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THE ELECTORAL COLLEGE, THE RIGHT TO VOTE, AND OUR FEDERALISM: A COMMENT ON A LASTING INSTITUTION

LUIS FUENTES-ROHWER* AND GUY-URIEL CHARLES**

A decade before the 2000 presidential elections, in a chapter ominously entitled *The Coming Constitutional Crisis*, David Abbott and James Levine admonished that the Electoral College would soon produce a "wrong winner"—a President who wins the electoral count yet loses the popular vote.[1] Whenever this happened, they predicted, the Presidency would face a profound crisis of legitimacy.[2] Among critics of the College, the possibility that the College would produce a "wrong winner" has been held, like the sword of Damocles, over the heads of the current system's supporters, who are too enamored of the Framers' invention to appreciate the impending doom.

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1. DAVID W. ABBOTT & JAMES P. LEVINE, WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE 1-20 (1991).

2. *Id.*

These dire predictions are hardly new. For critics of the Electoral College, the Achilles heel of the College is its ability to select a President that fails to win the popular vote. Moreover, and as a direct result of the close presidential elections in the last forty years, many students of the Electoral College have continually warned that the College would soon "malfunction" by producing a minority President. In response, reformers have introduced myriad proposals for changes in the Electoral College. These changes must be understood exactly within the larger historical context. "Close presidential elections, those in which the new president has only a narrow margin in the total popular vote," Polsby and Wildavsky write, "always lead to renewed public discussion of the merits of the electoral college, since close elections remind people of the mathematical possibility that the candidate with a plurality of all the votes will not necessarily become president."[3]

Those who foretold that the College would produce a wrong winner were prescient in one respect: the 2000 presidential election, one of the closest and most exciting presidential contests in the history of our republic, did in fact produce a "wrong winner." George W. Bush, the forty-third President of the United States, won the electoral count but lost the popular vote—an event that has only occurred on two previous occasions in American history.[4] But, in their contention that the Presidency would suffer a crisis in legitimacy if the electoral count did not match the popular vote count, Abbott and Levine may be on the wrong side of history. The circumstances surrounding George W. Bush's ascension to the Presidency defied warnings that such a state of affairs would give rise to "unrest, public clamor for reform and an atmosphere of crisis."[5]

Notwithstanding the fact that the fire and brimstone forecasted by the naysayers have not come to pass, the Electoral College remains an unpopular institution. Unsurprisingly, particularly in view of the results of the 2000 presidential election, there have been many calls for reforming the Electoral College. Again, this is nothing new; calls for reform, perhaps abolition of the College altogether, have been made loudly and often since its implementation over two centuries ago.[6] Relatedly, the proposals for reform have a distinctive

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3. NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS 245 (10th ed. 2000).

4. The two previous elections were the Hayes-Tilden presidential election of 1876 and the Cleveland-Harrison election of 1888. LAWRENCE D. LONGLEY & NEIL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 2000, at 27-28 (1999).

5. John D. Feerick, *The Electoral College—Why it Ought to be Abolished*, 37 FORDHAM L. REV. 1, 1 (1968).

6. ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 141 (1994) ("There is no exact account of the number of proposals and alternatives for electoral reform that have been introduced in Congress since

historical feel. The three perennial proposals are for direct election, for proportional distribution of electoral votes, and for a districting system.[7] There have been some relatively fresh innovations, such as the National Bonus Plan.[8] In general, suggestions for reform have been essentially the same.

In light of this constant barrage of criticism, an obvious question arises: how has the College managed to survive despite its lack of popularity, its opacity, and its generally controversial nature? Commentators answer this question in three ways. First, and as with many of the institutions designed by the founding generation, one is initially tempted to ascribe the longevity of the College to the wisdom of that generation.[9] As Robinson Everett wrote decades ago, "[o]ccasionally our political mythology seems to attribute an element of immutability and divine sanction to our electoral process—as if it had been ordained at Mount Sinai."[10] Yet, to the extent that the founding generation exhibited much wisdom in the design of many of our present institutions, the College hardly epitomizes such wisdom. A cursory glance at the historical record, which we undertake shortly, suggests as much.

A second possible explanation for the College's durability looks to the force of history and tradition. Herbert Wechsler explained, "This difficulty shows why present methods have endured despite the magnitude of the objections to them: changes impinge in an incalculable fashion on the balance of advantage with which we are familiar and have learned to deal."[11] Additionally, in view of the fact that abolishing the College would ultimately necessitate a constitutional

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the time of the Constitutional Convention. Estimates range from no less than 500 to over 700."). For the text of the various reform proposals, see ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 97-104 (1971).

7. *See* RICHARD L. BURRILL, CONTROVERSY OVER THE PRESIDENTIAL ELECTORAL SYSTEM 22-23 (1975).

8. TWENTIETH CENTURY FUND, WINNER TAKE ALL: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON REFORM OF THE PRESIDENTIAL ELECTION PROCESS 4-5 (1978). Under this plan, each state plus the District of Columbia gets two extra votes, which are to be awarded to the winner of the popular vote. This plan would also abolish the office of electors and award Electoral College votes automatically. For those times when no majority is achieved, a runoff would take place between the top two candidates. *Id.; see also* Arthur Schlesinger, Jr., *Fixing the Electoral College*, WASH. POST, Dec. 19, 2000, at A39.

9. For example, Hardaway states that though the Electoral College was "hailed as part of the 'Grand Compromise,' which included the equal representation of the states in the Senate, it in fact reflected far more—namely, the vision and genius of the constitutional framers." HARDAWAY, *supra* note 6, at 14.

10. Robinson O. Everett, *Foreword* to *The Electoral Process: Part I*, 27 LAW & CONTEMP. PROBS. 157, 157 (1962).

11. Herbert Wechsler, *Presidential Elections and the Constitution: A Comment on Proposed Amendment*, 35 A.B.A. J. 181, 273 (1949).

amendment, a particularly onerous and generally difficult exercise, the inertia of the entrenched system should not be surprising.[12]

A third possibility, and the one that serves as our point of departure, looks to the foundation of our political structure and the nature of our democratic commitments. In this vein, we are particularly intrigued by the question of electoral legitimacy. To be clear, we are not interested in the question of legitimacy in and of itself. It is clear to us that the question of legitimacy—and more generally the larger debate surrounding the use of the College as the method of presidential selection—rests upon an infrequently articulated conception of democracy and an oft-debated notion of federalism.

In this Article, we contend that the debate over the Electoral College masks two fundamental inquiries. The first inquiry deals with the extent of our constitutional regime's commitment to democracy. We maintain that the Constitution reflects two competing understandings of democracy. In most areas of politics, our constitutional structure boasts a broad conception of democracy where the right to vote is paramount. The redistricting revolution may be catalogued under this broad banner. In contrast—and as Justice Scalia made painfully clear in his riposte to the dissenters' disgust about the stay order of December 9, 2000—we treat presidential elections quite differently.[13] In this second area, the constitutional structure reflects a narrow conception of democracy where a constitutional right to vote for President and Vice President is nonexistent.[14]

The second inquiry explores the content and scope of our commitment to federalism. The fundamental question here is one of self-definition: who are we? To be sure, this is a very old question. It is also a very difficult question, one with which we continually grapple, even to this day. Put explicitly, to what extent are we fundamentally a collection of sovereign states? To what extent are we a nation with the interests of the states subsumed to those of the federal government?[15]

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12. While the Amendment process is difficult, it is not impossible. *See* U.S. CONST. amend. XII.

13. *See* Bush v. Gore, 531 U.S. 1046, 1046-47 (2000) (Scalia, J., concurring) (arguing that the issue was whether the votes that the Florida Supreme Court ordered to be counted were "legally cast votes," not whether counting every legal vote would constitute irreparable harm).

14. Concededly, this is but a sketch of a much more complex relationship between the right to vote and our constitutional commitments. We explore some of the nuances and complexities below.

15. As Professor Farber stated in a related context, do we "prefer to pledge . . . allegiance to 'One Nation' or to a 'Federalist System' of interlinked republics[?]" Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1145 (2000).

Our position is grounded within the context of these two larger inquiries. That is, before we can meaningfully talk about whether the Electoral College is worth keeping or changing, we must first come to grips with the scope of our democratic commitments. We must also grapple with the nature of the compromise that we have struck between state and federal interest in presidential elections. Until we struggle with and come to appreciate these two crucial foundations of our democratic ethos, the Electoral College debate will continue to consist of recycled ideas that will continue to be rejected.

We discuss these and other issues in Part III. In Part II, we ground our discussion by presenting the leading arguments for and against the College. Before turning to the future, however, we look first to the past. In light of all that it teaches us about the institution, the history of the Electoral College is worth examining, even if over a few short pages. This is the task to which we turn in Part I.

Before proceeding, an important caveat is warranted. This Article is designed to frame the debate over the Electoral College and the right to vote. By design, this means that many more questions will arise than we are prepared to answer. For example, our discussion of the foundation of federalism, and particularly the view of states as "sovereign entities with dignitary interests," gives rise to a number of interesting possibilities, some of which are addressed by Chief Justice Rehnquist's concurrence in *Bush v. Gore*.[16] Similarly, we also raise important questions about the existence of the right to vote in presidential elections in light of the modern reapportionment revolution post-*Baker v. Carr*.[17] We recognize that many of these issues demand fuller treatment than we are capable of giving them in this format. As such, we simply flag them for the time being, nothing more.

I. LOOKING TO HISTORY

In his classic survey of American history and culture, Alexis de Tocqueville alluded to the inherent difficulties in designing a method from which to choose a national executive. As he wrote:

> There is reason for criticizing the elective system, when applied to the head of state, in that it offers so great an attraction to private ambition and so inflames passions in the pursuit of power that often legal means do not suffice them, and men appeal to force when they do not have right on their side.[18]

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16. 531 U.S. 98, 112-15 (2000) (Rehnquist, C.J., concurring).

17. 369 U.S. 186 (1962).

18. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127-28 (George Lawrence trans., J.P. Mayer ed., 1969) (1832).

The real issue, he explained, boiled down to this: "The problem was to find that mode of election which, while expressing the real will of the people, would least arouse their passions and leave them least in suspense."[19]

Delegates to the Federal Convention of 1787 confronted these multiple difficulties.[20] The number of proposals made at the convention, standing alone, provides a fairly accurate picture of the degree to which the manner and mode of selecting the executive raised some very difficult conundrums: Should the executive be chosen by Congress, as in the original Virginia Plan;[21] by popular vote;[22] by the states through their executives[23] or legislatures; by electors chosen by the people in districts within each state; or maybe by electors chosen by said legislatures?[24] Similar difficulties arose about the nature of the office and its tenure. For example, should the Constitution institute a single executive elected by Congress for one term of seven years, as in the Virginia Plan;[25] a plural executive elected by Congress for one term;[26] or, as Alexander Hamilton suggested in his long

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19. *Id.* at 132.

20. "It may be proper to remark, that the organization of the general government for the United States, was, in all its parts, very difficult.—There was a peculiar difficulty in that of the Executive.—Everything incident to it, must have participated of that difficulty." Statement by James Madison at the Virginia Convention (June 12, 1788), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 331 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS].

21. *See* 1 FARRAND, RECORDS, *supra* note 20, at 64-69 (Madison's journal). This method of selection was proposed on June 1 and approved the next day. It was soon discarded as other procedures gained prominence. On July 17, election by Congress was approved ten to zero. 2 FARRAND, RECORDS, *supra* note 20, at 22. On July 24, the delegates reintroduced the procedure, only to defeat it again in the coming weeks. *Id.* at 97-106.

22. *See* 1 FARRAND, RECORDS, *supra* note 20, at 80 (Madison's journal). This method was raised early on but did not receive much support. The delegates returned to this method on July 17. After some debate, direct election was defeated nine to one. *See* 2 FARRAND, RECORDS, *supra* note 20, at 32. Two days later, on July 19, direct election was reconsidered. Both Governeur Morris and James Madison advocated it. *Id.* at 51-59 (Madison's journal). In this vein, James Wilson explained that the "idea was gaining ground, of an election mediately or immediately by the people." *Id.* at 56. On August 24, and while the convention examined the report of the Committee of Detail closely, it returned to this issue yet again. Direct vote was immediately rejected, nine to two. *Id.* at 397.

23. *See* 1 FARRAND, RECORDS, *supra* note 20, at 156 (Robert Yates' journal). On this method, each governor would be given as many votes as the state had in the election of the Senate. *Id.* at 176 (Madison's journal). The motion introduced by Elbridge Gerry was defeated ten to one.

24. *See* 2 FARRAND, RECORDS, *supra* note 20, at 32 (Madison's journal). This proposal was rejected on July 17, by an eight to two vote. The delegates reversed their decision two days later and decided on selection by electors appointed by state legislatures. *Id.* at 58. This hardly settled the matter. On July 24, the electoral plan was reconsidered and ultimately rejected; election by Congress was reinstituted. *Id.* at 101. Along these lines, Wilson suggested that fifteen members from Congress, selected by lottery, would subsequently choose the executive. *Id.* at 103.

25. *See* 1 FARRAND, RECORDS, *supra* note 20, at 230.

26. *See id.* at 244 (Madison's journal). This plan was ultimately rejected on June 19. 2 FARRAND, RECORDS, *supra* note 20, at 50.

speech of June 18, a single executive chosen for life by electors selected by the people in districts?[27] These various possibilities were proposed but rejected often, and some resurfaced a number of times. Ultimately, the delegates settled on a single executive and the now-familiar idea of the Electoral College.[28]

The concept of the Electoral College arose fleetingly during the midsummer of 1787. Early in June, James Wilson raised the possibility of filling the executive office through the appointment of electors.[29] Alexander Hamilton made a similar proposal on June 18.[30] Both proposals were either ignored (in the case of Hamilton's) or handily defeated.[31] On July 17, Luther Martin raised a motion for the election of the executive by electors appointed by the state legislatures.[32] His proposal was defeated overwhelmingly.[33] At this time, the convention instead unanimously approved a proposal whereby the executive would be chosen by the national legislature.[34] And yet, the debate did not end there. Two days later, on July 19, Oliver Ellsworth put forth a proposal similar to Martin's.[35] This second time, the proposal was approved by a vote of eight states to two.[36] This vote hardly ended the matter. Ultimately, the Committee of Eleven[37] met on August 31. On September 4, it proposed what became the Electoral College.[38]

Our discussion thus far is intended to illustrate, if briefly, the degree to which the convention members struggled with their available alternatives. As James Wilson remarked during the ratification debate in Pennsylvania, "The Convention, sir, were perplexed with no part of this plan so much as with the mode of choosing the President of the United States."[39] The difficulties were such as to provoke Max Farrand to comment more than a century later: "Whatever difficul-

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27. *See* 2 FARRAND, RECORDS, *supra* note 20, at 292 (Madison's journal).
28. The delegates agreed on a single executive and reelection on July 17. *Id.* at 22.
29. 1 FARRAND, RECORDS, *supra* note 20, at 80 (Madison's journal).
30. *Id.* at 300 (Yates' journal).
31. *See id.* at 81.
32. 2 FARRAND, RECORDS, *supra* note 20, at 32 (Madison's journal).
33. *Id.*
34. *Id.* at 22.
35. *Id.* at 57-59.
36. *Id.* at 58.
37. The Committee of Eleven, as the delegates were called, included eleven states: New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. *Id.* at 496-97 (Madison's journal).
38. *Id.* at 481, 496-503 (Madison's journal).
39. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 511 (Jonathan Elliot ed., reprint ed. 1987); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 FARRAND, RECORDS, *supra* note 20, at 132 ("The first of these objects, as respects the Executive, was peculiarly embarrassing. . . . [For] tedious and reiterated discussions took place.").

ties might have been encountered in other directions, they paled into insignificance in comparison with the problem before the convention of determining a satisfactory method of electing the executive."[40] This specific debate raged on until September 1787, when the delegates finally arrived at, or perhaps stumbled into, a compromise.[41] These issues are ably documented elsewhere and we need not reproduce those efforts here.[42] For our specific purposes, three questions are worth exploring. First, how did the delegates solve the difficult question of presidential selection? Second, why did they choose this specific procedure? And third, what were the pitfalls inherent in such a plan?

The first question simply demands a close look at the constitutional text.[43] On its face, the text is fairly clear. States, by any way

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40. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 160 (1913); *see also* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 48 (4th rev. ed. 1957) ("On no problem did the Convention of 1787 expend more time and effort than on devising a suitable method of choosing a President."); Wechsler, *supra* note 11, at 181, 182 ("It is consoling to remember that the problem that gives us our difficulty is the one the Framers found it hardest to resolve.").

41. Letter from James Madison to Henry Lee (Jan. 14, 1825), *in* 3 FARRAND, RECORDS, *supra* note 20, at 464 (explaining that the Electoral College had been adopted as a compromise between the small and large states). This is not to denigrate the institution itself, of course, for, as Corwin wrote, "With no other feature of the Constitution did they express greater satisfaction than with the method finally devised." CORWIN, *supra* note 40, at 48.

42. *See, e.g.*, JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 41-87 (1979); MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION (1992); TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804 (1994).

43. The relevant portions of the Constitution read in full:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2.

> The Electors shall meet in their respective states and vote by ballot for [two Persons], one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall [make a List of all the Persons voted for], and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted,—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 if [two or more candidates have such a majority, and have an equal number of votes, then] the House of Representatives shall choose immediately, by ballot, [one of them for] President[; and if no Candidates have a majority, then from the five highest on the list the House shall in like manner choose the President.] But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds

their legislatures deem proper, will select a number of electors to cast two votes for the office of the President. In this vein, each state will receive a number of electors equal to their number of representatives in the national legislature.[44] From these votes, the person with the highest number will be anointed the President while the runner-up will become the Vice President.[45] Yet, two preconditions remain to be met. First, the winning candidate must attain a majority of all ballots cast.[46] If no such majority is secured, the House of Representatives will choose a President from among the top five candidates in terms of electoral votes, with each state delegation casting one vote.[47] Second, in those rare cases when an electoral majority is in fact achieved but the leading candidates receive an equal number of votes, the House of Representatives will similarly choose a President from among the two candidates.[48]

The second question—why the delegates chose this specific procedure—follows directly from the first and asks about the intentions of the delegates in devising the Electoral College. Three leading explanations arise from this question. The first explanation looks to the difficulty faced by the convention delegates in arriving at a widely accepted solution. As customary, Madison's words, written a generation later, provide a helpful guide. In a letter to George Hay, Madison remarked on "[t]he difficulty of finding an unexceptionable process for appointing the Executive Organ of a Government such as that of the U.S., was deeply felt by the Convention."[49] It may be said that the delegates had reached an impasse and, more troubling yet, the repercussions of their inability to reach a common ground were serious. Thus, Madison continued, "and as the final arrangement of it took place in the latter stage of the Session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies: tho' the degree was much less than usually prevails in them."[50] Plain and simple, the delegates were tired and ready to go home. As such, the Electoral College is not just a compromise, but a compromise borne of exasperation and in an atmosphere where a

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> of the states and a majority of all the states shall be necessary to a choice. [In every case, after the choice of the President,] the Person having the greatest number of votes [of the Electors] shall be the Vice-President[. But if there should remain two or more who have equal votes,] the Senate shall choose [from them by ballot] the Vice-President.

Id. amend. XII.

44. *Id.* art. II, § 1, cl. 2.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Letter from James Madison to George Hay (Aug. 23, 1823), *in* 3 FARRAND, RECORDS, *supra* note 20, at 458.

50. *Id.*

"best" plan might not be as palatable as a "good" plan.[51] On this reading, and to put it mildly, the genesis of the Electoral College is rather inauspicious.

A second (and much more promising) explanation posits these electors in a position of complete independence, expected to deliberate freely about the needs of the nation and the qualifications of the various candidates. A cursory look at the relevant text does much to support this interpretation. To begin, states are authorized to appoint electors, who may be neither a Senator nor a Representative, nor, more importantly, a "person holding an Office of Trust or Profit under the United States."[52] This requirement has generated some litigation and its meaning remains uncertain;[53] yet, on its face, it raises some very interesting issues. For example, why is it that the electors cannot be those who are either federal officials or persons holding offices of "trust"? A very plausible answer is, simply, that the electors must be encouraged to think independently, to weigh all relevant information, and to choose accordingly.

Also, note how the electors must *meet* in their particular states and vote for two persons, one of whom must not be an inhabitant of their same state. These requirements point in two analogous directions. For one, the fact that the electors must meet with one another supports the view that they would be independent of public opinion and prior constraints; they would be free to decide anew and choose any two persons they deemed fit. And yet, the delegates knew that regional ties would play a big role. Thus, electors could not make both choices based on state residence.

This view finds further support from some very respectable sources. We know, for example, the extent to which the delegates worried about the independence of the executive. Thus, each time that motions for the choice of popular selection for the President were raised, they were quickly defeated.[54] Similarly, Publius explains in *Federalist 68* that "the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were

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51. "I have found no better way of selecting the man in whom they place the highest confidence," Madison argued at the Virginia Ratifying Convention, "than that delineated in the plan of the convention." Statement by James Madison at the Virginia Convention (June 18, 1788), *in id.* at 329-30. *See* CORWIN, *supra* note 40, at 31 ("For this portion of the Framers' work the only thing to be said is that it no doubt represented their conscientious belief that they had done the best they could in the circumstances.").

52. U.S. CONST. art. II, § 1, cl. 2.

53. *See, e.g.*, Sheboygan Co. v. Parker, 70 U.S. 93 (1865); *In re* George H. Corliss, 11 R.I. 638 (1876); Commonwealth v. Binns, 17 Serg. & Rawle 219 (Pa. 1828).

54. *See, e.g.*, 2 FARRAND, RECORDS, *supra* note 20, at 32, 402 (Madison's journal).

proper to govern their choice."[55] This is a view that finds support in modern times from well-respected quarters. In his dissenting opinion in *Ray v. Blair*, Justice Robert H. Jackson wrote: "No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices."[56]

A third explanation posits instead that the voters would follow their state biases, and as such the Electoral College was designed in a way that would neutralize these natural tendencies. Tadahisa Kuroda explains: "Rather than disinterested citizens, the framers anticipated individuals who would in general express the views, interests, and biases of their communities and states in the office of presidential elector."[57] This view also finds substantial support in the constitutional text; electors, after all, must cast at least one of their two votes for a candidate who "shall not be an Inhabitant of the same State with themselves."[58] On this competing view, electors will not deliberate with like-minded public servants in search of the public good; instead, regional interests will lead them to choose state and local interests over national ones. The constitutional text clearly reflects this worry.

The third question—what are the inherent pitfalls of the Electoral College scheme—proves far more interesting, especially in light of the historical record. On its face, either of the two rationalizations for the electoral requirements under Article II appears possible. On either account, it is clear that the convention delegates envisioned that individual "candidates" would be chosen by these electors and that once all votes were tallied, the best two men would come to occupy

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55. THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1457, at 321-22 (1833); *see also* CORWIN, *supra* note 40, at 40 (delegates intended for electors to "exercise their individual judgments in the choice of a President"); JOHN J. PATRICK ET AL., THE OXFORD ESSENTIAL GUIDE TO THE U.S. GOVERNMENT 167 (Berkeley ed. 2000) (stating that electors are free agents "diligently searching to find the best candidates for President"). *Compare* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665 (1996) (agreeing that electors are free agents, yet also agreeing that states have the power to bind electors and make them pledge how they will vote), *with* HARDAWAY, *supra* note 6 (arguing that the convention delegates never expressed such a view *during* the convention debates, even if many advocates made such an argument during the ratification debates).

56. Ray v. Blair, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting); *see also* Feerick, *supra* note 5, at 9 ("The evidence is compelling that the Framers envisioned a system under which persons of the highest caliber would be chosen as electors."); John D. Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 254 (1968).

57. KURODA, *supra* note 42, at 12.

58. U.S. CONST. art. II, § 1, cl. 3.

these important offices. This vision, however, failed to account for a crucial element of American politics: the concept of party politics.[59]

The argument goes something like this. On the plan as codified in Article II,[60] electors would use their votes on those individuals they deemed as best qualified for the office of national executive. Concededly, the delegates assumed that the electors would be partial to their regions' preferred candidates. As such, they were given two votes. For the second vote, "each elector was expected to vote independently according to his own best judgment."[61] But there was more. These assumptions of both partiality and independence led some of the delegates to the further view that a candidate would seldom receive a majority of the votes.[62] And whenever they did not, the Constitution provided that the House of Representatives would decide the election, with each state delegation receiving one vote.[63]

On this model, the electors would independently evaluate the prospective "candidates." As such, the likelihood of having any one candidate achieve a majority was theoretically small, while the concomitant role of the House of Representatives was correspondingly higher. That is, from the top five candidates in terms of electoral votes, the House would often decide the election. This was a strongly held view among the delegates; although, in all fairness, it was not universally shared.[64] Yet, what were the chances, really, of candidates failing to garner a majority of electoral votes? In the delegates' defense, it may be said that they suspected that some semblance of party politics, however rudimentary, would creep into the presidential electoral process. This is why, in the rare instance that a majority of electoral votes is attained yet two candidates receive an equal number of votes, the House "shall immediately chuse by Ballot one of them for President."[65] For such a scenario to take place, however, it would require strict party discipline. Either that, or a great deal of luck. The election of 1800, and the electoral tie between Thomas Jefferson and Aaron Burr, provides a fitting example.[66] The Twelfth

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59. Wechsler, *supra* note 11, at 182 ("Whatever abstract merit was possessed by the idea of independent electors, the rise of parties swiftly made the concept obsolete.").

60. U.S. CONST. art. II, § 1, cl. 2-4.

61. FARRAND, *supra* note 40, at 167.

62. *Id.*

63. U.S. CONST. art. II, § 1, cl. 3.

64. *See* HARDAWAY, *supra* note 6, at 81-82. While this might be true as a descriptive matter, it was not so normatively. Madison expressed the view at the convention, for example, that he "considered it as a primary object to render an eventual resort to any part of the Legislature improbable." 2 FARRAND, RECORDS, *supra* note 20, at 513 (Madison's journal).

65. U.S. CONST. art. II, § 1, cl. 3.

66. To be sure, the Founding generation's derision for the concept of parties is well established. *See, e.g.*, RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840 (1969) (especially chapters 2 and

Amendment was ratified in order to remedy this problem.[67]

Further, what should be made of the role played by the House of Representatives? One argument is simply that this was the best way to appease the smaller states, as they would control the ultimate election.[68] A competing argument, borrowing on an earlier position, would expect the House to behave with a regional gloss, though they were also expected to rise above the "mischiefs of faction."[69] These men, after all, would be "a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[70] If and when the election came to them, they would rise above faction and regional outlook. They would rise above politics.

As is evident from this Part, we must be careful when expressing support for the Electoral College on originalist grounds. Too often, commentators appear wedded to the so-called "wisdom of the founding fathers" in devising this institution[71] when, in truth, the evidence is equivocal. At best, the convention delegates stumbled upon the College as a compromise early in September 1787, in a small committee and while the constitutional convention was drawing to a close. We also know that this was one of the most difficult choices faced by the delegates. The best defense we have is Madison's position that "no better way" than the Electoral College was found.[72] This is hardly

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and 3). And yet, we know that the concept of party politics, if embryonic when compared with our mature political system, arose in some form soon after the Constitution went into effect. This, Richard Hofstadter argues, is "the primary paradox" of his inquiry into the rise of the American party system. He explains: "Jefferson, the . . . co-founder, of the first modern popular party, had no use for political parties. . . . [T]he creators of the first American party system on both sides, Federalists and Republicans, were men who looked upon parties as sores on the body politic." *Id.* at 2. The election of 1800 and the Twelfth Amendment must be understood exactly within this context.

67. Instead of granting electors two votes to be cast on any two candidates of their choice, and from which the two leading candidates would become President and Vice President, the Twelfth Amendment asked electors to vote specifically for a President and a Vice President. In this way, candidates from different parties would not have to serve together, as with President Adams and Vice President Jefferson after the election of 1796. Also, the likelihood that the contingency plan would play a role, with the House of Representatives deciding the election, was seriously diminished. Seen as a whole, these changes may be viewed as turning away from a romanticized view of electors as above party and pointing toward a descriptive view of political combat where winning is all that matters. *See* Wechsler, *supra* note 11, at 182.

68. HARDAWAY, *supra* note 6, at 82.

69. THE FEDERALIST NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 1961).

70. *Id.* at 82. The representatives will "possess the most attractive merit and the most diffusive and established characters." *Id.* at 83. Additionally, the representatives will have "enlightened views and virtuous sentiments." *Id.* at 83-84.

71. *See* HARDAWAY, *supra* note 6, at 11.

72. Statement by James Madison at the Virginia Convention, 3 FARRAND, RECORDS, *supra* note 20, at 329; *see also* 2 FARRAND, RECORDS, *supra* note 20, at 111 (Madison's journal).

a ringing endorsement. It is precisely on those grounds that some concluded that the College has outlived its usefulness.[73]

Moreover, the compromise that the delegates agreed upon at the convention reflected certain assumptions about popular democracy and the appropriate sphere of operation for both state and federal governments. The point is not that the compromise and values upon which the College rests are necessarily ones that we share today. Rather, the argument is simply that the College is best understood by reflecting upon the assumptions that gave rise to its inception. These are issues that we explore in the next Part.

II. THE ELECTORAL COLLEGE IN MODERN TIMES

"Suggestions of substitutes for the electoral college system," wrote Alexander Bickel a generation ago, "have abounded throughout our history. The college is, after all, complex, seemingly anachronistic—a curiosity; and it has alternated between being the butt of humorists and the concern of reformers."[74] Bickel is right on both accounts. The first point, about the many calls for reform, is amply supported by the historical record. The direct method of selection, whereby the President is chosen on the basis of a national election, was first considered at various times during the constitutional convention.[75] Myriad reasons led to its defeat on successive occasions.[76] Congress first considered its merits in 1816 to no avail.[77] Direct popular election of the President has been the most popular choice of reformers over the

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73. *See* Feerick, *supra* note 5, at 42-43; Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section I and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 204 (1994) (arguing that the Electoral College was a compromise designed to appease slaveholding interests and as such should be abolished). In 1979, the U.S. Senate held extensive debates on this issue, yet the proposal was ultimately defeated by a fifty-one to forty-eight vote. 125 CONG. REC. 17,766 (1979); S. REP. NO. 96-111, at 3-4 (1979).

74. BICKEL, *supra* note 6, at 10; *see also* William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 149 n.24 (1996) (documenting various reform proposals made through the years).

75. *See* 2 FARRAND, RECORDS, *supra* note 20, at 29-31, 56-57, 111 (Madison's journal).

76. Its opponents argued, for example, that this method was impracticable, 1 FARRAND, RECORDS, *supra* note 20, at 135 (Madison's journal); that the people were too little informed and thus liable to deception, *id.* at 137; and that the people were never fully informed and would vote for the same man within their own states, thus giving large states a much larger influence in the election, *id.* at 392 (Yates' journal). Finally, the fear existed that the people would be duped by cabals, such as the Society of Cincinnati. *Id.* at 454. It was obvious to all that such societies should not have a predominant influence in the government. *See id.* at 456. Further complications existed. For example, they argued about what to do with the slave question and other sectional problems, *id.* at 413, as well as what to do about the population disparities among the various states. *Id.* at 452.

77. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 161 (rev. ed. 1981).

years.[78] The District System and the Proportional Plan have played a similar role in discussions of electoral reform. The former was first introduced in 1800, the latter in 1848.[79] As with the plan for direct election, both of these proposals have received much support through the years.[80]

The second point on the anachronicity of the Electoral College is also an accurate assessment of the critical commentary. Much has been written about the College and very little of the commentary has been complimentary. In this section, we do not wish to add to the list; in fact, we are not sure that anything new could be added to any such list. Rather, this second Part acknowledges that no discussion of the Electoral College is complete without revisiting the proposals for reforming or abolishing the College as well as the arguments of the defenders of the College. We thus divide this Part into two sections. In the first, we discuss the four virtues the present system is said to have. In the second, we discuss four of the most common criticisms of the institution. In so doing, we also present some of the many reform proposals under discussion, past and present. This Part concludes with a cautionary note. While critics of the College do not entirely persuade us, we are also less than satisfied with the explanations provided by the College's defenders. Before advancing these arguments, which we do in Part III, we first examine the College itself, both the good and the bad.

A. The Good College

Defenders of the Electoral College system make four basic claims in support of retaining this institution. First, they point to the genesis of the institution and the problems and conditions faced by those

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78. *See, e.g.*, AMERICAN BAR ASSOCIATION, ELECTING THE PRESIDENT: A REPORT OF THE COMMISSION ON ELECTORAL REFORM 4 (1967) ("While there may be no perfect method of electing a President, we believe that direct, nationwide popular vote is the best of all possible methods."); Birch Bayh, Comment, *Reflections on the Electoral College*, 13 VILL. L. REV. 333 (1968); Ronald A. Dubner, *The Electoral College: Proposed Changes*, 21 SW. L.J. 269 (1967); Paul A. Freund, *Direct Election of the President: Issues and Answers*, 56 A.B.A. J. 773 (1970); William T. Gossett, *Electing the President: New Hope for an Old Ideal*, 53 A.B.A. J. 1103 (1967). *But see* JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE (1971); Albert J. Rosenthal, *Some Doubts Concerning the Proposal to Elect the President by Direct Popular Vote*, 14 VILL. L. REV. 87 (1968).

79. PEIRCE & LONGLEY, *supra* note 77, at 132, 144.

80. *See, e.g.*, Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737 (1917); Estes Kefauver, *Proposed Changes in the Presidential Election System*, 1 VAND. L. REV. 396 (1948); Sen. John J. Sparkman, Comment, *Reflections on the Electoral College*, 13 VILL. L. REV. 338 (1968); Wechsler, *supra* note 11, at 270; William Raspberry, *Post-Traumatic Suggestion*, WASH. POST, Jan. 1, 2001, at A23.

On districting, see Sen. Karl E. Mundt, Comment, *Reflections on the Electoral College*, 13 VILL. L. REV. 336 (1968). The leading criticism of this plan is that it would open the door to gerrymandering. CORWIN, *supra* note 40, at 52; Clark, *supra*, at 747.

in charge of its creation. "It happens that," Alexander Bickel wrote, "somewhat like the Senate, the electoral college can satisfy, at once, the symbolic aspirations and distant hopes of the small states, and the present, practical needs of the large ones. Not many human institutions work out as artistically as that."[81]

Second, a particularly powerful defense of the Electoral College is grounded on the need for certainty soon after the close of the particular election. Put in general terms, Judith Best argues that "an electoral system should produce a definite, accepted winner and avoid prolonged contests and disputes that create uncertainty and public turmoil."[82] This is the function now played by the Electoral College. To its defenders, it does so in two ways. One, it saves the nation "from the effects of an ambiguous outcome."[83] In this way, it confers the requisite legitimacy even in the face of close elections.[84] And two, it also "protect[s] the nation from the crisis of a disputed election."[85] It is for this reason that proposals for direct election of the President are seen as particularly problematic. Once certainty is seen as important, it is clear that a system of direct election will make close elections less certain, not more.[86] Presently, litigation need only take place on a state by state basis; what if we needed to recount on a countrywide basis?[87]

Third, the College forces candidates to flatten their level of support. As Corwin explains, "[t]he truth of the matter is that, in the absence of a strong third party, the electoral system serves very well just as it stands at the present moment to guarantee that the candidate with the stronger popular following will win out."[88]

A final argument in favor of the Electoral College looks simply to the historical record. "There are several reasons," Clinton Rossiter wrote decades ago in the context of the Electoral College, "all of them convincing, why we should hesitate a long time before replacing a humpty-dumpty system that works with a neat one that may blow up in our faces."[89] Alexander Bickel echoed this sentiment. He wrote:

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81. BICKEL, *supra* note 6, at 10.

82. BEST, *supra* note 78, at 210; *see also* HARDAWAY, *supra* note 6, at 163 ("The asset that is priceless in a free and peaceful society is a clear and prompt result in the election of the national leader.").

83. HARDAWAY, *supra* note 6, at 127.

84. *But see* Robert D. Brown, *NO—The Electoral College Should Not Be Abolished*, *in* CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION 212 (Gary L. Rose ed., 2d. ed. 1994).

85. HARDAWAY, *supra* note 6, at 136.

86. BEST, *supra* note 78, at 204 ("[T]here is no reason to believe the direct-election plan would increase the certainty in any close election.").

87. *See* BICKEL, *supra* note 6, at 32.

88. CORWIN, *supra* note 40, at 52.

89. CLINTON ROSSITER, THE AMERICAN PRESIDENCY 199 (2d. ed. 1960); *see* BICKEL, *supra* note 6, at 3 ("The sudden abandonment of institutions is an act that reverberates in ways no one can predict, and many come to regret.").

"We do well to remain attached to institutions that are often the products more of accident than of design, or that no longer answer to their original plans, but that challenge our resilience and inventiveness in bending old arrangements to present purposes with no outward change."[90] Similarly, Martin Diamond states, "We should preserve the electoral college . . . simply on grounds of its nearly two-centuries long history of tranquil popular acceptance."[91] This is a position shared by many.[92]

B. The Big, Bad College

The Electoral College has been the subject of much scholarly commentary, a lot of it critical. In light of its inauspicious beginning, this should not be surprising. This section discusses four leading charges against the College.

1. Faithless Electors

We begin with one of the least compelling criticisms of the Electoral College, the "faithless elector" problem. A "faithless elector" is an elector who "takes it in his head to act independently" and votes for a presidential candidate other than the winner of their state's presidential election.[93] The argument, taken seriously, is this: if a "voter has a constitutional right to cast an effective vote for President, an elector who casts his ballot contrary to the voters' mandate may be said to be acting under color of state law to deprive the voters

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90. BICKEL, *supra* note 6, at 3.

91. Martin Diamond, *The Electoral College and the American Idea of Democracy*, *in* AS FAR REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIN DIAMOND 2 (William A. Schambra ed., 1992).

92. *See* CORWIN, *supra* note 40, at 66 (relying on "[t]he verdict of actual practice"); WALLACE S. SAYRE & JUDITH H. PARRIS, VOTING FOR PRESIDENT: THE ELECTORAL COLLEGE AND THE AMERICAN POLITICAL SYSTEM 2 (1970) ("[T]he burden of proof lies heavily upon those who would eliminate known defects of the electoral college system but risk the hazards of untested alternatives."); William R. Keech, *Background Paper*, *in* WINNER TAKE ALL: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON REFORM OF THE PRESIDENTIAL ELECTION PROCESS 68 (1978) ("The discussion about election systems is colored by the fact that the status quo is the Electoral College, which, in spite of risks and close calls has not produced a major malfunction for almost 100 years. This record produces a sense of security for its defenders."); *see also* BEST, *supra* note 78, at 216, 218:

> The present electoral system is not perfect. To cure all its defects may be beyond present skill.
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> . . . .
>
> [And yet] [j]udged in terms of its practical effects, our electoral system has a sound heart. Like all living things, it has imperfections and defects, but it functions; indeed, it thrives. Those who focus on its blemishes, real or imagined, advocate major surgery in the pursuit of abstract perfection, preferring logical consistency to viability. Major surgery is not indicated if we prefer life to logic.

93. BICKEL, *supra* note 6, at 34.

of that constitutional right."[94] This is another way of saying that, since 1796, electors have become "party dummies."[95] Their role is but limited to registering the preference of state voters at large, nothing more.[96]

There are many reasons the faithless elector problem is one of the least captivating defects—if indeed it is a defect—of the Electoral College. As a point of departure, the faithless elector problem is often described as a "specter"; throughout the history of the College, "faithless electors" have not surfaced often. Longley and Peirce report that "since 1796 fully 21,291 electoral votes have been cast for president, but only nine votes in all those years were indisputably cast 'against instructions.'"[97] The statistical probability that a faithless elector would cast a decisive vote in a presidential election is extremely low.[98] Hence, the argument is about possibility, not probability.

Second, remedies for the "faithless elector" are readily available. As a matter of procedure, only those who are most committed to the party are selected as electors. Additionally, many states have passed statutes compelling electors to strictly vote for the presidential nominee of the party of their choice.[99] Further, if the faithless elector does become a significant problem, it can be fixed by the simplest amendment to the Constitution, the automatic vote.[100] That is, instead of choosing electors as a bridge between the popular vote and the Electoral College, proposals have been made to assign electoral votes to the winning candidates automatically.[101] Moreover, it is open to question whether the electors were intended to act as free agents, independent of the public's opinion within their corresponding states.[102] Finally, and as the Supreme Court's opinion in *Bush v. Gore*

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94. Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections,* 67 MICH. L. REV. 1, 26 (1968); *see also* Lawrence D. Longley, *YES—The Electoral College Should be Abolished*, *in* CONTROVERSIAL ISSUES IN PRESIDENTIAL ELECTIONS, *supra* note 84, at 204.

95. CORWIN, *supra* note 40, at 40.

96. PATRICK ET AL., *supra* note 55, at 167.

97. LONGLEY & PEIRCE, *supra* note 4, at 113.

98. *Id.*

99. *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1152 (1975).

100. *See* Diamond, *supra* note 91, at 191.

101. This particular provision came to be known as the Katzenbach Amendment. *See Electoral College Reform: Hearings Before the Senate Judiciary Comm.*, 91st Cong. 274 (1970) (statement of Nicholas deB. Katzenbach).

102. For an argument that the electors were so intended, see Feerick, *supra* note 5, at 8-9. For the contrary view, see LUCIUS WILMERDING, JR., THE ELECTORAL COLLEGE (1958); John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 810-11 (1961).

made vastly clear, a constitutional right to vote for President is simply nonexistent.[103]

2. Inspiring "Respect and Acquiescence"

For a second criticism, we look to none other than James Madison. "Next to the propriety of having a President the real choice of a majority of his Constituents," he wrote to George Hay in 1823, "it is desirable that he should inspire respect & acquiescence by qualifications not suffering too much by comparison."[104] To be sure, the popular vote is the simplest and most accepted way to chose a representative, and the chief executive is no exception. Yet, absent that, the chosen person must "inspire respect & acquiescence."

Unlike Madison, we are not quite as worried with the qualifications of the chosen executive; perhaps our recent history leaves us a bit cynical to ask for too much. Instead, we worry more about the fact that, unsurprisingly, many Americans do not fully understand how the Electoral College works.[105] As an ABA commission on electoral reform concluded, the College is "archaic, undemocratic, complex, ambiguous, indirect, and dangerous."[106] In this vein, others have gone as far as to call it "a deplorable political institution."[107] The fact that a majority of Americans do not understand how the Electoral College works is potentially problematic. After all, this is the process by which we select our President and nothing short of the legitimacy of the incoming President potentially hangs in its balance.

Defenders of the institution concede this point rather willingly, at least at first glance. Martin Diamond, for example, writes that:

> Perhaps the fear is that voters are baffled by the complexity of the Electoral College and that their bafflement violates a democratic norm. It must be admitted that an opinion survey could easily be devised that shows the average voter to be shockingly ignorant of what the Electoral College is and how it operates.[108]

And yet, these concessions lead him away from the expected conclusions, for, as he proceeds, "[i]t all depends on what kind of knowledge

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103. Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College." (citing U.S. CONST. art. II, §1)).

104. Letter from James Madison to George Hay (Aug. 23, 1823), 3 FARRAND, RECORDS, *supra* note 20, at 458.

105. *See infra* note 112.

106. *Electing the President: Recommendations of the American Bar Association's Commission on Electoral College Reform*, 53 A.B.A. J. 219, 220 (1967).

107. Longley, *supra* note 94, at 200.

108. MARTIN DIAMOND, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY 13 (1977).

the voter is expected to have. . . . However ignorant they may be of the details of the Electoral College, their ignorance does not seem to affect at all the intention and meaning of their vote, or their acceptance of the electoral outcome."[109]

Diamond raises a second objection, one grounded specifically in the republican tradition and our system of government. The Electoral College, he maintains, is "only one example of the complexity that characterizes our entire political system. Bicameralism is complex; federalism is complex; judicial review is complex; the suspensory executive veto is a complex arrangement; the Bill of Rights introduces a thousand complexities."[110] Thus, he asks, "[i]f a kind of prissy intelligibility is to be made the standard for deciding what should remain and what should be simplified in American government, how much would be left in place?"[111]

Much can be said for Diamond's position. Most Americans pay very little attention to politics. In general, the political knowledge of the average American is rather limited.[112] Taken together, these two premises lead to our present condition over the public's understanding of the Electoral College. That is, the fact that many people misunderstand the workings of the Electoral College is undoubtedly a function of the attention that the average American devotes to politics and the minimal level of political knowledge of the electorate as a whole.

In response to this condition, one may argue that the fact that many Americans are unaware of how the College works undermines the legitimacy of the incoming President or of the electoral system as a whole.[113] We do not think so. An electoral institution may be said to undermine the legitimacy of the winning candidate in a case where political elites have deliberately conspired together for the purpose of coercing the electorate to accept an institution that it would not otherwise accept. Such is not the case here. Thus, the question is whether a "long-standing constitutional arrangement"[114] is undemocratic simply because it is complex. On this score, we agree with

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109. *Id.* at 14.

110. *Id.*

111. *Id.*

112. To be sure, political scientists have debated quite vigorously the extent of this knowledge. *See generally* ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960); PHILIP E. CONVERSE, THE NATURE OF BELIEF SYSTEMS IN MASS PUBLICS (1962); ROBERT E. LANE, POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES (1962); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992).

113. Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2549 (2001) (concluding that the Electoral College as presently constituted is "less attractive" because its operation is not sufficiently transparent).

114. Diamond, *supra* note 91, at 187.

Diamond, who asserted that institutional simplicity is not the sine qua non of democracy.[115]

3. Ideological Purity, the Minority President, and Contingencies

A third argument against the Electoral College looks to the legitimacy of the institution and modern democratic understandings. To some commentators, the Electoral College should be abandoned in favor of a direct election system not simply because of voter confusion and ignorance but on the grounds that selection by popular vote is the more legitimate democratic alternative.[116] To be sure, when the electoral count and the popular vote count are convergent and elevate the same presidential candidate to the Presidency, concerns about electoral legitimacy are largely an academic exercise. The worry, however, is that at some point—such as the 2000 presidential election—the two counts will diverge and the legitimacy of the incoming President, if not the Presidency itself, will be implicated.

Not surprisingly, the critics have spilled most of their ink exactly here. There are two variations of this criticism. This first variation is primarily directed at the contingency plan—the established procedure were a candidate unable to garner the requisite electoral votes. As we know, such a scenario would send the election to the House of Representatives, where each state delegation would cast one vote.[117] To some, this is the feature of the electoral system "that has been most condemned."[118] At its most extreme, this procedure may allow one person to cast the deciding vote in an election—a decision that is clearly "distasteful in a democracy."[119] As such, "steps should be taken to prevent their recurrence."[120] Even defenders of the College concede some ground here; Diamond, for example, has labeled the prospect of an election decided by the House of Representatives a "horror."[121]

The second variation—and more popular criticism—even has its own name: Senator Kefauver has labeled the possibility that the Electoral College votes and the popular vote do not match the

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115. *See id.*

116. *See supra* note 78.

117. Kefauver, *supra* note 80, at 398.

118. J. Hampton Dougherty, *The Law of the Constitution in Relation to the Election of President*, 14 AM. LAW. 21, 23 (1906).

119. Richard C. Baker, *On Becoming President by One Vote*, 48 A.B.A. J. 455, 456 (1962).

120. *Id.*

121. Testimony of Martin Diamond at a hearing of the Subcommittee on the Constitution of the Committee of the Judiciary of the U.S. Senate, regarding an amendment proposed by Senator Birch Bayh to eliminate the Electoral College and provide for direct election of the President (1977), *reprinted in* MARTIN DIAMOND, TESTIMONY IN SUPPORT OF THE ELECTORAL COLLEGE 9 (1977) [hereinafter Testimony of Martin Diamond].

"Loaded Pistol to Our Heads" problem.[122] Abbott and Levine have similarly likened the election of an executive who has not won a majority of the popular vote to the "Great San Andreas Earthquake."[123] Representative Emanuel Celler, while Chairman of the House Committee on the Judiciary, described the electoral process resulting in a minority President as "horrible," "unsporting," "dangerous," and "downright uncivilized."[124] John Feerick forecasted that "resentment, unrest, public clamor for reform and an atmosphere of crisis would probably ensue"[125] "if the popular-vote winner were to lose a presidential election."[126]

The advent of *Baker v. Carr*[127] and the "one person, one vote" revolution[128] frames this particular criticism of the Electoral College. There are two ways understand this argument. First, and as Neal Peirce and Lawrence Longley write, "[t]o lose their votes is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed."[129] The second point is much simpler. As Alexander Bickel explained a generation ago: "It is time for the system to be ideologically pure. The Court has said that the Constitution commands equal apportionment. We should, therefore, reapportion the presidency."[130] In light of the his-

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122. *Id.* at 5.

123. ABBOTT & LEVINE, *supra* note 1, at 1.

124. 115 CONG. REC. 24,963 (1969).

125. Feerick, *supra* note 5, at 1.

126. *Id.* Professor Paul J. Piccard argued that "even the winning party is going to be sufficiently embarrassed to accept direct popular election of the President. I think they will turn to that." PEIRCE & LONGLEY, *supra* note 77, at 166 (quoting *Nomination and Election of President and Vice President and Qualifications for Voting: Hearing before the Comm. on the Judiciary and Subcomm. on Constitutional Amendments*, 87th Cong. 31, 501 (1961)); *see also* BEST, *supra* note 78, at 26-27 ("The principle underlying the charge that the present system may result in the victory of a runner-up is that democratic legitimacy requires a guarantee that the candidate with the most popular votes will win."); Longley, *supra* note 94, at 208:

> This problem is a fundamental one—can an American president operate effectively if he or she clearly has received fewer votes than the loser? I would suggest that the effect upon the legitimacy of a contemporary American presidency would be disastrous if a president were elected by an obscure electoral college after losing in the popular vote.

127. 369 U.S. 186 (1962).

128. Reynolds v. Sims, 377 U.S. 533, 557-58 (1964) (stating that election systems should give equal weight to each vote cast).

129. PEIRCE & LONGLEY, *supra* note 77, at 131 (quoting Missouri Senator Thomas Hart Benton, 41 ANNALS OF CONG. 170 (1824)); *see* Longley, *supra* note 94, at 200.

130. BICKEL, *supra* note 6, at 14; *see* Estes Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 L. & CONTEMP. PROBS. 188, 188 (1962); *see also* Wechsler, *supra* note 11, at 184 ("There is no longer room for difference on providing federal protection of the popular participation in the choice. Time has made the Fathers' difficulty on this issue wholly academic.").

tory of the College and specifically its precarious inception, this is an argument worth thinking about.

From these perspectives, the question presented is rather simple: is the Presidency less legitimate if the Electoral College process produces a wrong winner? Supporters of the College have offered a number of responses. We examine the three most persuasive defenses. First, defenders of the College point out that a "runner-up" Presidency would be mostly a "fluke." As such, the possibility of a divergent vote is hardly a source of concern, for simply, "[t]he American people would grin and bear it and throw him [the "runner-up" President] out the next time, if they did not like what he did. Flukes happen. . . . [T]hat is as close to Russian roulette as a pimple is to cancer."[131]

Second, commentators question the reflexive coupling of American democracy with majority rule. Hardaway argues, for example, that "[a] winner in the Electoral College who fails to win the most popular votes is no more a 'wrong president' than legislation passed by the Senate is the 'wrong legislation,' or an amendment passed by the States (and not by popular vote), is the 'wrong amendment.'"[132] Polsby and Wildavsky similarly argue that "there is no serious reason to quarrel with the major features of the present system, since in our form of government 'majority rule' does not operate in a vacuum but within a system of 'checks and balances.'"[133]

Third, one could question the criticism over the legitimacy of a minority Presidency on its own merits. Two such responses are particularly attractive. The first response argues that the institution of the Electoral College affects campaigning across the country and in so doing makes it difficult, perhaps impossible, to know how a candidate who does not win the popular vote would fare under a different system.[134] On this view, it is unfair and ultimately inaccurate to separate the popular vote from its particularized electoral context. Plainly, the argument concludes, the popular vote is a distorted and ultimately useless measure.[135] The second response looks to the function played by the Electoral College, particularly after a close election. Alexander Bickel notes, for example, that:

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131. Testimony of Martin Diamond, *supra* note 121, at 9.

132. HARDAWAY, *supra* note 6, at 121.

133. POLSBY & WILDAVSKY, *supra* note 3, at 252; *see also* Brown, *supra* note 84, at 221-22 (contending that the College preserves important principles, such as federalism, minority rights, and republicanism).

134. *See* HARDAWAY, *supra* note 6, at 121-22.

135. *See* Brown, *supra* note 84, at 212-13 (stating that the Electoral College method of electing the President is democratic and constitutional because it safeguards minority rights).

> When some 70 million votes divide so closely, only an immensely dogmatic majoritarianism would insist that the so-called winner has the sole legitimate claim to office. In truth, there is a standoff, and all that is needed is a convenient device—any convenient device previously agreed upon—for letting one of the two men govern. That is all that is needed, and that is all that is possible.[136]

These defenses are persuasive at least in one respect. They underscore the fact that legitimacy in presidential contests is not simply outcome-determinative. The supposition of illegitimacy presupposes an outcome-determinative conception of legitimacy: the presidential process is legitimate only if it produces the right outcome.[137] In this case, "right" is defined as the outcome determined by the popular vote count. But that is precisely the question: should the popular vote count provide the normative baseline for judging whether the presidential election procedure identified in the Constitution[138] is sufficiently democratic?

In this context, democratic legitimacy is both outcome-dependent and process-dependent. If the rules of the game are described ex ante and the parties play by these rules, then any outcome is by definition legitimate. The fact that the Electoral College may produce a "wrong-winner" is part of the expected outcome as defined by the rules of the game. Put simply, the rule of decision is that the "person having the greatest number of votes . . . shall be the President, if such number be a majority of the whole number of Electors appointed."[139]

The controversy surrounding the 2000 presidential election is useful to illustrate this point in a less abstract manner. The fact that George W. Bush lost the popular vote did not seem to terribly unnerve the general public. The public accepted the result of the electoral count once the legal challenges were exhausted because there was a sense that the selection of George W. Bush was part of the expected outcome.[140]

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136. BICKEL, *supra* note 6, at 31.

137. Neal Kumar Katyal, *Florida's Election Day Vote Could Be Irrelevant*, *at* http://www7.cnn.com/2000/LAW/11/columns/fl.katyal.florida.11.09/ (last visited Oct. 3, 2001) ("Basic popular sovereignty principles underlying our constitutional system argue that the people's vote should govern.").

138. U.S. CONST. amend. XII.

139. *Id.*

140. There are undoubtedly other factors that contributed to the acceptance of the results of the 2000 presidential election. For example, many Americans accepted the result because they were not terribly excited about either candidate: it made less difference to them which candidate won. Though we would agree with this observation, our point is slightly different here. Our argument is simply that what it means to "win" an election cannot simply be defined as the result of the popular vote. Fundamentally, we are committed to two definitions of what it means to win a presidential election: one method defines a winner as the person who received the most popular votes; another defines a winner as the person who received the most electoral votes. A certain number of Americans reconciled themselves to the fact that George W. Bush rightfully assumed the mantle of President not

In contrast, the reaction to the Bush Presidency in the African-American community differed markedly from that of many White Americans. Some commentators criticized African-American leaders for publicly announcing that they will not accept the result of the election on precisely the grounds mentioned above—that the result was democratic because it was part of a democratically expected outcome. However, African-American leaders responded that they were rejecting an outcome that they would have conceded ex ante was legitimate. Rather, they argued that the outcome was not legitimate because the rules of the game were not followed.

Thus, though there may not be agreement about whether the proper procedures were followed in the 2000 presidential elections, there is widespread agreement about the ground rules: When the proper procedures are followed, the outcome cannot be contested. In other words, in a society committed to democratic rule, systemic outcomes are by definition democratic when those outcomes are the product of preexisting commitments.

Even if one concedes this point to the defenders of the current system, however, their defense is nevertheless unsatisfying. The question posed is a normative one: whether electing the President by popular election is, as a normative matter, more democratic than the current system. The answer that the current system is democratic or that popular election is not the sine qua non of democracy does not resolve the normative inquiry. This answer does not speak to the question of comparative "democraticness." We will return to this point in Part III. Before doing so, we discuss one last criticism of the Electoral College institution.

4. Unit Voting

A common criticism often offered in favor of the eradication of the Electoral College is that the College diminishes the voting power of various political minorities, including both voters of color and voters who support third-party candidates. The criticism is essentially that the winner-take-all system or unit rule unnecessarily "wastes" votes, particularly when compared to a districted-vote system or a direct-vote system.

The argument is disarmingly simple. The unit-voting system employed by most states—which is not constitutionally required—"wastes" votes whenever the unit winner wins by a greater margin than necessary to carry that unit.[141] The votes are considered wasted not simply because they represent an unnecessary marginal excess,

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because they enjoyed the outcome but because they accepted that the outcome was part of the game.

141. ABBOTT & LEVINE, *supra* note 1, at 24.

but because the excess margins could make up the difference in another unit that the candidate lost.[142] Similarly, the unit vote rule also wastes the votes of the unit loser. Even though the unit vote loser was able to win some votes, because the losing candidate did not carry the unit, he or she does not get any electoral votes. Consequently, the voters who voted for that candidate "wasted" their vote, especially if their candidate was from a third party.

a. The Electoral College and Third Parties.—Let us first think about the Electoral College's impact on third parties before we examine the College's impact on voters of color. The unit vote system, as opposed to a proportional system, does in fact make it more difficult for political minorities to win electoral votes. When the unit is defined as the "state," which it is in every jurisdiction with the exception of Maine and Nebraska, political minorities will find it more difficult to carry the unit. The unit rule is one reason that third parties have found it nearly impossible to break the hold that the Republican and Democratic parties have had on presidential selection.

Appendix Table 1 shows how Ross Perot's third-party candidacy fared in 1992. As is evident from Table 1, 19,741,657 Americans voted for Perot. Unfortunately for the Perot supporters, Perot carried nary an electoral vote. From this perspective, 19,741,657 Perot voters wasted their votes.

Appendix Table 2 demonstrates how a Perot candidacy would have fared under a proportional distribution system. Under a proportional distribution system, Perot would have garnered 102 electoral votes. Even though Perot could not have acquired sufficient electoral votes to win the Presidency, he and his party could have played a significant role in who would eventually become President. In many respects, the current system minimizes the role that third parties can play as brokers and kingmakers in presidential politics.

In making this claim, we must underscore the fact that the solution here is not achieved by changing the size of the unit but by getting rid of the winner-take-all feature of the electoral system. Thus,

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142. Of course, most states award all of the electoral votes to the candidate that wins the state—the unit—even if only by a mere plurality. Abbott and Levine explain one of the possible scenarios that the winner-take-all system gives rise to wasted votes in the following way:

> [I]magine that the winning candidate carried the twelve largest states (and their 279 electors) by narrow 10,000 vote margins in each of those states. Thus, the winner's total plurality in those twelve states was 120,000 votes. However, our winner lost the remaining states overwhelmingly, by an average of 100,000 votes per state. The other candidate's plurality in those thirty-eight states would, therefore, be 3,800,000. Thus, although the losing candidate received 3,680,000 more votes nationwide, the other candidate would win the electoral college vote 279 to 259!

Id.

in this circumstance the debate is not really about the unit rule as much as it is about the benefits of proportional representation over a first-past-the-post system.[143]

Further, note that the unit role provides a certain amount of stability to the system and underscores the importance of two-party politics to the constancy of the current system. Without the unit rule, a third party or third-party candidate of reasonable political strength would almost always prevent either of the two major parties from getting an Electoral College majority.

A third-party candidate's impact does not necessarily depend upon capturing 20 percent of the electorate's imagination as Perot did in 1992. Appendix Table 3 illustrates that even if a third-party candidate secures 10 percent of the popular vote as Perot did in 1996, the third-party candidate can prevent either major party candidate from attaining an Electoral College majority. Thus, under a proportional distribution system, Perot could have prevented or delayed Clinton's Presidency in 1996.

In sum, the unit rule does have a disproportionately negative impact on supporters of third-party candidates. Compared to a proportional distribution system, the unit rule minimizes the voting power of third parties. In exchange, the unit rule provides some stability to the two-party system. This is a feature that, while many find virtuous, others find accursed.

b. The Electoral College and Voters of Color.—Though the impact of the current system on third parties is quite clear-cut, the impact of the College on voters of color is not. In this section we examine the oft-stated assumption that the Electoral College is inherently biased against voters of color.[144] We conclude that the Electoral College is not inherently biased against voters of color. In fact, the College favors some voters of color, particularly Latinos and Latinas, and disadvantages others, especially African Americans living in the South. There is, however, no evidence to suggest that the College invariably and directly disadvantages voters of color, even African-American voters who reside in the South, *qua* voters of color. Rather, the evidence suggests that where the College disadvantages voters of color,

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143. We thank Heather Gerken for this observation. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 1095 (2d ed. 2001) (explaining the "First Past the Post" or plurality vote system).

144. *See, e.g.*, ABBOTT & LEVINE, *supra* note 1, at 90-99; LONGLEY & PEIRCE, *supra* note 4, at 154-61; Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996); Lawrence D. Longley, *The Electoral College and the Representation of Minorities*, *in* THE PRESIDENT & THE PUBLIC (Doris A. Graber ed., 1982); Lloyd B. Omdahl, *The Negro Stake in the Electoral College*, 2 BLACK POLITICIAN 29, 62-63 (1971).

this is because they live in a state that is disadvantaged by the College.[145]

Many commentators have stated that the Electoral College reduces the voting potential of voters of color.[146] For example, Abbott and Levine note that African Americans, particularly those residing the South, "find themselves typically casting votes for president that have virtually no influence on the electoral votes of their states."[147] The proposition that the political preferences of voters of color, particularly African Americans, are disproportionately and negatively affected by the Electoral College has gained increasing and widespread acceptance in both scholarly and popular circles.[148]

Some scholars argue that the Electoral College disadvantages voters of color because of the predominance of the unit-vote or winner-take-all method of selecting electors employed by the overwhelming majority of states.[149] As we noted earlier, a consequence of unit-voting is the submergence of the votes of political minorities where the political preferences of voting minorities diverge with those of political majorities.[150] As a result of the unit rule, African Americans—specifically African-American voters in the South who vote overwhelmingly for the Democratic Party—are more often than not submerged because they are surrounded by White voters who vote overwhelmingly for the Republican Party.[151] Unless the presidential electoral preferences of African Americans who reside in the South coincide with those of their Southern White neighbors,[152] they will seldom select a presidential elector. Consequently, as described by one commentator, the vote of African Americans in the South is "virtually meaningless in the final selection of the President."[153]

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145. *See* Omdahl, *supra* note 144, at 62 (explaining how presidential candidates place a premium on voters depending on their location; thus, the College may disadvantage voters of color based purely on the location where they reside).

146. ABBOTT & LEVINE, *supra* note 1, at 93, 109-10; GLENNON, *supra* note 42, at 71-72.

147. ABBOTT & LEVINE, *supra* note 1, at 93 ("Black Southerners' presidential votes have been meaningless and without any political impact whatever."); *id.* at 94 ("[S]outhern Blacks have had little more influence on most modern presidential general elections than Bulgarians. Their votes, although technically cast, have usually not counted.").

148. *See, e.g., id.*; GLENNON, *supra* note 42.

149. LONGLEY & PEIRCE, *supra* note 4, at 137.

150. *Id.*

151. ABBOTT & LEVINE, *supra* note 1, at 93.

152. *Id.*

153. Hoffman, *supra* note 144, at 936; *see also* ABBOTT & LEVINE, *supra* note 1, at 93 ("The cause of . . . [Southern Blacks'] electoral impotence is the fact that Southern Blacks vote for the party in their states that is the perennial presidential loser there.").

The impact of the Electoral College's winner-take-all system on the votes of Southern African-American voters has at least led one commentator to conclude that states, with the exception of Maine and Nebraska of course, violate the Voting Rights Act ("VRA") by employing the unit-vote system to select presidential electors. Hoffman, *supra* note 144, at 947, 1020.

Taking this criticism on its merits, there are no empirical reasons to believe that unit-voting invariably minimizes the electoral prospects of voters of color. There is support for the proposition that unit-voting minimizes the votes of African Americans in the South.[154] This is because African Americans, who are a political minority and a distinctively liberal minority on some issues, are surrounded by the most politically conservative voters in the country—White voters in the South. As long as African Americans in the South remain politically liberal and are numerical minorities, and Whites in the South remain politically conservative, African Americans will continue to cast "wasted" votes in presidential elections.

As Longley and Peirce document, the Electoral College disproportionately affects the relative voting power of African-American voters compared to other groups and the electorate as a whole.[155] Significantly, Peirce and Longley explain that African Americans are disadvantaged by the Electoral College not because they are African

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154. Abbott and Levine argue that the Electoral College minimizes the voting strength of Northern African Americans. ABBOTT & LEVINE, *supra* note 1, at 90-91. But they do not explain how. They state that even though African Americans have considerable clout within the Democratic Party and are strategically positioned geographically with respect to the Electoral College, Northern African Americans cannot take advantage of their potential clout because both parties do not compete for their votes. *Id*. It goes without saying that the fact that African Americans politically identify with the Democratic Party—and overwhelmingly so—cannot be attributed to the Electoral College. So it is not clear why Abbott and Levine think that the Electoral College disadvantages Northern African Americans. Incidentally, Abbott and Levine exclaim that this "situation is likely to continue until a significant number of Black voters show themselves willing to cast their ballots for a Republican presidential candidate." *Id.* at 91. Our guess is that "Black voters [will] show themselves willing to cast their ballots for a Republican candidate" when and if they perceive that the Republican Party stands for policies that further African-American political interests. *Id.*

155. LONGLEY & PEIRCE, *supra* note 4, at 154-61. Longley and Peirce's study of African-American voting power is based upon their broader analysis of the advantage or disadvantage that the College confers upon a voter simply because of where they live. Using this method, Longley and Peirce aim to determine whether the College benefits small states or large states.

Longley and Peirce's analysis is conducted in three stages. First they determine the chance that each state has in casting the crucial bloc of electoral votes in the College. Second, they calculate the different combinations by which a citizen, by changing her vote, can determine the winner of her state's electoral slate. They then combine the results of the first two steps to ascertain a voter's chance of affecting the outcome of a presidential election by casting the determinative vote given that her state's electoral slate will determine the winner of the election.

From this analysis, Longley and Peirce conclude that a voter in California—the state whose citizens have the greatest relative voting power—has 2.66 times the potential for determining the outcome of a presidential election than a voter from Montana—the state whose citizens have the least voting power. *Id.* at 153-54. Longley and Peirce also conclude that even though the College benefits the smaller states by essentially awarding them a minimum of three electoral votes, irrespective of their population, the largest states benefit the most from the current system as a result of unit voting. *Id*. at 153. The classic study of voting power is John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968).

Americans, but on the basis of their geographic concentration and distribution throughout the United States.[156] This is because African Americans are largely concentrated in the South, and Southern states are disadvantaged by the Electoral College.[157] Thus, Black disadvantage is ancillary to the inherent geographic biases of the Electoral College and is due to the stochastic element that is geographic distribution.

The criticism that the unit-vote system depresses the votes of political minorities masks a more fundamental division. The unit-vote debate is really an argument about what should constitute a proper "unit" for presidential elections. On one level, the argument is whether the proper unit is a state or a congressional district. But on a more fundamental level, the argument is whether the proper unit is a state or the whole of the United States.

Viewed from this perspective, the unit-vote debate clearly raises questions about our national commitment to a certain conception of federalism. To what extent are we fundamentally a collection of sovereign states? To what extent are the interests of the states subsumed to that of the national or federal government? We take up these questions in the last Part.

III. ELECTIONS AND LEGITIMACY

The debate over the Electoral College's legitimacy can be recast as an argument favoring the abolition of the College on the grounds that our conception of democracy has evolved beyond that of the founding generation and the era of the Electoral College's debut. On this argument, it may be said that popular election is now more important than it once was. Similarly, some may argue that our conception of federalism has also correspondingly changed and that the federal government should play a stronger role—and the states a lesser one—in presidential elections. These positions link both contentions about unit voting and democracy: the question is whether the individual, the state, or the federal government is the fundamental entity within which lies democratic legitimacy. Put differently, how do we apportion political rights between these three entities? And of

156. LONGLEY AND PEIRCE, *supra* note 4, at 158 ("The differences in voting power arise because people live in different states, not because of differences in race."). It is worth noting that we are not making light of the fact that the Electoral College disadvantages some voters of color, in this case, African Americans. We recognize that residential segregation is not a random event but often the product of state-sponsored racism. African Americans came to the South by force and not by choice. Our only point here is to point out that the College negatively affects African Americans who live in the South, but it also negatively affects everyone else who lives in the South. Moreover, as we point out, the College has a positive effect on racial groups, including African Americans, who live outside of the South.

157. *Id.*

those three entities, which one should be the ultimate bearer of political rights?

We contend that the debate over the Electoral College is grounded on two basic commitments about the nature of our democratic experiment: federalism and the right to vote. The latter commitment is quite strong and encompassed by the slogan "one person, one vote."[158] Its constitutional moorings are suspect. In contrast, the commitment to states' rights and our federal structure has much less pull but impeccable constitutional foundations. In many respects, these commitments stand in conflict with one another. The crucial question is: which commitment trumps the other? The debate over the Electoral College has raged on for as long as it has, in great part, because a resolution to this question has proven very difficult.

Our national struggle with this particular question should not be surprising. Undoubtedly, the Electoral College, as currently constituted, reflects a compromise made at its founding that a certain balance is needed between state and federal interests. Similarly, we as a contemporary political society also struggle, albeit to a lesser extent, with demarcating the proper line between state and federal interests. That struggle has not changed.

Relatedly, our conception of the right to vote differs dramatically from that of the founding generation. Arguably, this newfound appreciation comes as a direct result of the Court's reapportionment revolution. The institution of the Electoral College itself evidences the founding generation's ambivalence, at best, toward direct democracy. However, while it is true that we may have a different conception of the individual right to vote than the founding generation, as the founding generation struggled with the scope of their democratic commitments, we too wrestle with the same question.

In this Part, we support our contention that the fight over the Electoral College is in fact a fight between twin commitments to popular democracy and federalism. In Part III.A., we survey the case law evidencing the recent revival of our judicial commitment to states' rights. In so doing, we demonstrate the extent to which our contemporary constitutional structure continues to struggle over the proper boundary between state and federal responsibilities. In Part III.B., we reveal the Court's struggle with the right to vote.

A. Our Federalism

In the last decade, the Supreme Court has engaged in a vigorous debate regarding the proper limits between state and federal power. These debates have taken place within a doctrinal context that ex-

158. *See* Reynolds v. Sims, 377 U.S. 533, 557-58 (1964).

plores the extent of Congress's regulatory power under the Commerce Clause;[159] Congress' equality-enforcing power pursuant to Section Five of the Fourteenth Amendment;[160] and the relevance of the Tenth Amendment to congressional legislation purporting to commandeer state legislatures.[161] Further, the Court has similarly resurrected the doctrine of state sovereignty under the Eleventh Amendment and established firm limits on Congress's ability to facilitate suits by private individuals against the states in either state or federal court.[162]

The boundaries of this debate, while flexible, are clear. For the most part, both sides of the debate agree that our contemporary understanding of federalism has evolved from that of the founding generation.[163] Moreover, with the notable exception of Justice Clarence Thomas, Justices on both sides of this debate have acknowledged that changed social, economic, and political circumstances justify a broader role for federal authority than the role envisioned by the Framers. Their disagreements boil down to two key points. First, the two sides differ on the existence of appropriate limitations (other than judicial scrutiny) on federal authority. Second, they disagree over the utility (or disutility) of judicial review of federal legislation implicating federalism concerns.

These competing positions have played prominent roles in recent years. In *Garcia v. Metropolitan Transit Authority*, for example, the majority of the Court argued that judicial review is not the proper method for limiting Congress's powers under the Commerce Clause.[164] Instead, as Justice Blackmun argued, the states must find their protection from the political process.[165] "[T]he principal means chosen by the Framers," Blackmun remarked, "lies in the structure of the Federal Government itself."[166] We think of this view as a "neo-Federalist" position in the sense that it mirrors the thinking of those

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159. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

160. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

161. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

162. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

163. *Compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543-45 (1985) (Blackmun, J.), *with id.* at 583-84 (O'Connor, J., dissenting).

164. *Id.* at 548 ("We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States . . . .").

165. *Id.* at 550-54.

166. *Id.* at 550. "It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* at 550-51.

at the founding who were in favor of a strong national power and a lesser role for the states.

As then-Justice William Rehnquist predicted in his dissent in *Garcia*, such a conception of federalism and its limited notion of the judicial role proved to be short-lived.[167] In *United States v. Lopez*,[168] and for the first time since the New Deal, the Court struck down an act of Congress as outside the congressional powers under the interstate commerce clause. This is the "neo-anti-Federalist" view.[169] Of note, the five Justices responsible for this revived jurisprudence have offered a number of explanations in justification of their vigilant enforcement of states' rights vis-à-vis Congress.[170] Justice O'Connor's opinion for the Court in *Gregory v. Ashcroft*[171] provides one of the most recent and succinct defenses of federalism in the case law. In *Gregory*, the Court provides three leading defenses.

First, the Court pronounces that "the principal benefit of the federalist system"[172] is its ability to protect individual liberty.[173] In making this point, the majority takes its cues from none other than James Madison, who argued that the creation of two governments would ensure liberty by forcing both the state and the federal governments to compete for the affections of the people.[174] On this argu-

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167. *Id.* at 579-80 (Rehnquist, C.J., dissenting).

168. 514 U.S. 549 (1995).

169. *See* Farber, *supra* note 15, at 1135 ("For the student of constitutional history, much of the rhetoric in recent Supreme Court opinions is startling. Rather than echoing Alexander Hamilton, James Madison, and John Marshall, the Court's language often seems more reminiscent of the views of their opponents."). For an argument that the Court—which is fond of quoting Madison and Hamilton on questions of federalism—should be faithful to their character and develop a more historical, nuanced, and contextual understanding of what they stood for, see David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Court*, 85 MINN. L. REV. 755 (2001).

170. *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 273 (2000) (recognizing the "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy"); *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); Gregory v. Ashcroft, 501 U.S. 452 (1991); *Garcia*, 469 U.S. at 528.

171. 501 U.S. 452 (1991).

172. *Id.* at 458.

173. Justice O'Connor wrote:

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Id.; *see also Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) ("Though on the surface the idea may seem counterintuitive, [federalism] was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.").

174. *Gregory*, 501 U.S. at 459.

ment, the Court concludes that in "the tension between federal and state power lies the promise of liberty."[175]

Second, the Court exalts the now common paean to the states as laboratories of democracy. In Justice Kennedy's words in *Lopez*, federalism permits states to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[176]

A third argument is grounded on some of the basic tenets of democratic theory. On this view, the Court takes public involvement in politics very seriously, as well as governmental responsiveness. As the Court wrote, the federal structure "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes."[177] Further, this structure also "allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."[178]

All of these justifications arguably depend upon a rationale that seems to be foundational to the revivification of the Court's federalism jurisprudence. Underlying the Court's federalism doctrine—or put less forcefully, an important component of that doctrine—is the conception of states as sovereign entities with dignitary interests. For the latter day "anti-Federalists," the states are bearers of constitutional and political rights akin to individuals.[179]

This vision is clearly evident in Justice Powell's dissent in *Garcia*, whose position is later adopted by the Court in *Lopez*. Justice Powell asserts that the Tenth Amendment is an explicit acknowledgment that the states are bearers of political rights.[180] As such, he ascribes the professed need for the Bill of Rights not on the basis of a need to protect the rights of individual citizens, as is commonly accepted, but as an explicit guarantee of state sovereignty.[181] He concludes that the

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175. *Id.*; *see also* New York v. United States, 505 U.S. 144, 181 (1992).

176. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); *see also* Smith v. Robbins, 528 U.S. 259, 273 (2000) (recognizing the "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy").

177. *Gregory*, 501 U.S. at 458.

178. *Id.*

179. *See* Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1125 (2000).

180. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568 (1985) (Powell, J., dissenting).

181. Justice Powell maintained:

> [M]uch of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, in-

constitutional structure left to "the several States a residuary and inviolable sovereignty" that cannot be abrogated through congressional legislation.[182]

It is this very vision of the states—sovereign entities with political rights—that Justice Blackmun attempted to undermine in *Garcia* by overruling a central underpinning of *National League of Cities v. Usery*.[183] "The central theme of *National League of Cities*," Justice Blackmun wrote, "was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."[184] It is true, Justice Blackmun noted, that the states do retain some sovereignty.[185] And yet, he concluded, the crucial inquiry is one of transference of power. In other words, the question of state sovereignty must of necessity look to the constitutional text, since states possess powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[186]

In spite of Justice Blackmun's best efforts in *Garcia*, the reification and personification of the states has returned with a vengeance, particularly so in the Court's recent Eleventh Amendment cases.[187] Consider the following passages from *Alden v. Maine*:

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative inter-

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> cluding a provision explicitly reserving powers in the States, would be among the first business of the new Congress. . . . So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary.

Id. at 568-69.

182. *Id.* at 570 (citing THE FEDERALIST NO. 39, at 256 (James Madison) (J. Cooke ed., 1961)).

183. 426 U.S. 833 (1976).

184. *Garcia*, 469 U.S. at 547.

185. *Id.* at 549.

186. *Id.*

187. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78-80 (2000); Alden v. Maine, 527 U.S. 706, 748 (1999) (stating that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns," which includes dignity and respect); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (noting that Eleventh Amendment protects the "dignity and respect" of a state); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996) (stating that the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instances of private parties'") (quoting Puerto Rico Aquaduct & Sewer Auth. v. Metcalf, 506 U.S. 139, 146 (1993)); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 31 (1994) (recognizing the dignitary interest of states protected by Eleventh Amendment); *see also* Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 81, 83-84.

> pretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .
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> . . . .
>
> . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.
>
> . . . .
>
> The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.
>
> . . . .
>
> The States thus retain "a residuary and inviolable sovereignty." They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.[188]

Without question, this is the language of a Court very committed to the states as sovereign entities.

Recognizing that the states have achieved personhood, though informative, does not tell us how the Court reconciles its commitment to the states with its commitment to actual persons. In this vein, Professor Farber explains that the Court's federalism doctrine is not solely concerned with the dignity of the states but in fact reflects other concerns. As he notes, the Court's doctrine has three goals: maintaining the dignity of the states, policing the federal/state boundary, and preserving individual rights.[189] "The Court's interest in states' rights," he concludes, "ends at the point where its commitment to individual rights begins."[190]

We agree that the Court has been willing to limit state power when state power conflicts with individual rights.[191] However, an important distinction is worth noting. The distinction is that the Court has been willing to subsume its federalism concerns and modify state power when individual rights are at stake, as understood and defined by the Court.[192]

Thus, the prosopopoeia of the states sought by Justice Powell is not only fully achieved by the Court's modern federalism jurispru-

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188. *Alden*, 527 U.S. at 713-15 (internal citations omitted).

189. Farber, *supra* note 15, at 1134.

190. *Id.* at 1140.

191. *See id.* at 1140 & nn.36, 39.

192. *See* Shaw v. Hunt, 517 U.S. 899, 907 (1996); Miller v. Johnson, 515 U.S. 900, 900 (1995); Shaw v. Reno, 509 U.S. 630, 630 (1993).

dence, it is also transformed in an important way. As Professor Caminker observes, "[o]n its face, the particular language with which the Court proclaims the states' entitlement to dignified treatment appears to exalt states as having a status superior to individuals."[193] This raises two very interesting propositions. The first is, simply, that the states are now considered bearers of political rights, in the same manner that an individual citizen is a bearer of political and constitutional rights. These rights include an ancillary right to make demands on the political community. The second furthers the first. The political demands of the states, on the basis of their political and constitutional rights, can trump the rights of individuals depending upon the Court's conception of the scope of the individual right.

With respect to the existing tension between federalism and individual rights, a tension that gives rise to our larger thesis, Professor Caminker remarks that the concern for the states' dignitary interest is "at odds with our foundational notion of popular sovereignty."[194] We agree, with one modification. The Court's federalism doctrine, as we have briefly presented it, is at odds with *a* conception of popular sovereignty, though not *our* conception of popular sovereignty.[195]

Consequently, what we lack as a society is a consensus on whether the state, the individual, or the federal government is the irreducible unit within which lies democratic legitimacy and whose claims trumps all others. In this vein, we contend that while we continue to fight over these issues as a whole, the debate over the Electoral College demonstrates that federalism appears to be edging out democracy and popular sovereignty. Put differently and perhaps more accurately, it may be said that, at present, the Court's broad conception of federalism coexists with its narrow conception of democracy. We develop this second conception in the next section.

B. The Reapportionment Revolution and the Right to Vote

Our contemporary understanding of democracy and the right to vote has indubitably progressed beyond that of colonial times. To the extent that the English colonies recognized a right to vote, it was extremely limited. Almost all colonies restricted the right to

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193. Caminker, *supra* note 187, at 86.

194. *Id.*

195. Our slight disagreement with Professor Caminker is limited only to the choice of words in that particular sentence. We fully agree with the import of Professor Caminker's argument. Professor Caminker goes on to state:

> [T]he view that states have self-esteem concerns suggests that states, once created, acquire a life and interests independent of those conferred upon them by the people. Put differently, the notion that states are organically bestowed with a dignity incident to all sovereigns rests in tension with the notion that states are mere creatures of and subservient to the truly sovereign people.

Id.

vote on the basis of race. Most colonies explicitly limited the right to vote to freeholders. Others, in addition to expressly excluding nonfreeholders from the suffrage, also restricted it to men. For most of American history, the franchise was restricted to white male property-owners.[196]

Undoubtedly, our conception of the franchise has evolved from these early understandings. The Constitution amply reflects these changes. Our contemporary understanding of the right to vote includes the Civil Rights Amendments,[197] the Nineteenth Amendment,[198] the Twenty-fourth Amendment,[199] and the Twenty-sixth Amendment.[200] Of note, the struggle to enfranchise women and voters of color has involved both the federal government and the Courts.

We may add the reapportionment cases to this list. Since the early 1960s and the advent of *Baker v. Carr,*[201] the Supreme Court has led the way in affixing the principle of majority rule onto our beloved constitutional canvass. This is the now classic "reapportionment revolution." In its early rendition, the Court drew a simple and efficient line, encompassed by the words "one person, one vote." This would be a flexible standard, the Court assured us; after all, while one man really equals one person, "one vote" really meant one vote "as nearly as is practicable."[202] Without question, the "one person, one vote" standard is widely accepted, to the point that it "has now been sanctified by history."[203] This is not to say, to be

196. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000); Robert S. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

197. U.S. CONST. amends. XIII-XV.

198. *Id.* amend. XIX.

199. *Id.* amend. XXIV.

200. *Id.* amend. XXVI.

201. 369 U.S. 186 (1962).

202. Wesberry v. Sanders, 376 U.S. 1, 7-8 (1963).

203. Bernard Grofman, *Toward a Coherent Theory of Gerrymandering:* Bandemer *and* Thornburg, *in* POLITICAL GERRYMANDERING AND THE COURTS 29, 57 (Bernard Grofman ed., 1990) ("[The one person, one vote doctrine] has now been sanctified by history, and is generally regarded as a resounding success."). This point has been made often. *See, e.g.*, Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of "One Man-One Vote*," 1969 SUP. CT. REV. 219, 268 ("'One man-one vote' should be perceived as the symbol of an aspiration for fairness, for avoidance of complexity, for intelligibility in our representational process—indeed, for a sense of meaningful membership in the *polis*."); Bernard Grofman & Howard A. Scarrow, *Current Issues in Reapportionment*, 4 LAW & POL'Y Q. 435, 439 (1982) ("[T]he doctrine of 'one person, one vote' has been elevated to the status of moral platitude."); C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 872 (1964) ("[T]he history of democratic institutions points compellingly in the direction of population as the only legitimate basis of representation today.") (quoting *One Man, One Vote*, *in* THE TWENTIETH CENTURY FUND 4 (1962)).

clear, that "one person, one vote" is a universally accepted constitutional principle.[204]

As one could expect, *Baker v. Carr* generated a great deal of scholarly writing.[205] "The alarums and excursions that ensued in the legal-political world," wrote Professor McCloskey soon after the decision was handed down, "exceeded anything evoked by a Supreme Court decision since 1954, and memory would have to reach back a good many years more to find another adequate comparison."[206] While some commentators applauded the Court's decision,[207] many others, fearing the worst, attacked the ruling's seemingly expansive reach.[208] Others remained a bit more optimistic and hoped that the Court, instead of embarking on a direct assault on the states' apportionment processes from their secluded judicial bastion, would simply limit its role to the excision of only the most extreme cases, where indices of "inertia and the abdication of political

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204. *See Wesberry*, 376 U.S. at 23-24 (Harlan, J., dissenting); *Baker*, 369 U.S. at 301 (Frankfurter, J., dissenting); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 121 (1980); Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 208 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) ("One person, one vote . . . is not an end in itself or an equation of democracy and simple majority rule, as many members of the current, post-Brennan Court believe.").

205. *See* GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT, at viii (1966); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS, at vii (1968); ROYCE HANSON, THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY (1966); ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 8 (1965); Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 2; Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of* Baker v. Carr, 61 MICH. L. REV. 711 (1963); Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Phil C. Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUP. CT. REV. 252; *The Problem of Malapportionment: A Symposium on* Baker v. Carr, 72 YALE L.J. 7 (1962).

206. McCloskey, *supra* note 205, at 54.

207. *See* ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 121 (1963); *see also* Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1057 (1958).

208. *See, e.g.*, Dixon, *supra* note 203, at 231 (asserting that *Baker v. Carr* "seems destined to cause major redistricting upheavals"); Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 149 (1964) (asserting that "[t]he reapportionment cases . . . are as revolutionary in the political area as the desegregation cases have been in the social area"); Neal, *supra* note 205, at 253 ("[T]he few months since the decision was handed down have seen action by the lower courts swifter and more far-reaching than any that has occurred in implementing the school segregation decision in the seven years since it was announced."); *see also* Grofman & Scarrow, *supra* note 203, at 439 ("It is hard, in retrospect, to appreciate how threatening this court involvement in the reapportionment process was then seen to be."). For a sampling of the tremendous response to the *Baker* decision at the state level, see McCloskey, *supra* note 205, at 56 n.14.

responsibility"[209] were found—that is, "org[ies] of inactivity," as witnessed in Tennessee.[210]

To the critics' dismay, the Court forged ahead. In fact, the Court took the principle of "one person, one vote" probably as far as some might have feared. In *Kirkpatrick v. Preisler*,[211] for example, the Court explained: "the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."[212] Under this formulation, the Court concluded, Article I, Section 2 "permits only the limited population variances which are *unavoidable* despite a good-faith effort to achieve absolute equality, or for which justification is shown."[213] Thus, in *Kirkpatrick*, the state's attempt to draw its congressional lines along existing political boundaries was not enough to justify a 5.9 percent deviation.[214] In recent years, the Court has gone farther still; it has enforced a zero deviation standard for congressional districting plans.[215]

The Court's understanding of the right to vote and the role that voting played in a democratic society reached its zenith in the reapportionment era cases, particularly *Reynolds v. Sims*.[216] *Reynolds* promised a tantalizingly broad conception of democracy and popular sovereignty where the individual is the ultimate bearer of political rights. The Court stated, "each and every citizen has an inalienable

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209. Alexander M. Bickel, *The Durability of* Colegrove v. Green, 72 YALE L.J. 39, 44 (1962).

210. *Id.*; Gerhard Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 7 ("*Baker v. Carr* had concerned a relatively clear situation: a state constitutional command to reapportion every ten years and no action by the Tennessee legislature since 1901."); Dixon, *supra* note 203, at 224 ("*Baker v. Carr* can be justified without jumping all the way to arithmetic absolutism. . . . [S]ome judicial intervention in the politics of the people seemed necessary to have an effective political system. . . . [*Baker*] would terminate egregious population disparities."); McCloskey, *supra* note 205, at 73 (proposing that *Baker* should follow a restraintist path, adopting a rule "that focused only on the opening up of the procedures of popular consent").

211. 394 U.S. 526 (1969).

212. *Id.* at 530-31 (internal citation omitted); *see also* White v. Weiser, 412 U.S. 783, 791-92 (1973), where the Court invalidated a congressional district plan with a maximum deviation of 2.43 percent above and 1.7 percent below the ideal, because a plan which generally followed district lines and with a total maximum deviation of 0.149 percent was available.

213. *Kirkpatrick*, 394 U.S. at 531 (emphasis added).

214. *Id.* at 533-34.

215. In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court invalidated a congressional districting plan with a 0.7 percent maximum variation, a deviation that the appellants argued was "the functional equivalent of zero." *Id.* at 735 (citing Brief for the Appellants, at 18).

216. 377 U.S. 533 (1964).

right to full and effective participation in the political processes of his State's legislative bodies."[217] Moreover, the Court also noted:

> [U]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is a preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[218]

For the Court in *Reynolds*, where the fundamental right of the individual clashed with the states, the individual prevailed.

Taken at face value, *Reynolds* appears to be quite revolutionary. And yet, its reach has been cabined by tensions existing in the text and structure of the Constitution. These are the tensions we identified earlier. On one side of the ledger we find the states, their rights and interests. On the other we have the right to vote as epitomized by the *Baker* revolution. *Baker* and *Reynolds* purported to rest the right to vote in the individual. In contrast, certain provisions of the Constitution can certainly be read as resting the right to vote in the states. These divergent visions give rise to the tension between the text and structure of the Constitution and the Court's reapportionment era cases. Two recent cases illustrate this tension. We have in mind here the cases of Puerto Rico and Washington, D.C.

In *Igartua de la Rosa v. United States*,[219] a unanimous three-judge panel of the First Circuit Court of Appeals held that the commonwealth of Puerto Rico stands outside the edifice of the Electoral College. As the Court explained summarily, the right to vote in this context belongs to state legislatures under Article II. Because Puerto Rico is a territory and not a state, "the residents of Puerto Rico have no constitutional right to participate in the national election of the President and Vice-President."[220] For the panel, Article II ended the matter.[221]

However, one may take another view, as did the lower court in *Igartua*.[222] Relying upon the Supreme Court's reapportionment era cases, the lower court explained that voting is a fundamental right.[223] As a fundamental right, it belongs to all citizens of the United States, including citizens of Puerto Rico. In reaching this conclusion, the

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217. *Id.* at 565.
218. *Id.* at 561-62.
219. 229 F.3d 80 (1st Cir. 2000).
220. *Id.* at 83.
221. One of us explores these matters at much greater length elsewhere. *See* Luis Fuentes-Rohwer, Authority, Obligation and the Constitution: The Unfortunate Case of Puerto Rico (2001) (unpublished manuscript, on file with author).
222. Igartua de la Rosa v. United States, 113 F. Supp. 2d 228 (D.P.R. 2000).
223. *Id.* at 232.

court noted the "fact that Puerto Rico is subject to the Territorial Clause of the Constitution does not affect the fundamental right to vote of its residents."[224]

The case of the residents of Washington, D.C., presents yet another example of this tension. In *Adams v. Clinton*,[225] the question presented was similar to that in *Igartua*, albeit in reference to congressional representation. Put simply, do residents of Washinton, D.C., have a constitutional right to congressional representation? The answer is clearly, no. For support, the court looks to the language of Article I, Section 2, which provides that "[T]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." On this view, only state citizens are allowed the right to vote for congressional representatives. The District of Columbia is clearly not a state, so its citizens may not elect congressional representatives. The court's concluding language while discussing the Equal Protection Clause is particularly appropriate for our purposes. To the court, "notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, the doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress."[226]

Once the revolutionary dust settled, the Court played down this tension, as it assured us that earlier worries about its apparent willingness to intrude in matters traditionally left to the states were unwarranted. In the end, that is, the Court explained that it had "adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment."[227] While the Court acknowledges that "reapportionment is a complicated process,"[228] most of the reapportionment decisions are presently left to the states. For its part, the Court has simply ensured that enacted plans comport with broad constitutional guidelines. To some extent, these tensions are replicated in the various opinions in *Bush v. Gore*.[229]

Seen generally, *Bush v. Gore* is both an example of the Court's struggle to identify the proper boundary between state and federal responsibilities, as well as the divisiveness of that struggle. One looking to catalogue the various opinions in *Bush v. Gore* may situate them within one of the three categories stemming from the Court's federalism cases: preserving individual rights; maintaining the dignity of the states; or policing the boundary between federal and

224. *Id.* at 234.
225. 90 F. Supp. 2d 35 (D.D.C.), *aff'd sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).
226. *Id.* at 67.
227. White v. Weiser, 412 U.S. 783, 795 (1973).
228. *Id.*
229. 531 U.S. 98 (2000).

states interests.[230] In this vein, many of the Justices acknowledge the premise that presidential elections fall within the responsibility of the states.[231] That is to say, on the question of whether the Constitution has granted this responsibility to the states as opposed to the federal government, the opinions all agree that the point of departure must be that presidential elections are assigned to the states.

In looking to the earlier categories, however, it soon becomes clear that the opinions find very few points of convergence. To begin, the unsigned per curiam opinion, presumably representing the views of Justices Kennedy and O'Connor, is clearly concerned about individual rights. In their own words, these Justices purport to be concerned with the "equal weight accorded to each vote and the equal dignity owed to each voter."[232] This position sparked a debate within the Court as to whether individual rights are at stake or whether the Court should defer to the State as it attempts to fulfill its constitutional obligations.

In turn, and rather uncharacteristically, the Justices who usually dissent in federalism cases in favor of greater federal power, though dissenting yet again, sided with the states this time. Thus, Justices Ginsburg, Stevens, Breyer, and Souter all agreed that the states, including their own courts, should be given every opportunity to fulfill the duties assigned to it under the Constitution.[233] Additionally, they suggest that if a State is unable to perform its prescribed obligations, the issue belongs to Congress.[234] In this way, they categorically rejected the view that this area raises any individual rights violations under the Constitution.[235]

Not surprisingly, the third faction in *Bush v. Gore* gave us a ringing defense of states' rights. To be fair, Chief Justice Rehnquist and Justices Scalia and Thomas provided two twists to their traditional position. First, they interpreted the meaning of "state" strictly, and in so doing included the state legislature while excluding the state Supreme Court.[236] And second, they arrived at their states' rights argument by emphasizing the federal interest at stake, a presidential election.[237]

How then would the Justices in *Bush v. Gore* answer the question of whether the individual, the state, or the federal government is the fundamental entity within which lies democratic legitimacy? Justices

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230. *See supra* text accompanying notes 189-95.

231. Bush v. Gore, 531 U.S. at 105-06 (per curiam); *id.* at 112 (Rehnquist, C.J., concurring); *id.* at 123 (Stevens, J., dissenting); *id.* at 141 (Ginsburg, J., dissenting).

232. *Id.* at 104 (per curiam).

233. *Id.* at 141 (Ginsburg, J., dissenting).

234. *Id.* at 129, 130, 134 (Souter, J., dissenting).

235. *Id.* at 134 (Souter, J., dissenting).

236. *Id.* at 112-15 (Rehnquist, C.J., concurring).

237. *Id.* at 112 (Rehnquist, C.J., concurring).

O' Connor and Kennedy would probably answer that democratic legitimacy lies fundamentally in the individual. Chief Justice Rehnquist and Justices Thomas and Scalia would find democratic legitimacy in the state legislature. The *Bush v. Gore* dissenters share the most nuanced position. They would seem to find legitimacy in all three, depending upon the circumstances.

CONCLUSION

With these competing views in hand, we come to the end of our road. We end with *Bush v. Gore*. In the case, the Court reminds us that we have struck a compromise between democracy and federalism. On the side of federalism, the Court states in stark terms that the "individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."[238] Additionally, the "State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."[239]

On the side of democracy, it is fair to say that our commitment to majority rule encompasses the principle of "one person, one vote" and that this principle "comes closer to summarizing current notions of democracy in representation than any other."[240] It is clear that we have elevated this concept to the realm of "moral platitude."[241]

At present however, when federalism and democracy clash or when notions of popular sovereignty meet the current system of selecting our President and Vice President, federalism wins; the Electoral College prevails. Whether rightly or not, we believe that this end result will continue until we achieve any consensus in the struggle to accommodate democracy and federalism. As matters stand, in other words, the Electoral College is our default position as we struggle over our commitment between democracy and federalism.

238. *Id.* at 104.
239. *Id.*
240. Pritchett, *supra* note 203, at 872.
241. Grofman & Scarrow, *supra* note 203, at 439.

APPENDIX

Table 1: 1992 Presidential Election—Current System

Candidate	Percent Popular Vote	Popular Vote	Electoral Vote	Percent Electoral Vote
Clinton (D)	42.3	44,908,326	370	69
Bush (R)	37.9	39,103,882	160	31
Perot (Indep.)	19.6	19,741,657	0	0

Table 2: 1992 Presidential Election—Proportional System

Candidate	Percent Popular Vote	Electoral Vote	Percent Electoral Vote
Clinton (D)	42.3	232	43
Bush (R)	37.9	203	38
Perot (Indep.)	19.6	102	19

Table 3: 1996 Presidential Election—Proportional System

Candidate	Percent Popular Vote	Popular Vote	Electoral Vote	Percent Electoral Vote
Clinton (D)	48.8	47,401,054	268	50
I ɔle (R)	42.0	39,197,350	223	42
Perot (Indep.)	9.1	8,085,285	45	8.4