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## The Pathological Perspective and Presidential Election

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# THE PATHOLOGICAL PERSPECTIVE AND PRESIDENTIAL ELECTION

Edward A. Hartnett\*

## ABSTRACT

*We live in troubled times, with competing political camps acting like opposing tribes. We live in separate enclaves, get our information from separate sources, and remain inside our own information bubbles. We should bear these divisions in mind as we discuss possible changes to our system of electing the President.*

*The year 2020 began with a presidential impeachment trial, featured at its midpoint a Supreme Court decision holding that a state may require its presidential electors to vote in accordance with that state's popular vote, and will end with a presidential election. Many think that we should scrap electors and use a national popular vote. One proposed method is the National Popular Vote Compact. The idea is to guarantee that the winner of the national popular vote would win the electoral vote: states joining the Compact agree that once jurisdictions with a majority of the electoral votes join the Compact, they will cast their electoral votes for the national popular vote winner.*

*This Article argues that, in today's hyper-partisan political culture, a presidential election using a national popular vote—particularly the National Popular Vote Compact—invites disaster. A simplified version of a proposal by Lawrence Lessig, however, would be a significant improvement of our current system and would not run the risks posed by a national popular vote. Replacing the winner-take-all allocation with proportional allocation of electors in each state eliminates the worst feature of our current electoral college system and makes many more voters relevant in a presidential election. It also preserves state control over elections, making it harder for would-be authoritarians to entrench themselves.*

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## I. INTRODUCTION

**W**E live in troubled times, with competing political camps acting like opposing tribes. We live in separate enclaves, get our information from separate sources, and remain inside our own information bubbles, distrusting and disparaging information from the other side's sources. Bad faith is presumed, and efforts at compromise are treated as weakness. We regard each other as existential threats to the nation and enemies to be vanquished—to the point where intermarriage is taboo.

Overcoming these divisions may be the central political and cultural task of our time. But this Article's ambition is far less grand. Instead, this Article argues that we should bear these divisions in mind as we discuss possible changes to our system of electing the President.

This year has already featured a presidential impeachment trial and a Supreme Court decision regarding whether state legislatures can control

not only how presidential electors are selected but also how they vote. It also, of course, features a presidential election. Two of the last five presidential elections have been won by candidates who lost the national popular vote, and it may happen again this year.<sup>1</sup> And it is possible that the November election will be conducted during a resurgence of the coronavirus, with a severity that varies widely across the nation.<sup>2</sup>

Many think that we should move to the direct election of the President by popular vote. Fifteen states, plus the District of Columbia, have enacted the National Popular Vote Compact, under which the electoral votes of those jurisdictions that enact it would be awarded to the winner of the national popular vote.<sup>3</sup> By its terms, the compact would not take effect until jurisdictions with a majority of the electoral votes had enacted it; so far, the enacting jurisdictions have 196 of the 270 needed.<sup>4</sup> The idea is to guarantee that the winner of the national popular vote would win the electoral vote; once jurisdictions with a majority of the electoral votes enacted it, their votes would control the election.

Meanwhile, Professor Lawrence Lessig advocated for a Supreme Court decision holding that presidential electors are free to vote as they wish, notwithstanding state laws attempting to control their votes, in the hope that such a decision would prompt sufficient attention to make constitutional reform possible.<sup>5</sup> Lessig favors direct election; he also offers what he considers a second-best alternative: proportional allocation of electoral votes in each state.<sup>6</sup>

The Court did not oblige; instead, it unanimously held that states may sanction presidential electors for breaching their promise to vote as an agent of others.<sup>7</sup>

This Article argues that, in the current environment, a presidential election using a national popular vote—particularly the National Popular Vote Compact—courts disaster. A simplified version of the Lessig propo-

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1. Tara Law, *These Presidents Won the Electoral College—But Not the Popular Vote*, TIME (May 15, 2019, 4:58 PM), <https://time.com/5579161/presidents-elected-electoral-college/> [https://perma.cc/78DF-THES].

2. Hannah Osborne, *The “Second Wave” Is Still to Come and the U.S. Has No Specific Plan to Deal With It*, NEWSWEEK (Aug. 11, 2020, 7:39 AM), <https://www.newsweek.com/coronavirus-second-wave-fall-white-house-plan-1524243> [https://perma.cc/MW74-X9UT].

3. *National Popular Vote*, NAT’L CONF. ST. LEGISLATURES (Jan. 27, 2020), <https://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> [https://perma.cc/V7AP-JP6P].

4. *Id.*

5. See Nina Totenberg, *Supreme Court Considers Pivotal Electoral College Case*, NPR (May 13, 2020, 5:00 AM), <https://www.npr.org/2020/05/13/853724211/supreme-court-considers-pivotal-electoral-college-case> [https://perma.cc/8QWX-XAW6].

6. Margaret M. Hylton & Austin W. Li, *Harvard Law Professor Lawrence Lessig Advocates for Changes to the Electoral College*, HARV. CRIMSON (Oct. 21, 2019), <https://www.thecrimson.com/article/2019/10/21/hls-prof-advocates-for-electoral-college-change/> [https://perma.cc/RQ2B-YJ9N].

7. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328–29 (2020). Justice Kagan’s opinion for the Court spoke for eight Justices; Justice Thomas filed an opinion concurring in the judgment, joined in part by Justice Gorsuch. See *id.* at 2316.

sal, however, would be a significant improvement to our current system and would not run the risks posed by a national popular vote. What Lessig offers as a second-best choice, with some simplification, should be viewed as the best choice.

## II. THREE MISIMPRESSIONS

### A. MISFIRES

Some describe instances in which the electoral winner did not win the popular vote as misfires that produced the wrong winner, proclaiming that the person who actually received the most popular votes would have won if we elected presidents by popular vote.<sup>8</sup>

But that is a misimpression. We simply cannot know who would have won an election had it been governed by a different set of rules any more than we can know that the Yankees would have won the 1960 World Series if total runs scored in the series decided the winner, or that the Falcons would have won Super Bowl LI if the number of quarters won decided the winner, or that the Red Sox would have won the 1986 World Series if the number of innings won decided the winner.<sup>9</sup>

The point of these sports analogies is not to suggest that elections are sporting events in which the winner doesn't really matter.<sup>10</sup> Instead, the point is that just as it is impossible to know who would have won the sporting events if the rules had been different, it is impossible to know who would have won past elections if the rules had been different.

For example, if total runs in the World Series decided the winner, managers wouldn't save certain pitchers, known as closers, for the final innings of games in which they were narrowly ahead.<sup>11</sup> If the number of innings won decided the winner, once an inning was already lost, a

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8. See, e.g., Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 184–85 (2011) (noting that “critics allege that the Electoral College has ‘misfired’”).

9. The Pirates won the series four games to three, but the Yankees scored fifty-five runs across the seven games, while the Pirates scored only twenty-seven. *1960 World Series*, BASEBALL ALMANAC, <https://www.baseball-almanac.com/ws/yr1960ws.shtml> [https://perma.cc/G7XZ-BACT]. That's because the Pirates won four close games (6–4, 3–2, 5–2, 10–9), while the Yankees won three games by lopsided margins (16–3, 10–0, 12–0). *Id.* The final score in Super Bowl LI was New England Patriots 34, Atlanta Falcons 28, but there was no score in the first quarter. *Super Bowl LI—New England Patriots vs. Atlanta Falcons—February 5th, 2017*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/boxscores/201702050atl.htm> [https://perma.cc/23HM-WPZS]. The Falcons outscored the Patriots in the second quarter 21–3 and in the third quarter 7–6, with the Patriots outscoring the Falcons in the fourth quarter 19–0. (The Patriots won with a touchdown in overtime.) *Id.* The Mets won the series four games to three, but the Red Sox scored more runs in fifteen innings, while the Mets scored more runs in only twelve innings. *1986 World Series*, BASEBALL REFERENCE, [https://www.baseball-reference.com/postseason/1986\\_WS.shtml](https://www.baseball-reference.com/postseason/1986_WS.shtml) [https://perma.cc/EF7A-7D4D].

10. Cf. Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 472–73 (2007) (calling the sports analogies “silly” because “elections are not sporting events”).

11. *Closer*, MLB, <http://m.mlb.com/glossary/positions/closer> [https://perma.cc/QVE2-UL7X].

pitcher would be left in to take his lumps that inning no matter how many runs he gave up. If the number of quarters won decided the winner in football, clock management and play calling, particularly near the end of a quarter, would be very different.

But it's not just that the strategy inside a particular game would change. Who was hired to play on a particular team would change. Of course, some players would be hired under multiple rule variations, but others would be hired under some rule variations but not others. And even among those hired—and those seeking to be hired—the particular kind of athlete they choose to develop themselves into would change. If total runs in a series—or number of innings won in a game—determined the winner, what would be the point of having a closer on a baseball team anymore?

The changes wouldn't stop with strategy and personnel. Other rules would change as well. Surely if total runs in the series determined the winner, a home team that was ahead would bat in the bottom of the ninth inning. And if the number of innings with the most runs determined the winner, maybe the home team would not bat in any inning once it won that inning. Such a rule change would not only dramatically shorten many games but also significantly reduce the number of hitters that a visiting pitcher would face in many games. And such rule changes would, in turn, likely cause changes to personnel; for example, teams might change the ratio of pitchers to non-pitchers on their squads.

The same is true of presidential elections. If the winner were decided by a national popular vote, campaign strategies and political platforms would be different. Where candidates spent time and money would be different. What issues they chose to emphasize—indeed, their positions on issues—would be different. Advocates of a national popular vote system sometimes tout such changes as benefits without always acknowledging that it undermines any claim about who would have won past elections if the national popular vote had determined the winner.<sup>12</sup>

Voter behavior, including voter turnout, would change. In some places that are currently noncompetitive, turnout might increase; in other places that are currently battlegrounds, it might decrease. Willingness to vote for a third-party candidate would likely change, at least to the extent that some current voters are more willing to vote for a third-party candidate if they are confident that their preferred major-party candidate will surely win their state anyway.<sup>13</sup>

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12. Compare JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 450 (4th ed. 2013) (discussing how campaigning would change under a national popular vote), *with id.* at 455 (discussing “wrong winner” elections). *But see id.* at 749 (“It is impossible to say whether Al Gore would have been elected President in 2000 under the National Popular Vote system, because the campaign would have been conducted very differently.”).

13. See Russell Berman & Andrew McGill, *The States Where Third-Party Candidates Perform Best*, ATLANTIC (Aug. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/08/third-party-candidates-2016-clinton-trump-johnson/493931/> [https://perma.cc/5DSD-KF29].

Just as with sports, the changes would not be limited to strategy. Just as the people hired to play sports would change if the rules were different, the candidates nominated (and those who choose to run) would also change. As with sports, some candidates would run or be nominated under multiple sets of rules. But others would run or be nominated under some rules but not others. And even among those who would run or be nominated, the particular kind of politician they choose to develop themselves into would change. Moreover, other rules would likely change in response.

It is a fallacy to say that Hillary Clinton in 2016, or Al Gore in 2000, or Grover Cleveland in 1888, or Samuel Tilden in 1876, would have won if only we elected presidents based on the national popular vote.<sup>14</sup> We don't know if they would have won under that system. We don't even know that they would have been their party's nominee under that system—or who their opponents would have been under that system. One cannot change an important part of an interconnected system and pretend that everything else would have stayed the same.

## B. DISTRICTS

It is easy to get the impression that there is something unique about the possibility of a mismatch between the electoral vote and the popular vote. But this is a misimpression; the possibility of a mismatch between who prevails in an area as a whole and who prevails in each of a series of district-based contests is inherent in the very idea of districting.<sup>15</sup> Unless one is prepared to condemn all district-based election systems, one has to tolerate this possibility.

Consider a state legislature. If the seats are allocated by district, a party can win a majority in the state as a whole but still not win a majority in the legislature. This is obviously true if partisan gerrymandering happens, but it can easily happen even without such gerrymandering. For instance, it could happen even if the districts were created by an algorithm that chose (say) the most compact equal-population districts possible and chose randomly among any maps that tied for compactness. All that is necessary is that one party (like the Pirates in the 1960 World Series) win a majority of districts each by a small margin and the other party (like the Yankees in that Series) win a minority of districts each by a large margin.<sup>16</sup> No one gerrymandered the lines between the games of the 1960 World Series, and no one need gerrymander district lines to produce a mismatch between the statewide vote for a party in legislative elections and the allocation of seats in the legislature.

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14. See Law, *supra* note 1 (discussing presidential candidates who won the popular vote but not presidential election).

15. See *Districting*, ACE PROJECT, <http://aceproject.org/main/english/ei/eie03.htm> [<https://perma.cc/9UQA-ZA6W>] (discussing the definition of districting in the context of elections).

16. See *1960 World Series*, *supra* note 9.

Is there any good reason to tolerate districts, knowing that it can produce this discrepancy? Sure there is; one reason is to promote communication and connection between representatives and their constituents.<sup>17</sup> But that's not the only one. Another is to avoid the extreme results that can be produced by at-large elections. If all seats in the legislature were elected at large, it would be possible for a party to win just over 50% of the votes statewide and capture every single seat in the legislature. If the at-large elections were also conducted (as elections in the United States generally are) under the first-past-the-post system, third-party candidates could lower this percentage even more—in a close three-way race, a party that won just over 33% of the votes statewide could capture every single seat in the legislature.<sup>18</sup>

But presidential electors have no communication and scant connection with those who elect them. Is there any good reason to conduct presidential elections on a districted basis, state by state, rather than on a national basis? Yes. Conducting presidential elections on a state-by-state basis recognizes that states are sovereigns, “not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart.”<sup>19</sup>

States vary in many ways, including in the proportion of each state’s population that is ineligible to vote—whether because of incarceration, felony conviction, age, mental ability, or citizenship.<sup>20</sup> Plus, maintaining state control and avoiding centralized control over the election process is a significant protection against tyranny.<sup>21</sup>

It bears emphasis that using states as districts for the purposes of presidential elections does not mean that each state must be treated as a winner-take-all bloc. Members of Congress are elected from particular states, not at large across the United States or even from a region of states (such as a federal judicial circuit).<sup>22</sup> As a constitutional matter, members can be (and have been) elected at large in a state.<sup>23</sup> But they can also be elected

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17. See KARL T. KURTZ, *LEGISLATURES AND CITIZENS: PUBLIC PARTICIPATION AND CONFIDENCE IN THE LEGISLATURE 2* (1997), [https://www.ncsl.org/documents/public/trust/LegCitizens\\_PublicParticipation\\_Kurtz2.pdf](https://www.ncsl.org/documents/public/trust/LegCitizens_PublicParticipation_Kurtz2.pdf) [<https://perma.cc/XM4S-FT6D>] (noting that communication between legislatures and their constituents provides “linkage” and legitimacy to the government).

18. See *First Past the Post (FPTP)*, ACE PROJECT, <http://aceproject.org/ace-en/topics/es/esd/esd01/esd01a/default> [<https://perma.cc/5KXG-JDZF>].

19. *New York v. United States*, 505 U.S. 144, 188 (1992).

20. See *Voter Registration Rules*, VOTE.ORG, <https://www.vote.org/voter-registration-rules/> [<https://perma.cc/W5HZ-VSKM>] (listing voter registration rules by state).

21. See David Landau et al., *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1247 (2020).

22. See U.S. CONST. art. I, §§ 1–3.

23. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (“For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or ‘general ticket’ elections. Such States typically sent single-party delegations to Congress. That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation.” (citation omitted)).

by district within a state, thereby opening up both the possibility of divided congressional delegations from a state and the concomitant possibility of a mismatch between the statewide congressional vote and the allocation of that state's congressional seats. Moreover, since 1842, Congress has required, by statute, that members of the House be elected in single-member districts.<sup>24</sup> If it weren't for this statute, states could elect members of Congress at large (or in larger, equal-population, multiple-member districts) and do so using a wide variety of election mechanisms, including proportional representation.<sup>25</sup>

So, too, presidential electors may be selected by district rather than at large.<sup>26</sup> That's what Maine and Nebraska currently do.<sup>27</sup> And there is no legal impediment to states using proportional representation to select their presidential electors.<sup>28</sup> What has driven all but two states to winner-take-all elections for presidential electors is not legal compulsion. Instead, winner-take-all is the result of the desire of each state to maximize its impact through bloc voting, coupled with the absence of a power in Congress to compel district voting for presidential electors parallel to its power to do so for congressional elections.<sup>29</sup>

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24. See Joel Francis Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?*, 17 LAW & CONTEMP. PROBS. 276, 281 (1952); see also 2 U.S.C. § 2c (2018) (current version, adopted in 1969). A small sliver of statutory authority for at-large congressional elections appears to survive. See 2 U.S.C. § 2a(c)(5) (2018) (provision, enacted in 1941, stating that until a state is redistricted after a census, "if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large"); see also *Branch v. Smith*, 538 U.S. 254, 273 (2003) (Scalia, J., plurality opinion) (concluding that adoption of § 2c did not impliedly repeal § 2a(c)(5)).

25. Although the Constitution does not require proportional representation, *Rucho*, 139 S. Ct. at 2501 (rejecting the constitutional requirement "that each party must be influential in proportion to its number of supporters"), nothing in the Constitution prohibits proportional representation. See *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) ("Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."); *Vieth v. Jubelirer*, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) ("This is not to say that single-member districts are preferable; it is simply to say that single-member-district systems and more-directly-representational systems reflect different conclusions about the proper balance of different elements of a workable democratic government.").

To be clear, I am speaking of proportional representation as a voting mechanism so that the proportions that matter are the proportions set by the distribution of votes in a given election—not an a priori attempt to allocate seats to particular groups (racial or otherwise) based on their proportion to the population. Cf. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting) (stating that "a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races," would "amount to the core constitutional violation of 'outright racial balancing'" (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989))).

26. See *McPherson v. Blacker*, 146 U.S. 1, 41–42 (1892).

27. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2321 n.1 (2020) ("Maine and Nebraska . . . developed a . . . system in which two electors go to the winner of the statewide vote and one goes to the winner of each congressional district.").

28. See *McPherson*, 146 U.S. at 25.

29. *Id.* at 29 ("The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a

## C. INDIRECT ELECTIONS

Some may object that the analogy to legislatures ignores that while there are multiple legislators in a legislature, there is only one President. True enough, but while there is only one President, there are multiple electors. This objection, then, is really an objection to indirect elections rather than direct elections.

But what's so bad about indirect elections? That's how parliamentary systems work: the people elect legislators, and the legislators elect a chief executive.<sup>30</sup> Unless one is ready to condemn parliamentary systems as insufficiently democratic, indirect election of a chief executive should not be condemned as undemocratic. Indeed, one might view presidential nomination and Senate confirmation of principal officers, both executive and judicial, as an indirect method of electing all of those officers.

If all states used the Maine–Nebraska system for selecting presidential electors, our presidential election system would, in significant ways, look like a parliamentary system.<sup>31</sup> Voters in each congressional district would choose representatives, and those representatives would choose the chief executive. In choosing a representative, the voters would know which party that representative will support for chief executive. Winning a majority of the legislature would mean winning the chief executive.

Of course, in a parliamentary system, the role of legislator and the role of executive elector are combined together.<sup>32</sup> Under the United States Constitution, by contrast, these two roles are separated and held by different people.<sup>33</sup> That reduces the dependency of the executive on the legislature and enables voters to split their votes, supporting one party for the legislature and a different party for the executive—thus increasing the chances that the branches will check each other. But that increases the options available to a voter, and it is hardly a basis for condemnation as insufficiently democratic.

In addition, each state gets two presidential electors, corresponding to

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disadvantage by a division of their strength . . . .”). *Compare* U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .”), *with id.* art. II, § 1, cl. 4 (“The Congress may determine the Time of ch[oo]sing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”). For further discussion of congressional power regarding presidential elections, see *infra* text accompanying notes 157 to 165.

30. See, e.g., Jonathan Zasloff, *Why No Parliaments in the United States?*, 35 U. PA. J. INT'L L. 269, 272 (2013) (“By ‘parliamentary democracy,’ I mean a governmental system in which the electorate chooses the Legislature, which then in turn chooses the Executive.”).

31. ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE* 25 (2020) (“In its composition, the Electoral College was (and is) a temporary replica of Congress populated by ‘electors’ . . . who would assemble only once . . . and who would have no ongoing dealings with the national government. It was, in effect, a temporary legislature . . . .”).

32. See, e.g., Zasloff, *supra* note 30.

33. U.S. CONST. art. II, § 1, cl. 2 (ensuring separation of roles by providing that “no Senator or Representative . . . shall be appointed an Elector”).

the state's senators.<sup>34</sup> But because the electoral votes for each state equals the sum of two senators plus the number of representatives each state has in the House, the larger number of the latter generally (but not always) swamps the former.<sup>35</sup> California has about three-and-a-half times as many people per presidential elector as Wyoming has.<sup>36</sup> But California has about sixty-six times as many people per senator as Wyoming has.<sup>37</sup> Given the power of the Senate itself, both over legislation and over executive and judicial nominations, it is straining at gnats while swallowing the camel to accept the Senate yet resist this modest nod to federalism represented by the senatorial electors. If there were no downside risks in a national popular vote, swatting this gnat might be worth it. But the risks are too great.

### III. CHANGED INCENTIVES UNDER THE NATIONAL POPULAR VOTE COMPACT

The National Popular Vote Compact seeks to change the method of presidential election to a national popular vote without amending the Constitution.<sup>38</sup> The basic idea is that each member state would cast its electoral votes in accordance not with the vote in that state, but with the national popular vote.<sup>39</sup>

The compact provides that each member state would conduct a state-wide popular election, communicate the tally to other members, and add all of those together (along with the number of votes in nonmember states that hold a statewide popular election) to determine a national popular vote total.<sup>40</sup> Each member state, having determined a national popular vote winner, would then appoint as the state's electors those who were "nominated in that state in association with the national popular vote winner."<sup>41</sup> For example, if New Jersey voters supported the Democratic candidate, but the national popular vote was for the Republican candidate, New Jersey would appoint the electors pledged to the Republican candidate. Because the compact takes effect only when enacted by states that cumulatively hold a majority of electoral votes, if all goes as planned the result would be that the members' electoral votes would control the outcome and guarantee that the popular vote winner is elected

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34. *Id.* art. II, § 1, cl. 2; THOMAS H. NEALE & ANDREW NOLAN, CONG. RESEARCH SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 1 (2019).

35. *See id.*

36. *See Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 2010 Census*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/decennial/tables/2010/2010-apportionment/apport2010-table2.xls> [<https://perma.cc/YS27-RE6M>].

37. *See id.*

38. NEALE & NOLAN, *supra* note 34, at 1.

39. *Id.* at 7.

40. *Text of the National Popular Vote Compact Bill*, NAT'L POPULAR VOTE arts. II–III <https://www.nationalpopularvote.com/bill-text> [<https://perma.cc/K29W-7SS8>] (Proposed Draft 2020).

41. *Id.*

President.<sup>42</sup>

But all may not go as planned.

#### A. INCENTIVES TO EXPAND THE ELECTORATE

Under the current system, states have no incentive to increase the proportion of its population eligible to vote. No matter how many people in a state are eligible to vote, the state's number of electors remains the same. Each state gets two electors corresponding to its two senators.<sup>43</sup> And each state gets an elector corresponding to each of its members of the House of Representatives;<sup>44</sup> those representatives, in turn, are "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."<sup>45</sup> So, too, states have no incentive to increase the number of people who actually vote. No matter how many people in a state actually vote in a presidential election, that state's electoral votes remain the same.

But if the national popular vote determines the winner of the presidency, this changes. States then would have an incentive to broaden eligibility to vote and to increase voter turnout.

There is a wide range of possible ways to increase eligibility to vote. Ending felon disenfranchisement is one. Other possibilities include allowing incarcerated prisoners to vote, allowing those under eighteen to vote, and allowing aliens to vote.<sup>46</sup> The voting age could be lowered modestly to sixteen, dramatically to ten, or so low as to include those in utero. Alien voting might be limited to those legally present in the United States, or it might be expanded to those not legally present in the United States or to those in detention because of their illegal presence. Naturally, some would worry whether the votes of those in the custody of another would have their votes dominated by their custodians—whether parents, wardens, or immigration authorities.

If some of these seem radical, bear in mind that total population—not voters—is the basis for allocating seats in the House of Representatives (and therefore electors).<sup>47</sup> States that have large portions of young people, aliens, or prisoners would see their voters' effective voting power decreased by a move to national popular voting. Loss of current power

42. *National Popular Vote*, *supra* note 3.

43. NEALE & NOLAN, *supra* note 34, at 1.

44. *Id.* at 2.

45. U.S. CONST. amend. XIV, § 2.

46. States have allowed aliens to vote. *See, e.g.*, KEYSSAR, *supra* note 31 at 139–40 (discussing a Michigan "alien intent" law "which for decades had enfranchised (predominantly Democratic) immigrants who had been in the state for several years and declared their intention to become citizens"). *Cf.* JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT 241 (2020) (asserting that "[i]n a popular vote election, . . . noncitizens would not count at all"). A 1996 federal statute prohibits aliens from voting in federal elections, 18 U.S.C. § 611, but its constitutionality is questionable, particularly as applied to presidential elections. *See infra* text accompanying notes 160–165.

47. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016).

can be a powerful stimulus. Plus, changes that are anathema in some states might be plausible in others.

Over time, still more radical ideas might be considered on the table rather than off the wall. Options might include allowing part-year residents to vote, or even allowing corporations to vote.

Notice that eligibility to vote for the President need not be linked to eligibility to vote for any other office. The Constitution requires that eligibility for voting for Congress be tied to eligibility to vote for “the most numerous Branch of the State Legislature.”<sup>48</sup> But there is no such requirement for presidential electors, reflecting the basic point that the Constitution does not require popular voting for the President.<sup>49</sup> That means that states could expand the franchise for presidential voting without having to make a corresponding change with regard to voting for other offices. Election officials are accustomed to dealing with voters who can vote for only part of the ballot, and voting machines handle that all the time; that’s what happens in party primaries where voters can vote in one part of the ballot but not another.

States could also take steps to encourage people who are eligible to vote to actually vote. For example, a state might make it very easy to register to vote or make registration automatic based on a variety of triggering events.<sup>50</sup> Or a state might allow people to register at the moment they show up at the polls to vote.<sup>51</sup> States could insist on little to nothing to prove eligibility to register or not require identification upon voting.<sup>52</sup> They might expand early voting and voting by mail. To respond to the risks posed by a possible resurgence of the coronavirus in the fall of 2020, they might make voting by mail the norm by mailing ballots without awaiting a request.<sup>53</sup>

Even more radically, they might require people to vote, backed by a fine or even imprisonment. Or they might adopt cumulative voting—giving every voter (say) ten votes for President to allocate among candidates as the voter sees fit—and then report the total vote using those cumula-

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48. U.S. CONST. art. I, § 2, cl. 1 (eligibility to vote for members of the House); *see id.* amend. XVII (same requirement for eligibility to vote for members of Senate).

49. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

50. *See, e.g., Automatic Voter Registration*, NAT’L CONF. ST. LEGISLATURES (Apr. 14, 2020), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> [<https://perma.cc/4K8Z-62FV>] (providing an example of automated voter registration, primarily involving a state’s department of motor vehicles).

51. *See, e.g., Same Day Voter Registration*, NAT’L CONF. ST. LEGISLATURES (June 28, 2019), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> [<https://perma.cc/ZE48-FX4M>] (discussing legislation allowing individuals to register and vote all in the same day).

52. *See, e.g., Wendy Underhill, Voter Identification Requirements*, NAT’L CONF. ST. LEGISLATURES (July 9, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/6G8S-8CYB>] (discussing various state voter identification requirements).

53. *See* Larry Buchanan et al., *Will You Have Enough Time to Vote by Mail in Your State?*, N.Y. TIMES (Aug. 31, 2020), <https://www.nytimes.com/interactive/2020/08/31/us/politics/vote-by-mail-deadlines.html> [<https://perma.cc/BB5A-X874>] (reporting that nine states will send ballots to most voters automatically).

tive numbers.<sup>54</sup> The effect, of course, would be to multiply the power of that state's presidential vote.

### B. INCENTIVES TO DEPRESS VOTING

Some may think that all but the most radical changes outlined above would be good changes and that the most radical changes are so implausible as to not be cause for concern. On this view, the march of history is toward broadening the franchise, and that march should be encouraged, making the incentives created by the National Popular Vote Compact a feature, not a bug. But not all incentives pull in the same direction. That is because, if the national popular vote controls, then there is an incentive to depress the votes of the in-state loser far beyond what it takes to win in that state. Under the current method of presidential election, if a party is confident of victory in a particular state, it doesn't matter how many votes the losing presidential candidate gets (so long as he or she in fact loses). But under the National Popular Vote Compact, those votes for an in-state loser might help that in-state loser win the national popular vote, and thus the election.

All the ways to depress voting for one's adversaries become more attractive, starting with the most benign—making efforts to avoid encouraging voting by those likely to vote for one's opponents. In some states, there would be an incentive not only to continue (or expand) felon disenfranchisement but also to purge the voter rolls aggressively and to make registration difficult. On Election Day, techniques might include reducing the number and accessibility of polling places, understaffing polling places (thereby increasing wait times), checking identification insistently, and spreading rumors about cops with arrest warrants working alongside poll workers. Reducing the number of physical polling places and staffing them with law enforcement or military personnel might be a reasonable way to deal with a resurgence of the coronavirus, but it might also be an attempt to depress voting.<sup>55</sup> With preclearance no longer required,<sup>56</sup> various methods of voter suppression could be used, subject only to later litigation, putting the burden of overcoming inertia back on the voter.<sup>57</sup>

### C. RISKS GREATEST IN MOST HIGHLY PARTISAN STATES

Some might think that these incentives are present today in concentrated form in the presidential battleground states; after all, getting a few more votes for one's favored candidate, or suppressing a few that would

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54. See *Cumulative Voting*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

55. See, e.g., Joe Trovata, *Wisconsin National Guard to Assist with Polling Station Staffing, Other Missions*, WIS. DEP'T MIL. AFFS. (Apr. 1, 2020), <https://dma.wi.gov/DMA/news/2020news/20041> [<https://perma.cc/HN25-5QV8>] (announcing that military personnel will staff polling places for coronavirus purposes).

56. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

57. Cf. Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 789–90 (2018).

otherwise go to one's disfavored candidate, can go a long way in a closely divided state.

But the National Popular Vote Compact would extend these incentives to all states, including the safest states. And if a state is dominated by a single party on the state level, it would have not only the incentive but also the opportunity to act on these incentives. Such a state can more readily make changes to its election laws and practices, and it can more readily avoid punishment for those changes at future elections.

Thus, the places where we might expect the biggest changes are safe presidential states dominated on the state level by a single political party—that is, the most highly partisan states in the Union.

And this is true whether or not the state has joined the Compact. That's because the member states agree to defer to the popular vote in all the states that conduct a popular vote, not just to the popular vote in the member states.<sup>58</sup>

#### D. FRAUD

Advocates of the National Popular Vote Compact contend that fraud is less likely to be a concern under the Compact than it is under current practice. They reason that it is harder to fraudulently manufacture (or destroy) the many votes necessary to change a nationwide count than to do the same and change the outcome in a single battleground state.<sup>59</sup>

That may be true if we focus only on fraud undertaken by outsiders, including foreign agents hacking into election systems. If we focus on that kind of fraud, we might assume that those in charge of state government are eager to prevent and punish it. But if we focus on fraud by insiders, or fraud that insiders are willing to avert their eyes from, the picture changes dramatically.

Under the current system, there is no incentive for insiders to fraudulently inflate or deflate the presidential vote in a safe state. It doesn't increase the state's electoral vote.<sup>60</sup> But insiders do have such an incentive if the National Popular Vote Compact takes effect.<sup>61</sup> Worse, the Compact requires the member states to “treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate.”<sup>62</sup>

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58. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 1.

59. KOZA ET AL., *supra* note 12, at 740–45.

60. NEALE & NOLAN, *supra* note 34, at 1.

61. *Cf.* Theodore H. White, *Direct Elections: An Invitation to National Chaos*, LIFE, Jan. 30, 1970, at 4 (noting that if “all the raw votes from Hawaii to Maine are funneled into one vast pool,” then “the pressure to cheat . . . must penetrate everywhere—for any vote stolen anywhere in the Union pressures politicians thousands of miles away to balance . . . it”).

62. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 5. To gain such conclusive effect, all that is required is that the official statement be “made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress.” *Id.* This is a reference to 3 U.S.C. § 5, which creates a safe harbor for a final determination, pursuant to preexisting law, of any contro-

And as with the other electoral changes discussed above, if a state is dominated by a single party on the state level, those insiders would have not only the incentive but also the opportunity to act on these incentives. They are also more likely to avoid punishment for fraud, precisely because of one party's dominance of the state. We might, therefore, expect that the greatest risk of increased insider fraud would be safe presidential states dominated by, on the state level, a single political party—that is, the most highly partisan states in the Union. Again, given that member states agree to defer to the popular vote in all the states that conduct a popular vote,<sup>63</sup> this is true in non-member states as well.

#### E. SUSPICION AND RUMORS

Some may think that good sense and good faith among the states would prevent all but the most benign changes discussed above. That might be enough in a less polarized environment, but it is not likely to be enough today.

First, it is doubtful that all could agree on what changes are truly benign. Moreover, most of the changes (perhaps all of them short of fraud) could be supported by people who view themselves as acting in good faith. I can picture some readers rolling their eyes and thinking, “No one could in good faith support *that* change.” But even if all readers are united in eye-rolling, they would disagree about which possible changes merited that response. The very same change that some see as supportable in good faith, if not benign, would be viewed by other readers as beyond the pale.

Worse, in today's polarized environment, with many people consuming news sources that will tell them what they want to hear, even if good faith leads states to avoid taking any of the actions discussed above, it is almost certain that there would be suspicion and rumors that states did so. Whether through cable news networks or social media, some will hear and believe, for example, that one or more states allowed those not legally in the country to vote. Others will hear and believe, for example, that one or more states suppressed Black voting through a variety of devices.

If a state dramatically decreases the number of physical polling places and staffs them with law enforcement or military personnel, some will see that as a wise way to safeguard the public health in a pandemic, and others will see it as a bad-faith effort to depress the vote. Similarly, if a state makes voting by mail very easy, some will see that as a wise response to the coronavirus, and others will see it as an invitation to

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versy or contest concerning the appointment of electors reached at least six days prior to the time fixed for the meeting of electors. See 3 U.S.C. § 15 (2018) (providing rules to deal with objections to “any vote or paper from a State”).

63. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 1.

fraud.<sup>64</sup>

#### F. MISCHIEF BEYOND A STATE'S ALLOCATED POWER

Such conduct—real, exaggerated, or imagined—will matter to people wherever it occurred because it could determine the national popular vote. Under today's system, the impact on the election of any state's mischief in a presidential election is confined to the electoral vote in that state—just as any state's mischief in a Senate or House election is limited to that state's congressional delegation. No matter how badly New Jersey behaves (or is thought to behave), it can provide no more than fourteen electoral votes.<sup>65</sup> No matter how badly Georgia behaves (or is thought to behave), it can provide no more than sixteen electoral votes.<sup>66</sup> In that important sense, a state's mischief is confined to that state.

But that limit is gone if the winner is determined by the national popular vote. Any state's mischief in increasing the vote of its favored candidate, or decreasing the vote of its disfavored candidate, affects the total—without the cap. And any state's suspected mischief in increasing the vote of its favored candidate, or decreasing the vote of its disfavored candidate, will raise suspicions about the total. For the first time ever in any election for any federal office, a state's mischief (or suspected mischief) will have an impact (or be suspected of having an impact) beyond the limits of that state's power in the Union, measured by the number of senators and representatives allocated to it in Congress.

### IV. CONSTITUTIONAL DOUBTS

The National Popular Vote Compact goes into effect only when adopted by a sufficient number of states.<sup>67</sup> It is not the unilateral act of any state, but it goes into effect only “when states cumulatively possessing a majority of the electoral votes have enacted” it.<sup>68</sup> As a compact or an agreement between the states, there is a serious constitutional question whether it can take effect without the consent of Congress. Even if congressional consent is not required, there is some reason to question whether the compact is judicially enforceable.

#### A. COMPACT CLAUSE

The Constitution provides that “[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another

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64. See Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, N.Y. TIMES MAG. (May 5, 2020), <https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html> [<https://perma.cc/TX4A-XAY3>] (quoting Wisconsin Senate majority leader who described the governor's proposal to send mail-in ballots to every registered voter a “complete fantasy”).

65. *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> [<https://perma.cc/U45T-P5EX>].

66. *Id.*

67. See *National Popular Vote*, *supra* note 3.

68. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. IV, cl. 1.

State.”<sup>69</sup> On its face, this would seem to clearly prohibit all agreements or compacts between states, absent congressional consent. But this prohibition has long been read more narrowly.<sup>70</sup>

The kinds of agreements or compacts that require congressional consent are those “which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.”<sup>71</sup> For example, if an agreement establishing the boundary between states “cut[s] off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary;” accordingly, “the consent of Congress may well be required.”<sup>72</sup> By contrast, if the states are “not . . . adjusting the boundary between them . . . [but merely] locating precisely [the] already existing boundary,” then “neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government,” and congressional consent is not required.<sup>73</sup>

Advocates of the National Popular Vote Compact contend that there is no need for congressional consent because the choice of the manner of appointing electors is exclusively a state power and therefore does not encroach upon federal supremacy.<sup>74</sup> There are nonetheless substantial reasons to think that the National Popular Vote Compact is subject to the requirement of congressional consent because that requirement not only guards against threats to federal supremacy, narrowly conceived, but also, as the Court put it in 1838, “guard[s] against the derangement of” the agreeing states’ “federal relations with the other states of the Union.”<sup>75</sup>

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69. U.S. CONST. art I, § 10, cl. 3.

70. *See* *Virginia v. Tennessee*, 148 U.S. 503, 517–19 (1893).

71. *Id.* at 518; *see also id.* at 519 (“Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”).

72. *Id.* at 520. For a list of numerous boundary agreements to which Congress consented, see Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, 735–48 (1925).

73. *New Hampshire v. Maine*, 426 U.S. 363, 370 (1976); *see also* *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472–73 (1978) (holding that Multistate Tax Compact did not require congressional consent because it “contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States,” while acknowledging that “[t]here well may be some incremental increase in the bargaining power of the member States [with respect to] the corporations subject to their respective taxing jurisdictions”).

74. KOZA ET AL., *supra* note 12, at 633.

75. *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838) (stating that power of Congress to refuse assent to compact would be “a perfect nullity for all practical purposes” if it did not extend to compacts of boundary and explaining that the power is not designed to “prevent the states from settling their own boundaries, so far as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure”); *see also* *U.S. Steel Corp.*, 434 U.S. at 471 (“The relevant inquiry must be one of impact on our federal structure.”). In holding that the Multistate Tax Compact did not require congressional con-

Imagine if Ohio and Pennsylvania entered into a compact to award their electoral votes as a bloc to the winner of the combined popular vote in those two states. That would almost certainly tend to increase and build up the political influence of those states; after all, the reason why nearly all individual states opted for winner-take-all electoral schemes in the first place was precisely to increase their political power vis-à-vis other states, and the reason so few states have opted to allocate electors by congressional district is that it decreases their political power vis-à-vis other states. Such a compact between Ohio and Pennsylvania would effectively create, for presidential election purposes, a jumbo-state with a winner-take-all system.<sup>76</sup>

If that's true for a compact between two states, it's all the more true for a compact between more than two states. Imagine a similar compact to pool the electoral vote in favor of the popular-vote winner in all member states, but that would go into effect only upon the agreement of states that collectively have a majority of the electoral vote. That would effectively create, for presidential election purposes, a mega-state that controlled the outcome of the presidential election. No other states would matter. Once it took effect, the pressure on other states to join would be irresistible. (An even more coercive version can be imagined: If the compact closed membership as soon as the members collectively had a majority of the electoral vote, there would be enormous pressure to be quick enough to join before the door closed.)

These examples should be sufficient to demonstrate that a tendency to increase and build up the political influence of the contracting states in a way that “derange[s] . . . their federal relations with the other states of the Union” is sufficient to require congressional consent.<sup>77</sup> Indeed, the example given by the Court in *Virginia v. Tennessee* of a boundary agreement that moved “an important and valuable portion of a State” from one state to another, thereby enhancing the political power of the enlarged state, suggests as much.<sup>78</sup> As Felix Frankfurter and James Landis put it, “[A]greements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.”<sup>79</sup>

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sent, the Supreme Court did not hold that the threat to nonmember states or the federal structure is irrelevant but that the plaintiff failed to show such a threat. *Id.* at 477–78.

76. Cf. U.S. CONST. art. IV, § 3, cl. 1 (“[N]or [may] any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

77. *Rhode Island*, 37 U.S. at 726; see Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 393 (2007) (arguing that the Compact Clause “protects the interests of non-compacting states from the political encroachments of compacting states, and that the [National Popular Vote] Interstate Compact is this type of political encroachment”).

78. *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893).

79. Frankfurter & Landis, *supra* note 72, at 695. If more convincing is needed: Imagine that Maryland (with its 6 million people earning an \$80,000 median household income) and

One might go even further and argue that such an agreement would properly be considered an “alliance” or a “confederation,” which the Constitution flatly forbids states from entering into.<sup>80</sup> Justice Story described these forbidden agreements as including those where “the parties are leagued for . . . political co-operation . . . or external political dependence.”<sup>81</sup> Because such agreements make a state’s exercise of a political power—selecting its presidential electors—dependent on a political entity outside itself, they may be constitutionally forbidden. Imagine if a state entered into an agreement with a foreign government regarding the selection of a state’s presidential elector. One would hope that this would count as a forbidden alliance or confederation. But there is no separate constitutional language barring alliances and confederations between states and foreign government; instead, by barring a state from entering into *any* alliance or confederation, the constitutional prohibition applies whether the other party is a foreign nation or a sister state. As Chief Justice Marshall explained,

A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the [C]onstitution.<sup>82</sup>

It may be impossible to draw a neat analytic line between a forbidden confederation and a permissible compact subject to congressional consent. Frankfurter and Landis maintained that this is not a line that can be drawn by courts and that “only Congress is the appropriate organ for

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West Virginia (with its 1.8 million people earning a \$43,000 median household income) agreed that Maryland would pay West Virginia \$600 million in exchange for West Virginia agreeing to appoint one of its presidential electors in accordance with the popular vote in Maryland. See Grant Suneson, *Wealth in America: Where Are the Richest and Poorest States Based on Household Income?*, USA TODAY (Oct. 8, 2018, 11:09 AM), <https://www.usatoday.com/story/money/economy/2018/10/08/wealth-america-household-income-richest-poorest-states/38051359/> [<https://perma.cc/K2UY-LBUJ>]. Or suppose one state agreed to cede a portion of its territory to another state but only on the condition that the popular vote in the ceding state control the appointment of one presidential elector in the receiving state. If all that matters for purposes of congressional consent is that there is no risk to the supremacy of federal law, narrowly conceived, these agreements could go into effect without congressional consent.

80. U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”).

81. 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1833).

82. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Although Marshall referred to “treaty, alliance or confederation” as “these compacts,” it is clear that he is not referring to the Compact Clause both from the language itself and because his next two sentences discuss letters of marque and reprisal and the coining of money—the two flat prohibitions that immediately follow the bar on treaties, alliances, and confederations in Article I, Section Ten, Clause One. *Id.*; cf. James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL RTS. J. 775, 786–87 (2019) (noting that the Supreme Court has been more willing to find some compacts or agreements among the states as not requiring congressional consent than to do so for compacts or agreements with foreign powers (citing *Holmes v. Jennison*, 39 U.S. 540 (1840))).

determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation', and what arrangements come within the permissive class of 'Agreement or Compact.'"<sup>83</sup>

It must be admitted that there is an important difference between these various examples and the National Popular Vote Compact. The National Popular Vote Compact does not look only to the popular vote of the member states but also to the popular vote in non-member states.<sup>84</sup> It does not broadly attempt to freeze out the power of non-member states.

Perhaps this is enough to save it from both outright condemnation and the need for congressional consent.<sup>85</sup> But that is far from clear. First, there is one circumstance in which non-member states would be frozen out. That will happen to any state that chooses its electors by a method other than popular vote for each presidential slate. Every state currently does conduct such a popular vote, and member states agree to do so.<sup>86</sup> But if a non-member state decided to select its presidential electors by

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83. Frankfurter & Landis, *supra* note 72, at 694–95, 695 n.37 (stating that any analytical classification “is bound to go shipwreck for we are in a field in which political judgment is, to say the least, one of the important factors” and that the “considerations that led the Supreme Court to leave Congress the determination of what constitutes a republican form of government as guaranteed by the Constitution are equally controlling in leaving to Congress to circumscribe the area of agreement open to the States” (citation omitted)). Derek Muller has argued that the Supreme Court has effectively read the prohibition on states entering into treaties with other states out of the Constitution. *See* Muller, *supra* note 77, at 383 (arguing that the Court “allowed any kind of agreement between [the] states” and thereby “undercut the total prohibition on any ‘treaty, alliance, or confederation’”). He relies on a passage from *Virginia v. Tennessee* in which the Court stated that “[t]he terms ‘agreement’ or ‘compact,’ taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects.” *Virginia*, 148 U.S. at 517–18; *see* Muller, *supra* note 77, at 383. But the Court in *Virginia v. Tennessee* was plainly discussing the Compact Clause, not the Treaty Clause, since it quoted the terms “agreement” and “compact” in the cited sentence and the full Compact Clause in the prior paragraph. *See Virginia*, 148 U.S. at 517. Muller seems to think that simply because the Court has indicated that some political agreements are permissible (with congressional consent), no agreement between the states can run afoul of the Treaty Clause. But that does not follow. Some kinds of political agreements might be prohibited treaties, even if some political agreements are permissible (with congressional consent). Simply because “[t]he terms ‘agreement’ [and] ‘compact’ taken by themselves . . . embrace all forms of stipulation . . . relating to all kinds of subjects,” *see id.* at 517–18 (emphasis added), it does not follow that they might not have a narrower meaning when contrasted with the terms “treaty,” “alliance,” and “confederation.” Alternatively, a “treaty,” “alliance,” or “confederation” might be viewed as a subset of “agreement” or “compact.” It may be so difficult to draw the distinction between a “treaty,” “alliance,” or “confederation” (on the one hand) and an “agreement” or “compact” (on the other) that there are no judicially manageable standards and, as Frankfurter and Landis suggested, the distinction poses a nonjusticiable political question. *See* Frankfurter & Landis, *supra* note 72, at 695 n.37. If so, Muller might be right that Article III courts cannot police that boundary. But this conclusion simply underscores the responsibility of the House and the Senate to do so.

84. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 1.

85. *Cf. Amar*, *supra* note 10, at 478 (arguing that congressional consent would not be needed but stating that “[t]he matter might be different if the coordinating states had sought to freeze other states out—say, by agreeing to back the candidate winning the most total votes within the coordinating states as a collective bloc, as opposed to the most total votes nationwide”).

86. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. II (“Each member state shall conduct a statewide popular election for President and Vice President of the United States.”).

some other means, the member states would control the outcome and that non-member state would be irrelevant. That's not as dramatic a freeze-out of non-members states as a compact that counted only the votes in member states, but it does freeze out any state that rejects the popular vote premise of the compact.

But even apart from the possibility of freezing out any state that chooses not to conduct a popular vote, there is still a "derangement" of the federal relations among the states of the Union. The Constitution allocates to each state a certain share in the selection of those who exercise the power of the national government. Each state is allocated two senators.<sup>87</sup> Each state is allocated representatives in the House in proportion to its population.<sup>88</sup> Each state is allocated presidential electors equal to the sum of senators and representatives.<sup>89</sup> And no state has any agency in the exercise of any other state's allocated power.

The National Popular Vote Compact would change—derange—that aspect of the federal relations among the states of the Union. It would give every state that conducts a popular presidential vote a role in the selection of the electors of every other state that joined the compact. That effect is not incidental to some other purpose—that is the very purpose of the compact.<sup>90</sup> Thus, while the matter is not free from doubt, there is a substantial argument that the compact is unconstitutional, at least absent congressional consent.

## B. ROLE OF ELECTORS

This past term, in *Chiafalo v. Washington*, the Supreme Court held that a state has the power to require a presidential elector to vote in accordance with that state's popular vote.<sup>91</sup> The Court observed that states had long required electors to pledge in advance to support the nominee of the political party whose candidate wins that state's popular vote, and that it had "upheld such a pledge requirement decades ago, rejecting the argument that the Constitution 'demands absolute freedom for the elector to vote his own choice.'"<sup>92</sup> It concluded that a state may not only require such a pledge but "may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won

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87. U.S. CONST. art. I, § 3, cl. 1.

88. *Id.* art. I, § 2, cl. 3.

89. *Id.* art. II, § 1, cl. 2.

90. Could an interstate compact (with or without congressional consent) create a single deliberative Electoral College—despite the constitutional requirement that "Electors shall meet in their respective States" rather than in a central location—by providing for a video conference among all electors across the country? U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XII. Although the term "Electoral College" is commonly used to refer to all electors, it would be more precise to refer to "Electoral Colleges" because each state has its own college of electors. See 3 U.S.C. § 4 (2018) ("Each state may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.").

91. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

92. *Id.* at 2319–20 (quoting *Ray v. Blair*, 343 U.S. 214, 228 (1952)).

his State's popular vote."<sup>93</sup> In a companion case where the state had replaced, rather than penalized, the elector, the Court "reversed for the reasons stated in *Chiafalo*."<sup>94</sup> Thus, it is clear that a state may require its electors to vote in accordance with that state's popular vote.

The Court offered two basic reasons for this conclusion: text and long-settled practice. As a matter of text, the Court stated that "the power to appoint an elector . . . includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect."<sup>95</sup> Just as a state can require that an elector live in the state and "can insist . . . that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote," so too, "so long as nothing else in the Constitution poses an obstacle[,] a State can add . . . an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty."<sup>96</sup>

It rejected the elector's textual argument that "electors" who "vote" by "ballot" must be able to vote as they choose.<sup>97</sup> The Court gave several examples where voting does not "connote independent choice," including "a person [who] always votes in the way his spouse, or pastor, or union tells him to."<sup>98</sup> Although some Framers expected presidential electors to exercise their own judgment, they "did not reduce their thoughts about electors' discretion to the printed page," and the text "took no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be."<sup>99</sup> This textual argument supports a broad power of a state legislature to direct how a state's electoral votes will be cast and will cheer advocates of the National Popular Vote Compact.

But the Court also relied on a long-established practice. Going back to the nation's first contested presidential election in 1796, "[w]ould-be electors declared themselves for one or the other party's presidential candidate" so that "selectors of an elector knew just what they were getting—not someone who would deliberate in good Hamiltonian fashion, but someone who would vote for their party's candidate."<sup>100</sup> The Twelfth Amendment, by providing for a separate vote for President and Vice President, enabled electors to "'carry out the desires of the people' who had sent him to the Electoral College."<sup>101</sup> By 1892, the Court could say that, in practice, electors "were chosen 'simply to register the will of the appointing power in respect of a particular candidate.'"<sup>102</sup>

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93. *Id.* at 2320.

94. *Colorado Dep't of State v. Baca*, 140 S. Ct. 2316, 2316 (2020) (per curiam).

95. *Chiafalo*, 140 S. Ct. at 2324.

96. *Id.*

97. *Id.* at 2325 (referencing U.S. CONST. art. II, § 1; *id.* amend. XII).

98. *Id.* ("We might question his judgment, but we would have no problem saying that he 'votes' or fills in a 'ballot.'").

99. *Id.* at 2326.

100. *Id.*

101. *Id.* at 2327 (quoting *Ray v. Blair*, 343 U.S. 214, 224 n.11 (1952)).

102. *Id.* (quoting *McPherson v. Blacker*, 146 U. S. 1, 36 (1892)).

State election laws evolved to reinforce that development, ensuring that a State's electors would vote the same way as its citizens. . . . States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters. Washington's law, penalizing a pledge's breach, is only another in the same vein. It reflects a tradition more than two centuries old. In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen.<sup>103</sup>

It acknowledged that 180 "faithless" votes had been cast and that Congress had counted these votes but emphasized that these votes (putting aside the ones from 1872 when the Democratic nominee died just after Election Day) "represent just one-half of one percent of the total," and "because faithless votes have never come close to affecting an outcome, only one has ever been challenged."<sup>104</sup> While that one challenged vote was counted, "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years."<sup>105</sup>

There is, of course, no established practice of choosing electors who are legally obligated to vote for a candidate whom the state's voters have *rejected*. And no established practice of choosing electors who are legally obligated to vote for a candidate that some set of people *outside the state* have chosen.<sup>106</sup>

It may be that the absence of such a tradition leaves the power in the state legislature—subject to other constitutional constraints, including the Compact Clause.<sup>107</sup> One such constraint is the Guarantee Clause.<sup>108</sup> Some might contend the National Popular Vote Compact violates the Guarantee Clause, reasoning that a state that hands over its vote to the citizens of another sovereign is no longer republican.<sup>109</sup> Imagine if a state decided to appoint electors who were legally obligated to vote for the candidate chosen by the King of France—or the President of Russia.

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103. *Id.* at 2328 (citation omitted).

104. *Id.*

105. *Id.*

106. To be clear, the concern is not that the National Popular Vote Compact would require electors who were pledged to the candidate who won in their state to instead vote for a competing candidate if that competing candidate won the national popular vote. That is not how the compact is designed to work. Under the compact, the electors pledged to the candidate who won the national popular vote would be appointed as a member state's electors regardless of who won the popular vote in that state. For example, if the Democratic candidate won in New Jersey, but the Republican candidate won the national popular vote, New Jersey would appoint as its electors those who were pledged to vote for the Republican candidate. The switch from the state's own vote to the national vote occurs at the elector selection stage—not at the elector voting stage.

107. *See Chiafalo*, 140 S. Ct. at 2324 n.4 ("Checks on a State's power to appoint electors, or to impose conditions on an appointment, can theoretically come from anywhere in the Constitution. A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause.").

108. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

109. *See id.*

*Chiafalo* held that “[t]he Constitution’s text and the Nation’s history both support allowing a State to enforce an elector’s pledge to support his party’s nominee—and the state voters’ choice—for President.”<sup>110</sup> And the Court made a point of not speaking to other situations. In particular, it noted “that because the situation is not before us, nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate.”<sup>111</sup> Thus, while the *Chiafalo* decision is certainly more favorable to the National Popular Vote Compact than a contrary holding would have been,<sup>112</sup> one might reasonably conclude that because the situation was not before the Court, nothing in the opinion should be taken to permit the states to choose electors who are bound to support the candidate chosen by some set of people outside the state.

And even if a state can choose to select its own electors in this way, it does not follow that one state can enforce an agreement with another state to do so. Even if the power to appoint implies the power to impose conditions on the appointment, it does not follow that the power to appoint implies the power to enter into legally binding contracts about the exercise of that power.<sup>113</sup>

That’s because even where the ordinary requirements of a contract are all present, a contract concerning how one will vote or make a political appointment is not legally enforceable. A presidential candidate might promise to appoint someone to the Supreme Court in exchange for (say) withdrawing from the presidential race, but such a contract would not be legally enforceable.<sup>114</sup> A state can enter into a legally enforceable con-

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110. *Chiafalo*, 140 S. Ct. at 2323–24.

111. *Id.* at 2328 n.8.

112. If the Court had held that an elector must be free to cast an independent vote, while distinguishing *Ray v. Blair*, 343 U.S. 214 (1952), as involving an unenforceable political pledge, that would have lent support to the argument that even if a state may make a political pledge about how it will select its presidential electors, such a pledge is not legally binding.

113. Lots of political pledges are not legally binding. For example, George H.W. Bush famously promised: “Read my lips: no new taxes.” Vice President George H.W. Bush, *Acceptance Speech at the Republican National Convention* (Aug. 18, 1988), <https://millercenter.org/the-presidency/presidential-speeches/august-18-1988-acceptance-speech-republican-national> [<https://perma.cc/59DX-WPBP>]; see Stephen D. Sencer, *Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises*, 90 MICH. L. REV. 428, 469 (1991) (arguing that the law “should demand” “truth and honesty” “in the world of politics,” while acknowledging the “legal system’s historical reluctance or inability to play a role in policing . . . campaign deception”). Using the language of contract does not change that, as the “Contract with America” illustrates. *Hurt v. Wicker*, No. 1:06-cv-241-M-D, 2006 WL 2727980, at \*1 (N.D. Miss. Sept. 22, 2006) (dismissing complaint alleging breach of the “Contract with America”). See generally CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 4–5, 8 (Ed Gillespie & Bob Schellhas eds., 1994).

114. See *United States v. Blagojevich*, 794 F.3d 729, 737 (7th Cir. 2015) (noting that “[s]ome historians say that . . . Earl Warren came to be Chief Justice of the United States” by “deliver[ing] the California delegation at the 1952 Republican convention to Eisenhower (rather than Senator Taft) in exchange for a commitment to appoint him to the next vacancy on the Supreme Court”); see also 18 U.S.C. § 599 (2018) (“Whoever, being a candidate, directly or indirectly promises or pledges the appointment . . . of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined under this title or imprisoned . . . .”); 18 U.S.C. § 600 (2018) (“Who-

tract with another state to buy (say) office equipment. But could a state enter into a legally enforceable contract with another state to buy its electoral votes? Could members of Congress from two states enter into a legally enforceable contract with each other to vote as a single bloc?

## V. IMAGINING ELECTIONS UNDER THE NATIONAL POPULAR VOTE COMPACT

If the requisite number of states joined the National Popular Vote Compact, the incentives discussed above would kick in. States would have an incentive to increase the number of voters for favored candidates and to decrease the number of voters for disfavored candidates. In our current political culture, many would believe that states were engaged in such activities, even if they weren't.<sup>115</sup>

### A. REACTION

How will states react when they learn (or wrongly believe) that other states are taking steps to increase the number of voters for favored candidates and to decrease the number of voters for disfavored candidates? For example, how will other states react to the news (or rumors) that California is letting people vote who are in the country illegally? How

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ever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined under this title or imprisoned not more than one year, or both.”); *Blagojevich*, 794 F.3d at 737 (declining to address whether § 599 is compatible with the First Amendment).

115. See, e.g., Nick Corasaniti, *A Pennsylvania County's Election Day Nightmare Underscores Voting Machine Concerns*, N.Y. TIMES (Nov. 30, 2019), <https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html> [https://perma.cc/H4PJ-EZMD] (referring to “an era where some candidates and incumbents try to challenge or discredit a close loss by questioning the system, either with unfounded allegations of voter fraud or claims of a ‘rigged’ election,” and stating, “Voters across the county said the experience further eroded their already shaken confidence in the election process”); see also, e.g., Michael D. Shear, *Trump Again Assails Mail-In Voting*, N.Y. TIMES (Aug. 31, 2020), <https://www.nytimes.com/2020/08/03/us/politics/trump-mail-in-voting.html> [https://perma.cc/X683-RRUU] (“The president has been raging against voting by mail for several months, claiming without evidence that the process is plagued by fraud.”); Bazelon, *supra* note 64 (quoting President Trump calling voting by mail “corrupt” and Representative Thomas Massie calling it “the end of our republic as we know it”); Maggie Haberman et al., *Trump's False Attacks on Voting by Mail Stir Broad Concern*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/politics/trump-vote-by-mail.html> [https://perma.cc/W4V3-MKAW] (stating that “Mr. Trump has focused intensive new attacks on voting by mail,” and that President Trump claimed that “[t]here is tremendous evidence of fraud whenever you have mail-in ballots,” . . . a statement that has no basis in the experience of the states that give voters the option of voting by mail”); *id.* (noting that Professor Richard L. Hasen “said that unlike the president’s false claims about in-person voting, there have been sporadic problems with mail-in voting, giving Mr. Trump a kernel of truth on which to build an indictment of the entire system”).

will other states react to the news (or rumors) that Texas is restricting the hours and locations of voting in an effort to suppress the Black vote?

One reaction would be to change their own voting practices to counter-balance what other states are (or thought to be) doing. If California is letting people who are in the country illegally vote, we better lower our voting age. If Texas is restricting the hours and locations of voting in an effort to suppress the Black vote, we better expand early voting and let prisoners vote. Suspicions about what is going on in other states could lead states to change their practices, which could, in turn, lead other states to change their practices so that a real change on the ground could be brought about by rumors. Indeed, fear that a state *might* take some action could prompt preemptive action by other states so that a real change on the ground could be brought about by fear.

It is possible that these moves and countermoves might prompt a state to withdraw from the compact. The compact permits withdrawal, but a withdrawal after July 20 of a presidential election year does not take effect until the next election.<sup>116</sup> One way in which the constitutional issues discussed above might be litigated would be if one or more states purported, after July 20, to withdraw effective immediately and other member states sued to compel compliance with the compact. There would then be about three-and-a-half months until Election Day for the litigation to be resolved.

On the other hand, if no state withdrew before Election Day, but in the weeks following a presidential election a compact state concluded (rightly or wrongly) that some other state improperly (in the view of the first state) inflated or deflated its vote, it might respond in other ways. Fraud is perhaps the easiest example of real or imagined state misbehavior that could prompt a response by other states. (Other actions, such as voting by those not legally in the country or vote suppression, could similarly provoke a response.) If a compact state is convinced that there was rampant fraud in another state, its executive might refuse to count that other state's vote in compiling the national popular vote. This would mean that the "national popular vote" as calculated in the refusing member state would be different than the "national popular vote" calculated in other member states—unless all member states reached the same conclusion, but there is no mechanism for such coordination.

Instead, any such refusal would appear to violate the compact, which makes an official statement of the popular votes "conclusive."<sup>117</sup> But if litigation were brought to enforce the compact, all kinds of questions would arise.

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116. See *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. IV, cl. 2.

117. *Id.* art. III, cl. 5.

## B. LITIGATION

One set of questions would be the constitutional questions discussed above. The point of that discussion was not to reach a conclusion about those questions but rather to demonstrate that they are serious questions—serious enough that a state might act on them.

In addition to the issues of whether the compact is constitutionally permissible and enforceable, there would be issues about who could sue to enforce it. Only a member state? A non-member state whose votes were rejected? The rejected electors? A presidential candidate? Are all member states necessary parties to the litigation? All non-member states? All presidential candidates?

There would also be the question of whether the compact should be interpreted, on the merits, to treat a count tainted by fraud as “conclusive.” If both the rejected and rejecting state were members, the rejecting state might claim that the rejected state violated its obligation to “make a final determination of the number of popular votes cast in the state,” freeing the rejecting state from its obligations under the compact.<sup>118</sup>

Nor could a state avoid litigation simply by adhering to the terms of the compact. That’s because the candidate who won the popular vote in that state but whose electors were not appointed could sue, raising the same constitutional and interpretive issues.<sup>119</sup>

Litigation is possible, then, with regard to the appointment of electors in every member state where there is a mismatch between that state’s own popular vote and the national popular vote. Depending on the parties named in each case, litigation might be brought in state court, federal district court, or even the Supreme Court’s original jurisdiction. And depending on where the litigation is brought, consolidation may—or may not—be available.

The time to resolve all this litigation before the electors meet in their respective states to vote will certainly be less than six weeks, and it may well be less than one week. That’s because Election Day is the Tuesday after the first Monday in November (which can range from November 2 to November 8),<sup>120</sup> and the date for electors to cast their votes is the Monday after the second Wednesday in December (which can range from December 13 to December 19).<sup>121</sup> That’s forty-two days from Election Day until the electors must meet and vote, counting Election Day and the day the electors meet. The very earliest that a member state could appoint electors—and thereby trigger litigation by those aggrieved by the appointment—would be forty-two days before the electors vote.

However, members of the National Popular Vote Compact may not be able to appoint electors that quickly, even if state law otherwise permit-

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118. *Id.* art. III, cl. 4.

119. Indeed, that candidate could sue, raising the constitutional issues, even if there were no claims or rumors of other misconduct in the election.

120. 3 U.S.C. § 1 (2018).

121. *Id.* § 7.

ted such speed. Under the compact, members must make a final determination of their own popular vote at least six days before the meeting of the electors.<sup>122</sup> That is the same date as the safe harbor for a final determination of any controversy or contest under preexisting law concerning the appointment of electors under the Electoral Count Act,<sup>123</sup> and the same date set by the compact for member states to give “conclusive” effect to official statements of popular votes for all states.<sup>124</sup> So a state that was eager to get inside the safe harbor might announce a decision to reject another state’s popular vote as soon as possible to maximize how much of the possible thirty-five days between Election Day and the safe harbor would be available. But the state might not be able to tally the national popular vote and appoint its electors until the safe harbor day arrives. All member states have to wait for the slowest state.<sup>125</sup> If there are unresolved disputes about the counting of votes in even one state, the compact requires all member states to wait until either that dispute is resolved or there are only six days until the day for electors to vote before they tally the national public vote and appoint their electors. If one state fails to make it into the safe harbor, it appears that every member state would also fail because they would have to wait until the time expired. And if one state gets in just under the wire, every member state may fail unless they can turn things around in the minutes or hours left.

So we may be looking at six days to resolve these legal issues about the constitutionality, enforceability, and proper interpretation of the compact—with litigation beginning after the safe harbor has already closed. Maybe even less. While the safe harbor provides an incentive to resolve disputes prior to that date, it does not so require. Nor does the National Popular Vote Compact, which requires each member state to tally the national popular vote total “[p]rior to the time set by law for the meeting and voting by the presidential electors” and to appoint the corresponding electors.<sup>126</sup> A state that was not so concerned about the safe harbor might wait longer—perhaps simply to delay, perhaps to consider its options carefully, perhaps to see what happens in the state it suspects of improper behavior, perhaps to see how other states are reacting—to announce its tally of the national popular vote and appoint the corresponding electors,

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122. Members must also communicate their statement to other member states within twenty-four hours. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 4.

123. 3 U.S.C. § 5.

124. *See Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 5.

125. Increased voting by mail due to the coronavirus could easily delay the counting of votes. Shane Goldmacher, *A Winner on Election Day in November? Don't Count on It*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/politics/november-2020-election-day-results.html> [<https://perma.cc/R9CK-SR78>] (noting that “a senior adviser on election security for the Department of Homeland Security[ ] said the greater number of mail-in ballots this fall would make results take longer to tabulate than in the past,” and that “[t]he need to take a longer time to process and count these ballots is a sign of the process working,” . . . [not] ‘an indication of anything malicious’”).

126. *Text of the National Popular Vote Compact Bill*, *supra* note 40, art. III, cl. 1.

or to announce its rejection of the compact and appoint the electors corresponding to the winner in that state.

### C. LEGISLATIVE APPOINTMENT AND MULTIPLE SLATES OF ELECTORS

All of this might lead state legislatures to get into the act and appoint electors themselves. They might foresee that disputes might not be resolved in time for the electors to vote and that this might be viewed as the state having “failed to make a choice” on Election Day—triggering the existing statutory provision for state legislatures to appoint electors after Election Day.<sup>127</sup> They might also foresee that if litigation ultimately rejected the state executive’s position about the compact, then a backup appointment of electors might be necessary to avoid the state having no electors counted in the presidential elections. In addition to litigation uncertainty, state legislatures may also appoint electors themselves because they foresee the possibility that issues about the constitutionality, enforceability, and interpretation of the compact will arise when the House and Senate meet for the counting of the electoral vote. At that meeting, resolution of those issues might result in the rejection of a state’s electoral vote.

If the state executive and legislature are in accord, the electors directly appointed by the legislature might be the same as those certified by the executive. In that instance, one simply serves as a backup to the other. But if the state executive and the state legislature disagree about the constitutionality, enforceability, or interpretation of the compact, or about the facts of what actually happened in other states—as is likely if the executive and the legislature are in the hands of different parties—there could be two opposing slates of electors.<sup>128</sup>

The result (particularly if there has been no final resolution before the safe harbor closes) is that competing slates of electors might meet and vote on the appointed day. The slate of electors associated with the candidate who claims to have won the national popular vote could meet and

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127. See 3 U.S.C. § 2 (“Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”). Some contend that once a state legislature has given the people the right to vote for President, that right is fundamental, and therefore the legislature cannot override the will of the people by appointing electors to do something different after the fact. See, e.g., Transcript of Oral Argument at 41, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465) (statement of Mr. Purcell). *But see id.* at 56 (agreeing that it would probably be permissible if the legislature made clear in advance that the public vote was entirely advisory). Even if one accepts that argument, it does not follow that this statute is unavailable if the people failed to make a choice on Election Day; there is then nothing to override, and the alternative may be that the state gets no representation in the electoral vote. Moreover, acceptance of this argument could present another challenge for advocates of the compact: If the people of a state have a (legislatively created) fundamental right to vote for how a state’s electoral votes are cast, does it dilute that fundamental right to authorize voters from other states to participate in voting for how a state’s electoral votes are cast?

128. There is also the possibility of a division within the state executive in states that lack a unitary executive.

vote. So, too, could the slate of electors associated with the candidate who claims to have won the vote in the state.

Competing slates of electors might meet and vote even without post-election legislative appointment. That's because the presidential candidates might foresee the possibility of prevailing in litigation after the meeting and voting of the electors but before the electoral votes are counted on January 6 in the presence of the Senate and the House of Representatives.<sup>129</sup> Or the candidates might foresee the possibility of prevailing when the Senate and House meet if some electoral votes are rejected.

#### D. THE MEETING OF THE HOUSE AND SENATE

The Electoral Count Act establishes standards and procedures to apply to the counting.<sup>130</sup> It generally calls for the result of any decision reached prior to the closing of the safe harbor pursuant to preexisting law to be accepted, but even then, it allows for the two houses concurrently to reject votes not “regularly given by the electors.”<sup>131</sup> In the absence of a decision reached prior to the closing of the safe harbor, if the House and the Senate disagree about which of multiple returns to count, the Electoral Count Act states that the return certified by the state executive shall be counted.<sup>132</sup> These provisions—especially the latter—give plenty of room to debate both the constitutionality of the National Popular Vote Compact and the legitimacy of the way any particular state conducted its presidential election.

It might be thought that the Senate and the House have no authority whatsoever to reject electoral votes. But even the narrowest view of their authority would have to concede the authority to reject votes that are not from a state—but instead (say) from a group of self-appointed individuals or a foreign nation—and the authority to decide which of multiple returns from a single state is the legitimate one.<sup>133</sup> Lest this seem fanciful, over the years the House and the Senate have decided multiple challenges to electoral votes, including considering whether a return was from a state and which of multiple returns from a single state to count.<sup>134</sup>

More dramatically, the House and Senate have rejected electoral votes based on the conclusion that the states were not republican, and thus in

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129. See U.S. CONST. amend. XII. The January 6 date is set by 3 U.S.C. § 15. In some years, Congress sets a different date. See, e.g., Date for Counting 2012 Electoral Votes in Congress, Pub. L. No. 112-228, 126 Stat. 1610 (2012) (establishing January 4, 2013, for the 2012 election).

130. 3 U.S.C. § 15 (2018).

131. *Id.*

132. *Id.*

133. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1795 (2002) (“Under even the ‘thinnest’ conception of the counting function, the joint convention [of the House and Senate] must judge the authenticity of the electoral certificate, distinguishing between what is merely the legal equivalent of a Publishers Clearinghouse sweepstakes entry and what is a bona fide electoral certificate.”).

134. See *id.* at 1680–94 (recounting the history of these incidents).

violation of the Guarantee Clause of the Constitution.<sup>135</sup> In that instance, the House and Senate acted by law, presenting the bill to President Lincoln for his signature or veto. Lincoln signed it in deference to the House and Senate, but clearly stated that, in his view,

[T]he two Houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter.<sup>136</sup>

Is there something unique about the Guarantee Clause, or may (must?) the votes of electors who were selected in violation of other constitutional provisions also be rejected? I suggest that the votes of electors who were selected pursuant to an unconstitutional process should also be rejected. Imagine a state enacted a statute providing that its presidential electors would be white, male, Roman Catholic priests selected by the Pope—thus violating the Equal Protection Clause, the Establishment Clause, and the Religious Test Clause.<sup>137</sup> Is there any doubt that the vote of electors so chosen should not be counted?

This does not necessarily mean that the votes of individual electors may be rejected by the House and the Senate because that vote was cast unconstitutionally. For example, if an elector votes for someone under the age of thirty-five, or votes for a President and Vice President who were both citizens of the elector's state, it may be that the House and Senate have no authority to refuse to count the vote.<sup>138</sup> And perhaps each state's electoral college has conclusive authority to determine whether individual electors are disqualified.<sup>139</sup> But each state's electoral college must not be able to determine conclusively whether the law that provided for its appointment is constitutional. It is one thing for an admittedly valid body to judge the qualifications of individual members, but if the legality of the body as a whole is in question, it would be the purest of bootstrapping for it to have conclusive authority to determine its own legitimacy.

We can expect that some members of Congress will contend that the National Popular Vote Compact is unconstitutional and will seek to reject any votes from electors appointed pursuant to that compact. Under the

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135. See *id.* at 1797; see also U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

136. Kesavan, *supra* note 133, at 1797 (citing HOUSE SPECIAL COMMITTEE, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 229–30 (1877)).

137. See U.S. CONST. amends. XIV, I; *id.* art. VI, cl. 3.

138. See Kesavan, *supra* note 133, at 1805 (making this argument).

139. *Id.* at 1802 (arguing that elector ineligibility, such as the prohibition on members of Congress and those holding office under the United States being electors, cannot be enforced by the House and Senate, because “the elector ineligibility problem is impossible to resolve without knowing the persons voted for” and the House and Senate “may not judge the acts of electors”). Kesavan writes broadly that the House and Senate “may not judge the manner of appointment . . . of electors,” but he does not address the kind of defect in the manner of appointment that would render the appointment of all electors in that state unconstitutional. *Id.*

Electoral Count Act, if litigation has reached a final decision prior to the closing of the safe harbor, that result must be accepted unless both houses of Congress concurrently reject the votes as not “regularly given by the electors.”<sup>140</sup> Alternatively, if there are multiple returns from a state, and the House and the Senate disagree about which of multiple returns to count, the Electoral Count Act states that the return certified by the state executive shall be counted.<sup>141</sup> Under these rules, particularly in our hyper-polarized political environment, it might be crucial whether the House and the Senate are both controlled by the same party.

This assumes that the Electoral Count Act itself is binding. But it certainly cannot bind a future Congress acting by law. To the extent that an earlier Congress may validly pass a statute, a later Congress can amend it, either generally or for a particular occasion. Indeed, the Electoral Count Act itself has been amended for particular electoral counts.<sup>142</sup>

The Electoral Count Act may not even bind the Senate and the House of Representatives acting without the President. That’s because any rules governing the procedure in the Senate and the House may be in the hands of the Senate and the House, rather than something that can be controlled by a law subject to presidential presentment and possible veto.<sup>143</sup> If that’s right, then the House and the Senate could change the process dictated by the Electoral Count Act without the involvement of the President—a feature that may be crucial if Congress and the presidency are held by different parties. The incumbent President is the one who would matter, whether or not that person is also a candidate.

Moreover, the Electoral Count Act’s provision for concurrent action by the Senate and the House acting separately may be unconstitutional. There is a powerful argument that the Constitution views the joint meeting of the Senate and the House of Representatives as its own body so that any vote to be taken by the body should be taken in that body as a unicameral whole—not the Senate and the House of Representatives voting separately.<sup>144</sup> That voting rule would make crucial the party division in Congress as a whole, rather than the party division in each house.

One final complication: the Electoral Count Act, by setting the date for the joint meeting on January 6, provides for the newly elected Congress—elected in November and assumed office on January 3—to resolve objections to the electoral votes. But neither Article Two nor the Twelfth Amendment explicitly so provide. Nor does the Twentieth Amendment, which, by moving the starting date of congressional and presidential terms from March until January, was designed to eliminate lame duck

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140. 3 U.S.C. § 15 (2018).

141. *Id.*

142. *See, e.g.*, H.R.J. Res. 122, 112th Cong., 126 Stat. 1610 (2012) (changing the date of the meeting to count the electoral vote in January 2013 but otherwise leaving January 6 as the date for future meetings).

143. Kesavan, *supra* note 133, at 1779–87.

144. *See id.* at 1720–29, 1792–93 (marshalling evidence and arguing for unicameralism).

sessions of Congress but failed to do so.<sup>145</sup> Thus, it is possible that the outgoing lame duck Congress might move the meeting to a date prior to January 3, claiming for itself the power to resolve objections to the electoral vote. The outgoing Congress has already moved the date, each on a one-time basis, on five different occasions since 1984, albeit never earlier than January 4.<sup>146</sup>

To recap: Under the National Popular Vote Compact, states will, for the first time ever, have a role in determining which electors are appointed in other states, giving them a new incentive to run up the vote for a state's favored candidate and depress the vote for a state's disfavored candidate. These incentives may be hard to resist in states dominated by a single party, and in our hyper-partisan political culture, states will be suspected of mischief even if they do not engage in any. Once that happens, there will be pressure in member states to resist awarding electoral votes in accordance with the popular vote, and competing slates of electors may meet and vote. Battles over the constitutionality, enforceability, and proper interpretation of the compact can erupt in state legislatures, a variety of courts, and in the House of Representatives and Senate, under enormous time pressure and considerable uncertainty—not only with regard to these issues but also with regard to the rules that govern in the joint meeting of the House and Senate, and even whether the lame duck or the new House and Senate are the ones to judge the electoral returns.

Perhaps all of this can be avoided if the relevant actors behave with restraint and adherence to tradition. Perhaps we can rely on existing practices and the Electoral Count Act to serve as a precommitment from which political actors dare not depart.<sup>147</sup> But in an era that has seen, for example, the abolition of the filibuster for nominations to executive and inferior judicial offices, the refusal to consider a Supreme Court nominee, and the abolition of the filibuster for Supreme Court nominations, how

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145. See John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS L. REV. 1177, 1180–82 (2012); John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 483 (1997).

146. Date for Counting 2012 Electoral Votes in Congress, Pub. L. No. 112-228, § 1, 126 Stat. 1610, 1610 (2012) (setting January 4, 2013); Date for Counting 2008 Electoral Votes in Congress, Pub. L. No. 110-430, § 2, 122 Stat. 4846, 4846 (2008) (setting January 8, 2009); Date for Counting 1996 Electoral Votes in Congress, Pub. L. No. 104-296, § 2, 110 Stat. 3558, 3558 (1996) (setting January 9, 1997); Changing the Date for the Counting of the Electoral Vote by Congress to January 4, 1989, Pub. L. No. 100-646, 102 Stat. 3341 (1988) (setting January 4, 1989); Changing the Date for the Counting of the Electoral Votes in 1985, Pub. L. No. 98-456, 98 Stat. 1748 (1984) (setting January 7, 1985). Cf. WEGMAN, *supra* note 46 (asserting, without mentioning the relevant statutes governing the time to count electoral votes (or the Twentieth Amendment), that if there is a contingent election in the House upon the failure of any presidential candidate to receive a majority of the electoral vote, “the presidency is decided by the outgoing, lame-duck House, not the incoming one”).

147. Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 227 (1994) (calling those who are concerned about a future Congress (or a future joint meeting of the House and Senate) “spoilsports and worrywarts” and defending proposed legislation regarding the counting of electoral votes as serving “a precommitment and focal point”). Cf. Kesavan, *supra* note 133, at 1783 (“Call me a worrywart . . .”).

can anyone be confident of restraint and adherence to tradition and precommitments?

Such behavior seems likely to be in even shorter supply in the coming years. On the Democratic side, presidential candidates in the primary called for expanding the size of the Supreme Court and the abolition of the filibuster generally.<sup>148</sup> On the Republican side is an incumbent president running for reelection after impeachment. Advocates of the President's conviction argued, in formal filings in the Senate as a Court of Impeachment, that the President must be removed from office because otherwise "he will continue to endanger our national security, jeopardize the integrity of our elections, and undermine our core constitutional principles."<sup>149</sup> By contrast, the President's formal answer in the Court of Impeachment called the articles of impeachment "a brazen and unlawful attempt to overturn the results of the 2016 election and interfere with the 2020 election," and "a dangerous attack on the American people themselves and their fundamental right to vote."<sup>150</sup> The first day of proceedings in the Court of Impeachment included a House manager accusing senators of "voting for a cover-up" and defense counsel accusing the manager of making false allegations and telling him that he "should be embarrassed."<sup>151</sup> In closing arguments, House Manager Schiff stated, "You can't trust this President to do the right thing, not for one minute, not for one election, not for the sake of our country. You just can't. He will not change, and you know it."<sup>152</sup> And Deputy Counsel to the Presi-

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148. See Bob Egelko, *Democratic Candidates Propose Bigger Supreme Court to Counter 'Theft of Judiciary'*, S.F. CHRON. (Jan. 13, 2020, 6:37 PM), <https://www.sfchronicle.com/nation/article/Democratic-candidates-propose-bigger-Supreme-14972607.php> [<https://perma.cc/H5MJ-R49E>]; Burgess Everett, *Warren Calls for Ending the Filibuster*, POLITICO (Apr. 5, 2019, 11:42 AM), <https://www.politico.com/story/2019/04/05/elizabeth-warren-filibuster-2020-election-1259196> [<https://perma.cc/TN63-4F7C>]. President Obama joined the call to eliminate the filibuster if necessary to enact voting reforms. Bill Chappell, *Obama Calls For Abolishing Filibuster If It Stands in Way of Stronger Voting Rights*, NPR (July 30, 2020, 4:11 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/30/897283395/obama-calls-for-abolishing-filibuster-if-it-stands-in-way-of-stronger-voting-rig> [<https://perma.cc/6HZ9-9Q3E>] (quoting President Obama as saying, "And if all this takes eliminating the filibuster—another Jim Crow relic—in order to secure the God-given rights of every American, then that's what we should do.").

149. Trial Memorandum of U.S. House of Representatives at 46, *In re Impeachment of President Donald J. Trump* (Jan. 18, 2020) (Senate sitting as a Court of Impeachment); see also *id.* at 45 ("The Senate should convict and remove President Trump to avoid serious and long-term damage to our democratic values and the Nation's security.").

150. Answer of President Donald J. Trump at 1, 6, *In re Impeachment of President Donald J. Trump* (Jan. 18, 2020) (Senate sitting as a Court of Impeachment).

151. See Paul LeBlanc, *Roberts Scolds Legal Teams after Tense Exchange: 'Those Addressing The Senate Should Remember Where They Are'*, CNN POLITICS (Jan. 22, 2020, 1:54 AM), [https://www.cnn.com/politics/live-news/trump-impeachment-trial-01-21-20/h\\_2a37eba710285d140f5643cd25d8bda0](https://www.cnn.com/politics/live-news/trump-impeachment-trial-01-21-20/h_2a37eba710285d140f5643cd25d8bda0) [<https://perma.cc/LD4G-8WP2>]. The exchange led Chief Justice Roberts to admonish both sides to "remember that they are addressing the world's greatest deliberative body," where "members avoid speaking in a manner and using language that is not conducive to civil discourse." *Id.* Less formal communication questioned the patriotism of members of the House, called witnesses human scum, and described the impeachment inquiry as a witch hunt and kangaroo court.

152. 166 CONG. REC. S788 (daily ed. Feb. 3, 2020) (statement of House Manager Schiff).

dent stated, “This was a purely partisan, political process. . . . It was done by a process that was not designed to persuade anyone[,] or to get to the truth[,] or to provide process and abide by past precedents.”<sup>153</sup>

These polarized positions were not limited to the advocates. At the close of the trial, Senate Majority Leader Mitch McConnell stated that “‘the demon of faction’ has been on full display, but now it is time for him, the demon, to exit the stage. We have indeed witnessed an abuse of power—a grave abuse of power—by just the kind of House majority that the Framers warned us about.”<sup>154</sup> The Minority Leader, Chuck Schumer, responded,

[T]his is the first impeachment trial of a President[,] or impeachment trial of anybody else[,] that was completed that has no witnesses and no documents. . . . [T]he idea that . . . you shouldn’t have witnesses and documents, when we are doing something as august, as important as an impeachment trial, fails the laugh test. It makes people believe—correctly, in my judgment—that the administration, its top people, and Senate Republicans are all hiding the truth. They are afraid of the truth.<sup>155</sup>

Add to the mix the use of social media by foreign governments to spread misinformation, and the idea of counting on restraint and adherence to tradition and precommitments seems Pollyannaish.<sup>156</sup>

#### E. NATIONAL CONTROL

Some might say that there is an easy solution to these nightmare scenarios: national control over presidential elections. Control over eligibility would not be enough to deal with the other mechanics of elections, such as registration and identification requirements, that can be used to increase or decrease voters. National control over these mechanics would be necessary to guard against state manipulation as well. And even these would not control fraud by state officials (or fraud that state officials ignore). Indeed, one of the earliest proponents of coordinated state action to rely on a national popular vote has explained:

To avoid chaos and catastrophic confusion, the uniform and interlocking state laws enacted under the NPVIC will need to be supplemented by a comprehensive congressional statute providing detailed federal oversight of the presidential election process in all states—not merely the states that enact the [compact]. Such a statute could be rooted in Congress’s power to pass all laws “necessary and proper” to vindicate Congress’s role in overseeing interstate com-

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153. *Id.* at S782 (statement of Mr. Counsel Philbin).

154. 166 CONG. REC. S814–15 (daily ed. Feb. 4, 2020) (statement of Sen. McConnell).

155. *Id.* at S815 (statement of Sen. Schumer).

156. *But see* Akhil Reed Amar, *The Inaugural Abraham Lincoln Lecture on Constitutional Law: Electoral College Reform, Lincoln-Style*, 112 NW. U. L. REV. 63, 77–78 (2017) (advocating a public and solemn pledge by the presidential candidates, and their running mates, to abide by the national popular vote, and contending that renegeing by a presidential candidate would be stopped by his party, his running mate, and his own electors).

pacts under Article I, Section 10, and also in Congress's power to regulate the "Manner" of congressional elections under Article I, Section 4. (One part of a standardized ballot that Congress could lawfully mandate for House and Senate elections could include a standardized section for each voter to register her presidential preference; and this standardized section could be monitored and administered by federal election officials working alongside their state election-law counterparts.)<sup>157</sup>

It is hard to see how congressional power to implement a compact would apply if the compact were not approved by Congress in the first place. Even if Congress did approve, it is far from clear that such a power would extend to controlling elections in non-member states.<sup>158</sup> It is also far from clear that the power to control the manner of congressional elections extends to mandating a standardized section for presidential preference—that would seem to ignore that the power is textually limited to congressional elections and does not extend to presidential elections. As Justice Harlan explained:

Even the power to control the "Manner" of holding elections, given with respect to congressional elections by Art. I, § 4, is absent with respect to the selection of presidential electors. And, of course, the fact that it was deemed necessary to provide separately for congressional power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over "Times, Places and Manner" given by Art. I, § 4, does not refer to presidential elections, but only to the elections for Congressmen. Any shadow of a justification for congressional power with respect to congressional elections therefore disappears utterly in presidential elections.<sup>159</sup>

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157. *Id.* at 76–77; *see id.* at 77 ("But enactment of this comprehensive congressional law would require careful lawyering and broad political consensus. We should not underestimate the difficulties that flank this pathway."); *see also* Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 *GEO. L.J.* 237, 252 (2011) (referring to the "dangerous gaps" in the design of the compact and "forcefully urg[ing] Congress to supplement it with a system of uniform rules for tallying sentiment in all fifty states").

158. *See* Amar, *supra* note 157, at 254–55 ("Unless Congress has independent authority to create and compel a presidential preference poll to be administered in the states, the fact that some group of compacting states (which could be as few as two) might agree to something should not give Congress power that otherwise falls beyond its enumerated authority to impose on unwilling states.").

159. *Oregon v. Mitchell*, 400 U.S. 112, 211–12 (1970) (Harlan, J., concurring in part and dissenting in part) (footnote omitted). *But see* Amar, *supra* note 157, at 256 (endorsing the view that "Congress's power over Presidential elections [is] coextensive with that which Article I [S]ection 4 grants it over congressional elections" (footnote and internal quotation marks omitted) (first alteration in original)). Congress has "authority to prevent corruption in national Presidential elections." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (citing *Burroughs v. United States*, 290 U.S. 534 (1934)); *see also Mitchell*, 400 U.S. at 291 (Stewart, J., concurring in part) (noting that "[w]hen electors are chosen by popular election, the Federal Government has the power to assure that such elections are orderly and free from corruption" (citing *Burroughs*, 290 U.S. at 534)). But there is certainly a plausible argument that the prevention-of-corruption rationale should not be interpreted so broadly as to allow Congress to control the manner of presidential elections to the same extent that it

Congressional control over voter eligibility is even more questionable. In *Oregon v. Mitchell*, the Supreme Court did uphold—as applied to federal elections only—the constitutionality of a federal statute establishing eighteen as the voting age.<sup>160</sup> But there was no majority opinion.<sup>161</sup> Writing only for himself, Justice Black relied on inherent national power to reach this conclusion, finding “a residual power in Congress to insure that those officers represent their national constituency as responsively as possible” to be “inherent in the very concept of a supreme national government with national officers.”<sup>162</sup> No other Justice expressed agreement with this idea. Four Justices concluded that the statute was unconstitutional, even as applied to federal elections.<sup>163</sup> But the remaining four Justices, who formed a majority with Justice Black to uphold the statute as applied to federal elections, relied on Section Five of the Fourteenth Amendment and would have held the statute valid in both state and federal elections.<sup>164</sup> In the years since *Oregon v. Mitchell*, the Supreme Court has grown much more skeptical of congressional power under Section Five of the Fourteenth Amendment,<sup>165</sup> leaving considerable reason to doubt that the current Supreme Court would uphold congressional power to establish the qualifications for voters in presidential elections.

Those committed to having a national popular vote determine the President might welcome a complete federal takeover of the presidential elec-

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can control congressional elections, if for no other reason than to preserve the plain textual distinction between the two powers. And the Court has, since *Buckley*, adopted a narrower view of what counts as “corruption.” See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010).

160. *Mitchell*, 400 U.S. at 117–18.

161. *Id.* at 117.

162. *Id.* at 124 n.7 (Black, J., announcing the judgments of the Court in an opinion expressing his own view of the cases). He thought that it could not “be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.” *Id.* at 124. But as Justice Harlan observed, *see supra* text accompanying note 159, the constitutional text severely undermines that assertion. The recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403–04 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)), is not encouraging for anyone relying on a view of the Constitution adopted by a single Justice.

163. See *Mitchell*, 400 U.S. at 294 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part) (finding it “plain . . . that the Constitution . . . completely withholds from Congress the power to alter by legislation qualifications for voters in federal elections”); *id.* at 210 (Harlan, J., concurring in part and dissenting in part) (“It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.”).

164. See *id.* at 135 (Douglas, J., concurring in part and dissenting in part) (“I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.”); *id.* at 240 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part) (“We would uphold § 302 as a valid exercise of congressional power under § 5 of the Fourteenth Amendment.”); *id.* at 240 (stating that the case does not involve “an assertion of congressional power to regulate any and all aspects of state and federal elections, or even to make general rules for the determination of voter qualifications . . . [or] to set minimum ages for voting throughout the States”).

165. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

tion, even if a constitutional amendment were required.<sup>166</sup> After all, it is the President we are electing—Why not have a truly national election?

First, partisans are not likely to trust elections run by the other party. How many Democrats would trust an election run by a Secretary of Elections appointed by President Trump? Consider the level of confidence in Secretary of Education DeVos, Secretary of State Tillerson, or Secretary of Housing and Urban Development Carson. How many Republicans would trust an election run by a Secretary of Elections appointed by Hillary Clinton or Elizabeth Warren? There has been deep suspicion that the Postmaster General was attempting to suppress voting by making voting by mail less reliable.<sup>167</sup> If the Postmaster General isn't trusted to handle ballots fairly, how would a Secretary of Elections?

Nor is a non-partisan independent agency of election experts an answer in today's political culture. Some would attack the constitutionality of such an independent agency; others would view it as part of the "deep state" of bureaucratic elites committed to thwarting popular democracy. The former could be overcome by a constitutional amendment; the latter would make the very difficult amendment process even harder to successfully navigate.

Worse, a centralized election apparatus makes it much easier for an authoritarian to use the forms of democracy to entrench his own control. That's part of the recipe used by authoritarians in other nations. As David Landau, Hannah J. Wiseman, and Samuel Wiseman have argued, state control over elections is one of the structural safeguards that the United States has against an authoritarian takeover.<sup>168</sup> They note that "manipulation of electoral rules and elections is an important tool through which modern authoritarian regimes gain power" and that "it is significant that the constitutional design in the United States protects a relatively independent state structure in administering elections."<sup>169</sup> They acknowledge that "the strong federalism in U.S. electoral administration does not prevent all efforts to tilt the electoral playing field," but they note that in "systems where movements must only capture the federal government, an anti-democratic regime may be able to make substantial changes to electoral laws and institutions with blinding speed."<sup>170</sup>

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166. See Richard L. Hasen, *Bring On the 28th Amendment*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html> [https://perma.cc/T5YS-S4GN] (calling for a constitutional amendment that "would guarantee all adult citizens the right to vote in federal elections, establish a nonpartisan administrative body to run federal elections that would automatically register all eligible voters to vote, and impose basic standards of voting access and competency for state and local elections").

167. Emily Cochrane et al., *Postal Service Suspends Changes After Outcry Over Delivery Slowdown*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/us/politics/postal-service-suspends-changes.html> [https://perma.cc/4YXG-DLBX] ("Policy changes by the postmaster general prompted allegations that the Trump administration was trying to disenfranchise voters before the 2020 election.").

168. Landau et al., *supra* note 21, at 1192.

169. *Id.* at 1220.

170. *Id.* at 1224–25; see also *id.* at 1225 ("Anti-democratic change in the states is likely to be slower, unavailable in opposition-held states, and vulnerable to federal challenge

Indirect election of the President through a series of state-based electoral colleges may not be ideal, but it confines the mischief that any state can do to the electors allocated to that state. In a nation with a highly polarized political culture, and in a world of authoritarian governments using the forms of democracy to take control, that is no small accomplishment.<sup>171</sup>

## VI. THE PROPORTIONAL ALTERNATIVE

If the National Popular Vote Compact courts disaster, and state control over the machinery of presidential elections is an important safeguard against authoritarianism, is there nothing that can be done to improve our system of electing a president? No.

### A. PROPORTIONAL ALLOCATION

State control can be maintained, and any state mischief contained, by abandoning the winner-take-all system used in all but two states and instead adopting proportional allocation of electors in each state.

Professor Katherine Florey has persuasively argued that winner-take-all is the least defensible feature of our current electoral college system.<sup>172</sup> While critics often focus on the advantage given to small states by the explicit (and deliberate) constitutional provision for two senatorial electors for each state, “the benefit it confers upon small states is modest and generally overwhelmed by the impact of winner-take-all.”<sup>173</sup> By con-

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unless the federal judiciary has already been captured. Such a delay can provide crucial breathing space in which a move toward authoritarianism can be defeated.”).

171. It also means that a disaster in a state—whether a viral outbreak, hurricane, or anything else that drastically reduces the number of people who can vote in a state in a presidential election—does not cause a state and its voters to lose their proportionate power in the Union. If the disaster hits supporters of one candidate more than another, of course, it might affect which candidate wins that state’s electors. But, again, that impact is limited to the electors allocated to that state. By contrast, if a disaster strikes a populous state, it could have a much greater impact on the national popular vote. For example, California’s fifty-five electors are a bit more than 10% of the total 538 electors, and its 14 million votes cast in 2016 were just a bit more than 10% of the total 136 million votes cast nationwide. But if a disaster in California resulted in only 2 million people voting in California (with no change in other states), then its proportion of the popular votes would fall to less than 2%. Even if that disaster hit the California supporters of all candidates equally, California’s voice in a presidential election based on popular vote would be dramatically reduced.

172. Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment Is the Electoral College’s Least Defensible Feature*, 68 CASE W. RES. L. REV. 317, 366 (2017); see KEYSSAR, *supra* note 31, at 3 (observing that “politicians and political observers of diverse stripes have lamented on the impact of [winner-take-all] on presidential elections and repeatedly pressed for reforms that would get rid of it”). The one state, one vote rule for contingent elections in the House of Representatives, U.S. CONST. amend. XII, may be even less defensible. See KEYSSAR, *supra* note 31, at 3 (“Even more widely disparaged than winner-take-all has been the ‘contingent election system’—the constitutional procedure for deciding an election when no candidate has won a majority of the nation’s electoral votes.”). But because it applies only when the electors fail to produce a majority, it can be treated as subsequent to and outside of the electoral college system itself.

173. Florey, *supra* note 172, at 329. In the 2016 election, the dozen smallest states split evenly between Hillary Clinton (Vermont, Delaware, Rhode Island, New Hampshire,

trast, “the winner-take-all system evolved haphazardly at the state level, as a function of decisions by individual states designed to preserve their influence, rather than collective deliberation,” and it “stands out for the force of its influence on results.”<sup>174</sup> In addition, winner-take-all allocation has other “pernicious effects,” such as “caus[ing] candidates to focus resources and visits on a handful of close states, while slighting or completely ignoring the others,” which “effectively depriv[es] consistent political minorities within a state of any representation in the presidential election[;] . . . arbitrarily mak[ing] residents of some states disproportionately influential”; and “creat[ing] significant incentives to engage in state-level fraud . . . or efforts at voter suppression” in battleground states.<sup>175</sup>

Proportional allocation of electors could be done by states acting independently. But this is extremely unlikely because the very same dynamic of interstate competition for influence that led states to adopt winner-take-all in the first place will almost certainly prevent states from abandoning it. It is not surprising that the only two states that do not have winner-take-all allocation today are small states—Maine with four electors and Nebraska with five<sup>176</sup>—that are unlikely to amass much power by creating a single bloc of votes. An attempt to do so by an act of Congress or a compact between the states would run into many (but not all) of the difficulties discussed above, plus others—most notably trying to set the threshold for a compact to go into effect. Unlike the National Popular Vote Compact, it would not do to have it go into effect once agreed to by states controlling a majority of electors because those electors would not all be allocated to a single candidate.

For these reasons, a constitutional amendment would be the way to achieve a proportional allocation of electors.<sup>177</sup> Some might think this

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Maine, Hawaii) and Donald Trump (Wyoming, North Dakota, Alaska, South Dakota, Montana, Idaho). *Who Won the 2016 US Presidential Election—Live Results*, CBS NEWS (Nov. 10, 2016, 5:42 PM), <https://www.cbsnews.com/news/presidential-election-2016-results-live-updates/> [<https://perma.cc/FFU4-P6SF>]. In addition, the solidly Democratic District of Columbia effectively has two senatorial electors, even though it has no senators, because it is entitled to electors calculated as if it were a state. U.S. CONST. amend. XXIII; see Louis Jacobson, *Electoral College Outlook Gives Biden Decisive Lead Over Trump*, U.S. NEWS & WORLD REP. (July 9, 2020, 3:09 PM), <https://www.usnews.com/news/elections/articles/2020-07-09/biden-takes-decisive-lead-over-trump-in-electoral-college-outlook> [<https://perma.cc/A5RF-PPUR>] (classifying the District of Columbia as a “safe democratic” state).

174. Florey, *supra* note 172, at 322.

175. *Id.* at 323–24 (footnotes omitted). Those troubled by political gerrymandering should be especially troubled by winner-take-all. See KEYSSAR, *supra* note 31, at 137 (“But if we condemn the gerrymander because it lessens the representation of the minority, what is to be said of a system which excludes the minority from any representation whatever?” (quoting Governor Edwin Winans of Michigan)).

176. See *Distribution of Electoral Votes*, *supra* note 65.

177. Litigation challenging the constitutionality of winner-take-all has also been attempted but has not been successful. See, e.g., *Rodriguez v. Newsom*, No. 18-56281, 2020 WL 5361884 (9th Cir. Sept. 8, 2020); *Baten v. McMaster*, 967 F.3d 345 (4th Cir. 2020) (as amended); *Lyman v. Baker*, 954 F.3d 351 (1st Cir. 2020); *League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311 (5th Cir. 2020). It appears that the strategy is to bring similar cases around the country in the hope of creating a circuit split. A split has not mate-

impossible in our current political culture. And they may be right. Our history is littered with failed attempts to allocate electors proportionally or by district.<sup>178</sup> On the other hand, while proportional allocation of electors in any given state may have obvious partisan advantages (another reason it is unlikely to be adopted by independent action of individual states), it does not cross the country, particularly if adopted sufficiently in advance of any particular presidential election. Republicans in New York and California would cast meaningful votes for President, as would Democrats in Texas. Abolishing the senatorial electors may be impossible if small states refuse to give up that modest advantage, but the only states that would clearly be disadvantaged by a move to proportional allocation of electors would be a handful of battleground states.

## B. MODIFYING THE LESSIG PROPOSAL

Professor Lawrence Lessig has proposed a constitutional amendment that would allocate each state's electoral votes proportionally. He views the proposal as a second-best solution compared to a national popular vote.<sup>179</sup> For the reasons explained above, I think it is a better solution than a national popular vote, but I suggest a few revisions.

### 1. “Electors for President and Vice-President shall vote as directed by state law.”

Lessig hoped for a Supreme Court decision upholding elector independence as the trigger for public interest in the amendment, so it makes sense that he leads with this provision.<sup>180</sup> But as a drafting matter, it would probably be more sensibly placed later in the amendment, after provisions dealing with the allocation of electors. More substantively, it would be better to directly and straightforwardly reject elector independence and adopt the principle that electors must vote for the candidate to whom they are pledged.

*Chiafalo* does not moot the importance of this provision. Although *Chiafalo* empowers a state to impose this requirement on its electors, it does not oblige any state to do so.<sup>181</sup> Some might fear this provision could result in electors having to vote for candidates who have died between Election Day and the day the electors vote. *Chiafalo* acknowledged “how

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rialized yet, although Judge Wynn dissented in *Baten*, 967 F.3d at 361 (Wynn, J., dissenting).

178. See KEYSSAR, *supra* note 31.

179. See John Laidler, *End the Electoral College?*, HARV. GAZETTE (Oct. 21, 2019), <https://news.harvard.edu/gazette/story/2019/10/harvard-panel-debates-effectiveness-of-electoral-college/> [https://perma.cc/EV36-CN2B]. The full text of the Lessig proposal, which can be seen on a presentation available at this site, is reproduced in the appendix.

180. See Lessig, *Who Argued on Behalf of ‘Faithless Electors,’ Responds to the Supreme Court’s Decision*, HARV. L. TODAY (July 8, 2020), <https://today.law.harvard.edu/lessig-who-argued-on-behalf-of-faithless-electors-responds-to-the-supreme-courts-decision/> [https://perma.cc/PV29-M2E6].

181. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020) (“We hold that a State may do so.” (emphasis added)).

much turmoil such an event could cause,” and specifically noted that “nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate.”<sup>182</sup>

But that would be better than leaving to state law what electors should do if a candidate has died, with some states requiring electors to vote as pledged, others to vote for the candidate for Vice President to whom they are pledged for President instead, and others leaving them to act independently—thereby increasing the chances of a contingent election in the House of Representatives that might result in the candidate who lost on Election Day winning the presidency. The Twentieth Amendment already provides a succession rule for when the President-elect has died: the Vice President-elect becomes President.<sup>183</sup>

2. *“Beginning with the next election occurring not less than 24 months following ratification of this amendment, the Electoral Vote for President and Vice-President within a State shall be divided proportionally between the two persons receiving the most votes within their State as determined by the method of tallying votes chosen by the State, with fractions calculated to all significant digits.”*

It certainly makes good sense to have sufficient time between the adoption of the amendment and the first election using its process, both for administrative feasibility and to avoid the unfairness and disruption if the rules are changed in the middle of a campaign. In addition, the further removed in time from the next presidential election, the opaquer the veil obscuring the partisan impact of the change in that next election. (An even longer delay—(say) five years—might help on this score.) As a matter of drafting, the effective date would be better placed near the end of the amendment.<sup>184</sup>

The provision for proportional allocation is the heart of the proposal. It leaves to state law to determine how votes are tallied, enabling states to design the counting system in a variety of ways. By limiting electoral

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182. *Id.* at 2328 n.8.

183. U.S. CONST. amend. XX, § 3; see Amar, *supra* note 147. I do not mean to suggest that the apparent winner on election night is the “President-elect” under the Twentieth Amendment. Instead, it is the vote of the electors for the deceased candidate, at least if counted when the House and Senate meet, that makes the deceased candidate the “President-elect” under the Twentieth Amendment. *Id.* at 217–18 (“Although the legislative history of the Twentieth Amendment suggests that the electoral college winner is ‘President elect’ the moment the electoral college votes are cast, and before they are counted in Congress, the text of the Amendment fails to say this explicitly. In the absence of such explicit language, some might argue that the formal vesting rules of Article II and the Twelfth Amendment remain in effect, and that the Twentieth Amendment term ‘President elect’ does not apply to death prior to formal vote-counting in Congress.”). It may be wise to make explicit that electors should vote as pledged and that these votes are to be counted, notwithstanding the death of a candidate.

184. Cf. U.S. CONST. amend. XVII (providing in its last sentence that it “shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution”); *id.* amend. XX, § 5 (providing in its penultimate Section that “Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article”).

votes to the two persons receiving the most votes in the state, the proposal wisely reduces (but does not eliminate) the possibility of contingent elections in the House of Representatives that might otherwise be triggered by a failure of any candidate to receive a majority of electoral votes if all candidates received a proportional allocation of electors.

Note that it would be possible for someone to win the presidency without winning a single state. In a three-way race, if some states prefer *A* to *B* and *B* to *C*, while other states prefer *C* to *B* and *B* to *A*, *B* could win. Some might find this a bug, but I think it is a feature; particularly in these polarized times, candidate *B* would be far more likely to be able to unify the country than either candidate *A* or *C*.

The Lessig proposal would also award fractional electoral votes to the top two candidates, and it would calculate those fractions to all significant digits. This is needlessly complex. Fractional votes themselves are a hurdle because electors cannot themselves be divided. This problem can be surmounted by empowering individual electors to cast fractional votes—the way the shareholder of a corporation can cast fractional votes corresponding to the ownership of fractional shares of stock—but this requires a departure from the easy-to-understand principle of one elector, one vote.

Requiring that fractions be calculated to all significant digits means that most readers will have to recall (or learn for the first time) a mathematical term that functions to avoid overstating the accuracy of a measurement.<sup>185</sup> It is not clear how this concept is supposed to apply in the context of voting, since the count of votes purports to be an exact quantity, not a measured quantity—and exact numbers are considered to have an infinite number of significant figures.<sup>186</sup> Of course there can be errors made in counting votes, but if calculating to all significant digits is designed to take the error rate into account, it is far from clear how that is to be done. Perhaps the intended idea is simply to do the division until the decimal terminates in a zero or a repeating decimal, but, if so, the use of the term “all significant digits” is misleading.

The point of calculating fractional electoral votes is to avoid creating too large a threshold from winning one electoral vote in a state to winning the next one in that state.<sup>187</sup> For example, in a state with only three electoral votes, it would (under typical rounding rules) take just over a

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185. See Stephen L. Morgan, *Tutorial on the Use of Significant Figures*, U. S.C., 1, 1–7 <http://www.kfupm.edu.sa/sites/phys102/AnalyticsReports/Significant-Figures.pdf> [<https://perma.cc/GQ93-6F7T>]. For example, if a piece of wood is measured as 5.2 inches by 3.7 inches, simply multiplying to find the area would yield 19.24 square inches. But reporting the area as 19.24 square inches overstates the accuracy of the measurement, because when measurements are multiplied, the answer can have no more significant digits than the least accurate measurement. The area should be reported as 19 square inches because there are only two significant digits in each measurement. See *id.* at 3.

186. See *id.* at 2.

187. See Claire Daviss & Rob Richie, *Fuzzy Math: Wrong Way Reforms for Allocating Electoral Votes*, FAIRVOTE POL'Y 1, 14–16, 23–25 (2015), <https://fairvote.app.box.com/v/fuzzy-math-wrong-way-reforms> [<https://perma.cc/8XU2-YH2F>].

one-sixth share (16.7%) to get one electoral vote, just over one-half to get a second electoral vote, and over five-sixths (83.3%) to pick up the third electoral vote. Unless the top candidate could win by a five-to-one ratio over the second-place finisher, the second-place finisher would get one electoral vote. Every race closer than that would be fighting over a single electoral vote. But if fractional electoral votes are permitted, then winning 80–20 is a lot better than winning 51–49.

But there is a much simpler way to achieve this end than fractional electoral votes calculated to all significant digits: Simply multiply the number of electors by ten. Even the smallest states would have thirty electors, making the threshold needed to earn an additional elector vote about 3.3%—smaller than the margin of error in polls, thereby making every state competitive. In larger states, such thresholds would be even smaller. Each elector would have one vote, and there would be no need for fractional votes. Depending on the method of tallying used in a state, rounding rules might be necessary, but rounding rules could be left to states as part of their methods of tallying votes. Admittedly, this approach would not be as precisely proportional as fractional electoral votes, but at least in a world with some vote-counting errors, such precision may well overstate the accuracy of the result.

And instead of red states and blue states, every state would be some shade of purple.

3. *“The Electoral Vote of each State shall be equal to the number of Representatives times an equality factor plus the number of Senators. That factor shall be one initially. Congress may by law, passed in each House by a ¾ majority, increase the factor no less than 18 months before any presidential election. Alternatively, Congress may by law, passed in each House by a ¾ majority, allocate electors by State, proportionally. Once increased, the Equality Factor may not be reduced except through the amendment of this provision. Neither may a change to proportional allocation be reversed, except through the amendment of this provision.”*

The point of this part of the proposal is to enable Congress to gradually reduce the significance of the senatorial electors. For several reasons, I think it best to drop this complicated idea. First, the winner-take-all rules are far more important than the senatorial electors. Second, seeking to diminish the senatorial electors seems likely to prompt the opposition of smaller states. Third, the three-quarter voting requirement makes it unlikely ever to be used. Fourth, the three-quarter voting requirement is greater than the two-thirds voting requirement for proposing a constitutional amendment. It is certainly possible that a proposal might be able to obtain approval by three-quarters in both the House and the Senate, while being unable to obtain approval by two-thirds in the House and the Senate plus ratification by three-fourths of the states, but that seems un-

likely.<sup>188</sup> Finally, Congress already has the power to reduce the significance of the senatorial electors through ordinary legislation without any supermajority requirement: simply increase the size of the House of Representatives.<sup>189</sup>

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188. Of the six constitutional amendments proposed by Congress but not ratified by the states, it appears that only two—the Titles of Nobility Amendment and the Equal Rights Amendment—passed Congress by a three-quarter majority in both Houses. See Birch Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME L. REV. 80, 80 n.1 (1972) (House approved 354 to 23; Senate approved 84 to 8); H. JOURNAL, 11th Cong., 2d Sess., 423 (1810) (House approved Titles of Nobility Amendment 87 to 3); S. JOURNAL, 11th Cong., 2d Sess., 506 (1810) (Senate approved Titles of Nobility Amendment 19 to 5). And the current status of the Equal Rights Amendment is subject to controversy, now that the thirty-eighth state has ratified, albeit after the deadline set by Congress. See Russell Berman, *Did Virginia Just Amend the Constitution?*, ATLANTIC (Jan. 15, 2020), <https://www.theatlantic.com/politics/archive/2020/01/virginia-equal-rights-amendment-constitution/605002/> [<https://perma.cc/8ZXY-WK6M>] (“The Democratic-led legislature voted to become the 38th and final state needed to ratify the Equal Rights Amendment. But a court battle is already under way.”); Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1, 37 (2020) (concluding “that the ERA Resolution has expired and is no longer pending before the States”). The Corwin Amendment (which would have entrenched slavery) was approved 128 to 65 in the House and 24 to 12 in the Senate. H. JOURNAL, 36th Cong., 2d Sess., 425 (1861); S. JOURNAL, 36th Cong., 2d Sess., 383 (1861). The Child Labor Amendment passed by a vote of 297 to 68 in the House, and 61 to 23 in the Senate. Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became A Con Game*, 10 WHITTIER J. CHILD & FAM. ADVOC. 89, 134 (2010). The District of Columbia Statehood Amendment passed by a vote of 289 to 127 in the House, and 67 to 32 in the Senate. Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 U.D.C. L. REV. 1, 37 nn.313–14 (2010). It does not appear that the House or Senate conducted a roll call vote on the final package of the original proposed amendments to the Constitution, which included the Congressional Apportionment Amendment.

189. As a constitutional matter, the House could consist of more than ten thousand representatives. U.S. CONST. art. I, § 2, cl. 3 (“The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . .”). One of the constitutional amendments approved by Congress and sent to the states but never ratified would have changed this formula so that once the nation’s population grew enough, “the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.” 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 321–22 (1894). If that had been ratified, the maximum size of the House would currently be about six thousand six hundred. Some—including, unfortunately, whoever is responsible for the Senate’s website, *Congress Submits the First Constitutional Amendments to the States*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Congress\\_Submits\\_1st\\_Amendments\\_to\\_States.htm](https://www.senate.gov/artandhistory/history/minute/Congress_Submits_1st_Amendments_to_States.htm) [<https://perma.cc/AM2N-VFZT>]—erroneously think that this amendment would require the House to be that size. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 698 n.66 (1993) (noting the error by another author and correctly stating that the amendment “would impose a maximum number of Representatives based on population size, not a minimum. The minimum would be fixed at 200. Congress would retain authority to regulate the actual number, provided it is greater than 200 and less than the maximum of one per 50,000 in population . . .”). This error evidently treats the word “more” as if it were the word “less.” Although earlier versions did use the word “less,” it was changed before final passage in Congress to “more.” See 1 ANNALS OF CONG. 948 (1789); see also *The Bill of Rights: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript> [<https://perma.cc/D48A-ZGAQ>]. Jesse Wegman asserts that the amendment would require “a House of nearly 11,000 members” today, WEGMAN, *supra* note 46, at 185, an error that apparently is based on reading the first part of the proposed amendment (which requires the House to have no less than one member for every forty thousand

4. *“If no person shall receive a majority of the Electoral Vote, then the House of Representatives shall choose immediately by roll call vote from the persons having the highest numbers not exceeding two on the list of those voted for as President and Vice-President. In casting their vote, each representative shall have one vote for each office. The President and Vice-President shall be the persons receiving the most votes.”*

This would change the voting rule in any contingent election in the House so that states would no longer vote as states, but instead, individual representatives would vote.<sup>190</sup> In addition, it would move any contingent election of the Vice President from the Senate to the House.

It does not, however, make clear that the incoming House rather than the outgoing House should make the decision. This should be clarified in addition to clarifying that it is the incoming House and Senate that receive the electoral vote returns.

5. *“This Amendment shall become operative upon ratification by 38 state conventions.”*

The valuable contribution here is to specify ratification by convention—as was done for the repeal of prohibition<sup>191</sup>—rather than by state legislatures. But it should not refer to the number thirty-eight, because the number of states might change before it is ratified.

If adopted, such an amendment would eliminate the biggest problem of our current electoral college system while avoiding the dangers of a national popular vote. It would confine the mischief of each state to that state, thereby reducing the incentives for such mischief, and make every state relevant to presidential elections.

## VII. CONCLUSION

There is an undeniable attraction to abandoning the use of presidential electors and moving to a national popular vote. If President Donald Trump gets reelected while again losing the popular vote, the outcry for popular election will be loud.

Nevertheless, in today’s hyper-partisan political culture, moving to national popular elections while leaving control of voting qualifications and procedures to the states invites disaster. The supposed cure of national control over voting would make matters worse by destroying an important protection against authoritarianism.

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persons) but ignoring that this provision does not apply once the House reaches two hundred members.

190. While this would significantly reduce the power of small states in a contingent election in the House, no such election has been held in nearly two hundred years, and even strong advocates for small states would have a difficulty defending an attempt to cling to this power. See WEGMAN, *supra* note 46, at 179 (“Today you would be hard pressed to find anyone who defends it.”).

191. See U.S. CONST. amend. XXI, § 3.

Replacing the winner-take-all allocation of each state's electors with proportional allocation of electors in each state eliminates the worst feature of our current electoral college system and makes many more voters relevant in a presidential election. It also preserves state control over elections, making it harder for would-be authoritarians to take over the administration of elections and entrench themselves.

Proportional allocation of electors within each state will not overcome the deep divisions in our nation. But unlike a national popular vote, it is not likely to make those divisions even worse. In today's political culture, that's an achievement.

## APPENDIX

### A. LESSIG PROPOSAL<sup>192</sup>

1. Electors for President and Vice-President shall vote as directed by state law.

2. Beginning with the next election occurring not less than 24 months following ratification of this amendment, the Electoral Vote for President and Vice-President within a State shall be divided proportionally between the two persons receiving the most votes within their State as determined by the method of tallying votes chosen by the State, with fractions calculated to all significant digits.

3. The Electoral Vote of each State shall be equal to the number of Representatives times an Equality Factor plus the number of Senators. That factor shall be one initially. Congress may by law, passed in each House by a 3/4ths majority, increase the factor no less than 18 months before any Presidential Election. Alternatively, Congress may by law, passed in each House by a 3/4ths majority, allocate electors by state, proportionally. Once increased, the Equality Factor may not be reduced except through the amendment of this provision. Neither may a change to proportional allocation be reversed, except through the amendment of this provision.

4. If no person shall receive a majority of the Electoral Vote, then the House of Representatives shall choose immediately by roll call vote from the persons having the highest numbers not exceeding two on the list of those voted for as President and Vice-President. In casting their vote, each representative shall have one vote for each office. The President and Vice-President shall be the persons receiving the most votes.

5. This Amendment shall become operative upon ratification by 38 state conventions.

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192. Lawrence Lessig, Professor, Harv. L. Sch., *The Electoral College: Keynote Luncheon with Lawrence Lessig and Stuart Stevens* (Oct. 21, 2019).

## B. LESSIG PROPOSAL MODIFIED BY HARTNETT

1. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to ten times the whole number of Senators and Representatives to which the State may be entitled in the Congress. The District constituting the seat of government of the United States shall, for purposes of this amendment, be treated as if it were a State.

2. Electors shall pledge themselves to vote for particular candidates for President and Vice President.

3. Electors shall be appointed proportionately between the two persons receiving the most votes for President and Vice President within each State as determined by the method of tallying votes chosen by each State.

4. Electors, once appointed, shall vote for the candidates to whom they are pledged. These votes shall be cast as required, and treated as valid, notwithstanding a candidate's death, in which case the provisions of the third section of the Twentieth Amendment shall then apply.

5. The Senate and the House of Representatives shall assemble no sooner than noon on the third day of January to count the votes of the electors. The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed, and the person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed. But if, after the Senate and House of Representative have assembled in accordance with this paragraph, no person has received a majority of the Electoral vote, then the House of Representatives shall choose immediately by roll call vote from the persons having the highest numbers not exceeding two on the list of those voted for as President and Vice President. Each Representative shall have one vote for each office. The President and Vice President shall be the persons receiving the most votes.

6. This amendment shall govern elections held more than [two] years following the ratification of this article.

7. This amendment shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in three-fourths of the several States.