v. Blacker [1892]). Under the Compact Clause Congress has been allowed by the federal courts to attach conditions to its consent, as exampled above in the Petty case regarding the bridge commission, but those conditions must be constitutional (Tobin v. United States [1962]). As Zimmerman and Wendell have noted, “The basic purpose of the constitutional requirement of Congressional consent is to make certain that no such agreements can stand against the will of Congress” (Broun et al. 2006, quoting Zimmerman and Wendell 1976). Yet, Congress can have no “will” in regard to the Electoral College because it lacks any constitutional power over the institution.

A “Political Question”?  
As the Supreme Court has recently stated: “In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid’” (Zivotofsky v. Clinton [2012], quoting Cohens v. Virginia [1821]). However, there is what the Court in Zivotofsky referred to as a “narrow exception” to this responsibility: the “political question” doctrine. In Baker v. Carr (1962), the Supreme Court gave definition to the “political question” doctrine. This doctrine, premised upon the separation of powers and depending upon context, either prohibits or counsels against judicial review of a dispute (Barkow 2002). In light of the institutional roles of the states, Congress, and the Court in the question of the NPV, it is possible that the Court could decide the NPV presents a political question. However, it is unlikely the Court would avoid deciding such a case.

After Baker was decided the Court has rarely avoided deciding a case on political question grounds (Barkow 2002). As the Court recently stated, “No policy underlying
the political question doctrine suggests that Congress or the Executive... can decide the constitutionality of a statute; that is a decision for the courts” (Zivotofsky v. Clinton [2012], quoting INS v. Chada, [1983]). Any congressional approval of the NPV would take the form of a federal statute, which the Court could review. Also, none of the Baker justiciability tests are met by the NPV.

The Baker court provided the following six instances when the political question doctrine applies:

[When there is a] [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

First, the Constitution does not “commit” the question of the NPV to Congress. Although Congress supervises state compacts under the Compact Clause, the legal issue of whether the Compact Clause, Article II, Section 1, Clause 2, and the Supremacy Clause allow the NPV to be approved is a question of Congress’s constitutional power. The Court has not been reluctant to adjudge the power of Congress under the Constitution. Second, the Court has established “standards” for resolving this issue. In the late nineteenth century the Court set rules for when the states must submit a compact to Congress (Virginia v. Tennessee [1893]). Also, the Court has recognized the “law of the Union” doctrine, which not only describes the effect of congressional approval of a compact but also conditions such approval on the constitutionality of the compact (Texas v. New Mexico [1983]).

In regard to the four remaining Baker “formulations,” any review of the NPV by the Court would be a proper response to the Court’s constitutional responsibility to decide whether Congress has acted constitutionally, would not involve “disrespect” to the states or Congress, or the need to “adhere” to a foregone political decision, or the “embarrassment” of multiple pronouncements from the federal government on the issue. In short, it is highly unlikely that the political question doctrine will restrict the Court from ruling on the need for the states’ submission of the NPV compact to Congress or Congress’s power to approve the NPV.

Application to Other Interstate Compacts?

In light of the NPV compact and the opinions stated herein regarding its constitutional propriety, the question of the application of these opinions to
existing and future interstate compacts should be noted. Only a minority of interstate compacts lack congressional approval. The Court’s clear standards for the types of compacts that must be submitted to Congress will allow for judicial review of those not submitted. Also, with the exception of the NPV, all known interstate compacts appear to be well within the ambit of Congress’s power to approve. If Congress were to approve the NPV and the Supreme Court were to hold Congress’s approval unconstitutional, it is certainly possible that the language of the decision could allow for challenges to existing compacts. However, it is difficult to envision what challenges would be allowed to existing compacts, since the NPV is unique.

Although it is impossible to predict the future, any Court decision on Congress’s power to approve the NPV would likely be an unusual case probably not readily applicable to other congressional approvals of interstate compacts. The possibility of the Court upholding Congress’s approval of the NPV would be a potential watershed decision regarding interstate power. The reasoning supporting such a decision would be critical to evaluating its precedential importance. Yet, it is possible at this point to suggest that if Congress can sanction a fundamental alteration of the Electoral College, then interstate compacts could become very powerful instruments of not merely interstate cooperation, but interstate-initiated constitutional change.

**Conclusion**

It is likely that if and when the requisite number of states has enacted the NPV compact there will be multiple suits filed in state and federal courts seeking injunctions against states’ implementation of the compact. These suits may have different outcomes in the respective state and federal courts in which they are filed and perhaps even in the state supreme courts and federal intermediate appellate courts that will hear the initial appeals. If conflicting holdings result among the federal circuit courts of appeal, then the U.S. Supreme Court would almost certainly hear the case in order to resolve a conflict among the circuit courts. Even if no conflict among the circuits developed, the importance of the constitutional question might spur the Court to review the issue. In short, it is likely that the Supreme Court will be involved in any resolution of the constitutional issues surrounding the NPV. In light of the Court’s jurisprudence on interstate compacts, it will likely play a central role in determining whether the NPV interstate compact becomes the law of the land.

The NPV compact presents an apparent catch-22 problem for its proponents: The states must submit the NPV to Congress for approval, but Congress is constitutionally constrained from granting approval. These two claims might appear contradictory but are in fact necessary legal issues that must be addressed in
sequence. Whether the states must submit the NPV compact to Congress is a legal question that is raised begged by the NPV proponents and opponents’ stipulation that the NPV is an interstate compact. The proponents have argued that Supreme Court precedents interpreting the Compact Clause allow this compact to avoid being submitted to Congress for approval. Accordingly, any assessment of the NPV’s constitutionality must begin with addressing this initial claim by the NPV proponents. It is my conclusion that the NPV interstate compact must be submitted to Congress under the terms of the Compact Clause and Supreme Court precedents.

Then a second question arises: Is this a compact Congress can approve? This inquiry also requires a review of Supreme Court precedents. It is my conclusion that the “law of the Union” doctrine and the constitutional restrictions upon Congress’s power regarding the states’ appointment of electors prohibit Congress from approving this compact. The NPV is unique in that it directly seeks to fundamentally alter a constitutional institution. Neither Congress nor the states can use the Compact Clause as a backdoor method of amending the Constitution to change the Electoral College system. Ultimately, NPV proponents can resolve this dilemma by abandoning the interstate compact route and adhering to the Article V amendment process. Only a constitutional amendment will enable the shift from the Electoral College’s state-based system to a national popular vote system for electing the president.

Notes
1. Only Nebraska and Maine allocate their electoral votes on a proportional basis, wherein votes are awarded to the popular vote winner in each congressional district.
2. Vikram David Amar, an NPV proponent, has made a similar point regarding whether the Necessary and Proper Clause might serve as a basis for Congress to approve the NPV. Amar notes, “the fact that some group of compacting states (which could be as few as two) might agree to something should not give Congress power that otherwise falls beyond its enumerated authority to impose on unwilling states” (Amar 2011).

References


Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257 (1821).
Delaware River Joint Toll Bridge Commission v. Colburn, 310 U.S. 419 (1940).
Doe v. Pennsylvania Bd. of Probation and Parole, 513 F.3d 95 (3d Cir. 2008).
Fitzgerald v. Green, 134 U.S. 377 (1890).


League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974).


Myers v. United States, 272 U.S. 52 (1926).


United States Constitution.


Walker v. United States, 93 F.2d 383 (8th Cir. 1937).


