

## INTERSTATE AGREEMENT FOR ELECTORAL REFORM

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### I. INTRODUCTION

This Article will consider how an interstate agreement pursuant to Article I, Section 10 of the U.S. Constitution could provide a sub-constitutional legal alternative to the much-debated and oft-maligned political mechanics of the Electoral College system. The current gloss on the Compacts Clause and the Supreme Court jurisprudence relating to interstate agreements may make it possible for a number of states to come together to obviate the Electoral College without resort to constitutional amendment. More modestly, investigating how this might be so provides an opportunity for applied analysis of the under-scrutinized field of interstate agreements, which may prove useful as states employ experimentalist and cooperative strategies to meet challenges that span state lines. Before exploring this legal terrain, it serves to explore the political and strategic preconditions for such an effort.

With every close presidential contest, the pitch of the debate regarding the electoral process seems to increase, as attackers and defenders of the current system explore questions of democratic process and legitimacy at the wholesale level, and present mixed theoretic and empirical arguments as to group strategic benefits at the retail level.<sup>1</sup>

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1. For a defense of the electoral college, see generally JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975); ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1971); ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* (1994). The attacks against the Electoral College have been numerous. See, e.g., *Proposals for Electoral College Reform: Hearing before the Subcommittee on the Constitution on H.J. Res. 28 and H.J. Res. 43*, 105th Cong. 9 (1997)

Supporters of the Electoral College argue that the system guarantees a truly national presidential race by giving an increased voice to otherwise vulnerable small states, reflecting the values of federalism important to the Framers.<sup>2</sup> Such arguments, though familiar to civics class alumni, have become increasingly deconstructed and discredited in recent years by the system's critics.<sup>3</sup>

While it now seems that the weight of scholarly analysis goes against the Electoral College system, the victory for the critics is hollow. In defiance of the old adage, the critics have shown us why we should have the *will*, but have been surprisingly uncreative and defeatist as to the *way* to reform the current system.<sup>4</sup> The traditional refrain is: The Electoral College stinks, but we're stuck with it until a super-majority's worth of people catch the smell and push through a constitutional amendment.<sup>5</sup>

This Article will focus on one potential *way* in which Electoral College reform can be achieved without resort to the cumbersome and glacially slow process of constitutional amendment. Using a multilateral

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[hereinafter *Subcommittee Report*] (H.J. Res. 28) (discussing a proposed amendment to the Constitution to "abolish the Electoral College and provide for the direct popular election of the President and Vice President"); Paul Boudreaux, *The Electoral College and its Meager Federalism*, 88 MARQ. L. REV. 195 (2004); Akhil R. Amar, *The Electoral College, Unfair From Day One*, N.Y. TIMES, Nov. 9, 2000, at A23; Vikram D. Amar, *The 2004 Presidential Election and the Electoral College: How the Results Debunk Some Defenses of the Current System*, FINDLAW, Nov. 12, 2004, <http://writ.news.findlaw.com/amar/20041112.html> [hereinafter Amar, *Debunking Defenses*].

2. Or, at least, to the compromise that was made at the time of the framing. For these types of arguments supporting the institution, see HARDAWAY, *supra* note 1, at 163 (asserting that "to many reformers," the arguments of would-be reformers simply represent "a convenient fig leaf for their true agenda: to abolish the Electoral College and undermine the principles of federalism"). Also, Fuentes-Rohwer and Charles frame the issue of presidential election as a difficult choice in our attempt to balance competing norms of democracy and federalism. Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Law of Presidential Elections: Issues in the Wake of Florida 2000*, 29 FLA. ST. U. L. REV. 879, 922 (2001).

3. Amar, *Debunking Defenses*, *supra* note 1; Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2549 (2001) [hereinafter Note, *Rethinking the Electoral College*] (systematically addressing and debunking various supposed strategic and federalist justifications of the Electoral College and concluding that "[a]rguments based on the Framers' federalist visions . . . cannot withstand empirical scrutiny"); Boudreaux, *supra* note 1, at 246 ("Today's electoral mathematics work without any coherence."). *But see* HARDAWAY, *supra* note 1, at 141-60 (systematically deconstructing a number of the more popular alternative proposals and the logic behind them).

4. Robert Bennett also suggests that, "[t]he way seems reasonably clear to a popular vote for President if the will is there." Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 141, 149 (2002) [hereinafter Bennett, *State Coordination*].

5. This assumption is illustrated well in Fuentes-Rohwer & Charles, *supra* note 2, at 881-82 ("[A]bolishing the College would ultimately necessitate a constitutional amendment, a particularly onerous and generally difficult exercise . . .").

interstate agreement, a critical mass of states may be able to obviate the Electoral College system in favor of a national popular vote to decide the presidency. If a group of states that represents greater than 270 Electoral College votes were to agree to cast their votes to the winner of the national popular election, the Electoral College would become functionally irrelevant to the process of presidential selection.<sup>6</sup> While this idea has been presented previously, until recently it has been done only in passing, without full consideration of the current legal regime governing interstate compacts.<sup>7</sup> Further, little attention has been given to the questions of *whether* and *why* states would have any interest in pursuing and honoring such a pact, and how strategic obstacles could be overcome.

The lack of detailed consideration of the law of interstate agreements and compacts, vis-à-vis electoral reform, results perhaps from a general scholarly disinterest in the law of interstate compacts. This scholarly vacuum may, in turn, exist because the jurisprudence of the Interstate Compact Clause has demonstrated a surprising lack of precision, which in turn has begotten a capacious, and perhaps even cavalier, approach to this field that seems to ignore entirely concerns of horizontal federalism. This Article will therefore explore if, and how,

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6. Of course, it would remain as the procedural, if ceremonial, modality of presidential selection, and this may be an important and even decisive factor in an external constitutional challenge to the plan. *See infra* Part III.

7. The general idea has been presented in Akhil R. Amar & Vikram D. Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW, Dec. 28, 2001, <http://writ.news.findlaw.com/amar/20011228.html> [hereinafter Amar & Amar, *Direct National Election*]; Bennett, *State Coordination*, *supra* note 4; Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 241, 243-44 (2001). Since the writing of this Article, a multi-state movement along the lines considered in this Article has gained momentum, a lengthy book has been published, and both scholarly and news observers have taken note. *See generally* JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (2006) (proposing interstate compact method turning on national popular vote); Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARVARD J. ON LEGIS., 205 (2007) (reviewing the National Popular Vote proposal, its attempts at legislative reform, and its potential effects upon presidential political dynamics); Jennings Wilson, *Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way*, 5 ELEC. LAW JOURNAL 384 (2006) (suggesting bloc voting method whereby states agree to cast vote according to popular vote of bloc member states); *Drop Out of the College*, N.Y. TIMES, March 14, 2006, at A26 (describing the Electoral College as an "antidemocratic relic" and praising the efforts of the National Popular Vote organization). Very recently, the National Popular Vote organization has enjoyed legislative success. As of May 2007, forty bills inspired by the organization have been introduced in state legislatures, two bills have passed both state houses, and one bill, that of Maryland, has been signed by the Governor and entered into law. *See* <http://www.nationalpopularvote.com>; George Skelton, *In Voting to End Electoral College, Maryland Dares to Go Where Schwarzenegger Wouldn't*, L.A. TIMES, Apr. 12, 2007, at Metro 3.

the neglected law of interstate agreements might make possible an ambitious change in electoral politics.<sup>8</sup>

Part II treats briefly the background strategic effects and trends of the current Electoral College system before outlining and detailing the contours of the proposed interstate compact. While this Article proceeds largely from the standpoint of an assumption that electoral reform is desired, a brief treatment of the relevant strategic insights is of considerable help in understanding the viability of the plan from the standpoint of political economy and likely congressional response. Part III reviews the history and shape of the current law surrounding the Interstate Compact Clause, tracing the major case developments of recent decades. Part IV considers how the current proposal might interact with the law and scholarship of interstate agreements, particularly under the assumption of congressional silence. It also considers potential legal responses to the plan and the substantial obstacles, both with respect to enforcement and external challenges.

## II. ELECTORAL POLITICS AND THE OUTLINE OF A WAY OUT

### A. *Electoral Morass and Formulaic Chance*

Since the passage of the Twelfth Amendment in 1804, there have been hundreds of attempts to radically change or abolish the Electoral College system.<sup>9</sup> Further, in the wake of the 2000 election, which produced a “wrong” winner—where the candidate that won the popular vote loses the election as a consequence of capturing less electoral votes—and the 2004 election, which threatened to produce another “wrong” winner, the calls for reform have only intensified.<sup>10</sup> Of course,

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8. The Constitution states: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .” U.S. CONST. art. I, § 10, cl. 3. For a brief discussion of preconstitutional interstate compacts, see PAUL T. HARDY, *INTERSTATE COMPACTS: THE TIES THAT BIND* 3-4 (1982); Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 296-98 (2003) (discussing the problems regarding interstate compacts under the Articles of Confederation and framing the Interstate Compact Clause as the obvious and direct response to such problems). Further, it is at the capacious functional compact regime since *U.S. Steel* that Greve levels his penetrating critique. *Id.* at 377-79; *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978). For the full treatment of this case and the attendant Compact Clause analysis, see *infra* Parts II and III.

9. *Subcommittee Report*, *supra* note 1, at 4 (statement of Mr. Scott of Virginia). The pair of resolutions printed and discussed in the House report is one such example, and it should be noted that those resolutions typify the form of the traditional debate, as they are proposals for constitutional amendment. *Id.*

10. See Fuentes-Rohwer & Charles, *supra* note 2, at 879-80 (discussing the possibility of a

the controversy engendered by divergent, or “wrong” outcomes is not entirely surprising. It is in these situations that the Electoral College is most conspicuous, as it is only in this situation that the Electoral College is unequivocally outcome determinative. While in other cases the election may be influenced by the strategic dynamics of the system, it is only in the case of divergence that the Electoral College system clearly changes the outcome from what the popular vote would have otherwise dictated. And while popular vote winners have failed to win the presidential election only four times in American history,<sup>11</sup> with the 2000 election burning in recent memory, and the 2004 election a divergence near-miss,<sup>12</sup> the specter of a “wrong winner” looms. In these conditions, the premises of the arguments in support of the Electoral College are scrutinized more carefully; inertia of tradition and fear of change will not carry the day.<sup>13</sup> While a complete and detailed analysis of the Electoral College system is outside the scope of this Article, insofar as an analysis of the dynamics of Electoral College voting informs our understanding of the strategic choices facing potential

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“wrong winner” and citing DAVID W. ABBOTT & JAMES P. LEVINE, *WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE* 1-20 (1991)). Representative LaHood characterized the phenomenon of divergence as a “potentially huge, looming political crisis.” *Subcommittee Report*, *supra* note 1, at 14. Further, Akhil Amar has questioned whether such a “loser/winner” would “be seen as legitimate at home and abroad[.]” *Subcommittee Report*, *supra* note 1, at 51. *See also* Amar, *Debunking Defenses*, *supra* note 1 (arguing that we should not tolerate “any possibility of electoral ‘inversion’” and using the possibility of a divergence between the popular and the electoral vote winner as a principal argument against the electoral college system) (emphasis added). In 2001, *Harvard Law Review* noted that “A Lexis search in the New York Times and Washington Post databases for articles that feature the term ‘electoral college’ at least three times yields more articles from September 1, 2000, to April 1, 2001 (169 articles), than from the fifteen years prior to September 1, 2000 (137 articles).” Note, *Rethinking the Electoral College*, *supra* note 3, at 2526 n.3. Interestingly, this trend has only increased. From April 1, 2001, to Jan. 5, 2005, the term “electoral college” appeared in those two publications a combined 341 times.

11. In the 1824, 1876, 1888, and 2000 elections. Note, *Rethinking the Electoral College*, *supra* note 3, at 2526 n.2.

12. President Bush won both the popular vote and the Electoral College vote. Bush received 50.73% of the popular vote to Kerry’s 48.27%. FED. ELECTION COMM’N, 2004 PRESIDENTIAL POPULAR VOTE SUMMARY (2005), available at <http://www.fec.gov/pubrec/fe2004/tables.pdf>. Bush prevailed in the Electoral College vote 286 to 251. FED. ELECTION COMM’N, 2004 ELECTORAL VOTE DISTRIBUTION (2004), available at <http://www.fec.gov/pubrec/fe2004/presmaps.pdf>. Had Kerry taken Ohio, he would have won the election, 271 to 266. He lost in Ohio by 118,599 votes. *See* FED. ELECTION COMM’N, 2004 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS (2005), available at <http://www.fec.gov/pubrec/fe2004/2004pres.pdf>. *See also* Koza, *supra* note 7 at 16 (noting, if [fifty-nine thousand Bush voters in Ohio had switched in 2004, Kerry would have won the election).

13. *Subcommittee Report*, *supra* note 1, at 51 (statement of Akhil R. Amar) (attacking “[i]nertial, Burkean arguments”). For an argument that urges wary walking, see BICKEL, *supra* note 1, at 2-3 (urging that “political reformers must in any case proceed with caution,” and that there are “great virtues in a conservative attitude towards structural features of government”).

parties to our interstate compact, such analysis is both useful and necessary.

Civics class wisdom has it that the Electoral College system expresses values of federalism by encouraging candidates to vie for small states because those states are disproportionately represented by virtue of the two votes that each state receives under the Senate add-on feature of the Electoral College.<sup>14</sup> Yet, modern analysis shows that the “significant but largely unpredictable large-state advantage in the winner-take-all feature of the electoral college [sic] . . . generally dominates the [small-state] Senate add-on bias.”<sup>15</sup> Under the regime of winner-take-all, an individual voter in a large state has the ability to control more electoral votes than a corresponding voter in a small state, and thus exerts more electoral power.<sup>16</sup> One therefore observes a number of electoral dynamics in tension with one another. Any search for decisiveness or certainty with regards to systemic advantages and disadvantages will demonstrate that the one clear insight is that *nothing* is clear or certain.<sup>17</sup>

Yet, irrespective of the systematic effects of the current system vis-à-vis large or small states, rural or urban states, labor votes, Blacks, Jews, Italians, suburban shoppers, or metrosexuals,<sup>18</sup> one thing is clear: Unit voting, in which the margin of victory in a given state is irrelevant, discourages, if not prevents, candidates from collecting votes in clearly sympathetic states and from combating large deficits in hostile states.<sup>19</sup> These incentives guarantee that it is far better to be a swing state than a

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14. *Subcommittee Report*, *supra* note 1, at 11 (statement of Rep. Hyde) (“The notion of an arithmetic winner . . . strikes at the very heart of the compromises that put this country together back in 1789 and 1787.”).

15. Note, *Rethinking the Electoral College*, *supra* note 3, at 2537-38.

16. See generally John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968) (demonstrating how a single voter from a large state has a far greater chance of affecting the outcome). See also Koza, *supra* note 7, at 22. (“[T]he two-vote bonus established by the Constitution to enhance the influence of the small states exists today in *form*; however, the nearly unanimous use by the states of the winner-take-all rule robs these bonus electoral votes of any political *substance*.” This view has not enjoyed unequivocal support, though, and recent elections may make the situation murkier. See Boudreaux, *supra* note 1, at 221 (“Recent history, moreover, has not been kind to the assumption that the Electoral College aids voters in large states.”).

17. See HARDAWAY, *supra* note 1, at 142 (noting that any proposal based “perceived” advantages “to one group or another” is problematic because “demographics and political views change over time”).

18. These are some of the demographics isolated for example in Boudreaux, *supra* note 1, at 227, and HARDAWAY, *supra* note 1, at 142. See generally Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 ARIZ. ST. L.J. 743 (2003) (analyzing the politics and political economy of the rural vote and concluding that “rural dwellers have disproportionately little political voice”).

19. See Boudreaux, *supra* note 1, at 226-27.

state that is not “in play.”<sup>20</sup> Large but non-competitive states such as California, Texas, New York, Illinois, and Massachusetts are thus underserved relative to large but competitive states such as Florida, Pennsylvania, Ohio, Michigan, and Wisconsin.<sup>21</sup> While it is these larger swing states that inspire the most attention, it should be clear that the same logic should obtain for smaller states: Nevada will attract more attention than Idaho, Arkansas more attention than Mississippi. And insofar as the needs and interests of voters in competitive states are considered and addressed more completely than those in non-competitive states—an eminently reasonable assumption—we can begin to understand why the numerous non-swing states on *both* sides of the political divide might consider an alternative regime.

Before turning to the details of one such alternative, it is necessary to highlight one other important dynamic that currently obtains in presidential politics. Not only has divergence been a worrisome possibility,<sup>22</sup> but it has been quite unclear (both before and after the election!) which candidate would benefit from such divergence.<sup>23</sup> While Democrats were able to vilify the system which gave them the popular vote but not the presidency in 2000, it could have quite easily been the Republicans sounding the same refrain. Further, this pervasive uncertainty will continue as long as the relative presidential political parity between the two parties continues, and as long as our choice for President is the product of “formulaic chance.”<sup>24</sup>

The above analysis demonstrates that there is no way for any state

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20. See *id.* (noting that this dynamic “may result in neglect” of non-competitive states); Note, *Rethinking the Electoral College*, *supra* note 3, at 2544 (noting that while the electoral college encourages candidates to visit small swing states, it also “encourages them to ignore entire regions that one party controls, such as the Republican-dominated Deep South, Great Plains, and mountain states in the 2000 election”) (citing Simendinger et al., *Pondering a Popular Vote*, 32 NAT’L J. 3650, 3653 (2000), for a breakdown of candidate campaign efforts).

21. See Boudreaux, *supra* note 1, at 226-27 (“[C]itizens in states with a strong leaning to one candidate . . . may find that the nominees give them little attention during the campaign.”); Dotty Lynch, *Don’t Look Back*, CBS News, Apr. 12, 2001, available at <http://www.cbsnews.com/stories/2001/04/12/politics/main285366.shtml> (“What convoluted system caused Bush and Gore to virtually ignore the voters in four of the six most populous states – California, Texas, New York and Illinois – and spend so much time and money in Washington and Wisconsin?”). This distortion is also evidenced by the disparate sums of money spent in “battleground states.” “[O]f the \$237 million spent on advertising during the last month of the Presidential campaign, 72% was spent in five states (Florida, Ohio, Iowa, Wisconsin, and Pennsylvania.” Chang, *supra* note 7, at 218 (citing Koza, *supra* note 7, at 9-10).

22. See notes 9-10 and accompanying text.

23. See Note, *Rethinking the Electoral College*, *supra* note 3, at 2540-41 (noting that Al Gore could just have easily won the Electoral College while losing the popular vote); Amar, *Debunking Defenses*, *supra* note 1 (noting the same for the 2004 election).

24. Boudreaux, *supra* note 1, at 196.

or any group of states to know whether they benefit systematically from the Electoral College system. This is important, because this uncertainty may very well be the strategic precondition for any broad-based bipartisan interstate agreement. To see why this is so, an example may help. If Texas were disaffected with its comfortable and irrelevant place in the electoral pockets of the Republican Party,<sup>25</sup> and committed to cast its votes with the winner of the popular election, it would presumably boost its relevance by putting its considerable population as a numerator in the entire national denominator. Yet, it would realize that, most likely, the only case in which this scheme would *affect the outcome* of the election is where there is indeed a divergence between the popular and electoral winner.<sup>26</sup> In such an instance, if the Republican candidate were the popular vote leader and the Electoral College loser, Texas would do nothing differently—it would cast its votes for the Republican candidate, as it would have done anyway, though it would do so while watching Democratic-party states (identically bound) grudgingly give their electoral votes to Texas's favored candidate. But if the inverse outcome occurred, and the Democratic candidate won the popular vote but trailed in the electoral vote,<sup>27</sup> Texas would be forced to commit its votes to its disfavored candidate and thereby decide the election against its substantive preference. If we presume that substantive outcome trumps the niceties of platform reform as a matter of state strategy, we might expect that the chance of such a loss by a state's own hand would bar agreement. But in conditions of *uncertainty*, where it is quite unclear to whose benefit a divergence would inure, we might expect the likelihood of both divergence outcomes to cancel one another out, leaving only issues of campaign and platform reform as motivating concerns.

At this point one might ask: if a state wants to “put itself in play,” why would it not unilaterally move to distribute its electoral votes by district, eschewing the all-or-nothing approach for a proportional system?<sup>28</sup> After all, wouldn't this be the path of least resistance in making candidates fight for one's proxied interests? It seems the

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25. Texas has voted for the Republican candidate in eight of the last nine presidential contests. See Kelvin Pollard, *Presidential Elections: Swing States and Bellwethers*, Population Reference Bureau, PRB, Oct. 2004, <http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=11708>.

26. This is apart from the general, diffuse effect that the change in electoral tactics might have on the election as a whole.

27. As occurred in the 2000 election.

28. Nebraska and Maine, for example, already employ district voting, and Colorado has also considered such a change. See Pollard, *supra* note 25.

obstacles to such a move are two-fold. First, this may be akin to unilateral disarmament, asking a state to reduce its overall clout vis-à-vis other states.<sup>29</sup> Further, the governing majority of each state may not want to reduce its control of the entirety of the state's votes.<sup>30</sup> Why would Texas Republicans wish to transfer a significant portion of the electoral votes they currently control directly to the Democratic Party? It seems far more likely that they would be willing to risk this proposition in the case of divergence than that they would be willing to cede the votes as a matter of certainty. This is all the more likely if they can count on states with inverted preferences being similarly bound.

### *B. Contours of the Plan*

Because we have just considered why states might be willing to cede their Electoral College votes in favor of an interstate agreement, we can now consider the mechanics of such an agreement. Since any good plan needs a serviceable name and acronym, the plan can be termed the Electoral College Reform Agreement (ECRA). The predicate legislation of the interstate agreement could be, following the suggestion of Akhil and Vikram Amar:<sup>31</sup>

This state shall choose a slate of electors [for election of the President that is] loyal to the Presidential candidate who wins the national popular vote, if and only if other states, whose electors taken together with this state's electors total at least 270, also enact [to do the same, though this state will not be bound unless at least 100 of the initial 270 electoral votes represent states whose electoral votes went to a candidate other than the one chosen by this state in the prior election.]<sup>32</sup>

This legislation addresses two likely concerns of potential parties. It ensures that a state will sacrifice its block vote clout and pre-commit its votes in a way that risks giving the election to a disfavored candidate in favor of the national popular election only when 1) enough states have also joined so as to make the popular vote generally determinative, and 2) there is no particular party or candidate to whom the benefit of divergence is perceived as likely to repeatedly inure.

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29. Amar & Amar, *Direct National Election*, *supra* note 7.

30. Further, statewide political power may not mirror the presidential choice of a given state.

31. Amar & Amar, *Direct National Election*, *supra* note 7.

32. *Id.* See Bennett, *State Coordination*, *supra* note 4, at 147 (discussing concerns regarding political balance in contingent legislation). While I put the bipartisan figure at 100/270 here, it could probably go as high as 120 electoral votes. See *infra* notes 33, 34 and accompanying text.

While a number of permutations of potential state parties are possible, it seems safe to say that a coalition of eighteen states, seven of which traditionally favor the Democratic presidential candidate, and eleven of which traditionally favor the Republican, comprising 274 electoral votes could be established, and one such plausible grouping will form the basis of my assumption.<sup>33</sup> The states in this proposed plan are all states whose presidential politics are particularly stable.<sup>34</sup> There are no bellwether or battleground states that stand to lose much in the way of political influence and attention from the interstate agreement, an agreement that would obviate the disproportionate attention currently lavished upon such states by virtue of their current strategic significance.

Further, many of the suggested potential states party to this agreement are middle-sized states. While the Senate add-on and the all-or-nothing effects tend to advantage both big and small states (even if in sometimes unpredictable ways),<sup>35</sup> it seems that middle-sized states benefit from neither distortion.<sup>36</sup> Accordingly, these states should be particularly receptive to the idea of multilateral reform.

Before approaching the question of whether such an agreement requires consent under Article I, section 10 of the Constitution,<sup>37</sup> a few points should be addressed. First, no consideration has been given to whether the proposal would be for just one presidential cycle or whether it would be indefinite in length. Though a state might be willing to pre-commit itself to one election cycle, it might be more hesitant to commit indefinitely. Because the length of the commitment may affect (and be bound up with) the legal status of the agreement and its treatment under the Compact Clause, we will consider this question more fully below.

Two logistical issues remain as well: faithless electors and the actual tally of the national popular vote. Taking up the issue of faithless

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33. I envision CA (55); NY (31); IL (21); MA (12); WA (11) MN(10); HI (4) as the "Democratic" states, totaling 144 votes, and TX (34); GA (15); NC (15); VA (13); IA (11); AL (9); SC (8); OK (7); KS (7); MS (6); UT (5) comprising the "Republican" states, totaling 130. This would, of course, yield 18 states and 274 votes. For speculations on potential reformer states in the context of bloc voting proposal, see Wilson, *supra* note 7 at 400-01.

34. See Pollard, *supra* note 25 (cataloguing the electoral histories of various states in six recent presidential elections and describing which states are stable and secure for the respective political parties).

35. See notes 14-17 and accompanying text.

36. See Bennett, *State Coordination*, *supra* note 4, at 143 ("The states disfavored by the combination of the two-Senator bonus and the winner-take-all effect are found in the middle of the population spectrum.").

37. See *infra* Part III-IV. Both Amar & Amar and Bennett are optimistic that congressional consent is not required. See Amar & Amar, *Direct National Election*, *supra* note 7; Bennett, *State Coordination*, *supra* note 4, at 146.

electors first, it should be noted that faithless electors are no more a danger here than they are in the current regime. In both instances electors refuse to vote for that candidate to whom they are pledged. Further, faithless electors have been far more a paper tiger than anything else, as there have been only a handful of such electors in recent history,<sup>38</sup> and many states have laws prohibiting faithless electors.<sup>39</sup>

With respect to the actual tally of the national vote, there is legitimate concern regarding both overall accuracy and the potential for obstruction by disaffected states not party to the agreement. Currently, the tally of each state's popular vote is left to the state itself, which then submits the total to the archivist of the United States as part of the state's certificate of ascertainment.<sup>40</sup> Presumably, states could dispense with the popular vote as a means of choosing electors. And while even the most irate non-party state would likely prefer to keep its nose than to cut it off to spite the interstate electoral reformers, the possibility remains nonetheless.<sup>41</sup>

One method for eliminating dependence on potentially inept or recalcitrant state officials would be to set up an interstate electoral commission of some kind. Yet, the construction of an interstate commission or agency would of course leave non-party states outside its ambit, meaning that only the popular vote of the states which are parties

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38. HARDAWAY, *supra* note 1, at 50 (only seven of the 17,397 votes cast by electors between 1820 and 1980 have been cast against the choice of the elector's party). Interestingly, a Minnesota elector pledged to Kerry actually voted for John Edwards in the 2004 election. See Timothy Noah, *Against Secret Ballots: Who Was Minnesota's Faithless Elector?*, SLATE, Dec. 14, 2004, <http://slate.msn.com/id/2111077/>. Because the ballot is secret in Minnesota and no elector admitted to voting for Edwards, the identity and motivation behind this vote is currently unknown. *Id.* Yet, Edwards received all ten elector votes for Vice President as well, making it appear as though the vote for Edwards on the presidential ticket might have been a mistake. *Id.*

39. Boudreaux, *supra* note 1, at 210 n.105, 106. In the case of *Ray v. Blair*, 343 U.S. 214, 228-31 (1952), the Court held that a political party can require its elector to take a pledge to support that party's candidate. Though the Court did not reach the question of whether laws *punishing* faithless electors are constitutional, it seems that this is assumed, though even in this case, the deterrent effect could not, per se, *force* the elector to honor her pledge. HARDAWAY, *supra* note 1, at 53. Perhaps the danger in this situation is that the faithless elector would put the state in breach of its potential obligation vis-à-vis the other states party to the agreement. Insofar as this is a concern, then the analysis would track the general enforcement concerns considered in Part III and Part IV.

40. 3 U.S.C. § 6 (1948) (providing that it is the duty of the executive of each State to submit the apportionment of electors pursuant to state law to the archivist of the United States); Bennett, *State Coordination*, *supra* note 4, at 147.

41. See Amar & Amar, *Direct National Election*, *supra* note 7 (discussing this remote possibility). The authors here respond to such a possibility by tendering a proposal for independent criteria for determining the national popular vote through an interstate commission. *Id.* The possibility that a state on the losing side of a divergence might be given incentive to manipulate its vote tally also exists, though of course seems similarly unlikely.

could be calculated. First, this would mean that the referent vote tally would become the “popular vote of the states party to this agreement” rather than the overall national vote. Further, because this solution would alter the strategic calculus for the party states,<sup>42</sup> it might cause the entire agreement to become unstable. Lastly, a national commission might again impact the legal analysis of the agreement under Compact Clause jurisprudence, a point to which we will turn below. It is therefore likely that any interstate agreement would have to overcome considerable challenges of administration and implementation.

Apart from the logistical concerns are the legal questions raised by ECRA. For ECRA to be viable, it must be situated within the existing regime of interstate agreements, have a reasonable likelihood of enforceability, and survive external constitutional challenges. These considerations are discussed below.

### III. COMPACT CLAUSE HISTORY AND CURRENT POSTURE

In this Part, we will consider the history and current landscape of interstate compact jurisprudence. We will consider three landmark cases and analyze the current functional regime of vertical federalism analysis. Interestingly, while the constitutional law of interstate agreements seems in some tension with both constitutional text and insights of horizontal federalism, these weaknesses may be strengths with respect to ECRA.

#### A. *Compact History*

The use and analysis of interstate agreements and compacts predate the Constitution.<sup>43</sup> The Articles of Confederation provide, “No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”<sup>44</sup> There was much disunity under this regime and many controversies arose regarding boundary disputes, agreements with Indian tribes, and agreements between states without the consent of the Congress.<sup>45</sup> The framers of the Constitution sought to impose more uniformity in this regard.<sup>46</sup> The

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42. Presumably, either the Democratic or Republican leaning states would have a numerical advantage in this instance.

43. See ARTICLES OF CONFEDERATION art. VI

44. *Id.*

45. Greve, *supra* note 8, at 297.

46. See U.S. CONST. art. I, § 10, cl. 1.

Constitution therefore precludes states completely from entering into any treaties, alliances, and federations,<sup>47</sup> and provides that “[n]o state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .”<sup>48</sup> Thus, we have two forms of prohibition with respect to state agreements:<sup>49</sup> There is an *absolute* prohibition on treaties, alliances, and federations, and a *qualified* prohibition on agreements and compacts.

An important effort to fill in this dichotomy came with Justice Story’s *Commentaries on the Constitution of the United States*.<sup>50</sup> There, Justice Story speculated that the absolute prohibition applied to treaties “of a political character,” while the qualified prohibition applied to agreements involving the exercise of “mere private rights of sovereignty.”<sup>51</sup> Further, Story asserted that the congressional consent requirement for the latter category would “check any infringement of the rights of the national government.”<sup>52</sup> In his taxonomy, Story was over-inclusive with respect to both categories. He included treaties of cession in the category of absolute prohibition, and interstate boundary settlements within the qualified prohibition, despite ample contemporary evidence of state practice to the contrary.<sup>53</sup> This said, Story made no pretense of historical support for his claim, and admitted that his analysis was the result of speculation.<sup>54</sup> Ironically, not fifty years prior, James Madison, writing for *Publius*, made the only mention of the Interstate Compact Clause in the *Federalist Papers*, dispatching with any detailed analysis and stating that the reasons for the clause are “either so obvious, or have been so fully developed, that they may be passed over without remark.”<sup>55</sup> It was this supposed obviousness that has cast an air of uncertainty over all subsequent analysis.

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47. U.S. CONST. art. I, § 10, cl. 1.

48. U.S. CONST. art. I, § 10, cl. 3.

49. I use “agreements” here, as I do throughout, in its non-technical, constitutionally neutral form.

50. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1397 (1st ed. 1833) (in subsequent editions § 1403).

51. *Id.*; See also David E. Engdahl, *Characterization of Interstate Agreements: When is a Compact Not a Compact*, 64 MICH. L. REV. 63, 65 (1965) (discussing Story’s commentaries); Greve, *supra* note 8, at 299 (same).

52. Story, *supra* note 50; Engdahl, *supra* note 51, at 65. Though developed in further detail *infra*, it should be noted that this analysis focuses on the vertical relationship between party states and the national government, while ignoring the horizontal relationship between party states and states not party to the agreement.

53. Engdahl, *supra* note 51, at 65-66.

54. *Id.* at 65.

55. THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961).

This dichotomy between the absolute and conditional prohibitions in Article I § 10 is neither the focus of this analysis nor of modern Compact Clause jurisprudence. What *is* the essential focus of both is the dichotomy between those agreements that require congressional consent and those that do not. And while Justice Story's analysis seems largely irrelevant to this question as an analytical matter, as a historical matter, Justice Story's analysis is a crucial point of departure. To understand how, "[i]n a curious feat of judicial doubletalk, Story's distinction between 'treaties' and 'agreements or compacts' was applied to the new task of exempting all but a narrow class of 'agreements or compacts' from the requirement of congressional consent,"<sup>56</sup> one must examine the case of *Virginia v. Tennessee*.<sup>57</sup>

#### B. *Virginia v. Tennessee: Meta Historical Analysis*

In *Virginia v. Tennessee*, the two states were involved in a boundary dispute and Virginia challenged the existing agreement between them as violative of the Interstate Compact Clause on the theory that the requirement of congressional consent was unmet.<sup>58</sup> The Court noted that the language of Article I § 10 is so general and capacious as to "embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects[.]"<sup>59</sup> and thus sought to distinguish agreements "to those which the United States can have no possible objection or have any interest in interfering with," from those that "may tend to increase . . . the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States . . ."<sup>60</sup> Over the next two pages of the U.S. Reports, the Court considered this distinction and its import with help from Story's *Commentaries*.<sup>61</sup>

Specifically, the Court pointed out that Story himself noted that consent "may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."<sup>62</sup>

It seems that this comment by Story is susceptible to two readings. First, it might be considered a defense and justification of the

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56. Engdahl, *supra* note 51, at 66.

57. 148 U.S. 503 (1893).

58. *Id.* at 504.

59. *Id.* at 518.

60. *Id.*

61. *Id.* at 519-20.

62. *Id.* at 519-20 (quoting Story, *supra* note 50).

straightforward, inflexible rule requiring congressional consent. Story might be saying that this regime balances the need for control with that of efficiency by allowing for agreements *only* to which Congress consents. This is the most reasonable interpretation of this text.

Under an alternative reading, Story is implying that consent is good in some places, for some reasons, but onerous and unnecessary in others. While it is unclear which meaning the Court assumes in its quotation, it immediately follows this quote by announcing a new functional Compact Clause regime.<sup>63</sup> Thus, whether the Court took the second reading of Story's comments as authority, or whether it was simply casting about for justification, it precedes and follows its analysis of Story's *Commentaries* by stating that congressional consent is required only where such agreement may increase "the political power or influence of the states affected, and thus encroach . . . upon the full and free exercise of federal authority"<sup>64</sup> and/or the "just supremacy of the United States."<sup>65</sup> Interestingly enough, this entire analysis is actually dictum, as the Court held that congressional consent had been implied in this case.<sup>66</sup>

Far more importantly, especially for our purposes, is that this analysis may unduly ignore the *horizontal* aspect of functional federalism analysis.<sup>67</sup> The Court here seems to ask whether the power of the states is altered, but only as a proxy for how the states are affected in their relationship to the federal government. While Greve assumes that this devaluation of horizontal federalism arose simply as an accident of the facts of this case,<sup>68</sup> the Court itself may have been more circumspect. It speculated that if the political power of one of the states was noticeably enlarged in the settlement of a new boundary line, consent of Congress might be required.<sup>69</sup> Whether the Court here assumed that an enlarged state could be problematic because it will have altered its vertical relationship with the United States, or (also) because the aggrandizement of one state comes at the expense of another— an issue

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63. Greve, *supra* note 8, at 299, notes Story himself could not have favored a Compact Clause "with holes," if his concurrence in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 572 (1840), is to be believed.

64. *Virginia*, 148 U.S. at 520.

65. *Id.* at 519.

66. Greve, *supra* note 8, at 300-01; Engdahl, *supra* note 51, at 67. Though, as mentioned in these sources and as we will see below, this dictum has become an authoritative holding.

67. See Greve, *supra* note 8, at 301 (discussing and distinguishing horizontal and vertical federalism).

68. *Id.*

69. *Virginia*, 148 U.S. at 520.

of horizontal federalism,—is not totally clear from the opinion itself, but it is important to our evaluation of our interstate agreement, since ECRA could create changes in the relative influence of both member and non-member states.<sup>70</sup>

C. U.S. Steel: *Enshrinement of Vertical Federalism Analysis and End of Consent*

The next landmark case relevant to our inquiry converted the dictum of *Virginia v. Tennessee* into a constitutional holding. *U.S. Steel v. Multistate Tax Commission*<sup>71</sup> arose as a class action challenge to the Multistate Tax Compact. The compact, which languished in committee before ultimately dying without congressional consent, established a standing Multistate Tax Commission with regulatory and judicial authority to determine rules for evaluating tax obligations and arbitration for settlement of disputes.<sup>72</sup> This said, the compact permitted, in Article X, parties to withdraw by enacting a repealing statute—absent such provision, states are prevented from withdrawing unilaterally from an interstate compact.<sup>73</sup> Further, the pact did not authorize the member states to do anything they could not otherwise do in its absence.<sup>74</sup>

Urged by Appellants to abandon the *Virginia v. Tennessee* rule that became a holding in *New Hampshire v. Maine* one year prior,<sup>75</sup> the Court again affirmed its functional approach and refused to return to a literal reading to the Compact Clause, stating, “[W]e are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.”<sup>76</sup> Following this statement, the Court engaged in a lengthy analysis of the history and meta-history of the Compact Clause.<sup>77</sup> Interestingly, the Court noted that Justice Field’s analysis in *Virginia v. Tennessee* was

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70. See *infra* Parts III and IV.

71. 434 U.S. 452 (1978).

72. Greve, *supra* note 8, at 302-04.

73. MULTISTATE TAX COMMISSION, MULTISTATE TAX COMPACT: SUGGESTED STATE LEGISLATION AND ENABLING ACT art. X, at 10 (1966), available at [http://www.mtc.gov/uploadedFiles/Multistate\\_Tax\\_Commission/About\\_MTC/MTC\\_Compact/COMPACT\(1\).pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf); Hardy, *supra* note 8, at 3 (describing contractual nature of compacts and their binding nature).

74. *U.S. Steel*, 434 U.S. at 473. Though we will revisit this point *infra*, Justice White’s dissent should be noted. He pointed out: “The Clause must mean that some actions which would be permissible for individual States to undertake are not permissible for a group of States to agree to undertake.” *Id.* at 482 (emphasis added).

75. 426 U.S. 363 (1976).

76. *U.S. Steel*, 434 U.S. at 460.

77. See *id.* at 459-72.

dictum and also noted how he misread Story's text to come to his conclusion.<sup>78</sup> Yet, the Court nonetheless confirmed the functional test set out by Justice Field, and in so doing indicated unmistakably that it is vertical, and not horizontal issues of state power that are relevant to the inquiry regarding consent: "[T]he test is whether the Compact enhances state power quoad the National Government."<sup>79</sup> And if there were any doubts about this vertical orientation, they might have been extinguished later in the opinion when the Court rejected Appellants' argument that the "Compact exerts undue pressure to join upon nonmember States" and that the coordination of member states will "redound to [their] benefit," stating that "[a]ny time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result."<sup>80</sup> It seems the Court considered federal statute and preemption the proper way to confront the issue of horizontal competition.<sup>81</sup>

Before moving on to the last major case of our Compact Clause trilogy, it serves to make two more points. In his dissent, Justice White highlighted an aspect of the compact that troubled him and distinguished the compact, in his mind, from traditional reciprocal legislation.<sup>82</sup> He noted:

The Compact did not become effective in any of the ratifying States until at least seven States had adopted it. Thus, unlike reciprocal legislation, the Compact provided a means by which a State could assure itself that a certain number of other States would go along before committing itself to an apportionment formula.<sup>83</sup>

The ability to coordinate state action strategically in this sort of conditional pre-commitment scheme was, for Justice White, an important distinguishing feature from generic reciprocal legislation. And while this point was made in dissent, it is worth noting in connection with ECRA, which provides just such a conditional mechanism.

Lastly, to contextualize the holding of *U.S. Steel* in relation to the

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78. *Id.* at 467.

79. *Id.* at 473.

80. *Id.* at 477-78. To this argument, Greve, *supra* note 8, at 305, says: "[S]o what? Those other state policies are not constitutionally disfavored. State compacts are."

81. The dissent argued that congressional consideration is important in order to consider whether a given agreement is "likely to disadvantage other States to an important extent . . ." *U.S. Steel*, 434 U.S. at 485.

82. *Id.* at 493.

83. *Id.*

broader issue of congressional consent, it should be noted that, since *Virginia v. Tennessee*, “it appears that no court has ever voided a state agreement for failure to obtain congressional assent.”<sup>84</sup> *U.S. Steel* only ratifies and reinforces this trend.

*D. Cuyler v. Adams: Congress, Federal Law and Enforcement*

The last case in the trilogy is *Cuyler v. Adams*.<sup>85</sup> This case deals not with congressional consent, but instead with the question of when an interstate agreement becomes federal law, and when the nature and substance of the obligations binding upon party states are legal questions of federal construction.<sup>86</sup> The case involved the Interstate Agreement on Detainers, a compact among forty-eight states that permitted temporary transfer of prisoners for the purpose of facing criminal charges across jurisdictions.<sup>87</sup> While the Pennsylvania court held that state prisoners transferred under the agreement have no constitutional right to a pre-transfer hearing, the federal appellate court held that it was not bound by the state court’s holding, as the compact was approved by Congress and thereby “a federal law subject to federal rather than state construction.”<sup>88</sup> The Supreme Court affirmed, holding that, while the agreement did not require consent under the Compact Clause pursuant to *U.S. Steel*, “where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”<sup>89</sup>

While *U.S. Steel* reduced the class of agreements that Congress must authorize to pass muster under the Compact Clause, *Cuyler* expanded the class of agreements that, by grant of congressional consent, becomes federal law, the interpretation of which creates a federal question reviewable by federal courts, contradictory state law and judicial interpretations notwithstanding. *Cuyler* therefore has an inverse effect from *U.S. Steel*: Rather than place more agreements outside of the compact regime of Article I § 10, it instead *brings in*

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84. See Greve, *supra* note 8, at 289 and n.15.

85. 449 U.S. 433 (1981).

86. *Id.* at 438.

87. Note, *Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. REV. 1991, 1999 (1998) [hereinafter Note, *Charting No Man’s Land*].

88. *Cuyler*, 449 U.S. at 438.

89. *Id.* at 440.

agreements that would otherwise remain outside, at least for purposes of interpretation and enforcement.

It may be analytically useful to consider and differentiate *U.S. Steel* and *Cuyler* in terms of benefits and burdens. *U.S. Steel* establishes that only agreements which threaten federal supremacy must overcome the *burden* of congressional consent.<sup>90</sup> *Cuyler* establishes that certain agreements, though free of that burden, can become federal law, subject to interpretation and enforcement in federal courts if Congress has given its consent.<sup>91</sup> This can be viewed as an important *benefit* conferred upon an agreement insofar as the parties would look to the federal system as the only place for neutral interpretation and enforcement.<sup>92</sup> Prior to *Cuyler*, an interstate agreement for which states sought and received consent could be considered solely a matter of state law, outside the scope of federal jurisdiction, if the court found that the consent given was unnecessary.<sup>93</sup> After *Cuyler*, the first step of the analysis shifts from the properties of the agreement itself to the mere fact of congressional consent.<sup>94</sup>

Yet, the language in *Culyer* also suggests an important and potentially thorny limitation on Congress's ability to transform what would otherwise be state law agreements into federal law compacts. The Court held that state law is transformed where there is a state agreement *and the subject matter of that agreement is an appropriate subject for congressional legislation.*<sup>95</sup> This language suggests that it is not consent

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90. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472-73 (1978).

91. See *Cuyler*, 449 U.S. at 440-42.

92. Justice Rehnquist, writing for the dissent in *Cuyler*, characterized the majority's opinion as "a remarkable feat of judicial alchemy" that "transform[ed] state law into federal law" by holding that an "enactment of the Pennsylvania Legislature, for which the consent of Congress was not required under the Constitution, and to which Congress never consented at all save in the vaguest terms some 25 years prior to its passage, presents a federal question." *Id.* at 450 (Rehnquist, J., dissenting). Further, he remarked that "the Court's opinion threatens to become a judicial Midas meandering through the state statute books, turning everything it touches into federal law." *Id.* at 454.

93. See *id.* at 452-53.

94. It had been well-established that interstate compacts that fall under the Compact Clause and that have been consented to by Congress, operate as federal law. Yet, this is not to say that in each of these cases, congressional consent was a prerequisite. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 279 (1959) (stating explicitly that agreement between states, "because made by different States acting under the Constitution and with congressional approval, is a question of federal law"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851) ("This compact, by the sanction of Congress, has become a law of the Union."). See also *TRIBE*, *supra* note 90, § 6-35, at 1241; L. Mark Eichorn, *Cuyler v. Adams and the Characterization of Compact Law*, 77 VA. L. REV. 1387, 1403-05 (1991) (discussing "Law of the Union Doctrine"); Note, *Charting No Man's Land*, *supra* note 87, at 1998-99.

95. *Id.* at 440 (majority opinion).

simpliciter that transforms state into federal law—the consent must be for an agreement whose subject matter is otherwise appropriate under federal law. Of course, this limitation may cabin the ability of Congress to place its Midas touch<sup>96</sup> of federal law on certain agreements where the federal interest is in no way implicated. Perhaps it was with this concern that the Court added that limiting clause. While this may have been the Court's intention, it seems that this limiting clause regarding the subject matter of the agreement may be symptomatic of a conflation of competing ideas and values, unhelpful in addressing the functional concerns that otherwise motivate and dominate Compact Clause jurisprudence.

The questions of whether consent is *required* and whether a compact is *federal law* under the Law of the Union Doctrine<sup>97</sup> involve differing concerns and aim at different ends. The question of consent is one, as we have seen in our analysis of *U.S. Steel* and *Virginia*, of national power and interest—does the compact threaten federal supremacy?<sup>98</sup> If not, the United States will permit the states to negotiate and compact with one another without congressional supervision. The issue of whether such agreements are themselves federal law, on the other hand, is addressed to the need for enforceable agreements, and is driven largely by the functional concerns expressed in *Dyer v. Sims* regarding the need for neutral arbiters in conflicts between states.<sup>99</sup> Where Congress has consented to the compact, this concern is met by stressing the fact of congressional consent and highlighting its legislative form, which allows an easy transition, under the Law of the Union Doctrine, to the claim that an interstate compact is, in virtue of that consent, federal law.<sup>100</sup>

The tension that arises—the tension with which the *Cuyler* Court must then grapple—is how to reconcile the fact that some compacts don't require consent, while holding that this same consent is important to enforceability. Because the Court has assumed that agreements that fall under the *U.S. Steel* category of no consent are constitutional, but are not themselves compacts, the qualifying clause in *Cuyler* seemed important. After all, if the subject matter is appropriate for

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96. *Id.* at 454 (Rehnquist, J., dissenting) (worrying that the “Court’s opinion threatens to become a judicial Midas meandering through the state statute books, turning everything it touches into federal law”).

97. See *supra* note 94 and accompanying text.

98. See *supra* Parts III.B-C.

99. See *infra* Part IV; *Sims*, 341 U.S. at 28.

100. See *supra* note 94 and accompanying text.

congressional legislation, couldn't Congress have just passed a law anyway? Yet, if what Congress is doing is simply legislating in an area that it otherwise could, and the agreement itself is not, strictly speaking, a compact under the Constitution, then congressional consent seems like just run-of-the mill legislation and it is unclear why it "transforms the States' agreement into federal law under the *Compact Clause*."<sup>101</sup>

Without the "appropriate subject matter" qualification though, a more useful notion emerges. That is, congressional consent operates to transform any and all interstate agreements into interstate compacts, at least for purposes of federal enforcement under federal law. But this is essentially to say that: we like X agreement which, because it does not enhance state power quoad the national government, is not an interstate compact under the Constitution, but because we have pronounced that we like it,<sup>102</sup> registered our approval, it has now *become a compact under that same clause*. Understandably, the dissent in *Cuyler* found this doubletalk quite odd.<sup>103</sup> An alternative framing would be: some agreements don't require congressional consent because they don't threaten to rework our federal system or do violence to its balance of power— those agreements are not compacts inasmuch as they do not require congressional consent, but they are compacts inasmuch as they are agreements between states which cannot be subject to unilateral, self-judging interpretation and construction by the states parties— whether or not congress has acted.<sup>104</sup> This last step requires a more frank admission that the Court has, for over a century, really been saying not that interstate agreements (such as the one in *U.S. Steel*) are not compacts under the Compact Clause, but instead that such agreements *are compacts that do not require consent*. Though this would turn a creative gloss into a near-contravention, it would seem a more frank analysis that would allow the Court to better meet the functional demands that motivate and currently organize the field.

Of course, one might reasonably think that congressional consent doesn't magically convert agreements into compacts, or state law into federal law *under* the Compact Clause, while still thinking that *where consent obtains*, the agreement should be honored and enforced as

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101. *Cuyler*, 449 U.S. at 440 (majority opinion) (emphasis added).

102. "Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement [of consent is meant] to obtain its political judgment." *Id.* at 440 n.8 (quoting *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 485 (1978) (White, J., dissenting)). It is possible that Justice White's analysis of *submitted* compacts and/or explicit approval may be different in key respects than situations of implied consent.

103. See *Cuyler*, 449 U.S. at 451-52 (Rehnquist, J., dissenting).

104. See *Sims*, 341 U.S. at 28.

federal law—this may be the best reading of *Cuyler* itself. This is not to say that agreements that neither need nor receive congressional consent are somehow magically converted to federal law. Yet, if we accept the magic of the first proposition, it may not be so disturbing to accept the second.

Such a change would have an important effect on ECRA. While *Cuyler* has a profound effect on the law of compacts that do not require the congressional consent they in fact receive, it does not deal directly with the questions of if, when, and how agreements which neither need nor receive consent might be enforced in federal court.<sup>105</sup> Indeed, it seems that such agreements would not be considered federal law under *Cuyler*. It is this sort of enforceability that the potential states party to ECRA may very well seek as a precursor for entry into the agreement. If *Cuyler* were extended and the alternative framing above was to be adopted, ECRA would be a substantially more attractive proposition to the States.

#### IV. APPLYING ECRA TO THE INTERSTATE COMPACT REGIME

This Part will now consider various ways in which ECRA can be harmonized with the current law of interstate compacts and agreements. While there is more than one potential collision of the agreement with current law, this Part will treat just a few of the possibilities. Because the question of enforcement will loom large for all potential parties, we must determine whether and how the plan could be enforced by the federal judiciary, especially in the event that congressional consent is lacking and/or found legally unnecessary.<sup>106</sup> The prevailing *U.S. Steel* functional analysis regime indicates that congressional consent will not be required. Further, a similarly functional analysis employed by the *Cuyler* majority, and endorsed in the current literature, may allow the interstate agreement to be cast as a federal question involving federal or even quasi-federal law.<sup>107</sup>

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105. Courts have enforced the *Cuyler* rule without expanding it as far as the alternative framing suggests. Where a compact fails to meet the consent and subject matter consents, state law has been held to govern. Note, *No Man's Land*, *supra* note 87, at 2001.

106. The departure point in this analysis is *Cuyler v. Adams*, 449 U.S. 433 (1981), though, as is discussed in detail *supra* Part III, there congressional consent was given, though it was found unnecessary. *Id.* at 440-42.

107. In cases where the states themselves sue one another directly, jurisdiction would arise under U.S. CONST. art. III, § 2, cl.2. There is also indication that the law applicable to interstate disputes more generally is federal common law. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (holding that the question of apportionment of contested water rights between states is a question of federal common law upon which “neither the statutes nor the

I will also address some of the potential external constitutional challenges to the constitutionality of ECRA relating to the (im)permissibility of obviating the Electoral College.<sup>108</sup>

#### A. *Consent and U.S. Steel*

Because the courts have not invalidated an interstate agreement for want of consent in more than a century,<sup>109</sup> it seems likely—Justice White’s dissent in *U.S. Steel* notwithstanding—that ECRA, if challenged, would not be considered within the ambit of the Compact Clause.<sup>110</sup> On a functional vertical analysis test, it seems that ECRA, like the compact and commission in question in *U.S. Steel*, would survive. The agreement does not enhance “state power quoad the National Government” and it does not authorize the member states to do anything they could not otherwise do in its absence.<sup>111</sup> The states were free to determine how they would cast their electoral votes before this agreement, and so they would remain—they would assign their electoral votes according to the agreement, or they could assign their electors in whatever other method they choose.<sup>112</sup> The power and supremacy of the federal government are unchanged.

Yet, one could argue that there is indeed some vertical alteration of power. The Framers assumed that the election of the President would often require resort to the House of Representatives; in the absence of a stable two-party system, it did not seem inevitable that all presidential elections would result in a majority vote total for any single candidate.<sup>113</sup> Under the current plan, there *could never* be a situation where the House

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decisions of either State can be conclusive”). See also JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (2006); Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 141, 149 (2002).

108. The attention that ECRA would bring to this area of law might displace the current regime. The exposure that this agreement would force upon the otherwise little-considered law of interstate compacts might inspire a move away from the functional analysis that now dominates the field, to a more cautious and perhaps textually faithful approach.

109. See *supra* note 84 and accompanying text.

110. Were the Court to consider the “alternative framing,” see *supra* Part III.D, then the agreement would be considered within the Compact Clause, though it would nonetheless be exempt from the consent requirement.

111. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472-73 (1978).

112. For the constitutional requirements that create and cabin state prerogative in assigning electors, see notes 151-152 and accompanying text.

113. THE FEDERALIST NO. 68, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that . . . the House of Representatives shall [elect the President].”).

selected the President, as the electoral vote is guaranteed to constitute a majority of the total as a precondition of enactment of ECRA. Whether the destruction of such a remote and highly contingent power would be considered anything but a *de minimis* encroachment on the federal prerogative is difficult to predict,<sup>114</sup> but the possibility does remain.

More dangerous to ECRA is the possibility that such a high profile agreement would stir the Court from its slumber with respect horizontal federalism. It might, for instance, treat the agreement as a problem of troublesome delegation and dilution of state responsibility: States as political units are no longer making electoral decisions on their own, but are instead linking those decisions to the undivided citizenry.<sup>115</sup> The rejoinder would be that states are free to abolish the statewide vote as a matter of discretion; inasmuch as the agreement in question counts the vote of its citizens as a fraction of the national total, it would still be doing more than it is required to do—the greater power (to abolish the vote) should imply the lesser (fractional impact). A sur-rebuttal would go something like: In the case of abolishment of the vote, the state would presumably exercise some other form of unmitigated, uncompromised, and undiluted state control—the state would persist as the relevant unit of electoral choice and would not be delegating that choice to the national electorate.<sup>116</sup>

Another horizontal federalism argument would come in more simple form. Florida, for instance, could argue that the agreement reduces its power relative to the member states, thereby triggering the functional requirement. Even if we were to assume *arguendo* that such an argument could get past the current assumption that political power of states matters only as a proxy for concerns of vertical federalism, “any judgment of ‘enhancement’ requires a baseline for comparison.”<sup>117</sup> Setting this baseline at today’s distribution of electoral clout seems legally arbitrary—today’s distribution is not a matter of legal right or inherent constitutional architecture, but is instead an accident of

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114. The power in question is now provided for explicitly in the 12th Amendment, which displaced the prior (though functionally identical) clause in Article II. U.S. CONST. amend. XII (“The person having the greatest number of votes for President, shall be the President . . . and if no person have such majority, then . . . the House of Representatives shall choose immediately . . . the President.”).

115. See Greve, *supra* note 8, at 368 (suggesting a new functional test which would require consent if one of the following four risks exist: exercise of powers concurrently possessed by Congress; interstate externalities; cartelization; or agency problems, among which might be the dilution of political accountability and a delegation of legislative or executive power).

116. These arguments regarding greater includes the less and delegation are relevant also to the external constitutional critique. See *infra* Part III.C.

117. Bennett, *State Coordination*, *supra* note 4, at 146.

demographics. Further, insofar as the winner-take-all system produces a bias not intended by the Framers, ECRA simply restores the constitutional default principle.<sup>118</sup> Thus, power enhancement arguments, without more, should fail, given the “highly contingent and unpredictable” nature of the mechanics of the *current* system.<sup>119</sup>

One could also argue that ECRA goes further than the proposal in *U.S. Steel*, and therefore, that congressional consent would be required. Though there may not be a commission created under ECRA—assuming that a commission to monitor the popular vote is not necessary<sup>120</sup>—states would be committed at least through one election cycle, and perhaps longer, depending on the length specified in the agreement.<sup>121</sup> And ability to modify one’s participation or withdraw entirely from an agreement is one of the “indicia” going to the consent analysis in Compact Clause jurisprudence.<sup>122</sup>

Yet, under current doctrine, it seems ECRA would be exempt from the consent requirement.<sup>123</sup>

### B. Enforcement

As congressional consent is not a requirement under *U.S. Steel* analysis, we might turn to *Cuyler* as an alternative basis for converting ECRA into federal law and creating a federal forum for any potential disputes. Under *Cuyler*, this would require congressional approval of the plan. While this is not an impossibility, neither would this be an easy process. Many states—all the non-party states—would presumably vote against ECRA in the Senate, and even in the House, there is no guarantee that all members would consider ECRA an attractive proposition.<sup>124</sup> Further, the requirement that the subject matter of the

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118. *See id.*

119. *Id.*

120. *See supra* Part I; Amar & Amar, *Direct National Election*, *supra* note 7 (discussing the potential need for an election commission); JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (2006).

121. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 457 (1978) (parties were free to leave the compact at any point by enacting a repealing statute). Without such a statute, the agreement would be binding in perpetuity, escapable only if all other parties agree. *See Hasday*, *supra* note 90, at 3 (“A state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide . . .”) (citing *Dyer v. Sims*, 341 U.S. 22, 28 (1951); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 13 (1823)).

122. *Cf. Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 175 (1985) (noting that the parties could modify or withdraw their agreement).

123. *See generally*, Greve, *supra* note 8 for an criticism of the current doctrine.

124. One could imagine many Texas Republicans or California Democrats suspicious of any plan that risks the delivery of their state to its traditional winner. This is also to say nothing of the

agreement be an appropriate subject for congressional legislation<sup>125</sup> may limit the viability of this option. We have an unequivocally state-centered regime of Electoral College control, and it would seem quite hard to square the subject of this agreement with that constitutional design. In fact, the very appeal of ECRA is that it circumvents that design. It therefore seems that, under *Cuyler*, congressional consent would fail to convert ECRA to federal law. It is possible that the *Cuyler* rule could be extended to reflect the suggestion Part III D that the “appropriate subject matter” limitation is misguided. The new rule would then be that every time Congress consents to an interstate agreement, the agreement becomes federal law. This seems an eminently reasonable and possible holding. As discussed previously, it is unclear what this concept adds to the regime anyway. The subject matter of the compact itself only seems relevant under a theory of delegation whereby Congress is simply delegating its lawmaking authority to the states. But such a theory would seemingly violate the Presentment Clause in that the President is excluded from the process.<sup>126</sup> Also, the language of *Cuyler* does not seem entirely consistent with the view that there must be a separate source of congressional power: “[T]he consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”<sup>127</sup> It must be under operation of the Compact Clause, then, that federal law is created in this area. And it therefore seems irrelevant whether the subject is one that could be regulated under, say, the Commerce Clause.

Alternative methods for achieving enforceability of ECRA also exist. This is good news for ECRA, considering the possibility that a state, faced with giving the election to its disfavored candidate, would point to a subsequent state statute—presumably passed in an emergency legislative act as the election outcome crystallized—or some gloss on their constitution, or even a refusal to certify the relevant slate by the state’s executive branch, as an excuse against performance. And under the great strain of political pressure, without the availability of the federal judiciary, it seems the entire agreement could become unstable. There seem to be a number of methods for enforcement.

The first, most simple method might be under the Contracts Clause

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potential that various senators and representatives might consider the entire plan unconstitutional or simply unsound as a policy matter.

125. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *see supra* Part III.D.

126. U.S. CONST. art. I, § 7, cl. 2.

127. *Cuyler*, 449 U.S. at 440.

of the Constitution.<sup>128</sup> Second, where one State sued another on the agreement, original jurisdiction would apply in the Supreme Court.<sup>129</sup> Further, even under simple diversity jurisdiction a federal court could interpret the agreement as state law, but it could do so with greater neutrality.

Another method of enforcement would be to consider the agreement itself federal law. The *Cuyler* holding could be extended to the alternative framing put forward in Part III D, whereby the agreement itself is considered federalized and enforceable as federal law, even absent congressional approval. These alternatives will be addressed in turn below.

### 1. The Contracts Clause and Interstate Agreements

It is well-settled that interstate compacts are contracts between the member states, covered by the Contracts Clause of the Constitution.<sup>130</sup> Indeed, an interstate compact is “an exception to the rule that one legislature may not restrict its successors.”<sup>131</sup> Further, specific performance is available as a remedy in the case of a violation.<sup>132</sup> Yet, it may be argued that these principles apply only in the case of interstate compacts under the Compact Clause, and, per *U.S. Steel*, ECRA is simply not such a compact. This argument is unpersuasive. Even if ECRA is not an interstate compact, it is undeniably a contractual obligation shared between states. As one author has noted,

[B]ecause a pact is a contract, and the federal courts have a duty to enforce contracts between states, then the interpretation of any pact (even one to which Congress has not consented) would present a federal question. Thus, the role of the federal courts here is completely independent of Congress’ role in granting or withholding its

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128. U.S. CONST. art. I, § 10, cl. 1.

129. U.S. CONST. art. III, § 2. While a full discussion of the relationship between grants of jurisdiction and substantive law is outside the scope of this discussion, the Court has “fashioned a body of federal common law in interstate disputes as an implication of the jurisdictional grant and the obvious difficulty with applying the law of either disputant.” HENRY M. HART ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 738 (5th ed. 2003) [hereinafter HART & WECHSLER] (citing Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1031-32 (1967)).

130. U.S. CONST. art. I, § 10, cl. 1; *Dyer v. Sims*, 341 U.S. 22, 28 (1951) (holding that “an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified . . .”); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823) (explaining that “a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals”).

131. Hasday, *supra* note 90, at 2.

132. See *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930).

consent.<sup>133</sup>

Therefore, ECRA could be enforced by the federal courts through the Contracts Clause, whether the suit was brought by one state against another (giving the Supreme Court original jurisdiction), on diversity jurisdiction, or on appeal from a state court.

## 2. Diversity Jurisdiction and Choice of Law

Alternatively, if the case were brought on diversity jurisdiction, the federal courts could simply apply the relevant law of the agreement itself. If that law were simply the laws of the states, then, at the very least, there would be a more neutral forum for adjudication. But just as easily and far more effectively, ECRA itself could specify explicitly the law governing the agreement. And if ECRA were to specify substantive federal law of some kind—even Maritime law—it seems that the courts could apply federal law to the agreement, greatly improving its enforceability.<sup>134</sup>

## 3. Extension of *Cuyler* and “Quasi-Common Law”

Just as a functional analysis drives the question of congressional consent, a functional argument may provide another argument for the extension of federal jurisdiction to enforce ECRA. To make explicit what has been thus far assumed in this section, federal courts provide more neutral fora for the settlement of interstate compact disputes and allow for a better preservation of sovereignty interests and the interests of non-party states.<sup>135</sup> Indeed, this view finds support in *Sims*, where the Court states:

A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the “federal common law” governing interstate controversies . . . is the function and duty of the Supreme Court . . . . Deference is one thing; submission to a State’s own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite

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133. See Eichorn, *supra* note 97, at 1404 n.87.

134. *Id.* at 1407 nn.100-01. Again, the fact of a federal forum is itself perhaps the most important part of ensuring neutrality and enforcement, and anyway, federal common law may trump state law if the court infers that common law applies through inference or by applying *Hinderlider*. *Id.*

135. Note, *Charting No Man’s Land*, *supra* note 87, at 2002.

another.<sup>136</sup>

In light of these concerns, perhaps ECRA could inspire a needed overhaul of the underpinnings of the entire interstate agreement regime. Currently, and as was discussed in Part III D, the Court treats agreements which do not require consent as something other than agreements under the Compact Clause. Yet that may be an unnecessary conflation of two separate principles. For it is in no way preordained or obvious that an agreement ceases to be an agreement simply because it does not fall under a constitutional regime of consent. That is to say, an agreement that, per *U.S. Steel*, does not require consent of Congress may not be an agreement or compact qua the *consent requirement* of Article I, § 10, clause 3 of the Constitution, but it may still be considered an *interstate agreement* as far as the above-quoted language from *Sims* goes. And if that is the case, there is no persuasive reason to deny to the parties enforcement measures in these sorts of agreements that they would otherwise enjoy under the Compact Clause. It seems no more inherent to our constitutional system that we imagine interstate agreements transformed via congressional consent than that we consider such interstate agreements transformed into federal law, particularly if the functionalist thrust remains viable.<sup>137</sup>

This position may be all the more compelling after *Bush v. Gore*, inasmuch as that decision suggested that national elections implicate uniquely national interests, which militates against a showing of over-deference to state regimes.<sup>138</sup> Moreover, *Bush v. Gore* might also provide insight into the Court's willingness to review suspect state court interpretations and applications of ECRA, (which would be state law) inasmuch as such state law determinations related to the national presidential election.<sup>139</sup> Thus, *Sims* may arguably leave the door open for a regime of *quasi-federal common law* for the enforcement of interstate agreements that are not already transformed, per *Cuyler*, into federal law.<sup>140</sup>

The argument for federal common law is not totally without support. In *Texas Industries v. Radcliff*,<sup>141</sup> the Court, in considering the

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136. *Dyer v. Sims*, 341 U.S. 22, 28 (1951).

137. Note, *Charting No Man's Land*, *supra* note 87, at 2002.

138. *Bush v. Gore*, 531 U.S. 98, 112 (2000).

139. For analysis of the issue of state court determinations of state law in light of *Bush v. Gore*, see generally Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919 (2003).

140. See *Sims*, 341 U.S. at 28.

141. 451 U.S. 630, 641 (1981).

extent to which federal common law could be extended to protect uniquely federal interests, said:

In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.<sup>142</sup>

The extension of federal common law to cover interstate arrangements and to prevent self-judging evasions by states, evasions which would bring disharmony to the federal system, finds at least some support in the logic of the federal system and in the language of the Court.<sup>143</sup>

### *C. External Constitutional Critiques*

Apart from the myriad strategic infirmities that are internal to ECRA and have been examined thus far—collective action problems, coordination problems, consent requirements, and enforceability—there may be a trumping argument, an external constitutional critique that ultimately stands in the way of any electoral reform of this nature. The basic argument would go: “ECRA is just an attempt to amend the Constitution without going through the process set forth in Article V; it is an obvious attempt at an end-run and you just can’t destroy an institution that has existed since the founding and that was retained even in the Twelfth Amendment. We have a process for this and you can’t get around it.”

This argument may gain support from *U.S. Term Limits v. Thornton*,<sup>144</sup> where the Court held that states may not impose term limits or any other qualifications in addition to those set forth in Article II of the Constitution, and *Clinton v. New York*,<sup>145</sup> where the Court struck down the Line Item Veto Act by holding that the Act departed from the “finely wrought” procedure established for the passage of legislative enactments.<sup>146</sup> To the extent that these cases demonstrate a distrust of

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142. *Id.* at 641; *see also* TRIBE, *supra* note 90, § 3-23, at 474 (discussing federal common law and distinguishing procedural federal common law).

143. Further, federal common law may apply as per Supreme Court doctrine, *see supra* notes 111 and 141 and accompanying text, and where approval is provided by Congress, interpretation of the compact itself requires interpretation of an act of Congress, which may reach the predicate agreement. *See* HART & WECHSLER, *supra* note 134, at 738-41. *See also* note 134.

144. 514 U.S. 779 (1995).

145. 524 U.S. 417 (1998).

146. *Id.* at 439-40 (quoting *INS v. Chadha*, 462 U.S. 919, 941 (1983)).

end-runs around established architectural provisions of our constitution, ECRA may face a hurdle. The Court may not favor overly formalistic or glibly literalist attempts to obviate established practice in favor of a pragmatic program for reform.

There are a number of potential responses to this sort of challenge. Starting with the most obvious, it can be said that under the Constitution, “the actual appointment of electors is left up to the states . . . .”<sup>147</sup> Indeed, the Constitution itself states, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .”<sup>148</sup> To state the obvious, it does not specify in any way *how* the legislature shall do its directing. While it is true that every state now chooses popular election as its preferred method of appointment, every state retains the right to assign electors as it pleases. The states are free to abolish all voting entirely if they wish. Under a greater-includes-the-lesser argument, it seems that counting one’s own state’s votes as a denominator in a larger fraction of the entire national vote should remain within the limits of a grant of state power that is, after all, virtually limitless.<sup>149</sup> Yet, a mere greater-includes-the-lesser argument is often a sign that one is in trouble—the U.S. Reports are a graveyard of these arguments.<sup>150</sup>

There is, however, a more nuanced way to respond to the argument. With ECRA there is no infringement of other clauses of the Constitution, nor is there a frustration of the very provision in question. The Twelfth Amendment says nothing about particular means for selection of electors, and the Framers themselves clearly assumed that process of elector selection was left to the states themselves to choose in the

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147. HARDAWAY, *supra* note 1, at 47.

148. U.S. CONST. art. II, § 1.

149. The power is, of course, not limitless. A State could not violate other provisions of the Constitution; it could not violate the Equal Protection Clause of the 14th Amendment by discriminating among voters. *McPherson v. Blacker* established that the discretion was virtually unlimited, and *Williams v. Rhodes* establishes that states cannot violate other provisions such as the 14th Amendment. *McPherson v. Blacker*, 146 U.S. 1 (1892); *Williams v. Rhodes*, 393 U.S. 23 (1968). This example is a good one for the demonstration that the greater-includes-the-less argument is often unhelpful and fallacious. One can execute a person convicted of a capital crime, though torture would violate the 8th Amendment. Also, viewpoint discrimination in 1st Amendment cases demonstrates that mere ability to exclude all speech does not confer an ability to discriminate on the basis of viewpoint. Also, more to the point, *Bush v. Gore* demonstrates that while the individual has on right to vote for a presidential election, equal protection principles constrain state action once the franchise is granted. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

150. See, e.g., 44 *Liquor Mart v. Rhode Island*, 517 U.S. 510 (1996); *City of Lakewood v. Plain Dealer Publisher*, 486 U.S. 763 (1988); *Delta Airlines v. August*, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting).

manner they saw fit.<sup>151</sup>

We might look to *Thornton* for some support. There, the Court held that “if the qualifications for Congress are fixed in the Constitution,”<sup>152</sup> the states cannot indirectly impose additional violations that alter that fixed constellation. It then went on to say that an attempt to effect a “fundamental change in the constitutional framework . . . must come not by legislation . . . but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V.”<sup>153</sup>

This statement helps the defense of ECRA. By proving that rule, it may help our exception. The original understanding of the Electoral College system was based upon the lack of a two-party system and an assumption that there was more than one way to select an elector. Taking the Court at its word above, we must therefore conclude that the current electoral scheme, whereby the states choose to employ a winner-take-all, popular vote, two-party system methodology, effectively precluding any House involvement, and which has enormous strategic impacts that we have recited in Part I *supra*, did not “count” as such a change to the electoral system. Thus, neither should ECRA.

It might be argued alternatively that the original system was meant to enhance federalism by forcing states to be the relevant units of decision, and to delegate that choice to the undifferentiated national government violates the architecture of the Constitution. Yet, as is discussed in Part I, it is by no means clear that the values of federalism are advanced by our current system. Further, it may very well be that ECRA is the best way, in the estimation of each state—the relevant decisional—to maximize its voice in the federal system, a system which exists to give meaning to such voices. If, as an empirical matter, it seems that ECRA better allows states to register on the national radar screen, and the current system eliminates their relevance, it would be odd to say that federalism requires states to ignore the policy preferences of its citizens, as actualized by legislative enactment of ECRA.

## V. CONCLUSION

This Article reviews a proposal for an interstate agreement for Electoral College reform. Given the considerable unpopularity of the current system and the considerable difficulty of achieving a

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151. See THE FEDERALIST NO. 68, *supra* note 114, at 414.

152. U.S. Term Limits v. Thornton, 514 U.S. 779, 836 (1995).

153. *Id.* at 837.

constitutional amendment, along with the effective party parity in the presidential elections that exists today, such a proposal may be strategically viable. Further, the current doctrinal gloss in this area may create legal space for states with sufficient political will. More modestly, such a plan exposes important fault lines and weaknesses in the current regime of interstate agreements. While the ECRA is almost certainly viable even without congressional consent under *U.S. Steel*, this proposal might be the camel that breaks the straw.

In considering issues of enforcement, this Article has similarly demonstrated that the current law, while susceptible to a number of modalities of enforcement, or, at the very least, modest extensions of current doctrine, may be unequal to the task of coping with an agreement of the type contemplated by ECRA.

Irrespective of outlines of the proposed agreement itself, this Article demonstrates a need for greater attention to the law of interstate agreements, and allows an examination of the tension between the need for responsive and creative legal solutions to multi-state problems and the duty of fidelity to our constitutional structure.