

Comments

GUARANTEEING A FEDERALLY ELECTED PRESIDENT

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INTRODUCTION

In 2007, Maryland became the first state to “drop out” of the Electoral College.¹ In 2008–2009, New Jersey, Illinois, Hawaii, and Washington followed suit.² Specifically, these states adopted legislation providing that, in

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¹ MD. CODE ANN., ELEC. LAW § 8-5A-01 (LexisNexis Supp. 2008); see also Bill Schneider, *Dropping out of the Electoral College*, CNN.COM, Apr. 10, 2007, <http://www.cnn.com/2007/POLITICS/04/10/schneider.electoral/index.html>.

² N.J. STAT. ANN. § 19:36-4 (West Supp. 2008); 10 ILL. COMP. STAT. ANN. 20/1-10 (West Supp. 2008); HAW. REV. STAT. ANN. ch. 14D (LexisNexis Supp. 2008); *Gregoire Signs Popular Vote Bill into*

the event that states cumulatively possessing 270 electoral votes enact similar legislation, their presidential electors will go to the winner of the national popular vote, not the winner of their statewide vote.³ Because the eleven most populous states hold 270 electoral votes,⁴ eleven states theoretically could switch the entire nation to a national election of the President, bypassing the constitutional amendment process.

The movement to adopt a national popular vote through state statute began in the wake of the 2000 election, when Al Gore won the national vote but failed to garner the requisite 270 electoral votes to win the Presidency.⁵ Dissatisfied with the election, National Popular Vote (NPV),⁶ a nonprofit organization, began encouraging states to enact legislation that would send their electors to the winner of the national vote.⁷ NPV's proposed legislation (NPV legislation) works within the framework of the Electoral College,⁸ and does not truly require the states to "drop out" of the Electoral College. Instead, it moves the nation from a *federal* election of the President—where the winner must earn 270 electoral votes by winning majorities within states—to a *national* election of the President—where the winner simply needs to win the national vote.

While Maryland, New Jersey, Illinois, Hawaii, and Washington have been the only states to adopt the NPV legislation, the statute has been introduced in over forty other states.⁹ The national popular vote movement has

Law, SEATTLE TIMES, Apr. 29, 2009, http://seattletimes.nwsourc.com/html/localnews/2009140302_apwaelectoralcollege1stdwritethru.html; see also Tom Hester Jr., *New Jersey Governor Signs Popular Vote Measure*, NAT'L POPULAR VOTE, Jan. 13, 2008, http://www.nationalpopularvote.com/pages/articles/ap_20080113.php.

³ See *The National Popular Vote Plan's Proposed Agreement Among the States to Elect the President by National Popular Vote*, 5 ELECTION L.J. 231, 231–32 (2006) (setting forth the text of the model agreement advocated by National Popular Vote).

⁴ Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 243–44 (2001).

⁵ See Schneider, *supra* note 1.

⁶ National Popular Vote is the name of the nonprofit organization encouraging this legislation, but "national popular vote legislation" is also the term used to describe the statutes that are passed in individual states, like that in Maryland. This Comment will generally use the term "national popular vote" to refer to the broader political movement encouraging Electoral College reform, "NPV" to refer specifically to the nonprofit organization, and "NPV legislation" to refer to all national popular vote legislation.

⁷ National Popular Vote, *Explanation of National Popular Vote Bill*, <http://www.nationalpopularvote.com/pages/explanation.php> (last visited June 12, 2009).

⁸ *Id.*

⁹ National Popular Vote, *State Progress on Reforming Electoral College*, <http://www.nationalpopularvote.com/index.php> (last visited June 12, 2009). National popular vote legislation has passed both houses in California, Vermont, Rhode Island, Massachusetts, and Colorado; passed one house in nine states; passed a legislative committee in another seven; and been introduced in twenty-three more. *Id.*

drawn considerable media attention and editorial support,¹⁰ but few legal scholars have examined whether the movement is constitutional.¹¹ The absence of commentary is striking because, if adopted, NPV legislation would significantly change our electoral system.

This Comment argues that the NPV legislation violates the Guarantee Clause of Article IV, Section 4 of the United States Constitution. The Guarantee Clause provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”¹² The history of the Guarantee Clause and the meaning of the term “republican government” at the time of the Constitution’s ratification show that a republican government encompasses the guarantee of a federally elected President.¹³ Although a simple definition of republican government means a government that derives its power from the people, as opposed to a monarchy or an aristocracy,¹⁴ historical materials reveal that the Framers envisioned a “compound republic” at the national level where the source of the President’s power flows from the people *of the states*.¹⁵

Part I of this Comment discusses the national popular vote movement and applicable jurisprudence, arguing that although the Supreme Court recognizes that state legislatures have “plenary” power to appoint presidential

¹⁰ See National Popular Vote, Editorial Support, <http://www.nationalpopularvote.com/pages/editorials.php> (last visited June 12, 2009) (listing favorable editorials).

¹¹ Professor Bennett’s article focuses on the mechanics and practical possibility of reforming the Electoral College by state statute. Bennett, *supra* note 4, at 243–46. Professor Chang provides an excellent analysis of the practical advantages and disadvantages of moving to a national popular vote. See Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205 (2007). Jennings Wilson is one of the few legal scholars to address whether such reform is constitutional, rather than possible or desirable. See Jennings “Jay” Wilson, *Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way*, 5 ELECTION L.J. 384, 401–03 (2006). Still, Wilson does not address any Guarantee Clause issues and ultimately concludes the electoral reform is constitutional. *Id.* For other examples of work in this area, see Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218 (2008); *An Online Symposium on Recent Proposals for Electoral College Reform*, 106 MICH. L. REV. FIRST IMPRESSIONS 4 (2008), <http://www.michiganlawreview.org/firstimpressions/vol106/electoral.htm>.

However, in response to New Jersey’s electoral reform, an editorial did conclude: “We are a republic, not a democracy, and it’s worth noting that the U.S. Constitution was sent to the states for ratification, not put to a popular vote, with each state, large and small, having one vote regardless of population. Was that fair and democratic?” *Dumbing Down the Electoral College*, INVESTOR’S BUS. DAILY, Jan. 22, 2008, at A18. This quote is the extent of the editorial’s legal analysis.

Additionally, a student note argues that NPV legislation violates the Voting Rights Act but does not analyze the constitutional implications of the legislation. David Gringer, Note, *Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 183 (2008). The argument advanced in that note is contingent in large part on the popular vote plan causing minority vote dilution. *Id.*

¹² U.S. CONST. art. IV, § 4.

¹³ See *infra* Parts II–III.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part II.C.

electors, they cannot radically alter the Electoral College by enacting just any method for selecting presidential electors. In addition, Part I provides background on two potential constitutional problems for NPV legislation: the Compact Clause and the Guarantee Clause.

Part II examines the principles of republican government that the Guarantee Clause protects. An analysis of historical sources from the Framing and ratification of the Constitution, state practices concerning the appointment of presidential electors, and scholarly interpretations of the meaning of republican government reveals that the Guarantee Clause protects a compound republican government at the national level. Part II concludes that the guarantee of a republican form of government encompasses procedural aspects of federalism, or “process federalism.”¹⁶

Part III applies these republican principles to argue that NPV legislation is unconstitutional for two reasons. First, a national election of the President violates the concept that, in our compound republic, the source of the President’s power is federal, not national. Second, the means employed by NPV violates the Guarantee Clause, and if electoral reform is desired, it should come through a constitutional amendment. Allowing a minority of states to switch the nation to a national popular vote would also violate the republican principle that no state shall legislate for another state.

In addition, allowing states unbridled discretion to adopt schemes like that in NPV legislation fails to account for the problem of “superstates.”¹⁷ A superstate could be created if one state combines its electors with another’s. Those two states could then send their electors to the winner of the superstate’s vote.¹⁸ Taken to the extreme, the eleven states with a total 270 electoral votes could form a superstate where all 270 electoral votes go to the winner of the superstate, making the remaining thirty-nine states irrelevant in presidential elections. This suggests that there should be some constitutional limit on the ability of some states to make legislative choices for other states concerning the election of the President.

Finally, Part IV discusses which branch is best suited to guarantee a federally elected President and has the power to determine that NPV legislation violates the Guarantee Clause. This Comment argues that the Supreme Court is in the best position to decide whether NPV legislation violates the Guarantee Clause. This Comment does not argue that a national popular vote is an inferior method of electing the President; it merely posits that the movement to a national popular vote should be accomplished via constitutional amendment, not by statutes in a minority of states.

¹⁶ By “process federalism” this Comment means electoral procedures that provide for representation of the people through the states and limits on the federal government’s ability to interfere with state governments. See *infra* note 38 and the accompanying text for a further explanation of process—or procedural—federalism.

¹⁷ See generally Wilson, *supra* note 11.

¹⁸ *Id.* at 386–88.

I. THE NATIONAL POPULAR VOTE MOVEMENT AND GUARANTEE CLAUSE JURISPRUDENCE

This Part discusses the current status of the national popular vote movement as well as potentially applicable Supreme Court precedents. Section A explores the history and progress made by the national popular vote movement. Section B examines the Supreme Court's decisions on the Guarantee Clause and concludes that certain decisions suggest that the Supreme Court might find that the Guarantee Clause limits state power to pass such legislation.

A. *The National Popular Vote Movement*

There are only three elections where the winner of the national popular vote lost the Electoral College (1876, 1888, and 2000), and one other where the winner might have (1960).¹⁹ After the 2000 election, when Al Gore won the national vote but not the Presidency, many people questioned the desirability of the Electoral College.²⁰ While it appears that mostly Democrats are behind the move to reform the Electoral College via state statute, nothing in the process inherently advantages Republicans or Democrats.²¹

Robert Bennett was the first legal scholar to suggest reform of the Electoral College by state statute. Shortly after the 2000 election, he argued there was no obstacle to a state legislature pledging its electoral delegates to the winner of the nationwide popular vote. Furthermore, if states with at least 270 electoral votes made this pledge, the winner of the national vote would become President.²²

¹⁹ Bennett, *supra* note 4, at 244 n.9 (noting that it is difficult to tell who exactly won the national vote in 1960).

²⁰ Schneider, *supra* note 1.

²¹ *Id.* But see David Brooks, *The Class War Before Palin*, N.Y. TIMES, Oct. 9, 2008, at A33 (noting intentional GOP partisan approaches differentiating small interior states from more populous, coastal, Democrat-leaning states).

It is too soon to tell how the election of Barack Obama will affect the momentum of the national popular vote movement. Some commentators have expressed concern about the disparity between President Obama's relatively small popular vote victory and his very large Electoral College victory. See *The Daily Show* (Comedy Central television broadcast Nov. 5, 2008), available at <http://www.thedailyshow.com/full-episodes/index.jhtml?episodeId=209402> ("Last night, Barack Obama won the popular vote by a margin of fifty-two percent to forty-six percent and currently the electoral vote by 364 to 173. So, basically, a six percent popular vote victory translates into a two-to-one Electoral College drubbing, proving once again that the Electoral College makes perfect sense. It's as sound as it was when that shipload of mentally defective orangutans washed ashore and designed it.").

²² Bennett, *supra* note 4, at 243–44. Bennett also notes that switching to a national vote is likely to change the result in elections. *Id.* For example, if just 60,000 votes in Ohio had shifted to John Kerry in 2004, Kerry would have won the Electoral College while losing the popular vote by over three million votes. Thus, whether we have a federal or a national election could have a significant impact on the results of presidential elections.

Professor Bennett also claims that fewer than eleven states could affect a *de facto* national election of the President.²³ Even if states representing 270 electoral votes refused to enact popular vote legislation, some states could still choose to send their electors to the winner of the national vote. Because it is so unlikely that a candidate who is 80 to 100 electoral votes behind would obtain enough of the remaining states to reach the 270 votes, the United States would essentially have a popular vote.²⁴ Alternatively, instead of a handful of populous states switching the entire nation to a *de facto* national vote, adoption by just a few swing states or two politically divided states could achieve the same effect.²⁵

Although Maryland, New Jersey, Illinois, Hawaii, and Washington are the only states to have adopted this legislation, Electoral College reform still receives attention elsewhere. California is considering switching from a winner-take-all approach for the Electoral College to a district approach.²⁶ Additionally, NPV legislation has been introduced in many other states.²⁷ Thus, given the recent movement for Electoral College reform in many states and its potential consequences,²⁸ it is extremely important to study whether this legislation is constitutional. However, relevant Supreme Court precedent does not provide an obvious answer to this question.

²³ *Id.*

²⁴ *Id.* at 244. Bennett explains:

But *de facto* popular election could be accomplished by fewer than eleven states. . . . To begin with, California and Texas had 86 electoral votes between them in the last election and seem likely to have even more after the congressional reapportionment worked by the census now being completed. There have been very few instances in our history when the popular vote winner lost outright in the electoral college. Most typically the electoral vote exaggerates the victory of the popular vote winner. If the popular vote loser started out 86 or more votes behind, he would be exceedingly unlikely to win.

Id.

²⁵ *Id.* at 244–45 (“Adoption by the swing (and occasionally adventuresome) state of Wisconsin—with eleven electoral votes in the last election—would tilt the system decidedly toward popular election. Combinations of states across the political divide, with a larger total of electoral votes—Colorado and Oregon with a total of 15 votes, for instance, or Missouri and Minnesota with 21—would increase the odds even more.”).

²⁶ Robert W. Bennett, *Selecting the President: A Bad Idea Out There in California*, 102 NW. U. L. REV. COLLOQUY 82, 82 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/26/LRColl2007n26Bennett.pdf>. A winner-take-all approach is one in which the winner of the statewide vote gets all of the state’s electors; a district approach is one in which the state is divided into districts and the electors from each district go to the winner in the district, similar to the systems currently in place in Maine and Nebraska. *Id.*

²⁷ National Popular Vote, *supra* note 9.

²⁸ Passage in states representing less than 270 electoral votes would only switch the nation to a *de facto* national election if the states enacted statutes which, unlike Maryland’s, did not wait until states with 270 electoral votes passed similar legislation to take effect. *See generally* Bennett, *supra* note 26.

B. Plenary Power over Electors, Interstate Compacts, and the Guarantee Clause

This section outlines the Supreme Court precedent that might be applicable in the event that NPV legislation is challenged. The Supreme Court held in *McPherson v. Blacker* that state legislatures have “plenary power” over the manner of appointing presidential electors.²⁹ More recently, the Court reiterated this position in affirming a lower court’s holding that rejected a challenge to a state’s winner-take-all approach to the Electoral College.³⁰ These decisions are consistent with the text of the Constitution, which declares that “[e]ach State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors.”³¹

However, there are some potential limits on state power over the manner of choosing presidential electors. Justice Thomas, dissenting in *United States Term Limits, Inc. v. Thornton*, noted that “the States may establish qualifications for their delegates to the Electoral College as long as those qualifications *pass muster under other Constitutional provisions*.”³² Although this passage is dicta from a dissent, Thomas dissented because he thought states should have the power to impose congressional term limits.³³ That Thomas, the Justice construing state power the most liberally in *Thornton*, would limit the states’ authority to use their power over electors in a manner that violates other provisions of the Constitution indicates that the Justices who construed state power more narrowly might agree. Therefore, *McPherson* is not necessarily conclusive on whether state plenary power over presidential electors affords states the authority to adopt legislation that switches the nation to a national popular vote. If NPV legislation violates another provision of the Constitution, like the Compact Clause or the Guarantee Clause, it may be unconstitutional.

One line of constitutional attack against NPV legislation is the Interstate Compact Clause. The Compact Clause provides that “[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.”³⁴ In *Virginia v. Tennessee*, the Supreme Court held that, without congressional approval, the Compact Clause forbids agreements that would either increase the political power of a state or encroach

²⁹ 146 U.S. 1, 35 (1892).

³⁰ *Williams v. Va. Bd. of Elections*, 288 F. Supp. 622, 629 (E.D. Va. 1968), *aff’d*, 393 U.S. 320 (1969) (per curiam).

³¹ U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

³² 514 U.S. 779, 861 (1995) (Thomas, J., dissenting) (emphasis added) (noting that the primary limits are likely to be the First and Fourteenth Amendments). Justice Thomas was joined by Chief Justice Rehnquist, Justice O’Connor, and Justice Scalia.

³³ *Id.* at 861.

³⁴ U.S. CONST. art. I, § 10, cl. 3.

on the power of the national government.³⁵ While this is an interesting line of constitutional attack, it is beyond the scope of this Comment.

Another line of constitutional attack on NPV legislation is the Guarantee Clause.³⁶ As Justice O'Connor noted in *New York v. United States*, there are few Supreme Court cases regarding what constitutes a republican form of government.³⁷ However, there is Supreme Court precedent supporting the idea that the Guarantee Clause protects the separation of powers and process federalism.³⁸ Process—or procedural—federalism is distinct from substantive federalism. Process federalism focuses on the means by which a legislative result comes about, while substantive federalism focuses on the result itself. Of course, where the result of legislation changes governmental procedure, then the means as well as the result of that legislation might raise procedural concerns.

The Court addressed the issue of separation of powers in *Olney v. Arnold* and commented that the separation of the Judicial, Executive, and Legislative Branches is important for a republican government.³⁹ The fact that the republican government requires the separation of powers is relevant to procedural federalism issues. It demonstrates that the Clause does more than prevent monarchical government because it is also concerned with dangerous consolidations of power in one branch, regardless of whether that branch was democratically elected.

³⁵ 148 U.S. 503, 519 (1893). Scholars have come to differing conclusions on whether the Compact Clause applies to NPV legislation. Compare Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2d 141 (2002) (supporting the inapplicability of the Interstate Compact Clause to NPV legislation), and Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717 (2007) (offering a similar argument), with Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007) (offering the opposing view that NPV legislation violates the Compact Clause and requires congressional consent).

³⁶ This Comment argues, in Part IV, that the political question doctrine should not apply to the Guarantee Clause. Even if it does, that would only mean that it would be the duty of the political branches to declare NPV legislation unconstitutional. Recall that, in *Luther v. Borden*, the Supreme Court applied the political question doctrine to find that it was for the President and Congress to enforce the Guarantee Clause and determine which government in Rhode Island was lawful. 48 U.S. (7 How.) 1, 42 (1849).

³⁷ 505 U.S. 144, 184–85 (1992).

³⁸ For example, one can argue that the federal government dictating to the states that they must pass legislation requiring them to take title of nuclear waste violates procedural federalism, regardless of the desirability of the result, because the federal government should not be able to dictate state legislation. Procedural federalism is not implicated, however, by federal legislation providing special penalties for violence against women or federal antidrug laws. While such legislation might be unwise, or arguably not within Congress's constitutional authority, the legislation does not meddle with the process of state government and thus implicates only substantive federalism concerns.

³⁹ 3 U.S. (3 Dall.) 308, 314 (1796) (“But if any doubt shall exist upon the subject, the construction should be in favour of that general principle, in the policy of all well regulated, particularly of all republican, governments, which prohibits an heterogeneous union of the legislative and judicial departments.”).

Regarding process federalism, there are four cases that suggest certain procedural elements of our federal system are protected under the Guarantee Clause.⁴⁰ First, in *Forsyth v. City of Hammond*, the Supreme Court found that the Guarantee Clause protects state autonomy to restructure state government.⁴¹ Second, Justice O'Connor's dissent in *South Carolina v. Baker* suggested that "the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause of the Constitution."⁴² Third, O'Connor's dissenting view in *Baker*—that the Guarantee Clause might protect state autonomy—was reiterated in her majority opinion in *New York v. United States*, where five other Justices joined her opinion.⁴³ Finally, the Court in *Printz v. United States* noted that the Guarantee Clause might protect certain elements of state sovereignty because it "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights."⁴⁴

Overall, precedent suggests that the Guarantee Clause might protect procedural elements regarding federalism.⁴⁵ However, because there are so few cases that interpret the Guarantee Clause, whether the Supreme Court would apply the Guarantee Clause to NPV legislation is unclear.

II. REPUBLICAN PRINCIPLES AND THE GUARANTEE CLAUSE

Because there is so little guidance about the meaning of the Guarantee Clause, deciding whether NPV legislation violates the guarantee of republican government presents complex issues. This Part examines the text of the Guarantee Clause as well as important republican principles to suggest that the Guarantee Clause provides for a compound republic at the national level. Section A argues that the guarantee of republican government is more than a guarantee of some government other than a monarchy or dictatorship. Section B addresses whether the Guarantee Clause protects repub-

⁴⁰ See Part IV, *infra*, for a discussion on why procedural federalism challenges under the Guarantee Clause are justiciable.

⁴¹ 166 U.S. 506, 519 (1897).

⁴² 485 U.S. 505, 531 (O'Connor, J., dissenting) (citing Deborah Merritt, a vocal legal scholar who argues that the Guarantee Clause protects process federalism). No other Justice joined O'Connor's dissent. *Id.* at 530.

⁴³ Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas joined her opinion. 505 U.S. 144, 157, 183–86. O'Connor again cited Merritt, although she found that "even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases." *Id.* at 186.

⁴⁴ 521 U.S. 898, 919 (1997) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414–15 (1938)) (invalidating the Brady Handgun Violence Prevention Act because it commandeered the chief law enforcement officers of each state).

⁴⁵ It should be noted that the above cases involve using the Guarantee Clause as a shield to protect state action from the federal government, not as a sword to protect some states from the action of other states. Whether this distinction is constitutionally important has not been decided by the Court. This Comment argues that the Guarantee Clause should apply to this sort of state action. See *infra* Part II.B.

lican national government. Section C presents historical evidence revealing that the Framers intended the national government to be a compound republic, where power flows from different segments of the population.

A. Republican Government Beyond Antimonarchy

The text of the Guarantee Clause states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”⁴⁶ A basic promise of a republican government is that the source of the government’s power flows from the people.⁴⁷ Although stopping at this simple understanding is seductively easy, doing so would short-change an important provision of the Constitution. The text of the Clause is fairly cryptic. Deborah Jones Merritt comments that the search for meaning within the Clause has captivated many scholars, and notes that “John Adams confessed that he ‘never understood’ what the [G]uarantee [C]lause meant and ‘believe[d] no man ever did or ever will.’”⁴⁸

Scholars have certainly been captivated by the Guarantee Clause, and it could be argued that the Clause is nothing but a Rorschach test. The Guarantee Clause has been read to prohibit direct democracy,⁴⁹ require campaign finance reform,⁵⁰ protect individual rights,⁵¹ protect political rights,⁵² mandate wealth redistribution and the jury system,⁵³ limit governmental power,⁵⁴

⁴⁶ U.S. CONST. art. IV, § 4.

⁴⁷ Chief Justice John Jay’s definition of republican government was one where the “Supreme Power resides in a body of the people.” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793). *Johnson’s Dictionary* defines “republican” as “placing the government in the people” and “[o]ne who thinks a commonwealth without monarchy the best government.” 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1637 (London, W. Strahan, 4th ed. 1773). It defines “republic” as a “[c]ommonwealth; state in which the power is lodged in more than one.” *Id.*

⁴⁸ Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988).

⁴⁹ See, e.g., Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 725 (1994) (“Process and validity are distinct issues. The guarantee precludes initiatives to enact laws that would be valid if enacted by a legislature.”).

⁵⁰ Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 769 (2003).

⁵¹ Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 865 (1994) (“My claim is that the Guarantee Clause is best understood as being fundamentally about individual rights and thus very much an area where judicial review is appropriate.”).

⁵² Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. COLO. L. REV. 741, 741–42 (1994) (“I believe the Guarantee Clause probably would have been, and perhaps may still be, the Constitutional provision of choice with respect to many of the issues concerning legislative malapportionment and other denials of voting rights, especially regarding the method of selection (e.g., appointment versus election) of certain government officials.”).

⁵³ James Wilson argues that the Framers felt that republicanism meant a government that facilitated people’s pursuit of happiness, provided for wealth redistribution, barred the entail of estates, called for a jury system, and required civic virtue of leaders. JAMES G. WILSON, *THE IMPERIAL REPUBLIC* 25 (2002).

and require a system of checks and balances.⁵⁵ Interpreting the Guarantee Clause as simply prohibiting monarchy would provide an easy answer to the difficult questions these prior scholars have tackled. But defining republican government as a government that is not a monarchy, and nothing more, would be inconsistent with the Supreme Court's precedent that the Clause protects certain procedural elements of federalism.⁵⁶ A more sophisticated understanding of the Clause analyzes this question: given that republican government guarantees a government of the people, who constitutes "the people"?

Akhil Amar describes this inquiry as the "denominator problem."⁵⁷ The denominator problem asks which majority should rule—a majority of the people of the nation or a majority of the people within each state.⁵⁸ In answering this question, Professor Amar quotes Madison as describing the

⁵⁴ Robert Smith sees republicanism as guaranteeing a government of limited powers (such as one that ensures that no wars may be declared by executive fiat, because that would make the government more like a monarchy). ROBERT W. SMITH, *KEEPING THE REPUBLIC: IDEOLOGY AND EARLY AMERICAN DIPLOMACY* 4–5 (2004).

⁵⁵ Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1562 (1988). Sunstein writes:

Moreover, the systems of checks and balances, bicameralism, and federalism responded to the central republican understanding that disagreement can be a creative force. National institutions were set up so as to ensure a measure of competition and dialogue; the federal system would produce both experimentation and mutual controls. In all of these ways, the Constitutional framework created a kind of deliberative democracy, including Madisonian representation at the national level, safeguards against factionalism and self-interested representation, and opportunities for local self-determination through the federal system.

Id.

⁵⁶ See *infra* Part II.C.

⁵⁷ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 *U. COLO. L. REV.* 749, 750 (1994) [hereinafter Amar, *The Central Meaning of Republican Government*]. He argues:

Of course, participants in these Constitutional debates disagreed about a good deal—fiercely enough, at times, to wage civil wars—but these disagreements only prove my point, for different sides argued *within* the central meaning [of republican government], not *against* it. And without more, the central meaning of Republican Government left some big issues unresolved and up for grabs. Exactly who were "the People," a "majority" of whom could lawfully alter or abolish constitutions? I shall call this deep and recurring question "the denominator problem."

The denominator problem arose in many contexts, along many axes. Were adult women part of the Republican People—the polity? What about unpropertied adult males? How about free black men? Should "the People" be understood as the people of each state, or of the United States as a whole?

Id. (footnote omitted). But see Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 *OHIO N.U. L. REV.* 467 (2007) (providing an analysis of Amar's disagreement with the Electoral College system). While Amar discusses the national popular vote movement in his argument against the Electoral College, he does not address constitutional issues with the legislation such as the Compact Clause or the Guarantee Clause. *Id.* It should be noted that Amar is a prominent proponent of NPV legislation. Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution: Part Three of a Three-Part Series on the 2000 Election and the Electoral College*, *FINDLAW.COM*, Dec. 28, 2001, <http://writ.news.findlaw.com/amar/20011228.html>.

⁵⁸ Amar, *The Central Meaning of Republican Government*, *supra* note 57, at 767.

new government as “neither wholly *national* nor wholly *federal*.”⁵⁹ Therefore, any argument that NPV legislation is republican because it still allows for majority vote fails to consider the complexity of Guarantee Clause issues. However, even if the Guarantee Clause means more than not-a-monarchy, the argument could still be made that the Clause does not apply to the national government.

B. The Guarantee Clause Guarantees a Republican National Government

In asking whether the NPV legislation violates the Guarantee Clause, an important question is whether the guarantee of a republican government refers to a republican national government. This Comment argues it does.⁶⁰ First, the text of the Guarantee Clause does not distinguish between national and state republican government, so it should apply to the national government and not just the states. The Clause guarantees “republican government,” not “republican state government.” This textual argument is simple, yet many people might be misled by misreading the text. For example, if someone reads the Guarantee Clause as analogous to the proposition that “the United States shall guarantee to every state apples,” it is clear that the states, not the nation, get the apples. However, a more apt analogy would be that “the United States should guarantee to every state happiness in government.” This hypothetical promise would be violated just as much by a sad national government as a sad state government.

Additionally, historical evidence points to the fact that the national government is meant to be just as republican as the state governments. Alexander Hamilton in *The Federalist No. 73* wrote:

If a magistrate, so powerful and so well fortified as a British monarch, would have scruples about the exercise of the power under consideration, how much greater caution may reasonably be expected in a president of the United States, clothed for the short period of four years with the executive authority of a government *wholly and purely republican*?⁶¹

⁵⁹ *Id.* at 768.

⁶⁰ It is important to note that the promise of republican government might produce different results on similar issues regarding whether state or national procedures violate the Guarantee Clause. For example, direct democracy at the state level may or may not violate the guarantee of republican state government, but direct democracy at the national level, such as a national referendum, almost certainly violates the Guarantee Clause. This difference stems from the fact that there is a compound republic at the national level, which demands respect for certain elements of process federalism (like a federally elected President). See *infra* Part II.C. Wholly intrastate procedures (like a governor elected by the entirety of the state instead of a majority of the people within state districts, for example) do not touch on any aspect of process federalism as a part of the compound republic and would not raise the same Guarantee Clause issues.

⁶¹ THE FEDERALIST NO. 73 (Alexander Hamilton) (emphasis added).

Further, consensus existed among the Whigs that both the state and national government needed to be republican.⁶²

The historical evidence is not, however, conclusive. One could argue that the Framers provided for a republican national government simply through the structure created in the Constitution and did not intend for the Guarantee Clause to apply to the national government. There is also an argument that the Guarantee Clause was prompted by Shay's Rebellion,⁶³ which concerned a state insurrection. Additionally, one of the concerns prompting the Guarantee Clause was providing a source of federal power over state affairs to ensure republican state government.⁶⁴

This sketchy historical evidence should not detract from the plain reading of the text of the Guarantee Clause on this issue. While this Comment argues that the precise meaning of "republican government" is unclear, the question regarding whether the Guarantee Clause protects republican national government is distinct from the question regarding whether the Guarantee Clause protects process federalism or a federally elected President. One question concerns the reach of the Clause's protection and the other concerns the substance of that protection. There is a clear textual answer that the Guarantee Clause applies to the national government but not a clear textual answer for the question concerning whether the Guarantee Clause encompasses elements of federalism. Additionally, it is logical that there is little reference to the Guarantee Clause protecting republican national government when the Framers probably anticipated that the government they created in Articles I, II, and III was already republican. As such, the Framers did not conceive of the possibility that a minority of states could drastically alter how the federal structure works by legislation.

Finally, even if the Guarantee Clause applies only to state government, the necessary state governmental action required to adopt NPV legislation falls under the Guarantee Clause. Thus, even if the Guarantee Clause is inapplicable to acts by the federal government that render the national government unrepublican, it might still apply to acts by state governments that impede the republican nature of the national government. Moreover, by enacting NPV legislation, state governments are acting in a nonrepublican manner towards other states, and this state action violates the Guarantee Clause.⁶⁵ Because the text of the Guarantee Clause provides for republican

⁶² WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 12 (1972). "Madison repeatedly urged national intervention in state affairs to preserve the rights of the people and the form of republican government." *Id.* at 56.

⁶³ *Id.* at 50.

⁶⁴ *Id.* at 56; *see also infra* Part II.C (offering more historical evidence that the Framers intended our national government to be a compound republic).

⁶⁵ *See* Bruce G. Peabody & Scott E. Grant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 622–23 (1999) ("[I]nsofar as the states indirectly, through the electoral college, elect the President of the United States, one might conclude that a purposeful effort to substitute another person for the President-elect undermines the Clause's guaran-

national government, it is important to analyze what exactly is meant by republican government at the federal level.

C. *Compound Republic at the National Level*

Historical evidence and academic commentary support the premise that the U.S. government is a compound republic.⁶⁶ Consequently, the source of the government's power flows from many different cross-cuts⁶⁷ of the people via our federal system. History shows that republican government came to encompass the principles of separation of powers and procedural federalism at the time of the Framing. While a republican government is often described in terms of what it is not, prior to the Framing of the Constitution, the definition moved beyond the meaning of "not-monarchy."⁶⁸ The desire for a republican government prompted John Adams to advocate for a "mixed" Constitution with a separation of powers.⁶⁹ For Adams, republican government was necessary in order to provide a check on democracy.⁷⁰ The Framers feared "simple" government—direct democracy—and preferred a representative government with a separation of powers.⁷¹

Aside from the separation of powers, another important aspect of the new republican government was federalism. Prompted by Montesquieu's warning against large republics, the Framers devised a federal republic to

tee of a republican form of government. Understood in this way, the Clause may be read not only to provide a 'guarantee' to the individual states, but also to forbid constituting the federal government in a manner that conflicts with the principles of a republican government."). Peabody and Grant ultimately conclude that violation of the Twenty-Second Amendment would not violate republican principles. *Id.* at 623.

⁶⁶ By "compound republic," this Comment means a federal government that incorporates the principles of federalism and separation of powers.

⁶⁷ This Comment uses the term "cross-cut" to describe how the federal system divides the populace into different sections for the purpose of elections. For example, representatives are elected by districts within each state, and senators are elected by the entire state.

⁶⁸ WIECEK, *supra* note 62, at 73 ("Necessity, as much as inclination, forced the new states and their confederation to adopt nonmonarchical and non-aristocratic forms of government. Montesquieu had taught and most Americans concurred that in a confederation, which the new nation plainly had to be, all component governments should be republican. This meant that the American empire was to be republican throughout. But the transforming effects of the American revolution were immediately at work to replace the negative meaning of 'republican' with something else, positive and forward looking.").

⁶⁹ Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 834 (2002). Natelson notes that the most obvious meaning of "republic" is a government that is not a monarchy because people hold the power, although he does not adopt this limited, negative definition. *Id.* at 822–28, 855–56.

⁷⁰ *Id.* at 834.

⁷¹ WIECEK, *supra* note 62, at 21. Wiecek does discuss tensions with the idea that republicanism includes separation of powers given that states like Nebraska have been allowed to adopt unicameral legislatures. *Id.* at 27. *But see id.* at 62–63 (discussing how the Guarantee Clause was not meant to prohibit state experimentation with governmental structures as long as the experimentation was responsive to the popular will).

address this concern.⁷² The Framers felt that a federal republic would provide the greatest amount of harmony among the people of the new, diverse nation, and they also stressed the importance of each state respecting its neighbors in a federal republic.⁷³ Thus, historical evidence during the Framing of the Constitution points to the fact that the Framers intended the government to be a compound republic.

James Madison's defense of the new Constitution in *The Federalist Papers* also reveals that the United States is a "compound republic" in which procedural federalism plays an important role. The authors of *The Federalist Papers*, Hamilton and Madison, had a "split personality" regarding the definition of a republic.⁷⁴ Hamilton described republican government in *The Federalist No. 22* simply as a maxim which "requires that the sense of the majority should prevail."⁷⁵

In contrast to Hamilton, Madison's exposition of republican government in *The Federalist No. 10* differentiates a republic from a simple democracy.⁷⁶ Madison described the danger of factions in a pure democracy, but said that in a republic, a scheme of representation requires the "delegation of the government . . . to a small number of citizens elected by the rest."⁷⁷ This delegation of governmental powers to a small body of citizens would operate as a "medium" for public views and protect republican government from factionalism.⁷⁸ Madison additionally described the common error of equating republican government with simple democracy in *The Federalist No. 14*.⁷⁹ In answering an attack that the United States was too large to have a republican government, Madison countered that republican government should not be conflated with a democracy.⁸⁰

⁷² M.N.S. SELLERS, AMERICAN REPUBLICANISM 173–74 (1994).

⁷³ *Id.* at 174. Stewart Goodwin also argued that this American vision of a compound republic was influenced by Montesquieu's analysis of Greece's city-states and his belief that "small units constituted the optimally governable state. . . . The danger from powerful bureaucracies could be minimized if these units would be republics in the classic sense of participatory government." CHARLES STEWART GOODWIN, A RESURRECTION OF THE REPUBLICAN IDEAL 36 (1995).

⁷⁴ WIECEK, *supra* note 62, at 63–64.

⁷⁵ THE FEDERALIST NO. 22 (Alexander Hamilton). In seeking to understand the meaning of republican government, this Comment focuses upon Madison's descriptions of republicanism rather than Hamilton's. First, as explained earlier in this Part, the negative definition of "republic" as something that is not a monarchy is not helpful in answering any of the important questions about what a republic is. Given that a republic calls for the source of the power to flow from the people, see WIECEK, *supra* note 62, at 65, rather than a monarchy, dictatorship, or aristocracy, a negative definition fails to answer the question of who "the people" are. See generally Amar, *The Central Meaning of Republican Government*, *supra* note 57. Second, Madison played a large role in the creation of the Guarantee Clause, whereas Hamilton was not involved. WIECEK, *supra* note 62, at 64.

⁷⁶ THE FEDERALIST NO. 10 (James Madison).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ THE FEDERALIST NO. 14 (James Madison).

⁸⁰ *Id.* Madison again contrasted democracy to representative republic in *The Federalist No. 48*. THE FEDERALIST NO. 48 (James Madison).

Not only did Madison clarify that a republican form of government called for some positive principle like representation, he also contrasted “single republics” with “compound republics” in *The Federalist No. 51*.⁸¹ He described how, in compound republics, power is first divided between the federal government and the states, and then divided among different branches of government at each level.⁸² This division provides “double security” for people’s rights because the different levels of government check each other in a manner similar to the separation of powers.⁸³

Madison further argued for the importance of creating a compound republic by dividing the nation into separate states: “to guard one part of the society against the injustice of the other part . . . by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.”⁸⁴ He explained that this division of the people into federal units in the compound republic would break society into “so many parts, interests, and classes of citizens, that the rights of individuals or of the minority, will be in little danger from ‘interested combinations of the majority.’”⁸⁵ Thus, “[t]his view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government.”⁸⁶ In *The Federalist No. 62*, Madison additionally referred to the new government as a “compound republic, partaking both of the national and federal character.”⁸⁷ He specifically contrasted a compound republic with a “simple republic,” where there is an “improper consolidation of the States.”⁸⁸

The Constitution created a compound republic by way of a federal system.⁸⁹ Many scholars, noting Madison’s emphasis on a compound republic, have argued that republican government encompasses some elements of process federalism.⁹⁰ Deborah Jones Merritt is probably the most vocal

⁸¹ THE FEDERALIST NO. 51 (James Madison).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ THE FEDERALIST NO. 62 (James Madison).

⁸⁸ *Id.*

⁸⁹ Quotes from the time of the Framing of the Constitution also support the proposition that the Guarantee Clause protects state sovereignty. At the Pennsylvania ratification convention, Jasper Yeats said of the Clause, “[T]o assure us of the intention of the framers of this Constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th article that ‘the United States shall guarantee to every State in this Union, a republican form of government.’” Jonathon K. Waldrop, Note, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 275 (1999).

⁹⁰ John Maynor wrote that the federal representative system was viewed by many Framers as safeguarding the liberty of our republican government. JOHN W. MAYNOR, REPUBLICANISM IN THE MODERN WORLD 152–53 (2003). G. Edward White, in arguing against the proposition that republican

scholar arguing that the Guarantee Clause protects procedural elements of federalism. She writes that the Guarantee Clause secures state autonomy and limits federal interference with state government.⁹¹ Merritt views the Guarantee Clause as protecting states' autonomy over their own lawmaking procedures. Specifically, she suggests republican government requires state control over the franchise,⁹² the structures of state governments,⁹³ the qualifications for state office,⁹⁴ and the wages of state employees.⁹⁵ But the Guarantee Clause only protects state autonomy regarding the procedural aspects of state government, so it does not bar preemptive federal regulations of private activity through substantive legislation.⁹⁶

This Comment generally agrees with Merritt's argument that the Guarantee Clause limits federal interference with state government. However, federal interference is not the only way that state autonomy may be infringed. If a state sought to legislate for or control another state's government, then state autonomy could be infringed even though the federal government was not the violator.

Additionally, protection of state autonomy over lawmaking procedures is not entirely distinct from the basic notion that republican government cannot be a monarchy. A monarchy or dictatorship cannot be republican because a government should represent and be accountable to the people it governs, so the source of the government's power must flow, directly or indirectly, from the people. When one state's autonomy is infringed by the federal government or another state, the people of that state are deprived of accountable and representative government. Instead, their government is being controlled not by the people within the state it operates upon, but by a government accountable to the nation as a whole or to the people of another state. The source of their government's power is no longer the people

government simply means majority rule, similarly described the principle underlying our Constitution as "federated constitutional republicanism." G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 794–95 (1994). Philip Pettit further discussed the importance of dispersion of power, both through separation of powers and federalism, in republican governments, where power should be decentralized. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 178–79 (1997).

⁹¹ Merritt, *supra* note 48, at 22–23.

⁹² *Id.* at 36. Merritt explains:

Control over the franchise is a hallmark of republican government. Montesquieu observed that "it is as important to regulate in a republic, in what manner, by whom, to whom, and concerning what suffrages are to be given, as it is in a monarchy to know who is the prince, and after what manner he ought to govern." James Madison echoed this thought, declaring in *The Federalist* that "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government." In order to establish a government responsive to its electorate, a state must first define that electorate.

Id. (footnotes omitted).

⁹³ *Id.* at 40.

⁹⁴ *Id.* at 50.

⁹⁵ *Id.* at 55–56.

⁹⁶ *Id.* at 59.

within the state. This analysis also shows why one state infringing upon federal autonomy could also violate the Guarantee Clause. If one state sought to control the federal government, then this control would deprive the nation's people of a government that represents them. Instead, the source of the power of the federal government would flow just from the state that controlled the federal government. The Guarantee Clause protects against these mismatches between the sources of a government's power and the operation of that government's power.

Therefore, while Merritt's analysis is an excellent start toward understanding important principles for republican government, it is important to understand the link between state autonomy and the republican aversion to monarchy. This link suggests that protecting only state autonomy against federal infringement would not guard against all potential antirepublican schemes. A state that infringes upon the autonomy of another state, or even the federal government, would also violate republican principles.

III. APPLYING REPUBLICAN PRINCIPLES TO THE NPV QUESTION

Applying the republican principles developed in Part II to the NPV issue reveals that NPV legislation violates the Guarantee Clause for two reasons. First, section A argues presidential power specifically flows from a majority of the people *within each state*.⁹⁷ Thus, the guarantee of a republican form of government protects the federal election of the President in the absence of a constitutional amendment. This section also analyzes the impact this interpretation of the Guarantee Clause might have on other state practices concerning the Electoral College, such as districting.

Second, not only would the resulting national vote from NPV legislation violate the Guarantee Clause because it blurs important federal lines in our compound republic, employing state statutes as a means to make this change would also violate the Guarantee Clause. Section B explains why allowing a handful of states to move to a popular vote by statute contravenes important structural aspects of our federal system, such as the maxim that no state shall legislate for another state. Additionally, placing no limits on state power over electors would introduce the dangerous potential of an eleven-state superstate. This superstate could make the remaining thirty-nine states irrelevant in the presidential election.⁹⁸

A. *Compound Republics and Federally Elected Presidents*

This Comment argued in Part II that the Guarantee Clause provides for a compound republican government at the national level. This section argues that an important element of our compound republic is a federally elected President in which the source of the President's power flows from

⁹⁷ See *infra* Part III.A.

⁹⁸ See *supra* Part I.

the people of *each state*. Thus, NPV legislation violates the Guarantee Clause by blurring important state lines in our compound republic.

I. The Source of the President's Power.—The Guarantee Clause promises a compound republic where respect for our federal system is important. However, “compound republic” is still a vague term, and it is not apparent on its face that it relates to a federally elected President. Madison’s *The Federalist No. 39*, entitled “The Conformity of the Plan to Republican Principles,” is the most thorough exposition on what republican government means.⁹⁹ In it, Madison establishes that a critical aspect of the compound republic is the federal election of the President.¹⁰⁰

Madison draws a distinction between the *source* of a government’s power and the *operation* of a government’s power.¹⁰¹ He writes:

In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn[;] to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.¹⁰²

The distinction between source and operation of power is important because, although the President’s power may operate nationally, it is federally derived.

In describing the *source* of the Constitution’s power, Madison differentiates “national” acts from “federal” acts. For example, he describes how the Constitution will not be adopted by a national act, but by a federal one, because ratification of the Constitution requires a majority of the people within each state rather than an aggregate majority of the people in the nation.¹⁰³ Madison then analyzes the “sources from which the ordinary powers of government are to be derived.”¹⁰⁴ He discusses how the House of Representatives derives its powers from the people of the nation, and that “the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is *national*, not *federal*.”¹⁰⁵ The Senate, on the other hand, which derives its powers from the States, is “*federal*, not *national*.”¹⁰⁶

⁹⁹ THE FEDERALIST NO. 39 (James Madison).

¹⁰⁰ *Id.* But see Carol Nackenoff, *Constitutional Reforms to Enhance Democratic Participation and Deliberation: Not All Clearly Trigger the Article V Amendment Process*, 67 MD. L. REV. 62, 72–73 (2007) (providing a good summary of the opposing view that the Framers did not put much thought into the Electoral College process).

¹⁰¹ THE FEDERALIST NO. 39 (James Madison).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

After describing how the source of power in the House is national and the Senate is federal, Madison explains the compound nature of the source of presidential power:

The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.¹⁰⁷

Thus, although the *operation* and *extent* of the powers of the President are national,¹⁰⁸ the *source* of the President's power is federal—the people mediate their will through their states. Madison's analysis brings us back to the denominator problem.¹⁰⁹ With respect to presidential elections, the answer to Amar's denominator question is that a majority of the people within states govern via the Electoral College. Thus, presidential elections are federal in nature. Switching to a popular vote by enacting a statute in a handful of states deprives the rest of the nation of the compromises the Framers struck between a confederate system and a national system in creating a compound republic.¹¹⁰ It ignores the fact that the source of the President's power is not a majority of the people in the nation but instead a federal majority.

2. *Implications for Other State Practices in Choosing Electors.*—Critics may argue that the historical state practice of districting is inconsistent with the concept that the Guarantee Clause precludes NPV legislation. But this Comment's interpretation of the Guarantee Clause—that a federal election of the President is a protected element of the compound republic—is consistent with the practice of subdividing states into electoral districts. Most states employ a winner-take-all approach, where the winner of the statewide presidential vote takes all of the presidential electors.¹¹¹ However, Maine and Nebraska divide their states into smaller geographic districts,

¹⁰⁷ *Id.* Although Madison describes the President's power as part national and part federal, this Comment refers to the status quo process as a "federal election" of the President. The term "federal election" is simpler than "part-federally-part-nationally" elected President, and it emphasizes the contrast with a national popular vote.

¹⁰⁸ *Id.*

¹⁰⁹ See Amar, *The Central Meaning of Republican Government*, *supra* note 57, at 750.

¹¹⁰ One could rebut that NPV legislation operates within our federal framework because states could simply undo their decision to enact NPV legislation by statute as well. However, because NPV legislation affects even states that have not adopted it, this argument is unavailing.

¹¹¹ Bennett, *supra* note 4, at 241.

with electors representing each district awarded to the winner of the district-wide vote.¹¹² Additionally, popular election of the President, even in the form we have today where the popular election is mediated through the Electoral College, was not contemplated by the Framers.¹¹³ Instead, the Framers envisioned the state legislatures picking wise electors who would debate rather than just rubber-stamp the popular vote in the state.¹¹⁴

Although the practice of Maine and Nebraska, along with the Framers' original vision of the Electoral College, appears to suggest that states should have unbridled discretion in choosing their electors,¹¹⁵ the practice of smaller geographic districting within states and the original vision of the Electoral College significantly differ from popular vote legislation. An exercise of state discretion to assign electors according to geographic districts does not have the effect of systematically altering the influence of other states in the election of the President. In fact, a state's decision to switch to smaller geographic districts in allotting its presidential electors *reduces* its influence vis-à-vis other states.¹¹⁶

In contrast, states adopting NPV legislation affect the influence of the remaining states systematically and against their will. First, a movement to a national popular vote erases the advantage that small states gain from the fact that the number of electors each state receives is its number of senators plus its number of representatives.¹¹⁷ Second, the key distinction between electoral districting and NPV legislation is that NPV legislation changes the way the President is elected for *the entire nation*. A minority of states should not have the power to drastically alter the governmental structure

¹¹² *Id.* California is considering a move to the district approach. Bennett, *supra* note 26, at 82.

¹¹³ ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 15 (2006).

¹¹⁴ *Id.* This Comment takes no position on whether the move to have the electors essentially rubber-stamp the state popular vote violates any principle of representation inherent in republican government.

¹¹⁵ This Comment does not deny that states have considerable discretion concerning presidential electors, although it does argue that states are not free to use that discretion to switch the entire nation to a national popular vote by state statute in a handful of states.

¹¹⁶ Bennett, *supra* note 26, at 82. This reduction is the primary motivation for Republicans in California to move to districting. *Id.* at 83. Bennett explains:

Most congressional districts in California, as elsewhere in the country, have been produced by political gerrymandering and hence are themselves characterized by a decided political tilt. At best, selecting electors in district elections would induce campaigning only in the small number of competitive congressional districts, not in the state as a whole. Even that increase in campaigning would be quite modest, moreover, as small competitive winner-take-all states (New Hampshire, with four electoral votes, might be an example) would represent considerably bigger electoral college prizes than any one California district. And the large swing states would continue to represent far more attractive campaign grounds than California.

Id. at 82–83.

¹¹⁷ U.S. CONST. art. II, § 1, cl. 2. Even if this advantage is minor, it is granted by the Constitution.

because the source of the President's power flows from every state in our federal system.¹¹⁸

This analysis shows why other state approaches to appointing electors are not unconstitutional under this Comment's interpretation of the Guarantee Clause, even if the result of these practices made presidential elections *look* a lot like a national election. For example, if *every state* switched to electoral districting or allocated their electors proportionally with respect to the percentage of the vote a candidate won in that state, presidential elections might resemble national elections. But the key distinction under these schemes is that states are still making their decisions independently and as states. With NPV legislation, a handful of states are choosing to make state lines irrelevant for the remainder of the states. Of course, some might argue that a minority of states already have power to control elections in our present system. For example, a President can reach 270 electoral votes in any election without winning a majority of the states. But NPV legislation allows the enacting states to control every single presidential election indefinitely, or until they repeal the legislation. This permanent control is different in kind from the idea that, in any given election, some states will have the fortune of voting for the winner while others will not.¹¹⁹

Electoral districting is not the only alternative to NPV legislation or winner-take-all approaches to the Electoral College. Creative states could adopt reforms sending their electors automatically to the winner of the Republican nomination, the winner of a coin flip, the tallest nominee, or only someone from the Bush, Clinton, or Kennedy families. Or states could adopt a one-state, one-vote reform which would determine the winner of the vote within each state and then send their electors to the candidate that won twenty-six or more states. States could also combine with others to create superstates. Analyzing the constitutionality of each of these reforms is beyond the scope of this Comment, but this Comment does suggest that the central question in each of these cases should be whether the reforms infringe upon key principles of our compound republic and practically prevent dissenting states from voting independently.

B. The Means Employed by NPV Legislation

Additionally, NPV legislation violates the Guarantee Clause because of the means it employs to bring about a national election. When a handful of states enact NPV legislation, and if that legislation becomes operative, these states are effectively legislating for every other state. This section analyzes the structural principle that no state shall legislate for another state, or more appropriately, no governmental unit shall legislate for another governmental

¹¹⁸ See *infra* Part III.B for further discussion of the structural argument against allowing a minority of states to dictate to the rest of the nation the process for electing the President.

¹¹⁹ See Muller, *supra* note 35, at 390–93 (explaining why NPV legislation removes the ability of dissenting states to appoint electors as they see fit).

unit absent a grant of power. This principle is republican in nature and should be grounded in the Guarantee Clause. Not only does this principle reveal a flaw in NPV legislation, it can be applied beyond NPV legislation to explain many foundational constitutional cases concerning federalism.

I. No State Shall Legislate for Another State.—The principle that no state shall legislate for another state, or that no governmental unit shall legislate for another governmental unit, can be derived from the Guarantee Clause’s protection of state autonomy explained in Part II. It could be argued that the Guarantee Clause’s protection of state autonomy does not apply to the elements of procedural federalism as they relate to the federal election of the President. This would be a misconception of the Guarantee Clause. The reason the Guarantee Clause protects process federalism is because the *source* of the power of state governments flows from the *people of the states*, not the people of the nation.¹²⁰ Therefore, the people of the nation should not be able to interfere with a state’s government absent a constitutional grant of power. Similarly, the source of the President’s power is the federal election.¹²¹ NPV legislation represents an infringement on the autonomy of the dissenting states by the enacting states, which is just as important as Congress infringing state governmental power. In this respect, the underlying Guarantee Clause issue concerning the source of the power is the same because both situations concern interference with state autonomy.

The idea that a minority of states can dictate the process for electing the President violates the idea that “no State may legislate for another State.”¹²² Justice Thomas, in his *Thornton* dissent, argued that it would be unconstitutional for any state to impose additional qualifications for the office of President through its power over its electors.¹²³ He explained that one state imposing additional qualifications on the office of President would involve that state in legislating for other states. The republican prin-

¹²⁰ Merritt, *supra* note 48, at 23–25 (explaining how republican government requires that the government’s power be derived from the people and how the Guarantee Clause therefore promises each state a state government based upon popular control by the citizens of that state).

¹²¹ *See infra* Part III.A.

¹²² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting) (“[A] State has no reserved power to establish qualifications for the office of President Even though the Arkansas Legislature enjoys the reserved power to pass a minimum-wage law for Arkansas, it has no power to pass a minimum-wage law for Vermont. For the same reason, Arkansas may not decree that only Arkansas citizens are eligible to be President of the United States; the selection of the President is not up to Arkansas alone, and Arkansas can no more prescribe the qualifications for that office than it can set qualifications for Members of Congress from Florida.”). Although Thomas was dissenting in *Thornton*, his analysis of the idea that no state shall legislate for another state was dicta and not the reason the majority disagreed with him. See *supra* note 32 and the accompanying text for an explanation of why Thomas’s dissent on this point might have predictive value.

¹²³ 514 U.S. at 861 (Thomas, J., dissenting).

ciples discussed in Part II justify the principle that no state shall legislate for another state and show why it should be grounded in the Guarantee Clause.

The principle that one governmental unit should not legislate for another implicates the Guarantee Clause given the importance of the *source* of governmental power inherent in republican government.¹²⁴ For example, if the source of the power of the national government flows from the people of the nation, then the people of Maryland should not be able to control it. Similarly, if the source of the power of New York's government flows from the people of New York, then the people of the nation should not be able to control it.¹²⁵

Like the fact that a state cannot legislate for another state by adopting legislation that prescribes additional qualifications for the office of President,¹²⁶ states should not be able to legislate for other states concerning a change from the federal election of the President. Even the majority in *Thornton* stressed the need for a constitutional amendment to implement important changes in the constitutional framework.¹²⁷ Bringing about a national popular vote of the President violates the maxim that no state shall legislate for any other state as much as states adopting additional qualifications for the President. It also represents as fundamental a change in the government's structure as imposing term limits on Congress through state statute.

Professor Bennett recognizes the potential for states enacting the NPV legislation to put pressure on dissenting states to adopt similar legislation or make their presidential candidate preferences irrelevant.¹²⁸ He ultimately dismisses any federalism concern about the move to a popular vote because the Electoral College has changed in the past without drastically altering our federal system.¹²⁹ However, his analysis only covers the practical impact the movement to a popular vote would have on federalism.¹³⁰ His analysis does not analyze the *means* by which the nation moves to a popular vote, whether through constitutional amendment or state statute. Thus, his

¹²⁴ See *supra* Part II.A.

¹²⁵ Of course, if there is a specific grant of power in the Constitution to the federal government, then the federal government would be able to control state governments on that issue.

¹²⁶ States adding qualifications for President could be seen as falling under the "plenary power" of states in choosing electors just as much as sending their electors to the national winner.

¹²⁷ 514 U.S. at 837 ("We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would *effect a fundamental change in the Constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V.*" (emphasis added)).

¹²⁸ Bennett, *supra* note 4, at 245 ("In the presidential context, on the other hand, a very few states have the capacity dramatically to tilt the entire system toward direct election. The appeal to reformist zeal could prove tempting.")

¹²⁹ BENNETT, *supra* note 113, at 58.

¹³⁰ *Id.*

argument that NPV legislation raises no federalism concern does not address the fact that the move would come about by a handful of states forcing the entire nation into a popular vote and therefore provides no response to the argument that states enacting NPV legislation are legislating for other states.

Beyond *Thornton*, the principle that no state shall legislate for another is similar to structural arguments found in several other Supreme Court cases. In *McCulloch v. Maryland*, the Court held that Maryland could not tax the Bank of the United States.¹³¹ The Court reasoned that Maryland could not interfere with the national government's exercise of power.¹³² Similarly, in *New York v. United States*, the Supreme Court held that the "Take Title" provision of the Low-Level Radioactive Waste Policy Amendments Act was unconstitutional because Congress could not directly force state legislatures to adopt certain legislation.¹³³ Finally, in *Printz v. United States*, the Court invalidated part of the Brady Handgun Violence Prevention Act because the national government could not commandeer state chief law enforcement officers.¹³⁴

While these three decisions, along with Thomas's discussion in *Thornton*, involve disputes between the states and the federal government, the cases still espouse the structural mandate that no governmental unit can legislate for another governmental unit. Although these three decisions do not rely on the Guarantee Clause to reach their holdings, applying the Guarantee Clause's principle that no governmental unit shall legislate for another could justify and explain the results in these cases.

Thus, this Comment posits an interpretation of the Guarantee Clause that explains and justifies the results in important cases like *New York*, *Thornton*, *Printz*, and *McCulloch*. The Guarantee Clause prevents one governmental unit from legislating for another governmental unit because doing so would undermine our compound republic. Accordingly, the national government cannot legislate for New York by forcing it to adopt take-title legislation, and states cannot legislate for the nation or for other states by bootstrapping the nation into a national election.

2. *An Eleven-State Superstate*.—The potential for an eleven-state superstate shows the degree to which a minority of states could practically legislate for other states. It also supports the argument that there must be

¹³¹ 17 U.S. (4 Wheat.) 316, 436–37 (1819) (Marshall, J.). *McCulloch* is also important because it shows that, in order to protect the autonomy of federal or state governments, a practical standard for judging when autonomy is infringed is necessary. Thus, while Maryland did not force Congress to adopt any unwanted legislation, the practical effects of its tax undermined federal autonomy. Similarly, although states dissenting from NPV legislation are not forced to adopt any legislation against their will, their electoral choices are nullified as other states practically legislate for them.

¹³² *Id.* at 432–33.

¹³³ 505 U.S. 144, 149, 177 (1992).

¹³⁴ 521 U.S. 898, 935 (1997).

some constitutional limit concerning state power over electors that requires respect for the autonomy of other states. As previously described, a state tired of being ignored in presidential elections could combine with another state to create a superstate, and the two states would then send their electors to the winner of their superstate's vote. If the second state was of opposite partisan leanings, then the new superstate would be a swing state and receive more campaign attention.

Jennings Wilson recognizes the concern that states might abuse this ability and "freeze-out" other states.¹³⁵ However, Wilson still argues that states have plenary power to form superstates in any manner they see fit.¹³⁶ He finds the possibility that eleven states could form a superstate, making the remaining thirty-nine states irrelevant in presidential elections, concerning, but does not consider it an insurmountable problem.¹³⁷

Wilson suggests that states should have a triggering provision requiring the superstate to send their electors to the winner of the national vote as soon as the superstate nears collecting 270 electoral votes.¹³⁸ There are two significant flaws with his assumption that the triggering provision would adequately protect the interests of dissenting states. First, the triggering provision would be a function of state *statute* that participating states enact as a courtesy to dissenting states. A voluntary *statute* does not safeguard *constitutional* rights, and there must still be a *constitutional* standard that is protected. Second, Wilson never addresses how "close" the superstate would have to get to 270 electoral votes in order to trigger the superstate to send its electors to a national vote. As discussed in Part I, electoral reform in just a couple of states could have a large effect on the rest of the nation.¹³⁹ Therefore, Wilson's arguments fail to justify the constitutionality of NPV legislation. Once it is determined that NPV legislation violates the Guarantee Clause, the question remains regarding which branch of government has the power to declare it unconstitutional.

¹³⁵ Wilson, *supra* note 11, at 387 ("The last states to hold out (after the bloc grew to 270 or more electoral votes) would be completely frozen out of the presidential election. Their citizens' votes would, as a pre-ordained legal certitude, be unable to affect the outcome.").

¹³⁶ *Id.* at 401. In response to the idea that such a superstate would violate the Equal Protection Clause, Wilson writes:

[A]n argument along these lines is weak because the fact that one group of states can "lock up" the outcome of an election is more a product of the electoral college than of any state law or laws. Also, there is no legal precedent for inter-state equal protection claims. Successful equal protection claims have always been brought by citizens being disadvantaged vis-à-vis other citizens of their own state. The proposed reform would treat all eligible voters of any given enacting state equally.

Id. at 387. Wilson does not address the Guarantee Clause.

¹³⁷ *Id.* ("However, the freezing out of citizens because of the decision of their state not to join the bloc, for which they bear no responsibility, does seem a patent unfairness.").

¹³⁸ *Id.*

¹³⁹ See discussion *supra* notes 22–25 and accompanying text.

IV. JUSTICIABILITY OF CHALLENGES TO NPV LEGISLATION

Even if it can be agreed that NPV legislation violates the Guarantee Clause, the question regarding which branch of the United States government should enforce that guarantee still exists. Section A analyzes the text of the Guarantee Clause and argues that the judicial branch should enforce the Clause. Section B analyzes Supreme Court precedent to show that challenges to process federalism issues do not implicate the political question doctrine. Section C discusses various scholarly critiques of the use of the political question doctrine to argue that the promise of republican government will be a dead letter if the Judiciary does not enforce it. Finally, section D argues that prudential considerations militate against relegating enforcement of the Guarantee Clause to the political branches rather than the Judiciary.

A. *Text of the Guarantee Clause*

The text and placement of the Guarantee Clause suggest that all three branches of the federal government have a duty to enforce it. First, the provision provides that the “United States shall”¹⁴⁰ guarantee a republican form of government, *not* that the “United States Congress” or “United States Executive” shall guarantee republican government. Second, the placement of the Guarantee Clause in Article IV is highly suggestive that it is not a matter for just the Legislative or Executive Branch to enforce. If the political branches were meant to be the only departments that interpreted the Clause, it would have been placed in Article I or II.¹⁴¹ This is consistent with Justice Harlan’s view of the Guarantee Clause’s justiciability in his *Plessy v. Ferguson* dissent:

Such a system is inconsistent with the guarantee given by the Constitution to each state of a republican form of government, and may be stricken down by congressional action, *or by the courts in discharge of their solemn duty to maintain the supreme law of the land*, anything in the Constitution or laws of any State to the contrary notwithstanding.¹⁴²

Martin Redish also argues that the text and placement of the Clause support its justiciability, and the presence of a republican government is a “constitutional fact” especially appropriate for judicial resolution.¹⁴³ Thus, the text and placement of the Guarantee Clause both strongly support the idea that it is not a political question. As the next section reveals, Supreme Court precedent also confirms the argument that the Guarantee Clause may not always be a political question.

¹⁴⁰ U.S. CONST. art. IV, § 4.

¹⁴¹ WIECEK, *supra* note 62, at 77.

¹⁴² 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) (emphasis added).

¹⁴³ Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1040–41 (1984).

B. Baker v. Carr Factors

Supreme Court jurisprudence concerning the Constitution's guarantee of a republican form of government is meager due to the fact that the Clause is often dismissed as a political question.¹⁴⁴ However, cases implicating the Guarantee Clause are not *always* nonjusticiable political questions because there is a difference between substantive and procedural questions.¹⁴⁵ Thus, certain procedural aspects of federalism might be justiciable and protected under the Guarantee Clause. This section first discusses why NPV legislation might be justiciable under current doctrine, and then it explains why it should be justiciable.

Supreme Court jurisprudence has distinguished between procedural and substantive Guarantee Clause issues.¹⁴⁶ The Supreme Court has held that Guarantee Clause issues are nonjusticiable political questions when plaintiffs attempt to challenge the substance of a law. A substantive challenge focuses upon the merits of a law, while a procedural challenge focuses upon the process by which that law was enacted. Procedural challenges will often stem from the means used to enact legislation, while substantive challenges generally stem from the results of that legislation. However, where a statute impacts the process for enacting future laws or governing elections, for example, the result of that statute implicates procedure and not substance. For example, a procedural challenge might argue that redistricting is not republican while a substantive challenge might argue that the death penalty is not republican.¹⁴⁷ In *Luther v. Borden*, Martin Luther asked the Court to determine the legitimate government of Rhode Island after Dorr's Rebellion.¹⁴⁸ The Court declined to declare a winner, stating that it was for Congress to "decide what government is established in the State."¹⁴⁹ Moreover, at least one interpretation of the holding in *Minor v. Happersett* is that deciding whether denying women the right to vote violated the Guarantee Clause is a substantive question for Congress to decide.¹⁵⁰ Finally, in *In re Duncan*, the Court rejected a challenge by a murderer arguing that his death sentence was unrepugnant as a substantive decision inappropriate for the Court.¹⁵¹

Although the Court has rejected cases making substantive challenges under the Guarantee Clause, the Court has found cases bringing process

¹⁴⁴ See, e.g., *New York v. United States*, 505 U.S. 144, 184–85 (1992).

¹⁴⁵ See *supra* Part I.B.

¹⁴⁶ Waldrop, *supra* note 89, at 267.

¹⁴⁷ See *supra* note 38 and the accompanying text for a further discussion concerning procedural versus substantive issues.

¹⁴⁸ 48 U.S. (7 How.) 1, 28 (1849). Dorr's Rebellion involved a violent effort designed to overthrow the charter government of Rhode Island. *Id.* at 29.

¹⁴⁹ *Id.* at 42.

¹⁵⁰ See 88 U.S. (21 Wall.) 162, 178 (1874); see also Waldrop, *supra* note 89, at 286–90.

¹⁵¹ 139 U.S. 449, 461–62 (1891).

challenges justiciable. In *Texas v. White*, the procedural issue concerning whether Texas should be admitted back into the union was justiciable.¹⁵² Despite *Texas v. White*, however, the Court in *Pacific States Telephone & Telegraph Co. v. Oregon* used broad language in holding that “[i]t was long ago settled that enforcement of this guaranty belonged to the political department.”¹⁵³ But the Court in *Pacific States*, which was hearing a challenge to direct democracy¹⁵⁴ under the Guarantee Clause, framed the issue in the case as much larger than whether the initiative process violates the Guarantee Clause.¹⁵⁵ The Court instead framed the issue as whether the entire government of the state was republican.¹⁵⁶ If the Court found that the initiative process was un-republican, then it said the entire government of the state would be un-republican and illegal.¹⁵⁷ Under this view, the Court reasoned that it could not declare an entire government illegal because it did not have the authority to rebuild an entire state government.¹⁵⁸ Given the way the Court framed the issue in *Pacific States*—by asking whether the entire government was illegal—it is unsurprising that the Court dismissed the case as a political question.¹⁵⁹ However, a court reviewing the constitutionality of NPV legislation has no need to rebuild an entire state government. Instead, the court could simply invalidate the NPV statute.¹⁶⁰

There are other reasons to doubt the idea that the Supreme Court will *always* find that Guarantee Clause cases raise political questions. First, one possible interpretation of *Baker v. Carr* is that courts should apply the *Baker* factors¹⁶¹ on a case-by-case basis to determine whether the specific issue under the Guarantee Clause raises a political question.¹⁶² Second, in *New*

¹⁵² 74 U.S. (7 Wall.) 700, 719–20 (1868).

¹⁵³ 223 U.S. 118, 149 (1912).

¹⁵⁴ This Comment uses the term “direct democracy” to refer to lawmaking through initiative or referendum.

¹⁵⁵ 223 U.S. at 141–43 (reasoning that striking down state acts as the product of an un-republican government would empower courts to declare state governments illegal and further finding that allowing a court to fill this role would, in itself, deprive the nation of a republican form of government).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 141.

¹⁵⁸ *Id.* at 142 (“[A]s a consequence of the existence of such judicial authority, a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one.”).

¹⁵⁹ See William T. Mayton, *Direct Democracy, Federalism & The Guarantee Clause*, 2 GREEN BAG 2d 269, 274–77 (1999).

¹⁶⁰ The Court in *Pacific States*, logically, could also have claimed the smaller power to invalidate any laws passed by initiative and found the direct democracy issue justiciable. However, just because the *Pacific States* Court framed the issue so broadly does not mean that analogous issues like NPV legislation must similarly be framed so broadly.

¹⁶¹ See *infra* notes 166–167 and accompanying text.

¹⁶² 369 U.S. 186, 217 (1962) (setting forth the standards for when cases raise political questions). Waldrop argues just this. Waldrop, *supra* note 89, at 288. Although the *Baker* Court found the Guarantee Clause issue in that case nonjusticiable, it did find the equal protection issue justiciable. Justice Frankfurter, dissenting, argued that the equal protection claim was just a “Guarantee Clause claim, mas-

York v. United States, Justice O'Connor's majority opinion expressed doubts about applying the political question doctrine to the Guarantee Clause, citing decisions where the Court reached the merits of Guarantee Clause cases and scholarly criticism of applying the political question doctrine.¹⁶³ Therefore, Supreme Court political question jurisprudence does not necessarily foreclose judicial review of the Guarantee Clause.¹⁶⁴ As *Reynolds v. Sims* put it, only "some" Guarantee Clause issues are nonjusticiable—those issues that lack judicially manageable standards and are political in nature.¹⁶⁵

Thus, Guarantee Clause questions require a two-pronged analysis. First, courts need to ask whether the issue is substantive or procedural. If it is substantive, then Supreme Court jurisprudence indicates that it is probably a political question. Second, if the issue is procedural, then courts should apply the standards from *Baker*.¹⁶⁶ *Baker* established six standards to use in determining whether a case touches on a political question: (1) a textual commitment of the issue in the Constitution to another branch; (2) a lack of judicially manageable standards for resolution; (3) the impossibility of deciding the case without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of respect due to coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potential for embarrassment

quering under a different label," and that there was no reason to treat them differently. *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting).

¹⁶³ 505 U.S. 144, 184–85 (1992) ("We approach the issue with some trepidation because the Guarantee Clause has been an infrequent basis for litigation throughout our history. . . . The view that the Guarantee Clause implicates only nonjusticiable questions has its origin in *Luther v. Borden* This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. More recently, the Court has suggested that not all claims under the Guarantee Clause present nonjusticiable political questions. Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.").

¹⁶⁴ See *supra* Part II.C.

¹⁶⁵ 377 U.S. 533, 582 (1964). Perhaps William T. Mayton best described why the Guarantee Clause has not been put to death by the political question doctrine:

Accepting *Pacific States* on its own strange terms, the most that that case established is that the Clause presents too big a question to federal courts when they are asked to destroy a state as a state. Outside that implausible context (as several state courts have held and as the modern Supreme Court has indicated), the Clause had not been established as categorically non-justiciable. Thus, for political question purposes Guarantee Clause issues should be treated like any other constitutional issue, with a court applying ordinary *Baker v. Carr* standards . . . to determine justiciability. By these standards, the Guarantee Clause generally should be justiciable, as it was in *Hoxie v. Brewer* in 1956, when a federal district court found that an attempt at mob rule by white supremacists over a school board intent on desegregation was not a part of republican government (which elevates the rule of law over anarchy).

Mayton, *supra* note 159, at 276–77 (footnotes omitted).

¹⁶⁶ *Baker*, 369 U.S. at 217.

from multifarious pronouncements by various departments on one question.¹⁶⁷

None of the six *Baker* concerns apply to a judicial determination of the Guarantee Clause implications of NPV legislation. There is no textual commitment of this issue to another branch,¹⁶⁸ nor is there any unusual need for “unquestioning adherence” to a political decision already made.¹⁶⁹ It could be argued that Article II, Section 1 of the Constitution—providing for state appointment of electors—is a textually demonstrable commitment to the states concerning all constitutional issues surrounding the appointment of presidential electors. This argument fails for two reasons. First, at most, it would be a textually demonstrable commitment to allow states to interpret *that provision*, not the Guarantee Clause. Second, it would be very difficult to textually commit interpretation of a constitutional provision to fifty different states. States are likely to have conflicting interpretations of that provision, and the Supreme Court would need to be the arbiter to resolve those conflicts. If the Supreme Court, for example, refused to resolve a dispute between states regarding proper interpretation of the Guarantee Clause, this refusal would negate the dissenting states’ interpretation of the Clause.

Additionally, the Equal Protection or Due Process Clauses provide for no more judicially manageable standards than those provided by the Guarantee Clause. There is also no need for an initial policy determination regarding the desirability of a move to a national popular vote in order for the Court to decide the issue of whether NPV legislation violates the Guarantee Clause.¹⁷⁰ Finally, invalidation of the legislation would be no different than any other exercise of judicial review over state legislation, precluding any multifarious pronouncements on the question. Thus, if the Guarantee Clause political question issue were revisited under the *Baker* factors, a case challenging the constitutionality of the NPV legislation under the Guarantee Clause should be justiciable.

C. Prudential Effects

Not only is the Judiciary an appropriate branch to determine whether NPV legislation is constitutional, the likely prudential effects of applying the political question doctrine reveal that the Judiciary is the best branch to make the determination. If the Supreme Court heard a challenge to NPV

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* Part IV.A.

¹⁶⁹ The decisions by a handful of states to adopt NPV legislation do not implicate this factor, for invalidating NPV legislation is just a normal act of judicial review.

¹⁷⁰ See discussion *supra* Parts III–IV. This Comment does not analyze whether a valid constitutional amendment switching the nation to a national popular vote would be desirable. To determine that NPV legislation violates the Guarantee Clause, a court need only look to the history of the Clause and the structure of our compound, federal republic.

legislation and decided the issue, political fallout and criticism of the Court's decision might arise, especially if it was a 5–4 decision. The fallout might be similar to the criticism that was targeted at the Court after the 2000 election when the Court “elected” George W. Bush.¹⁷¹

However, the fallout resulting from a *judicial* determination would probably not even approach the extent of the fallout if the Supreme Court declared the issue a political question. Imagine, for example, if the Supreme Court had declared *Bush v. Gore*¹⁷² to be a political question and held that *Congress* should be the branch to determine whether or not there should be a recount in Florida. A congressional decision to halt a recount, just like a congressional decision to reject the NPV legislation on Guarantee Clause grounds, may be viewed by the public as much more political and much less legitimate than a Supreme Court decision. Alternatively, the Court might decide that the issue of NPV legislation is a political question for state governments to determine, which could result in fifty different conflicting decisions concerning the constitutionality of NPV legislation and provide an even less satisfactory resolution than throwing the matter to Congress.

Finally, Erwin Chemerinsky has pointed out that declaring the Guarantee Clause a political question essentially nullifies the promise of a republican form of government because the political branches do not enforce it.¹⁷³ Ann Althouse responds to Chemerinsky, arguing that judicial enforcement of the Guarantee Clause would empower a small minority of politically motivated individuals.¹⁷⁴ However, even if one finds her argument convincing,¹⁷⁵ it does not apply to the specific issue of whether the NPV legislation violates the Guarantee Clause. Far from empowering an “extreme and zealous subgroup of the electorate,”¹⁷⁶ a judicial determination that popular vote legislation is unconstitutional would *protect* a majority of states from a tyranny of the minority that seeks to make the choice for the entire nation that the President should be elected nationally by simple state statute.

¹⁷¹ See, e.g., ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001).

¹⁷² 531 U.S. 98 (2000).

¹⁷³ Chemerinsky, *supra* note 51, at 875–76.

¹⁷⁴ Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 885–86 (1994).

¹⁷⁵ If the Constitution is viewed as countermajoritarian, then empowering minority groups is probably not very problematic. Additionally, her concerns about judicial review are probably not unique to the Guarantee Clause and would apply just as much to other constitutional provisions, like the First or Fourteenth Amendments.

¹⁷⁶ Althouse, *supra* note 174, at 886.

CONCLUSION

Because the Framers created a compound republic, the guarantee of a republican form of government in the Constitution provides protection for certain aspects of process federalism. An integral part of this compound republic is the manner of electing the President provided for by the Constitution—a federal election whereby the voice of the people is mediated through the states and the Electoral College.

Additionally, the fact that states have extensive discretion over the manner of choosing their electors does not mean they have the unbridled discretion to move to a national popular election of the President by statute. NPV legislation violates the structural principle that no state should legislate for any other state. Placing no constitutional limit on state power over electors also creates the dangerous potential for eleven states to form a superstate and render the remaining thirty-nine states irrelevant in the election of the President. The limitations the Guarantee Clause provides against these results are desirable. Imagine if, instead of using their power over electors to adopt NPV legislation, a handful of states adopted reforms that dictated that their electors automatically go to the winner of the Republican nomination, the winner of a coin flip, the tallest nominee, or only someone from the Bush, Clinton, or Kennedy families. Such statutes would certainly not be seen as constitutional.

Not only does the Guarantee Clause limit states' power over their electors, and specifically their ability to enact NPV legislation, it is a justiciable question. In light of the text of the Clause, Supreme Court political question jurisprudence, the prudential effects of declaring the issue a political question, and scholarly criticism of the application of the political question doctrine to Guarantee Clause cases, the Judiciary is the appropriate branch to make the determination that a move to a national election of the President should occur only through a valid Article V constitutional amendment.

