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Volume 15, Number 1 **Winter 2020**

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TABLE OF CONTENTS

ELECTORAL COLLEGE SYMPOSIUM

ALSO FEATURING

Foreword

*Lawrence Lessig**

The papers collected in this volume were first presented at a conference at Harvard Law School in Fall 2019. Much has happened since that conference, yet the analysis offered here remains important.

The puzzle of the Electoral College has been the focus of scholars and activists for generations. Its essence is captured best in a question that is the title to an extraordinary book previewed at the conference by Alex Keyssar, *Why Do We Still Have the Electoral College?*.[1] In the interplay of these six essays, we can glimpse the beginning of an answer to that question. But to put that answer in context, I want to begin by identifying three distinct issues—or, depending upon your perspective, problems—that have been the focus of skeptics and reformers since the beginning of the Republic.

1. *The "one person, one vote problem"*: Because each state is allocated presidential electors based upon their representation in Congress, some states have more electoral votes per voter than others. In 2020, for example, there were about 275,000 votes cast for President in Wyoming. Those voters got represented by 3 votes in the Electoral College—one electoral vote per about 92,000 votes cast. In the same election, there were about 17,500,000 votes cast for President in California. Those voters got represented by 55 votes in the Electoral College—one electoral vote per about 318,000 votes cast. That means that one vote from Wyoming earns about 3.5 times as much weight in the College as one vote from California. That difference is the "one person, one vote problem."

2. *The "swing state problem"*: All but two states (Maine and Nebraska) allocate all of their electoral votes to the plurality winner of the popular vote in that state. That fact has an important strategic political consequence: campaigns focus almost exclusively on the so-called "swing states," states that could go one way or another, because the electoral vote in the other states will not change. For example, in 2016, 99% of general campaign spending occurred in just 14 states. Those states thus effectively selected our President. But those states are not representative of America generally. That unrepresentativeness is the "swing state problem."

3. *The "inverted election problem"*: Because the Constitution requires the President be selected by a majority of electoral votes, and because electoral votes are not perfectly proportional to the popular vote, there is always a chance that the winner of the popular vote will not be the winner in the Electoral College. That inversion has happened in five elections, two in the last 20 years—2016 and 2000. This is the "inverted election problem."

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[1] ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? (2020)

Reformers have tried to address each of these three problems. As we'll see, the most ambitious reforms address all three together. In the end, I will ask whether solving all three is actually essential to meaningful reform. But put that question to the side for the moment so we might see how these essays relate to these three problems.

Samuel S.-H. Wang and Jacob S. Canter's essay motivates the practical political need for reform. Though most who criticize the College focus upon the episodic (though as they argue, increasingly frequent) "inverted election problem," Wang and Canter help us focus on the persistent problems of the College, problems that happen in every election. And between the "one person, one vote problem," and the "swing state problem," they argue quite convincingly that the latter is far more significant than the former. (They refer to swing states as "battleground" states; for consistency, I'll stick with my moniker.)

I have already hinted at the reasons: Because of winner-take-all, the rational focus of both major campaigns is upon a small and unrepresentative fraction of the United States. These are the "swing states," which though not representative of America as a whole, receive practically all of any serious campaign's attention. Paralleling the work of Andrew Reeves and Douglas L. Kriner,[2] Wang and Canter argue that this fact has the predictable consequence of bending policy to an unrepresentative few. Those few are not small states. They are instead the demographics represented best in the swing states. But no framer chose the system for selecting the President with this effect in view. And no one today has identified any plausible moral or political reason to elevate the significance of swing state voters over Americans generally.

These problems press the need for reform. Wang and Canter urge that we focus on plausible reform. They discount the possibility of constitutional amendment (I'll return to that below) and press instead the National Popular Vote Compact ("NPVC").

The NPVC is an agreement among states to allocate their electoral votes to the national winner of the popular vote. Under the terms of that agreement, the obligation commences when states representing 270 electoral votes have joined the compact. As of this writing, states representing 196 electoral votes have already joined.

Without doubt, the NPVC is an elegant innovation that would reform fundamentally the nature of the presidential election. If it succeeds, it would solve both the "swing state problem" and (subject to an important qualification discussed below) the "one person, one vote problem." And if it succeeds as amended in the manner described in the essay by Rob Richie and his colleagues, it would also solve the "inverted election problem." If elections turned on the national vote, then no state would have any special advantage because of its swing state status. And no citizen would have any special ad-

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[2] Douglas L. Kriner, The Particularistic President: Executive Branch Politics and Political Inequality (2015).

vantage, because a vote from one would be worth as much as a vote from any.

But the problem with the NPVC is the idea of a "national popular vote" itself. Derek Muller rightly observes that there is no actual national popular vote in America. There is instead an aggregation of the votes in fifty-one separate jurisdictions (the fifty states plus the District of Columbia). Right now, the rules for implementing the vote in those fifty-one separate jurisdictions differ in important ways. Voter eligibility (including whether felons may vote) differs among these jurisdictions. Residency rules differ. Voting procedures differ. Ballot access rules differ. Recount rules differ. And while Muller rightly notes that some of these differences also exist intrastate for state-wide offices, he is certainly correct that no state evinces the level of difference intrastate that exists interstate at the national level. Or put differently, if any state crafted its popular vote system with a non-uniformity intrastate as great as the NPVC would create interstate, that state-based system would raise serious constitutional questions (and indeed, as Michael Morley argues, that system would be unconstitutional).

The problem is not just static. As Muller rightly notes, if the nation adopted the NPVC, there would be an ongoing incentive to "gamesmanship."[3] As he writes, "[w]e would expect states to start behaving differently if their election laws no longer had only intrastate influence but interstate influence . . . ."[4] This raises questions about the stability of the compact across elections. If states started behaving strategically, enhancing or curtailing the ability of their residents to vote for partisan reasons, it is not difficult to imagine the compact unraveling—and precisely because of a version of the "one person, one vote problem." Even though that problem is radically more significant today, it may well be more politically salient under the NPVC, even though the differences then would be relatively smaller. And while one might consider addressing these problems through federal legislation, Muller is convincing in his claim that the plausibility and federal authority for such a resolution is questionable. Barring an amendment, the NPVC is, in Muller's eyes, unstable at best.

Michael Morley doubles down on these doubts. His essay is a full-throated rejection of the NPVC on constitutional grounds. And while it is not my role here to respond fully to the arguments he's made, it is important for supporters of the compact to recognize that his arguments offer a map by which a court could well agree that the NPVC is beyond the power of the states.

The power of Morley's critique, however, hangs upon an assumption that is no longer clear. That assumption is that the Supreme Court is going to identify an implicit and original expectation about how the President is to be selected, and then enforce that expectation against the modern choices of

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[3] Derek T. Muller, *The Electoral College and the Federal Popular Vote*, 15 HARV. L. & POL'Y REV. 129, 147 (2020).

[4] *Id.* at 137.

state legislatures. The relevant implicit expectation is that it must be the votes of a people within a state that determine how a state allocates its electors—at least if voting is used at all. The NPVC violates that expectation by determining a state's electoral votes based in part at least upon the votes of people from without a state. For example, California, a member of the compact, has committed to allocating its electoral votes based on the national vote. Its contribution to that national vote is less than 12%. Thus, its determination of how its electors will be allocated turns mainly on the votes of people from without California.

Yet the constitutional status of such an expectation is strange. Morley doesn't argue (because of course, he couldn't) that this expectation was set at the founding. There was then no single method by which states selected their presidential electors. Legislatures were free to select electors themselves; they could—and certainly did—choose their electors or the method by which their electors would be selected based on the expected political map of the nation as a whole. Indeed, it is clear that the repeated shifts in the early history of America in the "manner" for selecting electors—between at-large elections, district elections, and choice by the legislature—were driven by a perception of the political landscape nationally.[5] If the original legislatures were free to make that adjustment directly, it's not clear why they couldn't effect the same adjustment, through a national popular vote, indirectly. Put differently, if state-based strategic behavior to support a national party was common soon after the founding; nothing since has expressly rejected that state power.

No doubt, soon into the history of the Republic, a clear pattern for allocating electors evolved. That pattern sets modern expectations, fundamentally. But even here, the Court has been clear that such patterns can be broken. *McPherson* v. *Blacker*[6], which has proven to be the most important presidential electors case in our history, expressly permits states to change evolved patterns for selecting the President. Petitioners in that case had challenged Michigan's decision to allocate electors at a district level rather than using the then-common "unit method," or what I refer to in this essay as "winner take all." The Supreme Court rejected this effort to enforce the then-present expectations against an expressly granted constitutional discretion. The framers had granted legislatures "plenary authority" to select the "manner" by which electors were selected. That plenary authority was not limited by any evolved practice of Michigan or of any other state.

That reasoning, if applied consistently, should free state legislatures to adopt new ways of determining how they will select the slate of electors from their states—including the NPVC. No doubt, there may be limits to that power. Could a state legislature say that the views of the British monarch shall determine which slate of electors shall represent a state? Could it decide to allocate its electors according to the vote of the UN? Or could it decide to

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[5] This story is told in KEYSSAR, *supra* note 1, part II.
[6] 146 U.S. 1 (1892).

allocate its electors to the loser of the popular vote in a state—an idea pursued by some legislators in the 2020 election?

Strictly speaking, we have no authority from the Supreme Court restricting the scope of a state legislature's power under the Manner Clause of Article II[7] in any context. Yet the Court's most recent authority might well suggest some limits. These limits, however, would not help Morley's argument.

In *Chiafalo v. Washington*,[8] the Supreme Court upheld state rules restricting the scope of electors' discretion.[9] That limitation was justified, the Court held, by an evolved democratic norm that the Court expressly recognized: As Justice Elena Kagan articulated it at the end of her opinion—"here, We the people rule."[10] That norm may well forbid a legislature from selecting the loser of a popular vote simply because s/he was the loser. It may well forbid a legislature from allocating electors according to the vote of the UN. But if state legislatures at the framing were free to survey the national political situation in deciding the "manner" by which their electors were to be selected, it's not clear why Kagan's norm must force states today to act obliviously to the democratic choices of other states. Kagan's norm was not present at the founding. There's nothing in the nature of that norm to demand that a state ignore the national political context.

One contrast makes the point more clearly. Imagine that prior to the Seventeenth Amendment (which changed the method by which senators were selected), state legislatures had entered into a compact similar to the NPVC. Under that agreement, states would conduct popular elections for senators. But the ultimate choice of a senator by a state was to be determined under the compact by the aggregate vote of members in that compact. If a majority of those states voted Democratic, then the legislature would select the Democratic candidate for Senate. If it voted Republican, then the legislature would vote Republican. Defenders of this senatorial compact might insist that the plan maximized the power of the state, by assuring that its Senators were part of the Senate majority, and that states were free to determine their Senators however they wished—an argument that parallels the arguments in favor of the NPVC today. But in this case, the opponents of the senatorial compact would have a strong argument that the Senator from a state was meant to represent that state. That argument, however, would not apply to the NPVC, since a President is elected to represent the nation as a whole, not any particular state. With the NPVC, "We the people" refers to the people of the nation. Nothing in Kagan's evolved democratic norm should forbid a state from choosing to empower that different, more national, "people."

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[7] U.S. CONST. art. II, § 1, cl. 2.

[8] 140 S. Ct. 2316 (2020).

[9] As I describe more fully below, I was lead counsel for the petitioners in *Chiafalo v. Washington,* and argued the case before the Supreme Court.

[10] *Chiafalo*, 140 S. Ct. at 2328.

Chiafalo thus strengthens the constitutional argument in favor of the NPVC. But as two of the essays in this volume suggest, the case has other lessons to teach as well.

No case prior to *Chiafalo* had addressed whether the state had the power to control how electors may vote. In *Ray v. Blair*[11], the Court had upheld the right of the state to discriminate in appointment against electors who had refused to pledge to support a candidate. Yet the power to discriminate in the appointment of an elector is fundamentally different from the power to control how an elector might vote. No one doubts the right of the President to discriminate among the potential judges that he or she might nominate; no one doubts that he or she has no power to control how a judge votes.

That electors would have a constitutional discretion had been a fairly uncontroversial view among scholars and historians. In *Ray*, Justice Jackson wrote in dissent:

> 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.[12]

The only fair question was whether that presumption had somehow been changed. That presumption produced enormous anxiety among some across our history. Jefferson had supported an amendment to eliminate the office of elector, precisely because of this danger.[13] Thomas Hart Benton introduced an amendment every year for twenty years that would have done the same thing.[14]

These facts led Rebecca Green to conclude in her essay for this volume—written before the Supreme Court's decision—that if history had liquidated anything, it had liquidated the fact that electors were indeed free. Applying the framework outlined by the Supreme Court in *National Labor Relations Board v. Noel Canning*,[15] Green surveyed this history of constant contestation about elector discretion and concluded the "evidence suggests that Electoral College norms and practice routinely anticipate elector discretion and that institutional and popular acceptance of elector discretion is widespread."[16]

Yet the Supreme Court in *Chiafalo* concluded to the contrary—certainly the clearest contradiction of an argument made by Will Baude that "in case after case, where the court looks at . . . a conflict between the original

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[11] 343 U. S. 214 (1952).

[12] *Id.* at 232 (Jackson, J., dissenting).

[13] Letter from Thomas Jefferson to Albert Gallatin (Sept. 18, 1801), https://founders.archives.gov/documents/Jefferson/01-35-02-0245 [https://perma.cc/PTE2-YZL6].

[14] *See* KEYSSAR, *supra* note 1, at 87.

[15] 573 U.S. 513 (2014).

[16] Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. & POL'Y REV. 53, 77 (2020) (emphasis removed).

meaning and something else, it's the original meaning that wins."[17] *Chiafalo* flatly rejects an original meaning (and textualist) interpretation of the electors' power. As one of the most prominent originalist scholars wrote of the decision, "[i]t is difficult to overstate how much of a catastrophe the 'faithless electors' *Chiafalo* case is for originalism."[18]

Justice Thomas's concurrence doesn't do much better. Thomas rejected the idea that Article II authorized the states to discipline electors. Article II, as he argued, gives states the power to choose the "Manner" by which electors are appointed. Article I gave states the power to determine the "Time, Place and Manner" by which representatives would be chosen. "Manner," Thomas argued, must be read in the same way in both clauses. As he wrote, "Nothing in the Constitution's text or history indicates that the Court should take the strongly disfavored step of concluding that the term 'Manner' has two different meanings in these closely aligned provisions."[19] And yet the Court had concluded that "Manner" in Article I gave the states no power over the qualifications of candidates for Congress; the same must be true, he argued, about "Manner" in Article II.

Even if the states have no power to control electors under Article II, they do, Thomas concluded, retain that power under the Tenth Amendment. But this conclusion raises an obvious question: What power did any state ever have to control how "electors" vote? If states have the power to control how presidential electors may vote, do states have the power to control how congressional electors—i.e., "voters"—may vote? Thomas had insisted that words must be read in the same way. So is the state's power over "electors" in Article I the same as its power over "electors" in Article II? If the Tenth Amendment reserved the former power to the states, did it reserve the latter? Can Massachusetts, under the Tenth Amendment, pass a law fining voters if they vote for a Republican?

As I sat down to present my argument in the case—the case was argued during the pandemic, and therefore, remotely—I looked across my desk to a book I had published the year before, *Fidelity and Constraint*.[20] That book is an extended account of the interaction between the meaning of the constitution, properly determined, and the constraints on the Court's ability to articulate that meaning. While preparing to offer the Supreme Court an originalist argument for elector discretion "on a silver platter,"[21] as Michael Rappaport described it, seeing my book triggered a premonition: I was about to be swallowed by my own theory. Yes, originally Article II "electors" had

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[17] *See* William Baude, *Is Originalism Our Law?* at 11:05, YouTube (Mar. 16, 2015), https://www.youtube.com/watch?v=rez2zEjO98w&feature=emb_logo&ab_channel=UniversityofChicagoLawSchool [https://perma.cc/55BA-VL5L].

[18] Michael Rappaport, *The Originalist Disaster in* Chiafalo, Law and Liberty (August 7, 2020), https://lawliberty.org/the-originalist-disaster-in-chiafalo/ [https://perma.cc/T2S4-NS2F].

[19] *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring).

[20] Lawrence Lessig, Fidelity & Constraint: How the Supreme Court Has Read the American Constitution (2019).

[21] Michael Rappaport, *supra* note 18.

the discretion we now presume Article I "electors" to have. But a cross-partisan norm now constrained that discretion. Because "here, We the People rule." *Chiafalo* is not an example of fidelity. *Chiafalo* is an example of judicial constraint—a constraint, in my view, that too few in constitutional theory try to reckon.

Chiafalo's democratic principle — "here, We the people rule" — should have an effect even beyond electors. In the brief moment in 2020 when supporters of President Trump suggested that state legislatures act on a power that *Bush v. Gore* had suggested they have, to recall the vesting of the appointment of electors in the people "at any time,"[22] the principle of *Chiafalo* showed just why that argument could not fly.[23] If *electors* have no power to ignore the will of the people, once expressed, then certainly *state legislatures* have no such power. At least the framers had intended some discretion in electors. We know quite clearly that they also intended that no existing authority—whether Congress, the state legislatures or the governors—was to have the power to select the President. If "here, We the people" rule over the presumptively entitled electors, then a fortiori, "We the people" rule over the presumptively disentitled state legislatures.

Guy Charles and Luis E. Fuentes-Rohwer offer a complicating view of this interpretive constraint. Their essay is a completely compelling account of why *Chiafalo* is supported neither by the text of the Constitution nor by its original public meaning. They therefore engage the question that I had hoped the Supreme Court would have engaged openly and honestly—what accounts for the change in the Constitution's meaning, if not an amendment? Charles and Fuentes-Rohwer explain the Court's evolved jurisprudence of historical "gloss." That account is grounded in "normative justifications" for the result, rather than "categorical definitions."[24]

I agree with Charles and Fuentes-Rohwer's rejection of an account tied to "categorical definitions." The Court has no list of categories against which it checks Supreme Court opinions. But I don't accept that the right way to understand the pressure that pushes the Court away from text and original meaning is to talk about "normative justifications." The constraint is less fancy than that, and if *Chiafalo* has convinced me of anything, it has convinced me of the increased importance of understanding the nature of the constraints on Supreme Court interpretations. The Court could not hold as text and original meaning would require because it had become taken-for-granted that electors are potted plants. This was not a partisan view; but it was a common view that the Court saw no reason to disturb. This is true not because America has a sophisticated gloss on history, or because America has a committed and informed normative view. This is true because in the mid-

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[22] 531 U.S. 98, 104 (2000).

[23] *See* Lawrence Lessig & Jason Harrow, *State Legislatures Can't Ignore the Popular Vote in Appointing Electors*, LAWFARE BLOG, https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors [https://perma.cc/ZB5Y-S76W].

[24] Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo: *Constitutionalizing Historical Gloss in Law & Democratic Politics*, 15 HARV. L. & POL'Y REV. 15, 47 (2020).

dle of a pandemic, facing an extraordinarily volatile presidential election, no justice was going to add to the uncertainty of that election by suggesting the possibility that electors alone could flip the popular result. Kagan's last line would have been more accurate had it said, "here, what we all believe rules," because she knows personally that the no deep normative commitment to "democracy" constrains this Supreme Court.

If constitutional jurisprudence were a real science, it would be this sort of anomaly that we would focus upon. David Strauss is right to insist that the actual constitution is far from the text as originally understood.[25] We need take seriously his observation and develop a better account of what allows that gap to exist. My sense is that the answer will be closer to Searle than Dworkin.[26] But the most striking fact to me is just how invisible anomaly-talk is in modern American jurisprudence. Michael Klarman devoted more than 150 pages to the question of democracy in his review of the Supreme Court term — a Harvard Foreword at least twice as long as any in the Journal's history.[27] *Chiafalo* doesn't merit even a footnote.

The final essay by Rob Richie, Patrick Hynds, Stevie DeGroff, David O'Brien, and Jeremy Seitz-Brown ("Richie et al.") offers one important modification to the NPVC to allow it to solve not only the "one person, one vote problem" and "swing state problem," but also the "inverted election problem."

To be clear analytically, there are two sources of the "inverted election problem," one of which a national popular vote eliminates automatically.

The first source, as described above, is the non-proportionality between the electoral votes in a state and the state's popular vote. The second source is the potential distortion caused by strong third-party candidates.

The first source is what Wang and Canter had modeled: even with just two candidates, an election can be inverted, because electoral votes are not perfectly proportional to the popular vote in a state.[28] This inversion is purely technical: The failure to select the majority candidate is not a product of a third candidate; it is simply the product of the system for aggregating preferences.

But the second source—strong third-party candidates—would be present even if there were a national popular vote.

Across our history, it is the second source that has presented itself most clearly. In 1844, for example, America was choosing between James Knox Polk, a pro-slavery warmonger, who insisted that Texas should be taken by force, and that "Manifest Destiny" entitled America to everything else west. Against him ran a soft abolitionist, Henry Clay, who like Lincoln at the

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[25] *Id.* at 41.

[26] *Compare* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 4–5 (1995) (describing the invisible social reality), *with* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

[27] *See* Michael J. Klarman, Foreword: The Degradation of American Democracy — and the Court, 134 HARV. L. REV 1 (2020).

[28] Samuel S.-H. Wang & Jacob S. Canter, *The Best Laid Plans: Unintended Consequences of the American Presidential Selection System*, 15 HARV. L. & POL'Y REV. 209, 219 (2020).

time, believed that slavery should be isolated so that a natural death would overwhelm it. But in New York, there was a third candidate?—?a hardline abolitionist, James Birney, who insisted that slavery must end immediately. Polk beat Clay in New York by 5,106 votes, yet Birney had received 15,812 votes. Between Polk and Clay, there is no doubt who the second choice of the Birney voters would have been. Had they been counted for Clay, Clay would have become President, the Mexican War would have been averted, and maybe slavery could have been ended without the bloodiest war in American history.

That same story could be told about the election of 2000. George Bush beat Al Gore in Florida by 537 votes. Ralph Nader received 97,488 votes. Between Gore and Bush, it is contested but plausible that Gore would have been a sufficient favorite of the Nader voters.[29] Had they been counted for Gore, who knows whether we would have blundered into the worst foreign policy mistake in American history, Iraq, and quite likely, we would today be anticipating a twenty-year anniversary of the first major climate change legislation enacted by the United States Congress.

These inversions were caused primarily by the system of requiring a majority of electoral votes. Yet even with a national popular vote, so long as more than two candidates can run, the risk of an inverted election remains. Richie, et al. aim to minimize this risk, by adding "ranked choice voting" ("RCV") into the national popular vote. RCV gives voters the opportunity to rank their choices. If their top-ranked choice doesn't receive a majority, then their second-choice vote gets counted. If that choice also does not receive a majority, then their third choice gets counted—and so on.

Even today, RCV is a critical innovation that could make the current system wildly more stable. Both Alaska and Maine have recognized this fact, and have now adopted RCV for determining how presidential electors are to be allocated in their states. If the NPVC were enacted, then RCV would protect against the potential distortion caused by a third-party candidate who attracts more votes than the difference between the top two candidates. That happened in 2000 (the difference between Gore and Bush was 543,895; Nader received 2,882,955 votes nationally), and in 1992 (the difference between Clinton and Bush was 5,805,339; Perot received 19,743,821). It could easily happen again.

RCV has been tested in many representative democracies across the world. It would complement the constitutional presumption of majoritarianism, by enabling a choice that expresses the preferences of a majority. But whether it can be integrated into the NPVC is a harder question. Richie, et al., are convinced that Congress has the power to mandate a national ballot

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[29] Michael C. Herron and Jeffrey B. Lewis's fascinating study the implicit political preferences of the actual ballots cast for Nader in 2000 suggests that Gore would have won a sufficient majority of Nader voters to prevail. *See* Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore's Presidential Bid?: A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election,* 2 Q.J. POL. SCI. 205 (2007). James Carville, by contrast, declared Nader's spoiling of 2000 "obvious." *See id.*

enabling RCV with the compact. I fear that's one federal power too far, given the clear difference between the Constitution's securing of power over congressional elections to Congress without any parallel power in Congress over presidential elections. Richie, et al.'s backup solution, building a RCV system into the states adopting the compact, is certainly constitutional if the compact is constitutional. But if we had different methods for counting the popular vote across the nation, that would emphasize the challenge that both Muller and Morley have raised: How do we reckon the national popular vote? With RCV or not? Or with RCV where enabled, and not where it is not? Is there an Equal Protection problem if half of the states eliminate all but the top two candidates in reckoning the popular vote, but half of the states do not?

These are serious questions. But I remain a supporter of the NPVC. It is still the easiest solution to both the "one person, one vote problem" and the "swing state problem." And if Richie, et al.'s, amendments were possible, it would also weaken the chances of an inverted election.

But in the closing paragraphs of this foreword, I offer a sketch of an idea that both I and Kevin Johnson have advanced, based on a proposal most recently considered in Congress in the middle of the last century.[30]

The presumption of reformers is that because partisan division is so stark, constitutional amendments are impossible. I agree that partisan division is stark. I'm not convinced that entails that constitutional amendments are impossible.

Because if, among the three problems that we've identified, the "swing state problem" were viewed as the most significant, then it seems clear that both parties in more than three-fourths of the states would actually benefit from an alternative solution to the problem of the Electoral College—one that would solve the swing state problem and the inverted election problem, even if it cannot address the "one person, one vote problem."

That alternative accepts the allocative framework of electoral votes in the Electoral College. It changes the division of votes within that framework. Under its terms, states would receive the same number of electoral votes as they receive now. But those votes would be allocated proportionally, at a fractional level, between the top two candidates within the state. States would have the power to determine how those top two candidates would be identified. Presumably, most would adopt RCV, but the solution would leave open the opportunity for states to experiment with other methods as well.

Under this system, for example, if the Democratic candidate in Montana received 41.70% of the vote (as Obama did in 2012), then s/he would receive 1.251 electoral votes. Likewise, if the Republican candidate in New

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[30] *See Presidential Elections: The Top Two Proportional Solution*, ELECTION REFORMERS NETWORK, https://electionreformers.org/the-proportional-allocation-solution/ [https://perma.cc/G3QL-W9CH]. This solution is similar to, though an improvement of, the Lodge-Gossett Amendment considered in the 1950s. *See Past Attempts at Reform*, FAIRVOTE, https://www.fairvote.org/past_attempts_at_reform [https://perma.cc/735S-DEY6].

York received 35.17% of the vote (as Romney did in 2012), then s/he would receive 10.199 electoral votes. By limiting the allocation to the top two candidates within a state, the system minimizes the chance of an inverted election. It doesn't eliminate that chance—a strong third-party candidate in one state could become one of the top two. But the system would work more effectively to identify a majority candidate across the fifty-one electoral systems within the United States than the current system does.

Like the NPVC, this change would solve the "swing state problem." It would also minimize the risk of the inverted election problem. But it would not solve the "one person, one vote problem," since the unequal allocation of electoral votes would be unchanged. And unlike the NPVC, it would also likely require a constitutional amendment to be effected.[31] These are all reasons to prefer the NPVC, since NPVC would get us more, sooner.

But the cost of not solving the "one person, one vote problem" might well be exaggerated. As the nation is today, there's no strong partisan advantage that would be secured through the extra weight given to small states. Among the 12 smallest Electoral College jurisdictions, 5 are solidly Blue (DC, VT, DE, RI, HI) and 5 are solidly Red (WY, AK, ND, SD, MT), and two swing (ME, NH). And to the extent the practical and constitutional concerns raised by Muller and Morley are seen as significant, they are mitigated in a system that remains federal rather than national.

I don't suggest this reform as an alternative to the NPVC. The NPVC is a critically important innovation that should happen right now. Yet at the same time that it is being considered and (hopefully) enacted, Congress should also be deliberating two distinct constitutional amendments. The first would ratify the NPVC, giving Congress the power to regulate the presidential vote as it regulates congressional elections, thereby avoiding many of the problems Morley and Muller identify. The second amendment would advance this second-best alternative of the top-two proportional allocation within each state at a fractional level.

If the NPVC proves to be stable, then there would be no practical push for either amendment. But to the extent it proves to be unstable, then these constitutional alternatives would give America two clear paths forward to pursue. Both would end the "swing state problem"—the problem that in my view is the most important problem to solve. Both could also solve the "inverted election problem," by incorporating RCV, and providing for an alternative to the flawed contingent election system of the Twelfth Amendment.[32] And while between the two, my strong preference would be for NPV, I do not believe it would not be deeply damaging if the United

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[31] In LAWRENCE LESSIG, THEY DON'T REPRESENT US (2020), I argue that fractional allocation could be a remedy to a finding that winner take all violates the Equal Protection Clause. *See id.* at 163–65.

[32] The Twelfth Amendment requires that if the Electoral College does not identify a majority winner, then the House selects a president from the top three candidates. U.S. CONST. amend XII. But the House votes one vote per state. That rule creates an enormous one person, one vote problem.

States, a federal republic, retained its federal system for selecting the President, despite its inherent bias for small states. So long as the swing state distortion is removed, we could at least secure a fundamentally more representative president.

So "Why do we still have an Electoral College?"

The interplay of these essays suggests to me at least one clear reason: We are viewing reform as a set of alternatives, rather than complements. Reformers should not be arguing about one reform over another. We should recognize the ways in which they could complement each other.

Let us ratify the NPVC as quickly as possible. But let us also acknowledge the concerns, raised in good faith and without any necessary partisan motive, about the NPVC, and begin the more difficult project of giving America a more fundamental choice. Congress should offer the states two amendments to choose between—one enacting a national popular vote; one requiring proportional allocation of electoral votes at a fractional level among the top two candidates in a state.

Both amendments would solve the "swing state problem." Both could minimize the chance of an inverted election. And the choice between the two would give America the chance to either confirm the value of one person, one vote, effected by the NPVC, or reaffirm the value of a federal system that could enable experimentation within a radically more representative framework. The temporary fix of the NPVC could well prove to be permanent. But the chance for a permanent fix should not stop us from effecting that fundamental reform, now.

Chiafalo: Constitutionalizing Historical Gloss in Law and Democratic Politics

Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer***

INTRODUCTION

On November 9, 2016 at 2:48 am, CNN's Wolf Blitzer announced Donald Trump as the next President of the United States.[1] On election day, November 8, 2016, Donald Trump won the popular elections in a sufficient number of states such that he emerged with the most pledged presidential electors, more than the 270 that he would need to defeat his Democratic opponent, the former Secretary of State and Senator from New York, Hillary Clinton. However, if Peter Chiafalo and his friends had their way, notwithstanding what happened on "election day," and leaving aside Wolf Blitzer's purportedly authoritative pronouncement on CNN, Donald Trump would not become the 45th President of the United States.

Peter Chiafalo, Levi Guerra and Esther John (the "Chiafalo Electors") were three presidential electors from the State of Washington who were pledged to vote for Hillary Clinton in the 2016 presidential election. Most Americans believed that Donald Trump won the election on "election day," November 8, 2016. But as the Chiafalo Electors knew, all that happened on "election day" was that the states selected their slate of presidential electors. It is true that the states award their electors to the party that wins the popular vote in the state and thus, as a functional matter, we can predict which candidate will prevail in the electoral college based upon the results of the popular returns in each state. Presidential electors are selected on the basis of

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[1] *See* Leinz Vales, *The Moment CNN Projected Donald Trump Is President-Elect*, CNN (Nov. 9, 2016), https://www.cnn.com/2016/11/09/politics/moment-cnn-projects-trump-u-s-president-cnntv/index.html [https://perma.cc/659Q-WRSV].

their loyalty to their party. But this was only a prediction. Nothing official had yet happened. The only presidential selection process that officially counts under the American Constitution is the meeting of the presidential electors, those selected on November 8, in their respective states to cast their electoral ballots. In the presidential election of 2016, that day, the day in which the presidential electors were required by law to meet and cast their ballots in their respective "electoral colleges," was December 19, 2016.[2]

Chiafalo was a co-founder of the "Hamilton Electors,"[3] a group of presidential electors who derived their inspiration from Alexander Hamilton's vision of the Electoral College. In *Federalist 68*, Hamilton painted a picture of presidential electors as judicious and independent thinkers entrusted with the grave task of choosing the person who would be the best President for the country.[4] The Hamilton Electors believed that the Constitution authorized them, as presidential electors, to vote for whomever they pleased. They did not believe that their discretion could be constrained by law, state or federal. Specifically, the Hamilton Electors hoped to deprive Trump of the presidency by persuading their fellow presidential electors, both those pledged to Trump and those pledged to Clinton, to vote on December 19 for a compromise candidate, someone other than Donald Trump or Hillary Clinton. At the very least, they hoped to deprive Trump of an Electoral College majority, which would then force the House of Representatives to choose the country's next President and Vice President.

The Chiafalo Electors faced a legal problem. Under the laws of the State of Washington, each elector nominee is required to pledge that if she is selected for the position, she agrees to serve and "to mark my ballots for president and vice-president for the nominees for those offices of the party that nominated me."[5] Moreover, in order for an elector's vote to be valid, the elector must cast her vote consistent with her pledge.[6] That is, the elector must vote for her party's nominee. Otherwise, her vote would not be counted. Under Washington law as amended in 2019, an elector who casts an invalid ballot—by not voting for the nominee of her party—is automatically removed as an elector. In the language of the Washington statute, the elector "vacates the office of elector, creating a vacant position to be filled" by the secretary of state as provided for by law. In 2016, before Washington

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[2] 3 U.S.C. § 7 (2020) provides: "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct." *Id.*

[3] *See* ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE 163 (2019).

[4] THE FEDERALIST NO. 68, at 354 (Alexander Hamilton) (Gideon ed., 2001).

[5] WASH. REV. CODE ANN. § 29A.56.084 (2019) (West, Westlaw through all legislation from the 2020 Reg. Sess. of the Wash. Leg.).

[6] *See* WASH. REV. CODE ANN. § 29A.56.090 (2019) (West, Westlaw through all legislation from the 2020 Reg. Sess. of the Wash. Leg.).

amended the law, an elector who filed an invalid ballot was subject to a civil fine up to $1,000.[7]

Because they refused to vote consistent with their pledge, the Chiafalo Electors were fined by Washington's secretary of state. They unsuccessfully appealed their fines through the state courts.[8] In its decision upholding the fines, the Washington Supreme Court stated that Article II, Section I "gives to the states absolute authority in the manner of appointing electors."[9] This authority also includes the power to fine electors who vote in a manner that is contrary to the dictates of the state. The Chiafalo Electors filed a petition for a writ of certiorari to the U.S. Supreme Court asking the Court to review their case.

The Chiafalo Electors were not alone. In Colorado, Michael Baca, Polly Baca, and Robert Nemanich (the "Baca Electors") were presidential electors selected by the Democratic Party. As Democrats, they pledged to vote for Hilary Clinton, who won the state's popular vote. Under Colorado law, presidential electors are required to cast their ballots for the winner of the State's popular vote. Therefore, the Baca Electors were required by Colorado law to cast their presidential electoral votes for Clinton.

However, dismayed by the prospect of a Trump presidency, Michael Baca— the other co-founder of the Hamilton Electors[10]—sought to convince a sufficient number of presidential electors, pledged Democrats as well as Republicans, to vote for an alternative candidate. Republican John Kasich was the suggested option.[11] Thus, instead of voting for Clinton at the December 19th meeting of the state's electoral college as he pledged and as required by state law, Baca voted for Kasich.[12] As a consequence, Colorado's Secretary of State removed Baca as an elector and discarded his vote. After seeing what happened to Michael Baca, Polly Baca and Robert Nemanich decided to vote for Clinton, though they too would have preferred to vote for Kasich.

The Baca Electors sued.[13] The district court dismissed the lawsuit on standing grounds and, alternatively, on the ground that the plaintiffs failed to state a claim. A panel of the Tenth Circuit reversed. In direct contrast to the Supreme Court of Washington, the Tenth Circuit held that Article II guaranteed the right of presidential electors to vote as they saw fit. The Court explained, "while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere

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[7] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2332 (2020).

[8] *See id.* at 2318.

[9] *In re Guerra*, 441 P.3d 807, 814 (Wash. 2019).

[10] *See* ALEXANDER, *supra* note 3, at 163.

[11] *See* Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, ATLANTIC (Nov. 21, 2016), https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/ [https://perma.cc/GD6P-D8GU].

[12] *See* Baca v. Colo. Dep't of State, 935 F.3d 887, 901 (10th Cir. 2019).

[13] *See id.* The State prevailed in the district court on the ground that the plaintiffs did not have standing and that they failed to state a claim upon which relief can be granted. A panel of the Tenth Circuit reversed the lower court's decision in part and affirmed in part.

once voting begins, to remove an elector . . . or to appoint an elector to cast a replacement vote." Colorado appealed to the U.S. Supreme Court, which granted certiorari to resolve the dispute between the courts.

In *Chiafalo v. Washington*, Justice Kagan authored an opinion for the Court upholding a state's power to compel electors, under pains of penalty—fines or removal—to vote as instructed by the state.[14] Justice Kagan offered two bases for her decision. First, she relied on the text of the Constitution. She argued that Article II, Section 1, which authorizes the states to appoint presidential electors "in such manner as the Legislature thereof may direct," provides the states wide latitude to condition the appointment of presidential electors on any basis not excluded by the Constitution. And because the Constitution does not preclude the states from eliminating the discretion of presidential electors, states can require presidential electors to vote for their party's nominee when that person prevails in the popular vote.

Second, Justice Kagan, more subtly—and we will argue more consequentially—relied upon past historical practice to support her conclusion that the Constitution authorizes states to not only require electors to take an oath to support their party's nominee but also to sanction electors who breach their oath. Justice Kagan explained that elector discretion had not been part of our historical practice.[15] To the contrary, states have long sought to bind electors. "From the first," she pointed out, "States sent them to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment." And electors, she intimated, have generally acquiesced to this loss of discretion.[16] Since almost immediately after the Founding, electors have functioned as "agents of others." The laws of Washington and Colorado simply "follow[ ] in the same tradition." Justice Kagan thus concluded for the Court in *Chiafalo*: "The Electors' constitutional claim has neither text nor history on its side." In a companion case, *Colorado Department of State v. Baca*, the Court issued a *per curiam* opinion based upon its decision in *Chiafalo*, which had the effect of reversing the Tenth Circuit and upholding Colorado's law.

Surprisingly, not a single Justice disagreed with Justice Kagan's deployment of historical gloss in *Chiafalo*. In fact, with the exception of Justice Thomas, who concurred in the judgment but would have decided the case on Tenth Amendment as opposed to Article II grounds, every member of the Court concurred in Justice Kagan's reasoning. And quite frankly, the disagreement between Justices Thomas and Kagan was quite narrow. Moreover, the outcome seemed popular among legal elites and among the public at large. For example, according to an analysis by the notable website

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[14] 140 S. Ct. 2316, 2328 (2020).

[15] *See id.* at 2326 ("Electors have only rarely exercised discretion in casting their ballots for President . . . .").

[16] *See id.* ("And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role.").

Fivethirtyeight.com, over 60% of Americans approved of the outcome in *Chiafalo*.[17]

Though *Chiafalo* looks like an easy case, the issue presented—whether presidential electors have a constitutional right to cast their ballots for whomever they want—is much more difficult than Justice Kagan's opinion lets on. *Chiafalo* is part of a recent trend of Supreme Court decisions that rely upon the post-Founding historical practices of constitutional actors to give meaning to the Constitution.[18] This method of constitutional interpretation, which some scholars have called "historical gloss,"[19] and others refer to as convention,[20] has also given rise to a growing and robust academic literature primarily focused on the conditions under which it is justifiable, if ever, for courts to use historical gloss as a modality of constitutional interpretation.[21] The literature has largely been driven by disputes in the domain of separation of powers—focused on the legitimacy and illegitimacy of deploying "gloss" to resolve constitutional disagreement among the three branches of the federal government—though scholars have extended their inquiry to other areas as well.[22] Justice Kagan in *Chiafalo* deploys historical gloss to give constitutional meaning in a context that has received little attention in the historical gloss literature, the law of democracy. This Article uses *Chiafalo* to examine the deployment of historical gloss in that context.

We make one central point in this Article. Justice Kagan's opinion in *Chiafalo* uses historical gloss to entrench a particular and modern view of political participation—which is best reflected by American political practices—by rejecting an alternative and anachronistic view—which is best reflected by the text and structure of the Constitution. Part I argues that *Chiafalo* is not a textualist opinion because Article II, Section 1 does not support the majority's conclusion that states have the power to limit elector discretion. The majority's reasoning to the contrary is not persuasive, even on its own terms. Part II argues that *Chiafalo* is best understood as the latest case from the Court to apply the approach of "historical gloss" to interpret-

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[17] *See* Amelia Thompson-DeVeaux & Anna Wiederkehr, FIVETHIRTYEIGHT (July 13, 2020), https://fivethirtyeight.com/features/the-supreme-courts-big-rulings-were-surprisingly-mainstream-this-year/ [https://perma.cc/Q86K-TMW2].

[18] *See, e.g.*, Noel Canning v. NLRB, 573 U.S. 513 (2014); Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1 (2015); *see also* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 60 (2017).

[19] *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417 (2012).

[20] *See*, *e.g.*, Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020). As Issacharoff & Morrison explain, "beneath the Constitution's text there lises a world of institutional settlement—a constitution by convention." *Id.* at 1916.

[21] *See, e.g.*, *id.*; Joseph Blocher & Margaret Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L.J. ONLINE 1 (2016); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2014).

[22] *See, e.g.*, Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701 (2019).

ing the Constitution. However, unlike past cases where the Court has used gloss to interpret the Constitution when the text is ambiguous or silent, in *Chiafalo*, Justice Kagan deploys historical practice in the face of a clear constitutional text which leads to a different conclusion than the evidence from historical practice. Part III examines why Justice Kagan relies on gloss in *Chiafalo* and explains, from the vantage point of law and democracy, that the Court deploys gloss instrumentally to constitutionalize a particular view of political participation and representation. *Chiafalo* updates and modernizes our understanding of representation and political participation. *Chiafalo* is thus as much about the future as it is the past. It is about entrenching a different conception of democratic politics. Part IV explores some problems that are raised for the historical gloss literature when gloss is used in this way to interpret the Constitution. Finally, we conclude with some questions about the robustness and potential of the Court's right of political participation.

I. Constitutional Text: Interpreting Article II, Section 1

In this Part, we address the central question presented in *Chiafalo*, which is how to interpret Article II, Section 1's appointment power. The question is specifically whether that clause authorizes a state to penalize an elector who votes in a manner that is inconsistent with the state's instructions. There are three obvious possibilities for interpreting Article II, Section 1. The first option is that Article II, Section 1 protects elector discretion. This was the position of the Tenth Circuit in *Baca*. The second option is that the constitutional text is silent and does not address the issue. This is the position of Justice Thomas in *Chiafalo*. The third option is that the text authorizes the state to penalize electors. This is the position that the majority in *Chiafalo* purports to support. As we show in this Part, of all three options, the least convincing one is the argument that the text of the Constitution authorizes the state to remove elector discretion.

Agreeing on a method for choosing the chief executive was no easy task for the delegates gathered in Philadelphia in 1787.[23] The delegates entertained a number of proposals, including election by popular vote, selection by the Governors of the States, selection by Congress, and selection by electors chosen by popular election.[24] Toward the end of the Convention, on September 4, three months after James Wilson suggested selecting the presi-

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[23] Reflecting on the constitutional convention, James Wilson recalled, "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." *Convention of Pennsylvania*, *in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution at Philadelphia, in 1787, at 415, 511 (Jonathan Elliot ed., reprint ed. 1987) (statement of James Wilson).

[24] *See* Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 Fla. St. U. L. Rev. 879, 880 (2002).

dent using electors, the Committee of Eleven proposed a compromise.[25] Article II, Section 1, clauses 2, 3, and 4 memorializes a process of presidential selection that we now refer to colloquially as the Electoral College.[26]

Though the language of the Constitution is often broad and often indeterminate,[27] the same is not true of the Electoral College. The constitutional text that sets up the presidential selection process is directive, specific, and determinate. Article II, Section 1, clause 2 provides a formula—reflecting the structural compromise between the large and small states—for allocating presidential electors. Under this formula, each state is entitled to the same number of electors as they are entitled to representatives in Congress. Reflecting the federalist structure of the Constitution, Article II, section 1, clause 2 instructs specifically that the state *legislatures* decide how to appoint presidential electors, but section 1, clause 4 states that Congress determines the time of choosing the electors and the day that the electors must transmit their votes to Congress.[28]

Article II, Section 1, clause 3 is at least as prescriptive. It provides that electors will meet in their respective states and vote for two people, one of whom must be a non-resident of the state. These electors will make a list of all the persons receiving votes and how many votes they received. They will then sign and certify the list and send it to Congress. Congress will assemble and the President of the Senate will unseal the lists and count the votes. The person receiving the most votes will be chosen as President. If no one receives a majority or there is a tie, the House of Representatives will choose the President. Prior to the ratification of the Twelfth Amendment, the person who received the next highest vote would be named as Vice President. In the case of a tie among the second-highest vote getters, the Senate would choose the Vice President. In keeping with Article II, the Twelfth Amendment is similarly commanding. Among its many prescriptions, the Twelfth Amendment requires the electors to meet in their respective states, to vote separate ballots for President and Vice President, to keep track of those who received votes, to sign, seal, and send the lists to Congress; Congress will count the votes and the person who received the greatest number of votes for President will be President.[29]

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[25] *See* James Madison, Journal (Sept. 4, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 493, 496–503 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; James Madison, Journal (Aug. 31, 1787), *in* 2 FARRAND'S RECORDS, *supra*, at 475, 481.

[26] Of course, the Twelfth Amendment made some changes to our presidential selection process, but the basic structure remained the same.

[27] Examples are numerous. What exactly is "due process" and "freedom of speech"; what are "privileges and immunities"; and what is the scope of the "executive power of the United States"?

[28] Section 2 of the Fourteenth Amendment imposes further restrictions on the states. *See* Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279 (2015).

[29] *See* U.S. CONST. amend. XII.

The Constitution precludes the electors from meeting together as a body of electors, which would presumably promote greater deliberation but might subject the electors to outside or foreign influence and might lead to a herd mentality. It almost seems as if the drafters of the text thought that the relevant pool of qualified candidates, and their apparent qualifications, would be self-evident to everyone, particularly to the ostensibly sagacious electors.[30] It is true that the Framers did not spend much time focusing on the details of presidential selection—everyone expected that George Washington would be selected as the first President of the United States.[31]

Nothing in the Constitution specifies how the electors are to identify candidates or how candidates make their case to the electors.[32] There is nothing to restrict (or guide) the judgment of the electors so that they could appropriately separate out qualified from less qualified candidates. Pursuant to Article II, Section 1, clause 3, electors must vote for one person who is not a resident of the state. The Twelfth Amendment instructs: "The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves." Article II, Section 1, clause 5 states that only individuals who are at least thirty-five years old, who have resided in the United States for at least fourteen years, and who were born in the United States are eligible to the presidency. Whatever the merits of these restrictions, they are minimal and do not appear able, or intended, to constrain the discretion that the text would seem to grant to the electors.[33]

If you take the text and structure of the Constitution and you take into account both the drafting history and the intention of the Framers, the best read of the text is that the Constitution created a federal office, of presidential "electors," with a distinctive, prescriptive, and consequential responsibility.[34] This was generally the view of legal commentators who examined the issue outside of the context of litigation,[35] and it was the position of a panel of the Tenth Circuit in *Baca v. Colorado Department of State*.[36]

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[30] *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 925 (2017) ("The patrician politics of the early republic allowed political elites to observe and evaluate the merit, intelligence, and work ethic of each other while working together in state capitals, the federal capital, or foreign missions.").

[31] *See* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1151 (2002).

[32] The assumption was that presidential electors, as part of the ruling political elite, would naturally be familiar with suitable candidates. *See* Whittington, *supra* note 30, at 926–27.

[33] *See* Whittington, *supra* note 30, at 920 ("The constitutional provisions relating to the appointment of the presidential electors and the casting of the electoral ballots for president are not especially vague or open-textured. As a matter of straightforward textual interpretation, the Constitution would seem to leave the presidential electors unbound in their decision-making.").

[34] The historian Alex Keyssar describes the electoral college as a "temporary legislature" that would "disband as soon as it carried out its one function." *See* ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 25 (2020).

[35] *See, e.g.*, Whittington, *supra* note 30, at 920.

[36] *See* 935 F.3d 887 (10th Cir. 2019).

The parties in *Baca* presented the Tenth Circuit with two opposing arguments. To Michael Baca, the determinative issue was whether the constitutional text confers discretion upon presidential electors. Baca anchored his argument on the Supremacy Clause: he was performing a federal function and unless the Constitution explicitly allowed the state to direct the votes of presidential electors, state regulation was inconsistent with the Supremacy Clause. By contrast, from the State's perspective, the determinative question was whether the constitutional text bars the states from compelling presidential electors to vote in a manner dictated by the state. Colorado rested its argument on the Tenth Amendment, and the view that the Amendment reserved the power to bind presidential electors to the states, unless the Constitutional text explicitly provided differently.

The Tenth Circuit agreed with Baca. Writing for the majority, Judge McHugh began the analysis by articulating the majority's interpretive framework. "As a general rule," she noted, the Constitution must be interpreted "according to its text," though in certain contexts a court must also interpret the Constitution in light of state practice.[37] Relying on the constitutional text, Article II and the Twelfth Amendment, the majority concluded that "the Constitution provides no express role for the states after appointment of its presidential electors."[38] Noting the prescriptive specificity of the text, the Court remarked that the Constitution assigns "specific duties to identified actors."[39] The states are authorized to appoint electors and they have wide discretion to determine the process for selecting the electors. However, once the states have selected their presidential electors, they have no further role to play.[40] "Instead, every step thereafter is expressly delegated to a different body."[41] States have no authority under the Constitution to interfere with the process of presidential selection once they have fulfilled their constitutionally assigned task, which is to simply appoint presidential electors.[42]

The court then concluded not only that the states lack the power to interfere with the electors once they have been appointed, but also that presidential electors have a constitutional right to exercise their discretion when voting for President and Vice President, as presidential electors. Article II and the Twelfth Amendment, uses the words "elector," "vote," and "ballot." The court reasoned that those words, understood from the perspective of

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[37] Baca v. Colo. Dep't of State, 935 F.3d 887, 936 (10th Cir. 2019).

[38] *Id.* at 942.

[39] *See id.* ("Article II, as modified by the Twelfth Amendment, describes the process for selecting the President and Vice-President in unusual detail."); *id.* at 943 ("From the moment the electors are appointed, the election process proceeds according to detailed instructions set forth in the Constitution itself.").

[40] *See id.*

[41] *Id.* at 942.

[42] *See id.* at 943 ("In short, while the Constitution grants the states plenary power to appoint their electors, it does not provide the states power to interfere once voting begins, to remove an elector, to direct other electors to disregard the removed elector's vote, or to appoint a new elector to cast a replacement vote.").

those who were alive at the time they were written in the Constitution, "have a common theme: they all imply a right to make a choice or voice an individual opinion."[43] The court thus concluded that "[i]t is beyond dispute that" presidential electors "exercise unfettered discretion in casting their ballot at the ballot box."[44]

Using the standard approach to legal analysis—text, structure, intent of the drafters, public and ordinary meaning of the text—the Tenth Circuit reasoned that the Constitution unambiguously supports the conclusion that presidential electors, not voters, select the President and Vice President. Efforts to limit their agency is inconsistent with the very text and structure of the Constitution. The reasonable implications from the text and structure of the Constitution are that the electors are agentic; their choices are supposed to be consequential.[45] They, not the voters, are the actors of constitutional consequence.

Alternatively, one might argue that the text of the Constitution is silent on the issue of elector discretion and that the Constitution's silence should be read in favor of state authority—including the power of the state to conclusively bind presidential electors and compel them to cast their ballot for a pledged presidential candidate.[46] This is Justice Thomas's position in *Chiafalo*.[47] Justice Thomas examined the issue primarily on federalism grounds. One of central purposes of the Constitution is to divide power between the states and the federal government, and federal power can be exercised only when it has been explicitly delegated to the federal government by the Constitution. "When the Constitution is silent," Justice Thomas wrote, "authority resides with the States or the people. This allocation of power is

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[43] *Id.* at 945.

[44] *Id.* The court did note, however, that presidential electors must abide by the minimal requirements set out in the Constitution, such as the requirement that a candidate is not eligible to the presidency who does not meet the age, residency or citizenship requirement provided for in the Constitution. *See id.* at 945 n.27.

[45] *See* Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 219 (1995); David A. Strauss, *Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 22 (2015) (noting in the context of the Electoral College that the "practice is different from what the text seems to contemplate"); Whittington, *supra* note 30, at 935–36 ("But the role of the presidential electors themselves is quite clear. The constitutional text specifies that the electors will be appointed in a manner chosen by the state legislatures and will cast ballots for president and vice president. Electors have few formal limitations on their discretion when casting those ballots.").

[46] There is also an intermediate step between the position that the text affirmatively supports elector discretion versus the view that the text is silent but should be read in favor of state power. One might argue that the text is silent and textual silence does not imply a normative valence. The constitutional text is simply silent. Electors are free to follow directives on how they should vote, from their states, their political parties, or any other institution. They are also free to vote according to the dictates of their conscience. Either approach is consistent with the constitutional text.

[47] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2333 (2020) (Thomas, J., concurring) ("[T]he Constitution does not speak to States' power to require Presidential electors to vote for the candidates chosen by the people. . . . When the Constitution is silent, authority resides with the States or the people.").

both embodied in the structure of our Constitution and expressly required by the Tenth Amendment." Justice Thomas goes on to explain that both the structure and text of the Constitution delegates the process of Presidential selection to the states, with very little for the federal government to do and with no explicit restriction on the power of the states.[48] Consequently, states can compel electors to vote for the nominee chosen by the states' voters, if that is what the people of the states want to do.[49]

In sharp contrast of the position of the Tenth Circuit in *Baca* and Justice Thomas in *Chiafalo*, one might argue that the Constitution clearly authorizes the states to require putative electors to pledge that they will vote for their party's nominee and to punish them when they defect. This is supposedly the majority's position in *Chiafalo*. Justice Kagan's opinion in *Chiafalo* purports to present a descriptive account of Article II, Section 1. Justice Kagan argued that Article II, Section 1 is an affirmative grant of power to the States that allows them to lawfully induce an oath from would-be presidential electors and to sanction the electors if the electors defect. In fact, Justice Kagan implied that the text is so clear that extralegal sources, such as the intent of the framers, were not necessary to interpret the text.[50]

Justice Kagan's legal analysis departed from the proposition that Article II Section 1, the appointments power—"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors . . ."—was a broad grant of power to the States that authorizes them to appoint electors, "in such manner" as they desire. From the power to appoint she reasoned that the State also has the power to condition the "appointment—that is, to say what the elector must do for the appointment to take effect."[51] As she explained: "A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period." From

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[48] *Id.* at 2335 (Thomas, J., concurring) ("[P]owers related to electors reside with States to the extent that the Constitution does not remove or restrict that power . . . . As the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people.").

[49] Another position: The Constitution is not silent on elector discretion, and the power of the state to punish electors that defect on this issue should be read in favor of state power—including a state's decision to conclusively bind presidential electors and sanction them if they do not cast their ballot as instructed—as opposed to reading the Constitution's silence in favor of the discretion of presidential electors to vote according their conscience and preference. That is, the Constitution—its text and structure—is neutral and silent on whether the state can require an oath as a condition of being an elector and whether a state can sanction the elector through removal or the imposition of a fine. But for consequentialist or prudential reasons one ought to read textual silence in favor of state power. State discretion allows for flexibility and adaptability, necessary components of a constitution that is expected to last the ages.

[50] *Chiafalo*, 140 S. Ct. at 2325–26 ("The Electors and their amici object that the Framers using those words expected the Electors' votes to reflect their own judgments. . . . But even assuming other Framers shared that outlook, it would not be enough. Whether by choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page. All that they put down about the electors was what we have said . . . .").

[51] *Id.* at 2324.

there she deduced that the power to condition also included the power to instruct: "a State can insist . . . that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote." Next, in a move not obvious to the untrained eye, the power to instruct included the power to sanction. Justice Kagan called this—in her inimitably elegant style — "an associated condition of appointment." As an "associated condition of appointment," the State "can demand that the elector actually live up to his pledge, on pain of penalty." And then we come full circle: under Article II, Section 1, the power to appoint presidential electors necessarily includes the power to punish the elector for voting in a manner inconsistent with the State's preferences. As Justice Kagan put it, "the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's."

Justice Kagan is undoubtedly right as a matter of logic that the power to appoint could also include the power to sanction. But of course, that was not the question before the Court—the question was not whether the power to appoint could theoretically or in the abstract include the power to sanction if the elector did not vote as specified by the state. The question before the Court was whether the text of the Constitution, Article II, Section 1, clause 2, authorizes the state to eliminate elector discretion and to sanction the elector as part of the State's appointments power. As Justice Thomas rightly notes in his concurrence, the power to appoint—Justice Thomas would call this the "affirmative duty" to appoint—is different from "the broad power to impose and enforce substantive conditions on appointment." As one legal commentator observed, state laws purporting to bind presidential electors "seem[ ] highly dubious if we consult the text, history, and structure" of the Constitution.[52]

Justice Kagan's analysis elides this distinction, in part because of her analogical style of reasoning. She wrote, for example, that "[a] State can require . . . that an elector live in the State or qualify as a regular voter during the relevant time period."[53] Surely a state can impose reasonable elector qualifications such as requiring that the elector be a resident of the state or that the elector be eligible voter as part of the power to appoint the elector. These qualifications are simply reasonable implications of the power to appoint, unless the Constitution is crystal clear that such reasonable qualifications are not permitted. Justice Kagan went on to provide another example, which she ostensibly presented as the equivalent of the prior example. "Or," she stated, using the conjunction to connote equivalency, "more substantively, a State can insist . . . that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote."[54] If the state can require the elector to be a resident of the State as a condition of

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[52] Amar, *supra* note 45, at 219.
[53] *Chiafalo*, 140 S. Ct. at 2324.
[54] *Id.*

appointment, Justice Kagan reasoned implicitly, it can certainly impose an equivalent qualification, which is to require the elector to take an oath to support the nominee of the elector's party. This is the key step in Justice Kagan's analysis.[55] If the state can require an oath, it must certainly have the power to sanction defecting electors in order to enforce the oath. Using the conjunction "or" once again to indicate equivalence among her examples, Justice Kagan deploys the oath requirement as a bridge to her conclusion that the state can "demand that the elector actually live up to his pledge, upon pain of penalty."[56]

To be fair to Justice Kagan, a number of Justices made similar moves at oral argument. Chief Justice Roberts asked Professor Lawrence Lessig, Chiafalo's counsel whether "simply requiring an elector to take a pledge [is] okay in your view?" "Absolutely," Lessig replied. A pledge is simply a "moral," not a "legal obligation." But if the state has the power to require a pledge, Roberts asked, why does it not have the power to compel compliance with the pledge? A state does not have such power, Lessig replied, because a sanction is "a legal obligation. It crosses the line because the State has no such power to impose such an obligation through law."[57] Justice Ginsburg picks up precisely on this point. "It's somewhat hard to understand the concept of something I am pledged, bound to do, I have made a promise to do something but that promise is unenforceable."[58] Justice Breyer too wanted to join in. "Counsel, a state can appoint people, requirement, that they be permanent residents of the state. That's all right, isn't it?"[59] Lessig agreed that a state could do that. And if the state can require the elector to be a permanent resident of the state, Breyer reasons, can the state remove the elector if the elector changes his or her residence such that the elector no longer meets the residency requirement and provide for an alternate elector who meets the residency requirement. Yes, Lessig agrees, the state can remove the nonresident elector and substitute a conforming elector. "What's the difference between that situation," Breyer muses, "where they say, you must promise to vote for the person who wins the most votes, and then he gets to the room, and in that room, he doesn't live up to that requirement . . . that he be a resident of the state."[60] Justice Gorsuch expressed a similar concern. "[C]ould a state say we'll pay your expenses and give you a per diem for your service, but only if you carry out your promise to vote in a particular way that you pledged initially."[61] "No," Lessig responded. "That is, in effect, a penalty as

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[55] *See, e.g.*, *id.* at 2324 n. 6 (articulating cleanly the point that "a law penalizing faithless voting (like a law merely barring that practice) is an exercise of the State's power to impose conditions on the appointment of electors").

[56] *Id.* at 2324.

[57] Transcript of Oral Argument at 5–6, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (No. 19-465).

[58] *Id.* at 13–14.

[59] *Id.* at 15.

[60] *Id.* at 16.

[61] *Id.* at 30.

well."[62] This short exchange was followed by the question that kept tripping up a number of Justices: "Why—why couldn't it do that if it could do the other things."[63]

The Justices could not get beyond the fact that, as Justice Ginsburg stated, a state can compel an elector to take an oath to support a particular candidate but could not enforce the oath. One might argue that the majority did not rely solely on analogical reasoning and deduction to support its argument that states can compel the elector to swear allegiance to the party's nominee as a condition of the appointment. The pledge requirement is somewhat supported by the Court's 1952 case, *Ray v. Blair*,[64] in which the Court upheld an Alabama law that refused to allow a potential presidential elector to participate in the party's primary election unless the elector pledged to support the party's nominee in the general election.

But *Ray* should have been confined to its facts. *Ray* is a political party case not an electoral college case. *Ray* arose out of the Dixiecrat revolt in 1948. The Dixiecrats refused to support the Democratic Party's presidential nominee, Harry S. Truman. The Alabama Democratic Party responded by enacting a state law precluding a candidate for elector from participating in the Party's primary unless the candidate pledged to support the Party's nominee in the general election.

The Court in *Ray* noted the "longstanding practice" of electors supporting the nominee of his or her party.[65] The Court then stated: "This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary."[66] The Court concluded that the pledge, in the primary, did not violate the Constitution.

But the Court distinguished between a pledge in the primary and the Electoral College. The Court noted: "[E]ven if such promises for candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, . . . to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional."[67] This is because a party pledge in the party's primary simply enforces "the rules of the party."[68] If the Alabama Democratic Party wants to require individuals who wish to serve as the Party's representatives to pledge to support the Party's general election candidate, that should be completely up to the Party and if the State wants to pass a law to that effect, that should be up to the State.

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[62] *Id.*
[63] *Id.*
[64] 343 U.S. 214 (1952).
[65] *Id.* at 228–29.
[66] *Id.* at 229–30.
[67] *Id.* at 230.
[68] *Id.*

But, as the majority in *Ray* recognized, that is not the same question as one asking whether the State—as opposed to a political party when it appoints its electors as its representatives—is entitled to compel its presidential electors to take an oath—not adjuring that they will be truthful or that they will faithfully perform their constitutional duty—but that they will vote a particular nominee. That question was not decided by *Ray*. *Ray* did not foreclose the possibility that a pledge and a penalty requirement could violate Article II, Section 1. At bottom, *Ray* and the pledge line of questioning were red herrings.

Justice Kagan's conclusion does not find succor in *Ray*, nor does it find much support from the text of the appointment power of Article II, Section 1. Justice Kagan's textual analysis depended entirely on her interpretation of the State's power to appoint.[69] As she put it, "the power to appoint an elector (in any manner)" conveyed "the broadest power of determination" over the appointment.[70] The explicit assumption of Justice Kagan's analysis was that the entity that has the power to make an appointment also as the power to impose substantive constraints on the appointment. However, as Keith Whittington noted: "Controlling election regulations is a far cry from controlling how those elected to an office will conduct themselves once in that office."[71]

Moreover, Justice Kagan's assumption cannot be right as a general proposition. There are many areas of election law in which everyone concedes that the state can impose qualifications for voters—electors—but cannot prescribe how voters are supposed to vote. For example, the states can compel voters to register as prerequisite to voting. It can compel voters to live in particular voting districts if they want to vote in those districts. It can require voters to take a pledge that voters will truthfully provide certain pertinent information. But no one would argue that because the state can promulgate these types of qualifications, it can also, as an associated condition, compel voters to vote for a specific candidate. Such a proposition would be absurd.

The Court rejected precisely that way of thinking in *U.S. Term Limits v. Thornton*.[72] In *U.S. Term Limits*, Arkansas argued that it had the right to refuse to provide ballot access to candidates for the House of Representatives who have already served three terms in the House and candidates for the Senate who have already served to two terms in the Senate. Arkansas urged, among its many arguments, that it had the power to exclude term-limited

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[69] Justice Thomas made a similar observation. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2332 (2020) (Thomas, J., concurring) ("The Court's theory is entirely premised on the State exercising a power to *appoint*." (emphasis in original)).

[70] *Id.* at 2324 (quoting McPherson v. Blacker, 146 U.S. 1, 27 (1892)).

[71] Whittington, *supra* note 30, at 920. Whittington further argues: "The manner of appointment could readily range from selecting the electors themselves, to authorizing the governor to appoint them, to authorizing the citizenry to elect them, and various other permutations. Choosing the way electors are appointed, however, would not seem to suggest that legislatures are empowered to instruct the elector on how to vote." *Id.*

[72] 514 U.S. 779 (1995).

candidates from the ballot under Elections Clause, Article I, Section 4, which provides that "[t]he Times, places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The Court disagreed. Writing for the majority, Justice Stevens concluded that the power delegated to the States under the Elections Clause, the "Manner of holding Elections," is "a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes." The Court in *U.S. Term Limits* was very clear that "manner" means the power to enact electoral procedures, not the power to dictate substantive outcomes.[73] As Justice Thomas recognized in his concurrence, there is no textual basis for reading "manner" differently in Article II, Section 1 than how it is read in Article I, Section 4.[74] There may be normative reasons and consequentialist reasons for allowing states to penalize electors for not voting as directed by the state. But the claim fails on textualist grounds.

II. *Chiafalo* and Historical Practice

Chiafalo cannot be justified on textualist grounds and quite frankly *Chiafalo* is not a textualist case. *Chiafalo* fits with a recent line of Supreme Court cases using historical practice to give meaning to the Constitution. In fact, gloss featured in two other cases decided the same term, *Financial Oversight and Management Board for Puerto Rico v. Aurelius*[75] and *Trump v. Mazars USA, LLP*.[76] Justice Sotomayor was the first to point to this path at oral argument in *Chiafalo*. She suggested, in the form of a question of course, "that historical practice since the founding offered a practical interpretation of the Constitution."[77] And that practice favored state regulation of electors. Justice Kagan, whose turn followed Justice Sotomayor, pushed the point ever more aggressively, intimating that Chiafalo's argument is undermined by historical practice. "Mr. Lessig, if . . . your reading is . . . very deeply contextual, then shouldn't we look to what happened in the very first elections under the Constitution, where, you know, immediately, right away, electors associated themselves with a political party, pledged their votes ahead of

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[73] *See id.* at 832–34 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations . . . . The Elections Clause give States authority 'to enact numerous requirements as to procedure and safeguards which experience show are necessary to enforce the fundamental right involved.'" (quoting Smiley v. Holm, 285 U.S. 355, 366)); *id.* at 835 (noting that state regulations under the Elections Clause are constitution where they regulate "elections procedures . . . and . . . not . . . substantive qualification[s] rendering a class of potential candidates ineligible for ballot positions").

[74] *Chiafalo*, 140 S. Ct. at 2330–31 (Thomas, J., concurring).

[75] 140 S. Ct. 1649 (2020).

[76] 140 S. Ct. 2019 (2020).

[77] Transcript of Oral Argument at 24, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (No. 19-465).

time, . . . and it's that practice that has continued for over 200 years? . . . [D]oesn't . . . history suggest the opposite?"[78]

Under the guise of responding to arguments made by Chiafalo, in her *Chiafalo* opinion, Kagan picks up right where she left off during oral argument. Quoting *The Pocket Veto Case*, Justice Kagan stated that "'[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'"[79] She noted that even though the electors claimed that historical practice was on their side, "[e]lectors have only rarely exercised discretion in casting their ballots."[80] The Nation's history with presidential electors "points in the opposite direction."[81] To the extent that electors have exercised discretion, those examples were anomalous and the exceptions that prove the rule.[82] Electors have cast over 23,000 votes over the course of the relevant historical period and they have cast approximately 180 faithless votes. And "because faithless votes have never come close to affecting an outcome, only one has ever been challenged."[83] Though it is true that Congress counted the faithless vote, Justice Kagan concluded that "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years."[84]

If one reads *Chiafalo* superficially, it would appear that Justice Kagan used historical practice in *Chiafalo* in the "classical" manner assumed by the academic literature—as a "gloss" to supplement the text. The text is clear and historical practice serves as additional evidence that interpretation suggested by the text is correct. Consistent with that view, she told us twice in the opinion that both the text and historical practice led to the same conclusion, in favor of the power of the states to control presidential electors. However, as we argue in this part, Justice Kagan does not use gloss in *Chiafalo* in the classical sense. Justice Kagan deploys historical practice not to supplement the text, but to counter it.

To frame our argument, consider a thought experiment. Assume that you are a person unfamiliar with American electoral practices but are interested in how Americans select their chief executive. Suppose that the text of the United States Constitution is the only information you have available to you. If you were to read the text and only the text, how closely would you be able to recreate actual electoral practices? Let us now run the experiment in the other direction. Suppose that you are a keen observer of American electoral practices and you want to deduce from your observation what the American Constitution or even more broadly, what American law, such as the Electoral Count Act, says about the process by which Americans elect

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[78] *Id.* at 28.
[79] 140 S. Ct. at 2326 (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).
[80] *Id.*
[81] *Id.*
[82] *See id.* at 2328 ("The history going the opposite way is one of anomalies only.").
[83] *Id.*
[84] *Id.*

their chief executive. From your keen observation of democratic practices on the ground, how closely could you recreate what the text says about how Americans are to select their chief executive?

We surmise that it would be difficult to recreate the constitutional text and structure if the only information you had to recreate the text came from observing American democratic practices. Conversely, even the best reader of the Constitution would be unable to recreate American electoral practices, with respect to the election of the Nation's chief executive, from simply reading the text. The Constitution, its text and structure, appears to set up a presidential selection process that seems to delegate a consequential choice to a group of people that the Constitution refers to as electors. Presumably, consistent with that delegation, the electors are to exercise their best judgment unbound, as a matter of law, by popular constraint. Consistent with this view, the Constitution imposes few constraints on presidential electors, which strongly implies that they are expected to exercise their independent judgment and that their choices are to be consequential. The Constitution does not provide any explicit direct role for popular input or control. And it clearly does not provide a positive right to vote for President and Vice President.

Notwithstanding the prescriptive specificity and clarity of the constitutional text, the way in which the Electoral College currently operates is not what one would expect if one only read the text of the Constitution, at least since political parties emerged on the scene.[85] Whatever else it has to commend it, the process described in the Constitution for selecting the President and Vice President—the Electoral College—is anachronistic.[86] It fits uncomfortably with modern democratic norms, in which popular control is the *sine qua non* of democratic legitimacy. Recall here the reapportionment revolution and its declaration that constitutional equality in the exercise of the franchise demands one-person, one-vote. With respect to the Electoral College, polling majorities seem to agree and would prefer the direct election of the President.[87] Critics of the Electoral College focus specifically on the delegate allocation formula, which provides a bonus to smaller states and does not proportionally reflect the voting power of voters in larger states,[88]

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[85] *See* Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 928–29 (2001).

[86] *See, e.g.*, Ethan J. Lieb & Eli J. Mark, *Democratic Principle and Electoral College Reform*, 106 MICH. L. REV. FIRST IMPRESSIONS, 105, 105 (2008) ("The electoral college is a relic from another time . . . .").

[87] *See* Stephen Shepard, *Poll: Voters Prefer Popular Vote over Electoral College*, POLITICO (Mar. 27, 2019), https://www.politico.com/story/2019/03/27/poll-popular-vote-electoral-college-1238346 [https://perma.cc/M39M-TAMC].

[88] This critique is of a piece with general criticisms about the undemocratic nature of the U.S. Constitution. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008). For a terrific defense of "the power of states to administer elections, and, more specifically, to determine voter eligibility," what he calls the "invisible federalism" that protects the

an inconsistency that is clearly at odds with the one-person, one-vote conception.

Keeping with modern ideas of democratic equality and political legitimacy, as a matter of democratic practice, we have a selection mechanism that is roughly populist, though a person unfamiliar with the American practice of presidential selection would not logically infer a roughly populist selection process from the text and structure of the Constitution. If you only read the text, you would not guess that American citizens, in all fifty states and the District of Columbia, participate in party primaries or caucuses and hold a general election purporting to elect their chief executive. In fact, you would be perplexed as to why residents of Puerto Rico vote in party primaries for President in light of the fact that they are not entitled to any presidential electors.

As a matter of American political practice, the Electoral College is not an independent selection mechanism that in fact chooses the chief executive. This is one of the bases for criticizing the Electoral College when the Electoral College winner does not match the winner of the popular vote. To the extent that the constitutional text assumes the independence of presidential electors as a collective of deliberative institutions that would engage in genuine deliberations in their respective states and uninfluenced by political faction or group bias, things have not worked out that way. *All* of the states select presidential electors via popular elections. Indeed, even before we get to the general election, we have a party primary system that essentially invites putative candidates, anyone who believes that they can capture the attention of the public, to participate. And for the most part, they do. If there is any wisdom in the process, it is the wisdom of the crowd and not of sagacious respected elders quadrennially debating the fate of the Republic.

As a matter of political practice, presidential electors are selecting from a pool of candidates, usually two, which the voting public has narrowed for them.[89] Put charitably, the process itself is very much a popularity contest, mediated by the political parties. As a matter of American political practice,

Electoral College against reform efforts, see Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1239 (2012).

[89] And of course, it is misleading to suggest that presidential electors select the president—implying independent agency. Our two political parties identify and select a slate of presidential electors who are generally partisans of unquestioned loyalty. The historical record makes clear that parties have done a good job of choosing party loyalists. Few electors have defected; instances of "faithless electors" are comparatively few. *See Faithless Electors*, FAIRVOTE, http://www.fairvote.org/faithless_electors [https://perma.cc/8H9V-P9TG] (last updated July 6, 2020). In fact, the very concept of a "faithless elector" is arguably aconstitutional. If the constitutional design set up these electors to exercise their own judgment, in whatever way they saw fit, then the constitutional text/history does not recognize the concept of "faithless elector". By constitutional definition, they cannot be faithless.

presidential electors have seen their roles reduced to mere ciphers or passive agents.[90] They are, at best, constitutional actors of no consequence.

And this historical devolvement is perfectly consistent with the text and structure of the Constitution—or so the majority argues. The Constitution, Justice Kagan tells us, "took no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be."[91] Or as she would put it elsewhere in the opinion, the "Constitution is barebones about electors."[92] The "Constitution left much to the future," to the evolutionary practices of the nation. "And the future did not take long in coming." The Nation soon developed a practice by which "presidential electors became trusty transmitters of other people's decisions."[93]

Though *Chiafalo* often reads as if Justice Kagan was providing a descriptive account of Article II, Section 1, she was not. Historical practice is responsible for much of the analytical work in the opinion. And though courts, for understandable reasons, are reluctant to argue that practice can and should trump a clear text, commentators are not so constrained.

The majority's argument *Chiafalo* is an example of a phenomenon described by Professors Curtis Bradley and Neil Siegel by which assertions of textual clarity are themselves "often affected by interpretive considerations that are commonly thought to be extratextual," such as historical practice.[94] Bradley and Siegel were specifically addressing perceptions of ambiguity in the text which is often used to justify the application or non-application of extratextual modalities of constitutional interpretation.[95] By contrast and contrary to the story that most legal academics tell about when courts use extratextual methods to interpret the text,[96] Justice Kagan claimed that the text was clear and used an extratextual modality to give meaning to the Constitution.

Building on Bradley and Siegel, our point here is that Justice Kagan's argument about the clarity and directionality of the text—that the text is clear and that it supports state laws that punish electors that defect from the state's directive—is constructed. The considerations that are potentially relevant to resolve the meaning of the text may also be relevant to determining

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[90] *See* Ronald D. Rotunda, *The Aftermath of* Thornton, 13 CONST. COMMENTARY 201, 204 (1996) (describing the electors as "faceless scriveners whose only real job" is "to ratify what the voters had already decided").

[91] Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).

[92] *Id.* at 2324.

[93] *Id.* at 2326.

[94] Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1238 (2015).

[95] *See id.* ("Participants in American constitutional practice typically agree that, when the constitutional text is clear, it is controlling. They often debate, however, whether the text is clear and, to that it is not, what should be consulted in resolving textual ambiguities.").

[96] *See id.* at 1241 ("Nontextual modalities can appropriately be considered, according to the orthodox view, only to resolve ambiguities in the text.").

both the clarity of the text and its directionality.[97] Thus, Justice Kagan's declaration in *Chiafalo* that the text is clear—and that it supports the right of the states to bind electors—cannot be viewed in isolation. It cannot be fully understood if separated from the influence, the decisive influence, of historical practice as an extratextual modality. And it is the extratextual lever that is doing the heavy lifting in the analysis.

III. Competing Views of Representation and Political Participation

Once we understand that evidence from the text of the Constitution and evidence from historical practice point in different directions with regard to the discretion of presidential electors, we can better understand the work that historical practice is doing in *Chiafalo*. It provides a basis for Justice Kagan to pick between two competing views of representation and political participation with respect to presidential selection. One view is supported by the text and the other view by historical practice. Through historical practice, Justice Kagan is providing a font for a modern conception of consequential political participation and attempting to modernize the Electoral College to make it more consistent with contemporary notions of representation.

The Electoral College reflects the Framers' elitist conception on political participation and representation. "The institution would function as yet another buffer between 'the people' and their government."[98] Presidential electors, not citizens, were given the power to choose the Nation's most important offices. They would indirectly represent the people and choose what is best for them. The states, specifically, their legislatures, were given the task of choosing the electors. The Electoral College's allocation formula only indirectly reflects populist influences. Moreover, if no candidate receives a majority of electoral votes, the Constitution's "contingent election system"

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[97] This formulation borrows from and extends a similar formulation in Bradley and Siegel. *See id*. at 1242 ("[T]he same considerations that are potentially relevant in resolving the meaning of ambiguous text can also affect the perceived clarity of the text in the first instance."). Our formulation deemphasizes the focus on ambiguity; as *Chiafalo* demonstrates, extratextual modalities can be applied even to texts that are offered as clear and controlling. We add to the Bradley & Siegel formulation the direction or the substantive content that a court gives to the text. Directionality is important because both sides of a dispute often argue that the text favors them and sometimes both parties claim, as in *Chiafalo*, that historical practice or other types of extratextual modalities are on their side. As we have noted, almost all of the scholars who have examined the question have concluded that the text is clear and it supports elector discretion. The Court, of course, held that the text is clear and that it supports the states. The emphasis on directionality shows that extratextual modalities come into play not just to inform clarity but also substantive meaning.

[98] Alexander, *supra* note 3, at 31.

kicks in,[99] and the House selects the President with each state voting as a bloc.

This process of presidential selection is heavily dependent upon elites who will both blunt the preferences of the people and act in their best interest, rising above factions and parochialism. Notably, Justice Harlan featured this conception of representation in his dissent in *Reynolds*. "[P]eople are not ciphers," Harlan offered, and "legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live."[100] It precludes direct participation by the demos in favor of the states and political elites.

The Constitution does not give voters a right to vote for President and Vice President. The text of the Constitution does not even give the voters a right to vote for presidential electors. Voters have no right to participation—at least not under the Constitution—in the process of presidential selection. The Constitution leaves it up to the states to decide what role if any voters ought to play in the process. If a state decides not to grant its voters the privilege of voting for presidential electors, and we use the word privilege intentionally, it does not have to do so.

Indeed, it is remarkable how important the states are under the Constitution when it comes to political participation. Two of the great oddities of the U.S. Constitution, for those unfamiliar with American constitutional history, is that it allocates much of the power to regulate federal elections to the states and that it views the states as units to be represented. States are both the foci of and medium for representation. The Constitution interweaves state and national regulatory power over elections in numerous ways. One example is Article I, Section 4.[101] This provision gives *states* in the first instance the express power to regulate *national* elections for Congress, though it preserves for Congress ultimate authority over the subject. Another example is Article I, Section 2, clause 1.[102] One could also add the Seventeenth Amendment to this list.[103] Thus, the Constitution not only provides that the states have the initial responsibility for regulating federal elections; it also provides that the states set voting qualifications for

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[99] ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 3 (2020).

[100] Reynolds v. Sims, 377 U.S. 533, 623–24 (1964) (Harlan, J., dissenting).

[101] *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.").

[102] *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

[103] *See* U.S. CONST. amend. XIV ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

Congressional elections. And unlike the times, places, and manners clause,[104] which provides for Congressional oversight, the only limitation here is that the same voter qualifications apply to both state and federal electors.

Additionally, in both the Senate and in the Electoral College the states are represented *qua* states. State representation is one of the institutional arguments often offered in defense of the Electoral College. Wyoming and Maine deserve representation *qua* states, not as a function of the size of their population. To be sure, the states are not represented in the College to the same degree as they are in the Senate; but their allocation is far greater than mere population numbers would grant them.

The architects of the American Constitution were famously concerned about mob rule.[105] James Madison specifically worried that popular majorities could not adequately protect private rights and public goods.[106] His solution was a mixed system, one that reflects ideals of popular sovereignty and direct representation. But that system also depended upon political elites, enlightened statesmen, who would rise above factional interests and deliberate over the public good. There is no better example of that balance than the selection method created by the framers for electing members of the House, elected via direct election,[107] versus Senators, who were selected by state legislatures in the Constitution's original design.[108] The Electoral College takes up both approaches and combines them into its formula for allocating electors.[109] We would venture to wager that if Americans were starting anew today, we would not choose the same system created by the Founders. Moreover, Americans today are unlikely to find the states as compelling entities to be represented. The Founders' worries two centuries ago were different than the concerns that drive us today. But we are stuck with the vision of the Framers because their vision is entrenched in the Constitution. Or are we?

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[104] *See* U.S. CONST. art. I, § 4 (authorizing the states to prescribe the "times, places and manner of holding elections for Senators and Representatives."); Foster v. Love, 522 U.S. 67, 69 (1997) ("The [Elections] Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.").

[105] *See* THE FEDERALIST NO. 68, at 354 (Alexander Hamilton or James Madison) (Gideon ed., 2001) ("Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.").

[106] *See, e.g.*, Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 252 (1990); Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 476 (1988).

[107] U.S. CONST. art. I, § 2, cl. 1 provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. CONST. art. I, § 2, cl. 3 provides: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."

[108] This was not changed until the ratification of the Seventeenth Amendment in 1913, which brought the method for electing Senators into line with the method for electing Representatives.

[109] *See* ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE 31 (2019).

Contrast this concept of political participation and representation with that being vindicated by Justice Kagan in *Chiafalo*. Justice Kagan is the Democracy Justice. Her aim in *Chiafalo* is of a piece with her uncharacteristically blistering dissent in the political gerrymandering case *Rucho v. Common Cause*.[110] In *Rucho*, Kagan took the majority to task for concluding that federal courts do not have the power to decide partisan gerrymandering cases because those cases raised political questions that were best decided by the political process. Kagan argued emphatically that political gerrymandering is unconstitutional because it "deprive[s] citizens of the most fundamental of their constitutional rights," which are "the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[111] Partisan gerrymandering is not just objectionable because it "debase[s] and dishonor[s] our democracy," it is particularly pernicious because it "turn[s] upside down the core American idea that all governmental power derives from the people."[112]

Chiafalo is an attempt, through the method of historical practice, to vindicate the same family of constitutional rights that Justice Kagan could not get the Court to vindicate in *Rucho*. She launches her opinion in *Chiafalo* by sounding the alarm that the presidential selection process may be selling a misleading bill of goods to the voters. She notes that even though voters "vote" for a presidential candidate every four years, they are in fact only selecting their state's presidential electors, who will later select the President.[113] The worry, of course, is that even though voters expect that their participation and their votes will be consequential, elector discretion would make those votes irrelevant.

Though the Framers did not provide for direct political participation by the people, the people themselves developed a political practice of consequential political participation, to borrow from Larry Kramer.[114] They exercised agency within the open crevices of the text and structure of the Constitution. Justice Kagan's opinion tells the story of the Nation's progression from an elitist presidential selection process as directed by the text to a populist political practice that better reflected the people's evolutionary expectations of consequential political participation. She closes the opinion with a populist battle cry and clarion call: "here, We the People rule."[115]

She reminds us early in the opinion that the Electoral College was not the product of sustained deliberation by the Framers.[116] Moreover, the Con-

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[110] 139 S. Ct. 2484 (2019).

[111] *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

[112] *Id.*

[113] Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020).

[114] *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 215 (2004).

[115] *See Chiafalo*, 140 S. Ct. at 2328.

[116] *See id.* at 2320 ("Our Constitution's method of picking Presidents emerged from an eleventh-hour compromise.").

stitutional text is very thin.[117] If that were not enough, this last minute, barebones framework became antiquated as well as "unworkable" as soon as it was tested. This is because the Framers' "plan failed to anticipate the rise of political parties."[118] The United States ratified the Twelfth Amendment in 1804, which was intended to fix the broken presidential selection system. "The Amendment thus brought the Electoral College's voting procedures into line with the Nation's new party system."[119] Soon thereafter, voters would use political parties as the mechanism for asserting popular control on presidential selection. "By 1832, . . . all States but one had introduced popular presidential elections." And "advanced, rather than resisted, the practice that had arisen in the Nation's first elections."[120]

In the early part of the twentieth century, voters likely understood themselves to be voting for presidential candidates directly, instead of voting for presidential electors. By the middle part of the twentieth century states passed statutes requiring presidential electors to vote the nominee of their party. Laws that penalize electors for defecting are only the latest developments of an evolutionary process that attempts to transmit as faithfully as possible the people's preferences in order to fulfill the expectations of the voters' that they have a right to vote for President and that their votes will count; it will matter.

Justice Kagan views the people—not the presidential electors or the states—as agentic. Recall here once more the reapportionment revolution and its one-person, one vote mantra. In *Reynolds v. Sims*, the Supreme Court famously declared, "[l]egislators represent people, not trees or acres."[121] What matters for Justice Kagan is not the selection process referenced in the text but the "vote of millions of . . . citizens"[122] who are to be represented. As a matter of democratic practice, voters have come to expect that they will vote for the president. They do not expect their votes to be an empty exercise. And they have come to expect that if their candidate receives the most votes, their candidate will prevail. Washington's and Colorado's laws are constitutional according to Justice Kagan because they are attempting to meet the expectation of the voters through the mechanism of presidential selection by ensuring direct representation—or as direct as is possible under the structural limitation of the constitution.

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[117] *See id.* ("The provision that they approved about presidential electors is fairly slim."); *see also id.* at 2324 ("The Constitution is barebones about electors.").

[118] *Id.* at 2320.

[119] *Id.* at 2321.

[120] *Id.* at 2327.

[121] 377 U.S. 533, 563 (1964).

[122] Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020).

IV. Justifying Gloss

In *Chiafalo*, the majority uses historical practice to impose meaning upon the text of the Constitution, yet it does so in a manner that is arguably inconsistent with a straightforward reading of that text. The Electoral College offers an intriguing constitutional puzzle. The text and structure of the Constitution direct a particular process for selecting the nation's chief executive that seems to leave the selection process to elites and the states. Yet, that is not what happens as a matter of evolutionary constitutional practice. Presidential selection is a function of mass popularity and party politics. The Electoral College operates in a manner that is arguably inconsistent with the text but certainly inconsistent with the structural orientation of the Constitution. These clashes between the text and practice are not unusual and scholars have noticed them in many contexts including in the context of the Electoral College. *Chiafalo* raises an important and fundamental question about justifications for gloss. When, if ever, are courts justified in entrenching constitutional meaning derived from historical practice, particularly in the face of contrary meaning from the text and structure of the Constitution?

If there is an approach that anticipated the Court's reasoning in *Chiafalo* and provides the best account of the decision, in retrospect it is Whittington's argument that the historical practices of presidential electors after the Founding have essentially amended the Constitution.[123] Though conceding that the text of the Constitution clearly and unambiguously supports the conclusion that presidential electors are entitled to exercise their discretion free from state constraint,[124] Whittington argues that the Constitution should be interpreted to allow states to direct the electors' preferences. This is because—notwithstanding the text or the intent of the Framers—"by 1796, the presidential electors were an afterthought. The voters were making up their own minds as to who should be president, and the electors were expected to do what they were told."[125] For more than two hundred years, presidential electors have been reduced to the role of mere scriveners, shorn of agency.

Whittington maintains that this long historical practice—electors acting as delegates rather than as trustees—has effectively amended the Constitution and "established" an "unwritten and informal" but "new constitutional rule."[126] Whittington calls these unwritten and informal rules "constitutional constructions." "Constitutional constructions supplement [constitutional] interpretations by establishing the practical meaning of the foundational docu-

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[123] Indeed, Justice Kagan cites Whittington in support of her claim that after 1796, everyone expected electors to act as instructed by those who appointed them, be they legislatures or voters. *See Chiafalo,* 140 S. Ct. at 2326.

[124] *See* Whittington, *supra* note 30, at 935–36.

[125] *Id.* at 927.

[126] *Id.*

ment and guiding the behavior of government officials."[127] Put differently, a sufficiently long practice changes the meaning of the text and tells democratic citizens, including constitutional interpreters, what behavior is consistent with the Constitution and what behavior is not. Returning to the context of the Electoral College, as a consequence of changed political practices since the Founding, the "practical construction of the Constitution has been that the presidential electors were to formally record the vote of the people of the states in which they were chosen, not exercise independent judgment in selecting a president. They were to be clerks, not kingmakers."[128] Thus, notwithstanding the prescriptions of Constitutional text and the implications of its structure, as a practical matter long-standing political practice trumps clear text.

Whittington does not offer a justification for preferring practice over text. Moreover, and as *Chiafalo* shows, the distinction between an unwritten and informal practice and a written one is extremely thin. All that is required is for some government to formalize the practice through codification. In his 2015 Foreword to the Harvard Law Review, David Strauss addresses this question head-on.[129] Professor Strauss starts his article by recounting the question posed by the late Justice Antonin Scalia to then-Solicitor General Donald Verrilli, Jr. during the oral argument of *NLRB v. Noel Canning*, in which the Court was deciding whether a President has the power to make recess appointments.[130] Justice Scalia asked what should happen if a long-standing practice conflicts with the clear text of the Constitution. The implication of Justice Scalia's question was that a clear text should certainly prevail over political practice, even a long-standing political practice. The Solicitor General answered that practice should trump text. The Solicitor General added that the circumstance hypothesized by Justice Scalia—a clear text yet contrary practice — is rare in American constitutional law, implying that resolving those rare conflicts do not pose much of a threat to our standard approaches to constitutional interpretation.

Not so, says Strauss. "If we read the text of the Constitution in a straightforward way, American constitutional law 'contradicts' the text of the Constitution more often than one might think. Or, in the words of Issacharoff and Morrison, "practice-based institutional settlements are pervasive in the law."[131] Adhering to the text, Strauss notes, would require us to relinquish many of the most important and well-established principles of constitutional law."[132] Though not central to his Foreword, one of the examples that Professor Strauss provides in passing is the Electoral College. He observes that while the method of presidential selection can be squared with

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[127] *Id.*
[128] *Id.* at 936.
[129] *See* Strauss, *supra* note 45.
[130] 573 U.S. 513 (2014).
[131] Issacharoff & Morrison, *supra* note 20 at 1917.
[132] Strauss, *supra* note 45, at 3.

the text, "the practice is different from what the text seems to contemplate."[133] These types of examples, clashes between clear text and contrary constitutional practice, dot the landscape of American constitutional law.

Strauss calls these clashes between clear text and contrary outcomes, anomalies, a term of art which for him means clashes that "call into question our familiar way of thinking about the relationship between the text of the Constitution and constitutional law."[134] Anomalies help us to understand that the text is less decisive in interpreting the Constitution than we believe. Under the standard account of constitutional interpretation, the constitutional text always controls, when the text is clear. We only go beyond the text when there is no text available or when the text is ambiguous. Professor Strauss argues that the standard account does not provide an accurate description of what constitutional interpreters actually do when they interpret the Constitution. "Clear text does not always govern . . . ."[135] We do not interpret the Constitution by starting with the text—recall here the Tenth Circuit majority's contrary starting premise in *Baca*—"constitutional law resembles the common law much more closely than it resembles a text-based system."[136] Refining the description slightly, Professor Strauss argues we have a "mixed system, composed of both text and precedent."[137] And text is itself a kind of precedent that needs to be reconciled and harmonized with other types of precedent.

Strauss argues that constitutional interpretation is "an effort to accommodate three institutional interests . . . in sovereignty, adaptation, and settlement."[138] By sovereignty, he seems to mean an institution, such as a legislature, that is democratically accountable and can be responsive to the needs of the demos. Adaption allows the legal system to respond to changed circumstances. Settlement permits the legal system to identify the matters that are not contestable because the benefit of having a clear rule outweigh whatever benefits might come from a reconsideration of the matter.

Strauss acknowledges that a legal system toggling among these three interests will not always yield a bright-line rule to guide the behavior of constitutional actors. Adherence to clear text must be justified as necessary to accommodate one of the three interests and "if we cannot justify adherence to the text by reference to those interests, then we should—in fact, we do—depart from it."[139] With respect to the Electoral College, Professor Strauss implies that states can limit the discretion of presidential electors though he does not provide a full defense of the point.[140]

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[133] *Id.* at 22.
[134] *Id.* at 4.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 13.
[138] *Id.* at 53.
[139] *Id.* at 54.
[140] *See id.* at 57 (noting with seeming approval that we have seen a "common law-like evolution" that has "diminished" "the power of presidential electors").

One possible defense is Professor Mark Tushnet's constitutional workaround framework.[141] A constitutional workaround is a political solution for getting around a clear constitutional text that stands in the way of a desired political outcome.[142] Take as one illustrative example the National Popular Vote Interstate Compact proposal, which Tushnet uses to demonstrate the concept. The Compact is a proposed agreement among the states and the District of Columbia to award their electoral votes to the presidential candidate that wins the national popular vote, as opposed to the candidate that wins the statewide vote (or district vote, in the case of Maine and Nebraska). The Compact is designed to work around the requirements of Article II and the Twelfth Amendment.[143] Though the Constitution obviously and clearly specifies the mechanism for electing the President and Vice President, it does not explicitly preclude each state from awarding their electoral votes to the national vote winner, given that under *Chiafalo* they can compel their presidential electors to do so.

Relying on his previous work,[144] Tushnet suggests that the acceptability of workarounds might depend upon whether they are working around provisions that implicate the "thick" or "thin" Constitution. The thick Constitution is the part of the Constitution that sets up and regulates the government.[145] It does not reflect deep or controversial political, moral, or constitutional value judgments. Take the requirement that the President has to be thirty-five years old. It reflects a shallow and not very controversial intuition that the President must be someone of sufficient maturity to run the government. This is the equivalent of Strauss's settlement justification: we just need to coordinate around one outcome. By contrast, there are other provisions in the Constitution that implicate deeper and more fundamental values, such equality, liberty, and autonomy.[146]

Professor Tushnet argues that workarounds that attempt to work around the thick Constitution are not objectionable.[147] This is because the

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[141] *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

[142] Professor Tushnet explains that Constitutional workarounds "arise (a) when there is significant political pressure to accomplish some goal, but (b) some parts of the Constitution's text seem fairly clear in prohibiting people from reaching that goal directly, yet (c) there appear to be other ways of reaching the goal that fit comfortably within the Constitution." *Id.* at 1503.

[143] Professor Tushnet states that a constitutional workaround is one that is itself authorized by the text of the Constitution. *See id.* at 1503–04. It is not clear to us why textual authorization is a necessary conceptual component of the definition. In fact, we would argue that it detracts from it. If constitutional actors are choosing between two texts that point in different directions, it is hard to call the process of reconciling opposing textual commitments a workaround. What seems to make a workaround a workaround is that the Constitution prohibits a particular means, which also implies the prohibition of a particular purpose. Political actors are able to achieve the impliedly-prohibited purpose through a means that is not prohibited by the Constitution.

[144] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[145] *See id.* at 9.

[146] *See id.* at 11.

[147] *See* Tushnet, *supra* note 142, at 1511; *id.* at 1507.

provisions of the thick Constitution are anachronistic; they are no longer relevant to the "structure of a well-functioning government."[148] But workarounds that attempt to work around the thin Constitution are problematic, presumably, because they challenge fundamental values, which if they are to be changed ought to be changed through the standard mechanisms that we use for amending the Constitution.

The problem is that the constitutional provisions that we want to work around are the ones that are often the most normatively contestable. In Tushnet's parlance, they are part of the thin Constitution. Thus, normative justifications really matter because we will be choosing among options that are deeply contestable and deeply contested.

Chiafalo raises a number of difficult collateral methodological questions for gloss as a judicial method of constitutional interpretation. We focus on two here: how do we determine the relevant historical practice that counts as gloss and what counts as settled practice? We then turn to what we view as the fundamental question, which is articulating the normative values that justify the deployment of gloss. Put differently, under what circumstances should the federal courts essentially amend the Constitution by giving effect to one set of institutional arrangements when those institutional arrangements are inconsistent with the text or inconsistent with a competing set of institutional arrangements? This is a difficult question and the answer must turn on normative justifications offered to prefer practice to text.

First, what is the relevant practice that counts as a historical practice for the purpose of applying gloss?[149] If historical practice is to serve as a modality that courts can use to interpret the Constitution, it is important to identify the relevant practice with a great deal of specificity and it is equally important to develop a methodology for identifying the relevant practice. We know that gloss applies to governmental practice.[150] Professor Curtis Bradley provides some extremely important guidance, which is particularly useful in the context of separation of powers and foreign affairs. He explains for example, that historical practice can, and arguably must, include congressional statutes, "presidential actions intended to have binding effect," committee reports, legal memoranda and the like.[151]

As importantly, Bradley explains that what counts as practice and as doing gloss depends upon the normative justifications using gloss as a modality of constitutional interpretation.[152] This is a fundamental point with which we agree and upon which we build below. But we might also make

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[148] *Id.* at 1511.

[149] *See* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 69–72 (2017) (addressing this question in context of separation of powers).

[150] *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 18 (2020).

[151] Bradley, *supra* note 150, at 69–70.

[152] *See id.* at 70; *id.* at 64 ("Any consideration of who to 'do' and approach is inevitably intertwined with normative questions about the value of the approach, and that is true of the gloss approach to constitutional interpretation.").

some headway on the question by thinking about the following points. As a point of departure, we might determine whether the relevant practice ought to be identified at the broadest or narrowest level of generality. This is critical because choosing the level of generality often essentially decides the constitutional question. Or, we might ask whether the relevant practice ought to mirror, and if so, how exactly, the facts that gave rise to the dispute. Further, we might need to identify the vantage point for determining the relevant historical practice. For instance, using *Chiafalo* as illustrative, are we to examine the historical behavior of the states—and if so, which states? All of them? Just the states involved in the dispute; or only the states of the electors involved?[153]

The facts that gave rise to *Chiafalo* offer at least three possible relevant practices, which range from broad to narrow, that we might identify as the relevant historical practice. Perhaps at the broadest level of generality, we might ask whether electors have generally voted the preferences of those who selected them. Here we are looking at historical practice from the vantage point of electors and asking whether there is a long-established pattern of electors who have always voted per the instructions of others. Alternatively, we can switch our vantage point and ask whether states have generally required electors to take an oath to support the nominee of their party as a condition of being selected as an elector. Lastly, at the narrowest level of generality, we might ask whether states have penalized electors who have defected and what types of penalties states have leveled.

Second, how do we determine whether a practice is settled and who has the burden of showing that the practice is settled? As Professors Bradley and Siegel note, the goal is to identify practice that is longstanding. Moreover, a longstanding practice need not be unbroken. "[M]odern practice can potentially qualify as gloss even if it differs from earlier practice."[154] However, there is no agreement on the Court or among academics for figuring out when a practice is settled.

This inquiry is made more complicated by the methodological questions we have already noted, such as uncertainty about the relevant practice and the distinctive vantage points of the actors involved in the dispute. Do we have a settled history of elector defections? Yes, we do. The first one is believed to have been Samuel Miles in 1796 and depending how you count, there have been as many as 196 faithless electors in American history.[155] And the history of people complaining against faithless electors is just as long.[156] Do we have a long history of citizens voting for presidential electors? Yes, we do. Citizens in Maryland and in Pennsylvania were voting to elect presiden-

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[153] It is because of these types of complications that some commentators are reluctant to apply historical gloss outside of the context of separation of powers. *See, e.g.,* Bradley, *supra* note 18 at 64, Bradley & Morrison, *supra* note 19 at 416.

[154] Bradley & Siegel, *supra* note 148, at 19.

[155] *See* ALEXANDER, *supra* note 3, at 131.

[156] *See* KEYSSAR, *supra* note 100, at 31.

tial electors as early as 1789.[157] By 1876, every state selected their electors by popular elections.[158] Do we have a settled history of states requiring electors to take an oath as a condition of being appointed as an elector? Well, that question is more complicated. Some states have a long history of doing so, for more than 100 years. But only 30 states, and the District of Columbia, currently have an oath requirement. Twenty states have no such requirement.[159] And even fewer states penalize electors who defect. Penalties for violations are very recent and they vary. Most states who penalize defecting electors simply do so by replacing them. A few provide criminal sanctions, including a fine. Thus, even though some states have had some of these laws in their books, those states have been few, and those penalties have been a comparatively recent development. It is difficult, then, to say that there is a settled history of requiring electors to pledge.

Third, what is the justification for using gloss to entrench one interpretation of the constitution over a competing interpretation? One fundamental worry about using historical practice to entrench constitutional meaning is, as Professor Adrian Vermuele has argued, "the inherent lack of democratic responsiveness and accountability" in the generation of the practice.[160] Recall here as well David Strauss's concern about sovereignty, which raises a similar worry. Democratic legitimacy worries are particularly acute in the context of law and democracy—as, for example, compared to the separation of powers context—to the extent that courts are using historical practices of some states or individual actors to bind the whole country by entrenching those practices through constitutional interpretation. Put differently, whereas it might make sense to talk of "the Presidency" as an institution, with continuity over time, and perhaps it might also make sense to think of "Congress" in the same way, it is probably less useful and maybe even incoherent to talk about presidential electors—and thus "the Electoral College"—as an institution, implying temporal continuity. The deployment of gloss in some domains might raise more or less legitimacy considerations than the deployment of gloss in other domains.

There are a number of possible justifications for using gloss as a method of constitutional interpretation. Professor Curtis Bradley offers four justifications that courts sometimes use when they apply gloss to interpret the Constitution, particular in the separation of powers context.[161] Courts apply gloss: as deference to nonjudicial actors, when those actors are viewed as equal—to courts—interpreters of the Constitution; as a consequence of the limitations on judicial capacity when the text of the Constitution is insufficient to supply the materials for robust judicial analysis; and for Burkean consequentialist reasons, by which courts defer to what has worked before;

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[157] *See id.* at 32.
[158] *See* ALEXANDER, *supra* note 3, at 5.
[159] *See id.* at 134–35.
[160] Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 300 (2015).
[161] *See* Bradley, *supra* note 150, at 59.

and reliance interests.[162] Professors Issacharoff and Morrison point to the telos of government. "Ours is a constitution of making things work under conditions of uncertainty. It is a domain conditioned by experience in governance, by the imprecise processes of institutional accommodation."[163] Issacharoff and Morrison argue that courts tend to enforce the settlements arrive through practice when they "discern an enforceable constitutional norm from the contours of historical practice."[164]

Understanding the justifications for the deployment of historical practice is important not only for democratic legitimacy reasons but also because normative justifications shape the methodological considerations that determine how courts apply historical practice and thus derive constitutional meaning. That is, normative justifications construct and constrain —to borrow from, and expand, Bradley and Siegel—disputes about: the clarity, or lack thereof, of the text; whether or not the text ought to be clear as a condition of the deployment of historical practice; whether the practice ought to be written or not; what counts as the relevant practice; whether the practice is settled; the level of generality; etc. Debates about historical practice arise against the backdrop of contested and contestable normative visions about our fundamental rules and fundamental values. If there was no contestation, there would be no controversy.[165]

This is one reason that we do not think categorical definitions—conventions, liquidation, constitutional construction—are useful, descriptive, prescriptive, or normative guides. What matters for gloss is contestation and the plausible existence of historical practice. Whether gloss is deployed turns on normative considerations. How gloss is deployed is dependent upon the instrumental utility of the collateral methodological inquiries to achieving the Court's normative aim.

Chiafalo illustrates how these normative justifications cash out. The decision is not explained by the length, nature, or solidity of the historical practice. It is explained by the normative justifications. Building on Bradley's work, we articulate, by way of illustration, two justifications that are relevant to *Chiafalo*. One possibility is what Bradley calls Burkean consequentialism, by which he means that courts might defer to "long-standing practices [that] are suggestive of what works well." As Bradley emphasizes, one important worry here is the probability of unforeseen and unintended consequences. A second possibility, which we call excavating fundamental rights, builds on and expands what Bradley calls reliance interests. Recall here the plurality opinion in *Casey* with respect to stare decisis. A practice may become suffi-

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[162] *See id.* at 64–69.

[163] Issacharoff & Morrison, *supra* note 20, at 1917.

[164] *Id.* at 1936.

[165] This is another way of thinking about Tushnet's distinction between thin and thick Constitution. Within the thick Constitution are the things we do not fight about. Within the thin Constitution reside the morass of our potential and actual disagreements.

ciently long-standing and embedded in our society such that citizens have come to rely upon it and view it as a fundamental constitutional right.

We see both of those justifications in *Chiafalo*. With respect to Burkean consequentialism, if one listens to the oral argument in the case, the Justices were very much concerned with the consequences of elector discretion. The conservative Justices in particular were concerned about fraud, bribery, and chaos—particularly chaos. For example, Justice Alito, speaking to Chiafalo's lawyer, Professor Lawrence Lessig, asked: "Those who disagree with your argument say that it would lead to chaos, that in—where the election—where the popular vote is close and changing it just a few votes would alter the outcome or throw it into the House of Representatives, there would be—the rational response within the losing political party or elements within the losing political party would be to launch a massive campaign to try to influence electors and there would be long period of uncertainty about who the next president was going to be."[166] Here is Justice Kavanaugh. "I want to follow up on Justice Alito's line of questioning and what I might call the avoid chaos principle of judging, which suggests that if it's a close call or a tiebreaker, that we shouldn't facilitate or create chaos. And you, I think answered and said it hasn't happened, but we have to look forward, and just being realistic, judges are going to worry about chaos. So what do you want to say about that?"[167]

To the chagrin of conservatives in the legal academy,[168] all of the Court's conservative Justices, with the exception of Justice Thomas who concurred only in the majority's judgment, joined Justice Kagan's majority opinion and none, including Thomas, complained about her methodology. But Burkean consequentialism might explain why some of the Court's conservative Justices were willing to ignore what some conservative legal academics regard as a clear text and an easy case for Chiafalo on originalism grounds. From the perspective of the Court's conservative Justices "fidelity to the text," risks corruption in the form of bribery and electoral chaos. What is to gain? Textual purity? Faithfulness to an outdated vision? States have developed and are developing a process that seems to work—so why second-guess them?

Perhaps more strongly, *Chiafalo* also illustrates the deployment of gloss to excavate fundamental principles, such as whether voters have a right to vote for President and Vice President. This might explain both why the liberal Justices used gloss here and why the majority identified the relevant historical practice at its broadest level of generality. The majority in *Chiafalo* picked a side in a clash over two competing understandings of representation

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[166] Transcript of Oral Argument at 21, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (No. 19-465).

[167] *Id.* at 33.

[168] *See, e.g.*, Mike Rappaport, *The Originalist Disaster in Chiafalo,* LAW & LIBERTY (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-chiafalo/ [https://perma.cc/DG25-28GM].

and political participation. *Chiafalo* supports the modern conception of representation in which the people, broadly defined, are sovereign and bearer of political rights. This is one of the reasons, we surmise, that Justice Kagan did not rest her analysis on the Tenth Amendment, which makes the states sovereign. Her opinion seeks to vindicate political participation and political equality among the electorate, unrestrained by the states. Under this modern view, the people's choices are determinative as a matter of political legitimacy. Electors are their agents, delegates who are only authorized to vote as instructed by their principals.

This is the basis of appeals to the popular vote when results of the Electoral College do not track the popular vote count. Notwithstanding the fact that we do not elect our presidential directly through a national popular vote, appeals to the popular vote count to impeach the electoral vote rest on the argument that in choosing our rulers, we the people are sovereign, we get to make those choices, and our revealed preferences ought to be determinative. As Justice Kagan said in *Chiafalo*, "here, We the People rule."[169]

Justice Kagan's opinion in *Chiafalo* anchors a jurisprudence in which a right to vote and political participation can be established, even when that right cannot be anchored in the text of the Constitution. Moreover, Justice Kagan's opinion gives some initial content to the right. Votes must be registered and counted. Voting is not an empty exercise. Voting is a mechanism for conveying the preferences of the electorate. The expectations and practices of the demos can both establish the right and give content to it. Kagan provides agency to the demos. The people are not limited to positive rights of political participation established by the dead hand of the past. They can create their own rights through their own democratic practices.

Conclusion

What are the implications of the Court's decision in *Chiafalo*? Notwithstanding *Chiafalo*, so much of the way our presidential selection system operates remains entrenched in the Constitution and much also depends upon practice or convention. To what extent can the presidential system be altered by giving new meaning to the text through gloss instead of through the Article V amendment process? Consider three particular questions, all of which have been asked by Electoral College reformers.

First, do voters now have a constitutional right under the federal constitution to, indirectly but effectively, elect the President and Vice President? Put differently, as a consequence of historical practice, are states constitutionally required to allow voters to vote for presidential electors? A longstanding reform proposal of the Electoral College calls for the direct popular election of the President. This proposal dates back to the Founding, when

[169] Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020).

proponents relied on its apparent simplicity.[170] Critics responded with arguments that resonate to this day. For example: it would be impractical; voters lack information and would be easily deceived; and the large states would have a larger influence than the smaller states.[171] The critics won this first battle, but reformers did not let up. Congress took up the question again in 1816 but failed to pass legislation on the matter.[172] Reformers came very close in 1970, when the Bayh-Celler Amendment passed in the House by large margins and received President Nixon's endorsement, only to succumb to a Senate filibuster.[173] Buoyed by public support,[174] reformers have pressed on through the years with no success. Constitutional obstacles have proven insurmountable. Can voters now say that the Court's approach in *Chiafalo* provides them with a right to vote for President and Vice President?[175]

Second, reforms have also focused on how states choose to allocate their Electoral College votes. Presently, most states assign all their votes on a winner-take-all basis.[176] The states need not do so, however, and nothing in the Constitution forbids them from assigning their votes differently. For example, states may choose to follow a districting system. Under this system, states would distribute their votes by congressional district, with the two remaining votes—one for each Senator— given to the winner of the statewide vote. States may also follow a proportional plan, which assigns their Electoral College votes in proportion to the statewide vote. These plans date back to the nineteenth century and continue to receive popular and scholarly support today.[177] But they are unable to overcome multiple obstacles. To be

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[170] *See* James Madison, Journal (July 25, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 25, at 107, 111; James Madison, Journal (July 19, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 25, at 50, 56–57; James Madison, Journal (July 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 25, at 25, 29–31.

[171] *See id.* at 135, 137, 392, 454.

[172] *See* 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).

[173] *See* LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 174 (1972).

[174] *See* Shepard, *supra* note 87.

[175] We do not raise this question simply as an academic exercise. For example, politicians in Arizona are proposing legislation that would authorize the State legislature to appoint the State's presidential electors after voters have voted. *See GOP Bill Would Let Arizona Legislature Revoke Presidential Election Results*, KTAR NEWS, Jan. 29, 2021, https://ktar.com/story/3949182/arizona-gop-bill-would-let-legislature-revoke-presidential-election-results/ [https://perma.cc/9Q6Q-R2GN]. This proposal would seem to render the voters' ballots purely advisory.

[176] *See* Jonah Engel Bromwich, *How Does the Electoral College Work?*, N.Y. TIMES (Nov. 8, 2016), http://www.nytimes.com/2016/11/09/us/politics/how-does-the-electoral-college-work.html [https://perma.cc/635L-CUHA].

[177] *See* PEIRCE & LONGLEY, *supra* note 173, at 132, 144; Ben Chapman, *A Bipartisan Approach to Electoral College Reform*, MEDIUM (June 27, 2018), https://medium.com/@Ben_Chapman/a-bipartisan-approach-to-electoral-college-reform-ab8c71d42442 [https://perma.cc/AW59-ZFRG]; Edward B. Foley, *An Idea for Electoral College Reform That Both Parties Might Actually Like*, POLITICO (Jan. 19, 2019), https://www.politico.com/magazine/story/2019/01/12/electoral-college-reform-conservatives-223965 [https://perma.cc/ME2K-ZPKG].

sure, Nebraska and Maine have adopted the districting method. However, only once in their history—Nebraska in 2008—has one of these states split the Electoral College vote. If more states begin to allocate their electoral votes proportionally, will this serve as historical practice that will eventually compel all of the states to allocate electoral votes proportionally?

Finally, consider the National Popular Vote Interstate Compact.[178] Under the compact, states agree beforehand to distribute their Electoral College votes to the candidate who wins the national popular vote. The Compact will take effect once states that collectively reach 270 electoral votes agree to bind themselves. Fifteen states plus the District of Columbia have agreed to the compact, with electoral votes totaling 196. Notably, the Compact does not require a constitutional amendment and, in fact, that is precisely the point. The compact is a precommitment strategy.[179] Once the requisite states bind themselves, the Compact takes effect and avoids the constitutional amendment process. This is because the Compact does not change the Constitution at all, but the way that states choose to allocate their electoral votes. How should the Court examine the Compact post-*Chiafalo*? Does the approach of *Chiafalo* improve the constitutional standing of the Compact? Chief Justice Roberts anticipated this question at oral argument in *Chiafalo* and seemed to imply yes.

The Court's decision in *Chiafalo* undermines a possible and critical safety valve of our presidential selection process, by which a sufficient number of electors could disregard the wishes of the people if they believe that the people have selected a demagogue to lead them. But the Court's decision in *Chiafalo* also provides more agency to the people. They are responsible for their own political choices by crafting the types of democratic practices that are consistent with their contemporary values. The Court's decision in *Chiafalo* makes the dead hand of the past, in the form of sticky textual commitments, less sticky and less controlling. It remains an open question whether the Court's attempt to reconcile text and practice is better or worse for democracy. Are we better working with a system that is neither fish nor fowl? Would we be better off facing the dictates of the text and the past even if they lead to dire consequences, which would provide the impetus for reforming our presidential selection system? How are we to deal with potential pathologies of our current system that cannot be glossed over. For example, what happens if the Electoral College continues to select with greater frequency a candidate that loses the popular vote but wins the Electoral College vote? Does *Chiafalo* make it easier or harder to address this eventuality? There certainly are limits to what courts and historical gloss can do to ad-

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[178] *See* Muller, *supra* note 88, at 1238; Vikram David Amar, *How to—Carefully—Surmount the Electoral College*, ATLANTIC (Jan. 14, 2020), https://www.theatlantic.com/ideas/archive/2020/01/national-popular-vote/604861/ [https://perma.cc/C2ZY-ENJE].

[179] *See* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37–47 (1979) (discussing precommitment strategies); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 195 (Jon Elster & Rune Slagstad eds., 1988) (applying the concept to constitutions).

dress the gaps between practice and text. At some point, at least in the domain of the law of democracy, the people themselves must take up challenge and entrench their settled agreements and watch the cycle begin anew for a different generation that knew not Joseph.[180]

[180] Exodus 1:8 ("Now there arose a new king over Egypt, who did not know Joseph.")

Liquidating Elector Discretion

*Rebecca Green**

In Chiafalo et al. v. Washington*, the U.S. Supreme Court determined that states may constitutionally remove or punish faithless electors. In support of its holding, the Court cited a 2014 case called* National Labor Relations Board v. Noel Canning*, which blessed a form of constitutional interpretation that looks to settled practice (or "liquidation," as James Madison called it) to resolve constitutional ambiguity. The Court agreed with petitioners that electors following the majority will of voters in their state is settled practice. This Article engages this assertion, suggesting that the question is more nuanced than the Court allowed. It examines Electoral College norms and practice finding support for the conclusion that, while its exercise is rare, elector discretion was—at least until* Chiafalo*—the understood and accepted norm.*

INTRODUCTION

The winner of the popular vote failed to win the White House in 2016. As this reality set in, reports of foreign interference swirled.[1] To a greater

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[1] *See, e.g.*, Jon Campbell, *Stewart-Cousins Wants Intelligence Briefing for Electors*, J. NEWS (Dec. 13, 2016, 3:30 PM), https://www.lohud.com/story/news/politics/politics-on-the-hudson/2016/12/13/stewart-cousins-intelligence/95385846/ [https://perma.cc/RQ5V-N7ZY] (citing presidential elector seeking more information about foreign interference); Gregory Jarrin, *Electors Should Switch to Clinton*, ARIZ. DAILY SUN (Dec. 18, 2016), https://azdailysun.com/news/opinion/mailbag/electors-should-switch-to-clinton/article_152d836f-ab45-556a-b468-a227655d9df2.html [https://perma.cc/UX4R-TYYH] (citing foreign interference as a reason electors should defect); Matt O'Brien, *Elector Seeks Intelligence Report on Russian Interference*, AP NEWS (Dec. 13, 2016), https://apnews.com/e33e8d7f06a7487fad

degree than any time in U.S. history, electors faced a deluge of public pressure to vote for someone other than the popular vote winner in their state.[2] Seven electors ultimately did so.[3] These defections did not impact the outcome. But the tumult succeeded in raising the profile of the faithless elector question—so much so that whether states may constitutionally prohibit elector defection went before the U.S. Supreme Court in the spring of 2020.[4] Resolution of this question was of critical import as the nation careened towards what looked to be another nail-biter in November.

It is hard to argue that the Framers intended anything but elector discretion in the original design.[5] But those who believe that states can constitutionally remove or penalize defecting electors point to the quick devolution of electors to the role of mere party lackeys, particularly after passage of the Twelfth Amendment.[6] In common practice, goes the argument, electors quickly began acting as mere "ministerial agents" of state political parties—not conscience-following "voters"—soon after the Founding to present.[7]

This Article draws on James Madison's analytic frame of "constitutional liquidation," blessed by the U.S. Supreme Court in *National Labor Relations Board v. Noel Canning*,[8] to challenge this narrative. When the constitution is ambiguous, Madison counseled, resolving it "might require a regular course of practice to liquidate and settle [its] meaning."[9] Liquidation requires examining what institutions, relevant actors, and the general public accept as settled practice with respect to indeterminate constitutional text. Madison believed that this analysis should inform courts charged with interpreting constitutional commands.

In resolving the case, the Court referenced the *Noel Canning* frame. Justice Kagan drew on the concept of "settled practice" to argue that the elector's role as ministerial has long been the norm in the United States.

01e0c0cf4979be [https://perma.cc/LE4X-VJ5Y] (reporting on Rhode Island elector seeking information about foreign interference in election).

[2] *See infra* Section III.B.

[3] *See Faithless Electors,* FAIRVOTE, https://www.fairvote.org/faithless_electors [https://perma.cc/7F9W-Q8TF]. According to FairVote's analysis, eight Democrats and two Republicans tried to cast faithless votes in 2016; of those ten, three were unable to because they either were forced to change their vote to the nominee (David Bright of Maine switched back from Bernie Sanders to Hillary Clinton after his Sanders vote was ruled "out of order") or because they were removed and replaced with someone who instead cast a vote for Clinton (Muhammad Abdurrahman of Minnesota and Micheal Baca of Colorado). *See id.*

[4] Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

[5] *See* THE FEDERALIST NO. 68, at 354 (Alexander Hamilton) (Gideon ed., 2001); Stephen M. Sheppard, *A Case for the Electoral College and for Its Faithless Elector*, 2015 WIS. L. REV. ONLINE 1, 3–5 (2015) (noting that the constitutional texts clearly envision discretion).

[6] *See generally* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE (2020) (taking a deep dive into debates surrounding passage of the Twelfth Amendment, shedding new light into its meaning and impact, arguing that it reflects a majoritarian consensus).

[7] Keith Whittington uses the "agent" versus "delegate" frame. *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 910 (2017).

[8] 573 U.S. 513 (2014).

[9] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al. eds., 2009).

Directly refuting appeals to *Noel Canning* for the opposite proposition, she writes,

> Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today [the state of] Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role.[10]

This discussion drills down on Justice Kagan's claim, examining Electoral College norms and practice by looking at state statutes, procedures, and voting at meetings of electors historically and today. While it is true that the vast, vast majority of state electors have accepted the command of popular will in their states and that electors voting according to popular will is widely assumed, a counternarrative exists. Norms of Electoral College design, history, and practice in the states suggest that elector *discretion* is settled and accepted practice. The discussion below lays out this argument and addresses its key shortcomings as well as difficulties in applying a liquidation analysis to the question of elector discretion.

This Article does not pretend to answer comprehensively whether history and practice support a counternarrative of "settled" elector discretion. Rather it challenges the *Chiafalo* Court's unblinking assumption that the *Noel Canning* frame dictated the conclusion it reached.

I. *Norms and Constitutional Interpretation*

What is the "liquidation" analysis and what does employing it entail? Can it be applied to resolving ambiguities about elector discretion? This section walks through these questions.

A. The Noel Canning Frame

In *Noel Canning*, a 2014 U.S. Supreme Court case reviewing presidential recess appointment powers, the Court faced the common conundrum of resolving competing constitutional claims. The case called into question the validity of President Obama's recess appointments to the National Labor Relations Board without Senate consent.[11] In its analysis, the Court attached significant weight to historical practice, citing *McCulloch v. Maryland*'s direction to examine it.[12] With this frame in mind, Justice Breyer wrote of recess appointments:

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[10] *Supra* note 4 at 2326.

[11] *See Noel Canning*, 573 U.S. at 520 (citing recess appointments as invalidating appointment of three of five members of the National Labor Relations Board).

[12] *See id.* at 524 ("[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people,

> Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.[13]

The Court explored working arrangements and common acceptance in practice over the course of this country's history to address the scope of powers involved. Although the Court did not invalidate recess appointments on this basis,[14] the decision provided authority for the idea that "the longstanding 'practice of the government' can inform [our] determination of 'what the law is.'"[15]

Since *Noel Canning*, legal scholars have expounded on this method of constitutional interpretation.[16] Harvard Law School Professor Richard Fallon explored this idea that "precedent" should be understood to reach further than judicial pronouncements to include government practices and procedures that gain common acceptance.[17] As an example, Professor Fallon points to the Article II requirement that the President must make treaties and appoint various officers only with "advice and consent" of the Senate. As Fallon describes, President Washington soon gave up the practice of appear-

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are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." (quoting McCulloch v. Maryland, 17 U.S. 316, 401 (1819))); *see also id.* ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))).

[13] *Id.* at 526.

[14] The Court instead relied on technical distinctions not relevant for present purposes. *See id.* at 552 (citing Senate rules by which the Senate may retain power to conduct business during pro forma sessions).

[15] *Id.* at 514.

[16] In addition to Professors Richard Fallon and William Baude, discussed in this Section, see, e.g., Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Paul G. Ream, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

[17] *See* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773 (2015) ("[J]ames Madison maintained that [constitutional] meaning would need to be 'liquidated' or settled by precedent and practice."); *see also* THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained *by a series of particular discussions and adjudications*." (emphasis added)). Professor William Baude notes that The Federalist No. 37 is only one source of Madison's use of the term. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019) ("While Federalist No. 37 may mark the beginning of Madison's discussion of liquidation, he continued to discuss and elaborate on the concept over the course of his life—in public and private, in the abstract and concretely.").

ing in person before the Senate to seek such advice and consent;[18] the practice of subsequent Presidents reinforced that "advice and consent" need not entail physical presence at the Senate.[19]

Madison referred to the idea of resolving constitutional ambiguity by looking to settled practice as "liquidation."[20] Professor Fallon wisely notes "liquidation" may not serve up easy answers. How fixed must "settled practice" be to establish precedential value? Must the settled practice derive from norms developed soon after the Founding? Does settled practice arrived upon long after the Founding carry less weight or more?[21] Especially with respect to the resolving ambiguities about the role of presidential electors, what if settled practices in the states are not uniform either between states or over time?

University of Chicago Law School Professor William Baude, in a 2019 article called *Constitutional Liquidation*, addresses some of these questions by analyzing Madison's writings.[22] Professor Baude identifies three distinct elements of Madison's liquidation analysis: (1) the presence of a discrete textual indeterminacy; (2) a course of deliberate practice (i.e., repeated decisions by institutional actors and authorities that reflected constitutional reasoning);[23] and (3) actual settlement of the ambiguity revealed by institutional and public acquiescence to the practice in question.[24]

Can liquidation help resolve whether the Constitution requires elector discretion? The next section discusses complications of attempting it.

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[18] *See* Fallon, *supra* note 16, at 1773 ("Today we often equate precedent exclusively with judicial precedent. But the term reaches more broadly. As Madison foresaw, historical evidence of settlement through nonjudicial practice sometimes figures importantly in constitutional law . . . In an early instance, President George Washington appeared before the Senate to seek its advice in person, but the occasion went badly, and Washington never repeated the exercise.").

[19] *See* Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 259–60 (2012) ("During the nineteenth century, Presidents would occasionally consult formally with the Senate prior to negotiating or signing treaties. But Presidents rarely consulted formally with the Senate, and the Senate rarely sought to weigh in unsolicited, at the negotiation stage. As Edwin Corwin later observed, a change in the 'working constitution' had been effected, and by 1936, Justice Sutherland would state for the Court in sweeping dicta that, although the President 'makes treaties with the advice and consent of the Senate . . . he alone negotiates [and] [i]nto the field of negotiation the Senate cannot intrude . . .'").

[20] *See* Fallon, *supra* note 16, at 1774–75. The term "liquidate" may seem strange to modern ears for this meaning, but Professor Baude explains that starting in the seventeenth century, the term was used to mean "clarify" or "settle." Baude, *supra* note 16, at 12 ("Since at least the seventeenth century, 'liquidate' has been used to mean '[t]o make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes).'" (quoting *Liquidate*, OXFORD ENGLISH DICTIONARY (2d ed. 1989))).

[21] Professor Baude answers this with a definitive no. *See infra* Section III.B.

[22] *See* Baude, *supra* note 16, at 13–18 (building out liquidation theory as consisting of three factors: indeterminacy, a course of deliberate practice, and settlement).

[23] *See id.* at 16 (2019); *see also infra* note 126 and accompanying text (discussing the degree of uniformity liquidation requires).

[24] *See* Baude, *supra* note 16, at 16. In writing about liquidation, Baude points out that it is a particularly democratic form of constitutional interpretation. *See id.* at 46 ("[Liquidation] attempts to entrench traditions that have been found acceptable by many groups of people . . . ").

B. Liquidating "Settled Practice" and the Electoral College

U.S. elections are enormously complex in large part due to their decentralized nature. The U.S. presidential election is not one single federal tally, but rather fifty-one separate state popular elections followed by fifty-one separate Electoral College votes.[25] State election rules and practices governing both the popular vote and Electoral College operation vary considerably. Wide divergence between state election practices and procedures therefore seems to render the task of identifying "settled practice" dead in the water. Few would use the words "settled practice" and "U.S. elections" in a single sentence. It is one thing to liquidate constitutional meaning of a narrowly circumscribed congressional or executive act. How to liquidate constitutional meaning when fifty-one state institutions are in play?

At least two factors suggest a liquidation analysis is possible. First, unlike elections for other offices, the narrow question of elector discretion is comparatively straightforward. Popular elections in the states involve a huge number of moving parts that have created complexities and vast divergences between how states run elections. How do candidates qualify for the ballot? Where are polling places located and how many must there be? What type of identification must voters present? Who may vote by early and absentee ballot? These and myriad other variables vastly complicate and "unsettle" election practice as among the states. The question of Presidential elector discretion implicates far fewer variables.[26] Settled practice of elector balloting and institutional and public acquiescence to those norms is therefore discernable.[27]

Second, the presence of existing claims about settled practice demonstrates that such consensus is arguably possible. A dominant narrative already exists about what constitutes settled practice when it comes to elector discretion. As discussed in greater detail below, scholars already argue that settled practice exists in the form of wide acceptance that the popular will of voters in states dictates elector votes.[28] Even more convincingly, petitioners to the Supreme Court arguing against elector discretion cite the *Noel Canning* frame in support of their position.[29] The task here is to interrogate this assertion.

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[25] *See* U.S. CONST. amend. XXIII, § 1 (adopted in 1961, granting the District of Columbia a number of presidential electors equal to that of the least populous state).

[26] Article II, Section 1 of the U.S. Constitution mandates the required number of electors in each State, and the Twelfth Amendment imposes structure on electoral college voting not likewise spelled out for the popular vote (which is instead delegated to state legislatures). *See* U.S. CONST. art. I, § 2; *id.* amend. XXII. Furthermore, the only ambiguity raised with respect to elector discretion is the narrow issue of whether the phrase, "[t]he Electors shall meet in their respective states and vote by ballot for President and Vice-President," intends that this vote belongs to the elector as an exercise of conscience or not. *Id.* amend XII.

[27] Admittedly, state practice varies widely in many respects as between the states. *See* discussion *infra* Sections III.A and III.B.

[28] *See* discussion *infra* Section IV.A.

[29] *See* Petition for Writ of Certiorari, Colo. Dep't of State v. Baca, 140 S. Ct. 2316 (2020) (No. 19-518), 2019 WL 5390121, at *30. ("This well-established post-enactment understand-

From this vantage, in examining settled assumptions and acceptance of the elector role, what conclusions emerge? The following section applies Professor Baude's liquidation framework with an eye towards whether it might support reading the Constitution to require elector discretion.

II. Liquidation and Elector Discretion

Using Professor Baude's three-part frame, the discussion in this section takes each in turn. It first examines the specific textual indeterminacy that renders the extent of elector discretion uncertain. It then reviews whether it is possible to identify a "course of deliberate practice" with respect to electors exercising independent judgment. And finally, it assesses the degree of "settlement" of institutional actors and popular acquiescence to the exercise of elector discretion.[30]

A. Indeterminacy

The first prong of Professor Baude's analysis is easily met. According to the text of the Twelfth Amendment:

> [t]he electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons voted for as Vice-President, and the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate.[31]

The Constitution thereby directs electors to "vote," but does not settle whether electors must be permitted to exercise discretion casting their ballots. Federal statute adds little meat to the bones on this question, mandating that "electors of President and Vice President of each State shall meet

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ing by the public [that electors have no discretion], coupled with longstanding historical practice [that electors have no discretion], is entitled to no less weight than that placed on the pre-enactment statements by some Framers relied on by Respondents."); *see also Noel Canning*, 573 U.S. at 524.

[30] Baude suggests other forms of acquiescence might exist. *See id.* at 18–19 ("The key idea of acquiescence was that the losers in some sense gave up. This might mean bipartisan acceptance. For instance, Madison described the requisite practice as 'that which has the uniform sanction of successive Legislative bodies, through a period of years and under the varied ascendancy of parties.' Or it might be institutional. For instance, we might look for whether other branches had acquiesced in a particular branch's interpretation, as opposed to that branch simply reasserting its own contested views. The strongest cases of acquiescence appeared to combine the two." (citations omitted)).

[31] U.S. Const. amend. XII.

and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each state as the legislature of such State shall direct,"[32] and that "electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution."[33]

Nothing on the face of either the Constitution or federal statute resolves the question of whether a state may prohibit electors from exercising discretion or whether states must honor that choice when they do.[34] Aspects of this design have been litigated. For example, the Supreme Court has held that political parties may constitutionally require electors to take pledges to vote for a particular candidate.[35] But the Supreme Court has not resolved the ultimate question of whether states may punish or remove electors who violate that pledge.

Some have argued that use of the words "ballot," "vote," and "elector" in the text of the Constitution and federal statutes resolves the question by implying an exercise of discretion.[36] As Robert Bennett describes, the Framers' choice of these words, "naturally conjures up . . . groups of electors making genuine choices and then recording those choices on their 'ballots.'"[37] The Tenth Circuit agreed. It concluded that contemporaneous understandings at the time the Framers wrote those words "have a common theme: they all imply the right to make a choice or voice an individual opinion. We therefore agree . . . that the use of these terms supports a determination that the electors, once appointed, are free to vote as they choose."[38] The Washington Supreme Court disagreed, finding that "nothing in [the text] of Article II, Section 1 suggests that electors have discretion to cast their votes

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[32] 3 U.S.C. § 7 (2018).

[33] *Id.* § 8.

[34] Some commentators suggest that in fact the text of the Constitution leaves no ambiguity as to elector discretion. Writes Keith Whittington, "[t]he constitutional provisions relating to the appointment of the presidential electors and the casting of the electoral ballots for president are not especially vague or open-textured. As a matter of straightforward textual interpretation, the Constitution would seem to leave the presidential electors unbound in their decision-making." Whittington, *supra* note 7, at 920.

[35] Ray v. Blair, 343 U.S. 214, 231 (1952). Notably, the Court itself recognized longstanding acceptance of the practice of electors voting according to the popular vote. *See id.* at 228–29 ("History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the long-standing practice."). Note, however, experts in the history of government can both acknowledge an expectation that electors will support a nominee *and* that electors in the end have the discretion not to.

[36] *See, e.g.*, ROBERT BENNETT, TAMING THE ELECTORAL COLLEGE 104 (2006) ("Use of the word 'ballot' is often cited as strong textual support for elector discretion.") (citing, *inter alia*, NEIL R. PEIRCE, THE PEOPLE'S PRESIDENT 129–30 (1968)); William Josephson and Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 172 (1996) (discussing whether the use of the word "ballot" implies that electors cast secret ballots and stating that "[i]n all other election contexts, the Framers used the words 'choose' or 'elect,' which do not imply secrecy" and that "[p]resumably, the Framers intended the use of the word 'ballot' to be equivalent to 'secret ballot").

[37] BENNETT, *supra* note 35, at 104.

[38] Baca v. Colorado Dep't of State, 935 F.3d 887, 945 (10th Cir. 2019).

without limitation or restriction by the state legislature."[39] The Washington Supreme Court chose not to read meaning into the use of those words. These divergent interpretations amply satisfy the indeterminacy prong.[40]

B. Course of Deliberate Practice

Professor Baude's second prong requires an analysis of the "course of practice" in elector balloting.[41] In this analysis, should founding-era practice be accorded more weight than modern day? According to Baude, "privileging early practice through liquidation is tempting but wrong."[42] He argues instead that recent practice is more relevant to the liquidation analysis.[43] With an eye towards more recent practice, this section will examine this question from four angles: first, the frequency of faithless elector votes; second, the geography of defecting electors; third, Electoral College ballot design; and fourth the degree of elector accountability. In each instance, practices in the states offer support to the idea that elector discretion is the accepted default.

First, electors exercising discretion has become more not less common. The Constitution delegates to state legislatures the power to appoint electors.[44] When the Electoral College began functioning in presidential elections starting in 1788, the ten participating state legislatures selected electors

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[39] *In re* Guerra, 441 P.3d 807, 814 (Wash. 2019), *cert. granted sub nom.* Chiafalo v. Washington, 140 S. Ct. 918 (2020) (No. 19-465). The Washington Supreme Court quoted *Ray v. Blair*'s statement that "[i]t is true that the Amendment says the electors shall vote by ballot . . . [but] it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself." *Id.* at 816 (quoting *Ray*, 343 U.S at 228). The Washington Supreme Court concluded "*Ray*'s holding rests on a rejection of [the] position that the Twelfth Amendment demands absolute freedom for presidential electors." *Id.*

[40] Justice Kagan dismissed this argument in Chiafalo: ". . .[T]hose words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he "votes" or fills in a "ballot." In those cases, the choice is in someone else's hands, but the words still apply because they can signify a mechanical act. Chiafalo v. Washington, *supra* note 4 at 2325.

[41] Madison used many formulations to describe this idea, which Professor Baude describes as a "regular course of practice"; a "course of practice of sufficient uniformity and duration"; a "continued course of practical sanctions"; "reiterated sanctions . . . thro' a long period of time"; a "settled practice, enlightened by occurring cases"; a "course of authoritative, deliberate and continued decisions"; or a "course of authoritative expositions sufficiently deliberate, uniform, and settled." Baude, *supra* note 17, at 16–17.

[42] *Id.* at 59.

[43] *See id.* at 54 ("Suppose that for decades, a course of practice seemed to confirm one view and to represent a liquidated constitutional settlement. But later, somehow, a contrary practice took over. This new contrary practice was itself debated, but then became liquidated by a similar course of practice. What should the modern interpreter do? The answer . . . is to follow the *later* practice, not to treat the first practice as permanent and inviolate. Under both historical and modern doctrines of precedent, it was and is generally accepted that later precedent, once established, is controlling.").

[44] *See* U.S. CONST. art. II, §1, cl. 2 ("Each state shall appoint in such a 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 . . .").

directly without popular input.[45] By 1836, almost all states had shifted to models in which the popular vote directed elector voting.[46] The number of "faithless electors" over the course of U.S. history is quite small relative to the total number of faithful electors since this country's first presidential election: 165 electors have cast their vote for someone other than the candidate with the most votes in their state (90 for President and 75 for Vice President).[47] Seventy-one of those electors defected because the candidate chosen by popular vote in their state died before the Electoral College met (sixty-three for President and eight for Vice President).[48] The remaining exercised discretion to vote for someone other than the popular vote winner in their state. Even accounting for defecting votes due to the death of a candidate, electors have exercised independent discretion to vote for someone other than a ministerial role would dictate dozens of times in U.S. history.

Important for present purposes, elector discretion can be both rare and settled practice. As an empirical matter, the vast majority of electors casting their ballot for the winner of the popular vote in their state may seem to resolve the "deliberate practice" question.[49] But this conclusion misses a key aspect of Electoral College voting: by design, elector defection is *meant* to happen very rarely.[50] Electoral College design intended electors whose discretion and independence inspired the confidence of the voters who elected them,[51] yet the practice of popularly electing members of the Electoral College as surrogates for a presidential candidate quickly developed such that an elector's decision to defect from the will of voters was widely viewed as political suicide.[52] The result of this design and practice is that instances of elector discretion are atypical—i.e., that in the regular course electors will choose to follow popular will in their states unless extraordinary circumstances de-

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[45] *See* FOLEY, *supra* note 6, at 17.

[46] *See* TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE ch. 2 (2012).

[47] *See Faithless Electors*, *supra* note 3.

[48] *Id.*

[49] Indeed, in 1872, electors pledged to Horace Greeley stuck with him even though "by the time of the Electoral College vote, Greeley was dead and in his coffin." Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENT 201, 204 (1996).

[50] In practice, "exceptionally close elections—those that yield ballot-counting disputes—are relatively infrequent." EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTION IN THE UNITED STATES 17 (2016).

[51] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1451 (1833) ("A small number of persons, selected by their fellow-citizens from the general mass for this special object, would be most likely to possess the information and discernment and independence essential for the proper discharge of the duty.").

[52] *See* 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 37 (New York, D. Appleton & Co. 1854) (claiming that faithless electors "would be attended with infamy, and with every penalty which public indignation could inflict"); 1 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 192 (Philadelphia, Lippencott, Grambo, & Co. 1853) (saying of a faithless elector, "his political character was gone for life"); 3 STORY, *supra* note 49, § 1457 ("It is notorious that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them . . . [A]n exercise of an independent judgment would be treated as a political usurpation, dishonourable to the individual . . .").

mand otherwise,[53] such that an elector would sacrifice political life and reputation to cast a faithless vote for the perceived good of the nation.[54]

This design has borne out in practice. Only rarely have electors chosen to buck the popular vote.[55] They have done so for discrete reasons. To cite a few modern examples, in 1956, W.F. Turner of Alabama voted for Walter E. Jones instead of the Democratic popular vote winner he was picked to vote for, Adlai Stevenson.[56] On November 9, 1960, an attorney in Montgomery, Alabama named R. Lea Harris wrote to every presidential elector suggesting a plan to prevent Kennedy from winning a majority of Electoral College votes.[57] Persuaded by Harris' plea, Henry Irwin, a Republican elector in Oklahoma, sent a telegram to 218 Republican electors around the country urging them to defect as well.[58] Unsuccessful in getting anyone else to join him, Irwin did ultimately deny Nixon his Electoral College vote, instead voting for two conservative senators for President and Vice President: Harry F. Byrd of Virginia and Barry Goldwater of Arizona.[59] In 1988, a West

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[53] As Keith Whittington describes, "[t]he Electoral College is sporadically interesting. It is perhaps not as obscure of a constitutional provision as, say, the Emoluments clause. But most of the time it slumbers in relative obscurity." Whittington, s*upra* note 7, at 904.

[54] *Id.* ("It is perhaps unsurprising that the Electoral College will attract more comment and criticism when the country is highly polarized, geographically sorted to an unusual degree, and closely divided. It is in that political environment that the small effects of an electoral institution's design are likely to be noticed and taken as significant."); *see also* BENNETT, *supra* note 35, at 98 (discussing some of the reasons why faithless elector votes are rare).

[55] It should be noted that in addition to the dozens of faithless electors who have cast successful votes at odds with the will of voters, there are unknown others who attempted to cast a faithless vote when their state Electoral College met, but were immediately replaced without formal record of their attempt. For example, in 2016, a Minnesota elector attempted to cast a vote for someone other than Hillary Clinton, who won the state's popular vote, and upon attempting to do so was immediately replaced by an alternate who would vote for Clinton. *See* Michael McIntee, *Minnesota Electors Cast Presidential Ballots in Electoral College*, YOUTUBE (Dec. 19, 2016), https://youtu.be/cLq1DE_blic?t=3685 [https://perma.cc/X9LP-ZDRK], (timestamp 101:25 to 1:06:40). As this example illustrates, we cannot know how many electors attempted to defect but were summarily removed without record of their doing so.

[56] *See* ROSS, *supra* note 44, at 117. Why? Apparently, Turner's preferred candidate was formerly a circuit court judge from his hometown. *See* GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 57 (3d ed. 2019).

[57] *See* 109 CONG. REC. 2,440 (1963). The Congressional Record notes that Irwin and Harris "bombarded electors with literature urging them to cast 'free votes' as is their constitutional right and duty." *Id.*

[58] *See Nomination and Election of President and Vice President and Qualifications for Voting: Hearing on S.J Res. 1, S.J. Res. 2, S.J. Res. 4, S.J. Res. 9, S.J. Res. 12, S.J. Res. 16, S.J. Res 17, S.J. Res 23, S.J. Res. 26, S.J. Res. 28, S.J. Res. 48, S.J. Res. 96, S.J. Res. 1-2, S.J. Res. 113, and S.J. Res. 114, Proposing Amendments of the Constitution Relating to the Method of Nomination and Election of the President and Vice President, and S.J. Res. 14, S.J. Res. 20, S.J. Res. 54, S.J. Res. 58, S.J. Res. 67, S.J. Res. 71, S.J. Res. 81, and S.J. Res. 90, Proposing Amendment to the Constitution Relating to Qualifications for Voting Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 87th Cong. 610 (1961) (testimony of Henry D. Irwin, Bartlesville, Okla.) ("I am Oklahoma Republican elector. The Republican electors cannot deny the election to Kennedy. Sufficient conservative Democratic electors available to deny labor Socialist nominee. Would you consider Byrd President, Goldwater Vice President, or wire any acceptable substitute. All replies strict confidence.")

[59] *See id.* at 563. For a longer description of the history of faithless electors and particularly the rise in the phenomenon in the mid-twentieth century in the name of efforts to resist

Virginia elector, surprised by the degree of discretion afforded her, decided to cast a defecting vote to draw attention to the fact of elector discretion.[60] In 2000, a District of Columbia elector defected to protest lack of congressional representation for the District.[61]

The 2016 presidential election provides a clear example of defections arising as a consequence of extraordinary circumstances—a candidate many believed unfit for office, a mismatch between the popular vote total and Electoral College winner by a significant margin, and evidence of foreign interference. These factors produced an unusually high rate of elector defection.[62] The 2016 election might prove an extreme example, but is consistent with past practice of electors exercising discretion only on the rare occasion when they believed circumstances warranted. Looked at this way, the relatively rare occurrence of defecting electors does not discount the possibility that their exercise of discretion constitutes settled practice.

Electors have defected with surprising regularity throughout U.S. history. As Appendix 1 demonstrates, if U.S. presidential elections between 1796 and 2016 are broken down into eleven twenty-year cycles, only two of those cycles featured zero defecting electors.[63] In the majority of those nine cycles in which at least one elector defected, not one but multiple electors defected.[64] And, as Baude counsels, looking to more recent practice as a guide, elector defection is becoming more common, not less, suggesting increasingly settled belief that defection is constitutionally acceptable.[65] In the past eighteen U.S. presidential elections, at least one elector has defected in ten of them.[66] The vast majority of electors have followed majority will in their states,[67] but electors have defected in states all around the country, have done so steadily over the course of U.S. history, and have done so with greater prevalence more recently, giving weight to the argument that elector discretion has become settled practice.

Second, consideration of geography also points to settled practice. If elector discretion were not the deliberate default in practice, one might ex-

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federal desegregation orders, *see* Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty After the Election of Donald Trump*, 28 U. FLA. J. L. & PUB. POL'Y 215, 218–22 (2017).

[60] *See* ROSS, *supra* note 44, ch. 2; Bernard Weinraub, *Bush Gets to Proclaim Own Election Victory*, N.Y TIMES, Jan. 4, 1989, at B6.

[61] *See* ROSS, *supra* note 44, at 118.

[62] *See* Gouzoules, *supra* note 57, at 217 (noting that "seven [faithless electors] were recorded in 2016—by far the most in more than a century").

[63] The twenty-year periods from 1876–1892 and 1916–1932 featured no defecting electors, though notably the 1876 election was a contested election decided ultimately in the Senate. *See infra* Appendix 1. Every other twenty-year cycle featured at least one instance in which something other than an ordinary vote for the candidate selected by the party occurred. *See id.*

[64] Six out of the eleven twenty-year cycles featured more than one instance in which electors departed from the ordinary course of voting for the party/popular vote choice: 1796–1812, 1816–1832, 1896–1912, 1956–1972, 1976–1992, and 1996–2012. *See id.* That number rises to seven out of twelve if the current twenty-year cycle ending in 2032 is included. *See id.*

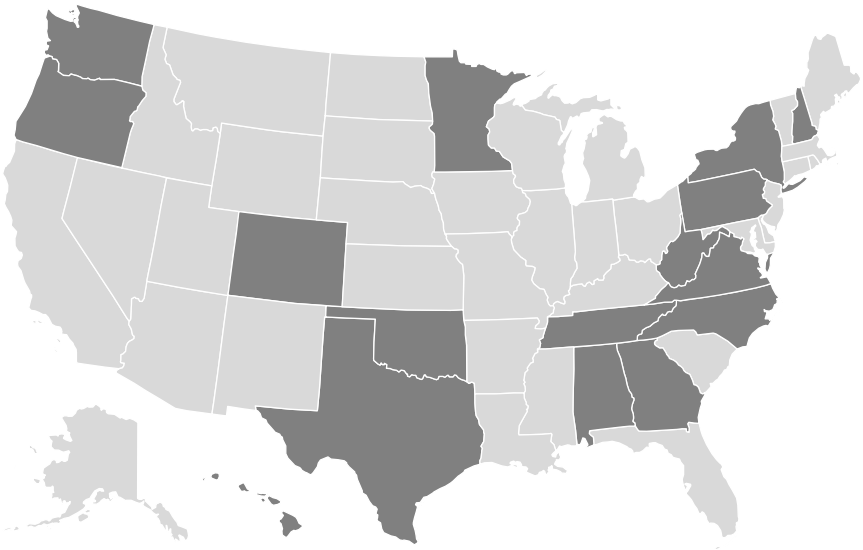
[65] *See* Baude, *supra* note 16, at 54.

[66] *See infra* Appendix 1.

[67] *See* AFTER THE PEOPLE VOTE 91–95 (John Fortier ed., 2004) (listing state Electoral College vote totals corresponding to popular vote outcomes, 1789–2000).

pect that any elector defections would be confined to a single state or a small group of states which perhaps featured statutory commands or normative practices giving rise to greater incidence of faithless electors in those few states. In fact, defecting electors over the course of U.S. history have appeared all over the map as Figure 1 below shows. Far from being clustered all in one state or even in a limited few, elector defections—though they happen rarely—have occurred all over the country in seventeen U.S. states.[68]

FIGURE 1[69]



A third indicator of settled practice regarding elector discretion is the ballots themselves. If electors have come to play only a ministerial role in practice, we might expect that ballots states use would not provide electors with an actual choice. We might imagine, for example, that elector ballots would look something like the one Michigan used in 2016, which left a space for the elector to sign under the words "I hereby cast my vote for

[68] There does not appear to be a strong correlation between states that currently bind electors or remove faithless electors and whether or not those states have had incidents of faithless electors. Colorado, North Carolina, and Oklahoma have a history of one or more defecting electors and currently bind electors. Arizona, Indiana, Michigan, Montana, Nebraska, Nevada, New Mexico, and South Carolina either bind electors or remove defecting electors, but none have had elector defections in the past.

[69] Drawn from *Faithless Electors*, *supra* note 3. For present purposes, "defecting" includes electors who voted against popular will in their state whether by not casting a vote (abstaining) or by voting their conscience. In each case, the elector exercised some degree of discretion, the key factor for purposes of the present analysis. Note that Colorado is shaded in, although the validity of its 2016 faithless elector vote is pending before the Supreme Court. *See Baca*, 140 S. Ct. 918 (2020).

Donald J. Trump for President of the United States."[70] Clearly such "ballot" does not contemplate Michigan electors voting for anyone but Donald J. Trump; it expects only that the elector will merely sign his or her name below the printed "choice" of voters. Colorado elector Michael Baca got around this problem in 2016 when confronted with a similar ballot that listed only Hillary Clinton's name. Unlike Michigan's 2016 elector ballot, Colorado's included a box next to Clinton's name that electors were intended to mark. Instead, Mr. Baca crossed out Clinton's name and wrote in by hand "John Kasich," even drawing a separate box next to Kasich's name and marking that box with an "X" before signing his ballot.[71]

In this way, even when a ballot features a printed name and lacks indicators of choice by design, there is no getting around electors exercising choice by virtue of electors being handed a constitutionally-mandated ballot and a pen.[72]

But Michigan and Colorado's 2016 "choiceless" ballots do not appear to be the norm. Many Electoral College ballots supply electors a true choice as a matter of ballot design. A cursory search (consisting of a Google search of images of Electoral College ballots) reveals that multiple states ballot design decisions do in fact anticipate elector choice quite clearly on the face of the ballot.[73] Electoral College ballots from Illinois in 2008[74] and Texas in 2016[75]

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[70] Sarah Rice, Photograph of Michigan Presidential Elector Ballot, *in* Gary L. Gregg, *The Electoral College—After the People Vote*, EPOCH TIMES (Sept. 18, 2019), https://www.theepochtimes.com/the-electoral-college-after-the-people-vote_3041988.html [https://perma.cc/ZSY8-W4AB].

[71] Derek T. Muller, *Analysis: 10th Circuit Finds Colorado Wrongly Removed Faithless Presidential Elector in 2016*, EXCESS OF DEMOCRACY (Aug. 21, 2019), https://excessofdemocracy.com/blog/2019/8/analysis-10th-circuit-finds-colorado-wrongly-removed-faithless-presidential-elector-in-2016 [https://perma.cc/W6FH-52HF].

[72] Immediately after Mr. Baca wrote in John Kasich's name, he was dismissed as an elector by Colorado Secretary of State Wayne Williams, who replaced Mr. Baca with a substitute elector who then cast a vote for Hillary Clinton. *See* Brief of Appellants at 2, Baca v. Colo. Dep't of State, 935 F.3d 887 (10th Cir. 2019) (No. 18-1173).

[73] Googling "Electoral College ballot" returned images of several ballots that allowed clear elector discretion. These include Texas's 2016 ballot discussed *infra*; Indiana's 2008 ballot, which featured a blank line to allow the elector to enter a choice; Florida's 2000 ballot, which in violation of the Twelfth Amendment includes both the vice presidential and presidential candidates on the same ballot but which instructs the elector, "Mark a cross (X) to the right of the name of the person for whom you desire to vote"; Illinois's 2008 ballot, discussed *infra*; Nevada's 2016 ballot, which leaves a blank line for the elector to fill in the choice; Pennsylvania's 2000 and 2016 ballots, which feature a blank line; and Minnesota's ballot which does not include a year but pictures a handwritten "Barack Obama" in the blank line provided. Three ballot images returned in this search did not include indicators that electors had discretion, i.e., did not provide choice, leave a blank line or otherwise provide obvious avenue for defection: Ohio in 2016, Michigan in 2016, and Colorado in 2016, which Baca nevertheless found a way to defect from as described *infra*.

[74] *See Illinois Electoral College Ballot (2008)*, OFF. OF THE ILL. SECRETARY OF ST., *100 Most Valuable Documents at the Illinois State Archives*, https://www.cyberdriveillinois.com/departments/archives/online_exhibits/100_documents/images/2008-il-electoral-college.jpg [https://perma.cc/Z84C-4NE5].

[75] *See* Bob Daemmrich, Photograph of Texas Presidential Elector Ballot, *in* Patrick Svitek, *Why Bills to Bind Texas' Electoral College Never Reached Gov. Abbott,* TEX. TRIB. (June

are representative: both ask the elector to select one candidate from among a list of presidential nominees.

If settled practice were that electors exercise a ministerial role only, it seems odd that many states—in recent elections—would require electors to indicate a choice on their ballot as in the Illinois and Texas examples. A comprehensive review of electoral ballot design would be required to make any definitive statement about what is or has become settled practice when it comes to expectation of elector discretion from the perspective of ballot design. But such a review, particularly of modern practice,[76] would be helpful in establishing expectations and practice at state Electoral College meetings.

Fourth, to what extent are electors accountable for their vote? Were electors playing a purely ministerial role, one might expect that states would require them to stand by their vote to ensure they had not exercised independent choice when casting their ballots. Yet anecdotal evidence suggests that the practice of electors casting secret ballots may have happened with regularity. In 2004, for example, an elector defected in Minnesota but no one knew which elector had done so because Electoral College balloting had been conducted in secret.[77] Some surmise that use of the word "ballot" in the Constitution's text requires *secret* ballots.[78] Few historians have examined the history of Electoral College balloting. Robert Dixon conducted an informal survey in 1949 on voting procedures in the Electoral College from which he created the chart pictured below in Figure 2.[79]

9, 2017), https://www.texastribune.org/2017/06/09/texas-electoral-college-bills-abbott/ [https://perma.cc/ES7P-WKC3].

[76] *See supra* note 17 (noting Professor Baude's argument that recent practice is more applicable in a liquidation analysis).

[77] *See* Tim Gihring, *The Enduring Mystery of America's Last 'Faithless Elector'*, MINN. POST (Dec. 15, 2016), https://www.minnpost.com/politics-policy/2016/12/enduring-mystery-america-s-last-faithless-elector/ [https://perma.cc/9REW-F88Z].

[78] U.S. CONST. art. II, § 1, cl. 3. A congressional report citing Senator Charles Pinckney, one of the two South Carolina signers of the Constitution, quotes the Senator as follows: "the vote should be taken in such manner [secretly], and on the same day, as to make it impossible for the different States to know who the Electors are for, or for improper domestic, or, what is of much more consequence, foreign influence and gold to interfere." 10 ANNALS OF CONG. 129 (1800) (statement of Sen. Charles Pinckney). It is unclear by whom "secretly" is added in brackets to this quote, but suggests at least some acceptance of secret Electoral College balloting. *See* Robert G. Dixon, Jr., *Electoral College Procedure*, 214 W. POL. Q. 214, 220 (1950) ("The constitutional injunction to vote 'by ballot' would seem to imply secret voting and certainly to require a written ballot.").

[79] *See* Dixon, *supra* note 76, at 221.

FIGURE 2

VOTING PROCEDURE IN ELECTORAL COLLEGE

	Blank Paper	Typewritten Ballot	Printed Ballot	Engraved Ballot	Oral Voting
Elector's Vote Either Signed or Announced	Ala., Mich., Ore.	Ariz., Minn., N.H., Tex., Wyo.	Calif., Del., Ohio, W.Va.,		La., Md., Mass.,* N. D., Wash.
Elector's Vote Neither Signed nor Announced	Idaho, Kan., Mass.,* Mo., Neb., Okla., R.I., S.D., Tenn., Utah, Wis.	Colo., Ill., Mont., Nev., N.C., S.C., Vt.	Conn., Fla., Maine, Pa.**	N.J., N.Y.	

Source: Author's questionnaire to secretaries of states, April, 1949.

* Massachusetts—Elector announces vote as he deposits ballot, which is blank paper and unsigned.

**Pennsylvania—Printed ballot is used but elector writes in name of president and vice-president and is told he need not sign it.

From this evidence, which includes responses from only forty-one states, it appears that in at least twenty-four states, as of 1949, electors were not held accountable for their vote (i.e., they could exercise discretion without anyone knowing how they voted or holding them to a pledged candidate). In the remaining seventeen states, electors were required to stand by their vote, yet it is not clear from this survey whether the ballots distributed nevertheless left room for elector choice as a question of ballot design.[80] Were it uniform practice that electors played only a ministerial role, surely states would universally hold electors accountable for their "vote." Variance among states in elector accountability demonstrates a lack of settled practice with respect to elector balloting—and undermines claims that settled practice assumes electors lack discretion.

Examining other aspects of state procedures and norms in conducting Electoral College meetings could further the "settled practice" analysis. For example, how often do states require electors to select a secretary to preside over the process (much like a jury foreman)? If this is common practice, it may suggest a greater degree of elector independence.[81] Work is required to develop a conclusive picture. But as this sampling demonstrates, looking closely at the statutes, rules, and practices within state Electoral College

[80] In a voice vote, choice is limitless—one can utter whatever one likes. In Massachusetts, Roberts reports that an elector "deposited" an unsigned blank paper ballot as the elector announced his vote, providing ample opportunity for discretion by that design. Dixon, *supra* note 77, at 221.

[81] North Carolina, Ohio and Wisconsin, for example, begin their elector meeting with electors voting on leadership within the group (e.g., secretary). *See* N.C. GEN. STAT. § 163-210 (Lexis Advance through Session Laws 2020-97 of the 2020 Regular Session of the General Assembly, but does not reflect possible future codification directives relating to Session Laws 2020-95 through 2020-97 from the Revisor of Statutes pursuant to G.S. 164-10); OKLA. STAT. ANN. tit. 26, § 10-107 (West, current with enacted legislation of the Second Regular Session of the 57th Legislature (2020)); and Wis. Stat. § 7.75 (West, current through 2019 Act 186, published April 18, 2020).

meetings could help support a conclusion that elector discretion is a deliberate course of practice in most states.

C. Settlement

According to Professor Baude's assessment of "settlement," Madison looked beyond a course of deliberate practice for a degree of "sufficient uniformity" such that a practice becomes *settled*.[82] Examining Madison's writings on the subject, Professor Baude concludes that the settlement analysis consists of two elements: the degree of institutional acquiescence and the degree of popular acceptance of elector discretion. The next two subparts examine each in turn.

1. Institutional Acquiescence

At the federal level, as briefs in the Supreme Court case and litigation below report, the U.S. Congress has yet to turn away a faithless elector's vote.[83] States have sent faithless elector ballots to the President of the Senate more than 150 times; not once has the President of the Senate rejected or otherwise not included faithless ballots in the congressional count.[84] This fact deserves great weight in the present analysis. If some defecting votes had not been accepted or if the Senate accepted defecting ballots early on in U.S.

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[82] *See* BAUDE, *supra* note 17, at 18.

[83] *See* Respondents' Brief in Support of Certiorari, *Baca*, 140 S. Ct. 2316 (2020) (No. 19-518), 2019 WL 6211320, at *7 ("In fact, Congress has accepted every vote contrary to a pledge or expectation in the Nation's history that has been transmitted to it - a total of more than 150 votes across twenty different elections from 1796 to 2016."). Still, there is some disagreement about whether or not this is true. In the highly abnormal election of 1872, the electoral votes from Arkansas and Louisiana were not counted for various reasons, and the reasons given for Louisiana seem to include something about the electors not voting as intended. *See Journal of the Senate of the United States of America, 1789-1873*, AM. MEMORY, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(sj06845)) [https://perma.cc/64HZ-VCGP]. In their cert. brief in Chiafalo, the petitioners refuted this claim on the basis that "Congress did count two ballots from replacement electors in January 2017 - one from Colorado and one from Minnesota." *See* Petition for Writ of Certiorari, *Baca*, 140 S. Ct. 2316 (2020) (No. 19-518), 2019 WL 5390121, at *30–31 (emphasis omitted). In 2016, Congress accepted, without objection, three votes for Colin Powell and a vote each for John Kasich, Ron Paul, Bernie Sanders, and Faith Spotted Eagle. *See* Jamie Garza, *Counting of Electoral College Votes*, C-SPAN (Jan. 6, 2017), https://www.c-span.org/video/?c4642640/user-clip-january-6-2017counting-electoral-college-votes [https://perma.cc/34KS-7JMT] (showing some objections being raised and the counting of deviant votes without objection); *see also* 115 CONG. REC. 246 (1969) ("Objections to the Electoral College votes were recorded in 1969 and 2005. In both cases, the House and Senate rejected the objections and the votes in question were counted."). It is possible that many more electors considered defecting and ultimately chose not to. For example, Richie Robb, a West Virginia elector indicated reticence about casting his ballot for George Bush, though in the end he apparently did. *See* BENNETT, *supra* note 35.

[84] In only two election cycles—1969 and 2005—have formal objections to Electoral College votes been recorded. In both cases, the House and Senate rejected those objections and counted the votes in question. *See Electoral College Fast Facts*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College/ [https://perma.cc/RLG4-7YRX].

history but not later on, one could imagine that the institutional settlement question would be much harder to answer. That the Senate has accepted every defecting vote seems dispositive on the question of institutional acceptance at least with respect to Congress.

What of state-level institutions? In addressing whether *states* can bind electors under Article II, relevant inquiries might be the degree to which states do in fact bind electors, whether states enforce their binding rules in the belief that doing so is constitutional, and whether states that do not have binding rules refrain from enacting them in the belief that such rules are unconstitutional.

On these questions, the picture—though hardly uniform—tilts towards common acceptance of elector discretion. Part of the reason relates to the relative lack of attention in states to elector discretion. As one commenter described it, "the subject of faithless electors is treated by both the Congress and many states with surprising casualness."[85] At present, only nine state statutes require that defecting electors be removed and replaced by alternates.[86] Several other states fine or otherwise penalize defecting electors.[87] New Mexico, for example, slaps faithless electors with a fourth degree felony charge, up to eighteen months in prison, and a fine up to $5,000.[88]

Even in states that statutorily remove electors upon their casting a defecting ballot, such electors are nevertheless handed ballots that anticipate elector choice. The Nevada statute, for example, requires the secretary of state to refuse defecting ballots and replace defecting electors.[89] And yet the

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[85] BENNETT, *supra* note 39, at 97.

[86] States that remove and replace defecting electors include Arizona, Colorado, Indiana, Maine, Michigan, Montana, Nebraska, Nevada, South Carolina, and Washington. This is the process chosen by the Uniform Faithful Presidential Electors Act, discussed *infra* Section IV.A. The UFPEA renders any attempt to vote in violation of a pledge as a resignation creating a vacancy to be filled. Notably, even in states that remove defecting electors, some seem to acknowledge that under certain circumstances electors may yet defect. *See e.g.*, *Electoral College in South Carolina*, S.C. ELECTION COMMISSION, https://www.scvotes.org/electoral-college-south-carolina [https://perma.cc/748L-BKHH] ("Those elected must vote for the candidate for whom they declared. Any person selected to fill a vacancy in the Electoral College must vote for the same candidate for whom the person he is replacing declared. Any elector who votes contrary to their declaration shall be deemed guilty of violating the election laws of the State and upon conviction shall be punished according to law. However, the executive committee of the party from which an elector was elected may relieve the elector from the obligation of his declaration when, in its judgment, circumstances shall have arisen which, in the opinion of the committee, it would not be in the best interest of the State for the elector to cast his ballot for such a candidate.").

[87] States that do not penalize defecting electors affirmatively in their codes may nevertheless punish faithless electors through other statutes. California's election code, for example, imprisons and/or fines anyone "charged with the performance of any duty under any law of this state relating to elections who willfully neglects or refuses to perform it." CAL. ELEC. CODE § 18002 (West, Westlaw through Ch. 3 of 2020 Reg. Sess.). Presumably this includes electors.

[88] *See* N.M. STAT. ANN. § 1-15-9 (West, Westlaw through Ch. 84 of the 2nd Regular Session of the 54th Legislature (2020)).

[89] *See* NEV. REV. STAT. ANN. § 298.075(2) (West, Westlaw through the end of the 80th Reg. Sess. (2019)) ("If a presidential elector . . . [d]oes not present both ballots, presents an unmarked ballot or presents a ballot marked with a vote that does not conform with the [state popular vote]: (1) The Secretary of State shall refuse to accept either ballot of the presidential

ballot handed to electors in 2016 in Nevada contained nothing but a blank space, inviting electors to write down whomever they chose.[90]

One might even argue that state legislatures pass statutes ejecting or otherwise penalizing electors *because* they understand that the Constitution requires elector discretion. In a 2010 publication, the Congressional Quarterly noted that at least as of that year, "no faithless elector has been punished and experts doubt that it would be constitutionally possible to do so."[91] This statement indicates a degree of acceptance that binding laws (at least as of 2010) were largely aspirational. If it were widely understood and accepted that electors could not constitutionally defect, why the need for state statutes binding them (and why such harsh criminal sanctions)? Maybe penalty, removal, and pledge statutes represent toothless pressure tactics imposed in the face of implicit recognition that states lack power to constitutionally bind electors.

If a majority of state legislatures seem to broadly accept elector discretion, what of state courts? It appears that—at least until *Baca* and *Chiafalo*[92]—only two state courts had ruled against elector discretion. The Nebraska Supreme Court held that electors exercising discretion against the popular will in the 1912 election deprived the state's voters of their right to vote.[93] In New York, after electors defected in the 1932 presidential election, a New York superior court ruled that the role of electors is "purely ministerial."[94] These two cases—though of course not authoritative when it comes

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elector; and (2) The Secretary of State shall deem the presidential elector's position vacant. The vacancy must be filled pursuant to the provisions of NRS 298.065.").

[90] *See* Ed Pearce, *Governor Sisolak Vetoes Presidential Popular Vote Compact Bill*, KOLOTV.COM (May 31, 2019), https://www.kolotv.com/content/news/Its-on-the-governors-desk-Nevada-set-to-join-popular-vote-compact-510410131.html [https://perma.cc/J3NQ-RFZQ].

[91] GUIDE TO U.S. ELECTIONS, at 819b (6th ed. 2010); *see also* BENNETT, *supra* note 39, at 98–99 (discussing various reasons why states may not attempt to bind electors in the belief that doing so would ultimately be adjudged unconstitutional); LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 140 (1972).

[92] *In re* Guerra, 441 P.3d 807, 817 (Wash. 2019), *cert. granted sub nom*. Chiafalo v. Washington, 140 S.Ct. 918 (2020).

[93] *See* State *ex rel.* Neb. Republican State Cent. Comm. v. Wait, 138 N.W. 159, 165 (Neb. 1912).

[94] Thomas v. Cohen, 262 N.Y.S. 320, 326 (N.Y. App. Div. 1933). The plaintiff sought mandamus action to require New York to list the names of electors on the ballot (it listed only the names of presidential and vice presidential candidates). He argued, "'I am entitled to know just who the person is and where he lives, to whom I entrust the duty of selecting for me a president and vice-president. I might have great confidence in one man and none in another of the same group. It matters not what their politics is. The presidential electors can make the selection without regard to politics or the candidates nominated by the political parties' . . . 'The law gives the elector the absolute right to vote for any one whom he may please for president and vice-president of the United States.'" *Id.* at 323. Notably, the court gave credence (if not in name) to the concept of liquidation: "Free people have the right to effect a change in the meaning of their written constitution by the process of long and continuous interpretation followed by action, which interpretation and action are contrary to the exact wording of the organic law. Marked change in conditions, nonexistence of reasons for provisions, official action coupled with universal public acceptance and co-operation repeated over a long period of time, such as 100 years, warrant giving to words a meaning interpretive of those new conditions and actions, when the new meaning accords fully and completely with the

to interpreting the federal Constitution, show a degree of institutional acceptance of electors as ministerial agents. Then again, that only one state supreme court and one state superior court have so held despite dozens of defecting electors over the course of U.S. history undermines the conclusion that state courts stand uniformly behind state efforts to bind electors.

This short survey of institutional acquiescence of elector discretion is admittedly incomplete. In addition to further study of state Electoral College practice and procedure, it would be interesting to explore other avenues, such as the degree to which state secretaries of state and attorneys general enforced state elector binding laws. What does emerge, however, is at least the bones of an argument that federal and state institutions routinely acquiesced to and expected elector discretion.

2. Popular Acceptance

As for popular acceptance, the evidence is strong that Americans are accustomed to and accept elector discretion as a default—particularly when circumstances foment. Again, 2016 provides an example. The 2016 Electoral College vote featured a massive campaign to persuade electors to defect.[95] People lobbied hard through letter campaigns and newspaper opinion columns for electors to consider defecting.[96] A "Conscientious Elector" petition at Change.org gained millions of signatures imploring electors to cast their vote for the popular vote winner.[97] The unique circumstances of the 2016

understanding that the public has had for a long time. That is especially so, when a strict interpretation of the language is fraught with unnecessary dangers that would, without doubt, menace the peace and well being of the nation and might even rise to proportions that would challenge the very existence of the republic." *Id.* at 330.

[95] Keith Whittington provides a good summary of the post-2016 activism to persuade electors to upset the Electoral College outcome. *See* Whittington, s*upra* note 7, at 912–17. Many news reports of elector harassment appeared. *See e.g.*, Nathan Brown, *Idaho Secretary of State: Stop Harassing Our Electors*, GOVERNING (Nov. 16, 2016), https://www.governing.com/topics/elections/tns-idaho-electors-sos.html [https://perma.cc/4ZGV-PA3]; Scott Detrow, *Donald Trump Secures Electoral College Win, With Few Surprises*, NPR (Dec. 19, 2016, 4:52 PM), https://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises [https://perma.cc/3PBC-S63U]; Alexandra King, *Electoral College Voter: I'm Getting Death Threats*, CNN (Nov. 30, 2016, 4:27 PM), https://www.cnn.com/2016/11/30/politics/banerian-death-threats-cnntv/index.html [https://perma.cc/5FNQ-HC45].

[96] *See e.g.*, Brown, *supra* note 93; David Pozen, *Why G.O.P. Electoral College Members Can Vote Against Trump*, N.Y. TIMES (Dec. 15, 2016) [https://perma.cc/MXS8-GKMQ]; Linda Sheets, Letter to the Editor, *Electors Obligated to Vote Their Conscience*, DAILY GAZETTE (Dec. 9, 2016), https://dailygazette.com/article/2016/12/09/electors-obligated-to-vote-their-conscience [https://perma.cc/E3HV-R8SP]; Mary L. Strickland, Letter to the Editor, *An Appeal to the Electoral College*, CANTONREP.COM (DEC. 7, 2016, 12:35 PM), https://www.cantonrep.com/opinion/20161207/letter-to-editor-appeal-to-electoral-college?template=AMpart [https://perma.cc/LHP9-78MZ]; Christopher Suprun, Opinion, *Why I Will Not Cast My Electoral Vote for Donald Trump*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html [https://perma.cc/P7K4-EUR8].

[97] *See* Daniel Brezenoff, *Electoral College: Make Hillary Clinton President.,* CHANGE.ORG, https://www.change.org/p/electoral-college-make-hillary-clinton-president-on-december-19-2017 [https://perma.cc/TU94-5NL9].

election unleashed a torrent of popular pressure on specific electors to defect. A *USA Today* headline blared, "Harassment or Hail Mary, Electors Feel Besieged."[98] A *Politico* story titled "Electors Under Siege" recounted how "once-anonymous electors are squarely in the spotlight, targeted by death threats, harassing phone calls and reams of hate mail. One Texas Republican elector said he's been bombarded with more than 200,000 emails."[99] Some states hired protection for beset electors.[100]

Popular pressure on electors following the 2016 popular vote ultimately did nothing to change the outcome of that election. Yet the massive effort underscores that the public assumption that electors have discretion.[101] If widespread acceptance of electors playing only a ministerial role were the norm, how to explain the uproar in 2016? Just because circumstances never previously converged to trigger such widespread calls for the exercise of elector discretion, when circumstances did coalesce in 2016, the public assumed electors possessed the ability to exercise choice.

As the above discussion details, Professor Baude's three elements of liquidation point to settled practice assuming elector discretion. Textual ambiguity leaves the question unanswered; a course of deliberate practice shows states commonly assuming discretion in practices and procedures during Electoral College meetings; and institutions and the public routinely acquiesce and expect electors have discretion. Making these arguments as forcefully as facts allow, however, still leaves room for debate and unanswered questions as the next section explores.

III. Rebuttals

Liquidating Electoral College practice by no means leads inevitably to concluding that the proof that the Constitution prevents states from quashing elector discretion. This section first examines ways in which liquidation points to states' right to bind electors. It then looks at very real shortcomings inherent in trying to apply the principle of liquidation to elector discretion at all.

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[98] Joseph Gerth et al., *Harassment or Hail Mary? Electors Feel Besieged*, USA Today (Nov. 16, 2016, 9:31 AM) https://www.usatoday.com/story/news/politics/elections/2016/11/22/electoral-college-electors/94256024/ [https://perma.cc/XG6B-6MBA].

[99] Kyle Cheney, *Electors Under Siege*, Politico (Dec. 17, 2016, 1:07 PM), https://www.politico.com/story/2016/12/electors-under-siege-232774 [https://perma.cc/72TZ-RG2B].

[100] *See e.g.*, Greg Hadley, *Pennsylvania Presidential Electors to Receive Police Protection Before Vote Monday, Report Says*, News & Observer (Dec. 19, 2016, 7:39 AM), https://www.newsobserver.com/news/politics-government/election/article121700447.html [https://perma.cc/Z8S8-844M].

[101] Students of the Electoral College acknowledge that popular sentiment supports elector discretion. *See* Bennett, *supra* note 35, at 102 ("We have seen that there is a strong current of [public] opinion that elector discretion—and hence defection—is constitutionally protected.").

A. Settled Practice Pointing to the Constitutionality of Binding Electors

The trend in recent decades of states passing statutes to remove or impose penalties on faithless electors could signal growing acceptance of state power to bind electors. National reform movements suggest a tide in this direction. The National Conference of Commissioners on Uniform State Laws (NCCUSL) took up the task of drawing a model statute to ensure faithful electors. In July 2010, NCCUSL issued its model rule, the Uniform Faithful Presidential Electors Act (UFPEA), to encourage standardizing state rules binding electors by removing them should they defect.[102] Six state legislatures have since enacted versions of the rule in their states.[103] That six states signed on to the UFPEA since NCCUSL formally adopted it in 2010 represents some degree of momentum. But it is hardly a stampede. The success of the movement to advance the National Popular Vote Compact (NPVC) could likewise be seen as a signal of growing acceptance of the idea that the national popular vote—not electors—should drive the outcome in elections for President in the United States.[104] Then again, calls for legislative reform might be seen to acknowledge settled practice defaulting to elector discretion—and the desire to change what most understand the Constitution to currently require.

A second reason why liquidation may not clarify the elector discretion question is that the country so far has not been faced with a situation in which faithless electors have changed the outcome of a presidential election.[105] Would the public (and public institutions) accept a faithless elector produced outcome? When no candidate receives sufficient Electoral College votes to win the presidency, the Constitution provides that the House of Representatives elects the President—a so called "contingent election."[106] There is precedent for the public accepting outcomes when faithless electors have led to contingent election for the Vice Presidency.[107] But because the

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[102] The UFPEA requires that "an elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot in violation of the elector's pledge . . . vacates the office of elector, creating a vacant position to be filled under Section 6." *See* UNIF. FAITHFUL PRESIDENTIAL ELECTORS ACT § 7 (UNIF. LAW COMM'N 2010).

[103] These states are Montana in 2011, Nevada in 2013, Nebraska in 2014, Minnesota in 2015, Indiana in 2017, and Washington in 2019. *See Faithful Presidential Electors Act,* UNIFORM L. COMMISSION. https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d [https://perma.cc/B5DH-NADR].

[104] *See* NAT'L POPULAR VOTE!, https://www.nationalpopularvote.com [https://perma.cc/K2H8-X6BJ] (describing the movement and the states that have signed on and are considering signing on).

[105] We came quite close in the 2000 election in which President Bush won the Electoral College by five votes (four if the District of Columbia's defecting elector is included in the Gore count). *See* BENNETT, *supra* note 35, at 99.

[106] U.S. CONST. amend. XII ("[A]nd if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President . . .").

[107] Contingent elections have happened only twice in U.S. history: first, to elect the President in 1825, and second, the Vice President in 1837. *See* EDWARD J. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 73 (2016). The 1825 contingent election was not a result of faithless elector voting; the 1837 contingent elec-

true extent of public acceptance of elector discretion has never been tested by a faithless elector-driven contingent election for the Presidency, we cannot know whether and to what degree our institutions and the public at large would accept it.[108] As a result, that elector defections have been universally recognized thus far does not wholly resolve the question.

Finally, the argument that elector discretion is settled practice bucks up against decades of pronouncements to the contrary. Keith Whittington, writing about faithless electors in 2016, described the intense lobbying effort to persuade electors to defect that year represented as a marked break from past assumptions. Activists after the 2016 popular vote, he writes,

> sought to recast the office of presidential elector from being a mechanical and ceremonial role to being a role of substantial discretionary authority. They dusted off the historical purpose of the Electoral College and reinterpreted it as establishing an invaluable check on democratic errors.[109]

Whittington details the extent to which authoritative actors throughout U.S. history have assumed electors' ministerial role.[110] Quoting Charles Storey, for example, Whittington contends that "[f]or better or for worse, the Constitution 'has been silently changed' and . . . presidential electors 'have been reduced to the duty of reading the newspapers, and recording the result of the action of the party to which they belong.'"[111] Even historian Robert Dixon, who surveyed Electoral College balloting in 1949 as described above, dismissed its relevance. He wrote, "[n]ow that the elector's vote in support of his party's candidates is a forgone conclusion it really matters little whether the form of the elector's action be through signed or unsigned ballots, or viva voce."[112]

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tion was. In 1836, Martin Van Buren comfortably received enough electoral college votes (170) to surpass the number needed to win a majority (148 were needed). His vice presidential running mate, Richard Johnson, however, did not secure enough Electoral College votes. Virginia's twenty-three electors refused to support Johnson after learning of his relationship with an African American woman. As a result, Johnson received only 147 electoral college votes. The Senate then gave the vice presidency to Johnson by a vote of thirty three to sixteen. *See The Senate Elects a Vice President*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Senate_Elects_A_Vice_President.htm [https://perma.cc/6CC3-E7WK].

[108] Some commenters suggest that a faithless-elector-driven outcome in the modern day could lead to "widespread social turmoil, even widespread violence." *See* BENNETT, *supra* note 35, at 103.

[109] Whittington, s*upra* note 7, at 904–05.

[110] For an extensive discussion providing many additional examples, see Whittington, s*upra* note 7, at 929–35.

[111] *Id.* at 932.

[112] Dixon, *supra* note 76, at 221; *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915) ("[Electors] were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President . . . This intention has failed; the "electors" have become a mere means of voting for a particular candidate . . . The understanding that an elector is not really to elect, has now become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians . . . The power of an elector to elect is as completely abolished by constitutional under-

Yet whether and the extent to which these pronouncements deserve weight as evidence of "settled practice" remains an open question. Maybe, for example, such statements are merely descriptive observations about what normally happens. Or maybe they should be read as aspiration. Dixon quotes a 1948 Ohio elector's understanding of his role: "Our task is purely perfunctory if we are faithful to the trust confided in us."[113] In one sense this serves as an acknowledgement that this elector believes he is bound by popular will. In another sense, however, note his use of the word "if." The statement could be read as a warning of sorts—acknowledgement that his fellow electors may not be so cautious. In this way, pronouncements about the ministerial versus discretionary role of electors can be difficult to parse in terms of their relevance to determining settled practice.

B. Analytic Shortcomings of Liquidating Elector Discretion

It may be that the *Noel Canning* test is instructive in some contexts, but not in this one. If President Washington avoided appearing in person to obtain advice and consent at the Senate and subsequent presidents fell into this practice, that is a straightforward example that can be catalogued. Likewise, the frequency of presidential recess appointments is easily measured. Executive action is ripe for liquidation analysis. The difficulty of pinning down settled practice with respect to elector discretion is a much tougher business. Fifty-one Electoral College meetings over the course of dozens of presidential elections does not produce clean answers about either practice or popular expectation.[114] For this reason, perhaps applying liquidation principles to the question of faithless electors is neither conclusive nor instructive.

A second and powerful concern in applying a liquidation analysis here relates to the root of the liquidation idea. If the Supreme Court had held that states may not bind electors, such an outcome would likely be so disruptive as to itself disprove the "settled practice" hypothesis. Some believe that the motive of litigants who sought such an outcome was precisely to disrupt the status quo and prompt popular outcry to amend to the Constitution or advance the NPVC.[115] Yet the liquidation analysis is at least in part intended

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standings in America . . ." Indeed, this view is borne out by the relative lack of care in choosing electors.

[113] Dixon, *supra* note 76, at 221.

[114] Professor Baude suggests that Madison's own reflections on liquidation could preclude its application to practices that lack sufficient uniformity. Baude writes, "[s]ometimes [Madison's] descriptions of an example of liquidation were even more emphatic: 'that which has the uniform sanction of successive legislative bodies, through a period of years and under the varied ascendancy of parties'; [and] 'reiterated and deliberate sanctions of *every* branch of the Govt . . .'" Baude, *supra* note 16, at 16–17.

[115] *See* Richard L. Hasen, *The Coming Reckoning Over the Electoral College*, SLATE (Sept. 4, 2019, 11:08 AM), https://slate.com/news-and-politics/2019/09/electoral-college-supreme-court-lessig-faithless-electors.html [https://perma.cc/44QR-7ZY8] ("[Lawrence] Lessig," a professor at Harvard Law School and one of the attorneys behind the faithless elector litigation, "has a bigger target. He wants to use the case as a way of moving toward a constitutional amendment to change the system for choosing the president to one based on the national popular vote, or to bypass the amendment process by getting enough states in the country

to accomplish the opposite. Professor Baude underscores that liquidation is a fundamentally democratic analytic tool. It is intended to buttress the path forward that involves the least disruption. He writes:

> Liquidation provides a particularly democratic and structured way to harness this kind of traditionalism in constitutional law. The discarding of bad traditions is part of the natural selection account of tradition . . . By looking to settlement across both institutions and parties, and ideally with the public sanction, [liquidation] attempts to entrench traditions that have been found acceptable by many groups of people.[116]

Seen from this perspective, accepting elector discretion as settled practice runs against the calming effect liquidation is meant to supply. For this reason, perhaps liquidation is an inappropriate interpretive tool for reformers hoping to spark change.

Numerous other problems plague applying liquidation to the question of elector discretion. How can popular acceptance be established when, as has been the case in American elections for centuries, and was on full display in the aftermath of the 2020 election, the losing side will always cast doubt on the structure and rules of the contest?[117] Is an analysis of popular will accomplished by measuring it within states or nationally? These and many other questions complicate attempts to liquidate the Constitution's meaning in this context. But, if indeed these challenges to applying liquidation are too difficult to overcome, perhaps the real lesson learned is that Justice Kagan accepted Petitioners' reliance on it too readily.

Conclusion

Where does this leave us? The discussion above is a thought experiment challenging the orthodoxy (and the *Chiafalo* Court's conclusion) that settled practice argues against elector discretion. In fact, evidence suggests that Electoral College norms and practice routinely *anticipate* elector discretion and that institutional and popular acceptance of elector discretion is widespread. Whether or not a liquidation analysis is appropriate in evaluating whether states may constitutionally bind an elector is debatable. But as a matter of practice, original elements of Electoral College design that assumed electors had freedom of choice were not abandoned. Post-*Chiafalo*,

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representing a majority of Electoral College votes to pledge their states' votes to the winner of the national popular vote. Lessig supports this National Popular Vote 'compact,' and he hopes the uncertainty created by the case would create the necessary groundswell of public support for either an amendment or the compact.").

[116] Baude, *supra* note 16, at 46.

[117] *See* Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 943 (2005) (providing empirical support for the losing side often having less faith in the fairness of election processes). *See also* Mot. For Leave to File Bill of Complaint, Texas v. Pennsylvania, No. 220155 (U.S. Dec. 7, 2020).

states would be wise to eliminate trappings of discretion in their Electoral College statutes and procedures to "settle" the matter once and for all.

Appendix 1[118]

In the chart below, presidential elections in which at least one elector voted for someone other than their state's presidential and vice-presidential popular vote winners or abstained from voting for the state's popular vote winners are indicated. An "X" delineates an election in which at least one elector cast a "faithless vote" (i.e., exercised discretion to vote against the popular vote winner in their state). An asterisk indicates an election in which a popularly elected candidate died after the popular vote but before the meeting of the Electoral College.

1796	X	1876		1956	X
1800		1880		1960	X
1804		1884		1964	
1808	X	1888		1968	X
1812	X	1892		1972	X
1816		1896	X	1976	X
1820	X	1900		1980	
1824		1904		1984	
1828	X	1908		1988	X
1832	X	1912	*	1992	
1836	X	1916		1996	
1840		1920		2000	X
1844		1924		2004	X
1848		1928		2008	
1852		1932		2012	
1856		1936		2016	X
1860		1940		[2020]	
1864		1944		[2024]	
1868		1948	X	[2028]	
1872	*	1952		[2032]	

[118] *See Faithless Electors*, *supra* note 3.

The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact

*Michael T. Morley**

The National Popular Vote Compact requires member states to appoint their presidential electors based on the outcome of the national popular vote in presidential elections. It enters into force when states holding a total of 270 electoral votes adopt it. The Compact has already progressed more than two-thirds of the way toward that goal. If it becomes effective, the Compact will fundamentally change the nature of presidential elections, without a constitutional amendment.

The Compact suffers from numerous constitutional flaws that have not been addressed in the literature. By requiring member states to appoint presidential electors based on national vote tallies, the Compact violates the right to vote of those states' citizens. Votes cast by a member state's eligible voters are unconstitutionally diluted or even overwhelmed by votes of other states' citizens, who are ineligible to vote in that member state's elections under its state constitution. The Compact also violates the Equal Protection Clause as applied in Bush v. Gore. *It requires all votes cast throughout the nation in the presidential election to be tallied together, even though they were cast under fifty-one different electoral systems, with materially differing voter qualification standards, opportunities for casting ballots, voter identification requirements, rules for counting and recounting ballots, and even policies on whether ranked-choice voting is permitted.*

The Compact also violates the Constitution's implicit structural protections for federalism. It undermines the special protection that the Electoral College affords smaller states, allowing their citizens' voices to be overwhelmed by votes from states with large populations. More fundamentally, it enables a cabal of states to decide among themselves whom the President will be, rendering other states' electoral votes irrelevant. Finally, the Compact violates the Presidential Electors Clause by purporting to limit the inalienable plenary authority that the U.S. Constitution confers directly on state legislatures to determine the manner in which the state will choose its electors.

Even if the Compact were constitutionally valid, prudential and practical considerations counsel strongly against it. The Electoral College allows a presidential election to be resolved as a series of fifty-one discrete, independent contests, rather than a single national election involving over 136 million votes cast at thousands of locations. The Electoral College's compartmentalization makes the system manageable, confines the scope of recounts or post-election litigation, and limits the consequences of any natural disasters, mistakes, or even fraud that may occur. Due to the geographical breadth of our modern nation and size of our population, the ability to elect a national leader through dozens of smaller, limited elections has become a largely inadvertent gift from the Framers that we should not squander.

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INTRODUCTION

Over the past few years, the United States has moved closer to choosing the President based on the national popular vote in the presidential election. Sixteen states, collectively holding a total of 196 electoral votes, have voted to adopt an interstate compact called the "Agreement Among the States to Elect the President by National Popular Vote" (colloquially, the "National Popular Vote Compact" or "Compact").[1] In 2019 alone, Colorado,[2] Dela-

[1] *See* CAL. ELEC. CODE § 6921 (West, Westlaw through ch. 9 of 2021 Reg. Sess.) (fifty-five electoral votes); COLO. REV. STAT. ANN. § 24-60-4002 (West, Westlaw through legis. effective Apr. 1, 2020 of 2020 Reg. Sess.) (nine electoral votes); CONN. GEN. STAT. ANN. § 9-175a (West, Westlaw through 2020 Reg. Sess.) (seven electoral votes); DEL. CODE ANN. tit. 15, § 4300A (West, Westlaw through ch. 7 of 151st Gen. Assemb. (2021-2022)) (three electoral votes); D.C. CODE ANN. § 1-1051.01 (West, Westlaw through Aug. 6, 2020) (three electoral votes); HAW. REV. STAT. ANN. § 14D-1 (West, Westlaw through 2020 Reg. Sess.) (4 electoral votes); 10 ILL. COMP. STAT. ANN. 20/5 (West, Westlaw through P.A. 101-629) (twenty electoral votes); MD. CODE ANN., ELEC. LAW § 8-5A-01 (West, Westlaw through chs. 1 to 11 from 2020 Reg. Sess. of Gen. Assemb.) (ten electoral votes); 2010 MASS. ACTS 933–34 (eleven electoral votes); N.J. STAT. ANN. § 19:36-4 (West, Westlaw through L.2019, ch. 518 and J.R. No. 33) (fourteen electoral votes); N.M. STAT. ANN. § 1-15-4 (West, Westlaw through ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020)) (five electoral votes); N.Y. ELEC. LAW § 12-402 (McKinney, Westlaw through L.2019, ch. 758 & L.2020, ch. 25) (twenty-nine electoral votes); 2019 Or. Laws ch. 356 (seven electoral votes); R.I. GEN. LAWS § 17-4.2-1 (West, Westlaw through ch. 20-6 of 2020 2nd Reg. Sess.) (four electoral votes); VT. STAT. ANN. tit. 17, § 2751 (West, Westlaw through Acts 1 through 2 of Reg. Sess. of 2021-2022 Vt. Gen. Assemb. (2021)) (three electoral votes); WASH. REV. CODE ANN. § 29A.56.300 (West, Westlaw through 2020 Reg. Sess. of Wash. Leg.) (twelve electoral votes). Colorado held a statewide referendum in 2020 in which the voters reaffirmed the state's approval of the Compact. *See* Colo. Sec'y of State, Official Results, Proposition 113 (Statutory), https://results.enr.clarityelections.com/CO/105975/web.264614/#/detail/1126 [https://perma.cc/CL8T-FW7A]; *see also* John Aguilar, *Now that Prop 113 Has Passed, Colorado Waits for Other States to Join the National Popular Vote Movement*, DENVER POST (Nov. 3, 2020, 3:00 PM).

ware,[3] New Mexico,[4] and Oregon[5] joined the Compact. That year, the Nevada legislature voted to adopt the measure, but the Governor vetoed the bill;[6] it passed the Minnesota House of Representatives, but died in the state senate.[7]

The Compact does not enter into effect until states collectively holding 270 electoral votes have adopted it. This requirement ensures that member states are not required to potentially override their citizens' preferences in presidential elections until enough states have joined the agreement to guarantee that the national popular vote will determine the next President.[8] Some surveys peg popular support for selecting the President based on the national popular vote as high as seventy percent.[9]

Numerous prominent legal scholars have endorsed the Compact in some form, including Bruce Ackerman,[10] Vikram David Amar,[11] Akhil Reed Amar,[12] Robert W. Bennett,[13] Lawrence Lessig,[14] Sanford Levinson,[15] and

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Because the Twenty-Third Amendment effectively treats the District of Columbia as a state for purposes of the Electoral College, this Article will use the term "state" to include the District unless context dictates otherwise. *See* U.S. CONST. amend. XXIII, § 1.

[2] *See* S.B. 42, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (codified at COLO. REV. STAT. ANN. §§ 24-60-4001 to -4004 (West, Westlaw through legis. effective Apr. 1, 2020 of 2020 Reg. Sess.)); *see also* Aguilar, *supra* note 1 (discussing referendum that approved S.B. 42).

[3] *See* S.B. 22, 150th Gen. Assemb., 1st Reg. Sess. (Del. 2019) (codified at DEL. CODE ANN. tit. 15, § 4300A (West, Westlaw through ch. 7 of 151st Gen. Assemb. (2021-2022))).

[4] *See* H.B. 55, 54th Leg., 1st Reg. Sess. (N.M. 2019) (codified at N.M. STAT. ANN. § 1-15-4 (West, Westlaw through ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020))).

[5] *See* S.B. 870, 80th Legis. Assemb., Reg. Sess. (Or. 2019) (codified at 2019 Or. Laws ch. 356).

[6] *See* Assemb. B. 186, 80th Sess. (Nev. 2019); Letter from Steve Sisolak, Governor, Nev., to Jason Frierson, Speaker, Nev. State Assembly (May 30, 2019), http://gov.nv.gov/uploadedFiles/govnewnvgov/Content/2019-05-30_AB186.pdf [https://perma.cc/GEW8-SQJY].

[7] *See* S. File 2227, 91st Leg. (Minn. 2019); SF 2227, MINN. OFF. REVISOR STATUTES, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=SF2227&ssn=0&y=2019 [https://perma.cc/JNK5-SLG8].

[8] *See* James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87, 98 (2014).

[9] *See Polls Show More Than 70% Support for a Nationwide Vote for President*, NAT'L POPULAR VOTE (July 22, 2019), https://www.nationalpopularvote.com/polls [https://perma.cc/HZ59-J3TV]; *see also* Jennifer Karr, Note, *Proportional Union or Paper Confederacy?*, 48 CONN. L. REV. 595, 628 (2015) ("In a survey taken seven years after the 2000 election, seventy-two percent of respondents said they would support abolishing the Electoral College in favor of a national popular vote.").

[10] *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 136–37 (2010).

[11] *See* Vikram David Amar, *Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities*, 69 ARK. L. REV. 253, 262–65 (2016).

[12] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 457 (2012); Akhil Reed Amar, *Electoral College Reform, Lincoln-Style*, 112 NW. U. L. REV. 63, 76–77 (2017) [hereinafter Amar, *Electoral College Reform*] (proposing Compact and alternative); Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 476–80 (2007) [hereinafter Amar, *Some Thoughts*] (same).

[13] Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241 (2001).

[14] LAWRENCE LESSIG, THEY DON'T REPRESENT US: RECLAIMING OUR DEMOCRACY (2019) (arguing that the Electoral College should be reformed).

Jack Balkin.[16] John Koza's book *Every Vote Equal* presents a forceful and comprehensive case in favor of the Compact.[17] The most thorough critical analysis in the scholarly literature[18] appears in a debate between Professors

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[15] *See* Sanford Levinson & Jack Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 292 (2016) ("[S]tates can bargain around the Electoral College through an interstate compact ratified by Congress.").

[16] *See id.*

[17] *See generally* JOHN KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (2006).

[18] Some student pieces provide histories of the issue and varying normative perspectives. *See, e.g.*, Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 229 (2007) (arguing that the Compact's benefits outweigh its costs); Rami Fakhouri, Comment, *The Most Dangerous Blot in Our Constitution: Retiring the Flawed Electoral College "Contingent Procedure,"* 104 NW. U. L. REV. 705, 730 (2010) (arguing for a variation of the Compact to require electors to cast their votes based on the national popular vote only when the electoral vote would otherwise be tied); Dennis A. Leinhardt, Jr., Note, *The Electoral College: An Analysis of Reform Proposals Through the Lens of Past Presidential Elections*, 61 WAYNE L. REV. 439, 447–53, 459–60 (2016) (contrasting the Compact with other potential election reforms and endorsing it). One particularly noteworthy piece, which *Shelby County v. Holder*, 570 U.S. 529 (2013), has subsequently partly undermined, is David Gringer, Note, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 219 (2008), which argues that the Compact violates Sections 2 and 5 of the Voting Rights Act; *cf.* Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 941 (1996) (arguing that states' current winner-take-all systems, which allocate all of a state's presidential electors to whichever presidential candidate wins a statewide plurality, violates Section 2 of the Voting Rights Act). Another equally compelling piece, Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009), outlines a potential Guarantee Clause challenge to the Compact, which this piece briefly discusses below. *See infra* note 117.

A series of online essays, including a symposium in *Michigan Law Review First Impressions*, also examines various aspects of the issue. *See, e.g.*, Alexander S. Belenky, *The Good, the Bad, and the Ugly: Three Proposals to Introduce the Nationwide Popular Vote in U.S. Presidential Elections*, 106 MICH. L. REV. FIRST IMPRESSIONS 110, 113–15 (2008) (critiquing the Compact); Thomas W. Hiltachk, *Reforming the Electoral College One State at a Time*, 106 MICH. L. REV. FIRST IMPRESSIONS 90 (2008) (defending the Electoral College); Daniel P. Rathbun, Comment, *Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118-19 (2008) (arguing that the Compact does not impose true majoritarian rule because states' votes in the Electoral College are not fully proportionate to their populations); *see also* Geoffrey Calderaro, *Promoting Democracy While Preserving Federalism: The Electoral College, the National Popular Vote, and the Federal District Popular Vote Allocation Alternative*, 82 MISS. L.J. SUPRA 287, 289 (2013) (arguing that states should allocate electoral votes by congressional district rather than adopting the Compact); Jillian Robbins, *Changing the System Without Changing the System: How the National Popular Vote Interstate Compact Would Leave Non-Compacting States Without a Leg to Stand On*, 2017 CARDOZO L. REV. DE NOVO 1, 21 (arguing that the Compact is constitutional and does not require congressional consent).

Some pieces also discuss the Compact briefly in the course of broader arguments. *See, e.g.*, Jack M. Beerman, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 736–37 (2014) (questioning the constitutionality of the Compact); Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE W. RES. L. REV. 317, 382–83 (2017) (arguing that the Compact is one of several potential solutions to replace winner-take-all allocations of states' electoral votes); William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 667 n.249 (2009) (recommending a revised version of the Compact); James Sample, *The Electorate as More Than Afterthought*, 2015 U. CHI. LEGAL F. 383, 424 (supporting the Compact, along with many other measures, as a way of benefiting voters); Robert A. Sedler, *Our Eighteenth Century Constitu-*

Norman Williams[19] and Vikram David Amar[20] in the *Georgetown Law Journal*. Professor Derek Muller has also written an insightful piece explaining how the Electoral College promotes what he calls "invisible federalism," by protecting the prerogative of each state to determine its own voter qualifications without pressure to artificially enhance its share of control over presidential elections' outcomes.[21] Several recent articles concerning the validity of interstate compacts assess the Compact's validity under their proposed frameworks.[22]

This Article bolsters existing critiques of the Compact by identifying a range of constitutional flaws that have received scant attention in the academic literature and public debate. It also contends that one of the main benefits of the Electoral College is that it alleviates the need to calculate the national popular vote. Our current system allows us to conduct a presidential election as a series of fifty-one independent smaller contests, rather than a single nationwide event involving over 136 million participants. This approach limits the scope of any problems, emergencies, and post-election disputes, and makes it easier to reach an accurate outcome, bolstering the legitimacy of the process.

Part I begins by briefly explaining the current structure and operation of the Electoral College, as well as the major objections to it. This part then surveys the key provisions of the Compact, which supporters advocate as the most convenient means of circumventing the Electoral College.

Part II rebuts one common constitutional objection to the Compact, demonstrating that it is unlikely to require congressional consent under the

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tion, the Electoral College, and Congressional Reapportionment: A Response to Professor Daniel Tokaji, 34 OHIO N.U. L. REV. 361, 366–69 (2008) (rejecting the Compact because our current method of electing the President is "an integral part of the American political system"); *see also* Jerry Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 988–90 (2016) (endorsing the Compact as a possible reform).

[19] *See* Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011) [hereinafter, Williams, *Reforming the Electoral College*]; *see also* Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1526–27 (2012) [hereinafter, Williams, *National Vote Compact*] (arguing that the Compact violates the Presidential Electors Clause).

[20] *See* Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237 (2011). For a transcript of a written debate among other law professors concerning the issue, see Sanford Levinson et al., *Debate: Should We Dispense with the Electoral College?*, 156 U. PA. L. REV. PENNUMBRA 10 (2007).

[21] Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1278 (2012). An influential Note in the *Harvard Law Review* does not expressly discuss the Compact, but calls for replacement of the Electoral College and is frequently cited in academic debates over the Compact. *See* Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526 (2001).

[22] *See* Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the "Federal Structure,"* 44 N.M. L. REV. 383, 429 (2014) (arguing that the Compact requires congressional approval); Derek Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 387–393 (2007); *see also infra* notes 148-51 and accompanying text.

Compact Clause of the Constitution.[23] The Supreme Court's current standard for requiring congressional approval of interstate agreements is very lax. The Court focuses on whether a compact would aggrandize member states' authority at the expense of the federal government, ignoring the compact's horizontal impact on non-member states.[24] Though a strong argument can be made that the Court should modify its Compact Clause jurisprudence, under current doctrine the Compact probably does not need congressional assent. Moreover, even if the Compact Clause applied, it would be merely a temporary roadblock since an ideologically sympathetic Congress could approve the Compact at any time.

Part III explains that, regardless of congressional approval, the Compact likely violates the Constitution in four ways. *First*, the Compact infringes the Fourteenth Amendment right to vote.[25] The Supreme Court has held that this right includes not only the right to cast a ballot, but to have that ballot be counted and given full effect without being diluted or cancelled out by ballots from ineligible people.[26] Nearly every state constitution in the nation specifies that, to be eligible to vote in elections for that state's public offices, a person must be a citizen of that state.[27] Yet the Compact requires each member state to appoint its presidential electors based on the outcome of the national popular vote. In this way, the Compact allows the votes of a member state's eligible voters to be unconstitutionally diluted and potentially even overridden by the votes of other states' citizens, who are ineligible to participate in that state's elections. Appointing a state's presidential electors based primarily on the votes of ineligible voters violates not only the state constitution's voter qualification requirements, but the federally protected right to vote, as well.

Second, the Compact violates the Fourteenth Amendment's Equal Protection Clause.[28] In *Bush v. Gore*, the U.S. Supreme Court held that the Equal Protection Clause requires states to apply a uniform standard to determine the validity of all ballots cast by members of the relevant electorate in an election.[29] By requiring member states to appoint presidential electors based on the outcome of the national popular vote, the Compact makes the entire nation the relevant electorate for equal protection purposes. The Compact treats presidential votes from all states as fungible, aggregating them together to determine the slate of electors that each member state must appoint. Yet each state has very different electoral rules, including different

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[23] *See* U.S. CONST. art. I, § 10, cl. 3.

[24] *See, e.g.*, U.S. Steel v. Multistate Tax Comm'n, 434 U.S. 452, 471–72 (1978).

[25] *See* U.S. CONST. amend. XIV, § 1; Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[The] political franchise of voting is . . . a fundamental political right, because preservative of all rights."); *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . .").

[26] *See infra* note 182 and accompanying text.

[27] *See infra* note 184 and accompanying text.

[28] *See* U.S. CONST. amend. XIV, § 1.

[29] *See* 531 U.S. at 104-05.

voter qualifications, registration deadlines, absentee ballot restrictions, voter identification requirements and, most importantly, standards for determining what constitutes a legally valid vote.[30] Votes that would be deemed valid in one jurisdiction may be rejected under other jurisdictions' standards. Applying such disparate standards to voters from across the nation who are effectively participating in the same election would violate the Equal Protection Clause as interpreted in *Bush v. Gore*.

Third, the Compact violates several of the Constitution's structural, federalism-based restrictions. Most obviously, it eliminates the structural protection that the Electoral College provides for small states. The Electoral College amplifies their voters' voices so they are not completely drowned out by the voters of the nation's most populous states. More disturbingly, through the Compact, a cabal of states collectively possessing enough electoral votes to determine the outcome of a presidential election determines in advance that its members will cast their ballots for the same candidate, based on the same criterion. This agreement renders the electoral votes of nonmember states irrelevant. The Constitution must be read to implicitly prohibit a subset of states from exerting a stranglehold over the Presidency in this manner—even if those states collectively adopt the national popular vote as their criterion for choosing their respective presidential electors.

Finally, the Compact violates the Presidential Electors Clause, which empowers states to appoint presidential electors.[31] The Clause is part of the constitutional framework that establishes the Electoral College as the mechanism for selecting the President. The Framers expressly adopted the Electoral College as an alternative to a national popular vote. The Clause cannot reasonably be construed as authorizing states to adopt the very alternative that the Framers specifically rejected.

Perhaps more importantly, the Supreme Court held in *McPherson v. Blacker*[32] that the Clause gives state legislatures plenary authority over the appointment of presidential electors that "can neither be taken away nor abdicated," even by a state constitution.[33] One of the Compact's key provisions, however, specifies that a member state cannot withdraw from the Compact—in other words, a member state cannot change its method of selecting presidential electors—within six months of a presidential election.[34] The Compact cannot validly limit a state legislature's plenary, inalienable authority under the U.S. Constitution to determine how the state's presidential electors will be appointed. And that six-month deadline is an integral, inseverable part of the Compact that prevents member states from reneging at the

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[30] *See infra* notes 213–22 and accompanying text.
[31] *See* U.S. CONST. art. II, § 1, cl. 2.
[32] 146 U.S. 1 (1892).
[33] *Id.* at 35 (quoting S. REP. NO. 43-395, at 9 (1874)).
[34] *See, e.g.*, CAL. ELEC. CODE § 6921, art. IV, para. 2 (West, Westlaw through ch. 9 of 2021 Reg. Sess.). Since all parties to the Compact have adopted it in materially identical form, this Article cites the Compact as it appears in the California Election Code for convenience.

last minute if they do not like how presidential polls are trending. Without that lynchpin, the entire Compact collapses.

Part IV emphasizes the enormous practical problems that the Compact would create in close elections. If the outcomes of presidential elections were based on national popular vote tallies, candidates in tight races would have a compelling incentive to seek fifty-one simultaneous recounts and potentially pursue up to fifty-one separate election contests in a compressed timeframe across the nation. The past two decades have demonstrated that such post-election maneuvers will inevitably be accompanied by a raft of simultaneous state and federal constitutional challenges, litigated in accelerated emergency proceedings. Particularly if state supreme courts or U.S. Courts of Appeals resolved similar issues in different ways, a contentious resolution by the U.S. Supreme Court or even the chambers of Congress themselves might be necessary.[35] *Bush v. Gore*, which was limited to ballots and election officials in the state of Florida, was traumatic enough for the nation.[36] *Bush v. Gore* occurring simultaneously in fifty-one different jurisdictions throughout the nation would irrevocably undermine public faith in the electoral process.

Moreover, by turning a presidential election into a single national contest, the Compact would eliminate the Electoral College's inherent firewalls, allowing problems in a single jurisdiction to impact the rest of the country. Under the Compact, a natural disaster, terrorist attack, mistake, or even fraud within a state would not only potentially affect that state's slate of electors, but reverberate across all of the Compact's member states as well. Additionally, because the national popular vote tally is impacted by every problem that happens in every state across the nation, the overall accuracy of a presidential election's results would be much more dubious than under current law. Our current system treats each jurisdiction's election as an isolated event; problems in one race do not spill over to impact other states' outcomes. The Compact blithely eliminates these structural safeguards.

The article briefly concludes by explaining that the Electoral College is one of the Framers' most important inadvertent gifts, performing valuable functions that the Framers themselves could not have anticipated. Allowing a presidential election to be resolved as a series of fifty-one discrete, parallel contests, rather than a single national election involving over 136 million votes, makes the system more manageable, cabins the scope of any post-election administrative proceedings or judicial challenges, and limits the potential consequences of any natural disasters, terrorist attacks, fraud, mistakes, or other difficulties that arise. Considering both the vast geographic extent of our nation and the size of our population, the ability that the Elec-

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[35] *See* U.S. CONST. amend. XII (discussing Congress's role in counting electoral votes).

[36] *See 2000 Year-End Report on the Federal Judiciary*, SUPREME COURT (2001), https://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.aspx [https://perma.cc/83TJ-VST7] (noting that the 2000 election "tested our constitutional system in ways it had never been tested before," and both federal and state courts "became involved in a way that one hopes will seldom, if ever, be necessary in the future").

toral College provides to elect a national leader through dozens of limited, distinct elections is a near-miraculous gift that we should not squander.

I. Background on the Electoral College and National Popular Vote Compact

The Compact is a mechanism for electing a President through a national popular vote without amending the Constitution to eliminate the Electoral College. This part begins by discussing the constitutional structure of the Electoral College, then analyzes some of the major objections to this arrangement. It concludes by explaining how the Compact would operate within the confines of the Electoral College to elect the President based on the national popular vote.

A. The Electoral College and Its Critics

The Framers adopted the Electoral College as the primary constitutional mechanism for selecting a President,[37] rather than allowing either Congress to appoint the President[38] or the people to vote for the office directly.[39] The Constitution allots each state a number of presidential electors equal to the number of Senators and Representatives in that state's congressional delegation.[40] Because each state has at least one representative and two senators,[41] it is entitled to at least three presidential electors. Thus, a state's influence in the Electoral College is roughly proportionate to its population, but this proportionality is tempered by the guaranteed allotment of three electors for sparsely populated states.

The U.S. Constitution's Presidential Electors Clause empowers each state's legislature to decide how its electors will be appointed.[42] Legislatures

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[37] As discussed below, if no candidate wins a majority of votes in the Electoral College, the U.S. House of Representatives selects the President. *See infra* notes 63–64 and accompanying text. Many commentators explain that the Framers originally intended the Electoral College to function as a primary election, winnowing the list of viable presidential candidates from which the House would make the final selection. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 Wm. & Mary L. Rev. 1501, 1520–21 (2014); Williams, *National Vote Compact*, *supra* note 19, at 1569.

[38] *See* William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. Legis. 145, 152–53 (1996).

[39] *See infra* notes 262–64 and accompanying text.

[40] *See* U.S. Const. art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3 (2018).

[41] *See* U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 3, cl. 1; *id.* amend. XVII. The Twenty-Third Amendment grants the District of Columbia three electoral votes, as well, despite its lack of voting representation in Congress. *See id.* amend. XXIII, § 1.

[42] *See id.* art. II, § 1, cl. 2. Congress, however, "may determine the time of choosing the electors." *Id.* art. II, § 1, cl. 4. It has exercised this power by requiring states to choose electors either on Election Day, or on a later date if a state holds an election on Election Day but "fail[s] to make a choice." 3 U.S.C. §§ 1–2 (2018).

Commentators debate the implications of the Constitution's delegation of authority over the appointment of presidential electors specifically to the legislature of each state, rather than to the state as a whole. Most notably, throughout the nineteenth century, several state supreme

have virtually plenary power over the issue, so long as they do not violate other federal constitutional provisions.[43] For example, electors may not be Senators, Representatives, or anyone else holding an "Office of Trust or Profit Under the United States."[44] Historically, states chose electors in a variety of ways, including direct appointment by the legislature itself, election of individual electors on a district-by-district basis, and statewide elections for the state's full slate of electors on a winner-take-all basis (also referred to as the "unit rule").[45] Forty-nine jurisdictions presently use a winner-take-all or unit-rule system.[46] Under this approach, when a presidential candidate wins the popular vote within a state, the candidates for presidential elector associated with that person are appointed to that state's seats in the Electoral College.[47] Maine[48] and Nebraska,[49] in contrast, award most of their electors

courts, the chambers of Congress, and some leading commentators concluded that, when state legislatures exercise their authority under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, or Presidential Electors Clause, *id.* art. II, § 1, cl. 2, to regulate federal elections, they are bound only by the substantive constraints set forth in the U.S. Constitution and federal law, and not state constitutions, as well. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2021). *But see* Hayward Smith, *History of the Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 733 (2001) (rejecting this interpretation of the Presidential Electors Clause).

Likewise, the Presidential Electors Clause's use of the term "Legislature" could be read to mean that laws governing presidential elections may not be enacted through public initiative or referendum, *see* Richard L. Hasen, *When "Legislature" May Mean More Than Legislature: Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 601 (2008) (concluding that "[t]here are reasonable policy arguments to be made on both sides of the question"), but the Supreme Court rejected this argument in the analogous context of the Elections Clause, *see* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808–09 (2015); *see also* Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631, 641 (2008). Commentators also disagree over whether to read *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76–78 (2000) (per curiam), as requiring courts to construe state laws regulating federal elections according to a super-strong plain-meaning canon. *Compare* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1262 (2002) ("Article II of the Constitution appears on its face to forbid . . . judicial reshaping of the law in connection with the appointment of presidential electors."), *and* RICHARD POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 155–56 (2001), *with* Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 98 (2002) (arguing that presidential elections are governed by the "usual interplay of state statutes, the state constitution, and judicial interpretations").

[43] *See* McPherson v. Blacker, 146 U.S. 1, 25, 27 (1892). The *McPherson* Court asserted in dicta that state legislatures are not bound by their state constitutions when regulating federal elections, *id.* at 34–35 (quoting S. REP. NO. 43-395, at 2 (1874)), but in recent years the Court has rejected that premise, *Ariz. State Legislature*, 576 U.S. at 818–19; *cf.* Morley, *supra* note 42, at 8–9 (explaining that state legislatures regulate federal elections through a grant of authority directly from the U.S. Constitution and are not subject to substantive restrictions in state constitutions when exercising that power).

[44] U.S. CONST. art. II, § 1, cl. 3.

[45] *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 20 (2020).

[46] *See* Josephson & Ross, *supra* note 38, at 160.

[47] A political party that wishes to have its presidential nominee appear on a state's ballot generally must nominate a slate of people to serve as presidential electors in the event that nominee wins the state's popular vote. Similarly, independent candidates are typically required

based on the popular vote within each of their congressional districts, with the winner of the statewide popular vote receiving two additional elector positions (corresponding to the state's Senators).

The Twelfth Amendment provides that electors must meet within their respective states to cast their electoral votes.[50] Federal law specifies that these meetings must occur on "the first Monday after the second Wednesday in December" following the election.[51] Each elector casts one vote for President and another vote for Vice President; the candidates an elector chooses may not both be from the same state.[52] Over three-fifths of states have laws requiring their electors to cast their electoral votes for the presidential and vice-presidential candidates of the political party that nominated them.[53] The enforcement mechanisms for these measures vary greatly, however. Many states lack any express means of enforcing their "elector binding" requirements.[54] Some impose sanctions on electors who vote the "wrong"

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to file their own slates of electors to be appointed in the event they receive a plurality of the statewide popular vote. *See, e.g.*, FLA. STAT. ANN. §§ 103.021(3), 103.022 (West, Westlaw through ch. 18 of the 2020 Second Reg. Sess. of the 26th Leg.).

[48] *See* ME. REV. STAT. ANN. tit. 21-A, § 802 (West, Westlaw through 2019 2nd Reg. Sess. of 129th Leg.).

[49] *See* NEB. REV. STAT. ANN. § 32-710 (West, Westlaw through legis. effective Mar. 26, 2020, of 2nd Reg. Sess. of 106th Leg. (2020)).

[50] *See* U.S. CONST. amend. XII.

[51] 3 U.S.C. § 7 (2018); *see also* U.S. CONST. art. II, § 1, cl. 4 (empowering Congress to "determine . . . the day on which [presidential electors] shall give their votes"). The Constitution further specifies that electors must cast their electoral votes on "the same [day] throughout the United States." U.S. CONST. art. II, § 1, cl. 4.

[52] *See* U.S. CONST. amend. XII; *see also* 3 U.S.C. § 8 (2018) (requiring electors to cast their votes "in the manner directed by the Constitution").

[53] *See* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS 1–29 (2016), https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf [https://perma.cc/Z7S5-KRBW]; *see also Faithless Elector State Laws*, FAIRVOTE, https://www.fairvote.org/faithless_elector_state_laws (last updated July 7, 2020) [https://perma.cc/SNU4-EM4].

[54] *See, e.g.*, ALA. CODE § 17-14-31 (West, Westlaw through Act 2020-2060); ALASKA STAT. ANN. § 15.30.090 (West, Westlaw through ch. 32 of 2020 2nd Reg. Sess. of 31st Leg.); CONN. GEN. STAT. ANN. § 9-176 (West, Westlaw through 2020 Reg. Sess.); DEL. CODE ANN. tit. 15, § 4303(b) (West, Westlaw through ch. 7 of 151st Gen. Assemb. (2021-2022)); D.C. CODE ANN. § 1-1001.08(g) (West, Westlaw through Aug. 6, 2020); FLA. STAT. ANN. § 103.021(1) (West, Westlaw through chs. from 2020 Second Reg. Sess. of 26th Leg. in effect through July 1, 2020); HAW. REV. STAT. ANN. § 14-28 (West, Westlaw through 2020 Reg. Sess.); MD. CODE ANN., ELEC. LAW § 8-505 (West, Westlaw through chs. 1 to 11 from 2020 Reg. Sess. of Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 53, § 8 (West, Westlaw through ch. 129 of 2020 2nd Annual Sess.); MISS. CODE ANN. § 23-15-785 (West, Westlaw through laws from 2020 Reg. Sess. effective upon passage as approved through Aug. 21, 2020); OHIO REV. CODE ANN. § 3505.40 (West, Westlaw through File 40 of 133rd Gen. Assemb. (2019-2020)); OR. REV. STAT. ANN. § 248.355(2) (West, Westlaw through 2020 Reg. Sess. of 80th Legis. Assemb.); TENN. CODE ANN. § 2-15-104(c) (West, Westlaw through laws from 2020 First Reg. Sess. of 111th Tenn. Gen. Assemb., effective through Sept. 1, 2020); VT. STAT. ANN. tit. 17, § 2732 (West, Westlaw through Acts 1 through 2 of Reg. Sess. of 2021-2022 Vt. Gen. Assemb. (2021)); VA. CODE ANN. § 24.2-204 (West, Westlaw through end of 2020 Reg. Sess.); WIS. STAT. ANN. § 7.75(2) (West, Westlaw through 2019 Act 186, published Apr. 18, 2020); WYO. STAT. ANN. § 22-19-108 (West, Westlaw through 2020 Budget Sess. of Wyo. Leg.).

way,[55] others allow them to be removed from office and replaced with alternates,[56] and a few jurisdictions do both.[57] The Supreme Court recently affirmed the constitutionality of such measures.[58]

After a state's electors cast their electoral votes, the state tallies, certifies, and transmits them to the President of the U.S. Senate.[59] On the following January 6, Congress meets in joint session and the Senate President opens each state's certificate to count its votes.[60] If members object to particular votes, the chambers re-convene separately to decide whether to count them.[61] A candidate becomes President or Vice President if he or she receives electoral votes from a majority of electors appointed.[62] If no one receives a majority of votes for President, then the House of Representatives chooses the President from among the three candidates who received the most electoral votes for that office.[63] When choosing the President, each state's House delegation votes as a unit, casting a single vote; a candidate must win a majority of states' votes in the House to become President.[64]

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[55] *See, e.g.*, N.M. STAT. ANN. § 1-15-9 (West, Westlaw through ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020)); S.C. CODE ANN. § 7-19-80 (West, Westlaw through 2020 Act No. 142).

[56] *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-212 (West, Westlaw through Second Reg. Sess. of 54th Leg. (2020)); CAL. ELEC. CODE § 6906 (West, Westlaw through ch. 10 of 2021 Reg. Sess.); COLO. REV. STAT. ANN. § 1-4-304 (West, Westlaw through legis. effective Apr. 1, 2020 of 2020 Reg. Sess.); IND. CODE ANN. §§ 3-10-4-1.7, 3-10-4-9 (West, Westlaw through all legis. of 2020 Second Reg. Sess. of 121st Gen. Assemb.); ME. REV. STAT. ANN. tit. 21-A, § 805(2) (West, Westlaw through 2019 2nd Reg. Sess. of 129th Leg.); MICH. COMP. LAWS ANN. § 168.47 (West, Westlaw through P.A.2020, No. 149, of 2020 Reg. Sess., 100th Leg.); MINN. STAT. ANN. § 208.46 (West, Westlaw through 2020 Reg. Sess. and 1st, 2nd, and 3rd Spec. Sess.); MONT. CODE ANN. § 13-25-307 (West, Westlaw through 2019 Sess.); NEB. REV. STAT. ANN. § 32-713(2) (West, Westlaw through legis. effective Mar. 26, 2020, of 2nd Reg. Sess. of 106th Leg. (2020)); NEV. REV. STAT. ANN. § 298.045 (West, Westlaw through end of both 31st and 32nd Spec. Sess. (2020)); UTAH CODE ANN. § 20A-13-304 (West, Westlaw through 2020 Fifth Spec. Sess.); WASH. REV. CODE ANN. § 29A.56.090 (West, Westlaw through 2020 Reg. Sess. of Wash. Leg.).

[57] *See* N.C. GEN. STAT. ANN. § 163-212 (West, Westlaw through S.L. 2020-57 of 2020 Reg. Sess. of Gen. Assemb.); OKLA. STAT. ANN. tit. 26, §§ 10-102, -108 (West, Westlaw through legis. effective through Sept. 1, 2020 of Second Reg. Sess. of 57th Leg. (2020)).

[58] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020); Colo. Dep't of State v. Baca, 140 S. Ct. 2316 (2020) (mem.).

[59] *See* U.S. CONST. amend. XII; *see also* 3 U.S.C. §§ 9–11 (2018).

[60] *See* U.S. CONST. amend. XII; 3 U.S.C. § 15 (2018).

[61] *See* 3 U.S.C. § 15 (2018). An objection is in order only if it is submitted in writing and signed by at least one Member of the House of Representatives and one Senator. *See id.*

[62] *See* U.S. CONST. amend. XII. If an elector abstains from voting for President or Vice President, it appears that person would still be counted in determining the number of electoral votes that constitutes a majority.

[63] *See id.*

[64] *See id.* The House of Representatives has resolved only two presidential elections, in 1800 and 1824. The election of 1800 was conducted under the original rules set forth in the Constitution of 1789, before the Twelfth Amendment was adopted. Each elector cast two electoral votes, without distinguishing between the offices of President and Vice President. *See* U.S. CONST. art. II, § 1, cl. 3. The candidate who received the most votes, so long as it was a majority, became President, and the candidate who received the second-greatest number of votes became Vice President. *See id.* Because the Democratic-Republican electors supported the Jefferson-Burr ticket, they all cast their electoral votes for both candidates. As a result, Jefferson and Burr received the same number of electoral votes. The election was thrown to the

Similarly, if no candidate receives electoral votes for Vice President from a majority of electors, the Senate chooses the winner from between the two candidates with the most electoral votes for that office.[65] A candidate must receive a majority of votes in the Senate to prevail.[66]

While commentators have attacked the Electoral College on a wide variety of grounds, there are four main critiques. The primary objection to the Electoral College is that it is antidemocratic because it allows a candidate to win the Presidency without receiving a majority, or even plurality, of the popular vote. Throughout American history, we have had five Presidents elected without winning a plurality of the popular vote.[67]

TABLE 1: PRESIDENTS ELECTED WITHOUT A PLURALITY OF THE POPULAR VOTE

Year	Prevailing Candidate	Popular Vote	Electoral Votes	Other Candidate(s)	Popular Votes	Electoral Vote	Comment
1824	John Quincy Adams (Democratic-Republican)	113,122 (30.92%) *lost by 38,149 votes*	84 (32.18%)	Andrew Jackson William H. Crawford Henry Clay (all Democratic-Republicans)	151,271 (41.35%) 40,856 (11.17%) 47,531 (12.99%)	99 (37.93%) 41 (15.71%) 37 (14.18%)	Election decided by U.S. House (Adams won 13 out of 23 states)
1876	Rutherford B. Hayes (Republican)	4,033,497 (47.95%) *lost by 254,694 votes*	185 (50.14%)	Samuel Tilden (Democrat)	4,288,191 (50.98%)	184 (49.86%)	Electoral votes from four states decided by commission
1888	Benjamin Harrison (Republican)	5,449,825 (47.82%) *lost by 89,293 votes*	233 (58.10%)	Grover Cleveland (Democrat)	5,539,118 (48.61%)	168 (41.90%)	
2000	George W. Bush (Republican)	50,455,156 (47.87%) *lost by 537,179 votes*	271 (50.37%)	Albert Gore, Jr. (Democrat)	50,992,335 (48.38%)	266 (49.44%)	Florida recount halted by U.S. Supreme Court
2016	Donald Trump (Republican)	62,984,828 (46.09%) *lost by 2,868,686 votes*	304 (56.51%)	Hillary Clinton (Democrat)	65,853,514 (48.18%)	227 (42.19%)	

House of Representatives, which selected Jefferson after dozens of rounds of voting. *See* S. DOC. NO. 113-1, at 1340 (2014); Josephson, *supra* note 18, at 623–25. The House was forced to resolve the election of 1824 because electoral votes were split among four candidates—all Democratic-Republicans—none of whom received a majority. *See* S. DOC. NO. 113-1, at 1343. The House ultimately selected John Quincy Adams as President, even though he had lost both the national popular vote and the electoral vote. *See* Fakhouri, *supra* note 18, at 718–22.

[65] *See* U.S. CONST. amend. XII.

[66] *See id.*

[67] Statistics are from FED. ELECTION COMM'N, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 6 (2017), https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf [https://perma.cc/5SLW-UD26]; 1 CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 755, 768, 771, 799 (Deborah Kalb ed., 7th ed. 2016); *see also* Levinson, *supra* note 20, at 10 (statement of Levinson) (critiquing the Electoral College because it "regularly sends to the White House persons who did not receive a majority of the popular vote," or even a plurality).

Democracy can take "many possible forms" however; there are "many different institutional embodiments of democratic politics."[68] As Professors Rick Pildes and Elizabeth Anderson argue, "[n]o uniquely 'rational' institutional architecture exists" for determining the will of the people, because "no such collective will exists" independent of the political institutions and electoral processes used to ascertain and implement it.[69] The Constitution itself embodies the notion that the will of the people can be measured and applied both directly and indirectly through different mechanisms in order to promote government stability. The Electoral College enables the President to be elected on both a national and federal basis, taking into account the will of the people intermediated through the states that comprise our constitutional structure.[70] Thus, the democracy-based critique of the Electoral College is rooted in the somewhat tautological assumption that a national popular vote is the only, or most legitimate, way of ascertaining the popular will. Moreover, it overlooks the fact that the Framers specifically declined to adopt a purely democratic system in order to ensure the nation's long-term stability and prevent the government from degenerating into mob rule.[71]

Relatedly, critics also contend that the Electoral College violates one-person, one-vote principles.[72] They argue that, because each state receives at least three electoral votes no matter how small its population, the Electoral College gives greater weight to votes from sparsely populated states than more populous ones.[73] This equality-based challenge to the Electoral College may be overstated, however. In addition to artificially inflating the weight of small states' votes, the Electoral College also allows large states to "amplify" the effects of their citizens' preferences by awarding electoral votes on a winner-take-all basis.[74]

In most states, the candidate who receives a plurality of the statewide popular vote is awarded all of that state's electors.[75] In this way, nearly every state throws all of its voting power in the Electoral College behind a candidate supported by only a fraction—not necessarily even a majority—of its

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[68] SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 1 (5th ed. 2016).

[69] Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197–98 (1990).

[70] *See* THE FEDERALIST NO. 39, at 251 (James Madison).

[71] *See, e.g.*, James Madison, Journal (July 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 31 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS] (statement of George Mason); James Madison, Journal (Aug. 7, 1787), *in id.* at 193, 203–04 (statement of James Madison); *see also* Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birthplace of American Jurisprudence*, 29 J.L. & POL. 189, 211 n.95 (2014) (collecting quotes from the Constitutional Convention).

[72] *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

[73] *See* Levinson, *supra* note 20, at 12 (statement of Levinson); *see also* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 906–07 (2017) (explaining how the structure of the Electoral College creates disparities between the size of a state's population and the number of electoral votes allotted to it).

[74] *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, *supra* note 21, at 2537–38.

[75] *See supra* notes 46–47 and accompanying text.

voters. A large state has more electoral votes than smaller states with which to artificially enhance the support of the candidate who wins its statewide popular vote. Some commentators have concluded that this "winner-take-all bias" in favor of large states generally outweighs the advantages that the Electoral College confers on small states,[76] while Professor Akhil Amar suggests that these competing biases generally cancel each other out.[77]

Professor Derek Muller also points out that presidential elections are not unique in according somewhat differing degrees of voting power to people in different jurisdictions.[78] Despite the Supreme Court's "one-person, one-vote" case law, states generally draw their congressional districts so as to equalize each district's total population, rather than the number of eligible, likely, or actual voters.[79] As a result, each voter in a district where voters comprise a relatively lower percentage of the overall population has greater power to determine a congressional election's outcome than voters in districts comprised of higher percentages of voters.[80] Thus, voters in different congressional districts exercise differing proportions of power to determine who their respective representatives will be. The presidential election process, Muller argues, imposes similarly tolerable minor disparities in the relative ability of voters in different states to affect the election's outcome.[81]

Critics also maintain that the Electoral College leads candidates to focus their attention on only a few "swing" states,[82] distorting not only the policies they propose, but even Executive Branch decision-making in the months leading up to presidential elections.[83] States' winner-take-all systems encourage this selective focus. Once a candidate wins a plurality of votes within a state, any additional votes he or she receives there are effectively wasted; a candidate may not use them to offset deficits in other states. Thus, rather than focusing resources on increasing public support or voter turnout in "safe" states which they are overwhelmingly likely to win—or, conversely,

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[76] *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, *supra* note 21, at 2538 (citing Joseph E. Kallenbach, *Our Electoral College Gerrymander*, 4 MIDWEST J. POL. SCI. 162, 175 (1960); Carleton W. Sterling, *The Electoral College Biases Revealed: The Conventional Wisdom and Game Theory Models Notwithstanding*, 31 W. POL. Q. 159, 170 (1978)).

[77] *See* Amar, *Some Thoughts*, *supra* note 12, at 472.

[78] *See* Muller, *supra* note 21, at 1258–59, 1262.

[79] *See id.* at 1257 (citing Gray v. Sanders, 372 U.S. 368, 371 (1963)); *see also* Evenwel v. Abbott, 136 S. Ct. 1120, 1130 (2016) ("Consistent with constitutional history, this Court's past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations.").

[80] *Cf.* Reynolds v. Sims, 377 U.S. 533, 562–63 (1964) (holding that "state legislative districting schemes which give the same number of representatives to unequal numbers of constituents" effectively afford greater weight to certain people's votes than others).

[81] *See* Muller, *supra* note 21, at 1258–59, 1262.

[82] *See* Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 234–37 (2012).

[83] *See* Douglas Kriner & Andrew Reeves, *Has the Constitution Exacerbated the Crisis of Governance? The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 746 (2014) (arguing that the Electoral College leads Presidents to "pursue policies that disproportionately benefit voters in swing states at the expense of a fair and economically optimal distribution of federal resources").

seeking to mitigate the extent of their loss in states that are virtually impossible to win—presidential candidates tend to focus almost exclusively on a dozen or so states in which the plurality winner is unpredictable.[84]

Moving to a national popular vote system would only change the nature of this problem, however. Rather than focusing on a relatively diverse range of swing stages—jurisdictions like Florida, Virginia, Pennsylvania, and Nevada—a national popular vote system would instead create strong incentives for candidates to focus their efforts primarily on high-population states, and especially high-density population centers.[85] Compact supporters reject such concerns, pointing out that candidates in statewide elections do not disproportionately focus their time or resources only on major cities.[86] But presidential candidates must campaign across the entire nation within an election cycle of the same duration. The geographic breadth of the nation and sheer size of the population will inevitably compel them to concentrate their resources on major population centers to a much greater extent than statewide candidates.

Finally, some commentators, including Professor Akhil Amar, have also condemned the Electoral College as a vestige of slavery,[87] since the number of electoral votes to which each state originally was entitled was based in part on the Three-Fifths Clause.[88] A main piece of evidence frequently cited in support of this argument is a statement that James Madison made during the Constitutional Convention. He declared that the delegates would never agree to elect the President based on a national popular vote because "[t]he right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes."[89]

Historian Sean Wilentz has recently challenged this narrative.[90] He points out that the most likely alternative to the Electoral College at the

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[84] *See* Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 246 (2004); Calderaro, *supra* note 18, at 297–301; *see also* Brandon H. Robb, Comment, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President By National Popular Vote*, 54 LOY. L. REV. 419, 459 (2008).

[85] *See* Calderaro, *supra* note 18, at 302–05; Richard F. Duncan, *Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus*, 96 NEB. L. REV. 799, 816 (2018); Ross & Hardaway, *supra* note 22, at 393–94; *see also* Yen-Tu Su, *Retracing Political Antitrust: A Genealogy and its Lessons*, 27 J.L. & POL. 1, 43 (2011).

[86] *See* KOZA ET AL., *supra* note 17, at 451.

[87] *See* Amar, *Electoral College Reform*, *supra* note 12, at 67; Amar, *Some Thoughts*, *supra* note 12, at 470; Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1147 (2002) (arguing that "the connection between slavery and the electoral college was deliberate"); Juan F. Perea, *How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1086–91 (2018).

[88] *See* U.S. CONST. art. II, § 1, cl. 3.

[89] James Madison, Journal (July 19, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 71, at 50, 56–57, *quoted in* Amar, *Electoral College Reform*, *supra* note 12, at 69–70.

[90] *See* SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 70–71 (2019); *see also* Sean Wilentz, *The Electoral College Was Not a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/04/opinion/the-electoral-college-slavery-myth.html [https://perma.cc/WZN6-Q3VE].

Convention was not direct election of the President, but rather appointment by Congress, which was also elected in part based on the Three-Fifths Clause.[91] Moreover, many slaveholding states opposed the Electoral College, with North Carolina, South Carolina, and Georgia voting against it.[92] Rather than a compromise between Northern and Southern states, or free and slave states, the Electoral College may best be viewed as a compromise primarily between large and small states.[93]

Even upon its implementation, the Electoral College did not artificially bolster slave states' ability to win the Presidency. Wilentz contends that, following the 1790 census, slave states controlled approximately 42% of the electoral votes and had 41% of the nation's total white population; their influence in selecting the President would have been roughly equivalent whether elections occurred through the Electoral College or a national popular vote.[94] In addition, over time, any advantage that slave states may have hoped to gain from the Electoral College dissipated. "[S]ettlement of migrants and new immigrants" in the early nineteenth century "disproportionately favored the North."[95]

The Electoral College facilitated the election of anti-slavery President John Quincy Adams, who lost the national popular vote but was ultimately elected by the House of Representatives.[96] As Professor Akhil Amar explains, by the time of the Civil War, the Electoral College actually gave a structural advantage to free states.[97] Due to winner-take-all rules and the "enormous population of the antislavery North in 1860," the Electoral College "tip[ped] decisively against slavery."[98]

Moreover, regardless of why some Framers originally might have supported the Electoral College, the Reconstruction Amendments extirpated any connection it may have had to slavery. The Thirteenth Amendment abolished slavery.[99] The Fourteenth Amendment superseded the Three-Fifths Clause.[100] And the Fifteenth Amendment prohibited racial discrimination concerning voting rights.[101] Thus, we should neither repudiate the Electoral College nor relinquish the important benefits it provides today based on debates over the extent to which its origins might have had a connection to our nation's shameful history of slavery.[102]

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[91] *See* WILENTZ, *supra* note 90, at 70-71.

[92] *See* Wilentz, *supra* note 90; *see also* WILENTZ, *supra* note 90, at 294 n.42 (discussing "opposition to the [electoral] college from the lower South states").

[93] *See* MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 231 (2016) (explaining how the Framers crafted the Electoral College to balance the interests of large and small states).

[94] *See* Wilentz, *supra* note 90.

[95] WILENTZ, *supra* note 90, at 187.

[96] *See* Wilentz, *supra* note 90; *see also supra* notes 64, 67, and accompanying text.

[97] *See* Amar, *Electoral College Reform*, *supra* note 12, at 65.

[98] *See id.*

[99] *See* U.S. CONST. amend. XIII, § 1.

[100] *See id.* amend. XIV, § 2.

[101] *See id.* amend. XV, § 1.

[102] Some commentators defend the Electoral College on the grounds that it increases the likelihood that the prevailing candidate in a presidential election will emerge with a "clear

B. The National Popular Vote Compact

The National Popular Vote Compact is an agreement among states that, upon entering into effect, would result in the President being chosen based on the outcome of the national popular vote, even without a constitutional amendment abolishing the Electoral College.[103] It requires member states to hold "statewide popular elections" for President and Vice President, as all states presently do.[104] Following the election, each member state's chief election official must tally the presidential candidates' vote totals from each state and the District of Columbia—including from states that did not join the Compact—to calculate the candidates' "national popular vote total[s]."[105] Each member state must then appoint the slate of presidential electors associated with the presidential candidate who won the national popular vote.[106]

Member states must resolve any disputes concerning their respective elections and make a "final determination" of their electors at least six days before the date in mid-December on which federal law requires electors to cast their electoral votes.[107] This requirement ensures that member states' electors are chosen by the federal "safe harbor" deadline, protecting them from potential challenges during the joint session of Congress in which electoral votes are counted.[108] Likewise, if a dispute arises concerning candidates'

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mandate," enhancing his or her perceived legitimacy. *See* Levinson, *supra* note 20, at 18 (statement of McGinnis) ("[T]he Electoral College tends to magnify the winner's margin of victory. Particularly among the general public . . . this greater margin bestows a greater legitimacy. The sense of legitimacy is especially important for the president because in our system the president is . . . the head of state, unifying the nation in times of crisis."); Stephen M. Sheppard, *A Case for the Electoral College and for Its Faithless Elector*, 2015 WIS. L. REV. FORWARD 1, 5; *cf.* Beerman, *supra* note 18, at 735–36 ("The only saving grace of the Electoral College is that it can make a close election look less close. Even a close popular vote can result in a decisive margin in the Electoral College. In my view, this is an insufficient virtue to save the Electoral College . . . ."). It is unclear, however, that the general public knows presidential candidates' electoral vote tallies. Moreover, since the media often focuses on the results of the national popular vote, it is unlikely that a major electoral college victory would enhance a candidate's legitimacy following a narrow win—or especially a loss—in the national popular vote. If the Electoral College bolstered the legitimacy of winning candidates' mandates in generations past, it no longer appears to do so effectively today.

[103] *See* Anthony J. Gaughan, *Ramshackle Federalism: American's Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1038 (2016); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POLITICS 665, 667 n.1 (1996).

[104] CAL. ELEC. CODE § 6921, art. II (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

[105] *Id.* art. III, para. 1. Member states are required to publicly disclose "all vote counts or statements of votes as they are determined or obtained." *Id.* art. III, para. 8. The Compact does not provide a means of taking into account the preferences of citizens in a state whose legislature directly appoints presidential electors without holding a popular vote. *See* Williams, *Reforming the Electoral College*, *supra* note 19, at 209–10. Since no state currently uses this method of selecting presidential electors, that problem is purely hypothetical.

[106] *See* CAL. ELEC. CODE § 6921, art. III, para. 1 (West, Westlaw through ch. 9 of 2021 Reg. Sess.). In the unlikely event of a tie in the national popular vote, each member state would appoint the slate of electors associated with the candidate who won the statewide popular vote in that jurisdiction. *Id.* art. III, para. 6.

[107] *Id.* art. III, para. 4.

[108] 3 U.S.C. § 5 (2018). The Electoral Count Act of 1887 requires Congress to accept as "conclusive" a state's "final determination" of any controversies concerning the appointment of

vote tallies in a particular state, member states must "treat as conclusive" any official statement that the state issues concerning its returns by the federal safe harbor deadline.[109]

The Compact enters into effect when states cumulatively possessing a majority of electoral votes—in other words, at least 270 electoral votes—have adopted it.[110] States may withdraw from the agreement, but any attempted withdrawal that occurs within six months of a presidential election does not take effect until after the election is over.[111]

Though numerous arguments have been raised in support of the Compact, the main rationales for it are the intertwined notions of promoting democracy[112] and ensuring the equality of all people's votes.[113] Some supporters also maintain that the Compact will increase voter turnout, since people in "safe" states will feel that their votes now matter.[114] By making the entire nation the relevant electorate, however, the Compact would dramatically dilute the weight of each person's vote.[115] Each vote would become one out of a nationwide total of over 136 million, rather than one out of a statewide total of a few hundred thousand, or even a few million.[116] Thus, to the extent voters are motivated by the possibility that their votes may impact the election's outcome, the Compact may fail to induce safe-state voters to vote, while simultaneously reducing the incentive for swing-state voters to do so.[117]

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its electors so long as, among other things, that determination is made "at least six days before the time fixed for the meeting of electors." *Id.* Electors are required to meet to cast their electoral votes on the first Monday after the second Wednesday in the December following their appointment. *See id.* § 7. The safe harbor deadline is therefore the day before the second Wednesday in December.

[109] CAL. ELEC. CODE § 6921, art. III, para. 5 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

[110] *See id.* art. III, para. 9; *id.* art. IV, para. 1.

[111] *See id.* art. IV, para. 2; *see infra* Section III.D.2.

[112] *See* Amar, *Some Thoughts*, *supra* note 12, at 467; *see also* Beerman, *supra* note 18, at 736 (claiming that the Electoral College poses a "grave threat to democracy"); Robb, *supra* note 84, at 464; Zachary J. Shapiro, Note & Comment, *The Constitutionality of Methods that Influence a Presidential Elector's Ability to Exercise Personal Judgment*, 26 J.L. & POL'Y 395, 437 (2018); *cf. supra* note 67 and accompanying text (explaining that the Electoral College has allowed Presidents to be elected without winning a plurality of the popular vote).

[113] *See, e.g.*, Chang, *supra* note 18, at 229; *see also* Birch Bayh, *Foreword* to KOZA ET AL., *supra* note 17, at xix, xxi; *cf. supra* notes 72–73 and accompanying text (discussing the equality-based objection to the Electoral College).

[114] *See* Alexander Keyssar, *The Right to Vote and Election 2000*, *in* THE UNFINISHED ELECTION OF 2000, at 75, 96 (Jack N. Rakove ed., 2001).

[115] *See* John A. Zadrozny, Comment, *The Myth of Discretion: Why Presidential Electors Do Not Receive First Amendment Protection*, 11 COMMLAW CONSPECTUS 165, 182 (2003) ("Defenders of the electoral college, however, note that . . . the smaller voting pool within a given state, and the value of that state's electoral votes, make it more likely that voters will show up at the polls because of the recognition of their increased voting power.").

[116] *See* FED. ELECTION COMM'N, *supra* note 67, at 6.

[117] Some critics charge that the Compact will encourage more third-party candidacies, which in turn may allow candidates to win the Presidency with only a small plurality of the national popular vote. *See* Williams, *Reforming the Electoral College*, *supra* note 19, at 203. It is difficult to assess the validity of such empirical predictions. There have already been many serious third-party candidacies, as well as plurality winners, under the Electoral College. And a

II. Procedural Concerns: Congressional Consent Under the Compact Clause

Perhaps the most obvious objection to the National Popular Vote Compact is that it is invalid under the Compact Clause[118] unless and until Congress consents to it.[119] Under the Court's longstanding interpretation of the Clause, however, congressional approval is likely unnecessary. In any event, if states collectively holding 270 or more electoral votes joined the Compact, Congress would likely grant its approval at some point, perhaps when Democrats controlled both Congress and the Presidency. Thus, at most, the Compact Clause reflects a potential constitutional speed bump, not an impenetrable barrier. Regardless, it is necessary to determine whether congressional consent is required, or if instead the Compact may immediately enter into force when enough states have adopted it.

Interstate compacts were originally used "to resolve disputes between small numbers of states concerning boundary issues, water rights, and other similar local issues,"[120] often without congressional consent.[121] In the twentieth century, interstate compacts evolved into "a tool for dealing with a wide range of social, environmental, and political issues."[122] Interstate agreements have sometimes even created new administrative agencies transcending state boundaries.[123] The forty-six-state tobacco Master Settlement Agreement[124]

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national popular vote may enhance the advantages that party-backed candidates enjoy under a plurality-based system. *Cf.* Maurice Duverger, Political Parties 217 (1954).

Other opponents argue that the Compact violates the Guarantee Clause, U.S. Const. art. IV, § 4, which requires each state to provide a republican form of government. *See* Feeley, *supra* note 18, at 1444; *see also* Ross & Hardaway, *supra* note 22, at 431. The Guarantee Clause, however, is non-justiciable. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 28 (1849). Moreover, since states are not constitutionally required to allow their citizens to participate in selecting presidential electors at all, *see* U.S. Const., art. II, § 1, cl. 2; Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam), appointing them based on the national popular vote would probably not violate the clause. In addition, since the Compact does not affect the election of state legislators or governors, its changes concerning presidential electors are unlikely to impact whether a state's form of government is sufficiently "republican." *See* Robbins, *supra* note 18, at 24.

[118] *See* U.S. Const. art. I, § 10, cl. 1.

[119] As with any legislative action by Congress, a bill or joint resolution approving an interstate compact would be subject to a presidential veto. *See* U.S. Const. art. I, § 7; Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 285, 319 n.138 (2003); *see, e.g.*, H.R. Doc. No. 77-690, at 2 (1942) (President Franklin D. Roosevelt's veto of the Republican River Compact, H.R. 5945, 77th Cong. (1942)).

[120] Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 Colum. J.L. & Soc. Probs. 511, 515 (2009); *see also* Eric T. Tollar, Note, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 Suffolk U. L. Rev. 695, 702 (2018).

[121] *See* Pincus, *supra* note 120, at 517 (citing Felix Frankfurter & James Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 749–54 (1928)).

[122] *Id.* at 516.

[123] *See* Agreement of N.Y. and N.J. establishing Port of N.Y. Auth., ch. 77, art. II, 42 Stat. 174, 175 (1921).

and the Regional Greenhouse Gas Initiative,[125] which established a cap-and-trade system for carbon offsets among ten states, are among the most elaborate interstate agreements that have entered into effect without congressional consent. The Council on State Governments reports that nearly 200 interstate compacts currently exist.[126] The Compact is the only active or pending agreement, however, that deals with elections.[127]

The Compact Clause of the U.S. Constitution provides, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."[128] Perhaps because the Articles of Confederation contained a similar provision,[129] it did not attract attention at the Constitutional Convention[130] or during the ratification debates.[131] Although the Clause's plain text suggests that a state's compacts with other states are subject to the same constraints as compacts with foreign nations,[132] the Supreme Court has treated those two types of agreements very differently. The Court has granted states far greater flexibility to enter into interstate compacts than foreign agreements.[133]

In the 1893 case *Virginia v. Tennessee*,[134] the Court recognized that the terms "agreement" and "compact" in the Clause are "sufficiently comprehen-

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[124] *See* Star Sci., Inc. v. Beales, 278 F.3d 339, 360 (4th Cir. 2002) ("[T]he Master Settlement Agreement does not increase the power of the States at the expense of federal supremacy and . . . therefore, it is not an interstate compact requiring congressional approval under the Compact Clause.").

[125] *See* Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1959–60 (2007).

[126] *See Compact Search Results*, NAT'L CENTER FOR INTERSTATE COMPACTS, https://apps.csg.org/ncic/SearchResults.aspx [https://perma.cc/JVD7-YNDE].

[127] *See Compact Search Results: Elections*, NAT'L CENTER FOR INTERSTATE COMPACTS, https://apps.csg.org/ncic/SearchResults.aspx?&category=26 [https://perma.cc/HMH2-GB4B].

[128] U.S. CONST. art. I, § 10, cl. 3. The Constitution also provides, "No State shall enter into any Treaty, Alliance, or Confederation." *Id.* art. I, § 10, cl. 1. Unlike the Compact Clause, that provision is an absolute prohibition. Thus, Article I, Section 10 contemplates a distinction between treaties, which states may never execute, and compacts, which states may create only with congressional consent. For over a century, however, the Court has declined to apply the treaty provision to agreements among states. And, despite the plain text of the Compact Clause, the Court does not require congressional consent for all agreements between or among states. *See* Virginia v. Tennessee, 148 U.S. 503, 517–18 (1893).

[129] *See* ARTICLES OF CONFEDERATION of 1781, art. VI ("No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into and how long it shall continue.").

[130] *See* James Madison, Journal (Aug. 6, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 71, at 177, 177–89; James Madison, Journal (Sept. 12, 1787), *in id.* at 585, 585–89.

[131] The *Federalist Papers* declared that the Compact Clause was "a part of the existing articles of Union" and retained in the Constitution due to "reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark." THE FEDERALIST NO. 44, *supra* note 70, at 299, 302 (James Madison).

[132] *See* Ross & Hardaway, *supra* note 22, at 420 (noting that the Constitution's language does not distinguish between foreign and domestic agreements).

[133] *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 572 (1840) (opinion of Taney, C.J.); *see also* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 760–61 (2010).

[134] 148 U.S. 503 (1893).

sive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects."[135] Adopting the reasoning of Justice Joseph Story's *Commentaries on the Constitution*, however, it went on to reject a textualist interpretation of the Clause and instead adopted a purposivist one.[136] The Court held that congressional consent is required only for interstate agreements that either enhance the contracting states' "political influence" at the expense of the national government's supremacy, or interfere with the government's "rightful management" of issues under its exclusive control.[137] Such consent is unnecessary for compacts that affect only the contracting states themselves, such as contracts for the sale of small parcels of land, ordinary commercial transactions, or joint ventures for public works projects within their borders.[138]

The Court reaffirmed this standard nearly a century later in *U.S. Steel Corp. v. Multistate Tax Commission*, holding that congressional consent is required only when a compact potentially impacts either "the federal structure" or federal supremacy.[139] Over twenty states had joined the Multistate Tax Compact ("MTC"), which governed the taxation of multistate corporations.[140] The MTC established a Multistate Tax Commission with subpoena power that any member state could have audit taxpayer companies within its borders.[141] The Court held that congressional consent was not required, even though the MTC created a new administrative agency to which states had delegated a degree of sovereign power.[142] The Court reasoned that the MTC did not enhance state power at the expense of the federal government because it did not purport to grant member states any new powers that they otherwise lacked.[143] The Court emphasized that states could reject any pro-

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[135] *Id.* at 517–18.

[136] *See id.* at 519 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397, at 271–72 (Hilliard, Gray and Co. 1833)) (interpreting the Compact Clause by "looking at the object of the constitutional provision, and construing the terms 'agreement' and 'compact' by reference to it"); *see also* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459 (1978) (declining to read the Compact Clause "literally").

[137] *Virginia*, 148 U.S. at 518; *see also* Cuyler v. Adams, 449 U.S. 433, 440 (1981) (reiterating that congressional consent is required only for compacts "tending to increase the political power of the States, which may encroach upon or interfere with the just supremacy of the United States"); *cf.* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) (recognizing that interstate agreements for "political purposes . . . can scarcely fail to interfere with the general purpose and intent of the constitution").

[138] *See Virginia*, 148 U.S. at 518; *see also* New Hampshire v. Maine, 426 U.S. 363, 369–70 (1976) (holding that congressional consent was not required for a consent decree between states construing the meaning of terms in an instrument from 1740 identifying their borders).

[139] 434 U.S. at 471–72 (1978); *cf.* New York v. United States, 505 U.S. 144, 182–83 (1992) (holding that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials," particularly when it impacts "the Constitution's intergovernmental allocation of authority").

[140] *See U.S. Steel*, 434 U.S. at 471–72.

[141] *See id.* at 457.

[142] *See id.* at 472.

[143] *See id.* at 473.

posed regulations that the Commission recommended or even withdraw from the MTC at any time.[144]

Even when an interstate compact requires congressional approval, the Court has recognized that Congress may consent implicitly.[145] In *Virginia v. Tennessee*, for example, the Court held that Congress had implicitly approved an agreement resolving a boundary dispute between the contracting states by using the agreement's boundaries when legislating "for judicial and revenue purposes" and dealing with federal elections and appointments.[146] While legislating consistently with an interstate compact on a single occasion would not necessarily constitute implicit approval, such treatment "for a long succession of years, without question or dispute from any quarter," constitutes "conclusive proof of assent."[147]

Professor Michael Greve has cogently critiqued the *U.S. Steel* test because it focuses exclusively on an interstate compact's effects on the federal government's power, rather than its impact on other, non-signatory states.[148] Felix Frankfurter and James Landis likewise argued for a broader interpretation of the Compact Clause, framing the issue in terms of externalities.[149] They argued that Congress should be able to "safeguard[ ] the national interest" by "exercis[ing] national supervision" over any agreement that "affect[s] the interests of States other than those parties to [it]."[150]As Justice White pointed out in his *U.S. Steel* dissent, the Court's construction of the Compact Clause renders it superfluous.[151] By requiring congressional consent only for interstate agreements that infringe on Congress' constitutional authority, the Compact Clause imposes constraints that Congress could establish under its other powers.

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[144] *See id.*

[145] *See* Virginia v. Tennessee, 148 U.S. 503, 521 (1893) (holding that consent is "always to be implied when [C]ongress adopts the particular act by sanctioning its objects and aiding in enforcing them").

[146] *See id.* at 522.

[147] *Id.* at 522; *cf.* United States v. Florida, 363 U.S. 121, 138 (1960) (Harlan, J., dissenting) (declining to infer that Congress had implicitly approved a change in Florida's boundaries when it allowed Florida to rejoin the Union following the Civil War).

[148] *See* Greve, *supra* note 119, at 380; *see also* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 495 (1978) (White, J., dissenting); Heather Green, Comment, *The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause*, 16 CHAP. L. REV. 211, 238 (2012) ("While the necessity of consent in instances of horizontal encroachment is unclear from Supreme Court precedent, such compacts harm the balance of power between states, posing a risk to the entire federal system.").

[149] *See* Frankfurter & Landis, *supra* note 121, at 695.

[150] *Id.*

[151] *See U.S. Steel*, 434 U.S. at 452 (White, J., dissenting) (arguing that the Clause should prohibit certain agreements concerning "actions which would be permissible for individual States to undertake"); *see also* Pincus, *supra* note 120, at 528, 537 (arguing that *U.S. Steel* "empties the Compact Clause of all of its independent meaning and reduces it to a provision that simply serves to recapitulate the other provisions of the Constitution," and that congressional approval should be required for interstate compacts regarding issues that extend beyond areas of traditional state concern).

Despite the shortcomings of the *U.S. Steel* approach, the Court is likely to apply this interpretation of the Compact Clause to determine the validity of the National Popular Vote Compact. Under *U.S. Steel*, there are three possible rationales for requiring Congress to approve the Compact, but none is ultimately persuasive. First, the Compact allows member states to reduce the scope of the federal government's power by structurally precluding the U.S. House of Representatives and Senate from ever being able to exercise their prerogative to select the President and Vice President, respectively, when no candidate wins a majority of votes in the Electoral College.[152] The Compact enters into effect when states possessing at least 270 electoral votes sign on.[153] Once that occurs, the Compact provides that whichever candidate wins the national popular vote will receive all of those electoral votes, guaranteeing that person the Presidency.[154] So long as the Compact remains in force, the House of Representatives and Senate will be completely precluded from ever selecting the President or Vice President.

It is unclear how seriously the Supreme Court would take this concern. The House of Representatives has selected the President only twice, in 1800 and 1824.[155] The first occasion pre-dated the Twelfth Amendment and arose from the fact that electors did not cast separate ballots for President and Vice President—a problem the Twelfth Amendment corrected.[156] The Election of 1824, in contrast, occurred prior to the development of the modern political convention system and involved four major candidates, all of the same party. Over the subsequent two centuries, the U.S. House has not exercised its constitutional authority to resolve a presidential election.[157] Similarly, the Senate has chosen a Vice President only once, nearly two centuries ago, in 1836.[158]

Moreover, the power of the House and Senate to elect winners is not an absolute prerogative, but rather is contingent on the failure of any candidate to win a majority in the Electoral College. Although the Framers expected

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[152] *Cf.* Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 739–40 (2007); *see also* Ross & Hardaway, *supra* note 22, at 426.

[153] *See* CAL. ELEC. CODE § 6921, art. III, para. 9 (West, Westlaw through ch. 9 of 2021 Reg. Sess.); *id.* art. IV, para. 1.

[154] *See id.* art. III, para. 1. Of course, one or more "faithless electors" from member states may attempt to cast their electoral votes for candidates other than the one who won the national popular vote. Many states require electors to cast their electoral votes for the presidential candidate with which they are associated, however. *See supra* notes 53–58 and accompanying text.

[155] *See supra* note 64.

[156] *See id.* Under the Twelfth Amendment, electors now cast separate votes for President and Vice President. The candidate who receives the highest number of electoral votes for each office wins, so long as that figure constitutes a majority of the total number of electors appointed. U.S. CONST. amend. XII.

[157] In the Hayes-Tilden election of 1876, Congress formed a joint commission to determine the validity of contested electoral votes, alleviating the need for the U.S. House to select the President. *See* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 115 (2004).

[158] *See* Williams, *National Vote Compact*, *supra* note 19, at 1532 n.34.

the chambers of Congress would exercise this power regularly,[159] the Constitution does not guarantee they will be able to do so. From a modern perspective, preventing elections from being "thrown" to the House or Senate seems like a feature, not a bug, of the Compact. Thus, the Compact does not leave the national government with less power than it has exercised for nearly the past two centuries.

A second, more abstract, argument is that the Compact requires congressional approval because it "impact[s] . . . the federal structure."[160] It allows a group of states to select the President among themselves, rendering other states' electoral votes irrelevant.[161] As an initial matter, however, *U.S. Steel* provides that an interstate compact "impact[s] the federal structure" for purposes of the Compact Clause only if it infringes upon the federal government's authority. In other words, *U.S. Steel*'s reference to compacts that "impact the federal structure" does not create a new category of compacts requiring congressional approval. Instead, it is simply another way of referring to agreements that "enhance[ ] . . . state power at the expense of federal supremacy."[162]

Viewed from this vertical perspective, the Compact does not impact federal supremacy.[163] Apart from precluding the House and Senate from exercising their contingent authority to select the President and Vice President,[164] the Compact does not allow states to intrude upon the constitutional powers of Congress or the President.[165] To the contrary, it simply dictates the slates of presidential electors that member states must appoint. State legislatures have plenary discretion concerning the appointment of electors;[166] the matter is outside the federal government's control. As Professor Akhil Amar explains, "[T]he cooperating states acting together would be exercising no more power than they are entitled to wield individually."[167] Thus, the Compact does not affect the federal structure in a way that would require congressional approval under the Compact Clause.

A final potential objection is that the Compact empowers member states to collectively select the President without input from other states'

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[159] *See* LAWRENCE D. LONGLEY & NEAL R. PIERCE, THE ELECTORAL COLLEGE PRIMER 2000, at 25 (1999).

[160] U.S. Steel v. Multistate Tax Comm'n, 434 U.S. 452, 471–72 (1978); *cf.* Ross & Hardaway, *supra* note 22, at 424 ("The compact unilaterally changes the nature of the election system at a national level.").

[161] *See* Ross & Hardaway, *supra* note 22, at 404–05.

[162] *U.S. Steel*, 434 U.S. at 470.

[163] *Cf.* Muller, *supra* note 22, at 384–85.

[164] *See supra* notes 154–58 and accompanying text.

[165] *See* Sample, *supra* note 18, at 421–23; Robbins, *supra* note 18, at 22 ("[I]f the [Compact] were to be put into effect, there would be no disturbance in the balance of power—the states are simply exercising a right they already have under the Constitution, and that has no effect on federal authority.").

[166] *See* U.S. CONST. art. II, § 1, cl. 2; *see also* McPherson v. Blacker, 146 U.S. 1, 34–35 (1892).

[167] Amar, *Some Thoughts*, *supra* note 12, at 478.

electors. In other words, rather than enhancing member states' authority at the expense of the federal government, it does so at the expense of other states.[168] *U.S. Steel*, however, does not take into account a compact's horizontal impact on non-member states.[169] Moreover, that case strongly suggests that a compact which requires member states to take actions which they already have the authority to perform individually does not inflict legally cognizable harm upon non-member states.[170]

Furthermore, the impact of this argument depends on the level of generality at which one assesses the Compact. On its face, the Compact does not exclude non-member states from the process of selecting a President. To the contrary, the preferences of those states' citizens are taken into account twice. Each non-member state remains free to appoint presidential electors however it prefers, including based solely on its own citizens' votes. Those electors retain the same share of influence within the Electoral College that they would otherwise wield in the absence of the Compact. Perhaps more importantly, member states also take into account the preferences of non-member states' citizens as part of the national popular vote. Thus, if the Court focuses on the specific manner in which the Compact is implemented, the metric by which member states have agreed to appoint their presidential electors does not diminish other states' constitutionally delegated powers.[171]

Considered at a higher level of generality, however, the Compact is far more troubling. The Compact allows a cabal of states holding enough electoral votes to select the President on their own to adopt a uniform metric with which they will appoint a dispositive number of electors. Even though the Compact requires member states to select the President based on the national popular vote, the fact remains that a subset of states should not be able to assert such a formal stranglehold over the Presidency. The Compact could be a precedent for an agreement in which states holding 270 electoral votes decide to award those votes based only on the popular vote within those member states themselves,[172] completely excluding non-member states from any meaningful participation in the presidential election.[173] While the

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[168] *See* Muller, *supra* note 22, at 385–87; Derek Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 ELECTION L.J. 227, 231 (2008); Ross & Hardaway, *supra* note 22, at 427–28.

[169] *See* Greve, *supra* note 119, at 335; *see also* Schleifer, *supra* note 152, at 740–41. *But see* Florida v. Georgia, 58 U.S. 478, 494 (1854) (holding that the Compact Clause "prevent[s] any compact or agreement between any two [s]tates, which might affect injuriously the interests of the others"); Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1838) (holding that the Compact Clause protects against "derangement of [states'] federal relations with the other states of the Union, and the federal government").

[170] *See* U.S. Steel v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978).

[171] *See* Robbins, *supra* note 18, at 25–26.

[172] *See* Williams, *National Vote Compact*, *supra* note 19, at 1528; *see also* Feeley, *supra* note 18, at 1430.

[173] One can imagine more outlandish metrics by which member states could decide to award their electoral votes: a coin flip, a vote of the United Nations General Assembly, or the candidate who received the second-greatest number of votes in the national popular vote. *Cf.* Beerman, *supra* note 18, at 737 n.106; Hiltachk, *supra* note 18, at 93. Some commentators

notion of choosing a President based on the national popular vote may make the Compact seem less threatening, any agreement among certain states to select the President in a way that renders other states' electoral votes irrelevant is troubling. Even so, *U.S. Steel* does not require congressional consent for agreements that redistribute power horizontally among states or generate negative externalities for non-member states. Such concerns are best addressed on other constitutional grounds.[174] Thus, under current doctrine, the Compact likely does not require congressional approval under the Compact Clause.[175]

III. Substantive Constitutional Objections

The Compact raises several serious constitutional concerns that congressional approval would not remedy, regardless of whether the Compact Clause applies to it. First, the Compact likely violates the right to vote of a member state's citizens by allowing their votes to be diluted or even overridden by the votes of other states' citizens, who are ineligible under that member state's constitution to vote in its elections. Second, the Compact likely violates the Equal Protection Clause as construed in *Bush v. Gore*[176] because it requires votes from all fifty-one jurisdictions to be aggregated, even though they were cast and counted under differing voter qualification standards, electoral rules, and ballot-validity regulations.

Third, the Compact also likely violates the Constitution's structural federalism-based restrictions that the Supreme Court has recognized over the past several decades. Finally, by nullifying several key characteristics of the Electoral College, the Compact may violate implicit restrictions in the Presidential Electors Clause.[177] In particular, one of the Compact's key provisions purports to prohibit member states from withdrawing and changing their method of appointing electors—for example, by returning to a statewide vote—within six months of a presidential election. The Supreme Court has held, however, that any attempt to limit a state legislature's plenary authority under the Presidential Electors Clause is unenforceable.[178]

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have rejected such hypotheticals, arguing that courts can distinguish between defensible and irrational grounds for appointing electors. *See* Sample, *supra* note 18, at 420–21.

[174] *See infra* Section III.C (discussing structural constitutional arguments against the Compact).

[175] *See* Goldfeder, *supra* note 18, at 990 n.147. Matthew Pincus argues that the Compact should be subject to congressional approval because it has "the capacity to produce wide scale national change," but he recognizes that his reasoning does not reflect the current constitutional standard under *U.S. Steel*. Pincus, *supra* note 120, at 543.

[176] 531 U.S. 98 (2000) (per curiam).

[177] *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–34 (1994) (inferring implicit restrictions on the scope of the authority that the Elections Clause—a provision read *in pari materia* with the Presidential Electors Clause—delegates to state legislatures to regulate congressional elections).

[178] *See* McPherson v. Blacker, 146 U.S. 1, 34–35 (1892).

A. The Right to Vote

The Compact likely requires most member states to violate their citizens' right to vote under the U.S. Constitution. The Presidential Electors Clause grants each state legislature broad discretion to determine the "Manner" in which its state will select its presidential electors.[179] In *Bush v. Gore*, the Supreme Court held that, when a state chooses to appoint its electors based on popular elections, the Constitution's protections for voting rights are triggered.[180] The constitutional right to vote, most basically, refers to the right of "*the designated electors*" to "choose representatives . . . by some form of election."[181] It includes the right of eligible voters to have their validly cast ballots be counted and given full weight and effect, without being diluted by improper or fraudulent votes.[182] The Court has expressly recognized, "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[183] Thus, the right to vote protected by the U.S. Constitution requires states to ensure that their elections are limited to eligible voters—even though eligibility is largely a state-law issue.

Every state constitution in the nation contains a voter qualification clause, specifying the eligibility requirements that a person must satisfy to be a qualified voter of that state.[184] These provisions generally require, among

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[179] *See* U.S. CONST. art. II, § 1, cl. 2; *see also infra* notes 255–56 and accompanying text.

[180] *See Bush*, 531 U.S. at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . .").

[181] United States v. Classic, 313 U.S. 299, 318 (1941) (emphasis added).

[182] *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote cannot be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (citations omitted)); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (holding that the right to cast a ballot and have it be counted can neither be "denied outright" nor "be destroyed by alteration of ballots, or diluted by stuffing of the ballot box" (citations omitted)); Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts; or by a stuffing of the ballot box." (citations omitted)); *Classic*, 313 U.S. at 322 (holding that the Constitution protects the "right of the voter to have his vote counted in both the general election and in the primary election, where the latter is a part of the election machinery"); *see also* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2068–70 (2018) (discussing the "defensive right to vote").

[183] *Reynolds*, 377 U.S. at 555; *accord* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

[184] Numerous state constitutions specify that residents of the state are eligible to vote in its elections. ARK. CONST. art. 3, § 1; CAL. CONST. art. II, § 2; FLA. CONST. art. VI, § 2; LA. CONST. art. I, § 10 ("[C]itizen[s] of the state . . . ."); MO. CONST. art. VIII, § 2; N.H. CONST. pt. I, art. 11; N.D. CONST. art. II, § 1; OKLA. CONST. art. III, § 1; S.C. CONST. art. II, § 4; UTAH CONST. art. IV, § 2; *see also* CONN. CONST. art. VI, § 1 (requiring residence in a town); KAN. CONST. art. 5, § 1 (requiring residence in "the voting area" in which the person seeks to vote and specifying that Kansas will follow federal laws concerning presidential elections); VA. CONST. art. II, § 1 (specifying that "each voter shall be a resident of the Commonwealth and of the precinct where he votes," and that "[t]he General Assembly may also provide, in elections for President . . . alternatives to registration for new residents").

Many state constitutions provide that a person must be a state resident for a time period prescribed by law. *See* ALA. CONST. amend. 579; COLO. CONST. art. VII, § 1; IDAHO

other things, that a person be a resident of the state to be eligible to vote in elections there.[185] These residency requirements are usually construed to mean that only people domiciled within the state are eligible voters; the state must be their permanent home.[186]

CONST. art. VI, § 2; MONT. CONST. art. IV, § 2; NEB. CONST. art. VI, § 1; N.M. CONST. art. VII, § 1; OHIO CONST. art. V, § 1; TENN. CONST. art. IV, § 1; *see also* GA. CONST. art. II, § I, para. II (guaranteeing right to vote to "resident[s] of Georgia as defined by law"); S.D. CONST. art. VII, § 2 (extending right to vote to citizens who have "met all residency . . . requirements"); UTAH CONST. art. IV, § 2 (granting right to vote to citizens "who make[ ] proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law"); VT. CONST. ch. II, § 42; WYO. CONST. art. 6, § 2.

Others expressly set forth the required residency period. *See* HAW. CONST. art. II, § 1; KY. CONST. § 145; MD. CONST. art. I, § 1 (requiring residency "as of the time for the closing of registration" for an election to vote in it); N.J. CONST. art. II, § I, para. 3; N.Y. CONST. art. II, §§ 1, 9; PA. CONST. art. VII, § 1; R.I. CONST. art. II, § 1; WASH. CONST. art. VI, § 1; W. VA. CONST. art. IV, § 1; *see also* IND. CONST. art. 2, § 2 (requiring residency in a precinct within the state for at least 30 days before the election); MINN. CONST. art. VII, § 1 (same); MISS. CONST. art. 12, § 241 (specifying that a person must be a state resident for a specified period of time to vote, and that a person "shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector"). Many of the residency periods specified by state constitutions are unenforceable, however, because they violate the U.S. Constitution. *See* Dunn v. Blumstein, 405 U.S. 330, 348-49 (1972) (invaliding lengthy residency requirement while affirming validity of 30-day registration requirement).

Several state constitutions allow the legislature to shorten or otherwise establish the residency requirements for presidential elections. *See* ALASKA CONST. art. V, § 1 (specifying that "residency requirements" for presidential elections may be "prescribed by law"); ILL. CONST. art. III, § 1 ("The General Assembly by law may establish shorter residence requirements for voting for President . . . ."); MICH. CONST. art. II, §§ 1, 3 (providing that, for presidential elections, "the legislature may by law establish lesser residence requirements for citizens who have resided in this state for less than six months and may waive residence requirements for former citizens of this state who have removed herefrom"); N.C. CONST. art. VI, § 2 ("The General Assembly may reduce the time of residence for persons voting in presidential elections."); OR. CONST. art. II, § 2 ("[P]rovision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President."); *see also* DEL. CONST. art. V, §§ 2-2B (allowing the legislature to allow certain people who move shortly before a presidential election to vote in that election, even though they do not satisfy residency requirements); IOWA. CONST. art. II, § 1 ("The general assembly may provide by law for different periods of residence . . . in order to vote in various elections."); TEX. CONST. art. VI, § 2 (allowing the legislature to create exceptions to the general residency requirement for voting in presidential elections for certain people who fail to satisfy it).

Two states grant the legislature even broader discretion to set voter qualifications for presidential elections. ARIZ. CONST. art. VII, § 2 ("[Q]ualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law."); *see also* NEV. CONST. art. 2, § 1 ("The legislature may provide by law the conditions under which a citizen of the United States who does not have the status of an elector in another state and who does not meet the residence requirements of this section may vote in this state for President."). And the constitutions of two other states—Maine and Massachusetts—do not appear to expressly address qualifications for voting in presidential elections at all. *See* ME. CONST. art. II, § 1 (establishing requirements to be "an elector for Governor, Senators and Representatives"); MASS. CONST. art. of amend. III (establishing qualifications to vote for "governor, lieutenant governor, senators, or representatives"). *See generally* Derek T. Muller, *Complexity Confronting State Judges and the Right to Vote*, 77 OHIO ST. L.J. FURTHERMORE 65, 71 (2016).

[185] *See supra* note 184.

[186] *See* Muller, *supra* note 184, at 71; *see, e.g.*, Horwitz v. Kirby, 197 So. 3d 943, 950 (Ala. 2015) (agreeing that "the terms 'legally resides,' 'inhabitant,' 'resident,' etc., when used in con-

The Compact requires each member state to hold a statewide presidential election, but then appoint the slate of electors for the presidential candidate who wins the national popular vote, rather than that state's statewide popular vote.[187] Thus, the Compact will often require a member state to appoint a slate of electors that did not receive a plurality of votes within that state in the presidential election, but rather was rejected by that state's citizens. The Compact allows votes cast by a state's eligible voters to be diluted and overridden by votes cast throughout the rest of the nation by people who are ineligible under the state constitution to vote in that state's elections,[188] including for state officials such as presidential electors.[189] For a state to appoint presidential electors who did not win the election within that state based on the votes of non-residents who are ineligible to vote there appears to violate not only the state constitution's voter qualification provisions, but the right to vote—more specifically, the right to cast an undiluted vote—under the U.S. Constitution, as well.[190]

United States v. Classic bolsters this argument. *Classic* held that even though states are not required to hold primary elections, when they choose to do so, the primary "is by law made an integral part of the election machinery."[191] At that point, the fundamental right to vote attaches, and the state may not disregard the choice of its "designated electors"—meaning its voters.[192] As the *Classic* Court declared, "From time immemorial an election to public office has been in point of substance no more and no less than the expression *by qualified [voters]* of their choice of candidates."[193] This same reasoning applies to presidential elections. By appointing presidential electors based on the outcome of the national popular vote rather than its statewide vote, a state impermissibly allows the votes of its citizens—whom the

nection with political rights are synonymous with domicile" (quoting Mitchell v. Kinney, 5 So. 2d 788 (Ala. 1942)); Walters v. Weed, 752 P.2d 443, 445–46 (Cal. 1988) (explaining that California law construes the state constitution's reference to a voter's residence as referring to domicile); Md. Green Party v. Md. Bd. of Elections, 832 A.2d 214, 240 n.8 (Md. 2003) ("It is firmly settled that the word 'residence' in Article I means 'domicile.'"); Young v. Stevens, 968 So. 2d 1260, 1263 (Miss. 2007) ("In Mississippi, residence and domicile are synonymous for election purposes.").

[187] *See* CAL. ELEC. CODE § 6921, art. III, para. 3 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

[188] *Cf. supra* note 182 (explaining how a person's right to vote is violated if the weight of their vote is diluted by the inclusion of ballots from ineligible people in the final vote tallies).

[189] *See* Ray v. Blair, 343 U.S. 214, 224–25 (1952) ("The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents . . . . They act by authority of the state that in turn receives its authority from the Federal Constitution."); Burroughs v. United States, 290 U.S. 534, 545 (1934); McPherson v. Blacker, 146 U.S. 1, 35 (1892); *In re* Green, 134 U.S. 377, 378 (1890).

[190] *See also* Beerman, *supra* note 18, at 737 (claiming that awarding all of a state's electors to a candidate who lost the popular vote within that state "presents a serious constitutional question").

[191] United States v. Classic, 313 U.S. 299, 318 (1941).

[192] *Id.*

[193] *Id.* (emphasis added).

state constitution designates as its eligible voters—to be diluted and even overridden by people other than its "designated electors."[194]

States may be able to circumvent this objection and avoid violating their citizens' right to vote under the U.S. Constitution by amending their state constitutions to recognize out-of-state citizens as eligible voters who may vote for presidential electors.[195] If the pool of eligible voters under the state constitution encompassed all voters across the nation, a state's citizens would no longer be able to complain that their votes were being diluted by ballots from ineligible people. Such an extreme measure may exacerbate other constitutional problems of the Compact,[196] and would yield the anomalous result that each citizen is an eligible voter in up to fifty-one different jurisdictions, at least for the office of presidential elector. Without such reforms, however, the Compact likely violates state constitutions' voter qualification clauses and, by extension, the right to vote as protected by the U.S. Constitution.

B. Equal Protection and Election Administration

The Compact also likely violates *Bush v. Gore*'s equal protection principles, because it calls for the aggregation of all votes cast across the nation, despite the fact that voters in different states are subject to very different regulatory regimes. *Bush v. Gore* held that, once states decide to appoint presidential electors based on a popular vote, the election must be held in

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[194] *Id.*

[195] One might also object that the independent state legislature doctrine allows state legislatures to regulate federal elections without regard to substantive constraints in their state constitutions. *See* Morley, *supra* note 42, at 8–9. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 817–18 (2015), a majority of the Court tersely rejected that notion, albeit arguably in dicta. Moreover, with regard to congressional elections, the doctrine historically did not extend to issues concerning voter qualifications. Morley, *supra* note 42, at 18. Because the Constitution contains provisions expressly specifying who is eligible to vote in congressional elections, *see* U.S. CONST., art. I, § 2, cl. 1; *id.* amend. XVII, the Elections Clause's grant of authority to legislatures to regulate the "Manner" of congressional elections does not extend to that issue, Morley, *supra* note 42, at 66–69; *see also* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013). Consequently, even if the independent state legislature doctrine is valid, legislatures are bound by state constitutional provisions governing voter qualifications for *congressional* elections.

The issue is a bit more complicated with regard to presidential elections. The Constitution does not contain any voter qualification clauses for presidential elections, because states are not required to even hold such elections in the first place. It is therefore possible that this restriction on the independent state legislature doctrine might not carry over to presidential elections. That is, the doctrine might allow legislatures to override or ignore state constitutional provisions establishing voter qualifications in the context of presidential elections. However, the Elections Clause and Presidential Electors Clause are typically construed *in pari materia*, including with regard to issues where their language differs (such as the scope of Congress' authority). *See* Morley, *supra* note 42, at 20 n.70. Thus, if the modern Court were to recognize and enforce the independent state legislature doctrine, state legislatures would likely still be bound by state constitutional provisions governing voter qualifications when legislating with regard to presidential elections.

[196] *See infra* Sections III.C–III.D.

accordance with equal protection principles.[197] "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[198]

The Court held that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause because election officials were not applying uniform rules for determining which ballots should count as valid votes.[199] State law required officials to ascertain "the intent of the voter," but they were applying that vague principle in disparate ways.[200] "[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[201] The Florida Supreme Court also irrationally discriminated among voters by upholding manual recounts of overvotes from only a few counties.[202]

The Court emphasized that its holding was limited to the particular fact pattern before it: the "special instance of a statewide recount under the authority of a single state judicial officer."[203] Over the ensuing two decades, however, lower federal courts have applied these equal protection principles more broadly to the general conduct of elections as well.[204] Compact supporters might contend that *Bush v. Gore*'s Uniformity Principle is nevertheless inapplicable to differences among various states' laws governing presidential elections. They would likely point out that courts have consistently rejected equal protection challenges to the Electoral College on the grounds that it affords different weight to the votes of different states' citi-

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[197] *See* 531 U.S. 98, 104 (2000) (per curiam) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.").

[198] *Id.*; *see also id.* at 107 (reiterating that the Constitution prohibits "arbitrary and disparate treatment" of voters in different counties within the state (citing Gray v. Sanders, 372 U.S. 368 (1963))).

[199] *See id.* at 105–06.

[200] *Id.* at 105 (quoting Gore v. Harris, 779 So. 2d 270, 270 (Fla. 2000)).

[201] *Id.* at 106.

[202] *See id.* at 107. An "overvote" is a ballot which an automated tally machine rejects because it detects more than the legal number of votes.

[203] *Id.* at 109. The Court added that it was not addressing "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* Rather, the Court attempted to limit its holding to situations "[w]here a court orders a statewide remedy." *Id.*

[204] *See* Obama for Am. v. Husted, 697 F.3d 423, 428 (6th Cir. 2012); League of Women Voters v. Brunner, 548 F.3d 463, 477–78 (6th Cir. 2008). For a more detailed description of lower federal courts' far-reaching applications of *Bush v. Gore*, see Morley, *supra* note 182, at 2089–108; *see also* Edward B. Foley, *Election Administration: Refining the* Bush v. Gore *Taxonomy*, 68 OHIO ST. L.J. 1035, 1037 (2007) ("[N]otwithstanding its limiting language, *Bush v. Gore* contains a ruling capable of principled explication . . . ."); Daniel H. Lowenstein, *Election Administration: The Meaning of* Bush v. Gore, 68 OHIO ST. L.J. 1007 (2007) (identifying various contexts in which *Bush v. Gore*'s equal protection principle applies); Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 230–31 (2020) ("The *Bush* Court's insistence on uniform treatment of voters—call it *Bush*'s Uniformity Principle—raises challenging questions for the traditional structure of election administration.").

zens.[205] And in *Gray v. Sanders*, the Supreme Court expressly identified the Electoral College as an exception to the Constitution's general requirement of equal treatment of voters.[206]

Both *Gray* and subsequent cases rejecting equal protection challenges to the Electoral College, however, grappled with its current structure: presidential electors appointed as the result of fifty-one separate statewide elections by different groups of voters. The Compact, in contrast, requires each member state to appoint its electors based on the outcome of the national popular vote.[207] *Gray* itself declared that, under the Equal Protection Clause, "Once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit."[208] Under the Compact, the relevant "geographic unit" is the nation, not individual states. Each member state tallies together all votes from across the country to determine which slate of electors to appoint; votes from each state are treated as fungible. It is extremely likely that *Bush v. Gore*'s equal protection principles would require that voters throughout the country be treated substantially equally.[209]

By way of analogy, imagine if Maine had adopted a law stating that, for the Governor's race, people in northern Maine could cast ranked-choice ballots,[210] but people in southern Maine were required to cast standard, one-candidate-only ballots. Such a statute would violate equal protection principles. Different voters within the relevant electorate—the state—would be treated materially differently with regard to their fundamental right to vote. The chance to cast a ranked-choice ballot gives some voters the opportunity to shift their vote among multiple candidates and have their lower-order preferences taken into account in ways unavailable to people casting standard ballots.

The Compact suffers from the same defect. When the Compact enters into effect, it will require member states to appoint electors based on the outcome of the national popular vote. The entire nation therefore becomes the relevant electorate for purposes of equal protection analysis. If only Maine voters may cast ranked-choice ballots,[211] they are unfairly able to exercise more expansive voting rights than other voters participating in the same

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[205] *See* New v. Ashcroft, 293 F. Supp. 2d 256, 259 (E.D.N.Y. 2003); *see also* New v. Pelosi, No. 08 Civ. 9055 (AKH), 2008 U.S. Dist. LEXIS 87447, at *4–6 (S.D.N.Y. Oct. 29, 2008).

[206] *See* 372 U.S. 368, 377–78 (1963).

[207] *See* CAL. ELEC. CODE § 6921, art. III, para. 3 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

[208] Gray v. Sanders, 372 U.S. 368, 379 (1963).

[209] *See also* Ross & Hardaway, *supra* note 22, at 430 ("NPV creates one new, national electorate, even as it leaves in place fifty-one sets of state election laws to govern that single election pool.").

[210] For an explanation of ranked-choice voting, see Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 334 (2006).

[211] *See* ME. REV. STAT. ANN. tit. 21-A, § 805 (West, Westlaw through 2019 2nd Reg. Sess., 129th Leg.).

nationwide election. Such a scenario raises the same equal protection problems as in the hypothetical gubernatorial election discussed above. Importantly, these problems exist regardless of whether Maine is among the compacting states. The Equal Protection Clause violation arises from the fact that only certain voters whose ballots are included in the nationwide tally have the opportunity to cast ranked-choice ballots.[212]

Adopting the Compact would violate the Equal Protection Clause because states administer presidential elections very differently from each other in virtually every respect.[213] Most basically, states' voter qualifications differ, especially with regard to restrictions on felon voting.[214] Similarly, although the National Voter Registration Act establishes minimum federal requirements for voter registration for federal elections,[215] states apply substantially different approaches to updating their voter registration databases and ensuring the accuracy of information within them.[216] And, as explained above, Maine's recent decision to adopt ranked-choice voting for presidential elections would likely raise especially serious equal protection concerns under the Compact.[217]

Moreover, substantial differences among states' absentee and early voting laws afford their residents widely varying opportunities to vote, as well.[218] States also have different voter identification requirements, polling place

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[212] These equal protection concerns do not arise from Maine's use of ranked-choice voting in presidential elections outside the context of the Compact. Currently, Maine relies only on its own citizens' votes to determine who its presidential electors will be, and all Maine voters have the opportunity to cast ranked-choice ballots. *See id.* Moreover, no other state takes Maine's popular vote into account when conducting its presidential election. Consequently, Maine's decision to use ranked-choice ballots in presidential elections does not presently violate the Equal Protection Clause.

[213] *See* Muller, *supra* note 21, at 1253 (recognizing states' broad discretion in regulating all aspects of their respective elections for presidential electors); Williams, *Reforming the Electoral College*, *supra* note 19, at 223–26 (describing differences among states' election laws and procedures); *see also* Amar, *supra* note 20, at 249 (acknowledging that "the nonuniformity among the various states as to voter eligibility, voting machinery, and vote-count and vote-recount rules, present[s] a different set of challenges, and they are serious").

[214] *See* Jean Chung, *Sentencing Project, Felony Disenfranchisement: A Primer*, SENTENCING PROJECT (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https://perma.cc/A7YB-YF57]; *see also* Beth A. Colgan, *Wealth-Based Felon Disenfranchisement*, 72 VAND. L. REV. 55, 149–54 (2019) (discussing states' varying mechanisms for restoring felons' right to vote); Muller, *supra* note 21, at 1291 (recognizing that differences among states' policies concerning felon voting make it difficult to craft a uniform national standard for voter qualifications).

[215] *See* 52 U.S.C. §§ 20503–20507 (2018).

[216] *See, e.g.*, Brunner v. Ohio Republican Party, 555 U.S. 5, 5–6 (2008) (per curiam) (holding that a federal court could not consider the plaintiff's claim that the Ohio Secretary of State was violating the Help America Vote Act by refusing to compare voter registration records with the Social Security database, because that law did not create a private right of action).

[217] *See* ME. REV. STAT. ANN. tit. 21-A, § 805 (West, Westlaw through 2019 2nd Reg. Sess., 129th Leg.).

[218] *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 28, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx [https://perma.cc/TR4B-7P9X]. Federal law imposes minimum requirements for absentee voting in presidential elections, *see* 52 U.S.C. § 10502(d) (2018), but many states go far beyond them.

hours, and provisional ballot rules, all of which can impact a voter's ability to participate in an election. And, most obviously, states' vote-counting procedures—including their regulations for determining when to count incompletely, ambiguously, or erroneously filled out absentee ballots—vary, which would directly violate *Bush v. Gore*'s core equal protection principle.[219] State laws concerning the availability of recounts similarly differ, giving each state's voters substantially different odds of having identically marked ballots counted—another major red flag under *Bush v. Gore*.[220] Important distinctions likewise exist in the extent to which various states' officials are empowered to respond to election-related emergencies that impede people's ability to vote.[221]

In short, the substantial disuniformity across jurisdictions concerning the administration of presidential elections[222] makes states' reliance on nationwide vote tallies deeply problematic under *Bush v. Gore*. Congress could eliminate many of these equal protection problems by passing federal laws regulating the manner in which presidential elections are held.[223] Such laws would be a dramatic departure from our nation's tradition of allowing states to decide for themselves how to conduct most aspects of federal elections.[224] Moreover, states often seek to minimize administrative costs and burdens by applying the same rules to elections for offices at all levels of government.[225] Any uniform federal standards would therefore likely wind up governing state and local elections, as well. It is highly debatable whether Congress could establish uniform voter qualifications for presidential elections, however, beyond enforcing restrictions imposed by the Equal Protection Clause

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[219] *See* 531 U.S. 98, 105–07 (2000) (per curiam).

[220] *Cf. id.* at 107.

[221] *See* Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 610–13 (2018) (surveying the diverse range of states' election emergency laws).

[222] Professor Vikram David Amar also points out that states may adopt idiosyncratic ballot-access requirements for presidential candidates. *See* Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401, 427 (2018). California, for example, enacted a law requiring presidential candidates to disclose their tax returns as a condition of appearing on the primary ballot, though that measure was invalidated. *See* Patterson v. Padilla, 451 P.3d 1171 (Cal. 2019); *see also* Griffin v. Padilla, 417 F. Supp. 3d 1291, 1308 (E.D. Cal. 2019), *vacated and dismissed as moot*, No. 19-17000, 2019 U.S. App. LEXIS 38890, at *3 (9th Cir. Dec. 16, 2019).

[223] The Supreme Court has held that, despite the differences in constitutional text, Congress has the same near-plenary power over presidential elections as the Elections Clause grants it over congressional elections. *See* Burroughs v. United States, 290 U.S. 534, 545 (1934); *see also* Buckley v. Valeo, 424 U.S. 1, 13 n.16, 90, 132 (1976) (per curiam); Oregon v. Mitchell, 400 U.S. 112, 124 n.7 (1970) (opinion of Black, J.).

[224] *See* Nathaniel Persily, *"Celebrating" the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States*, 44 IND. L. REV. 85, 85 (2010) (emphasizing "the extreme decentralization of administrative responsibilities and policymaking" within the American electoral system).

[225] *See* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 111 (2017).

and other voting rights amendments,[226] since it lacks such power to establish voter qualifications for congressional elections.[227]

Alternatively, if all fifty-one jurisdictions joined the compact and voluntarily adopted identical standards for voter qualifications; voter registration databases; absentee and early voting; provisional ballots; voting machines; voter identification; responding to election emergencies; counting ballots; and holding recounts, they likely could avoid equal protection concerns. That outcome is extremely unlikely to occur, however. And if even a few states refused to join the Compact and retained materially different election laws, including their vote tallies within the national popular vote total would likely violate the Equal Protection Clause. In short, *Bush v. Gore* held that it was unconstitutional for a state to apply different standards to different voters participating in an election when determining whether to count incorrectly marked ballots. Such a rigorous application of equal protection principles—endorsed by seven out of nine Justices[228]—makes it virtually impossible to combine the results of fifty-one separate elections, held under materially different sets of rules, into a single nationwide total.

C. Structural Federalism

A third serious constitutional concern is that the Compact is in tension with structural, federalism-based limitations that the Supreme Court has read into the Constitution over the past few decades. The Court has held that the nation's constitutional structure protects states' prerogatives as independent sovereigns within the federal system.[229] This structural principle has led the Court to recognize numerous federalism-based protections for states that do not appear in the plain text of the Constitution. For example, the Court has enforced sovereign immunity protections for state governments[230] extending far beyond the Eleventh Amendment's text;[231] limited state legislatures' power to interfere with other states' sovereignty by legislating extraterritorially;[232] restricted state courts' ability to assert personal jurisdiction

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[226] *See supra* note 195 and accompanying text; *see also* Morley, *supra* note 182, at 2089–108 (discussing the evolution of voter eligibility rights under the Equal Protection Clause). *But see Oregon*, 400 U.S. at 118 (opinion of Black, J., announcing the judgment of the Court) (upholding provision of the Voting Rights Act setting the minimum voting age for federal elections to eighteen years old).

[227] *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013); *see also* THE FEDERALIST NO. 60, *supra* note 70, at 403, 409 (Alexander Hamilton).

[228] *See* Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam).

[229] *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1498 (2019) (recognizing that many constitutional doctrines "are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice").

[230] *See id.* at 1499; Alden v. Maine, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996); Hans v. Louisiana, 134 U.S. 1, 18 (1890).

[231] *See* U.S. CONST. amend. XI.

[232] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."); Hunt-

over people outside their borders;[233] established anti-commandeering protections for state legislatures[234] and officials;[235] and protected states' authority to regulate their elections.[236]

As the Court's limitations on states' power to legislative extraterritorially[237] and exercise jurisdiction over non-residents[238] demonstrate, the "equal sovereignty" of the states[239] "implie[s] . . . limitation[s]" on each state's power to interfere with other states' ability to exercise their sovereign authority.[240] Another core component of state sovereignty within our federal system is each "state government's responsibility to represent and be accountable *to the citizens of the State*."[241] The Compact appears to violate these structural constitutional principles in three distinct ways.

First, the Compact eliminates the structural protection that the Electoral College affords to small states. If the President were elected based on the national popular vote, each state's influence over the outcome of a presidential election would be directly proportionate to its share of the electorate, giving more populous states a natural advantage. The Electoral College, in contrast, was deliberately structured to temper the advantage that large states would receive by virtue of their large populations.[242] Combining elements of majoritarianism and federalism,[243] the Electoral College assigns each state a number of presidential electors equal to the size of its congressional delegation. The Constitution guarantees that each state's delegation will include at least one House member and two Senators, no matter how small its population.[244] In this way, the structure of the Electoral College allows smaller states to play a larger role in electing a President than they would under a

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ington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

[233] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

[234] *See* New York v. United States, 505 U.S. 144, 162 (1992) (holding that Congress may not "require the States to govern according to Congress' instructions").

[235] *See* Printz v. United States, 521 U.S. 898, 931–32 (1997).

[236] *See* Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013).

[237] *See Campbell*, 538 U.S. at 421.

[238] *See World-Wide Volkswagen*, 444 U.S. at 293.

[239] N.W. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009) (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)); *accord Shelby Cty.*, 570 U.S. at 544; *see also* Coyle v. Smith, 221 U.S. 559, 567 (1911).

[240] *World-Wide Volkswagen*, 444 U.S. at 293.

[241] New York v. United States, 505 U.S. 144, 177 (1992) (emphasis added).

[242] *See* James Madison, Journal (Aug. 24, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 71, at 400, 403 (statement of Madison); *see also* Whittington, *supra* note 73, at 925.

[243] *See* Williams, *Reforming the Electoral College*, *supra* note 19, at 192; *see also* Duncan, *supra* note 85, at 815 (explaining that presidential elections are "federally democratic").

[244] *See supra* notes 40–41 and accompanying text; *see also* Williams, *National Vote Compact*, *supra* note 19, at 1560–61. The contingent procedure through which the House of Representatives selects a President when no candidate wins a majority in the Electoral College further protects small states' interests. When the House chooses a President, each state's delegation casts a single vote, regardless of the delegation's size. *See* U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII. This procedure prevents large states with numerous Representatives from dominating the process. *See Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, *supra* note 21, at 2529.

purely majoritarian system. In the Electoral College, for example, "California enjoys only eighteen times the voting power of Wyoming, rather than sixty-six times the strength of Wyoming under the [Compact]."[245] By eliminating the relative advantage that the Constitution guarantees small states in selecting a President, the Compact changes a fundamental structural component of the Constitution—and without a constitutional amendment.[246]

Second, and perhaps more fundamentally, the Electoral College was structured to give all states a meaningful opportunity to participate in the selection of the President. The Compact, however, is an agreement among a subset of states to select the President themselves, based exclusively on criteria that they collectively decide upon, without the involvement of electors from non-member states. The Compact enters into effect only when member states collectively holding at least 270 electoral votes have joined.[247] Once that threshold is reached, other states' electors will be unable to influence a presidential election's outcome. An agreement among a subset of states to exert a perpetual stranglehold over the Presidency, neutralizing the electoral votes of non-member states' electors, violates the equality among states and their electors underlying the Electoral College. The fact that member states have chosen to award their electoral votes to the presidential candidate who wins the national popular vote does not remediate the more fundamental concern that no subset of states should be in a position to collectively decide among themselves the dispositive criterion for selecting a President.

Some critics respond that the Electoral College currently does not give all states a meaningful opportunity to participate in the presidential election, since most of the candidates' attention is focused on a handful of swing states.[248] Such criticisms conflate indeterminacy with importance. Presidential candidates need electoral votes from so-called "safe" states—solidly Democratic or Republican states—to win just as much as they need electoral votes from battleground states. Indeed, the only way that battleground states' electoral votes can help a candidate prevail is if they are combined with votes from safe states. The fact that it is typically easy to predict how safe states will vote in a presidential election does not undermine either the legal power of their electoral votes or the political necessity for them. The Compact, in contrast, renders the electoral votes of non-member states completely irrele-

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[245] Calderaro, *supra* note 18, at 308.

[246] *See* Feeley, *supra* note 18, at 1446–47 ("Switching to a popular vote by enacting a statute in a handful of states deprives the rest of the nation of the compromises the Framers struck between a confederate system and a national system in creating a compound republic. . . . [A] movement to a national popular vote erases the advantage that small states gain from the fact that the number of electors each state receives is its number of senators plus its number of representatives."); *cf.* Ross & Hardaway, *supra* note 22, at 431 (arguing that the Compact prevents presidential elections from being conducted based in part on principles of federalism, and converts it into a purely democratic process).

[247] *See* CAL. ELEC. CODE § 6921, art. III, para. 9 (West, Westlaw through ch. 9 of 2021 Reg. Sess.); *id.* art. IV, para. 1.

[248] *See, e.g.*, Robbins, *supra* note 18, at 1 ("[V]oters who live in populous but solid blue and red states feel as if their votes do not count . . . .").

vant, because member states have enough electoral votes among themselves to elect a President on their own.

Third, the structure of our federal system ensures that each state's officials, including presidential electors, are selected by and accountable to the citizens of that state, either directly or through their representatives.[249] The Compact violates this structural principle by requiring member states to appoint electors based on the outcome of the national popular vote, rather than the results of the presidential election within that state. As Professor Norman Williams argues, "The Constitution's delegation of power to the state legislature must . . . be read in light of this uniform, uncontested understanding that states are required to select electors in accordance with popular sentiment of voters in the state or the districts within it."[250]

It is important to recognize, however, that these structural objections might be more formalist than substantive, since states could achieve substantively the same outcome without a Compact. For example, a state legislature could use its plenary power to appoint the slate of presidential electors for whichever presidential candidate wins the national popular vote without entering into a Compact. And it could hold a presidential straw poll within the state so that its citizens' views could be taken into account in determining the national popular vote. The Supreme Court would be extremely unlikely to invalidate a legislature's direct appointment of electors based on concerns about legislators' subjective motivations or intentions (with the possible exception of constitutionally prohibited discrimination).

The fact that a state may achieve a desired outcome through certain mechanisms (for example, by independently deciding to appoint electors based on a national popular vote), however, does not necessarily imply that it is free to do so through any means it chooses (such as by joining the Compact).[251] While each individual state legislature is free to select presidential electors based on any criteria it chooses, an agreement among legislatures that collectively wield a majority of electoral votes to appoint electors based on the same criteria probably violates the Electoral College's structure. Such an agreement would eliminate the special protection that the Electoral College affords to small states, the equal ability of all states' electors to participate effectively in the President's election, and the accountability of a state's electors specifically to that state's electorate.[252]

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[249] *See* New York v. United States, 505 U.S. 144, 177 (1992); Williams, *National Vote Compact*, *supra* note 19, at 1561.

[250] Williams, *National Vote Compact*, *supra* note 19, at 1527.

[251] *Cf.* 15 U.S.C. § 1 (2018) (prohibiting agreements in restraint of trade, even if the participants could independently choose to take the actions involved).

[252] Professor Derek Muller makes a different structural argument, that the Electoral College empowers states based primarily on their total population, which includes children and non-citizens, rather than just the relative proportion of votes that a state's citizens cast, which is necessarily limited by the number of adult citizens in the state's population. Muller, *supra* note 21, at 1243.

D. The Presidential Electors Clause

1. Violation of the Clause's Implicit Restrictions

Finally, the Compact may violate implicit limits within the Presidential Electors Clause itself.[253] The clause provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors."[254] It does not expressly limit legislatures' authority over the selection of presidential electors. The Supreme Court has held that the clause "leaves it to the legislature exclusively to define the method" of choosing electors,[255] granting the legislature "plenary" authority.[256]

The Clause's phrasing, however, is similar to the Elections Clause, which specifies that the "Time, Place, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[257] The Court has construed this provision *in pari materia* with the Presidential Electors Clause, as granting legislatures "authority to provide a complete code for congressional elections."[258] In *U.S. Term Limits, Inc. v. Thornton*, the Court nevertheless held that this express grant of power implicitly prohibits states from enacting laws concerning congressional elections "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[259] The Court applied this principle in *Cook v. Gralike*, holding that a state may not disadvantage certain congressional candidates by specifying on the ballot whether they complied, or promised to comply, with voter instructions regarding congressional term limits.[260]

The Presidential Electors Clause might similarly be construed as implicitly limiting state legislatures' discretion, preventing them from under-

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[253] *Cf.* Williams, *National Vote Compact*, *supra* note 19, at 1527 ("Although Article II, Section 1 of the U.S. Constitution entrusts to the state legislatures the power to determine the manner in which presidential electors are selected, that power is not plenary in the customary sense."). Professor Keith Whittington offers a different argument, based on historical liquidation. He contends that, even though the Constitution's text does not prescribe how electors must cast their votes, historical practice has given rise to a constitutional construction requiring electors to vote in accordance with their state's popular vote. *See* Whittington, *supra* note 73, at 943 ("In a context in which it is inconceivable that [faithless] electors could have won office while openly announcing their plans, it would seem to be the worst of all possible worlds for the electors to instead make the attempt through subterfuge.").

[254] U.S. CONST., art. II, § 1, cl. 2.

[255] McPherson v. Blacker, 146 U.S. 1, 29 (1892); *see also id.* at 35 ("[T]he appointment and mode of appointment of electors belong exclusively to the states . . . .").

[256] Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

[257] U.S. CONST., art. I, § 4, cl. 1.

[258] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[259] 514 U.S. 779, 833–34 (1995); *accord* Cook v. Gralike, 531 U.S. 510, 523 (2001); *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting that states may enact "generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

[260] *See Cook*, 531 U.S. at 525 (concluding that the state's ballot notations "attempt[ ] to 'dictate electoral outcomes'" and that "[s]uch 'regulation' of congressional elections simply is not authorized by the Elections Clause" (citation omitted)).

mining or circumventing the accommodations reached at the Constitutional Convention, particularly concerning the Electoral College's key characteristics.[261] Most basically, Article II reflects the Framers' decision that the President would not be selected based on the national popular vote—a possibility they considered and expressly rejected.[262] Some Framers objected that the people would not know enough potential candidates, particularly from other states, to identify the best person to serve.[263] Others feared that the people could be easily swayed by popular passions or misled by "designing men."[264]

The *Federalist Papers* explain that, to alleviate such concerns, the Framers decided to select the President through a mixed system involving "at least as many federal as national features."[265] Each state's influence is determined partly by its population and partly by its status as a co-equal sovereign.[266] And the Constitution requires electors to meet separately, within their respective states, to prevent them from forming cabals with each other or being corrupted by foreign powers.[267] Building on *U.S. Term Limits*,[268] the Court might reasonably construe the Presidential Electors Clause as preventing states from fundamentally changing these aspects of the Electoral College's intended operation and functioning.[269]

2. Invalid Limitation of Legislatures' Plenary Authority

Perhaps more importantly, the Compact specifies that, if a state attempts to withdraw from the agreement within six months of a presidential election, the withdrawal will not take effect until after the new President is selected.[270] The Supreme Court has held that a state may not limit the plenary authority that the Presidential Electors Clause confers on the legislature to determine the manner in which the state's electors are appointed.[271]

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[261] *See* Schleifer, *supra* note 152, at 746–47; Williams, *National Vote Compact*, *supra* note 19, at 1560, 1573.

[262] *See* James Madison, Journal (July 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 71, at 25, 30–31.

[263] *See, e.g.*, *id.* at 29 (statement of Roger Sherman); *id.* at 31 (statement of George Mason).

[264] *Id.* at 30 (statement of Pinckney); *see also* James Madison, Journal (July 19, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 71, at 50, 57 (statement of Gerry).

[265] THE FEDERALIST NO. 39, *supra* note 70, at 250, 255 (James Madison).

[266] *See id.* ("The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society.").

[267] *See* James Madison, Journal (Sept. 4, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 71, at 493, 494, 500; *see also* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 264 (1996); THE FEDERALIST NO. 68, *supra* note 70, at 457, 459 (Alexander Hamilton). Professor Norman Williams offers a variation of this argument, contending that the Presidential Electors Clause implicitly prohibits states from appointing electors "on the basis of citizens outside the state's jurisdiction." Williams, *National Vote Compact*, *supra* note 19, at 1527.

[268] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995).

[269] *Cf.* Williams, *National Vote Compact*, *supra* note 19, at 1577–78.

[270] *See* CAL. ELEC. CODE § 6921, art. IV, para. 2 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

[271] *See* McPherson v. Blacker, 146 U.S. 1, 34–35 (1892) (quoting S. REP. NO. 43-395, at 9 (1874)).

Rather, a legislature's power over the appointment of presidential electors "can neither be taken away *nor abdicated*."[272]

Since the Clause's six-month prohibition on withdrawal flatly contradicts the Supreme Court's interpretation of the Presidential Electors Clause in *McPherson*, it is unconstitutional. And that provision is the lynchpin of the entire Compact. Without it, states could withdraw from the Compact based on polling in the days leading up to Election Day, or conceivably even after the election is held and the results are known. Notwithstanding abstract support for respecting the national popular vote, legislators would likely face tremendous pressure from their constituents to prevent the election of a political opponent—particularly one who had convincingly lost that state's statewide vote.[273]

Member states' conduct confirms the importance of the Compact's prohibition on immediate unilateral withdrawals. Any state currently may amend its laws to appoint its presidential electors based on the national popular vote. Yet even states which support that method of choosing a President refuse to do so unless enough other states similarly agree to abide by the national popular vote. In other words, member states' willingness to appoint electors based on the national popular vote is contingent on their ability to ensure that other states do so as well. If a member state could completely withdraw from the Compact at any time, other states would be unwilling to surrender their right to appoint electors based on their respective statewide vote tallies. Because of its centrality, the Compact's invalid limitation on withdrawal must be regarded as inseverable from the rest of the agreement. Thus, under *McPherson*'s interpretation of the Presidential Electors Clause, the entire Compact is invalid.

IV. Practical Objections to a National Presidential Election

Putting aside the Compact's serious constitutional vulnerabilities, one of the most compelling practical reasons for states to reject the Compact is to alleviate the need to accurately determine presidential candidates' national popular vote totals. A presidential election is currently conducted as a series of fifty-one independent contests.[274] When results within a particular state are close, any recounts, election contests, or other post-election litigation are limited to that state and do not require post-election proceedings anywhere else.[275] Likewise, when post-election litigation results in changes to vote-

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[272] *Id.* at 35 (emphasis added).

[273] As Professor Williams explains, had the Compact "been in force in Massachusetts in 2004, for example, Massachusetts would have been forced to appoint electors committed to George W. Bush, even though native son John Kerry won the state's popular vote by over 25 percentage points—a prospect that would surely trouble that state's heavily Democratic legislature." Williams, *Reforming the Electoral College*, *supra* note 19, at 215.

[274] *See* Muller, *supra* note 21, at 1264.

[275] *See* Williams, *Reforming the Electoral College*, *supra* note 19, at 233.

counting rules or the validity of certain ballots,[276] such relief is confined to a single state and does not call into question vote tallies throughout the rest of the nation.

Under the Compact, in contrast, recounts, litigation, and post-election proceedings would occur on a nationwide basis. Over 130 million ballots were cast in the 2016 presidential election.[277] At that scale, even if a candidate were to prevail by as many as 1.3 million votes, such a margin would constitute only one percent of the ballots cast and likely be insufficient to deter the trailing candidate from pursuing simultaneous, hurried recounts and lawsuits in as many states as possible. Florida's chaotic experience with hotly contested emergency legal challenges following the 2000 presidential election,[278] as well as its 2018 U.S. Senate[279] and gubernatorial elections,[280]

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[276] *See, e.g.*, Democratic Exec. Comm. v. Detzner, 347 F. Supp. 3d 1017, 1032–33 (N.D. Fla. 2018).

[277] *See* U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY 2016 COMPREHENSIVE REPORT: A REPORT TO THE 115TH CONGRESS 21 (2017), https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf [https://perma.cc/L3A9-UTDK].

[278] *See, e.g.*, Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317 (N.D. Fla. 2000), *aff'd*, 235 F.3d 578 (11th Cir. 2000); Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000), *rev'd sub nom.* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70 (2000) (per curiam), *on remand sub nom.* Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000); Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[279] *See, e.g.*, Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1315 (11th Cir. 2019) (challenging the constitutionality of Florida's signature-match requirement for absentee ballots); League of Women Voters of Fla., Inc. v. Scott, 366 F. Supp. 3d 1311, 1318 (N.D. Fla. 2018) (denying preliminary injunction requiring Governor Scott to recuse himself from his election-related responsibilities as Governor on the grounds he was also a Senate candidate); Democratic Senatorial Campaign Comm. v. Detzner, 347 F. Supp. 3d 1033, 1039 (N.D. Fla. 2018) (denying preliminary injunction against state laws for determining voter intent when voters fill out their ballots incorrectly); Democratic Senatorial Campaign Comm. v. Detzner, No. 4:18-CV-528-MW/CAS, slip op. at 1–2 (N.D. Fla. Nov. 15, 2018) (affirming denial of temporary restraining order seeking extension of recount deadlines, because election officials would be able to meet them); Nat'l Republican Senatorial Comm. v. Snipes, No. CACE-18-026364 (25), slip op. at 2-4 (Fla. Cir. Ct. Nov. 14, 2018) (ordering County Supervisor of Elections to immediately comply with a public records request to reveal the number of absentee ballots cast in the election and the number remaining to be counted); *see also* Caldwell v. Snipes, No. CACE-18-026464 (07), slip op. at 1-2 (Fla. Cir. Ct. Nov. 15, 2018) (same).

[280] *See, e.g.*, VoteVets Action Fund v. Detzner, No. 4:18-CV-524-MW-CAS, slip op. at 8–9 (N.D. Fla. Nov. 16, 2018) (denying preliminary injunction that would have extended the deadline for election officials to receive vote-by-mail ballots from domestic voters, even though ballots from overseas military voters would be accepted up to ten days after Election Day); League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1225 (N.D. Fla. 2018) (issuing preliminary injunction requiring the Secretary of State to re-interpret state law to allow the establishment of polling locations on college campuses); Fla. Democratic Party v. Detzner, No. 4:18-CV-463-RH-CAS, 2018 U.S. Dist. LEXIS 174528, at *3 (N.D. Fla. Oct. 10, 2018) (rejecting temporary restraining order in a challenge to the adequacy of the state's adjustments to the rules governing the impending election due to Hurricane Michael).

Georgia's 2018 gubernatorial election provoked almost as much litigation. Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1292 (N.D. Ga. 2019) (granting in part and denying in part Defendant's motion to dismiss a complaint alleging that Georgia adopted unconstitutional voting processes and policies during the 2018 election); Common Cause of Ga. v. Kemp, 347 F. Supp. 3d 1270, 1301 (N.D. Ga. 2018) (granting in part a temporary

provides a stark, cautionary example of what would happen in a close election under the Compact—except on a nationwide basis. Professor Bradley Smith calculates that recounts would have been necessary in at least six presidential elections since 1880 if they had been based on the national popular vote.[281]

Limiting the geographic scope of post-election proceedings is especially beneficial due to the fundamentally bureaucratic nature of modern elections. Over 130 million ballots are cast by a sweepingly diverse array of voters, including people with language barriers, mental or physical disabilities, and limited experience with the electoral process who frequently face additional challenges in casting valid ballots.[282] Ballots are accepted and counted by tens of thousands of election officials throughout the nation, many of whom hold those positions on a part-time basis and have limited training. Moreover, in a nation as vast as the United States, natural disasters or extreme weather that impact impending or ongoing elections are also reasonably likely.[283]

In a complex process of this magnitude, with so many people and discrete tasks involved, numerous errors will inevitably occur. When elections are conducted as fifty-one hermetically sealed contests, any problems or mistakes are limited to the particular jurisdictions in which they arise and cannot be aggregated across states. Difficulties in one jurisdiction do not impact results in others. Consequently, mistakes, unexpected crises, lost or misplaced ballots, statutory violations, or even malfeasance in most states will generally be irrelevant to the ultimate outcome of the presidential election. In most cases, either the winning candidate's margin within that state will be

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restraining order enjoining the state from immediately certifying the 2018 election results and ordering the Secretary of State to direct county election superintendents to review the eligibility of voters who cast provisional ballots); Democratic Party of Ga., Inc. v. Crittenden, 347 F. Supp. 3d 1324, 1347 (N.D. Ga. 2018) (granting in part a request for a preliminary injunction enjoining Georgia's Secretary of State from certifying the 2018 elections until he confirmed that absentee ballots with incorrect or missing birth dates were counted, but refusing to extend the cure period or require election officials to count absentee ballots cast outside a voter's county of residence); Martin v. Kemp, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018) (granting a preliminary injunction mandating that absentee ballots with signature mismatches be counted in Georgia's 2018 election), *stay denied sub nom.* Ga. Muslim Voter Project v. Kemp, No. 18-14502-GG, 2018 WL 7822108, at *1 (11th Cir. Nov. 2, 2018); Ga. Coalition for People's Agenda v. Kemp, 347 F. Supp. 3d 1251, 1296 (N.D. Ga. 2018) (granting a preliminary injunction requiring the Secretary of State to allow people who have been flagged as noncitizens to vote if they provide proof of citizenship); Curling v. Kemp, 334 F. Supp. 3d 1303, 1327–28 (N.D. Ga. 2018) (refusing to enjoin the state's use of electronic voting machines), *aff'd in part and appeal dismissed in part sub nom.* Curling v. Worley, 761 F. App'x 927, 935 (11th Cir. 2019).

[281] *See* Bradley Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 207 (2008).

[282] The law attempts to help voters overcome many of these obstacles. *See, e.g.*, 52 U.S.C. § 10503 (2018) (requiring election officials to provide voting-related materials in foreign languages under certain circumstances); Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (Sept. 28, 1984) (codified at 52 U.S.C. §§ 20101–20107 (2018)) (requiring that polling places be accessible to elderly and disabled voters). These provisions are imperfectly enforced and insufficient to help all voters, however.

[283] *See* Morley, *supra* note 221, at 553–86 (exploring case studies of election emergencies).

too great to be affected by such problems, or that state's electoral votes will be insufficient to change the results in the Electoral College.

Moreover, when problems do arise in a close election in a swing state that will be dispositive in the Electoral College, their scope is naturally confined. The numbers of ballots at issue and polling locations or recount sites involved is limited. Candidates, the media, and the public can focus their attention on one or a few states, ensuring that the necessary processes are conducted properly. Under the Compact, in contrast, even when results are close in only a handful of swing states, candidates would have an incentive to scrounge additional votes from wherever else they could throughout the nation.[284] Over the days and weeks following the election, vote tallies from throughout the nation would likely fluctuate on a near-daily basis,[285] continuously impacting the national popular vote and making the process appear far less determinate, accurate, and legitimate to the public. Post-election proceedings in any particular jurisdiction would receive far less attention from either the public or candidates, enhancing the possibility for mistakes or even manipulation, as well as the appearance of overall indeterminacy.

The Compact also enhances the importance of provisional ballots. The Help America Vote Act (HAVA) requires states to allow people to cast provisional ballots when they claim to be entitled to vote, but are not listed in registration records or otherwise cannot demonstrate their eligibility (for example, because their signature at the polling place does not match the one on record, or they do not have proper identification with them).[286] In the 2016 election, 2,460,421 provisional ballots were cast.[287] Depending on the jurisdiction, voters have up to ten days after the election to cure any defects or demonstrate their eligibility to election officials so that their provisional ballots will be counted. Under the Compact, in a close presidential election, election officials in potentially hundreds of locations across the country simultaneously (or within a few days of each other) would review and determine the validity of provisional ballots on a voter-by-voter basis, with full knowledge of the publicly announced results from election night. Election contests and other litigation would be virtually certain to ensue. The current structure of the presidential election process, in contrast, largely eliminates

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[284] *See* JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 193–94 (1975); *see also* Ross & Hardaway, *supra* note 22, at 402.

[285] *See* Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 J.L. & POL. 501, 505 (2013) (explaining how, in recent years, Democratic candidates have become more likely to gain additional votes after Election Night due to late-cast absentee ballots and post-election adjudication of provisional ballots). In Arizona's 2018 U.S. Senate race, Republican Martha McSally was in the lead on Election Night, but Democrat Kyrsten Sinema was ultimately declared the winner after election officials finished counting absentee and provisional ballots. *See* James Arkin, *Sinema Wins Arizona Senate Race*, POLITICO (Nov. 12, 2018, 4:42 PM), https://www.politico.com/story/2018/11/12/2018-arizona-senate-election-sinema-mcsally-984928 [https://perma.cc/4U9S-B24N].

[286] *See* 52 U.S.C. § 21082(a) (2018).

[287] *See* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 277, at 29.

candidates' incentives to contest every individual provisional ballot across the nation.

In short, the Compact's supporters appear to underestimate the layers of complexity that switching to a national popular vote model would introduce into the system. Appointing electors based on the national popular vote expands the scope of any recounts or election contests exponentially, from a few hundred thousand or even a few million votes to over 136 million votes, and from scores of counting sites within a state to thousands across the nation. The introduction of so many ballots, election officials, conflicting laws, and avenues for judicial review risks chaos. Opportunities for mistake or even malfeasance unavoidably multiply, while public confidence in the accuracy of the outcome is likely to correspondingly diminish. The Electoral College's greatest advantage—the Framers' unintended gift to future generations to promote the peaceful transfer of power and protect the public legitimacy of the electoral process—is its limitation of the scope of post-election proceedings.

The Compact's provisions concerning post-election litigation create legal problems, as well.[288] The Compact requires member states to treat as "conclusive" the presidential candidates' national popular vote totals as of the "safe harbor" date set forth in federal law.[289] It does not address the possibility that a federal or state court may order a state to change its vote total, on constitutional or other grounds, after that deadline. Indeed, in *Bush v. Gore*, the Florida Supreme Court ordered a recount that would have extended past that deadline.[290] And there is always a chance that states—particularly non-members states—will not finish counting or canvassing their ballots or certify their results until after the safe harbor deadline. Thus, the Compact requires member states to base their nationwide vote tallies on results that might not only be interim, but unconstitutional.

Relatedly, these provisions could also lead to disparities among member states' calculations of the national popular vote total. If a member state's chief election official certifies, or a court orders the certification or recertification of, a state's final vote tally after the Compact's deadline, that state would have to include that updated tally in its calculation of the national popular vote. The Compact requires other member states, in contrast, to ignore such belated updates and instead apply the vote tallies as they stood on the safe harbor deadline. In a close election, different member states

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[288] Professor Williams raises the possibility that non-member states could decline to publicly announce their statewide vote tallies in the presidential election until after the federal safe harbor deadline. *See* Williams, *Reforming the Electoral College*, *supra* note 19, at 212–13. Such anomalous extreme measures, however, would be inconsistent with both states' treatment of election results for other offices, as well as the transparency at the heart of most modern electoral systems. That theoretical possibility appears unrealistic.

[289] CAL. ELEC. CODE § 6921, art. III, paras. 4–5 (West, Westlaw through ch. 9 of 2021 Reg. Sess.).

[290] See Gore v. Harris, 772 So. 2d 1243, 1261–62 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

could have different national vote tallies, potentially leading them to conclude that different presidential candidates won the national popular vote.

The fundamental problem is that the Compact, as a state law, cannot limit the ability of federal courts to adjudicate and remedy violations of the U.S. Constitution or federal statutes that occur in the course of a state's presidential election. And state courts may feel similarly free to adjudicate alleged violations of the federal or state constitutions, or even statutes, notwithstanding the Compact's deadline. Thus, any attempt to require all member states to treat as dispositive states' vote tallies as they stand on a certain date will run into serious difficulties.

Conclusion

The Compact is what Mark Tushnet calls a constitutional workaround:[291] a method of "achiev[ing] results inconsistent with one constitutional provision by taking advantage of the opportunities provided by other constitutional provisions."[292] Historically, however, workarounds have been unnecessary to adopt needed democratic reforms. Although Article V's requirements are typically seen as virtually insurmountable barriers to formal constitutional amendments,[293] this has not been the case with regard to changes impacting the electoral process. The Constitution's provisions concerning presidential elections have already been amended three times;[294] the method for electing U.S. Senators has been fundamentally changed, from appointment by state legislatures to direct election by the people;[295] and almost half of the amendments since the Bill of Rights was ratified have expanded voting rights.[296] In short, the people have repeatedly succeeded in amending the Constitution to reflect changes in public norms concerning

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[291] *See* Mark Tushnet, *Constitutional Workarounds*, 87 Tex. L. Rev. 1499, 1500 (2009); *see also* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400, 480–81 (2015) ("[A]lthough the Constitution contemplates a President elected according to the votes of the Electoral College, states could ensure that the President was elected by a national popular majority by directing their electors to vote for the person who wins the national popular vote.").

[292] Tushnet, *supra* note 291, at 1506.

[293] *See, e.g.*, Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 160 (2006); Richard H. Fallon, Jr., *American Constitutionalism, Almost (But Not Quite) Version 2.0*, 65 Me. L. Rev. 77, 92 (2012) ("[T]he requirement that three-fourths of the states must ratify constitutional amendments makes it nearly impossible to achieve significant change in our written Constitution through the Article V process.").

[294] *See* U.S. Const. amend. XII (reforming procedure for casting electoral votes); *id.* amend. XX (changing start of presidential term); *id.* amend. XXII (imposing term limits for President).

[295] *See id.* amend. XVII.

[296] *See id.* amend. XIV, § 2 (recognizing affirmative right to vote); *id.* amend. XV (prohibiting racial discrimination in voting); amend. XVII (establishing direct election of Senators); *id.* amend. XIX (prohibiting sex-based discrimination in voting); *id.* amend. XXIII (granting electoral votes to the District of Columbia); *id.* amend. XXIV (prohibiting poll taxes in federal elections); *id.* amend. XXVI (prohibiting discrimination based on age concerning voting rights for people at least eighteen years old).

voting and the electoral process. Accordingly, we should be especially skeptical of attempts to circumvent the Article V amendment process with regard to those fields.[297] More specifically, we should reject the Compact's attempt to manipulate the Electoral College to elect the President through a national popular vote.

The Electoral College is an inadvertent gift from the Framers that protects our nation in ways they probably did not imagine. This gift is all the more extraordinary because it is extremely unlikely that the Electoral College would be adopted as part of the Constitution today. It achieves the remarkable, perhaps unique feat of allowing a national leader to be elected in a limited timeframe, and under intense public scrutiny and political pressure, without the need to ensure completely consistent treatment or even precisely accurate counting of over 136 million votes across the nation. The Electoral College instead establishes a system of fifty-one more limited and manageable independent elections, most of which involve margins of victory sufficiently large that the winning candidate is beyond reasonable challenge.[298] It cabins the scope of any recounts or litigation, as well as the consequences of any election emergencies, irregularities, mistakes, accidents, or fraud. By limiting the geographic scope of, and number of ballots at issue in, post-election disputes, the Electoral College as currently implemented enhances the accuracy of the electoral process and bolsters its public legitimacy.

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[297] *Cf.* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (declining to interpret the Constitution to include a right against political gerrymandering).

[298] *Cf.* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005) (discussing the "margin of litigation").

The Electoral College and the Federal Popular Vote

*Derek T. Muller**

The notion of holding a popular vote for the President of the United States is an intuitively simple idea. We hold popular elections for the governor of each state. We hold popular direct elections for basically every other office, from United States Senator to local dog catcher. We even elect judges in many states.

The National Popular Vote, or NPV, would change our existing system, in which the winner of the Electoral College wins the presidency, to a system that more closely resembles these other elections. The NPV turns the Electoral College into a mechanism by which the winner of the aggregate total of the popular vote in the fifty states and the District of Columbia becomes the winner of a majority of the electors in the Electoral College. States individually pledge to award their electoral votes to the candidate who receives the most aggregated votes in the fifty states and the District of Columbia. When at least 270 electoral votes' worth of states join the pledge, the compact takes effect.

The NPV shifts our system to that of a popular presidential election without the need to go through the onerous constitutional amendment process, which requires two-thirds of both houses of Congress plus legislative approval in thirty-eight states. The NPV Compact allows us to skip all that, for proponents of the NPV have a shortcut—just get 270 electoral votes' worth of states to sign on.

But any talk of a "national" popular vote is a misnomer at best, and an outright lie at worst. The only existing mechanism we have to compile voting preferences is federal, not national, in nature. In contrast, the only way to create a national popular vote is through nationwide regulation at the congressional level, which the Constitution does not now authorize. While piecemeal efforts might bring about some greater uniformity, a federal constitutional amendment is the only means to determine a national popular vote.

I. Partly National, Partly Federal

The NPV would turn the existing decentralized presidential election system into a single aggregate popular vote total. But the NPV's framework does not adequately consider how deeply this decentralization is embedded in our constitutional structure. Consider the framing in Federalist 39.

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In Federalist 39, Publius argues that the new Constitution is republican in character.[1] For the election of the President, Publius notes that it is mixed in character. He writes:

> The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.[2]

Publius rebuts the contention of the anti-federalists, who claimed that a republican government must be exclusively "federal" in form—that is, a confederacy of sovereign states. The anti-federalist complained that the Constitution would create a government too "national" in character. Publius walks through various provisions of the Constitution to identify how in some forms it is national in character, and in others it is federal.

This allocation of authority between federal and state power is not an accidental choice. Concerns arose at the Constitutional Convention that the executive would be too beholden to the legislature if the legislature had too much power over the selection of the executive. The legislature was excluded from the selection process of the executive—at least, excluded until the Electoral College failed to choose a President by a majority vote and winnowed the field for the House to choose among a set of candidates.[3]

Instead of giving Congress the power to choose the Presidents, the state legislatures have plenary authority to choose how to direct the appointment of presidential electors, who then vote for the President—this is what Publius describes as the "political characters" of the states. And that is a process

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[1] *See* THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob E. E. Cooke ed., 2010).

[2] *Id.*

[3] While many in the Constitutional Convention endorsed selection by the legislature, its opponents carried the day, some defending independence of the executive. *See, e.g.*, JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 306 (Adrienne Koch ed., 1987) (noting that Gouverneur Morris opposed selection of the executive by the legislature as the executive would be "the mere creature of the Legislature: if appointed & impeachable by that body"); *id.* at 311 (James Madison commenting that "[t]he Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a reappointment"). Late in the convention, it appeared that the legislature would have the power to choose the executive, over the opposition of Morris and others. *See* JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 524 (Adrienne Koch ed., 1967). But the Electoral College developed, as Roger Sherman explained from the Committee of Eleven designed to solve some intractable dilemmas, "to render the Executive independent of the Legislature." *Id.* at 576.

that varies state by state. Today, all fifty states and the District of Columbia direct the appointment by a popular vote.

Our presidential elections system is partly national, partly federal. And as we begin to examine the compiled vote totals in the United States, the federal elements begin to appear. Professor Norman Williams calls this the "myth of the national election."[4] Professor Michael Morley identifies the "national" popular vote as an "aggregation" of election results across the several states.[5] I have written about this as "invisible federalism," the hallmarks of elections from each state and the hidden distinctions between them that make them distinctive contests.[6] It is tempting to look at these common parallel actions of all fifty states and think there is a national popular vote. True, we can compile a nationwide total of the popular vote. But it is not a national popular vote.

II. Artificial National Popular Vote Totals

There is nothing particularly novel about adding up presidential votes like the NPV proposes. Pundits[7] and academics[8] commonly add up the popular vote received by presidential candidates in each of the fifty states and the District of Columbia, then arrive at a popular vote total for each candidate.

Indeed, we even create a popular vote tally under existing federal law. Every four years, the Federal Election Commission compiles the vote totals of each presidential candidate in all fifty states and the District of Columbia.[9] Under the Federal Election Campaign Act and its amendments, presidential candidates are eligible for public financing of elections. "Major party" candidates are those who are nominees of a party that received at least "25 percent or more of the total number of popular votes received by all candidates for such office" in the preceding presidential election.[10] They are eligible for the maximum amount of federal funding provided by statute.[11] "Minor party" candidates are those whose party received at least five percent but less than twenty-five percent of the popular vote in the preceding elec-

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[4] Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 Geo. L.J. 173, 222 (2011).

[5] Michael T. Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmity of the National Popular Vote*, 15 Harv. L. & Pol'y Rev. XX, XX (2020).

[6] Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1265–78(2012).

[7] *See, e.g.*, David Leonhardt, *Clinton's Substantial Popular-Vote Win*, N.Y. Times (Nov. 11, 2016), https://www.nytimes.com/2016/11/11/opinion/clintons-substantial-popular-vote-win.html [https://perma.cc/N6AJ-7EVM].

[8] *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1086, 1086 n.169 (2001) (noting that George W. Bush did not win "a majority of the popular vote").

[9] *See generally The Election and Voting Information*, Fed. Election Comm'n, https://transition.fec.gov/pubrec/fe2016/federalelections2016.pdf [https://perma.cc/GZ44-A3R3].

[10] 26 U.S.C. § 9002(6) (2018).

[11] *See id.* § 9004.

tion.[12] They receive a reduced amount of public funding depending on their share of the vote.[13] Congress decided to award public funding in rough measure to popular support, choosing popular vote totals over alternatives, like a nationwide petition drive or public opinion polling.[14]

Congress's judgment is not wrong. If Congress wants to provide public funding for serious campaigns and only serious campaigns, it needs a rough idea of national support. A popular vote total is a good, but rough, measure of national support.

But elections are not about rough measures of public support, as if they were public opinion polls. They aggregate the preferences of individual voters to determine a winner. And aggregating those preferences across state borders yields disparate results.

III. State Differences in Holding Elections

While the NPV adds up the vote totals across the states, it fails to recognize that voting differs from state to state. Imagine a gubernatorial election in Massachusetts. Imagine that the Democratic candidate was on the ballot in Barnstable County but not in Essex County. Imagine that incarcerated felons could vote in Middlesex County, but no one ever convicted of a felony could ever vote in Suffolk County. Imagine the polls were open until 6 pm in Worcester County but 9 pm in Norfolk County.

Such a system seems unbelievable because we could not fathom such disparities when we are all voting for the same office. If it is a single constituency election—that is, we are all as a nation voting for the President—then we should have *some* uniformity of rules. I am hardly alone in critiquing this—proponents of turning the Electoral College into a national popular vote have recognized that voting rules uniformity is essential to any reform effort.[15]

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[12] *Id.* § 9002(7).

[13] *See id.* § 9004.

[14] *See* Buckley v. Valeo, 424 U.S. 1, 99–100 (1976).

[15] *See, e.g.*, Robert W. Bennett, Taming the Electoral College 176 (2006) ("[A]ny full move to a nationwide popular vote would have to take seriously the definition of eligibility to vote for president."); Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 571 (1968) ("In short, a natural next step in our developing 'one-man-one vote' theory would be a constitutional amendment setting up a uniform and nationally policed system for presidential elections."); James A. Michener, Presidential Lottery 127 (1969) ("To stop this kind of basement bargaining, federal laws would pretty surely be required, and they would dictate such things as voting age, registration procedures, and polling practices. Opponents of federal control hold that this is too high a price to pay for the admitted advantages that otherwise flow from direct popular voting."); Neal R. Peirce & Lawrence D. Longley, The People's President 233 (1981) ("Senator Bayh stated the case in less formal language: 'If we see some mad scramble by the states to lower voter qualifications willy-nilly, then Congress can step in and establish uniform standards.'"); Wallace S. Sayre & Judith H. Parris, Voting for President: The Electoral College and the American Political System 87, 145 (1970) ("What is far more important is that the national government would intervene directly in the administration of presi-

Let us start with a few of the more obvious differences. Each state fixes voter eligibility, and voter eligibility varies among the states. Incarcerated felons can vote in Vermont and Maine, but nowhere else in the country. In states like Iowa and Kentucky, felons are permanently disenfranchised, even after completing terms of parole and probation.[16] Mental capacity provisions vary from state to state.[17] While no state authorizes children under the age of 18 to vote in presidential elections, there is nothing that prevents them from doing so in the future—indeed, some states experiment with youth voting in local elections.[18] Non-citizens have the right to vote in some local elections, too.[19] Adding vote totals, then, is not reflective of a single popular vote. It reflects a series of independent vote totals, state by state, with varying voting-eligible populations casting votes.

Residency restrictions may differ from state to state. Suppose you vote early in Colorado, then move to Arizona and cast another vote there on Election Day. Under many state laws, that is perfectly legal—the choice of

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dential elections, which is now a state function. . . . National administration of presidential elections would probably be necessary."); Robert W. Bennett, *Current Electoral College Reform Efforts Among the States*, *in* ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 187, 193 (Gary Bugh ed., 2010) ("Making the nationwide popular vote decisive also highlights state variations in who is eligible to vote, and might put pressure on states to expand that eligibility—for instance by lowering the voting age below eighteen. State variations in registration and other procedural requirements might also come under scrutiny."); Brian J. Gaines, *Compact Risk: Some Downsides to Establishing National Plurality Presidential Elections by Contingent Legislation*, *in* ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES, *supra*, at 113, 119 ("If the national vote total suddenly matters, however, expect a string of legal battles over efforts to impose uniform rules on a system never meant to be uniform."); Paul D. Schumaker, *The Good, the Better, the Best: Improving on the "Acceptable" Electoral College*, *in* ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES, *supra*, at 203, 207 ("The compact allows somewhat more complexity than the popular plurality systems used to elect state officials, because states could set different rules regarding voter eligibility (such as voting rights of former felons) and adopt different procedures for casting votes (such as the extensive use of the mail ballot in Oregon)."); Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 252 (2011) ("If and when the NPVC comes into being, I would forcefully urge Congress to supplement it with a system of uniform rules for tallying sentiment in all fifty states."); *see generally* Muller, *supra* note 7, at 1279–80 n.265.

[16] *See* Muller, *supra* note 7, at 1273–75.

[17] *See* Williams, *supra* note 5, at 223–24.

[18] *See, e.g.*, Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 63–64 (2017); Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1473–74 (2012); Daniel Hart & Robert Atkins, *American Sixteen- and Seventeen-Year-Olds Are Ready to Vote*, 633 ANNALS AM. ACAD. POL. & SOC., 201, 202 (2011); Carrie Seleman, *Around the World: Children's Suffrage: Giving 16 Year Olds the Right to Vote*, 38 CHILD. LEGAL RTS. J. 174, 174–75 (2018); *cf.* Muller, *supra* note 7, at 1270–73.

[19] *See* Muller, *supra* note 7, at 1275–77. *But see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 216, 18 U.S.C. § 611(a) (2012) (prohibiting non-citizen voting in certain federal elections); Derek T. Muller, *Is a Federal Ban on Alien Voting Unconstitutional?*, EXCESS DEMOCRACY (June 21, 2013), https://excessofdemocracy.com/blog/2013/6/is-a-federal-ban-on-alien-voting-unconstitutional [https://perma.cc/3538-EQFT]; Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 469 (2017).

presidential electors in Colorado is a distinct contest from the choice of presidential electors in Arizona, even though it appears you voted "twice" for President.[20]

Voting procedures can vary wildly from state to state, too. Some states have strict photo voter identification laws, others have no identification requirement at all.[21] Some open polling at different hours—including West Coast polling locations that are open far later than certain East Coast jurisdictions, in which millions of votes could be publicly reported as the polls remain open elsewhere.[22] Some have extensive early voting and some have little absentee voting at all.[23] Voters might well be discouraged from voting in later jurisdictions once results from earlier jurisdictions pour in, or might have more opportunities to participate in some jurisdictions over others.

Ballot access standards vary from state to state. In 2016, Green Party nominee Jill Stein and independent candidate Evan McMullin, among others, appeared on the ballot in only some states.[24] States like Texas have extremely early ballot access deadlines and prevent late entrants from joining the race.[25] There was an effort to keep Donald Trump off the ballot in 2016 in Minnesota for a filing error;[26] there are efforts to keep him off the ballot in 2020 for failing to disclose his tax returns.[27] In a "national" contest, it

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[20] *See, e.g.*, State v. Hannah, 355 P.3d 607, 609 (Ariz. Ct. App. 2015) (recognizing that federal elections in Arizona and Colorado, though held on the same day, are "separate and discrete elections," precluding application of a criminal statute forbidding a state resident from voting "more than once in any election"). *But compare* 52 U.S.C. § 10307(e)(1) (2012) ("Whoever votes more than once in an election [for the office of President, Vice President, presidential elector] shall be fined not more than $10,000 or imprisoned not more than five years, or both.") *with id.* § 10307(e)(3) ("the term 'votes more than once' does not include . . . the voting in two jurisdictions [in certain presidential elections], to the extent two ballots are not cast for an election to the same candidacy or office").

[21] *See Voter Identification Requirements*, NAT'L CONF. ST. LEGISLATURES (Feb. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/W955-CD82].

[22] *See* Muller, *supra* note 7, at 1266 n.177.

[23] *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. ST. LEGISLATURES (Apr. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx [https://perma.cc/UW2V-45RP].

[24] *See* Richard E. Berg-Andersson, *Presidential Candidate Ballot Access by State*, GREEN PAPERS (Jan. 18, 2020), https://www.thegreenpapers.com/G16/President-BallotAccessByState.phtml [https://perma.cc/E8KE-UR2U].

[25] *See* TEX. ELEC. CODE. ANN. §§ 146.023, 146.025, 172.002, 181.005, 181.006, 192.003, 192.031, 192.032, 192.033 (West, Westlaw through the end of the 2019 Regular Session of the 86th Legislature) (requiring independent candidates to petition "no later than the second Monday in May," *id.* § 192.032(c), while authorizing political parties to nominate "before the later of . . . the 71st day before the presidential election; or . . . the first business day after the date of final adjournment of a party's national nominating convention," *id.* § 192.031(a)(3)).

[26] *See* Rachel E. Stassen-Berger, *Donald Trump Will Stay on Minnesota Ballots, Court Rules*, TWIN CITIES PIONEER PRESS (Sept. 13, 2016), https://www.twincities.com/2016/09/12/donald-trump-will-stay-on-minnesota-ballots-court-rules/ [https://perma.cc/5MWE-VVFK].

[27] *See, e.g.*, Griffin v. Padilla, 417 F. Supp. 3d 1291, 1293–94 (E.D. Cal. 2019); Patterson v. Padilla, 451 P.3d 1171, 1178 (Cal. 2019). I argue such proposals are unconstitutional in that they exceed state power to regulate the "manner" of directing the appointment of presidential

seems unusual to compile the votes across jurisdictions when candidates differ across them.

Methods for counting ballots, from stray marks to signature matching, can vary. Ranked choice voting might alter how popular vote totals are reported from those jurisdictions as opposed to others.[28]

Recount laws vary from state to state—and none authorize recounts in close *national* elections. Most states have automatic recount provisions if the election is particularly close in the state, say within a quarter of a percentage point of votes cast separating the winner and loser. Others allow a candidate to file for—and maybe pay for—a recount if the election is a little less close. But many states do not allow a recount if the margin of victory is particularly large. Imagine we had our nationwide popular vote total, and the vote is close. We would want to recount everywhere. Practical problems, certainly. But legally, in many states, there would be no legal authority to recount unless states updated their statutes. Why? Because the race inside the state may not be particularly close, even if the nationwide margin is close. Again, state laws refer to state election results, not to nationwide vote tallies.[29]

Admittedly, we *do* see some variations from county to county in single constituency elections. A particular statewide election, like a governor or a United States Senator, on the ballot might affect voter behavior or turnout for other races.[30] Ballot formats may differ from across jurisdictions—think Florida in 2000 and how only some parts of the state used punch card ballots.[31] Today's early voting means some counties prepay postage for absentee ballots and other counties require you to supply your own postage.[32] Signature verification among absentee ballots could differ from jurisdiction to jurisdiction.[33] And even the most uniform of standards are subject to human error that may vary from the humans staffing a particular polling place.

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elections. *See generally* Derek T. Muller, *Weaponizing the Ballot*, FLA. ST. U. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450649 [https://perma.cc/2BGC-A8GV]. Even so, incentives for states to exclude disfavored parties or candidates from the ballot in ways that vary from state to state are longstanding. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 782 (1983).

[28] *See* Derek T. Muller, *Maine, Ranked Choice Voting, and the National Popular Vote Compact*, EXCESS DEMOCRACY (July 10, 2019), https://excessofdemocracy.com/blog/2019/7/maine-ranked-choice-voting-and-the-national-popular-vote-compact [https://perma.cc/HH4T-MRBG].

[29] *See* Williams, *supra* note 5, at 232–34.

[30] *See, e.g.*, Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700, 700 (2001).

[31] *See* Ford Fessenden, *No-Vote Rates Higher in Punch-Card Counts*, N.Y. TIMES, Dec. 1, 2000, at A29, https://www.nytimes.com/2000/12/01/us/contesting-vote-voting-machines-no-vote-rates-higher-punch-card-counts.html [https://perma.cc/4XYC-RVUR].

[32] *See, e.g.*, Susie Armitage, *Mail-In Ballot Postage Becomes a Surprising (and Unnecessary) Cause of Voter Anxiety*, PROPUBLICA (Nov. 1, 2018), https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety [https://perma.cc/DZN8-QPHD].

[33] *See, e.g.*, Susie Armitage, *Handwriting Disputes Cause Headaches for Some Absentee Voters*, PROPUBLICA (Nov. 5, 2018), https://www.propublica.org/article/handwriting-disputes-cause-headaches-for-some-absentee-voters [https://perma.cc/H5ML-VGHU].

So how much uniformity ought we have in a "national" presidential election? I would submit that we ought to have more than the NPV requires—none. And I submit that we ought to have more uniformity than currently exists in federal popular vote tallies.

It is not simply the lack of existing legislation that presents a practical problem that states ought to rush to repair. *Bush v. Gore*,[34] if we can talk about that case seriously and not as a one-ride ticket, emphasized that similarly situated voters must be treated similarly or risk violating the Equal Protection Clause.[35]

True, *Bush v. Gore* occurred in a single-constituency election—the state of Florida was electing presidential electors, and it needed to have some uniformity in its statewide election. But the decision to enact the NPV converts the state's choice of electors into an aggregation of the vote totals of the fifty states and the District of Columbia—in effect, a new single constituency. It would not pass "one person, one vote" as explained in *Gray v. Sanders*[36] to argue that Florida was aggregating the votes from its sixty-seven counties. Instead, single constituency elections require some minimal uniformity of treatment of voters.

But let us put aside whether some conception of the Equal Protection Clause—*Bush v. Gore*, "one person, one vote," or otherwise—constitutionally *compels* a particular degree of uniformity.[37] Instead, once we determine that we *ought* to have some level of uniformity, how might we go about achieving it? Creating uniformity presents its own challenges without a constitutional amendment.

IV. Challenges to Establishing Uniformity

Although the NPV adds up the votes across the country to come up with a popular vote total, it lacks a mechanism to bring uniformity to those different jurisdictions. Before shifting to a national popular vote, existing state practices must be aligned. Some existing uniformity in presidential elections is assuredly accidental. States may be aware of how other states handle elections, but many happily run elections with their own state-specific idiosyncrasies.

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[34] 531 U.S. 98 (2000) (per curiam).

[35] *See id.* at 106 ("[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."); *id.* at 109 ("The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."); *id.* at 126 (Stevens, J., dissenting) ("Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.").

[36] 372 U.S. 368 (1963).

[37] *See* Morley, *supra* note 6; Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 Harv. J.L. & Pub. Pol'y 371, 371–73 (2016).

A greater priority would be to prevent gamesmanship in the states for a nationwide election. We would expect states to start behaving differently if their election laws no longer had only intrastate influence but interstate influence—consider disenfranchising ex-felons, enfranchising children, or making it more difficult for some candidates to obtain ballot access. We do not need to identify any given change as good or bad—the mere difference from other states is sufficient for concern. Before the NPV can be implemented, then, mechanisms for uniformity to prevent gamesmanship must be implemented.

At a theoretical level, then, we need to consider how much uniformity and equality we want in elections, a consensus to implement across jurisdiction. And on top of that, we need not only a definition, but also to ensure that we can unify those standards so that similarly situated voters are treated similarly. The NPV is silent on this issue by design, because its proponents emphasize that states are free to continue to engage in their elections as they have done in the past and that the NPV is no dramatic change to the status quo. The NPV places exceedingly few conditions on state behavior—compacting states must recognize the results in other states and cannot withdraw from the compact six months before Inauguration Day.

And perhaps even more challenging, once we agree on how much uniformity we need, we then need to figure out how to implement it.

A. Uniform State Legislation

One option might be uniform state legislation. States could simultaneously adopt the same election rules in all presidential elections, obviating the need for federal legislation and consistent with the spirit of the NPV.

Such proposals seem unrealistic. If fifty states agree on uniform election rules, amending the Constitution seems the more attractive option, which tends to highlight the unlikelihood of uniform legislation. Most states, out of convenience, hold presidential elections alongside many other state and local election contests. Rules regulating presidential elections invariably affect other contests, unless the state chooses to separate them at increased cost.[38]

But any increase in uniformity would be better, even if not all fifty states join. Indeed, increased uniformity ought to have been a part of the draft NPV, or at least best practices should have been developed beforehand. Granted, such practices would only bind or advise the compacting states, but it would bring a greater degree of uniformity.

Uniform legislation also assumes states would not race to the bottom to manipulate their election rules to provide outsized effect on a national race. One state's decision to exclude a major party candidate from the ballot or alter enfranchisement rules could easily tilt an election.

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[38] *See infra* Section IV.B.

B. Existing Federal Constitutional Authority

If disparities exist across jurisdictions and states are reluctant to coordinate behavior, could Congress provide that uniformity? The original Constitution provides little federal power over presidential elections. Congress may determine the "time of choosing electors," and the "day on which they shall give their votes."[39]

That is it.[40] Congress has no power to regulate the "manner" of holding elections, unlike congressional elections.[41] There is no power to dictate the rules of voter eligibility or rules for uniformity.

Constitutional amendments offer some additional federal power. Congress has enforcement authority if the right to vote is "denied or abridged" "on account of race, color, or previous condition of servitude,"[42] "on account of sex,"[43] "by reason of failure to pay any poll tax or other tax,"[44] or "on account of age" for those "18 years of age or older."[45]

The Supreme Court recognized the authority of Congress to regulate the manner of elections, including some presidential election regulations. And stringing together Supreme Court precedents and past exertions of congressional authority may get advocates part of the way toward providing uniformity.

In *Ex parte Yarbrough*,[46] the Court upheld the scope of one of the Enforcement Acts, which criminalized conspiracy to prevent "any citizen who is lawfully entitled to vote" from supporting an "elector for President or Vice President" or a "member of Congress."[47] At particular issue in *Yarbrough* was a conspiracy to physically assault an African-American citizen attempting to cast a vote for a member of Congress.

Seemingly relying on the scope of the Elections Clause and the Necessary and Proper Clause, the Court explained "Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function?"[48] Then, turning to the power of Congress under

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[39] U.S. CONST. art. II, § 1, cl. 4. For a robust defense of the federal scope of authority of the Elections Clause, see Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019).

[40] *See* James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Electors*, 27 L. & CONTEMP. PROBS. 495, 497 (1962).

[41] *Cf. id.*; U.S. CONST. art. I, § 4, cl. 1.

[42] U.S. CONST. amend. XV.

[43] *Id.* amend. XIX.

[44] *Id.* amend. XXIV.

[45] *Id.* amend. XXVI.

[46] 110 U.S. 651 (1884)

[47] *Id.* at 655, 667.

[48] *Id.* at 661.

the Fifteenth Amendment, "Congress has the power to protect and enforce that right."[49]

The Supreme Court would later broaden its interpretation of the scope of congressional power, ostensibly relying on *Yarbrough*. Consider *Burroughs v. United States*,[50] which concerned congressional regulation through the Federal Corrupt Practices Act ("FCPA") of political committee activities, including those organizations that sought to "influence the election of presidential and vice presidential electors."[51] The Court acknowledged that Congress lacked a "manner" power for presidential elections, unlike congressional elections. But it emphasized that *Yarbrough* "made no distinction" between congressional and presidential elections (without noting the Fifteenth Amendment authority that *Yarbrough* heavily relied on and that the FCPA could not rest on).

The *Burroughs* Court emphasized that anti-corruption rules did not "interfere with the power of a state to appoint electors *or the manner* in which their appointment shall be made," and it did not invade "any exclusive state power."[52] Instead, federal law tacked penalties onto conduct surrounding existing state election rules: "Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections."[53] *Burroughs* stood for the power to preserve existing elections, not to alter state election rules.

The same principle extended to the Federal Election Campaign Act and the Supreme Court's decision in *Buckley v. Valeo*.[54] There the Court relied on *Burroughs* for the power to regulate campaign financing, but it also approved of publicly financed presidential elections to promote the "general welfare" and that public financing was "necessary and proper" to that end.[55]

Consistent with *Buckley*, Congress might exert its power over the purse to condition election-related spending in the states if states comply with certain federal mandates[56]—at the risk of unconstitutionally coercing states.[57]

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[49] *Id.* at 665.

[50] 290 U.S. 534 (1934).

[51] *Id.* at 541.

[52] *Id.* at 544–45 (emphasis added). This is a reason, I think, that Professor Vik Amar may overread the scope of *Burroughs* in describing the "federal power to safeguard elections of federal officers" that might authorize Congress to institute a nationwide presidential preference poll. Amar *supra* note 16, at 255–57; *see also*, Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 908 (2002) (construing *Burroughs* as "wide enough reach to embrace national-ballot and voting-equipment legislation").

[53] 290 U.S. at 548.

[54] 424 U.S. 1 (1976).

[55] *See id.* at 90–91 ("Congress has power to regulate Presidential elections and primaries, . . . *Burroughs*; and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power.").

[56] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citation omitted) ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.").

And, of course, Congress has the power to regulate the "manner" of federal *congressional* elections. If Congress provided extensive rules for congressional elections, it might simultaneously exert pressure on the states to align their presidential elections in the same manner.

Would that work? Maybe. Because Congress has broader authority to regulate congressional elections than presidential elections, it could dictate specific election rules—including ballot access rules and early voting requirements—under the Elections Clause. It already requires federal congressional elections and presidential elections to be held on the same day. As a result, there would be pressure on the states to have presidential election rules that match the congressional election rules.

That said, indirect federal pressure in elections has occasionally been unsuccessful. States are often reluctant to submit to indirect pressure. After the Twenty-Fourth Amendment prohibited poll taxes in federal elections, states with poll taxes largely continued to require them in state elections.[58] After Arizona and Kansas were forbidden from enforcing proof of citizenship requirements in federal elections after a Supreme Court ruling in 2013, they began to develop a separate registration system for state elections.[59] Federal congressional election rules might introduce some greater degree of uniformity, but it is far from assured.

Congress has certainly *legislated* as if it has broader powers than the Presidential Electors Clause and the enforcement authority of the constitutional amendments. The Voting Rights Act Amendments of 1970,[60] the Uniformed and Overseas Citizens Absentee Voting Act,[61] the National Voter Registration Act of 1993,[62] and the Help America Vote Act of 2002[63] each regulated presidential elections on "manner"-related topics. Perhaps states have largely acquiesced given the complexity of holding a separate election for congress from all other contests, or perhaps because the intrusions are (mostly) minor.[64]

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[57] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–82 (2012).

[58] *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 664 (1966).

[59] *See, e.g.*, Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES (Oct. 11, 2013), https://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html [https://perma.cc/Q862-JGTV].

[60] Pub. L. 91-285, § 6, 84 Stat. 314, 316 (defining durational residency for "voting for the offices of President and Vice President"); *id.* § 6, 84 Stat. at 316 (declaring that the right to vote "in any primary or in any election" shall not be "denied" "on account of age" for anyone "eighteen years of age or older").

[61] Pub. L. 99-410, § 107(3), 100 Stat. 924, 927 (codified at 52 U.S.C. § 20310(3)) ("'Federal office' means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.").

[62] Pub. L. 103-31, § 3(2), 107 Stat. 77, 77 (defining "Federal office" as defined by the Federal Election Campaign Act of 1971, or "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress," 52 U.S.C. § 30101(3) (2018)).

[63] Pub. L. 107-252, 116 Stat. 1666 (referring throughout to "Federal office").

[64] *But see* Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 35 n.2 (Thomas, J., dissenting) ("Constitutional avoidance is especially appropriate in this area because the NVRA purports to regulate presidential elections, an area over which the Constitution gives Congress no authority whatsoever.").

Of note, the Voting Rights Act Amendments of 1970 offered two notable expansions of federal power. First, it tried to enfranchise eighteen-year-olds in federal and state elections. A fractured Supreme Court with no majority opinion concluded Congress could do so for federal elections[65]—but not state elections, which led to the Twenty-Sixth Amendment.

A seven-justice majority of the Supreme Court later questioned the precedential value of *Mitchell*.[66] In *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court held that—at least for congressional elections—"[p]rescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times,* the *places,* and the *manner* of elections.'"[67] The Court likewise emphasized that a five-justice majority in *Mitchell* rejected the Fourteenth Amendment as a source of congressional authority to establish voter qualifications.[68]

Second, the Voting Rights Act Amendments of 1970 established minimum residency requirements in presidential elections.[69] The Court, in various opinions, upheld that authority on a variety of grounds—Congress's enforcement authority under the Privilege or Immunities Clause, the Privileges and Immunities Clause, the right to travel across state lines, or an inherent power to regulate presidential elections.[70]

In short, judicial precedents that affirm Congress's power to regulate presidential elections are typically untethered to textual grants of authority to Congress. When Congress's power is ratified by the Supreme Court, it often comes through plurality opinions that are later called into question or in generic language that emphasizes how state prerogatives in running presidential elections remain intact. Power over voter qualifications remains the least likely area of federal power. But exertions of authority through the Spending Clause or in parallel elections held pursuant to federal mandates under the Elections Clause might increase some uniformity.

C. Federal Constitutional Amendment

There is no viable state or federal mechanism to create uniform presidential election rules for a national popular vote. And while the NPV is

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[65] *See* Oregon v. Mitchell, 400 U.S. 112 (1970).

[66] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 n.8 (2013) (opinion of Scalia, J.) ("That result, which lacked a majority rationale, is of minimal precedential value here. Five Justices took the position that the Elections Clause did *not* confer upon Congress the power to regulate voter qualifications in federal elections. This last view, which commanded a majority in *Mitchell,* underlies our analysis here. Five Justices also agreed that the Fourteenth Amendment did not empower Congress to impose the 18–year–old–voting mandate.") (citations omitted).

[67] *Id.* at 17 (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (C. Rossiter ed., 1961)) (citing THE FEDERALIST NO. 52, at 326 (James Madison) (C. Rossiter ed., 1961)).

[68] *See id.* at 16 n.8.

[69] *See Mitchell*, 400 U.S. at 134.

[70] *See id.*

designed to take effect without a constitutional amendment, the only way to create this uniformity is with a constitutional amendment. It is worth considering the last serious federal constitutional amendment to abolish the Electoral College in 1969 to 1970. Congress was vigorously engaged in amending the Constitution on election law matters in that decade—consider the Twenty-Third Amendment giving presidential electors to the District of Columbia, passed by Congress in 1960; the Twenty-Fourth Amendment prohibiting poll taxes in federal elections in 1962; and the Twenty-Fifth Amendment dealing with presidential disability and succession in 1965. Its understanding of existing constitutional authority to regulate federal elections is instructive.

In the Bayh-Celler amendment's draft language, the voters in presidential elections were defined like those for the House, fixed to the qualifications for voters for the most numerous branch of the state legislature. The amendment empowered Congress to establish uniform residency requirements. While states could establish the times, places, and manner of holding elections, Congress could override those rules, including the "manner" of holding elections, which would extend to matters from ballot access rules to poll hours, much like the Elections Clause for Congress:

> The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice President, the legislature of any State may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications.
>
> The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations.[71]

The proposed presidential election amendment reflected a recognition that Congress needed a *new* "manner" power, consistent with the Constitution's text and structure as outlined above.[72] The proposed amendment likewise included a specific ballot access power. This crucial new federal power for uniform regulation of elections is absent uniform parallel legislation in all fifty states and the District of Columbia.

Conclusion

Questions about what level of uniformity we ought to have in elections and how to go about enacting them ought to be answered before the NPV

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[71] H.R.J. Res. 681, 91st Cong. (1969).
[72] *See id.*

takes effect—and not simply become a reaction upon its taking effect. Laws providing uniformity need to be considered now. They ought to be enacted immediately, or at least put in place to take effect when the NPV reaches its threshold total (which assumes its constitutionality).[73]

Maybe state and federal elected officials can bargain through a series of rules to tradeoffs regarding qualifications, ballot access, and election rules. Maybe recount provisions can be swiftly amended. Maybe. But these questions remain unanswered, and legislative solutions remain a low priority.

The lack of such efforts may simply reflect a lack of belief that the NPV will ever take effect. Or it may be that the questions are too hard to answer, a good reason to pause NPV efforts and to pursue holistic legislation. The Constitution, by design, makes it difficult for the federal government to exercise control over presidential elections.[74] A constitutional amendment would compel legislators to answer these questions and bring about a true national popular vote. Without it, there cannot be a national popular vote—only a federal popular vote.

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[73] *See, e.g.*, Derek T. Muller, *The Compact Clause and the National Popular Vote Compact*, 6 ELECTION L.J. 372, 389–93 (2007) (arguing that the Compact requires congressional consent before it may constitutionally take effect); Derek T. Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 ELECTION L.J. 227, 228–29 (2008) (arguing the same); Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1574–81 (describing limited scope of delegation of power to states to choose presidential electors).

[74] *See* U.S. CONST. art. V.

Toward a More Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact

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INTRODUCTION

Nothing captures the nation's attention like the contest for President. With a dwindling number of "swing states," two of the last six presidential elections resulting in an Electoral College victory for the popular vote loser, and fourteen states in 2016 awarding all of their electoral votes to candidates earning less than half of their statewide vote, it is no surprise that calls to reform the way the United States chooses its chief executive are increasing.

The National Popular Vote Interstate Compact (NPVIC) and ranked choice voting (RCV) have gained significant momentum since the controversial 2000 election between George W. Bush and Al Gore. Widely adopted by jurisdictions across the United States, they are the most promising reforms to make every vote count equally and give voters more voice and choice in presidential elections. To date, both reforms have been advanced separately, with the NPVIC based on electing the presidential candidate who wins a *plurality* of the *national* popular vote and RCV based on seeking to have states award their electoral votes to the candidate who wins the *majority* of the *statewide* popular vote. Moving forward, the challenge for supporters of both changes is to ensure that they can be integrated harmoniously.

This Article proposes two new statutory options to integrate RCV with the NPVIC, the pre-existing, active movement led by National Popular Vote to guarantee the presidency to the candidate who receives the most popular votes across all fifty states and the District of Columbia. Relying on the NPVIC taking effect before they would be activated, the two proposals are:

> (1) the "RCV in Presidential Elections Act," a congressional bill that relies on Congress's authority to regulate Presidential elections in order to establish uniform standards for a national RCV Presidential ranked choice ballot that would be used to determine the national popular vote winner; and
>
> (2) the "Interstate RCV Compact" that specifies how states can conduct an interstate RCV election to run the RCV tally down to two candidates and have the results integrated with the NPVIC.

The first option, the RCV in Presidential Elections Act, is a preferable policy because it would enable a national RCV election in Presidential elec-

tions. The second option, the Interstate RCV Compact, is one that states can act on immediately. It would allow a minimum of five states to jointly conduct an RCV election for the purposes of generating vote totals for the NPVIC. While this second Interstate RCV Compact option is less sweeping and, therefore, less ideal than the congressional statute option, it nonetheless could serve as a helpful incremental measure grounded in actions by state policymakers.

The NPVIC and RCV both affect very real, but different problems with elections for our nation's most powerful office. The number of swing states has declined and become much more rigid over time, with clear impacts on federal policies affecting states and voter turnout across states—inequities solved by the NPVIC. The high degree of partisan polarization means that, without RCV, the entry of a third party or independent candidate can change who wins the White House when states give all their electoral votes to candidates with less than a majority, as likely has changed presidential outcomes numerous times, including potentially in 2000, 2016, and 2020.

Given the growing popularity of RCV and the obvious inequity among states with the current Electoral College rules, more states are likely to act in order to have one or both proposals in place, raising the question: How might the NPVIC and RCV work together? To answer this question, this Article seeks to outline and advocate for how the RCV in Presidential Elections Act and Interstate RCV Compact approaches might work in practice. First, we provide an overview of the current presidential election system, the NPVIC, and the use of RCV in the United States. We then explain why it is necessary to prepare to integrate RCV with the NPVIC and provide detailed explanations of the RCV in Presidential Elections Act and the Interstate RCV Compact. Finally, we explore how these two proposed options would work in practice through the lens of the 1912 presidential election.

I. The Current Presidential Election Process and the National Popular Vote Interstate Compact (NPVIC)

Contrary to what most Americans support, voters do not directly elect the President. The Electoral College does.[1] The Electoral College is composed of electors allocated to each state, equal to the combined total of its U.S. Senate and House of Representative delegations.[2] The sole purpose of these electors is to elect the President and Vice President,[3] and the Constitu-

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[1] *See* Andrew Daniller, *A Majority of Americans Continue to Favor Replacing Electoral College with a Nationwide Popular Vote*, Pew Res. Ctr. (Mar. 13, 2020), https://www.pewresearch.org/fact-tank/2020/03/13/a-majority-of-americans-continue-to-favor-replacing-electoral-college-with-a-nationwide-popular-vote/ [https://perma.cc/DZ8Q-9PYZ].

[2] *See* U.S. Const. art. II, § 1.

[3] *See* Thomas H. Neale & Andrew Nolan, Cong. Research Serv., R43823, The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compact 2–3 (2019).

tion grants states the power to appoint their electors in any manner the state legislature directs.[4] Today, in a major shift from the early decades of the Electoral College, almost all states award their Electoral College votes through a "winner-take-all" system where the winner of the state's popular vote is awarded all of that state's electoral votes.[5] Maine and Nebraska are the exceptions. These states employ a district-based system.[6]

Although individual electors may be independent, members of the Electoral College cast their votes in accordance with the popular vote of their state. This is because the electors casting these votes will always be associated with the candidate who has earned them according to a state's rules.[7] Despite the role envisioned by the Framers,[8] historically electors have not acted as an independent body that shields the Presidential election from popular will. The Supreme Court recognized as much in 1892 in *McPherson v. Blacker*[9]:

> Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were chosen simply to register the will of the appointing power in respect of a particular candidate.[10]

In practice the United States does not elect its President by entrusting only a few individual electors with the choice of who should govern. The choice is instead determined by the popular will of eligible voters of each state.[11] This does not always align with the will of the nation. Five times

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[4] *See* U.S. CONST. art. II, § 1.

[5] *See* NEALE & NOLAN, *supra* note 3, at 3.

[6] *See id.* at 3 n.16.

[7] This is how the Electoral College functions most of the time. Sometimes an elector will cast a vote for a candidate who did not win a state's popular vote. These electors are often referred to as "faithless electors." *See generally Faithless Electors*, FAIRVOTE, https://www.fairvote.org/faithless_electors [https://perma.cc/FLD7-8BN8]. These electors have never changed the outcome of a presidential election. *See id.*

[8] The *Federalist Papers* suggest that the Electoral College should select the President, independent of popular will. In Federalist No. 68, Hamilton wrote: "It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture. It was equally desirable, 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 proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations." THE FEDERALIST NO. 68, at 189 (Alexander Hamilton) (Michael A Genovese ed., 2009).

[9] 146 U.S. 1 (1892)

[10] *Id.* at 36.

[11] *See* NEALE & NOLAN, *supra* note 3, at 3.

throughout history the Electoral College has elected a President who did not also win the national popular vote.

The United States does not have to rely on this system. This Article supports a change: that the President be elected by the popular will of the entire people of the United States. Once this is accomplished through the NPVIC, we believe a congressional act would help effectuate and protect the new system that will elect the candidate winning the popular vote in all fifty states and the District of Columbia.

The debate over the best method to elect the President dates back to the Constitutional Convention,[12] with the Framers ultimately agreeing to the Electoral College as part of a delicate balance between small and large states meant to both quell fears about uneducated voters and appease states with a large enslaved population.[13] In recent decades there have been numerous constitutional amendments proposed to change the Presidential election to a national popular vote.[14] Reform proposals, however, are not limited to constitutional amendments.

The NPVIC is a sensible, constitutional option for securing the presidential election by national popular vote winner. It is grounded in two powers that states have under the Constitution: establishing the rules for allocating electoral votes and being able to participate in interstate compacts. While previously discussed in academic papers,[15] John Koza and his co-authors developed and popularized a specific NPVIC plan in their book *Every Vote Equal*.[16] The plan is overseen by the non-profit National Popular Vote.[17] Under the plan, individual states enter a compact whereby their legislatures vote to allocate their Electoral College votes to the winner of the national popular vote in all fifty states and the District of Columbia.[18] The NPVIC goes into effect only when enough states have entered into the com-

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[12] *See generally* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35 (1986).

[13] *See id.*; Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1151–56 (2002).

[14] *See, e.g.*, H.R.J. Res. 7, 116th Cong. (2019) (proposing an amendment to the Constitution of the United States to abolish the Electoral College and to provide for the direct election of the President and Vice President of the United States); H.R.J. Res. 681, 91st Cong. (1969) (proposing an amendment to the Constitution relating to the election of the President and Vice President).

[15] *See, e.g.*, Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 241, 243–44 (2001).

[16] *See* JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 248–53 (2011).

[17] *See generally* NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/ [https://perma.cc/S42X-LELB].

[18] In the highly unlikely instance of an exact tie for the national popular vote winner, the state's electoral votes will be allocated to the winner of the popular vote in that specific state. *Text of the National Popular Vote Compact Bill*, art. III, NATIONAL POPULAR VOTE, https://www.nationalpopularvote.com/bill-text [https://perma.cc/7LFE-9LAZ]; *see also* KOZA ET AL., *supra* note 16, at 269.

pact such that they collectively control a majority (currently 270) of electoral votes and can guarantee election of the national popular vote winner.[19]

Underpinning the NPVIC is the fact that states control the rules that decide how to appoint their electors, which in most cases direct how the electors will cast their votes.[20] A state is not constrained to a certain method of appointment such as winner-take-all general ticket or district-based elections.[21] A state's legislature acts as the state's voice in the presidential election, deciding how electoral votes should be cast.[22] If a state chooses to enter the NPVIC, then its voice is clear—it decides to have the state's electoral votes cast for the candidate who wins the national popular vote. As of the writing of this Article, fifteen states and the District of Columbia have joined the NPVIC.[23] This amounts to 196 electoral votes, which is 72.6% of the 270 votes needed before the compact takes legal force.[24]

A recent survey found that 55% of Americans support replacing the Electoral College with a national popular vote, reflecting a partisan split that widened sharply after the 2016 election,[25] with 75% of self-reported Democrats supporting this change, compared with 32% of self-reported Republicans.[26] While large, this split has been small or even reversed in recent decades, and there is no inherent advantage for either party in the current system, demonstrated by simulations showing that Democrats would likely have won presidential elections in 2004, 2008, and 2012 even if losing the popular vote by less than a half million votes.[27] As recently as 2016, the number of state legislative sponsors of the National Popular Vote plan were

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[19] *See id.*; *Status of National Popular Vote in Each State*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state-status [https://perma.cc/5MFM-A3CY].

[20] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2319–20, 2323–24 (2020).

[21] *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892) ("The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effectuating the object.").

[22] *See* U.S. CONST. art. II, § 1.

[23] These states are Maryland, New Jersey, Illinois, Hawaii, Washington, Massachusetts, D.C., Vermont, California, Rhode Island, New York, Connecticut, Colorado, Delaware, New Mexico, and Oregon. *See Status of National Popular Vote in Each State*, *supra* note 19. On November 3, 2020, Colorado held a referendum on whether to overturn the 2019 law that entered Colorado into the Compact. Colorado's participation in the Compact was upheld in the referendum. *See Colorado Proposition 113, National Popular Vote Interstate Compact Referendum (2020)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Proposition_113,_National_Popular_Vote_Interstate_Compact_Referendum_(2020) [https://perma.cc/B4ER-S93B].

[24] *See id.*

[25] *See* PEW RESEARCH CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 55 (2018).

[26] *See id.* For historical views, see GALLUP POLLS: CONSISTENT SUPER-MAJORITY SUPPORT FOR A NATIONAL POPULAR VOTE 6, http://archive.fairvote.org/electoral_college/Gallup_Polls.pdf [https://perma.cc/AUA7-WUB6].

[27] *See* Andrea Levien, *Electoral College Rules Don't Help Either Party, but Do Harm American Democracy*, FAIRVOTE (Oct. 12, 2012), https://www.fairvote.org/election-simulations-from-1960-2008-show-that-electoral-college-rules-don-t-help-either-party-but-do-harm-american-democracy#.UQBqukJx7IY [https://perma.cc/P4X3-TS5Q].

roughly equal between parties,[28] and several state wins for NPVIC in 2018 and 2019 drew the support of Republican state legislators.[29]

Proponents of the NPVIC argue that it will address significant shortcomings of the current presidential election process that stem from state "winner-take-all" laws that award all of a state's electoral votes to the candidate receiving the most popular votes in each state. The first problem solved by NPVIC is that the current system has enabled five of our forty-six Presidents to come into office without winning the most popular votes nationwide.[30] Most recently this has led to two highly divisive outcomes in 2000 and 2016 and to bitterness and potential chaos when comfortable national popular vote victories could have reversed by a switch of fewer than 60,000 votes in 2004 and fewer than 22,000 votes in 2020.[31] The second problem the NPVIC would solve is the disproportionate focus on "swing states."[32] Under current rules, presidential candidates ignore "safe" states where they are safely ahead or hopelessly behind because no degree of campaigning will affect a single electoral vote, denying citizens an equal voice in electing the highest office in the land.[33] In 2012, for example, only 11 states had general election campaign events with rallies featuring major party presidential and vice-presidential nominees targeting voters in that state, demonstrating how

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[28] *See* Austin Plier, *18 States (and Counting) Introduce National Popular Vote Bills*, FAIRVOTE (Jan. 27, 2017), https://www.fairvote.org/15_states_and_counting_introduce_national_popular_vote_bills [https://perma.cc/RA3F-6JM8].

[29] These wins include those in Connecticut and Delaware. *See Connecticut*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state/ct [https://perma.cc/BXG7-6FUQ]; *Delaware*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state/de [https://perma.cc/LUH5-5HC4].

[30] The election in questions took place in 1824, 1876, 1888, 2000, and 2016. The 1824 and 1876 elections were controversial in how and where votes were counted in states. *See generally* D'Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG (Dec. 23, 2016), https://www.factcheck.org/2008/03/presidents-winning-without-popular-vote/; *1876 (Tilden – Hayees)*, FAIRVOTE, http://archive.fairvote.org/e_college/controversial.htm#1876 [https://perma.cc/4NC4-SBYG].

[31] George W. Bush won the 2004 election victory by more than three million votes, but he would have lost in the Electoral College if fewer than 60,000 votes for Bush in Ohio had gone to John Kerry. *See United States Presidential Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS ELECTION ATLAS, https://uselectionatlas.org/RESULTS/ [https://perma.cc/NQV4-PYF5] (select "2004" from the "General by Year" dropdown menu). In 2020, Joe Biden won the popular vote by more than six million votes, but he would have lost in the Electoral College with a switch of fewer than 22,000 votes in Arizona, Georgia and Wisconsin. *See id.* (select "2020" from the "General by Year" dropdown menu).

[32] *See, e.g.*, KOZA ET AL., *supra* note 16, at 43–47, 434–41; David Hill & Seth C. McKee, *The Electoral College, Mobilization, and Turnout in the 2000 Presidential Election*, 33 AM. POL. RES. 700, 700 (2005) (finding that, in the 2000 election, battleground states received significantly more media expenditures and candidate visits from the two major party campaigns than non-battleground states and that "state battleground status indirectly impacted state-level turnout through its effect on media spending and candidate visits"); *see also* Justine Coleman, *Push for National Popular Vote Gets Push from Conservatives*, HILL (Feb. 26, 2020, 7:43 PM), https://thehill.com/homenews/campaign/484843-push-for-national-popular-vote-movement-gets-boost-from-conservatives [https://perma.cc/NSA5-3YJU] (quoting Dennis Lennox, campaign manager for Conservatives for Yes on National Popular Vote, ast stating, "Let's be honest, we don't elect a President of the United States. We elect a President of the battleground states under the current method.").

[33] *See id.*

voters in "swing states" are unfairly granted more power to elect the President than voters in "safe states."[34] In both 2016 and 2020, more than 94% percent of such campaign events were in a dozen states.[35]

The NPVIC may also help increase voter turnout. A study of the 2016 election found that the campaigns focused 99% of their ad spend and 99% of their visits on fourteen battleground states, despite the fact that only 35% of eligible voters live in these states.[36] Over 50% of candidate ad spend and visits went to Florida, North Carolina, Ohio, and Pennsylvania alone.[37] Perhaps not surprisingly, battleground states had some of the highest voter turnout in the nation.[38] In fact, "[v]oter turnout in contested battleground states has been five to eight percentage points higher than in non-battleground states in each of the last five presidential elections."[39] Consequently, moving to a national popular vote could increase voter turnout by ensuring each voter was part of a meaningfully contested election.[40] Candidates would no longer be able to presume victory in a historically left or right leaning state, causing them to spread the ad spend and attention normally devoted to swing states more proportionately across the country. Voters in those previously neglected states would be assured that their individual votes would count rather than be a "meaningless" drop in the bucket for either the majority or minority candidate in their state. Every state party would matter in

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[34] *See* Robert Richie & Andrea Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, 43 PRESIDENTIAL STUD. Q. 353, 353–76 (2013); Theodore Landsman, *Tracking the Candidates Through the Final Campaign Push: Lots of Stops but Few States,* FAIRVOTE (Nov. 2, 2016), https://www.fairvote.org/tracking_the_candidates_through_the_final_campaign_push_lots_of_stops_but_few_states [https://perma.cc/4RNV-H6K6]; *The Only States That Received Any Attention in the 2012 General-Election Campaign For President Were States Within 3% of the National Outcome*, NAT'L POPULAR VOTE, http://nationalpopularvote.com/sites/default/files/2012-campaign-events-and-results-chart.pdf [https://perma.cc/4WD6-QKXU].

[35] *See 94% of 2016 Presidential Campaign Was in Just 12 Closely Divided* States, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/campaign-events-2016 [https://perma.cc/4YVQ-WKG8]; *Map of General Election Campaign Events and TV Ad Spending by 2020 Presidential Candidates,* NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/map-general-election-campaign-events-and-tv-ad-spending-2020-presidential-candidates [https://perma.cc/9SSJ-66A9].

[36] *See* GEORGE PILLSBURY & JULIAN JOHANNESEN, AMERICA GOES TO THE POLLS 2016, at 12 (2016), https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf/ [https://perma.cc/L3C2].

[37] *See id.*

[38] *See id.* at 7 ("Five of the six highest-turnout states, and 12 of the top 20, were battleground states."); Danielle Kurtzleben, *CHARTS: Is The Electoral College Dragging Down Voter Turnout In Your State?*, NPR (Nov. 26, 2016, 5:00 AM), https://www.npr.org/2016/11/26/503170280/charts-is-the-electoral-college-dragging-down-voter-turnout-in-your-state [https://perma.cc/HG5T-BDBY] ("Of 15 states that NPR labeled as battlegrounds or leaning states in its final battleground map, 12 had turnout rates above the national rate—58.4 percent of the voting-eligible population.").

[39] PILLSBURY & JOHANNESEN, *supra* note 35, at 7.

[40] *See, e.g.*, Burdett A. Loomis et al., *Electoral Reform, the Presidency, and Congress*, *in* CHOOSING A PRESIDENT: THE ELECTORAL COLLEGE AND BEYOND 74, 78 (Paul D. Schumaker & Burdett A. Loomis eds., 2002).

every election, promoting ongoing support for party-building work generating participation between and during elections.

Opponents, however, believe that the NPVIC could negatively impact rural communities and states with small populations because it might incentivize candidates to focus on urban areas and those states with the largest majority of electoral votes, leading to a geographical divide in elections.[41] This idea has been disputed, with many scholars pointing to the geographical divide already present in the current Electoral College system and to the realities of how candidates campaign for popular vote elections for Governor and U.S. Senator.[42] Within the current division of swing state and spectator states, rural voters are disproportionately concentrated in states that are taken for granted by campaigns.[43] Proponents of the NPVIC argue that "under direct election, presidential candidates would continue to wage broad national campaigns appealing to voters in different states and regions: a candidate simply cannot reach 50% or anything close to it without getting a lot of votes in a lot of places."[44]

Beyond political concerns, some have pointed out that the NPVIC might be hampered by a lack of uniform rules for administering elections and reporting the results.[45] As Vikram Amar has written, "Congress could set up a uniform system to come into effect if and when the NPVIC magic number is reached."[46] Congress has a compelling reason to provide valuable uniformity for the presidential election. As the NPVIC will be a new system, it is important that voters trust the process and its outcome. Because presidential elections frequently attract minor party and independent candidates who can split the vote, a congressional act providing for ranked choice voting and uniform tabulation procedures will ensure that the results of the NPVIC are the most representative of the national popular will and that counting and reporting is uniform. We argue this can be done without infringing on the states' constitutional right to appoint electors.

Indeed, Congress's action would improve the compact. By establishing uniform RCV ballots and a process for conducting a presidential election with RCV across all states, Congress would ensure that the NPVIC truly reflects a national vote and avoid potential pitfalls from dispute resolutions and a nationwide recount in close elections. As we discuss further in this

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[41] *See, e.g.*, TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 81 (2004).

[42] *See* Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 242–45 (2011).

[43] *See Rural States Are Almost Entirely Ignored Under Current State-by-State System*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/rural-states-are-almost-entirely-ignored-under-current-state-state-system [https://perma.cc/WWQ8-336H]; Andrea Levien, *The Role of Cities in National Popular Vote Elections,* FAIRVOTE (June 13, 2014), https://www.fairvote.org/the-role-of-cities-in-national-popular-vote-elections [https://perma.cc/4B98-FNRN].

[44] *See* Amar, *supra* note 41, at 244–45.

[45] *See id.* at 253.

[46] *Id.*

paper, using RCV as part of this uniform ballot process will help achieve both of these goals. RCV helps prevent vote splitting, saves money on recounts and runoffs, helps ensure the candidate with a broad majority of support is elected, and allows voters to truly express their preferences rather than compromise on one candidate.

NPVIC is far better than the status quo on major dimensions like political equality, respect for all states, and representative outcomes, and it is equal or superior on a range of particulars like addressing recounts, nonmajority outcomes, and faithless electors. But the NPVIC does not address all potential problems. In the spirit of seeking a more perfect union, there is merit to exploring how we might keep improving presidential elections in the wake of the passage of NPVIC.

II. Ranked Choice Voting (RCV) in the United States

This Article proposes two ways to integrate ranked choice voting (RCV) with the NPVIC. RCV is a simple but powerful electoral reform that upholds the right of voters to have fair outcomes and a stronger voice in their democracy. A third of our presidential elections have been won by candidates earning less than half the popular vote, and notably only a single state in the 1992 presidential election was won with at least 50% of the vote.[47] If RCV were adopted for presidential elections in a state, winners would always earn a majority of the final "instant runoff" pairing of the two strongest candidates head-to-head.

As noted in a *New York Times* news headline in February 2020, RCV is "having a moment."[48] In order to understand why RCV has gained significant momentum as a reform and is worthy of incorporating into the presidential election process, it is important to understand how RCV works, what problems it seeks to solve, the benefits it provides for voters and candidates, and where it is used.

For single-winner elections, RCV allows voters to rank candidates in order of choice, with the option to pick only one. If one candidate receives an outright majority of first choices, he or she wins. If not, the candidate with the fewest first choices is eliminated and votes for that candidate are added to the totals of the candidate ranked next on the ballot. This process of eliminating last-place candidates and adding their votes to next ranked

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[47] *See* The Editors of Encyclopaedia Britannica, *United States Presidential Election Results*, Britannica, https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863 [https://perma.cc/73XR-5UNU]; *End Majority Rule*, FairVote, http://archive.fairvote.org/irv/end_majority_rule.htm [https://perma.cc/ZD4F-9VQD].

[48] Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, N.Y. Times (Feb. 10, 2020), https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html [https://perma.cc/FS4N-Y9LK].

choices repeats until two candidates remain. The winner always earns a majority of this final "instant runoff."[49]

There are several problems afflicting American elections that RCV can help solve: unrepresentative outcomes, toxic partisanship, lack of choice, the need for "strategic voting," and low turnout. The most common way of voting in the United States—single-choice, plurality voting—contributes to all of these problems.

Under the current system, American elections frequently do not represent or reflect the will of voters. In both crowded primaries and general elections with minor parties and independents, a single-choice voting system fails to handle voters having more than two choices by distancing representatives from voters and disrupting fair outcomes with "split votes" and "spoilers." Winners do not need a majority of the vote to be nominated and elected. For example, in Maine, nine of the state's last twelve gubernatorial elections were won with less than 50% of votes—including three consecutive governors winning with less than 39%—a key factor in Maine's adoption of RCV in 2016.[50]

Presidential general elections—arguably the highest stakes contests in the United States—are at risk of interference if a well-funded or well-known candidate launches an independent bid to distort the outcome. As law professor Edward Foley argues, by addressing the "spoiler problem," RCV in key swing states is more likely to ensure nationally representative outcomes than having national popular vote elections that do not without addressing the problem of majorities splitting the vote.[51] In 2016, fourteen states were won with less than 50% of the votes, indicating that third-party candidates like Gary Johnson and Jill Stein may have impacted the final result. In 2020, Libertarian Party nominee Jo Jorgensen won more votes than the victory margin in four states, and there were controversies over potential manipulation of third party candidates in the presidential race and key U.S. Senate elections.[52] Independent and third-party candidates can offer important per-

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[49] Under the RCV Interstate Compact described later in this Article, we propose states always run the tally down to two candidates before reporting out those vote totals for the purposes of NPVIC—and to do so in coordination with enough states that these two finalists are nearly certain to be the two candidates nationally.

[50] *See* Katharine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?*, N.Y. TIMES (Dec. 3, 2016), https://www.nytimes.com/2016/12/03/us/maine-ranked-choice-voting.html [https://perma.cc/PU8K-S3DV].

[51] EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 175 (2019); Edward B. Foley, *A Different Billionaire May Decide Who Wins Next November*, CNN (Dec. 16, 2019), https://www.cnn.com/2019/12/16/opinions/election-2020-third-party-candidates-foley/index.html [https://perma.cc/HV3D-MH8Q].

[52] *See* Rick Hasen, *Rob Richie: "How to Stop Consultants from Weaponizing Voter Choice" [Corrected]*, ELECTION LAW BLOG (Nov. 2, 2020, 4:38 PM), https://electionlawblog.org/?p=118085 [https://perma.cc/D74S-JE4Q]; *United States Presidential Election Results*, *supra* note 30 (select "2020" from the "General by Year" dropdown menu).

spectives, but the single-choice, plurality system is not set up to include those perspectives in a productive way.

Plurality voting also fuels hyperpolarization and toxic partisanship. Strong parties with clear and distinct platforms help democracy function, but if parties become so polarized that they question the legitimacy of opposing parties' victories or refuse to ever make needed compromises, the American system will be prone to gridlock and crisis.[53] Plurality voting incentivizes candidates to attack or marginalize their opponents rather than reaching out to their opponents' supporters in order to seek common ground. This incentive contributes to excessively negative campaigning in elections and ineffective governance. In the 2012 presidential election, for example, well over 90% of independent expenditures by the five largest spenders in the presidential race was spent on ads attacking either Barack Obama or Mitt Romney.[54] RCV creates electoral incentives for candidates and their backers to run more positive campaigns.[55]

Another problem that can result from the current system is a lack of voter choice. Public opinion polling regularly indicates that Americans—especially younger voters who represent the nation's future—are increasingly frustrated with both major parties and would like more than two choices offered in elections.[56] But the current system incentivizes voters and interest groups to form into two parties—and those parties in turn have passed state laws ensuring that they remain the only viable parties of choice.[57]

When there is more choice on plurality voting ballots, voters are forced into "strategic voting" that limits their voice and ability to freely express themselves. Despite the superficial simplicity of an election with two major-party candidates, the current system can be quite taxing, as it adds pressure on voters to follow opinion polls and horse race coverage to determine when, if ever, they can vote for the candidate they like the most without helping the candidate they like the least. Voters should be able to vote for candidates they support, not just vote against candidates they most oppose. With RCV,

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[53] *See generally* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2016).

[54] *See* Kevin Quealy & Derek Willis, *Independent Spending Totals*, N.Y. TIMES, https://www.nytimes.com/elections/2012/campaign-finance/independent-expenditures/totals.html [https://perma.cc/K584-CZ6F].

[55] *See* Todd Donovan, Caroline Tolbert & Kellen Gracey, *Campaign Civility Under Preferential and Plurality Voting*, 42 ELECTORAL STUD. 157, 157–63 (2016).

[56] *See* Lee Drutman, *How Much Longer Can the Two-Party System Hold?*, VOX (Sept. 17, 2018, 2:40 PM), https://www.vox.com/polyarchy/2018/9/17/17870478/two-party-system-electoral-reform [https://perma.cc/SAG7-5S8W]; Hannah Hartig & Stephanie Perry, *Millennial Poll: Strong Majority Want a Third Political Party*, NBC NEWS (Nov. 29, 2017, 1:43 AM), https://www.nbcnews.com/politics/politics-news/millennial-poll-strong-majority-want-third-political-party-n824526 [https://perma.cc/G5D4-Z3N7].

[57] *See* Barry C. Burden, *Ballot Regulations and Multiparty Politics in the States*, 40 PS: POL. SCI. & POL. 669, 669–73 (2007); Theodore J. Lowi, *Deregulate the Duopoly*, NATION (Nov. 16, 2000), https://www.thenation.com/article/archive/deregulate-duopoly/ [https://perma.cc/G84A-VAM2].

voters can honestly rank candidates in order of choice knowing that if their first choice does not win, their vote automatically counts for their next choice instead. This frees voters from worrying about how others will vote and which candidates are more or less likely to win.

Finally, the United States suffers from low turnout, especially when compared to other advanced democracies. The percentage of the voter eligible population voting in U.S. presidential elections has hovered between approximately 50–60% for the last century.[58] In most other established democracies, voters have rules designed to handle more than two choices, such as runoff elections, ranked choice voting and proportional representation; voter-eligible-population turnout routinely exceeds 70% and sometimes far higher.[59] Keeping voter choice limited will make it harder to draw voters in who are already disaffected by their choices. Notably, cities with RCV have seen turnout increase in recent mayoral elections across a variety of contexts.[60]

A. Where RCV Is Used

RCV has been used for a century to elect the national legislatures in Ireland and Australia.[61] In the United States, RCV has gone from use in one city in 2000 to being used statewide in Maine and in more than twenty American cities, with more adopting it every year. At least five more jurisdictions are expected to use RCV for the first time by 2022, and no city has stopped using it for over a decade. The recent sustainability of RCV suggests that, with modern voting equipment, voters in jurisdictions with RCV want to continue using it.[62]

Maine voted in a 2016 initiative and 2018 referendum to adopt RCV in its primary and congressional elections, and the legislature passed a bill in 2019 to use RCV for general elections for President starting in November

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[58] *See Measuring Voter Turnout*, FAIRVOTE, https://www.fairvote.org/voter_turnout#measuring_voter_turnout [https://perma.cc/MC9Z-4EGV].

[59] *See* Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout,* PEW RES. CTR. (May 21, 2018), https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/ [https://perma.cc/XVA7-V9P6].

[60] *See* David C. Kimball & Joseph Anthony, Voter Participation with Ranked Choice Voting in the United States, 11-22 (Oct. 2016) (unpublished manuscript), https://www.umsl.edu/~kimballd/KimballRCV.pdf [https://perma.cc/2Y5W-AF8H]; *Voter Turnout and Participation*, FAIRVOTE, https://www.fairvote.org/research_rcvvoterturnout [https://perma.cc/4WA8-UQL4].

[61] *See Where Is Ranked Choice Voting Used?*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used [https://perma.cc/QS2K-XLNR]; Dan Diorio & Wendy Underhill, *Ranked-Choice Voting*, NAT'L CONF. OF ST. LEGISLATURES (June 2017), https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting.aspx [https://perma.cc/H4FF-CMU2].

[62] *See FAQ*, FAIRVOTE, https://www.fairvote.org/rcv#rcv_faq [https://perma.cc/8VQ2-QGB6].

2020.[63] As a result of the Maine implementations, RCV could have played a critical role in determining the national balance of power in the 2000 federal elections, with the state featuring hotly contested, multi-candidate elections for President and U.S. Senate.[64] New York City voters approved RCV for their local elections through a ballot measure in November 2019,[65] a reform that positions the city's 2021 elections to handle a potential influx of candidates as several candidates are expected to contest an open seat for mayor[66] and as many as 500 may compete in city council races.[67] As momentum for RCV continues and the evidence for its benefits accumulates, more reformers are likely to turn to the question of how to integrate RCV into presidential elections.

III. The Value of Preparing to Integrate RCV with the NPVIC

The NPVIC and ranked choice voting address different problems with presidential elections and ideally would work together to ensure majority rule and political equality. When integrated, they would reinforce each other. The NPVIC would eliminate the risk inherent in the current presidential election system of a popular-vote/electoral-vote split and ensure the presidential candidate who wins the most votes is elected President—i.e. guaranteeing at least "plurality rule." Using RCV in a presidential election determined by the national popular vote would generate yet more progress by replacing a plurality rule with majority rule; RCV ensures majority rule by correcting the "vote-splitting" dynamic that occurs when there are more than two candidates for President.

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[63] *See Ranked Choice Voting in Maine*, Me. St. Legislature (Apr. 17, 2020), https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509 [https://perma.cc/JJ9V-C7C5].

[64] *See* Steve Collins, *Experts: Maine's 2nd District Races Most Competitive, and Potentially Crucial, in 2020*, WGME (Nov. 24, 2019), https://wgme.com/news/local/experts-maines-2nd-district-races-most-competitive-and-potentially-crucial-in-2020 [https://perma.cc/8E6H-DKQA]; Siobhan Hughes, *Susan Collins Faces Tough Re-Election Race in Maine, Poll Suggests*, Wall St. J. (Feb. 18, 2020), https://www.wsj.com/articles/susan-collins-faces-tough-re-election-race-in-maine-poll-suggests-11582058400 [https://perma.cc/E8BA-GQ8T]; Charlie Mahtesian, *How Trump Rewired the Electoral Map*, Politico (Feb. 7, 2020), https://www.politico.com/news/magazine/2020/02/07/election-2020-new-electoral-map-110496 [https://perma.cc/ZD5Z-MNFT].

[65] *See* Erin Durkin, *Ranked-choice Voting Adopted in New York City, Along with Other Ballot Measures,* Politico (Nov. 5, 2019), https://www.politico.com/states/new-york/albany/story/2019/11/05/ranked-choice-voting-adopted-in-new-york-city-along-with-other-ballot-measures-1226390 [https://perma.cc/V4Q4-NJV5].

[66] *See* Nicole Brown, *Who's Running for NYC Mayor? A Rundown of Possible 2021 Candidates*, AMNY (Aug. 12, 2019), https://www.amny.com/news/nyc-mayoral-race-1-27751191/ [https://perma.cc/C3GB-Y6XU].

[67] *See* Ethan Geringer-Sameth, *With 500 Candidates Expected for 2021 Election Cycle, Campaign Finance Board Starts Early Outreach*, Gotham Gazette (May 28, 2019), https://www.gothamgazette.com/city/8550-with-500-candidates-expected-for-2021-election-cycle-campaign-finance-board-starts-early-outreach [https://perma.cc/H2AQ-W38T].

Both the NPVIC and RCV also improve political equality. When the NPVIC takes effect, voters in "safe states" will finally be treated equally to voters in "swing states." Presidential candidates will have incentives to campaign all across the country, not just in the usual five to ten swing states we see today. Similarly, RCV ensures political equality by giving voters across the political spectrum an equal opportunity to express themselves. With RCV, voters can vote with both their "heart" and their "head" by indicating their sincere first-choice candidate—even if that candidate is not perceived as a frontrunner—while having the option to indicate backup choices.

Nevertheless, as currently drafted, the NPVIC seems to assume a plurality system—that is, the candidate with the most popular votes is to be elected President, regardless of how low their percentage of the vote. While this potential of non-majority winners is not worse with NPVIC than in the status quo, it allows a candidate to win despite the opposition of most voters due to vote-splitting between two or more candidates. On the other hand, using RCV for Presidential elections in states might seem incompatible with NPVIC. Most fundamentally, which votes should be reported out for the purpose of NPVIC? Would it be the first choices among all the candidates? Or would it be the final "instant runoff" totals after the RCV tallies are completed? If the latter choice were made, what if one of the two strongest national candidates was eliminated during the RCV tally in a given state? While not an NPVIC deal breaker, it is an ambiguity worth seeking to resolve.

Not only do the NPVIC and RCV reinforce each other to advance fundamental principles of democracy, they are also both on-the-ground realities as policies. The Maine state legislature passed a law to implement RCV in its Presidential election in November of 2020,[68] so the need to consider how RCV will interact with the NPVIC is potentially approaching. If enough states passed the NPVIC for it to take effect, what would happen to the use of RCV for Presidential elections in Maine? While Maine might well only report the "first-choice" totals as its presidential election results for purposes of the "national popular vote count," that would essentially undo the benefits of having an RCV election.

The NPVIC is an excellent reform, and state legislatures should pass it whether RCV ends up being integrated with it or not. But states like Maine should not have to choose between granting their voters political equality with voters in other states via adoption of the NPVIC and empowering their voters with RCV. This unnecessary conflict between the NPVIC and RCV in presidential elections is already being demonstrated by some political thought leaders and candidates. Law professor Edward Foley penned an article in *Politico Magazine* arguing that the use of RCV in swing states is

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[68] *See Ranked Choice Voting in Maine*, *supra* note 62.

more practical than the NPVIC.[69] In another case, an *Axios* April 2019 roundup of 2020 Democratic presidential candidates' views cited former tech executive Andrew Yang's campaign opposition to the NPVIC while noting his support for RCV in presidential elections and implying the two reforms are in tension.[70] While these examples are relatively minor, reformers can expect these perceived small tensions to grow if more state legislatures begin seriously considering passing the NPVIC and RCV for presidential elections without clear guidance on how to integrate the two reforms.

While the idea of combining ranked choice voting and a popular vote has been proposed for years, it typically has assumed the need for a constitutional amendment to establish direct election of the President in tandem with ranked choice voting.[71] In contrast, the Interstate RCV Compact offers an immediate reform option for state legislatures. A non-NPVIC state like Maine could join the Interstate RCV Compact, allowing states to express their preference for meaningful use of RCV with or without the NPVIC. Once the NPVIC is in effect, this state-based approach to making RCV part of national popular vote elections could help gradually build support for a national RCV presidential election—what Congress could effectively enable by passing the RCV in Presidential Elections Act, the preferred, more comprehensive approach. The Interstate RCV Compact specifies that it would be suspended should an act like the RCV in Presidential Elections Act be adopted, allowing these two different prospective options to play a complementary role in advancing the cause of a majority-rule presidential election that gives voters more than two choices.

A. The Logistics of National RCV Elections

Ranked choice voting requires election data to be analyzed at a central location in order to proceed with RCV tallies that eliminate last-place candidates and reallocate their supporters' ballots to their next choice. In countries, such as Australia and Ireland, that tally RCV ballots by hand, this involves either collecting all ballots together or having a central agency col-

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[69] *See* Edward B. Foley, *Want to Fix Presidential Elections? Here's the Quickest Way,* POLITICO (May 4, 2019), https://www.politico.com/magazine/story/2019/05/04/electoral-college-reform-2020-226792 [https://perma.cc/RK6K-4S2V].

[70] *See* Orion Rummler, *Where Each 2020 Democrat Stands on Abolishing the Electoral College*, AXIOS (Apr. 7, 2019), https://www.axios.com/electoral-college-2020-Presidential-election-candidates-94d89ca6-b402-4de3-ae8e-06139592408e.html [https://perma.cc/E3TA-HK7X].

[71] *See, e.g.*, Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO NORTHERN U.L. REV. 467, 476 (2007); John B. Anderson, *Flunk the Electoral College, Pass Instant Runoffs*, FAIRVOTE (Jan. 2001), http://archive.fairvote.org/e_college/anderson.htm [https://perma.cc/8DF5-DDMX]; Lee Drutman, *If We're Abolishing the Electoral College, Let's Also Have Ranked-Choice Voting for President*, VOX (Mar. 21, 2019), https://www.vox.com/polyarchy/2019/3/21/18275785/electoral-college-ranked-choice-voting-President-democracy [https://perma.cc/7ZNF-DVZ8]; Rob Richie & Steven Hill, *Change Elections to Instant Runoff Voting*, BALT. SUN (Jan. 2, 2001), https://www.baltimoresun.com/news/bs-xpm-2001-01-02-0101020140-story.html [https://perma.cc/UR7D-M46S].

lect information and report back to local tally centers which candidates should next be eliminated. Where voting machines are used, as in nearly all American elections, this transmission of information can be done in different, more efficient ways depending on state election laws and technological capacities.

As RCV is used in more statewide elections, the need for secure and auditable processes for voters to rank candidates, "normalize" RCV ballot data for central analysis, and transmit RCV data is essential, with transparent practices that enable easy public confirmation of each state step of the RCV tally. Election officials and election administration experts have developed and begun to implement such processes, including risk-limiting audits and open source RCV tallying software.[72] For presidential elections, an additional element of a prospective RCV election is coordination of these processes across state lines—something that would be straightforward when established in federal law or an interstate compact.

B. Addressing Partisan Considerations of RCV and NPVIC Implementation

It is also important to address any apparent partisan motivation for these reforms—both perceived and real. To be sure, partisans often put their own interests ahead of those of voters, but there is no certainty in how these changes will affect election outcomes. When arguing which major political party benefits from electoral-vote/popular-vote splits in presidential elections, for example, many observers have succumbed to "recency bias"; just because the Republican nominee benefited from the winner-take-all Electoral College rules in 2000 and 2016, that does not mean that same party would benefit from the current system in the next election. Key demographic groups can often shift their support and affect the partisan balance in swing states—sometimes surprisingly so, as the shift from Barack Obama's 2012 Electoral College advantage[73] (often referred to as "the Blue Wall") to Donald Trump's 2016 Electoral College advantage demonstrates.[74] The long-run data show that the winner-take-all system has benefited both major parties

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[72] For a number of associated materials, see generally RANKED CHOICE VOTING RESOURCE CTR., https://www.rankedchoicevoting.org/ [https://perma.cc/E4GW-N2YV]. Specifically, see *Universal RCV Tabulator*, RANKED CHOICE VOTING RESOURCE CTR., https://www.rankedchoicevoting.org/universal_rcv_tabulator [https://perma.cc/Z74R-WSYQ].

[73] *See* Eugene Daniels & Beatrice Jin, *Three Reasons Why the Democrats' Blue Wall Crumbled*, POLITICO (Dec. 16 2019), https://www.politico.com/interactives/2019/democrats-blue-wall-swing-states-pennsylvania-wisconsin-michigan/ [https://perma.cc/9KE9-CL5J].

[74] *See* Richie & Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, PRESIDENTIAL STUDIES QUARTERLY (May 2, 2013), *supra* note 33, at 354; Nate Cohn, *Why Trump Had an Edge in the Electoral College*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html [https://perma.cc/F67V-NXAS].

roughly equally over the course of its existence and any partisan bias is fleeting.[75]

Similarly, the impact of minor-party and independent candidates without RCV is based entirely on the vagaries of where on the spectrum such a presidential candidate seems to fall. In 2000, when Ralph Nader was the Green Party nominee and clearly to the left of Al Gore, his votes in Florida were seen as having cost Gore the election.[76] Yet in 1992, Ross Perot's 19% of the vote was seen by some as cutting into George Bush's support and helping to boost Bill Clinton.[77] In 2016, for every Democrat upset with Green Party nominee Jill Stein, there was a Republican unhappy with former Republican governor Gary Johnson running as the Libertarian Party nominee.

Of course, partisans may feel they are relatively confident in projecting the beneficiary of the current rules in the next election and not feel inclined to give up their anticipated benefit. The question to these partisans is: Would they rather gamble on their uncertain projections in the service of a flawed system and, at-best, short-term benefit, or would they rather have a stable system that gives them a fair opportunity to win in every election? If they choose the latter, it would be wise to consider integrating RCV with the NPVIC and enjoy the benefits of a win-win solution that makes politics feel more rewarding and productive for voters and elected leaders alike.

IV. First Option: "The Ranked Choice Voting (RCV) In Presidential Elections Act"

To harmonize the benefits of both the NPVIC and ranked choice voting, we propose Congress pass legislation (see Appendix Two) to establish a uniform RCV ballot and tabulation rules once NPVIC is enacted.[78] The ballot would allow eligible voters to rank presidential candidates in order of preference and would be administered by all states on the day of the presidential election.[79] After counting ballots with RCV, the results would estab-

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[75] *See* Richie & Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, PRESIDENTIAL STUDIES QUARTERLY (May 2, 2013), *supra* note 69; Andrea Levien, *Election Simulations From 1960–2008 Show that Electoral College Rules Don't Help Either Party, but Do Harm American Democracy*, FairVote (Oct. 12, 2012), https://www.fairvote.org/election-simulations-from-1960-2008-show-that-electoral-college-rules-don-t-help-either-party-but-do-harm-american-democracy [https://perma.cc/8J8W-59XR].

[76] *See* Bill Scher, *Nader Elected Bush: Why We Shouldn't Forget*, RealClearPolitics (May 31, 2016), https://www.realclearpolitics.com/articles/2016/05/31/nader_elected_bush_why_we_shouldnt_forget_130715.html [https://perma.cc/Y89B-ZJQ8].

[77] *See* Eliza Collins, *Did Perot Spoil 1992 Election for Bush? It's Complicated.*, Wall St. J. (July 10, 2019), https://www.wsj.com/articles/did-perot-spoil-1992-election-for-bush-its-complicated-11562714375 [https://perma.cc/G6B3-BD9E].

[78] Congress could also establish other rules in this Act, such as standard ballot access for candidates so that all voters would be able to rank the same candidates.

[79] Credit for the idea of using a ranked-choice-voting ballot in a congressional bill regulating NPVIC states belongs to Vikram Amar. *See* Amar, *supra* note 41, at 253.

lish which candidate received the greatest popular support. With standardized RCV ballots across states and tabulation of consistently presented RCV ballot data by the Election Assistance Commission, results could be reliably reported to determine the winner of the national popular vote for President.

Determining the winner of the popular vote separately from the winner of the presidential election is, on some level, already done by states because they report out state popular vote numbers, but their citizens do not cast votes for President, the Electoral College does.[80] Thus, the real changes made by this legislation are to standardize the RCV ballot and centralize the counting and reporting of the national popular vote winner according to RCV rules. Just as popular-vote totals take weeks to complete, the RCV tally would take time—but interim RCV tallies could regularly be released to help clarify the likely outcome.

This new RCV ballot does not alter the Electoral College; it ensures that the national popular vote total is standardized, leading to greater trust by citizens. Trust in the results (and a potential recount) is of utmost importance to ensuring voters maintain trust in the NPVIC, which is designed to guarantee the candidate receiving the greatest number of popular votes wins the presidency. Consequently, this proposal is also about maintaining trust that our government represents the will of the people.

States that are party to the NPVIC would use the results of the RCV presidential ballot to decide which candidate receives their electoral votes. As noted earlier, most states currently cast their electoral votes for the candidate who wins the popular vote at the state level.[81] Importantly, the legislation does not require states that are not a party to the NPVIC to alter the manner in which those states decide to appoint their electors. Non-NPVIC states can still award electoral votes through a winner-take-all vote, a district-based system, or any other manner they choose. These states, however, must still conduct their presidential election with RCV ballots in accordance with the statute.

Voters in non-NPVIC states and voters in NPVIC states would see effectively the same ballot. Each voter would rank their preferences. The difference between states lies not within the presidential ranked choice ballot, but whether the state has independently chosen to join the compact that promises that the state will award its electoral votes to the winner of the national popular vote. Whether a state awards its electoral votes to the winner of the national popular vote or not, it is critical that *all* states use an RCV ballot and share their data in a consistent fashion in order to have a uniform and reliable measure for determining the candidate receiving the greatest number of votes *nationally*, according to an RCV tally. This is im-

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[80] *See id.* at 257.
[81] *See* NEALE & NOLAN, *supra* note 3, at 2–3.

portant, because once the NPVIC comes into force, the candidate receiving the highest national-popular-vote total will be elected President.

National uniformity in the counting, reporting, and potential recounting of votes for President would help maintain trust in the electoral system. Ensuring all states use the same ballot and unifying the tabulation procedures would likely reduce a number of complicating variables in the current system. Congress can advance the effectiveness of the NPVIC by requiring a RCV ballot and providing uniform standards for its administration and results reporting.

A. Congress's Power to Create Uniform Ranked Choice Voting Ballots and Tabulation Rule

Congress has the constitutional authority to pass legislation establishing the use of uniform presidential ranked choice voting ballots. While Congress could rely on constitutional powers derived from the Fourteenth Amendment, the Commerce Clause, or the Compacts Clause,[82] these are not the strongest arguments. And the requirements for reliance on the Spending Clause may not be easily implemented. Instead, constitutional provisions laying out the presidential election system, along with subsequent Supreme Court cases, establish that Congress has the independent authority to pass legislation like that proposed in Appendix Two. But before turning to Congress's independent authority, let's first address the other potential sources of authority.

The Fourteenth Amendment, while promising, ultimately proves to be too limited at this time. Under Section 5 of the Fourteenth Amendment, Congress has the "power to enforce [Section 1 of the Amendment] by appropriate legislation."[83] Section 1 provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[84] Congress's power to ensure the rights provided therein is somewhat limited; Congress may enact "remedial and preventive measures," but those must be "congruen[t] and proportional[ ]" to violations of Section 1 of the Amendment.[85]

Some have argued that potential disparities in voting regulations across NPVIC states might violate equal protection under the Fourteenth Amendment as announced in *Bush v. Gore*.[86] If this were true, it could allow Con-

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[82] *See* Amar, *supra* note 41, at 253–55; Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 879–87 (2002).

[83] U.S. CONST. amend. XIV, § 5.

[84] *Id.* § 1.

[85] City of Boerne v. Flores, 521 U.S. 507, 519–26 (1997).

[86] *See* Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 226–27 (2011).

gress to regulate the administration of the NPVIC. But the Supreme Court's holding in *Bush v. Gore* was explicitly narrow, which could present problems for relying on the case to say that Congress can statutorily prescribe uniform standards.[87] As other commenters have noted, expansive laws regulating presidential elections that are grounded in Section 5 would likely violate the proportionality requirement.[88] Thus, Congress may be quite limited in what it can do to regulate presidential elections under Section 5 at this time.

Those limitations may diminish, however, when and if more states adopt RCV for presidential elections. At that time, Congress could pass uniform regulations, implementing RCV for presidential elections, to protect ballot access for presidential candidates. The idea is that RCV will allow a greater number of minor-party candidates on the ballot,[89] but that those candidates may only be able to access the ballot in states that have adopted RCV. That number of states may be insufficient to permit a minor party candidate from actually being considered for the presidency; thus, minor party candidates would be structurally blocked from obtaining a sufficient number of electoral votes based on an inability to access the ballot in non-RCV states. Because the Fourteenth Amendment protects the right of candidates to be considered for public office,[90] Congress could enforce that right, under its Section 5 authority, by passing uniform RCV standards for presidential elections. Congress may indeed be able to rely on this power as states continue to adopt RCV for presidential elections, but given the developing nature of state adoption of RCV, we focus on other potential sources of authority for Congress to pass uniform standards.

The Commerce Clause also offers limited authority. There are two major issues.[91] First, Congress would likely need to aggregate regulations addressing the presidential election (like NPVIC legislation passed by states) to justify reliance on the Commerce Power.[92] As a general matter, under the Commerce Clause, Congress has "the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[93] Thus, there could be an argument that the election of the President, an individual who holds major influence over the national economy,[94] is something Congress can regulate pursuant to

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[87] *See* Amar, *supra* note 41, at 253–54 (citing Bush v. Gore, 531 U.S. 98, 109 (2000)).

[88] *See* Coenen & Larson, *supra* note 81, at 882–86 ("Section 5 would not support a congressional mandate that all states use specified voting equipment.").

[89] *See, e.g.*, *Correcting the Spoiler Effect*, FAIRVOTE, http://archive3.fairvote.org/reforms/instant-runoff-voting/irv-and-the-status-quo/spoiler-effect/ [https://perma.cc/PF6B-REFV] ("RCV affords voters more choices and promotes broader participation by accommodating multiple candidates in single seat races.").

[90] *See* Storer v. Brown, 415 U.S. 724, 728–29, 746 (1974) (citing Williams v. Rhodes, 393 U.S. 23 (1968)); Bullock v. Carter, 405 U.S. 134, 141 (1972).

[91] These issues were identified by Dan T. Coenen and Edward J. Larson. *See* Coenen & Larson, *supra* note 81, at 879–81.

[92] *See id.* at 879–80.

[93] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[94] *See, e.g.*, Ben Casselman, *A President's Economic Decisions Matter . . . Eventually*, FIVETHIRTYEIGHT (July 29, 2016, 7:00 AM), https://fivethirtyeight.com/features/a-Presi-

its Commerce Clause power.[95] That argument is likely foreclosed by Supreme Court decisions that prohibit aggregation in non-commercial activities.[96] Second, a statute may run afoul of anti-commandeering principles that prohibit the federal government from forcing state governments to administer and enforce federal programs.[97] Both issues create major hurdles for reliance on Commerce Clause power.

Conversely, Congress could rely on its power to approve state compacts under the Compacts Clause, along with its power to implement laws necessary and proper to carrying out its constitutional functions.[98] Congressional regulation, such as the uniform standards and ranked choice voting ballot proposed herein, would be necessary and proper to approval of the NPVIC as a compact. While this route is potentially constitutional, it does have some discernible potential downfalls. For instance, it has been noted that this reasoning could be extended to compacts between as few as two states, which could then permit Congress to evade federalism limits under the cloak of legislation that is necessary and proper to its approval of state compact.[99] This may be true, though perhaps certain standards could be set by Congress or the courts to prevent this slippery slope.[100]

In contrast to many of the sources of authority discussed above, the Spending Clause offers fairly clear constitutional authority for Congress to rely on to pass uniform standards. Congress could offer funding to states to assist with election administration, but condition the receipt of those funds on the adoption of uniform standards.[101] It also wouldn't be the first time Congress relied on the spending power to ensure some uniformity in election administration. In 2002, Congress provided funding to states to implement a number of election system reforms spelled out in the Help America Vote Act.[102] That said, two practical considerations leave us searching for other potential paths for Congress to pass uniform standards. First, it may be difficult for Congress to agree on providing funding, and what amount to provide. Second, the potential, however unlikely, that one or more states decide

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dents-economic-decisions-matter-eventually/ [https://perma.cc/ZC73-MSLS]; Duncan Rolph, *How Presidential Elections Affect The Markets*, FORBES (Oct. 26, 2016, 7:35 AM), https://www.forbes.com/sites/duncanrolph/2016/10/26/how-President-elections-affect-the-markets/#6fac09d2fb40 [https://perma.cc/4LYC-WW6G]; Mark Thoma, *How Much Impact Can a President Have on the Economy?*, CBS NEWS (Aug. 31, 2016, 5:30 AM), https://www.cbsnews.com/news/how-much-impact-can-a-President-have-on-the-economy/ [https://perma.cc/CA7P-VPLY].

[95] *See* Coenen & Larson, *supra* note 81, at 879.

[96] *See Lopez*, 514 U.S. at 559–61; Coenen & Larson, *supra* note 81, at 880.

[97] *See* Printz v. United States, 521 U.S. 898, 935 (1997); Coenen & Larson, *supra* note 81, at 880.

[98] *See* Amar, *supra* note 41, at 254.

[99] *See id.* at 254–55.

[100] Doing so here is outside the scope of this Article.

[101] *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987). If Congress chose this route to pass uniform standards after the NPVIC goes into force, it must ensure that the financial inducement offered is no "so coercive as to pass the point at which 'pressure turns into compulsion.'" NFIB v. Sebelius, 567 U.S. 519, 580–85 (2012) (citation omitted).

[102] *See* KENNETH R. THOMAS, CONG. RESEARCH SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 15 n.74 (2014).

to reject the funding and not implement the uniform standards could undermine the entire purpose of having uniform standards. This leads us to ask if there is a power Congress can rely on to pass the uniform standards, thereby ensuring that they will apply to all states. We think that Congress can pass these regulations under its independent authority to regulate presidential elections.

Congress derives its independent authority from Article II, Section 1 and the Twelfth Amendment. The Supreme Court, and the lower courts, have read a broad scope of authority for Congress under these constitutional provisions. Though no court has addressed whether Congress can pass legislation requiring states to conduct a uniform election poll of any kind, we argue that the language of the Constitution, as interpreted by the courts, supports Congress's authority to legislate the use of a presidential RCV ballot as we have described.

B. Constitutional Backing for Congressional Control over Presidential Elections

Congress derives the power to regulate federal elections directly from the Constitution. The various provisions discussed below offer the strongest authority to create a presidential RCV ballot and regulate the administration of the NPVIC. In three different places, the Constitution lays out Congress's authority with respect to the election of senators and representatives, and the President. Article I, Section 4—the Elections Clause—governs Congress's role in the election of senators and representatives.[103] Article II, Section 1 and the Twelfth Amendment govern Congress's role with respect to presidential elections.[104]

The Elections Clause gives Congress power over congressional elections and provides that: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the places of choosing Senators."[105] The Constitution first gives the power to regulate and administer federal elections to the states and then gives Congress the power to oversee and alter those regulations, as well as to put in place its own.

Congress's power is controlling. While states may get the first crack at regulating federal elections of senators and representatives, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules."[106] The Framers baked into the text of the Constitution the principle that Congress ought to be able to safeguard the election of individuals tasked with carrying out federal policy.

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[103] *See* U.S. CONST. art. I, § 4, cl. 1.
[104] *See id.* art. II, § 1; *id.* amend. XII.
[105] *Id.* art. I, § 4, cl. 1.
[106] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814–15 (2015).

The Constitution separately addresses the presidential election. There are three relevant clauses, two in Article II, and one in the Twelfth Amendment, which speak to the authority to regulate the presidential election. Like the Elections Clause, these provisions divide authority between the states and Congress. First, Article II, Section 1 provides, in relevant part, that: "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 the Congress."[107] Second, Article II provides that: "Congress may determine the Time of choosing the Electors, and the Day on which they Shall give their Votes; which Day shall be the same throughout the United States."[108] Third, the Twelfth Amendment provides that: "The President of the Senate shall, in the presence of the Senate and House or Representatives, open all the certificates and the votes shall be then counted."[109]

How does each of these authorities provide Congress with the power to institute the proposed legislation? Despite the differences in wording between the relevant provisions in Article I and Article II, court opinions and commentary suggest that Congress has a high degree of authority to regulate the administration of the Presidential election. We believe this includes instituting a presidential RCV ballot and related standards for the administration of the presidential election.

C. Congress Already Regulates Presidential Elections

Congressional control over the Electoral College and presidential elections is not new. Congress has done it before, through the Electoral Count Act of 1887,[110] the National Voter Registration Act,[111] and the Help America Vote Act.[112] Each of these pieces of legislation regulates in some manner either the Electoral College or presidential elections. These have never been successfully challenged on the grounds that the laws offend the provisions in Article II, Section 1 that, upon a superficial reading, seem to limit Congress's role in presidential elections to choosing the time electors cast their votes.[113] This is because Congress is not so limited in its power.

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[107] *Id.* art. II, § 1, cl. 2.
[108] *Id.* art. II, § 1, cl. 4.
[109] *Id.* amend. XII.
[110] *See* 3 U.S.C. § 5 (2012).
[111] 52 U.S.C. §§ 20501–20511 (2018). While not discussed in depth in this Article, this Act is another example of Congress regulating federal elections in an area where states traditionally exerted power. It "establish[ed] procedures that [sought to] increase the number of eligible citizens who register to vote in elections for Federal office" and "to ensure that accurate and current voter registrations rolls are maintained." *Id.* § 20501. With this Act, Congress directly regulated state power in federal elections.
[112] 52 U.S.C. §§ 20901–21145 (2018).
[113] *See, e.g.*, Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995) (supporting the idea that Article II, Section 1 has been interpreted broadly); Coenen & Larson, *supra* note 81, at 887–900.

In the Electoral Count Act of 1887, Congress directly regulated which electoral votes would be counted.[114] The Act requires that states fix their procedures for counting and awarding electoral votes at least six days before the national count to elect the President.[115] Whatever method exists at the six-day mark "shall be conclusive, and shall govern in the counting of the electoral votes."[116]

Congress passed this Act to preserve the public trust in the outcome of the presidential election. The seeds of this Act were planted in 1876. It was a presidential election year, and the contest was between Samuel J. Tilden and Rutherford B. Hayes.[117] The race was so close—within three percentage points of the Electoral College vote—that any contested votes would decide the election.[118] Ultimately, contested votes did tip the scales.[119] This type of contested presidential election can, and did, erode the public's trust in the fairness of the process and in the results.[120]

So, Congress stepped in. While Congress created an election commission to deal with the 1876 debacle, the debate over a more permanent fix continued for nearly a decade.[121] Finally, with "the imminent prospect of a repeat of the 1876 deadlock in the 1888 election," Congress passed the Electoral Count Act.[122] In order to safeguard federal elections, Congress "assert[ed] final congressional authority in counting electoral votes" and established that a statute could "set the precise parameters for state and federal control of the electoral-vote process."[123]

The nation faced another election crisis in 2000. This time the electoral count came down to one state. Whichever candidate won the popular vote in Florida would receive the state's twenty-five electoral votes and become the next President of the United States.[124] Yet voting procedures in the state made determining the winner difficult and contentious. Some Florida citizens argued that confusing ballots in a single county tipped the election.[125] Voters were apparently so thrown off by the ballot layout that individuals

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[114] *See* 3 U.S.C. § 5 (2018) (this includes provisions from the Electoral Count Act of 1887, which was repealed).

[115] *See id.*

[116] *Id.*

[117] *See* Coenen & Larson, *supra* note 81, at 862–63.

[118] *See id.* at 861–66.

[119] *See id.* at 862–63.

[120] *See id.* at 862–63 (referring to this episode in U.S. history as "spark[ing] a national crisis").

[121] Coenen and Larson provide a detailed account of this episode of U.S. history. *See id.* at 861–66.

[122] *Id.* at 866.

[123] *Id.* at 867.

[124] *See* Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting [https://perma.cc/TLL5-WNVW].

[125] *See* Don van Natta Jr. & Dana Canedy, *The 2000 Elections: The Palm Beach Ballot; Florida Democrats Say Ballot's Design Hurt Gore*, N.Y. TIMES (Nov. 9, 2000), https://www.nytimes.com/2000/11/09/us/2000-elections-palm-beach-ballot-florida-democrats-say-ballot-s-design-hurt-gore.html [https://perma.cc/9NZ8-DMDV].

mistakenly voted for candidates they did not intend to support.[126] Other voters were not successful in removing perforated sections of paper ballots—the only way to indicate which candidate they were voting for.[127] So began a legal battle that eventually wound up at the Supreme Court. Ultimately, without the recount procedures sought by Democrats, George W. Bush received Florida's electoral votes and won the presidency. But the winner of the popular vote? Al Gore.[128]

Congress felt the pressure to act. It regulated state administration of presidential elections with the Help America Vote Act of 2002.[129] Congress passed the Act "[t]o establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes."[130] Importantly, it *required* states that accepted this federal funding to implement programs and procedures for the following: provisional voting, voting information, updated and upgraded voting equipment, statewide voter registration databases, voter identification procedures, and administrative complaint procedures[131]—all seeds of uniform standards.

As readers are likely well aware, the nation faced yet another election related crisis of confidence with the discrepancy between the results of the Electoral College and the popular vote in 2016. But Congress may not be the only player to respond this time. States could step in and bring the NPVIC into force. That, however, does not mean Congress is without a role. Congress can help fix the electoral system and restore people's trust in its process and outcomes, by providing guidance and uniformity for the operation of a presidential election under the NPVIC.

Questions may remain, though, about Congress's authority to enact legislation that regulates the presidential election. The text of the Constitution is admittedly unclear on its face. We believe our examination of relevant judicial decisions establishes that Congress does have the authority to institute a presidential RCV ballot because it will help ensure the public's faith and trust in the electoral process and results.

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[126] *See id.*

[127] *See* Elving, *supra* note 123.

[128] *See 2000 Presidential Popular Vote Summary for All Candidates Listed on at Least One State Ballot*, FED. ELECTION COMM'N, https://transition.fec.gov/pubrec/fe2000/prespop.htm [https://perma.cc/AZ8A-YRRX] (last updated Dec. 2001).

[129] 52 U.S.C. §§ 20901–21145 (2018).

[130] Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666, 1666 (2002). States accepted these reforms. Help America Vote Act "funds and updates were accepted by all fifty states, the District of Columbia, American Samoa, Guam, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands." Sarah Milkovich, *Electoral Due Process*, 68 DUKE L.J. 595, 596 (2018).

[131] *See Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about/help-america-vote-act [https://perma.cc/H3QR-ZZ9G].

D. Courts Back Congress's Assertion of Control over Presidential Elections

The Supreme Court has previously embraced congressional regulation of presidential elections. In *Burroughs v. United States*,[132] the Court rejected a superficial reading of Article II, Section 1. In this case the Court examined the Federal Corrupt Practices Act.[133] In upholding its application, the Court announced a broad, animating principle of congressional control over Presidential elections: preservation of "the purity of presidential and vice presidential elections."[134] Despite the seemingly narrow text of Article II, Section 1, the Supreme Court confirmed that Congress has a substantive role in regulating presidential elections. It is not left entirely to the states. Congress has the authority to ensure the "purity" of presidential elections.

What does it mean to ensure the "purity" of presidential elections? The Federal Corrupt Practices Act, as examined in *Burroughs*, targeted "the improper use of money to influence the result" of presidential elections so as to prevent fraud and corruption.[135] But a "pure" election is not limited to the idea that it should be free from fraud and corruption. When there is fraud and corruption in elections, people lose their trust in the electoral process and its outcomes. That trust is essential to a functioning electoral system, and thus a democracy. The broader principle at work is the right for Congress to protect elections as the central pillar of the country's democracy. Congress's authority to ensure the purity of the presidential election is its power to protect the system from any pressures that tend to erode public participation and trust in the process and results.

The Court suggested a similar view on the importance of presidential elections and Congress's position as a protector of the election:

> While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[136]

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[132] 290 U.S. 534 (1934).
[133] *See id.* at 540, 544–48.
[134] *Id.* at 544.
[135] *Id.*
[136] *Id.* at 545 (citation omitted).

The Supreme Court was unambiguous in announcing that Congress has the power to pass legislation regulating presidential elections. The Court stressed the importance of the presidential "election and the vital character of [the office's] relationship to and effect upon the welfare and safety of the whole people."[137] As the representative branch of the federal government, Congress is the key protectorate of the general welfare.[138] This is eminently true when it comes to the election of federal officers.

To the Court, the "power of self-protection"—protection of U.S. elections and U.S. democracy—rests with Congress.[139] Self-protection in the *Burroughs* context meant prevention of fraud, corruption, or violence in the electoral system.[140] But if Congress truly has the authority to protect our presidential election system, then it must be able to guard against anything that threatens "the departments and institutions of the general government." And the Court appeared to recognize this. It endorsed congressional legislation that "preserve[s] the purity of presidential and vice presidential elections"[141]—a broader principle than protection against only fraud and corruption.

The logical next question may be: What is it exactly that Congress can preserve with legislation and how far does its power extend? Congress's role in presidential elections is really about ensuring that voters have trust in our electoral system. Voter trust in electoral integrity is essential to preserving legitimacy of democratic institutions.[142] That trust is informed by whether people believe that votes are counted as they were cast and that opportunities to participate in the election are fair and open.[143] Congress has the power to enact legislation that furthers these ends. These ends are not new and are no secret. They are directly in line with a core animating principle of the United States: The power to govern ultimately flows from the people.[144] It is Congress's prerogative to protect this.

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[137] *Id.*

[138] *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power to . . . provide for the . . . general Welfare of the United States.").

[139] *Burroughs*, 290 U.S. at 545.

[140] *See id.* at 545–46.

[141] *Id.* at 544.

[142] *See, e.g.*, Pippa Norris, Holly Ann Garnett, & Max Grömping, *Why Don't More Americans Vote? Maybe Because They Don't Trust U.S. Elections.*, WASH. POST (Dec. 26, 2016, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/26/why-dont-more-americans-vote-maybe-because-they-dont-trust-u-s-elections/ [https://perma.cc/RD3P-VQR3]; Nicol Turner Lee, *Congress in 2019: The Need for Bipartisan Action on Voting Rights and Election Integrity*, BROOKINGS (Dec. 30, 2018), https://www.brookings.edu/blog/fixgov/2018/12/30/congress-in-2019-the-need-for-bipartisan-action-on-voting-rights-and-election-integrity/ [https://perma.cc/J9HY-ACPF].

[143] *Cf.* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); Bush v. Gore, 531 U.S. 98, 109 (2000) (recognizing the importance of "the confidence that all citizens must have in the outcome of elections").

[144] *See* U.S. CONST. pmbl. ("We the People of the United States . . . .); *id.* amends. I to X.; Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2674 (2015) (calling popular referenda, where the people act as the "Legislature" under the Elections

The Supreme Court's broad reading of congressional power in presidential elections was confirmed by Judge Posner. In *Association of Community Organizations for Reform Now (ACORN) v. Edgar*,[145] he examined the constitutionality of the National Voter Registration Act. Judge Posner started his analysis of the Act's constitutionality by addressing the Elections Clause. He highlighted that the Elections Clause specifically provides for the power of Congress to step in and change or mandate regulations of federal elections held in states.[146]

As we have seen, Article I lays out Congress's power with regard to congressional elections. So, what of presidential elections? Judge Posner, referencing the Supreme Court in *Burroughs*, concluded of Article II, Section 1: "This provision has been interpreted to grant Congress power over [p]residential elections coextensive with that which Article I [S]ection 4 grants it over congressional elections."[147] Other courts that have addressed the issue of congressional power over presidential elections conclude that Congress has a direct and substantial role to play.[148]

There are two immediate counterarguments that might be apparent from the discussion above.[149] The first is that the Supreme Court in *Burroughs* addressed only Congress's power to combat fraud or corruption in

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Clause, "in full harmony with the Constitution's conception of the people as the font of governmental power").

[145] 56 F.3d 791 (7th Cir. 1995).

[146] *See id.* at 794.

[147] *Id.* at 793 (citing Burroughs v. United States, 290 U.S. 534 (1934)).

[148] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 n.16 (1976) ("The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); Fish v. Kobach, 840 F.3d 710, 719 n.7 (10th Cir. 2016) ("We recognize that, by its literal terms, the Elections Clause only addresses congressional elections. But both the Supreme Court and our sister courts have rejected the proposition that Congress has no power to regulate presidential elections."); Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 n.1 (6th Cir. 1997) ("While Article I section 4 mentions only the election of Senators and Representatives, Congress has been granted authority to regulate presidential elections."); *Edgar*, 56 F.3d at 793.

[149] For a thorough review of potential counterarguments to an expansion of congressional control over presidential elections and analysis showing that a broader reading of congressional power should still prevail, see Coenen & Larson, *supra* note 81, at 890–907. Coenen and Larson make their arguments relative to proposed national ballots and national voting equipment. The counterarguments they identify, however, are likely also to be ones asserted against the proposed congressional act regulating elections in NPVIC states. One of the stronger counterarguments may be that Congress's reliance on its Article II, Section 1 power to pass uniform standards for the administration of presidential elections violates the anti-commandeering doctrine. Should that win the day, Congress could always pass the uniform standards under its Spending Clause power, as discussed in Section IV.A, *supra*. There is also another potential counterargument: that the FCPA, examined in *Burroughs*, regulated third-party actors in elections, not states; therefore, the holding of *Burroughs* should not extend to regulation of states. *See* THOMAS, *supra* note 101, at 5–6. That said, no lower court that has touched on the issue of congressional regulations of presidential elections has identified this as a counterargument to the law and principles announced in *Burroughs. See, e.g.*, *Fish*, 840 F.3d at 719 n.7; *Edgar*, 56 F.3d at 791; *Miller*, 129 F.3d at 833; *see also* Coenen & Larson, *supra* note 81, at 891–92; THOMAS, *supra* note 101, at 5–6; *cf. Buckley*, 424 U.S. at 14 n.16 ("The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); Oregon v. Mitchell, 400 U.S. 112, 134 (1970) ("[T]he Federal Government . . . [has] the final control of the election of its own officers.").

presidential elections. Accordingly, the Court's opinion should be read narrowly to only apply to those circumstances. The second is that Judge Posner made too far reaching of a proposition when he announced that the Elections Clause power is coextensive with Congress's Article II, Section 1 power.

For reasons discussed above, the first is unpersuasive. The *Burroughs* Court announced principles that govern congressional control over presidential elections that are broader than the prevention of fraud and corruption. And lower courts and scholars have agreed.[150] For instance, the Tenth Circuit noted, in a challenge to Kansas law as preempted by the National Voter Registration Act, that "both the Supreme Court and our sister courts have rejected the proposition that Congress has no power to regulate presidential elections."[151] We agree with Coenen and Larson that "*Burroughs* by its terms suggests that federal legislation should stand if it genuinely 'seeks to preserve the purity of presidential and vice presidential elections.'"[152] That is, Congress can regulate the presidential election if it preserves or enhances voters' trust in the electoral process and its outcomes. It is not just *Burroughs*. In *Oregon v. Mitchell*, albeit a case dealing with a state challenge to Voting Rights Act Amendments, the Supreme Court said, "[T]he Federal Government . . . [has] the final control of the election of its own officers."[153]

The other counterargument is that Congress's power to regulate presidential elections may not be coextensive with its power over congressional elections. That said, the principles in *Burroughs*, such as national "self protection," "safeguard[ing]" the presidential election, and protecting the "purity" of presidential elections.[154] It is true that the boundaries of Congress's power over congressional and presidential elections may not exactly align, but its power over presidential elections, read in light of *Burroughs*, is certainly broad enough to protect voter trust in the process and outcomes.

In any event, Congress's Article II, Section 1 power need not be coextensive with its Article I, Section 4 power for it to pass the proposed legislation. The proposed legislation still allows states, consistent with their Article II power, to adopt the manner of appointing its electors.[155] As previously discussed, a state could adopt a winner-take-all or district-based system, or award its electoral votes to the winner of the national popular vote. Each of these systems tells the states' electors how to cast their votes for the President and Vice President.[156]

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[150] *See Fish*, 840 F.3d at 719 n.7; *Miller*, 129 F.3d at 836 n.1; *Edgar*, 56 F.3d at 793; Coenen & Larson, *supra* note 81, at 894; THOMAS, *supra* note 101 ("Congress's regulatory authority over presidential elections does seem to be more extensive than it might appear based on the text of the Constitution.").

[151] *Fish*, 840 F.3d at 719 n.7.

[152] Coenen & Larson, *supra* note 81, at 894 (citing *Burroughs*, 290 U.S. at 544).

[153] *Mitchell*, 400 U.S. at 134.

[154] *Burroughs*, 290 U.S. at 544–45.

[155] *See* Amar, *supra* note 41, at 257–58, 260 n.103; Coenen & Larson, *supra* note 81, at 899–901, 900 n.256.

[156] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2319–20, 2321 n.1 (2020).

State power over electors and presidential elections ends there if Congress decides to step in and regulate. The only thing Congress cannot do is interfere with the right of states to "appoint [its electors] in such a Manner as the Legislature thereof may direct."[157] Opponents of this viewpoint may point to the Court's decision in *McPherson* to suggest otherwise, but the context of that case, as well as later cases like *Burroughs*, suggests that the Supreme Court endorses the view that state power is limited and Congress has power to regulate presidential elections.

McPherson discussed a state's power to use a district-based system to award its electoral votes.[158] The Court's statements that "the appointment and mode of appointment of electors belong exclusively to the states" and "Congress is empowered to determine the time of choosing the electors and the day on which they are to give their vote . . . but otherwise the power and jurisdiction of the state is exclusive" must be put in the context of the issue of the case.[159] The Court was addressing the power of the state to "appoint" its electors. It was not addressing the power of Congress to otherwise regulate presidential elections.

Any doubt that the Supreme Court meant those statements within the context of a state choosing how to direct its electors to vote should be cast aside by the Court's pronouncements in *Burroughs*. In that case, as already discussed, the Supreme Court unequivocally endorsed congressional regulation of presidential elections by upholding provisions of the Federal Corrupt Practices Act that regulated political committees that exist "for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors."[160] This is congressional regulation of presidential elections that extends beyond simply "determin[ing] the time of choosing the electors and the day on which they are to give their vote."[161] Thus, the division of power between the states and Congress in Article II, Section 1 is closer to that of Article I, Section 4 (even if not coextensive).[162]

The presidential ranked choice ballot will help ensure that voters trust the process and results of an election under the NPVIC. Because the NPVIC goes into force once the compacting states are able to ensure the

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[157] U.S. CONST. art. II, § 1.

[158] *See* McPherson v. Blacker, 146 U.S. 1, 24–25 (1892).

[159] *Id.* at 35; *see also* Coenen & Larson, *supra* note 81, at 900 n.256.

[160] Burroughs v. United States, 290 U.S. 534, 541–44 (1934) (citing 2 U.S.C. § 241).

[161] *McPherson*, 146 U.S. at 35; *see also* Coenen & Larson, *supra* note 81, at 900 n.256; *supra* notes 123–32 and accompanying text.

[162] "[T]he import of *McPherson* is clarified by the Court's later decisions in *Burroughs* and *Buckley*, which unmistakably held that Congress does have power to regulate aspects of presidential elections that extend well beyond the time-related questions expressly mentioned in Article II, Section 1." Coenen & Larson, *supra* note 81, at 900 n.256. What Congress cannot do is infringe on the state's power to control the rules by which it appoints its electors. A uniform standard would not infringe on that right because states would still be able to write the rules of elector appointment and insist on electors casting their vote for how the state would like them to do so. Indeed, Congress in 2019 considered new uniform standards for the November 2020 election. *See* For the People Act of 2019, H.R.1, 116th Cong. (2019). With the disruption of the coronavirus in Americans elections in 2020, Congress sensibly considered new standards for casting absentee ballots for electing the President and other offices.

candidate receiving the greatest number of votes wins the presidency, it will be an entirely new system under which the President is elected. The system will need to rely on the national popular vote, but currently each state tabulates and reports its own popular vote under its own regulations. The importance of the popular vote under the NPVIC is such that voters will need to fully trust the system, especially under a recount scenario. Instead of each state operating under its own procedures, Congress can step in. Legislation, like what we propose, will help standardize the national popular vote counting. This way voters know the entire system is equal across the states. The legislation would help ensure voter trust in the process and its outcomes. That is within the power of Congress to regulate presidential elections.

Congress's power to enact this legislation may be reinforced by its power over congressional elections. Because presidential elections are held on the same day as congressional elections, and Congress has "an undeniable interest in promoting turnout for congressional elections," the presidential RCV ballot and the accompanying uniform standards may further Congress's interest.[163] If one assumes that the new system may turn some voters away because of its perceived complexity or unreliability, then Congress would have an interest in passing uniform standards to ensure voter trust in the system so that voters would continue to turn out for the congressional elections as well.[164] This buttresses Congress's power to pass legislation like that proposed herein.

Importantly, the presidential RCV ballot does not interfere with states' rights to choose the manner in which it appoints its electors. States choose whether or not to enter into the NPVIC. In entering the compact, states are choosing the manner in which to cast their electoral votes—to cast them to the winner of the national popular vote. The proposed legislation for a presidential RCV ballot merely standardizes how a national popular vote is tallied and reported. The legislation does not direct a state to enter, stay out of, or leave the NPVIC. It does not interfere with the state's power of appointment. Instead, it ensures clarity and consistency in the election of the President.

Congress has the power to enact this legislation under its inherent authority to regulate presidential elections. In *Burroughs*, the Supreme Court announced that it is Congress's role to ensure the "purity" of the presidential election. The presidential RCV ballot would help do just that—by providing uniform standards for determining the national popular vote totals, which in turn will be used by NPVIC states to award their electoral votes. The NPVIC comes into effect only once those states can guarantee that the candidate receiving the most popular votes nationally becomes the President, so it becomes eminently important that the rules and procedures for determining the national popular vote are comprehensive and uniform. Congress must protect the purity of the presidential election. It should—and constitu-

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[163] Amar, *supra* note 41, at 260.
[164] *See id.*

tionally can—enact legislation like that proposed in this Article to ensure voters trust the new system and its outcome.

V. Second Option: An Interstate RCV Compact

The National Popular Vote Interstate Compact has shown there is a path to a national popular vote without the need for a constitutional amendment. Grounded in state power over how to allocate electoral votes, the Interstate RCV Compact option would allow states to act on their own, setting their own terms for conducting elections by RCV rather than having those terms set by Congress. A compact would preserve the spirit of federalism as currently practiced in presidential elections, which are largely governed by state law. It would also recognize states' roles as the laboratories of democracy, enabling interested states to join (or leave) the compact depending on what they determine the best interests of their voters to be. On the other hand, the compact option would lead to greater inconsistency in how presidential elections are operated across the country as some states would use RCV and others continue to use plurality voting. A compact would offer only a partial solution to the problem of spoilers and unrepresentative outcomes until all states have adopted it. The compact option also comes with some significant logistical and political concerns as well, as explained below. Nevertheless, it is a viable option worth consideration.

Following the NPVIC model, states interested in using RCV for presidential elections could also adopt an interstate compact ("RCV Compact"), but in this case to use RCV before reporting out vote totals for NPVIC, with the eventual goal of expanding that compact to all states in the event the NPVIC is enacted. The RCV Compact would thus be a separate compact for states passing RCV. States joining the RCV Compact would still hold RCV elections in their state (and if not in the NPVIC, determine their state's own electoral votes with RCV), but agree to report out only their first choice totals for the purpose of the NPVIC until the RCV Compact is triggered by adoption in at least five states.[165] After the RCV Compact's enactment, compacting states would agree to change what votes they report out for the purposes of the NPVIC. The RCV Compact states would agree to pool their votes, run a single RCV tally down to the top two candidates, and report out their vote totals as their popular vote totals.

A compact for states to adopt RCV for President in conjunction with the NPVIC would need several basic elements that are similar to what would be needed to run a national RCV tally according to the RCV in Presidential Elections Act: all compacting states would need to share their full ranked

[165] We propose *five* states as sufficient to have confidence that the two final candidates at *the end of* the RCV tally are the two strongest candidates nationally, but this *minimum* number of states could be greater. Regardless the more states in the RCV *compact*, the more certain its final two candidates are the ones *deserving* of votes for the purposes of *determining* the NPVIC winner.

choice voting ballot data with each other (and the public) as soon as it becomes available; all compacting states would need to recognize and use the ballots from compacting states when tabulating votes; and all compacting states would need to have the same ballot access and tabulation rules.

The process could work as follows: First, voters would vote by ranking their ballots, as in any other RCV election. Second, states would run RCV tallies within their states to show who wins their state with RCV; states not part of the NPVIC would award their electoral votes to the statewide RCV winners. Third, after compacting states process the ballots within their state as usual, they would release and share the cast vote record ("CVR") of those ballots that records each ballot's rankings in a consistent format.[166] Fourth, the pooled CVRs from all compacting states would be tabulated as in any other RCV election—eliminating the candidate with the fewest votes within the RCV Compact states and distributing those votes to the next-highest ranked candidate on each ballot—until only two candidates remain. Finally, compacting states would certify the vote totals of the two remaining candidates as the popular vote totals of those states collectively, which would be used to determine the winner of the popular vote and therefore the winner of the election, as that candidate would receive the Electoral College votes of the members of the NPVIC.[167]

The requirement that compacting states eliminate all but two candidates and report both their totals—rather than reporting only the total of the top vote-getter—recognizes that the RCV Compact would not (initially, at least) include every state.[168] States outside of the RCV Compact that continue to vote for presidential candidates using the plurality method would continue to report the vote totals of every candidate—not just the candidate who received the most votes. The reason for this is obvious: the candidate receiving the most votes in any one state will not necessarily win the most votes nationwide. Similarly, the votes for the candidate who ultimately finishes second in RCV Compact states (called the "multi-state second place presidential slate" in the proposed language) could end up contributing to that candidate's national victory. Reporting the votes of the top two per-

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[166] "Cast vote records" are electronic records of all the information contained in a ballot, including, in the case of RCV elections, candidate rankings. Modern voting software is able to read the information contained in a CVR in the same way that a voting machine is able to read the information contained on a ballot. As with individual ballots, a CVR does not contain any information about a voter's identity. *See* VVSGTerm Glossary, GITHUB, https://github.com/HiltonRoscoe/GlossaryMD/blob/master/vvsg_living_glossary.md#cast-vote-record [https://perma.cc/R259-K9VX] ("Archival tabulatable record of a set of contest selections produced by a single voter as interpreted by the voting system.").

[167] Proposed text for an RCV Compact as well as the text of the NPVIC are included at the end of this Article for reference.

[168] This aspect of the RCV Compact could have some negative consequences for parties whose candidates do not finish in first or second place, particularly in states that link ballot access to performance in previous presidential elections. This should be mitigated by using first round vote totals when determining ballot access and federal matching funds in future elections.

forming candidates gives every candidate an incentive to campaign in the compact states even if it is unlikely they will win a majority of votes there. Even if the states in the RCV Compact lean Democratic, for example, Republican candidates would still have reason to reach out to voters in that state. Voters would be able to vote for their favorite candidate as their first choice without fear of "wasting" their vote.

The collective vote pooling among the states is also a crucial element of the RCV Compact.[169] There would be no need for an interstate compact if member states were to each use RCV to determine their own individual popular vote winners—they are already able to do so.[170] If individual states were to conduct an RCV tabulation of only those votes cast within each state and report out the top two vote winners as their popular vote totals then it creates the possibility that one of the top two national candidates might finish third in an RCV state, as would have happened in some states in presidential elections in 1912, 1968 and 1992.[171] If several states did this it would increase the possibility of the national popular votes being split among several candidates with a winner receiving a low plurality, undermining one of the primary aims of RCV: producing a majority winner.[172]

Like the NPVIC, the proposed RCV Compact language requires membership to reach a set threshold before going into effect. While the NPVIC's threshold—the combined electoral votes of its member states are enough to elect the President—is crucial to its operation, there is no particular threshold inherently necessary for the RCV Compact to take effect. For the purposes of this discussion, the proposed RCV Compact language goes into effect after five states join. Regardless of the threshold of states ultimately agreed upon, the practice of pooling the votes of all states in the RCV Compact would also create an avenue for the eventual nationwide adoption of RCV using the national popular vote in a scenario where every state joins the RCV Compact.

Ballot access for candidates is another important consideration. Voters in all compacting states should be able to rank the same candidates. A compacting state with stricter ballot access laws than the others could effectively end a candidate's chances of qualifying for the first or second place presidential slate by keeping that candidate off the ballot. The entire RCV Compact

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[169] The "pooling" is not literal. The ballots themselves will remain and be processed in the states in which they are cast. Only the data contained in the CVRs would be shared and used for tabulation.

[170] For example, Maine has already adopted RCV for presidential elections. *See* An Act To Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, S.P. 315, 129th Leg., 1st Sess. (Me. 2020).

[171] For example, in 1992 George H.W. Bush finished in second place nationally but third in Maine, falling just behind Reform Party candidate Ross Perot. If Maine had run the election by RCV and only reported the results of the final two candidates then it is possible that Bush would not have received any votes at all from the state. *See United States Presidential Election Results*, *supra* note 30 (select "1992" from the "General by Year" dropdown menu).

[172] As we will discuss below, a similar outcome occurred in 1912.

is meant to function like a single election, so every voter in the compacting states should have equal ability to rank the same candidates. Allowing states to include or exclude different candidates would be analogous to a gubernatorial election where a candidate was not on the ballot in every county. As a result, compacting states must have rules ensuring any ballot-qualified candidate in one state is qualified in all other compacting states

Finally, the question of timing is a significant concern. While over two months separate Election Day and Inauguration Day, there is a hard deadline compacting states must meet: the federal "safe harbor deadline."[173] The safe harbor deadline requires that all states determine their presidential electors by six days before the date the electors are required to meet and vote.[174] Compacting states will need to release CVR data with enough time for the results to be tabulated and certified before the safe harbor deadline, ideally leaving enough time to resolve any contests of results.[175] The proposed language gives compacting states up to ten days after the election to provide CVR data.[176]

A. Tabulation

The primary consideration regarding the CVR data is the question of *who* tabulates it. The first possibility is that each state would be responsible for doing that itself. This possibility is initially appealing because it would require fewer changes to how states currently administer elections. It would, however, create a set of logistical hurdles that would become more acute as more states join the compact. The other possibility is to create an interstate commission run by the chief election officials of the member states. Each state would continue to run their own elections, but this commission would create uniform regulations for RCV presidential ballots and would be responsible for aggregating the state-level results from the various member states and releasing the full results for the compact. While this possibility may encounter more initial resistance, it presents the best way to avoid the logistical obstacles posed by the alternative.

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[173] *See* 3 U.S.C. § 5 (2018).

[174] *See id.* Federal law sets the date for the federal electors' meeting at "the first Monday after the second Wednesday in December next following their appointment." *Id.* § 7 (2012).

[175] The Supreme Court has made clear that the safe harbor deadline may not be delayed to accommodate a recount in a presidential election. *See* Bush v. Gore, 531 U.S. 98, 113 (2000) ("If we are to respect the legislature's Article II powers, therefore, we must ensure that post election state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5.").

[176] To use the example of 2020, Election Day is November 3. The deadline for compacting states to provide CVRs would be November 13. The safe harbor deadline for 2020 is on December 8 and the presidential electors are scheduled to meet on December 14, which would give compacting states 25 days to tabulate results and resolve any election contests. Congress does have the power to extend these deadlines by statute, which would be a sensible change under current rules as well.

B. The Simultaneous Independent Tabulation Approach

Under this approach, states in the compact would use CVR data to each independently calculate the collective RCV result for the entire RCV Compact. Since all the states are using the same data and same counting rules, they should (in theory) all reach the same result. This approach would create significant redundancies, since all of the RCV Compact states would be performing the same tabulation process with the intention of each reaching the same result. It would also create the possibility that, through human or computer error, different states reach and announce different results. Without a single, central arbiter to review and confirm results, any discrepancies in results across the compacting states could lead to delays as each state tries to identify where the errors occurred and which total is correct. The resulting delays, along with the confusion and uncertainty over which results are valid, could have a corrosive effect on public confidence in elections generally and the RCV Compact specifically.[177]

Alternatively, each compacting state could tabulate and report their own individual vote totals, while using the combined CVR data to determine the order in which candidates should be eliminated.[178] Ranked choice voting functions by eliminating the candidate with the fewest votes and transferring those votes to each voter's next-ranked candidate. A candidate in last place in a single compact state may not be the candidate in last place overall among the RCV Compact states (which is why it is necessary for compacting states to share their CVRs rather than for each to tabulate their own results wholly independently, eliminating and transferring the votes until two candidates in each state remain *before* reporting their result).[179]

Under this approach, each compacting state would still scan all of its presidential ballots, convert them into CVRs, and publicly share the CVRs with the other members of the RCV Compact. While compacting states would not need to use the same voting equipment, it would need to create the same CVR and make it a public record. Each compacting state then would combine the CVR data reported by the other compacting states with its own and use that combined data to determine the last place candidate overall. The state would then eliminate that candidate from its tabulation (regardless of how that candidate performed within that state) and transfer the votes for that candidate to the voters' next choice. Using the combined CVR data, the state would then determine the next candidate to eliminate

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[177] Delays are especially troublesome in presidential elections since, as discussed in *supra* note 174, the process happens within an inflexible timeline.

[178] To succinctly summarize the difference between these methods, under the former every state tabulates and reports the results for all of the compacting states. Under the latter, every state uses the full results to determine and report what its individual contribution to the final results would be. In either case, every state would still need to use CVR data from every other compacting state to conduct a full tabulation and reach the same results as every other state.

[179] If that method were followed, it could result in the compacting states collectively reporting more than two candidates as receiving votes and would undermine the purpose of having a separate compact altogether.

and continue the process until only two candidates remain. It would then report the votes for those candidates as its statewide popular vote total. Each compacting state would treat the certified results of every other compacting state as conclusive (as is already required by the NPVIC). In effect, this would mean that each state conducts two parallel tabulations: first using the combined CVR data to determine each candidate's vote totals across all the RCV Compact states and then using that information to guide its own state-specific tabulation.[180]

This approach would not solve all the problems that could arise with several states attempting to independently work in unison. Compacting states would still need to pass and maintain uniform laws on matters such as ballot access, number of rankings permitted, and the release of CVR data. In the absence of a single entity issuing rules and overseeing vote tabulation, the most effective way to achieve this uniformity would be for the RCV Compact to contain legislative language that each compacting state adopts into its own legal code.

This presents another problem. While plurality voting only needs to address ties when two or more candidates are tied for first place, RCV laws must also address situations when multiple candidates are tied for last place and a tiebreaker is necessary to determine which candidate should be eliminated. The most common method used in American jurisdictions using RCV is to break the tie by lot to select a candidate at random. Compacting states would not be able to each do this independently, however, because five or more states using randomized tie-breaking methods are not guaranteed to reach the same result. Compacting states eliminating different candidates would result in those states would have different vote totals since the next-choice votes from one eliminated candidate's voters would not necessarily be transferred to the same candidates as they would be if another candidate had been eliminated instead.

Finally, the simultaneous independent tabulation approach would ossify the tabulation process into terms of an interstate compact that would be extremely difficult to change. If the compacting states wanted to make adjustments to the process contained in the compact, they would all need to agree to the changes and then update their implementing legislation accordingly, a process that could potentially take years.[181] This is not a concern for a compact like the NPVIC, which is solely concerned with the process of appointing presidential electors. An RCV Compact that takes the simultaneous independent tabulation approach, on the other hand, would need to

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[180] This process would not necessarily be as time-consuming as it may sound. Software can read CVR data to tabulate results relatively quickly. There would be no need for a lengthy hand count (although states would still retain original ballots for recounts and post-election audits).

[181] *See* FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 122 (1979) ("The history of uniform laws is replete with examples of amendments by State Legislatures or interpretations by state courts that made them nonuniform. A compact, however, cannot be amended by any party without the consent of all of them.").

create a uniform and comprehensive approach to issues like tabulation procedure, ballot design, and candidate qualification that member states may wish to revisit as time goes on.

C. Interstate Agency

The issues discussed above could be resolved if the RCV Compact were to create an interstate agency to collect CVR data and tabulate the full results for the compacting states.[182] This would provide the RCV Compact with a single, centralized arbiter to review and confirm results. While the individual states would still run their own elections, the interstate agency would centralize the CVR data and use it to tabulate results, which the compacting states would then certify and report in accordance with the NPVIC. The interstate agency could also be empowered to create rules for issues like tabulation and ballot access in order to maintain consistency across the compact. As noted above, to be successful the compacting states would need uniformity on issues like ballot access requirements and counting rules. A single agency representing all the compacting states with the power to regulate those issues—or issue uniform guidelines for compacting states to adopt—would be the most efficient and effective way to achieve that uniformity.

This agency would not run elections. That responsibility would remain with the compacting states. The states would still maintain voter registries, print ballots, operate polling stations, scan ballots, and the vast majority of the day-to-day work and implementation that comprises running an election. This work will still be done by the same state and county employees that performed it before the RCV Compact went into effect. States would continue to be responsible for their own election security.[183]

Since the agency's primary responsibilities are promulgating regulations and then collecting and running data through a computer program every four years, it will likely be quite small. It is possible that it would not need to

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[182] This is not an unusual feature of interstate compact agreements. The Washington Metropolitan Area Transit Authority, which operates the Washington, D.C.-area subway system, is the product of an interstate compact. *See* D.C. CODE § 9-1107.01 (West, Westlaw through Dec. 8, 2020).

[183] The interstate agency option would require additional security measures to cover the collection of member states' CVR data to the agency and during the agency's tabulation of results. The proposed compact in Appendix 3 requires the agency to develop security procedures for the collection and tabulation process. The commission could decide to use an encrypted process to transmit the CVRs electronically. Another option would be for states to physically transport the CVRs in data storage devices like Maine did in 2018, when precincts sent thumb drives to Augusta for centralized tabulation. As a practical matter, since each compacting state would be making its CVR data public, member states, the media, watchdog groups, and concerned citizens could all use that data to run the tabulation themselves and determine if there had been any tampering with the results released by the agency. In this way, the RCV Compact's commitment to transparency would bolster election security and promote public faith in the process.

have any employees of its own but instead be staffed by civil servants detailed from the election administration agencies of the compacting states.[184]

Considering the amount of coordination and organization necessary to ensure the RCV Compact would function smoothly, creating an interstate agency would be the most effective and reliable option. It in fact is similar to what must happen in most statewide elections, where the chief election official of a state (typically the Secretary of State) collects election data from separately administered counties and establishes the winners of elections for offices representing more than one county. It is also analogous to having the Election Assistance Commission oversee administration of the Ranked Choice Voting in Presidential Elections Act.

There may be political obstacles to this approach, however. First, while the direct administration of elections would remain in the hands of each compacting state, states may be reluctant to cede any degree of their authority over presidential elections to an external agency (albeit one in which the state plays a governing role). Second, while the agency itself would likely not need to be very large, it would certainly incur some expenses, and compacting states would have to commit to funding it. These concerns, while hardly insurmountable, add an additional layer of complications to the RCV Compact that might deter states otherwise interested in joining. Nevertheless, in light of the organization and coordination necessary for the RCV Compact to successfully operate using the tabulation process described above, some sort of central agency (jointly operated and controlled by compacting states) to oversee reporting and tabulation is probably necessary.

D. Constitutionality of the Interstate RCV Compact

The authority of states to enter into interstate compacts with one another is well-established. The Constitution acknowledges this authority in the Compacts Clause.[185] The Supreme Court has recognized that interstate compacts may create regulatory bodies.[186] Also embedded in the Constitution is the power of state legislatures to appoint presidential electors.[187]

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[184] This would have the added benefit of keeping the interstate agency's costs down, making it more appealing to states considering joining the compact.

[185] *See* U.S. CONST. art. I., § 10, cl. 3. ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."). The Supreme Court has read the requirement for congressional approval to apply only if the compact would "encroach . . . upon the full and free exercise of federal authority." Virginia v. Tennessee, 148 U.S. 503, 520 (1893).

[186] *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 30–31 (1951) ("That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government . . . What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact.").

[187] *See* U.S. CONST. art. II, § 1, cl. 2 ("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 the Congress: but no Senator or

States are free to appoint electors however they wish, limited only by the Constitution's authorization of Congress to select the time and date of choosing the electors and the day on which they vote.[188]

A state may, therefore, award its electoral votes however it chooses. It may do so on the basis of who wins that vote in that state, as all states currently do now. It may do so on the basis of who wins the national popular vote, as states in the NPVIC would do once it goes into effect. A state may spread its electoral votes among several candidates, as Nebraska and Maine do when awarding votes to the winner of each congressional district, or it may award them all to a single candidate, like the other forty-eight states and the District of Columbia. A state may award electors to the winner of an election conducted by ranked choice voting, as Maine does, or to the winner of a plurality election, as all other states and the District of Columbia currently do. A state does not even need to hold an election at all. There have been many presidential elections in which state legislatures voted on which candidate would receive their states' electoral votes without any public vote.[189] The Constitution places no limitation on the method a state may use when deciding how its electoral votes will be apportioned and states are therefore free to award them on the basis of election results reported from every state or even on the basis of results compiled and reported by an interstate agency that state has chosen to join.[190]

Candidates who do not finish as either the multi-state first- or second-place presidential slate because they were eliminated in the tabulation process may object to being excluded from the national popular vote total. However, there is no constitutional requirement that states look to a particular round of vote-counting when awarding electoral votes. As discussed earlier, there is no constitutional requirement that states count popular votes at all. Others may object to states surrendering their constitutionally-delegated role in selecting the President to an interstate agency but this would misrepresent that agency's role in the process. The interstate agency would not assign electoral votes. It would simply use the popular vote totals reported by member states to conduct the RCV tabulation and then report that final result to be used as the compacting states' contribution to the national popu-

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Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

[188] *See* McPherson v. Blacker, 146 U.S. 1, 35 (1892) ("In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.").

[189] *See id.* at 32–33 (noting that Delaware, Georgia, Louisiana, New York, South Carolina, Vermont, Colorado, and Florida all selected electors by vote of the legislature rather than popular vote at various points in the 19th century).

[190] There is considerable overlap between the case for the constitutionality of the RCV Compact and the case for the constitutionality of the NPVIC. For a detailed discussion of the latter, see KOZA ET AL., *supra* note 16, at 283–358.

lar vote. It remains up to the states to decide whether to join the NPVIC and award their electoral votes to the national popular vote winner and they are free to leave the NPVIC under its terms if they wish.

A change to presidential elections as consequential as what this Article proposes will undoubtedly invite legal challenges. Nevertheless, the RCV Compact rests on firm legal foundation, consistent with the roles the constitution created for the states in national elections.

E. Final Considerations for an Interstate RCV Compact

An interstate compact for RCV in presidential elections is an appealing option for several reasons. It leaves overall control of presidential elections with the states. It can start small, with a handful of states, allowing other states to see how it works in practice before deciding whether to join. There are some significant complications that must be considered, however, and the details of the compact will matter a great deal. A poorly designed compact risks creating delays and undermining the operation of the NPVIC. There are several possible ways to address these risks but the most secure would be the creation of an interstate agency to oversee the RCV Compact. Given the RCV Compact's need for uniform rules and procedures, a single interstate agency would be the best option to bring the benefits of RCV to presidential elections.

VI. In Practice: The 1912 Election

Let us consider how these two options to establish RCV in NPVIC elections—the RCV in Presidential Elections Act and the Interstate RCV Compact—would work in the context of the 1912 presidential election, imagining for the purposes of this thought experiment that states have modern optical scanning voting equipment that can produce cast vote record files. The 1912 election presents an excellent example for the use of RCV. It is unusual among American presidential elections as there were more than two viable candidates. Four major candidates are running for President: Democrat Woodrow Wilson, Progressive Teddy Roosevelt, Republican William Howard Taft, and Socialist Eugene Debs, with former Republican President Roosevelt having broken away to form his new "Bull Moose" Progressive Party. The Republican-Progressive schism and the presence of multiple candidates claiming the mantle of progressivism made the election particularly susceptible to vote splitting.

Contemporary readers may also feel less invested in the outcome of this 1912 election hypothetical than the controversial 2000 and 2016 presidential elections, making it easier to observe the merits of RCV in presidential elections without inflaming contemporary partisan divides. Indeed, it is not possible to say which candidate "would have won" the 2000 or 2016 elections under the RCV in Presidential Elections Act or the Interstate RCV Com-

pact, because if either of these proposals were in effect, they would have changed how candidates and parties approached the campaigns. RCV does not benefit any candidate or party; it empowers voters to more fully express themselves and incentivizes candidates to reach out beyond narrow bases of support.

The results of the 1912 election demonstrate the relevance of the Republican-Progressive schism of the time. Wilson won the election, receiving a plurality of the popular vote at 41.83%—the lowest vote share of any winning presidential candidate since the Civil War.[191] Wilson won a landslide in the Electoral College, receiving 435 out of 531 (or 81.82%) Electoral College votes but this number obscures the fact that many of his electoral votes came from states he won by a plurality. Wilson won a majority of the vote in only eleven states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia), which together represented 126 votes in the Electoral College.[192] Of the other twenty-nine states Wilson carried, the combined votes of Roosevelt and Taft surpassed Wilson in twenty-six of them, which represented 281 votes in the Electoral College, raising the possibility that a Republican ticket could have won the election had the party not split.[193]

Of course, there is another way the 1912 election could have played out without seeing the effects of widespread vote splitting: if the election had been conducted using RCV.[194] To explore how such an election would un-

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[191] *See 1912 Presidential General Election Data*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org/RESULTS/national.php?year=1912 [https://perma.cc/N3EJ-VTAK]. The only presidential elections where the winner received a lower share of the popular vote are 1824 and 1860. *See 1824 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org/RESULTS/national.php?year=1824&f=0&off=0&elect=0 [https://perma.cc/5APT-YABG] ("*1824 Results*"); *See 1860 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org/RESULTS/national.php?year=1860&f=0&off=0&elect=0 [https://perma.cc/D8L8-JRM5] ("*1860 Results*"). In 1824, John Quincy Adams received 30.92% of the popular vote, although he received fewer votes than his opponent Andrew Jackson, who received 41.36%. *See 1824 Results*. Any comparison with the popular vote in 1824 should be qualified since six states (SC, GA, NY, VT, DE, and LA) appointed their presidential electors through their legislatures rather than holding an election. *See id.* In 1860, Abraham Lincoln received 39.65% of the popular vote, although a majority of the vote in the number of states necessary for him to earn an Electoral College majority. *See 1860 Results*. As in 1824, South Carolina appointed its electors through its legislature rather than by a popular election, but it was the only state to do so. *See id.* By 1912, all states were using popular elections to award electoral votes. *See 1912 Presidential General Election Data*.

[192] *See 1912 Presidential General Election Data*, *supra* note 190.

[193] The states are Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, West Virginia, Wisconsin, and Wyoming. *See 1912 Presidential General Election Data*, *supra* note 190. Roosevelt received eighty-eight electoral votes from the states he won, and Taft had received eight. At the time, 266 votes were necessary to win a majority of the Electoral College. *See id.*

[194] This aspect of our thought experiment is not anachronistic. Ranked choice voting has existed since the 19th century. Denmark adopted a proportional, multi-winner version of RCV to elect the upper house of its legislature in 1855. *See* JOHN H. HUMPHREYS, PROPORTIONAL

fold we will have to use some simplistic assumptions. First, we will assume that every vote actually cast in 1912 would also be a voter's first choice if the election had been conducted by RCV.[195] Next we will assume that vote transfers from each candidate would go as follows if that candidate is defeated. If Wilson is defeated, we will assume his voters would be evenly split between Taft and Roosevelt and less inclined to support Debs, with 45% of Wilson's votes going to Roosevelt, 45% going to Taft, 5% going to Debs, and 5% of ballots not ranking any other candidate and becoming inactive.[196] We will assume that Roosevelt and Taft's voters are more likely to favor the other candidate but not exclusively so, and that if either Roosevelt or Taft is eliminated his votes will go 80% to Taft or Roosevelt (as the case may be), 10% to Wilson, 5% to Debs, and 5% will become inactive. We will assume that a substantial number of Debs voters, heeding their candidate's denunciation of all the other candidates as being representatives of the capitalist system, would not rank anyone else and those that do will be split evenly among the three, with 40% of becoming inactive, 20% going to Wilson, 20% going to Taft, and 20% going to Roosevelt.[197] Finally, for the sake of simplicity, we will assume that only the candidates already discussed (Wilson, Taft, Roosevelt, and Debs) are in the race and ignore all other minor parties and write-in candidates.[198] This will mean that for the purposes of determining the total number of votes cast in the election, we will only use the total number of votes cast for those four candidates.[199]

REPRESENTATION: A STUDY IN METHODS OF ELECTION 112 (1911). Other variants of RCV, both single- and multi-winner, have been used in Australia since 1892. *See* Benjamin Reilly, *The Global Spread of Preferential Voting: Australian Institutional Imperialism?*, 39 AUSTL. J. POL. SCI. 253, 255 (2004). The single-winner version of RCV that this paper is proposing for presidential elections, and which is currently in use throughout the United States, was created by Massachusetts Institute of Technology Professor William Ware in 1871. *See id.* at 259.

[195] In reality, many of the votes cast in 1912 were likely strategic votes cast for the candidate a voter judged to be more likely to win rather than the candidate the voter liked the most. The use of RCV would change that calculus for voters, who would not have to settle for "the lesser evil."

[196] An "inactive" ballot is one where every candidate ranked on it has been eliminated in the tabulation process and therefore no longer counts for any candidate. A ballot that only ranks a single candidate, for example, would become inactive if that candidate is eliminated.

[197] As noted above, these numbers are based solely on a desire to keep the exercise simple. If any scholar of the era has a more educated take on voters' preferences and hypothetical rankings of the candidates, we would be very interested to hear it. Since candidates may only be ranked once, votes transferred to a candidate who has already been eliminated will immediately transfer again following the transfer rules of that defeated candidate. This is consistent with the tabulation rules in every American jurisdiction currently using RCV, which, upon reaching a ranking for a candidate who was eliminated in an earlier round, will skip that ranking and go to the next-highest ranked candidate on the ballot who is still in the race. To simplify the process and avoid creating a loop, we will not transfer votes from one eliminated candidate to another eliminated candidate but instead treat such votes as inactive.

[198] We apologize to Prohibition Party candidate Eugene W. Chafin and offer our assurances that his party's greatest triumph was yet to come.

[199] This means that for the purpose of this exercise we will consider the total number of votes cast in the election to be 14,804,675. In reality, the total number of votes cast for President in 1912 was 15,046,540. *See 1912 Presidential General Election Data*, *supra* note 190.

A. Under the RCV in Presidential Elections Act

With our priors established, we will first consider how the 1912 election would unfold under the federal statute contained in Appendix Two. The NPVIC is in effect and Congress has passed the "The Ranked Choice Voting in Presidential Elections Act" ("the Act"). The date is November 5, 1912. In practice, Election Day itself operates much as it has in previous elections. The states are still responsible for administering the election. Voters go to polling precincts operated by state or county officials, and their ballots are still collected, scanned, and initially processed in the state where they were cast by whichever state or county agency designated by state law. Now, however, the ballots allow voters to rank the candidates, as required by the Act. Each state will make public the full CVR of all the ballots cast.[200] The Election Assistance Commission will use the aggregated CVR data from all states to determine the national popular vote winner. NPVIC states will award their Electoral College votes accordingly. States not in the NPVIC will still conduct their election with the ranked choice presidential ballot but will award their electoral votes however they wish.[201]

In the first round, Wilson leads the count with 6,294,384 votes (42.52%), followed by Roosevelt with 4,121,609 vote (27.84%), then Taft with 3,487,939 votes (23.56%), and finally Debs with 900,743 (6.08%). Since Debs has the fewest votes, he is eliminated and votes for him are transferred to his voters' next-ranked candidate, if any. The transfers from Debs do not affect the relative position of the remaining candidates and Wilson again leads in the second round, followed by Roosevelt and then Taft. Since Taft is now last, he is eliminated and his votes are transferred to his voters' next choices. This time, however, Taft voters overwhelmingly favor Roosevelt, putting the Progressive Party candidate ahead of Wilson. This final result is reported as the national popular vote and the member states of the NPVIC award their Electoral College votes to Roosevelt, sending him back to the White House—that same result as almost certainly would have occurred if Wilson and Roosevelt had faced off in a head-to-head runoff that year.

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[200] To speed the process along, we will, anachronistically, provide each state with technology to scan ballots and electronically record, transmit, and tabulate CVR data. While this process could conceivably be done by hand using paper spreadsheets, it would be extraordinarily laborious and time-consuming.

[201] For example, a state may use the rankings to determine the RCV winner of that particular state and award that candidate its electoral votes, or a state could decide to count only the voter's first choices and ignore the rest of the rankings, effectively holding a plurality election. In any case, it would not alter the outcome of the election since a majority of the Electoral College votes will be pledged to the winner of the national count, as established by the NPVIC.

TABLE 1: ROUND-BY-ROUND COUNT OF NATIONAL RCV ELECTION[202]

	First Round	Second Round	Third Round
Debs	900,743	*Eliminated*	*Eliminated*
Roosevelt	4,121,609	4,301,758	**7,272,909**
Taft	3,487,939	3,668,088	*Eliminated*
Wilson	6,294,384	6,474,533	6,878,022
Inactive Ballots	*n/a*	360,297	653,744
Total votes[203]	14,804,675	14,444,378	14,150,931

B. Under the Interstate RCV Compact

Under the next scenario, there has been no congressional action. The NPVIC is in effect, and five states—Illinois, Michigan, Minnesota, Utah and Wisconsin—have joined the RCV Compact. They have created an interstate agency ("The RCV Compact Commission" or "Commission") to tabulate votes using the CVR data.

As in the previous scenario, voters would still vote in polling places administered by their state or local election administrators but only voters in states that are members of RCV Compact would use ranked ballots. Like in the previous scenario, election administrators will have converted the information contained in the ballots into CVRs and make that information public, but now the CVR data will be used by the RCV Compact Commission to determine the RCV winner of the compacting states. After the polls close and the ballots are scanned, each state transmits its ballot report containing the CVRs of all ballots cast to the commission currently located in Madison, Wisconsin in offices provided by the Wisconsin Secretary of State.[204] Election officials from each member state have travelled to Madison to assist and monitor the tabulation.

The individual results from each state in the RCV Compact show Wilson leading in Wisconsin and Illinois, Roosevelt leading in Michigan and Wisconsin, and Taft leading in Utah. After the Commission aggregates the states' CVR data and tabulates the first round of votes, Wilson leads overall with 863,034 votes (34.61% of the votes cast in the compacting states), Roosevelt is in second with 813,540 (32.62%), Taft is in third with 642,867 votes (25.78%), and Debs trails in fourth with 174,493 (7%).

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[202] *See 1912 Presidential General Election Data*, *supra* note 190.

[203] "Total votes" is the sum of all ballots counting for candidates who have not been eliminated. It does not include inactive ballots since those do not count for any candidate.

[204] In an attempt to reduce costs and prevent any appearance of the commission unduly favoring or neglecting any particular states, the commission of this timeline has decided to rotate its headquarters among its member states every presidential election cycle, using facilities donated by the hosting state. This election happens to be Wisconsin's turn.

TABLE 2: FIRST ROUND VOTES BY STATE[205]

	Ill.	Mich.	Minn.	Utah	Wisc.	1st Round Total
Debs	81,278	23,211	27,505	9,023	33,476	174,493
Roosevelt	386,478	214,584	125,856	24,174	62,448	813,540
Taft	253,593	152,244	64,334	42,100	130,596	642,867
Wilson	405,048	150,751	106,426	36,579	164,230	863,034
Total votes	1,126,397	540,790	324,121	111,876	390,750	2,493,934

TABLE 3: ROUND-BY-ROUND COUNT OF RCV COMPACT STATES

	First Round	Second Round	Third Round
Debs	174,493	*Eliminated*	*Eliminated*
Roosevelt	813,540	848,439	**1,397,429**
Taft	642,867	677,766	*Eliminated*
Wilson	863,034	897,933	972,487
Inactive Ballots	*n/a*	69,797	124,018
Total votes	2,493,934	2,424,137	2,369,916

Since Debs has the fewest votes, he is eliminated. The commission then uses the CVRs to conduct a second round of tabulation, revealing Wilson to still be in the lead, followed by Roosevelt and then Taft. As the candidate with the fewest votes, Taft is the next to be eliminated. While he held a plurality lead in Utah and was second place in Michigan and Wisconsin, he trails overall and so under the RCV Compact he is eliminated and his ballots go to his voters' next choices.

Taft voters overwhelmingly prefer Roosevelt, a former Republican President and himself a contender for the Republican nomination just five months earlier, to Wilson.[206] With the transfers from Taft voters putting Roosevelt over the top, the compacting states certify him and his running mate, California governor Hiram Johnson, as the multi-state first place presidential slate and Wilson and his running mate, Indiana governor Thomas R. Marshall, as the multi-state second place presidential slate.[207] The

[205] *See 1912 Presidential General Election Data*, *supra* note 190.

[206] *See* Lewis L. Gould, *1912 Republican Convention: Return of the Rough Rider*, SMITHSONIAN MAG., Aug. 2008, https://www.smithsonianmag.com/history/1912-republican-convention-855607/ [https://perma.cc/MV3P-ZT2C].

[207] Let's suppose Illinois was in the RCV Compact, but not in the NPVIC. Based on the RCV tally only in Illinois, it likely would have given its electoral votes to Roosevelt instead of Wilson, as Roosevelt would likely have overcome the "spoiler" impact of Taft. But this would never affect who wins the White House under the terms of the NPVIC.

NPVIC adds these popular vote totals to the vote totals from the rest of the country, and all states in the NPVIC (including those in the RCV Compact) award their votes to the popular vote winner.

As was the case with the nationwide use of RCV under the federal statute option, RCV was able to negate most of the Republican-Progressive vote-splitting *in the RCV Compact states* and elevating Roosevelt over Wilson. Unlike the federal statute option, however, it would *not* have changed the result of the election. The five states were unable to cover the difference between Wilson and Roosevelt nationwide, and Wilson was elected twenty-eighth President of the United States, defeating Roosevelt 6,403,837 to 4,705,498.[208] The addition of more states might make the RCV Compact a decisive factor in subsequent elections, potentially spurring other states to join. Voters in the RCV Compact member states would have been able to vote more honestly than their fellow citizens elsewhere in the country. Rather than agonizing between Roosevelt and Taft, trying to determine which candidate was more likely to defeat Wilson, voters conflicted by the Republican Party split could simply rank one candidate first and the other second.

Conclusion

The two options discussed in this Article, the RCV in Presidential Elections Act and the Interstate RCV Compact, both seek to accomplish the same goal: integrating ranked choice voting into the NPVIC. The RCV in Presidential Elections Act would do this through Congress, creating a uniform national process for the entire country. Nationwide use of RCV would have a direct and immediate impact on presidential elections. The spoiler effect would be neutralized on a national level. Every voter would be able to rank candidates without worrying about splitting the vote and inadvertently contributing to the election of their least-preferred candidate. Short of a constitutional amendment, a federal statute would be the most effective way of accomplishing the outcome sought by both options.

However, the federal statute would likely face considerable skepticism and opposition. Many will resist increased federal involvement in state-run elections. There will likely be significant reluctance to introduce a sweeping, nationwide change to presidential elections that has been used only once in Maine in 2020 and adopted in one other state: Alaska.[209] Although enact-

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[208] In reality, Wilson received 6,294,384 votes, 863,034 of which came from the five states discussed here. Roosevelt finished second with 4,121,609 votes, putting him 2,172,775 votes behind Wilson. *See 1912 Presidential General Election Data*, *supra* note 190. The 1,397,429 votes Roosevelt would receive in this hypothetical would narrow Wilson's lead considerably but not overcome it. *See id.*

[209] At the time of writing, Maine and Alaska are the only American jurisdictions that have adopted ranked choice voting for presidential general elections. Maine used RCV in its 2020 presidential election, and voters in Alaska enacted it when approving Measure 2 on November 3, 2020. *See* Jon Kamp, *Maine Becomes First State to Use Ranked-Choice Voting in a Presidential Election*, Wall St. J. (Oct. 30 2020), https://www.wsj.com/articles/maine-becomes-first-

ment of the NPVIC and potential concerns about minor-party and independent candidates might change political calculations, any congressional action likely faces short-term challenges.

The Interstate RCV Compact option represents a more incremental approach that could be initiated before enactment of NPVIC. States could choose to join, allowing the reform to spread gradually and develop legitimacy and support as the public becomes more familiar with it. Those with valid federalism concerns would be reassured that states remain in control of presidential elections. This approach also carries risks, however. The public may not see the full benefit of RCV if membership in the interstate compact remains too small to meaningfully influence election outcomes. There also remains a possibility that no matter how successful and appealing the compact becomes, growth will stall as some states steadfastly refuse to join.

These differing approaches are not necessarily at odds with one another. An interstate compact is likely a more realistic option initially. As it grows and is able to operate successfully, Congress and the public may come to see RCV as an increasingly pragmatic and desirable way to elect the President. Legislators who were reluctant to support nationwide implementation of a practice followed by a handful of states may be willing to support it once it is used by dozens, with several election cycles of successful use behind it.

In either case, RCV would be integrated with the election of Presidents by popular vote, an idea that already enjoys broad public support.[210] As discussed above, a few states independently using RCV to determine their individual popular vote totals could create unexpected results on the national level. These proposals would avoid such outcomes and allow the two reforms to be used harmoniously.

Neither the RCV in Presidential Elections Act nor the Interstate RCV Compact are perfect options, but that is nearly always the case for advances in voting rights and electoral rules. The perfect should never be the enemy of the good when seeking a better, fairer democracy. There is every reason to believe that both the proposed congressional act and Interstate RCV Compact are achievable and constitutional. To be sure, as these reforms continue to gain traction, it will increase talk of a constitutional amendment expressly enabling or requiring the use of RCV presidential elections with a national popular vote. But at a time of widespread disillusionment with American democracy, creative thinking is needed to improve the process of electing our President.

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state-to-use-ranked-choice-voting-in-a-presidential-election-11604062812 [https://perma.cc/8EPH-QHXJ]; *Alaska Ballot Measure 2, Top-Four Ranked-Choice Voting and Campaign Finance Laws Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020) [https://perma.cc/G6RV-H4WA]. Internationally, both Ireland and Sri Lanka use forms of RCV to elect their Presidents. *See* BENJAMIN REILLY, GOVERNMENT STRUCTURE AND ELECTORAL SYSTEMS, IN AFGHANISTAN: TOWARDS A NEW CONSTITUTION 87–93 (2003).

[210] *See* Daniller, supra note 1.

The National Popular Vote Interstate Compact and ranked choice voting are examples of innovations that promote the core American principle of establishing a "more perfect union" that is "of, by, and for the people." As a Union, we do not always strengthen our democracy quickly, and we are far from finished. But over time, we manage to improve political equality and conduct more inclusive, freer, and fairer elections. We expanded suffrage to women, began directly electing U.S. senators, ended Jim Crow, and lowered the voting age to eighteen to name just a few important reforms.

Change to the way the United States elects its President is coming—it is a matter of when and how, not if. We should not accept that something as broken as the current Electoral College system cannot be changed. Rather than assume the NPVIC compact and RCV are in conflict with each other, reformers should lay the groundwork for a future where these reforms will coexist and reinforce each other. A national popular vote with ranked choice voting will ensure that every voter matters in every election.

Appendix 1: Existing Compact Adopted by 15 States and DC - "The Agreement Among the States to Elect the President by National Popular Vote"[211]

Article I—Membership

Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.

Article II—Right of the People in Member States to Vote for President and Vice President

Each member state shall conduct a statewide popular election for President and Vice President of the United States.

Article III—Manner of Appointing Presidential Electors in Member States

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a "national popular vote total" for each presidential slate.

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the "national popular vote winner."

The presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.

The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress.

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.

If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less

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[211] *Text of the National Popular Vote Compact Bill*, National Popular Vote, https://www.nationalpopularvote.com/bill-text [https://perma.cc/7LFE-9LAZ].

than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees.

The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.

This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.

Article IV—Other Provisions

This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.

Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.

This agreement shall terminate if the electoral college is abolished.

If any provision of this agreement is held invalid, the remaining provisions shall not be affected.

Article V—Definitions

For purposes of this agreement,

"chief executive" shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;

"elector slate" shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

"chief election official" shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;

"Presidential elector" shall mean an elector for President and Vice President of the United States;

"Presidential elector certifying official" shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors;

"Presidential slate" shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;

"state" shall mean a State of the United States and the District of Columbia; and

"statewide popular election" shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

Appendix 2: Newly Proposed Legislation by this Article's Authors - "The Ranked Choice Voting in Presidential Elections Act"[212]

Section 1. Short Title

This Act may be cited as the "RCV in Presidential Elections Act".

Section 2. Requiring Ranked Choice Voting in All States to Determine the National Popular Vote

(a) Ranked Choice Voting Presidential Ballot—Each State shall provide a ranked choice voting ballot in accordance with this act to determine the national popular vote for President.
(b) Measuring National Popular Vote—The results of the ranked choice voting tabulation shall constitute a national popular vote for each candidate for the offices of President and vice President of the United States.

Section 3. The Ranked Choice Voting Presidential Ballot and the National Popular Vote Compact

(a) Use of the ranked Choice Voting Presidential Ballot in States that Have Adopted the National Popular Vote Compact—Each State having adopted the National Popular Vote Compact shall use the aggregate results of the ranked choice voting presidential ballot across all states and the District of Columbia to measure the national popular vote for the President and vice President of the United States. These results shall be used in accordance with the provisions set out in the National Popular Vote compact, except that the Election Assistance Commission will have the authority and responsibility of tabulating all votes cast pursuant to this Act and reporting out the national popular vote winner.
(b) Ranked Choice Voting Presidential Ballot in States that Have Not Adopted the National Popular Vote Compact—Each State not a party to the National Popular Vote

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[212] Language has been modeled on proposed and existing legislation. *See* Ranked Choice Voting Act, H.R. 4464, 116th Cong. (2019); An Act to Establish Ranked-Choice Voting (Maine 2016). This proposed Act does not necessarily address all uniform standards that would help improve the RCV presidential election. For instance, Congress should also consider provisions defining ballot access requirements.

Separately, we believe that proposed ranked choice voting provisions and the accompanying uniform standards in this legislation could survive constitutional scrutiny as independent (from the NPVIC) federal legislation. But given the benefits, discussed above, of tying the NPVIC to ranked choice voting, this Article proposes that these uniform standards be implemented under the NPVIC umbrella.

Compact shall conduct the ranked choice voting ballot and tabulation procedures in accordance with this act.

(1) The results of the tabulation in States not party to the National Popular Vote Compact shall only be used in determining the national popular vote totals.

(2) The results of the tabulation of the national popular vote in States not party to the National Popular Vote Compact in no way directs non-party States to appoint or cast its electoral votes in any particular manner; each State is free to appoint its electors in any manner it so chooses.

(c) NO EFFECT ON STATE POWER TO DETERMINE MANNER OF APPOINTING ELECTORS—This Act shall not interfere with a State's choice to determine the manner in which it appoints its electors; accordingly, this title shall not prevent any State that is party to the National Popular Vote Compact from withdrawing from the National Popular Vote Compact, but such withdrawing States will remain obligated to use the ranked choice voting presidential ballot and tabulation procedures in accordance with this title.

Section 4. THE RANKED CHOICE VOTING BALLOT AND TABULATION PROCEDURES

(a) BALLOT DESIGN—The Election Assistance Commission shall promulgate ballots in accordance with the following, and each State shall ensure that the ballot used to tabulate the ranked choice vote for the President and vice President in their state meets the following requirements:

(1) The ballot shall have the same candidates listed.

(2) The ballot shall have an option for a single write-in candidate.

(3) The ballot shall limit the number of rankings available to 5.

(4) The ballot shall include instructions, as determined necessary by the Election Assistance Commission, to enable the voter to rank candidates and successfully cast the ballot.[213]

(b) BALLOT USAGE - States may choose to use the model ballot provided by the Election Assistance commission on its own or to integrate the ranked choice voting ballot with another ballot used on the national Election Day.

(c) Tabulation Process—

(1) AUTHORITY TO CONDUCT TABULATION PROCESS—The Election Assistance Commission shall have the authority to

[213] While this Article does not propose instructions, the authors believe that a uniform set of instructions would be necessary to ensure the effectiveness of the legislation and the administration of the ranked choice voting presidential ballots and tabulation procedures.

tabulate the votes from each state and determine the candidate receiving the greatest number of votes nationally.

(2) DETERMINATION OF CANDIDATE'S NUMBER OF VOTES—The number of votes received by a candidate in either the initial tabulation or in an additional round of tabulation shall be equal to the number of ballots on which the candidate is the highest ranked continuing candidate

(A) THE PROCESS—Each ballot shall count as one vote for the highest-ranked continuing candidate on that ballot. If two or fewer continuing candidates remain, the candidate with the fewest votes is defeated, the candidate with the greatest number of votes is elected and tabulation is complete. But if more than two continuing candidates remain, the continuing candidate with the fewest votes is defeated, and a new round begins.

(3) CRITERIA FOR NATIONAL PREFERRED PRESIDENTIAL CANDIDATE—A candidate shall be the national preferred presidential candidate if—

(A) the candidate receives a number of votes greater than 50 percent of the number of ballots cast in the election; or

(B) in the event that no candidate receives greater than 50 percent of the number of ballots in the first round of tabulation, the candidate receiving the greatest number of votes of the remaining continuing candidates.

(d) SKIPPED RANKINGS—In the event that a voter has left an available ranking position blank and ranks a candidate in a lower position, then the subsequently ranked candidates shall be moved to the highest available ranking(s).

(e) INCOMPLETE BALLOT—In the event that a voter does not rank candidates for the total allotted number of rankings, then the ballot shall be set aside as inactive after the last ranked position is reached.

(f) OVERVOTES—In the event that a voter has ranked more than one candidate at the same ranking, then the ballot shall be set aside as inactive if and when the overvoted ranking is reached in a round of tabulation.

(g) TIES—In the event of a tie:

(1) in the final round, the presidential elector certifying official of each state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.

(2) between last-place candidates in any round must be decided by lot, and the candidate chosen by lot is defeated. The result of the tie resolution must be recorded and reused in the event of a recount.

(h) REPORTING RESULTS—The Election Assistance Commission shall communicate a ballot report for the presidential race that lists, for each ballot, the presidential slate indicated at each ranking order on a state-by-state basis. The ballot report shall conform, to the extent possible, to the cast vote

record common data format standards promulgated by the National Institute for Standards and Technology (NIST).

Section 5. RECOUNT PROCEDURES

(a) PROCEDURE—This section describes the process and procedures that must be used in the event of a recount of the ranked choice voting presidential ballots. The Election Assistance Commission shall be responsible for promulgating regulations necessary to carry out the provisions in this Section.[214]

(b) TRIGGERING EVENT—This recount process shall occur when a candidate for President or vice President of the United States requests a recount of the votes cast using the ranked choice voting presidential ballots and the tally of the votes in the first count are within 0.1%.

(c) RECOUNTS INVOLVING TWO CANDIDATES IN THE FINAL ROUND OF RANKED CHOICE VOTING—When the candidate finishing second requests a recount of the final two continuing candidates from the last round of tabulation, the recount shall proceed as follows:

(1) All ballots shall be divided into the following categories:
   (A) LEADING CANDIDATE BALLOTS—Ballots that rank the leading candidate first or ahead of the second candidate;
   (B)Secondary Candidate Ballots—Ballots that rank the second candidate first or ahead of the leading candidate;
   (C) DISPUTED BALLOTS—Ballots for which it cannot be immediately determined which candidate was selected by the voter; and
   (D) DISCARDED BALLOTS—Ballots that do not rank either of the two final continuing candidates or which have been exhausted.

(2) Leading candidate and secondary candidate ballots shall be tallied and counted.

(3) Disputed ballots shall be verified and counted toward the leading candidate or secondary candidate if it can be determined that one candidate ranked ahead of the other on a specific ballot. Any ballots which cannot be resolved shall be added to the discarded ballots category.

(4) The sum of resolved disputed ballots with either the leading candidate or secondary candidate ballot shall be used as the final result.

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[214] A recount could be carried out on a state-by-state basis, depending on the results in each state or on a national basis. This Article does not argue for one choice over the other.

(5) Discarded ballots and disputed ballots not counted in any candidates tally shall be added to the total count to obtain the total votes counted.
(6) If the requesting candidate concedes the recount before all ballots have been counted, the original ranked choice vote count will be used as the final result.

(d) RECOUNTS INVOLVING THREE CANDIDATES IN THE PENULTIMATE ROUND OF RANKED CHOICE VOTING—When a candidate finishing third requests a recount of the top three continuing candidates from the penultimate round of tabulation, the recount shall proceed as follows:
(1) All ballots shall be divided into the following categories:
(A) LEADING CANDIDATE BALLOTS—Ballots that rank the leading candidate first or ahead of the second and third place candidates;
(B) SECONDARY CANDIDATE BALLOTS—Ballots that rank the second candidate first or ahead of the first and third place candidates;
(C) THIRD CANDIDATE BALLOTS—Ballots that rank the third candidate first or ahead of the first and second place candidate;
(D) DISPUTED BALLOTS—Ballots for which it cannot be immediately determined which candidate was selected by the voter; and
(E) DISCARDED BALLOTS—Ballots that do not rank any of the top three continuing candidates or which have been exhausted.
(2) Leading candidate, secondary candidate, and third candidate ballots shall be tallied and counted.
(A) While counting the secondary candidate ballots, additional tallies should be made and noted of:
1. Those that rank the leading candidate above the third-place candidate;
2. Those that rank the third-place candidate above the leading candidate;
3. Those that ranked neither.
(3) Disputed ballots shall be verified and counted toward the leading candidate, secondary candidate, or third candidate if it can be determined that one candidate ranked ahead of the others on a specific ballot. Any ballots which cannot be resolved shall be added to the discarded ballots category.
(4) The sum of resolved disputed ballots with either the leading candidate, second candidate, or third candidate ballot shall be used as the final result.
(A) If the third candidate who requested the recount still has the fewest votes after the recount, then the recount ends

because that candidate is eliminated, and the rest of the tally is unaffected.

(B) If, after the initial recount of the leading candidate, secondary candidate, third candidate ballot, and disputed ballots, the third candidate takes the place of the second candidate, the sub-group tallies from (d)(2)(A) of this Section shall be used to allocate the second candidate's ballots to the leading candidate, the third candidate, and the discarded ballot tally.

(5) Discarded ballots and disputed ballots not counted in any candidates tally shall be added to the total count to obtain the total votes counted.

(6) If the requesting candidate concedes the recount before all ballots have been counted, the original ranked choice vote count will be used as the final result.

Section 6. No Effect On Elections For State And Local Office

Nothing in this Act or in any amendment made by this Act may be construed to affect the manner in which a State carries out elections for State or local office.

Appendix 3: Newly Proposed Compact by this Article's Authors—"Interstate Compact for Ranked Choice Voting in National Popular Vote Elections for President"[215]

The Interstate Compact for Multi-State Ranked Choice Voting in Presidential Elections is enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows.

Interstate Compact for Multi-State Ranked Choice Voting in Presidential Elections

Article I—Purpose

The purpose of this interstate compact is to facilitate the implementation by multiple states of ranked choice voting in presidential elections when The Agreement Among the States to Elect the President by National Popular Vote governs the appointment of presidential electors.

Article II—Membership

Any state may become a member of this compact.

(1) recognizes the authority of the Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections over the matters addressed by this Compact that in the event of a conflict the Commission's rules and regulations supersede its own law in matters addressed by this Compact;

(2) specifies that that state will include on its ballot any presidential slate that has met the requirements for ballot access of any member state by September 1 of any presidential election year, provided that the presidential slate has provided to the chief elections official of each member state the names of candidates for the position of presidential electors nominated in accordance with that state's law;

(3) specifies that its chief elections official will, no later than 10 days after the day established by Congress for appointing presidential electors, communicate a certified statement of the vote count in containing the cast vote records of all ballots cast in its state in electronic form to the Commission and make such statement freely available to the public. This certified statement of the vote count shall communicate a ballot report for the presidential race that lists, for each ballot, the presidential slate indicated at each ranking order. The ballot report shall conform, to the extent possible, to the cast vote record common data format standards promulgated by the National Institute for Standards and Technology (NIST).

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[215] The authors developed this language of what an RCV Compact might look like in conjunction with John Koza of National Popular Vote Inc.

Article III—Procedure for Identifying First and Second Place Presidential Slates

This article shall govern the appointment of presidential electors in each member state in any year in which this compact is in effect in five or more states on July 20 of any year when presidential electors are to be appointed and in which The Agreement Among the States to Elect the President by National Popular Vote governs the appointment of presidential electors.

The Commission shall designate as the "multi-state first-place presidential slate" the presidential slate with the largest number of votes after the final round of tabulation and shall designate as the "multi-state second place presidential slate" with the second largest number of votes after the final round of tabulation.

The chief election official of each member state shall treat as conclusive the certification of votes made by the Commission.

The Commission shall immediately release to the public all statements of vote counts as they are determined or obtained.

Article IV—Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections

The Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections ("Commission") is hereby created as a body politic and corporate, with succession for the duration of this Compact, as an agency and instrumentality of the governments of the respective Parties.

The Commission shall consist of the chief election official of each Party, ex officio, or the chief election official's designee.

Each member of the Commission is entitled to vote on all matters before the Commission. Matters before the Commission shall be decided by a simple majority unless otherwise provided.

The Commission shall provide for its own organization and procedure, and may adopt rules and regulations governing its meetings and transactions.

The Commission shall organize, annually, by the election of a Chair and Vice Chair from among its members. A majority Commission members shall constitute a quorum for the transaction of business at any meeting of the Commission.

The Commission shall annually adopt a budget for each fiscal year and the amount required to balance the budget shall be apportioned equitably among the Parties by unanimous vote of the Commission. The appropriation of such amounts shall be subject to such review and approval as may be required by the budgetary processes of the respective Parties.

The Commission shall promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this Compact. Each Party, in accordance with its respective statutory authorities and applicable procedures, shall adopt and enforce rules and regulations to

implement and enforce this Compact and the programs adopted by such Party to carry out the programs contemplated by this Compact.

The Commission shall promulgate rules and regulations concerning the content of ranked choice voting ballots in presidential elections, the content, the collection, and tabulation of ballot reports, and the security of the collection and tabulation process.

The Commission shall collect ballot reports from each of the member states and tabulate them in accordance with this Compact and its rules and regulations. The Commission shall, as soon as feasible, certify the results of its tabulation and release them to the chief election official of each Party. The Commission shall include with the results of its tabulation the combined results from all Parties and individual statewide results from each Party.

Article V—Other Provisions

This compact shall take effect when any five states have enacted this compact in substantially the same form and each of these enactments have taken effect and The Agreement Among the States to Elect the President by National Popular Vote ("NPVIC") has taken effect.

Any member state may withdraw from this compact, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

When the NPVIC is in effect and fewer than five states have adopted the RCV Compact, member states agree to report out their first choice totals as the popular vote totals from their state.

When the RCV Compact is in effect and a member state is not a member of the NPVIC, it will award its electoral votes to the winner of the ranked choice voting tally or tallies in its state as defined in its state law.

The chief executive of each member state shall promptly notify the Commission of when this compact has been enacted and has taken effect in that official's state, when that official's state has withdrawn from this compact, and when that official deems that this compact has taken effect generally.

If any provision of this compact is held invalid, the remaining provisions shall not be affected.

Article VI—Definitions

For purposes of this compact,

"cast vote record" means an archival tabulatable record of all votes produced by a single voter from a given ballot containing the presidential slate indicated at each ranking.

"chief executive" means the Governor of a State of the United States, the Mayor of the District of Columbia, or the chief executive officer of any other jurisdiction entitled by law to appoint presidential electors;

"elector slate" means a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

"chief election official" means the state official or body that is authorized to certify the number of votes cast for each presidential slate in the state;

"Commission" means the Interstate Commission for Multi-State Ranked Choice Voting in Presidential Elections created in Article IV of this Compact.

"Presidential elector" means an elector for President and Vice President of the United States;

"Presidential elector certifying official" means the state official or body that is authorized to certify the appointment of the state's presidential electors;

"Presidential slate" means a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;

"ranked choice voting" means a voting method where voters rank presidential slates in order of preference, with each ballot counting as a single vote for its highest-ranked presidential slate, and votes are tabulated in rounds in which the presidential slate with the fewest votes is eliminated and those votes transferred to the next-highest vote on each ballot, continuing until two presidential slates remain.

"state" means any jurisdiction entitled by law to appoint presidential electors, including, but not limited to, a state of the United States and the District of Columbia.

The Best Laid Plans: Unintended Consequences of the American Presidential Selection System

*Samuel S.-H. Wang and Jacob S. Canter**

The mechanism for selecting the President of the United States, the Electoral College, causes outcomes that weaken American democracy and that the delegates at the Constitutional Convention never intended. The core selection process described in Article II, Section 1 was hastily drawn in the final days of the Convention based on compromises made originally to benefit slave-owning states and states with smaller populations. The system was also drafted to have electors deliberate and then choose the President in an age when travel and news took weeks or longer to cross the new country. In the four decades after ratification, the Electoral College was modified further to reach its current form, which includes most states using a winner-take-all method to allocate electors. The original needs this system was designed to address have now disappeared. But the persistence of these Electoral College mechanisms still causes severe unanticipated problems, including (1) contradictions between the electoral vote winner and national popular vote winner, (2) a "battleground state" phenomenon where all but a handful of states are safe for one political party or the other, (3) representational and policy benefits that citizens in only some states receive, (4) a decrease in the political power of non-battleground demographic groups, and (5) vulnerability of elections to interference. These outcomes will not go away without intervention. Several paths for reform can address these problems and have an identifiable path to success. The most promising of these is the formation of interstate compacts to allow aggregate action by multiple states at once. Any proposal to reform the Electoral College will likely face legal and policy challenges. But given the substantial and pervasive problems of the current system, citizens and lawmakers must sooner rather than later seriously consider reform.

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Introduction

Today's institution for selecting the President of the United States is a creature of its founding moment. In the late Eighteenth Century, slave owners dominated the leadership class, few citizens could vote, and communication and travel were slow.[1] At the Constitutional Convention, delegates from slave-owning states and states with small populations had considerable influence over the drafting process.[2] And while the delegates eventually resolved their differences over the legislative branch through systematic compromises, they did not reach easy agreement on to how to select the Chief Executive. Out of these circumstances Article II, Section 1 arose.[3]

Today, the mechanism for selecting the President includes not just Article II, Section 1, but also the Twelfth, Twenty-Second, and Twenty-Third Amendments.[4] Importantly, it also includes the near-uniform choice by individual states to assign electors through a winner-take-all method.[5] This cumulative institution reached its current form in the 1820s, and for simplicity's sake we refer to it by its commonly known name, the Electoral College. This patchwork of adaptations and repairs was aimed at addressing the political and social interests of that era. Many of those interests no longer exist today—but the Electoral College remains. Unfortunately, this antebellum creature now causes problems that were not anticipated and are not always readily apparent to modern observers, and it will not go away on its own.

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[1] About twenty-five of the fifty-five delegates to the Constitutional Convention were slaveowners. *See* Steven Mintz, *Historical Context: The Constitution and Slavery*, Gilder Lehrman Inst. of Am. Hist.: Hist. Now, https://www.gilderlehrman.org/history-now/teaching-resource/historical-context-constitution-and-slavery [https://perma.cc/X9J8-WMA6]. The right to vote was restricted to white, property-owning males. *See* Oscar T. Barck & Hugh T. Lefler, Colonial America 258–60 (1958). Travel in colonial America was difficult, dangerous, and expensive. *See Colonial Travel*, Founders Library, https://www.constitutionfacts.com/founders-library/colonial-travel/ [https://perma.cc/3V2U-9PEW].

[2] At the Constitutional Convention, James Madison stated on July 14, 1787: "It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. and South States. The institution of slavery & its consequences formed the line of discrimination." 1 James Madison, The Journal of the Debates in the Convention Which Framed the Constitution of the United States May-September, 1787, at 361 (Gaillard Hunt ed., 1908).

[3] For a detailed account of how the Electoral College was designed, see Jesse Wegman, Let The People Pick The President: The Case For Abolishing The Electoral College (2020).

[4] *See* U.S. Const. amends. XII, XXII, XXIII.

[5] *See* John R. Koza et al., Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote 79–83 (4th ed. 2013).

The primary objective of this article is to describe the harms of the Electoral College to American democracy, and to link them to proposed reform alternatives.

In this Article we identify and describe five unanticipated consequences of the Electoral College. First, the Electoral College allows the national popular vote winner to lose the election. Second, the Electoral College causes a "battleground state" phenomenon, in which a small number of closely-fought states have outsized influence over the presidential outcome. Third, state-level winner-take-all mechanisms and the system of electors results in representational and policy benefits for citizens in some states but not others. Fourth, minority communities that are concentrated outside battleground states have disproportionately little political influence over presidential contests. Finally, the Electoral College makes presidential elections vulnerable to interference.

The severity of these unanticipated consequences demonstrates the need to update the presidential selection mechanism. We do not use the traffic laws, military training, or public health standards of the Founding era. In the face of newer technology, modern science, and new social arrangements, such standards would lead to disastrous consequences. It is similarly undesirable to live with the consequences of early-nineteenth-century political needs.

Fundamentally, the unanticipated consequences of the Electoral College are problems of representation and incentives. Policy change is the appropriate way to address such problems, either through a constitutional amendment or legislative action. Any effort to reform the Electoral College will face substantial political and legal hurdles. But given the serious harms that the Electoral College currently causes, alternatives that remediate most of the harms and have an identifiable path to becoming law would be preferable to the current situation.

Part I of this article briefly describes the rules of the Electoral College and how it grew into its current form. Part II argues that Article II, Section 1 was hastily designed to accomplish goals that are no longer relevant. Part III explains and quantifies the unintended consequences of the Electoral College in modern America. Finally, Part IV considers different approaches to reform the presidential selection system.

I. The Mechanics of the Presidential Selection System

Article II, Section 1 of the United States Constitution defines the number of presidential electors each state receives. The section states in pertinent part that:

> 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 the Congress.[6]

Electors have the first opportunity to decide by a majority vote who becomes President.[7] The intent was that electors deliberate over who should be chosen. There is very little evidence that such deliberation has ever occurred.[8] Instead, in 99.9% of cases, electors have voted for the candidate to which they were initially assigned. Reinforcing this pattern, nearly half of the states now have laws that penalize electors who make faithless choices.[9]

Today, the Electoral College includes not just Article II, Section 1, but also the Twelfth Amendment, which established separate voting for the President and Vice President.[10] The need for this Amendment became apparent soon after ratification, an early example of the system failing to anticipate future consequences. After the election of 1800, Thomas Jefferson and Aaron Burr, both of the Democratic-Republican Party, received the same number of electoral votes. Plans were supposedly made for electors to cast one less vote for Burr to make him Jefferson's Vice President, but this did not occur. It took thirty-six rounds of balloting in the House of Representatives to eventually select Jefferson as President.[11]

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[6] U.S. CONST. art. II, § 1.

[7] *See id.* Section 1 goes on to state that the person with the second most votes becomes Vice President. *See id.* If no person receives a majority of votes, then the members of the House of Representatives decide on a majority vote who becomes President from the top-five candidates with electoral votes, where each state delegation has one vote. *See id.* Under this original design, the second place in the Electoral College became Vice President. *Id.* When the delegates at the Constitutional Convention established the method for selecting the President, it appears that they thought most contests would be sent to the House of Representatives. *See* Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. LEG. 205, 208 (2007). The House of Representatives has chosen the President twice, in 1800 and 1824. *See* KOZA, *supra* note 5, at 125–26.

[8] With regard to the intent of the delegates, see James Madison, Journal (Sept. 4, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 496, 500 (Max Farrand ed., 1911) [hereinafter FARRAND]; *see also* John D. Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 252 (1968). Out of 23,529 total presidential electors through American history, only twenty-four have been "faithless" to their state officials (0.1% of the time). *See* KOZA, *supra* note 5, at 111–18 (describing examples of faithless electors in elections through 2012); *see also* Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html [https://perma.cc/S4Y3-RQL2].

[9] *See, e.g.*, N.C. GEN. STAT. §163-212 (West, Westlaw through S.L. 2020-24 of the 2020 Reg. Sess. of the Gen. Assemb.) (indicating that a presidential elector who fails to or refuses to vote for the candidate he or she consented to select will lose his or her position as an elector and owe a penalty fee of five hundred dollars). The faithless elector laws vary in their enforceability. *See* KOZA, *supra* note 5, at 111–18. The principle that electors are free to be "faithless" is currently being tested in federal court. *See* Trip Gabriel, *Electoral College Members Can Defy Voters' Wishes, Court Rules*, N.Y. TIMES (Aug. 22, 2019), https://www.nytimes.com/2019/08/22/us/politics/electoral-college-faithless-elector.html [https://perma.cc/MC6A-89HG].

[10] *See* U.S. CONST. amend. XII.

[11] *See* WEGMAN, *supra* note 3, at 90. Since then, the Twenty-Second Amendment and the Twenty-Third Amendment were ratified, though these do not change the selection process. *See* U.S. CONST. amend. XXII (setting presidential term limits); U.S. CONST. amend. XXII (granting three electors to the District of Columbia).

In the first two presidential elections, eight different types of methods for appointing electors were used.[12] Four states used a direct vote by eligible citizens (usually white men with property) to choose electors.[13] But this diversity of methods did not last long. Variety in elector selection methods decreased after Thomas Jefferson's narrow defeat in 1796, the third presidential contest. Jefferson's loss to John Adams included one electoral vote for Adams from a district in Jefferson's home state of Virginia.[14] By the election of 1800, Jefferson convinced the Virginia legislative body to establish a winner-take-all contest.[15] Under winner-take-all rules, also known as first-past-the-post, all of a state's electors are awarded to the candidate who receives the highest number of votes, whether a majority or a plurality.[16] Several states had established winner-take-all contests for the 1796 election, and Jefferson wrote to Virginia Governor James Monroe that "it is folly [and] worse than folly" for the other states not to do the same.[17] In the 1800 election, all twenty-one of Virginia's electors went to both Jefferson and Burr. They each received a total of seventy-three electoral votes, while Adams and his running mate Charles Pinckney only received sixty-five.[18]

From the standpoint of a state's self-interest, a winner-take-all contest seems logical because it maximizes that state's impact on the national total. If all the state's electors are allocated to one candidate, then that state has a larger impact on the candidate's likelihood of victory. This allows the political party that controls the state government to give the largest possible boost to its preferred candidate. Moreover, as Jefferson aptly noted, as long as other states allocate electors through a winner-take-all contest, any state that chooses a different method gives away its own power. In this way, pressure to achieve electoral success and political influence for one candidate's party

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[12] See KOZA, *supra* note 5, at 67–87 for a detailed account of the types of methods the states used. In 1796, Tennessee used perhaps the most peculiar method, specifically naming citizens from different counties to appoint presidential electors. *See* An Act Providing for the Election of Electors to Elect a President and Vice-President of the United States, Tennessee, ch. 4 (1796). The purpose of the Tennessee statute was to ensure that presidential electors would be chosen "with as little trouble to the citizens as possible." *Id.* States are relatively unconstrained in how to appoint presidential electors, and the Supreme Court has never held that a method for doing so violates the Constitution. The Supreme Court has only once reviewed a State's method for appointing electors. *See* McPherson v. Blacker, 146 U.S. 1, 2 (1892). In *McPherson*, the Supreme Court held that Michigan's method for appointing electors does not violate the U.S. Constitution. *See id.* at 42.

[13] *See* KOZA, *supra* note 5, at 70.

[14] *See id.* at 73–78.

[15] *See id.* at 78–80.

[16] For example, in Utah during the 2016 election, 515,231 voters chose Donald Trump (45.5%), 310,676 voters chose Hillary Clinton (27.5%), 243,690 chose Evan McMullin (21.5%), and 61,833 voters chose another candidate (5.5%). Under winner-take-all rules, Donald Trump received 100% of Utah's six electoral votes. *See* FED. ELECTION COMM'N, ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 42 (2017), https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf [https://perma.cc/59A2-LSLT].

[17] Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800), *in* 9 THE WORKS OF THOMAS JEFFERSON 90, 90 (Paul Leicester Ford, ed., 1905).

[18] *See* WEGMAN, *supra* note 3, at 91.

strongly disfavors any method that divides electors between candidates.[19] By the mid-1820s, nearly every state had established a winner-take-all rule.[20] Today, forty-nine of the fifty-one jurisdictions that hold elections for presidential electors use winner-take-all contests.[21]

II. The Presidential Selection System Was Hastily Designed to Accomplish Goals that are No Longer Relevant

The Constitution was drafted in a single summer in Philadelphia, starting on May 25, 1787.[22] By September 10, the Convention's work was largely done, and a committee was convened to make non-substantive, stylistic changes to the Constitution.[23] The Convention was ended by a vote of the delegates to send the proposed Constitution to the states for ratification on September 17, 115 days from when the Convention began.[24]

For 29 of those 115 days, between June 19 and July 17, the primary topic was how to design the legislature.[25] The largest hurdles were how to accommodate the interests of slave-owning states and small-population states.[26] Slave-owning states were the seats of economic and political power in the young country.[27] Their delegates were influential, and included George Washington and James Madison.[28] Another key constituency was small-population states, which had less economic and political power but

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[19] In recent years, a proposal has been made in Pennsylvania to assign electoral votes by congressional district. Because Pennsylvania's districts were heavily gerrymandered at the time, this plan would have had an average effect that was beneficial to Republicans. It would also have reduced Pennsylvania's national influence. The proposal did not advance. *See* Katharine Q. Seelye, *Pennsylvania G.O.P. Weighs Electoral Vote Changes for 2012*, N.Y. Times (Sept. 19, 2011), https://www.nytimes.com/2011/09/19/us/politics/pennsylvania-republicans-weigh-electoral-vote-changes.html [https://perma.cc/8LJV-R5NL].

[20] *See* Koza, *supra* note 5, at 82; *see also* McPherson v. Blacker, 146 U.S. 1, 32 (1892).

[21] The exceptions are Maine and Nebraska, in which presidential electors are assigned on a winner-take-all basis by congressional district, and the two remaining "Senator-based" electors are appointed to the winner of the statewide popular vote. *See* Me. Rev. Stat. Ann. tit. 21-A, § 805.2 (West, Westlaw through the 2019 Second Reg. Sess. of the 129th Leg.); Neb. Rev. Stat. § 32-714 (West, Westlaw through legislation effective March 26, 2020, of 2nd Reg. Sess. of 106th Leg. (2020)). We note that only fifty-one jurisdictions include presidential contests because one jurisdiction in the United States—Puerto Rico—does not have a constitutional right to presidential electors. Also, American citizens who live outside the United States and lack a home state cannot vote for presidential electors.

[22] *See* 1 Farrand, *supra* note 8, at 2; *see also* Feerick, *supra* note 8, at 250.

[23] *See* Comm. of Style, *Proceedings of Convention Referred to the Committee of Style and Arrangement*, *in* 2 Farrand, *supra* note 8, at 565, 565; *see also* Feerick, *supra* note 8, at 253.

[24] *See* Journal (Sept. 17, 1787), *in* 2 Farrand, *supra* note 8, at 641, 648–49; *see also* Feerick, *supra* note 8, at 253.

[25] These are not the only days that the legislative branch was discussed, as much of the discussion during the first portion of the Convention (between May 25 and June 19) revolved around the legislature as well. *See* Feerick, *supra* note 8, at 250–51.

[26] *See* Wegman, *supra* note 3, at 66.

[27] *See* Alice Hanson Jones, *Wealth and Growth of the Thirteen Colonies: Some Implications*, 44 J. Econ. Hist. 239, 250 (1984)

[28] *See* Wegman, *supra* note 3, at 61.

whose votes were still necessary to establish and ratify any proposal.[29] The delegates ultimately decided that there would be a lower house, the House of Representatives, with members based on state population size and each slave being counted as three-fifths of a person; and an upper house, the Senate, where each state received two members (the "Three-Fifths Compromise").[30]

The rules for selecting the President did not receive the same focused attention from the delegates. This question was decided hastily in the last few days of the Convention after a series of disparate unsuccessful efforts. From the beginning to the end of the Convention, the delegates voted thirty times on how to select the Chief Executive.[31] A few days before the end of the Convention, on August 31, the delegates convened a "Committee of Eleven" to handle issues which had been postponed or not acted upon, including this question.[32] The committee presented a report on how to select a Chief Executive on September 4, and the delegates debated the topic for three days.[33] The committee's proposal had several features that were not previously proposed—notably, the decision to appoint a number of electors from each state based on congressional apportionment.[34] On September 6, two days before they would stop making any substantive changes, the delegates finally voted in favor of a presidential selection system that became Article II, Section 1.

Article II, Section 1's lack of detail is a product of that hasty and unfocused process. The delegates tried, but failed, to actually agree on a specific method for selecting the Chief Executive: James Wilson endorsed a direct election, Roger Sherman suggested that the national legislature decide, and William Houston proposed that state legislatures decide. None of these proposals nor several others were accepted.[35] Instead, the state legislatures were directed to choose electors who then would vote for a candidate, thus interposing electors between legislators and the eventual choice. This was not done for a principled reason; it was done because the delegates could not

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[29] *See id.* at 39.

[30] *See* Feerick, *supra* note 8, at 250–51. The Three-Fifths Compromise was also used for apportionment of taxes. *See* U.S. CONST. art. I, § 2; CATHERINE LOCKS ET AL., HISTORY IN THE MAKING: A HISTORY OF THE PEOPLE OF THE UNITED STATES OF AMERICA TO 1877, at 406 (2013).

[31] *See* WEGMAN, *supra* note 3, at 57.

[32] *See* James Madison, Journal (Aug. 31, 1787), *in* 2 FARRAND, *supra* note 8, at 475, 481; Feerick, *supra* note 8, at 252.

[33] *See* Feerick, *supra* note 8, at 252–53. There were ten formal votes among the delegates on how to select the Chief Executive before September.

[34] The delegates discussed the number of presidential electors per state on only two dates before September. The first discussion was on July 19, 1787, and the second was on July 24, 1787. On neither date did a delegate suggest the number of electors should be the number of Senators and Representatives a state is entitled to in Congress. *See* Journal (July 20, 1787), *in* 2 FARRAND, *supra* note 8, at 60, 60–70, 97–106.

[35] *See* Journal (July 17, 1787), *in* 2 FARRAND, *supra* note 8, at 21, 24 (direct election and election by the individual legislatures' votes on July 17); Journal (July 24, 1787), *in* 2 FARRAND, *supra* note 8, at 97, 98 (national legislature vote on July 24). For other votes on this subject, see generally 2 FARRAND, *supra* note 8.

settle on a plan, and did not want to spend more time trying.[36] The result is a short constitutional provision that left pressing challenges of a national election for later: How should the electors be appointed? What if the electors ignore the will of the state and its legislature? In this way fundamental decisions about how to choose a Chief Executive were simply left unresolved.

The method for selecting the President only passed at the Convention after the Three-Fifths Compromise was baked into its design. Thus, the legislative branch's design of empowering slave-owning states and states with smaller populations was applied to the Executive Branch. These advantages can be represented by calculating the impact of "Senate-based" electors and electors based on the number of slaves (hereafter "slaves-based") on each state's voting power in presidential contests. Table 1, composed using 1796 population data, displays the sixteen states in order of increasing number of non-slave persons per presidential elector. In this ordering, voters from states at the top of the table have more influence on a per-elector basis.

[36] *See* Feerick, *supra* note 8, at 252. On September 4, after the Committee of Eleven introduced its proposal, Gouverneur Morris listed the committee's and his own reasons for the plan. *See id*. He noted that the proposal did not have Congress select the President due to the danger of corruption and the difficulty of finding a body other than Congress to handle impeachments. *See id*. He also noted that as the electors would be required to vote at the same time across the country, it would be impossible to corrupt their decisions. *See id*. He did not cite as relevant the issue of state legislative participation in the presidential selection process.

TABLE 1: TOTAL NUMBER OF PRESIDENTIAL ELECTORS IN EACH STATE OF THE UNION BY ELECTOR TYPE AFTER 1790 CENSUS[37]

State	Non-slave population	Slave population	Senate-based electors	Slave-based electors	Total electors	Non-slave persons per elector (1,000)
Tenn.	32,374	3,417	2	0.1	3	11
Ga.	53,284	29,264	2	**0.5**	4	13
Ky.	61,258	11,830	2	0.2	4	15
Del.	50,209	8,887	2	0.1	3	17
R.I.	68,158	952	2	0	4	17
S.C.	141,979	107,094	2	**1.9**	8	18
Vt.	85,399	17	2	0	4	21
Va.	454,881	293,427	2	**5.3**	21	22
Md.	216,692	103,036	2	**1.8**	10	22
N.C.	293,179	100,572	2	**1.7**	12	24
N.H.	141,741	158	2	0	6	24
N.J.	172,716	11,423	2	0.2	7	25
Conn.	235,382	2,759	2	0	9	26
N.Y.	318,796	21,324	2	0.4	12	27
Pa.	430,636	3,737	2	0.1	15	29
Mass.	475,257	0	2	0	16	30
TOTAL	3,231,930	697,897	32	12.2	138	23

This ordering quantifies the Electoral College's benefit to small-population and slave-owning states. The six states with the least power per voter—New Hampshire, New Jersey, New York, Pennsylvania, and Massachusetts—all had populations greater than one hundred thousand and not enough slaves to account for even one elector. And in terms of total power (i.e. total number of electoral votes), even though the three largest states, Virginia, Pennsylvania, and Massachusetts, had similarly sized populations, Virginia had five or six more electors than the other two. Indeed, Virginia had more electoral votes than the five smallest-population states combined.

In such an arrangement, slaveowner interests were not easily neglected. The five states with the largest slave populations were Virginia, Maryland,

[37] Tennessee joined the Union in 1796 and is thus included. Slave-based electors that round to one or more are indicated in boldface.

South Carolina, North Carolina, and Georgia.[38] These states together had 55 electors in total, 12 of which were "slaves-based". Their slave populations increased their voting power by 28%. None of the other states received slaves-based electors. Such electors made it easier for slave-owning states to reach the majority threshold necessary to win the presidential contest. In the 1796 presidential election, 70 electors were needed to win the Presidency.[39] If there had been no slaves-based electors, then a nominee would have needed 64 electoral votes to win, and the five states with the largest slave populations would have together possessed 67% of the needed electoral votes to choose a President. But given that slaves-based electors were part of the calculus, these same states possessed 79% of the needed electors.

This relative advantage was associated with pro-slavery political success during the Founding era. Four of the first five Presidents—holding the office for thirty-two of the first thirty-six years of the Republic—were slaveholders from Virginia.[40] Without slaves-based electors, one of the four, Thomas Jefferson, would not have unseated John Adams in 1800.[41] Eighteen of the first thirty-one Supreme Court justices were slaveholders.[42] Congress consistently declined to pass anti-slavery laws.[43] There would be no anti-slavery President until the election of Abraham Lincoln in 1860.[44]

The five states with the smallest populations—Tennessee, Delaware, Georgia, Kentucky, and Rhode Island—had eighteen electors in total, ten of whom were Senate-based. Their Senate-based electors increased their voting power by 125%. However, these electors were offset somewhat by the fact that larger states also had Senate-based electors. Senate-based electors would not affect a presidential contest until 1876.[45] The overall pattern of presidential contests and victories demonstrates that during the Founding era the

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[38] *See supra* Table 1.

[39] *See Dave Leip's Atlas of U.S. Presidential Elections*, https://uselectionatlas.org [https://perma.cc/VQS5-ZLGM].

[40] Akhil Reed Amar, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 6, 2019), https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html [https://perma.cc/8SJM-VTPU]; Akhil Reed Amar, *The Troubling Reason the Electoral College Exists,* TIME (Nov. 26, 2018, 1:16 PM), https://time.com/4558510/electoral-college-history-slavery/ [https://perma.cc/68XA-W8WF]; *see also* GARY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 6 (2003). Indeed, in fifty out of the first sixty-one years of the Republic, a slaveholder held the presidency.

[41] *See* WEGMAN, *supra* note 3, at 105.

[42] *See* LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION 1780-1860, at 9 (2000).

[43] *See id.*

[44] The Republican Party was founded in opposition to slavery's expansion. In 1856, its first presidential nominee was John C. Fremont. *See Republican National Conventions 1856-2006*, LIBR. CONGRESS, https://www.loc.gov/rr/main/polcon/republicanindex.html [https://perma.cc/CJ44-QYWR].

[45] *See* Jonathan R. Cervas & Bernard Grofman, *Are Presidential Inversions Inevitable? Comparing Eight Counterfactual Rules for Electing the U.S. President*, 100 SOC. SCI. Q. 1322, 1331 (2019). Senate-based electors also impacted the presidential contests in 1916 and 2000. In 1876 and 2000, Senate-based electors were sufficient to create a presidential winner who received a smaller national popular vote than his main opponent. The 1876 election was particularly notable for causing a national crisis that eventually led to a compromise in which federal troops were withdrawn from former Confederate states, leading to a century-long curtailment

Electoral College achieved some of its original design goals (e.g. power for slave states) but failed to achieve others (e.g. fostering a deliberative process, as noted in Part I).

Whatever the track record of the Electoral College in meeting its original goals, those same presidential selection mechanisms now exist in a very different political environment. Slavery is now unconstitutional, so no slave-owning states exist to obtain a political advantage.[46] Barriers to voting have fallen for many citizens, and political norms about the right to vote and the meaning of representation have evolved.[47] Moreover, the structural challenges from colonial times no longer exist: long-distance travel and communication are now routine, and the major political parties now can unify citizens across the country with similar political views.

The Electoral College was built to serve the needs of a different time. As stated in Part I, even to meet those needs, its mechanisms had to be amended. In other words, the Electoral College was poorly designed and had to be repaired almost immediately. The conditions of that time, most prominently the institution of slavery, are now gone. We now analyze how those mechanisms behave when applied under conditions of modern technology and politics.

III. Unanticipated Consequences of the Presidential Selection System in Modern Times

The mechanisms that comprise the Electoral College have not changed since the early 1800s. Today, those mechanisms cause new harms to American democracy. These problems are *unanticipated* because they were not envisioned by the delegates who designed this system. This arises as an indirect consequence of the fact that technology and mores have changed. Just as a horse-drawn carriage would cause havoc on an airport runway, the Electoral College generates consequences that the Founders never could have imagined. We now identify and analyze five of these unanticipated consequences.

A. Contradictions Between the Electoral Vote and the National Popular Vote

In every other major democracy where voters select the chief executive, the outcome is based directly on the popular vote.[48] However, the Electoral

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of black civil rights and the Jim Crow era. *See* Eric Foner, Reconstruction: America's Unfinished Revolution 575–87 (1st ed. 1988).

[46] *See* U.S. Const. amend. XIII.

[47] *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964) (recognizing an evolving "equality among voters within a State"). To be sure, voting barriers still remain. *See e.g.*, Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 245, 249 n.16.

[48] *See* Drew Desilver, *Among Democracies, U.S. Stands Out in How It Chooses Its Head of State*, Pew Res. Ctr. (Nov. 22, 2016), https://www.pewresearch.org/fact-tank/2016/11/22/

College creates a high risk that in a close election, the winner of the electoral vote will not be the same as the candidate who wins the national popular vote. Concordance between the popular vote and the electoral vote arises because of the approximate proportionality between state population and electoral strength. However, in recent years, elections have been close enough to disrupt that concordance.

The Electoral College mechanism of winner-take-all state legislation across the country allows the possibility of a mismatch between the electoral-vote winner and the popular-vote winner. For example, it is mathematically possible for a candidate to win an electoral-vote majority with as little as one-fourth of the popular vote. But that outcome requires the winning candidate's votes to be contained perfectly in those winning states. Such a circumstance does not occur in real life. In practice, how often does a popular vote / electoral vote mismatch occur?

Until 2000, mismatches between the electoral vote and popular vote were uncommon, occurring in only three of the forty-four elections where the popular vote has been counted (Figure 1). Two such occasions occurred within twelve years of each other, in 1876 and 1888, so for most of American history there was no expectation that such a disruption would occur. However, since 2000, two out of the last five elections have resulted in the second-place popular vote finisher becoming President.[49] In both cases, the mismatch attracted considerable attention in the press and among voters at large.[50]

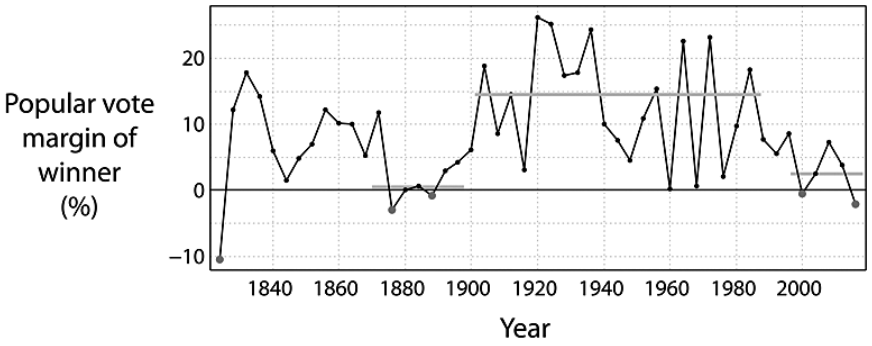

FIGURE 1: POPULAR VOTE MARGIN OF THE PRESIDENTIAL WINNER IN U.S. ELECTIONS, 1824-2016

among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/ [https://perma.cc/B9DJ-ALBM].

[49] The five contests were the presidential elections in 1824 (John Quincy Adams), 1876 (Rutherford Hayes), 1888 (Benjamin Harrison), 2000 (George W. Bush), and 2016 (Donald Trump).

[50] For example, the controversy around the 2000 recount was one of the top issues of public interest in 2000. *See Rising Price of Gas Draws Most Public Interest in 2000*, PEW RES. CTR. (Dec. 25, 2000), https://www.people-press.org/2000/12/25/rising-price-of-gas-draws-most-public-interest-in-2000/ [https://perma.cc/787L-RV5H].

This uptick in mismatches has occurred because presidential elections have been more closely contested in recent years. Because electoral votes are awarded in groups of varying size and because electors are not proportional to state population, winning more votes is not guaranteed to translate into more electoral votes. Regraphing the historical data of Figure 1 in order of lower to higher popular margin shows that in elections where the popular vote margin across the country was less than 3%, the likelihood of a mismatch was approximately 3 in 10. The same point emerges from computer simulations of a broad variety of coalitions based on the last four decades of electoral alignments. These simulations show that the Presidency would be expected to go to the popular-vote loser about 1 in 3 times (Figure 2).[51] Taken together, these lines of evidence prove that both in historical fact and as a general principle, close elections in the United States would be expected to lead to a high risk of a popular vote / electoral vote split.

Our analysis demonstrates that the risk of a popular vote / electoral vote mismatch is substantial under conditions of closely divided popular opinion. In election law and as a matter of fairness, the democratic precept against seating a popular-vote loser is taken as a fundamental principle. In the words of twenty-sixth President Theodore Roosevelt, "If the minority is as powerful as the majority there is no use of having political contests at all, for there is no use in having a majority."[52] Seating a popular-vote loser as President should be, at a minimum, normatively problematic. Even without a legal cause of action, as is now the case, a popular vote / electoral vote split produces substantial popular dissatisfaction with the Electoral College.[53] Such conflict can cause voters to lose faith in the legitimacy of the democratic process.

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[51] *See* Vinod Bakthavachalam & Jake Fuentes, *The Impact of Close Races on Electoral College and Popular Vote Conflicts in US Presidential Election*, PRINCETON ELECTION CONSORTIUM (Oct. 8, 2017), http://election.princeton.edu/wp-content/uploads/2017/10/bakthavachalam_fuentes17_MEVC_popular-electoral-split-model-8oct2017.pdf [https://perma.cc/SK8T-NVDG]; *see also* Vinod Bakthavachalam & Reed Hundt, *How Trump Is Running to Snatch Victory from the Jaws of Defeat, Again*, N.Y. TIMES (Feb. 20, 2020), https://www.nytimes.com/2020/02/12/opinion/electoral-college-2020.html [https://perma.cc/K78B-VZSK].

[52] IN THE WORDS OF THEODORE ROOSEVELT: QUOTATIONS FROM THE MAN IN THE ARENA 115 (Patricia O'Toole ed., 2012); *see also* ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989).

[53] *The Public, the Political System and American Democracy: The Electoral College, Congress and Representation*, PEW RES. CTR. (Apr. 26, 2018), https://www.people-press.org/2018/04/26/5-the-electoral-college-congress-and-representation/ [https://perma.cc/CJT5-Q9XX].

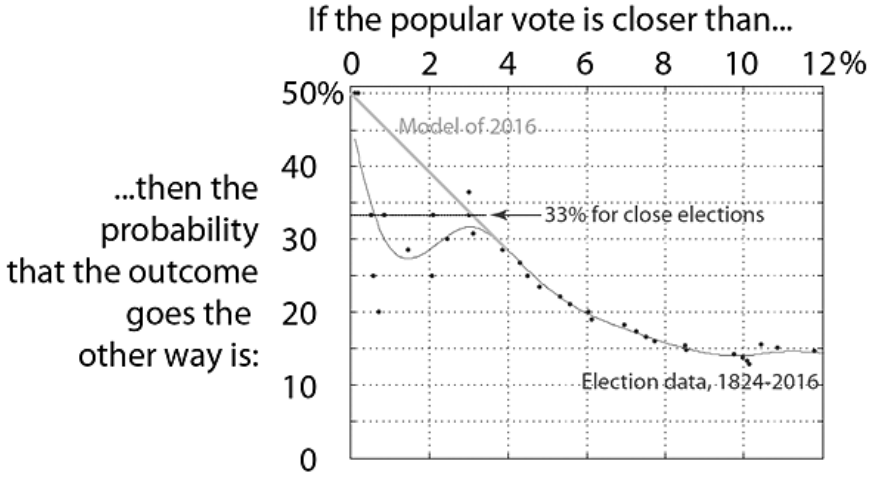

FIGURE 2: PROBABILITY THAT THE POPULAR-VOTE WINNER WILL ATTAIN THE PRESIDENCY[54]

B. Battleground States

For the last twenty years, presidential races have been marked by three features: close partisan division, entrenched voter preference, and voter behavior that can be predicted through polling and data analytics. Consequently, the selection of a President comes down to the outcome of a small number of "battleground states" which are known in advance of the election. The other remaining states are reliably for one of the major candidates. In every presidential contest since 2000 there have been up to about a dozen battleground states, varying slightly from election to election.[55]

Under the Electoral College—where forty-nine of the fifty-one jurisdictions (or 531 of the 538 total electors) use the winner-take-all method to appoint electors—the presidential campaigns have strong incentives to focus almost exclusively on battleground states and to ignore other states. A major party's nominee has limited resources (e.g. money, staff, volunteers) and time (usually no more than twelve weeks after the party convention) to maximize the chances of winning 270 electoral votes. And with high partisan loyalty supplemented by polling technology, the candidate can estimate his or her likely margin of victory or defeat in every state.

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[54] Data points and red curve are derived directly from past election data. The gray curve represents numerical simulations of hypothetical scenarios by Vinod Bakthavachalam and Jake Fuentes.

[55] *See Dave Leip's Atlas of U.S. Presidential Elections*, *supra* note 39 [https://perma.cc/VQS5-ZLGM].

Under these conditions, a candidate has little incentive to campaign in states where the projected margin of defeat is large. Consider Texas, which has more electoral votes than any state but California.[56] In 2016, the likelihood of any Democratic candidate taking the statewide contest away from the Republican would have been too low to justify the effort. Yet in election after election, millions of Texans vote for Democratic candidates.[57] In the presidential race, Democratic voters are written off—and Republican voters are taken for granted. Time and money spent there would reduce the likelihood of winning other states.

Candidates also have little incentive to campaign in states where winning is assured. The likelihood of a Republican opponent flipping the statewide contest in California is extremely low. A campaign in such a large state would take an enormous proportion of a campaign's money, time and energy, all for no added payoff at the end. Knowing this, a hypothetical Democratic candidate would feel no need to focus on California voters, and will likely be happy to see his or her Republican opponent spend substantial efforts there. In short, as a matter of resource optimization, it is in the interest of a presidential campaign to act as if all the non-battleground states are already decided.[58]

In recent elections the two major-party presidential candidates have followed this optimization strategy in their travel schedules. In the 2016 general election campaign, 375 out of 399 presidential candidate events by Hillary Clinton or Donald Trump, or 94%, were held in just twelve states (see Figure 3).[59] The three largest states, California, New York, and Texas, accounting for 122 electoral votes, received two visits, or 0.5% of all visits. Small non-battleground states were similarly ignored: the eight smallest states received no visits at all.[60] In this sense, the Founders' vision of protecting the power of small states has withered.

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[56] *See id.*

[57] *See id.*

[58] To be clear, this is a highly simplified model. No state is truly decided, and the candidates do spend money in noncompetitive, non-battleground states for myriad reasons (notably, in efforts to raise money, or, less often, to support down ballot candidates). But, as Part III.B shows below, there is a lot of truth to this simplified model.

[59] *See Two-Thirds of Presidential Campaign Is in Just 6 States*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/campaign-events-2016 [https://perma.cc/B3N2-LYWG]. This pattern was repeated in 2020, when 12 states received 96% of the general-election campaign events (204 of 212) by the major-party presidential and vice-presidential candidates. NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/map-general-election-campaign-events-and-tv-ad-spending-2020-presidential-candidates [https://perma.cc/8NCF-4HKP].

[60] Those states were Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Rhode Island, and Montana. *See id.*

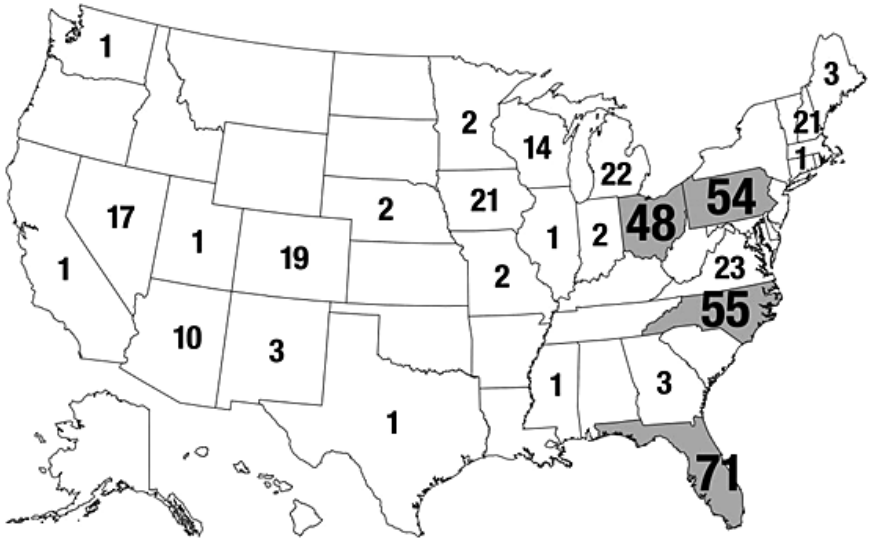

FIGURE 3: POST-CONVENTION VISITS IN 2016

A similar pattern held in 2012. From the end of the 2012 Democratic National Convention to the election, the presidential and vice-presidential candidates for both major parties visited only twelve states across 253 visits, and made no visits at all to thirty-eight states or the District of Columbia.[61] And during the 2008 general election, 97.7% of presidential and vice-presidential campaign visits from both parties occurred in just fourteen states.[62]

Presidential campaign advertising spending has followed the same patterns as travel. In 2004, 73% of all campaign advertising dollars were spent in just Florida (27%), Ohio (18%), Pennsylvania (12%), Wisconsin (8%), and Iowa (8%).[63] In 2008, 98.2% of presidential campaign spending for both major parties was focused on just fifteen states.[64] And in 2012, from April 11 until Election Day, President Barack Obama's reelection campaign spent over 99% of its $330 million advertising budget in just ten states.[65] His opponent, former Governor Mitt Romney, had $158 million for that same period, and spent 99.9% of it in those same ten states.[66]

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[61] *See Presidential Tracker 2012*, FAIRVOTE, http://www.fairvote.org/presidential_tracker_2012#2012_campaign_spending [https://perma.cc/32HC-BC7A].

[62] *See* KOZA, *supra* note 5, at 21–22.

[63] *See* FAIRVOTE, WHO PICKS THE PRESIDENT? 2 (2005), https://fairvote.app.box.com/v/who-picks-the-president [https://perma.cc/QRN9-Q5NT].

[64] *See Presidential Tracker 2012*, *supra* note 61.

[65] *See id.*

[66] *See id.* For additional details on campaign travel and spending, see KOZA, *supra* note 5, at 12–51.

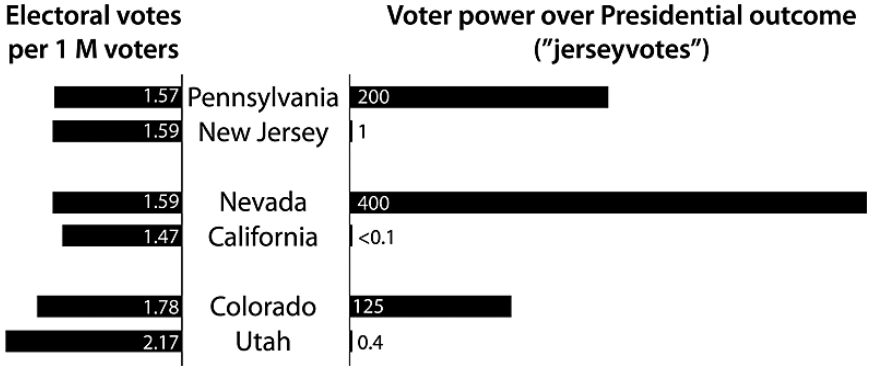

FIGURE 4: COMPARISON OF TWO MEASURES OF VOTER POWER[67]

The battleground state phenomenon has a substantial impact on political representation. Political representational challenges are relatively common in modern election law. The Supreme Court has held that the Constitution prohibits certain electoral schemes (most often apportionment plans) that give certain voters substantially more influence over who wins the election than others.[68] Also, under the Voting Rights Act, a federal court can require that changes be made to electoral processes based on findings of a history of discrimination and barriers to political access for minority populations.[69] These types of constitutional injuries seem similar to the harm that the battleground state phenomenon causes. However, there is no legal cause of action for political representational inequalities due to state citizenship that arise because of strategic decisions made by political campaigns.

C. Differential Benefits and Harms to the Citizens of Individual States

Enfranchisement gives political influence to new people as they gain the right to vote. Communities that lack voting rights often are deprived of political opportunities or benefits, so their entry into the voting population is likely to come with intentions to change the state of affairs. Politicians in power who work to expand individual voting rights take a risk of upsetting existing power alignments. Indeed, the franchise has only ever been significantly expanded in America out of political necessity.[70]

These natural pressures to avoid expanding the right to vote are enhanced by Electoral College mechanisms. Under the Electoral College, the

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[67] The left number equals the electoral votes per million voters. The right number is a quantification of the relative influence of voters over presidential outcome based on 2016 election results.

[68] *See* Reynolds v. Sims, 377 U.S. 533, 536 (1964).

[69] *See* Thornburg v. Gingles, 478 U.S. 30, 38–42 (1986).

[70] *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

number of electors a state has does not change if more people or fewer people vote. In a sense, it operates as if all of a state's citizens vote, even if many do not. Accordingly, in terms of the Presidency, no incentive exists to expand the franchise or even to increase overall turnout in any particular state.

This lack of incentive becomes apparent when one considers the battleground-state phenomenon. Voters who live in battleground states have more power than other voters over the outcome of presidential elections. The advantage that battleground states have under the Electoral College far exceeds any benefits that states with small populations have due to the Senate-based electors. One of us has defined a mathematical measure of voter power that represents the per-vote change in national win probability as exerted by voters in a particular state.[71] This is a more useful index of true voter leverage than the nominal measure of electors per voter used in Table 1.

Consider the case of a New Jersey voter.[72] Perennially, his/her vote (or even a thousand such votes) will have extraordinarily little impact on the state outcome, and an even smaller effect on overall likelihood of which presidential candidate will win the Electoral College.[73] However, in neighboring Pennsylvania, which has been a battleground state since 2004, votes have much more leverage and are therefore worth much more.[74]

The power of a vote can be quantified by asking: In a neck-and-neck race, how much does one vote (or some larger number of votes) affect a candidate's probability of winning the Presidency? As it turns out, this problem gives exactly the same result whether one is a Republican or a Democrat.[75] For example, a thousand voters in New Jersey, a safe Democratic state, have far less influence on the national election outcome than a thousand voters in Pennsylvania, a battleground state.[76] On a state-by-state basis, voters in battlegrounds possess far more power than voters in other states.[77] Figure 4 shows that battleground state voter power varies by a factor of thousands, whereas the number of electors per unit of population varies at most by a factor of three.[78]

Battleground-state voters appear to be aware of their relative power. Turnout in battleground states tends to be higher than the rest of the country.[79] The twelve most competitive states had an average turnout approxi-

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[71] *See* Samuel S.-H. Wang, *Origins of Presidential Poll Aggregation: A Perspective from 2004 to 2012,* 31 INT'L J. FORECASTING 898, 898 (2015).

[72] *See* Sam Wang, *The Power of Getting Out the Vote*, PRINCETON ELECTION CONSORTIUM (Nov. 2, 2008, 5:28 PM), http://election.princeton.edu/2008/11/02/the-power-of-getting-out-the-vote/ [https://perma.cc/JU5A-67C9].

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] When first constructed, the win-probability-focused voter power was scaled to the power of a vote in New Jersey. As New Jersey is not a battleground state, "Jerseyvotes" are worth little.

[78] *See id.*

[79] *See* Danielle Kurtzleben, *Is the Electoral College Dragging Down Voter Turnout in Your State?* NPR (Nov. 26, 2016, 5:00 AM), https://www.npr.org/2016/11/26/503170280/charts-

mately eight percentage points greater than all the others in 2004, six points greater than all the others in 2008, and nine points greater than all the others in 2012.[80] In 2016, ten of the fourteen states with the highest percentage turnout were battleground states.[81] In 2016, the turnout in those ten states was over 3.5 million votes greater than if turnout had matched the national average.[82] This difference was greater than the entire turnout in the smallest seven non-battleground states combined.[83]

The Electoral College's consequences for turnout and enfranchisement exemplify the idea that harms to social engagement and participation emanate naturally from such a system of selecting a President. Since participation in democratic processes and trust in government are closely related, the current presidential system is a potential cause of loss of trust in the national government.[84]

is-the-electoral-college-dragging-down-voter-turnout-in-your-state [https://perma.cc/W7T8-89GG].

[80] *See* Robert Richie & Andrea Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, 43 PRESIDENTIAL STUDIES QUARTERLY 353, 367 (2013).

[81] *See supra* Figure 3; *see also* Kurtzleben, *supra* note 79.

[82] For the data from which these values were calculated, see *Dave Leip's Atlas of U.S. Presidential Elections*, *supra* note 55.

[83] *See id.*

[84] *See* Marc Hooghe, *Trust and Elections, in* THE OXFORD HANDBOOK OF SOCIAL AND POLITICAL TRUST 617-631 (Eric M. Uslaner ed., 2018); Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RES. CTR. (July 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/ [https://perma.cc/S8FT-GCP6].

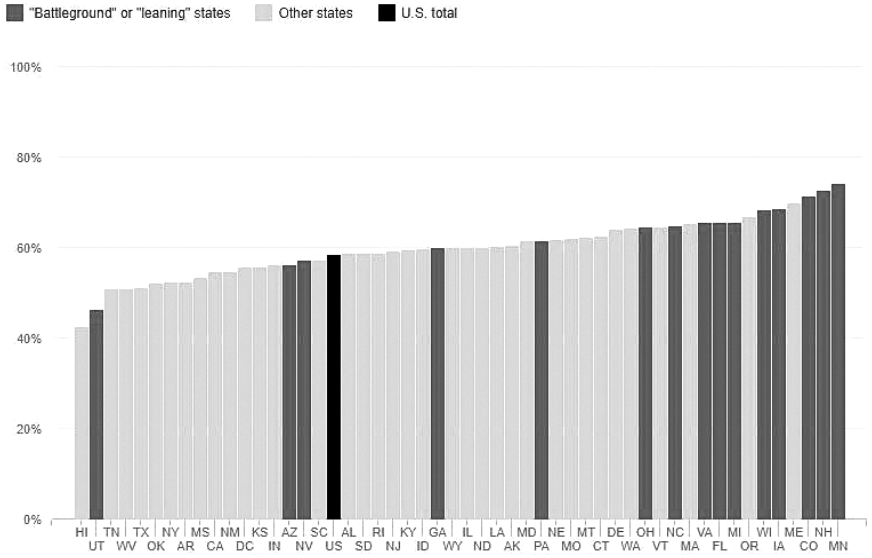

FIGURE 5: ELECTORATE TURNOUT RATE IN BATTLEGROUND STATES[85]

Battleground states can also receive more benefits from the federal government than other states. Battleground states are more likely to receive federal discretionary grants, and more money on average per grant.[86] And because of their travel schedules and campaign priorities, Presidents come into office with more familiarity with battleground-state needs.[87] Notably, President George W. Bush signed into law the senior prescription-drug benefit Medicare Part D after the 2000 campaign, which featured close contests in Florida and Pennsylvania, two states with large senior-citizen populations.[88] In the current administration of President Donald Trump, hurricane relief to Florida was prompt and aggressive, in contrast to slower efforts for Puerto Rico, whose residents are predominantly U.S. citizens but which has no electoral votes.

Recently it has come to the forefront that safe partisan states may be treated differently based on their political loyalty. Since 2017, President Donald J. Trump has made a pattern of policy decisions and public statements consistent with such bias. Examples include changes in tax policy that fall more heavily on Democratic states, responses to natural disasters, and

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[85] Danielle Kurtzleben, *supra* note 79.

[86] *See, e.g.*, JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 30–31 (2014).

[87] *See* Michael Lind, *If a Swing State Cares, It's an Issue*, N.Y. TIMES (Oct. 2, 2000), https://www.nytimes.com/2000/10/02/opinion/if-a-swing-state-cares-it-s-an-issue.html [https://perma.cc/5V89-TU6B].

[88] *See Two Big 'Gators Pounding Away*, ECONOMIST (Oct. 28, 2000), https://www.economist.com/united-states/2000/10/26/two-big-gators-pounding-away [https://perma.cc/3YWN-UGM4].

requests from individual governors for aid during the 2020 coronavirus epidemic.[89] President Trump has explicitly tied his attitude toward states to how their electoral votes were assigned in the 2016 election. The disparate policy treatment across the states violates the idea that the Chief Executive should treat citizens across the nation similarly.

D. Less Political Power for Non-Battleground Demographics

The Electoral College gives different amounts of political power to different demographics because of the battleground-state phenomenon. In 2016, battleground states had smaller minority populations than the nation as a whole. Over two-thirds of presidential campaign events in 2016 were held in six states: Florida, North Carolina, Pennsylvania, Ohio, Virginia, and Michigan.[90] These states had a smaller percentage of Hispanic individuals (9.8%) than nationwide (11.9%) and a larger percentage of the population sixty-five years or older (16.6%) compared to 15.4% nationwide.[91] Four of the five states with the largest total number of African-Americans—Georgia, New York, Texas, and California—received only five visits from the presidential campaigns in 2016.[92]

When a demographic is concentrated in noncompetitive states, it will have less influence. For example, Puerto Rican voters who live outside of Puerto Rico live largely in non-battleground states and therefore have lower average voter power. As illustrated in Figure 6, Mormons, who live largely in Western states, are also concentrated in non-battleground states and are likewise disempowered by Electoral College mechanisms.

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[89] *See* Brett Arends, *Trump's Tax Cuts Are Punishing States That Voted for Clinton, Data Suggest*, MARKETWATCH (Mar. 28, 2020), https://www.marketwatch.com/story/trumps-tax-cuts-are-punishing-states-that-voted-for-clinton-data-suggests-2019-03-07 [https://perma.cc/E2WX-AWK6] (noting that federal tax cuts are favoring states that voted for President Trump in 2016); Toluse Olorunnipa et al., *Governors Plead for Medical Equipment from Federal Stockpile Plagued by Shortages and Confusion*, WASH. POST (Mar. 31, 2020, 3:39 PM), https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html [https://perma.cc/XY94-4EB2] (noting that governors of states who did not vote for President Trump believed they were receiving less aid than states who did vote for him) ; Sophia Tesfaye, *Trump's Politics of Revenge: He's Still Picking Winners and Losers in a Pandemic*, SALON (Mar. 25, 2020, 10:00 AM), https://www.salon.com/2020/03/25/trumps-politics-of-revenge-hes-still-picking-winners-and-losers-in-a-pandemic/ [https://perma.cc/X8PS-73WH] (discussing President Trump's favorable treatment of states that voted for him with regard to COVID-19 aid).

[90] *See Two-Thirds of Presidential Campaign Is in Just 6 States*, *supra* note 59.

[91] The population data comes from the 2010 census results. *See QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/UWM7-RM83].

[92] *See Two-Thirds of Presidential Campaign Is in Just 6 States*, *supra* note 59. The population data comes from the 2010 census results. Georgia has 3,461,279 African-Americans; New York has 3,410,545; Texas has 3,243,777; and California has 2,421,507. *See QuickFacts*, *supra* note 91, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/UWM7-RM83].

FIGURE 6. PER-VOTER POWER INFLUENCE OVER PRESIDENTIAL OUTCOME BY MORMON VOTERS, 2016

E. Election Interference

Finally, the Electoral College makes elections more vulnerable to interference. The importance of a few key states creates a security risk because adversaries that wish to interfere with the presidential election need only focus on a few battleground states. Even when hundreds of thousands of raw votes, or more, separate the two candidates for President, during certain elections since the 1960's, as few as six hundred votes could have led to a different outcome, as Figure 7 illustrates.

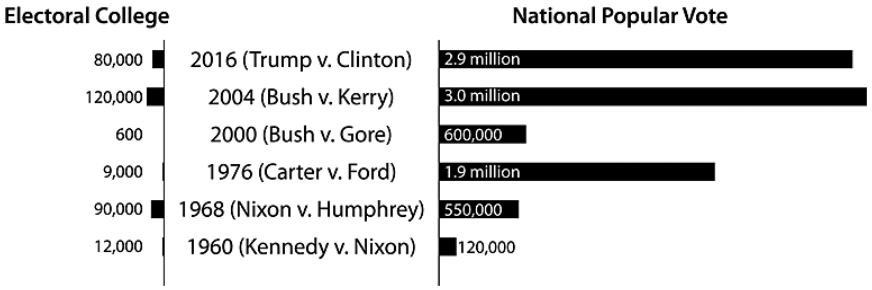

FIGURE 7: VOTES NEEDED TO REVERSE PRESIDENTIAL OUTCOME[93]

This risk can favor either party depending on circumstances. The famous election of 2000 made Republican George W. Bush president despite Democratic Vice President Albert A. Gore Jr. winning 600,000 more votes nationwide. Just four years later, President Bush narrowly escaped the converse experience. If his challenger, Democratic Senator John Kerry, had won

[93] The left-hand numbers are based on Electoral College mechanisms. The right-hand numbers are based on a national popular vote.

120,000 more votes in Ohio, he would have received more electoral votes and prevailed over Bush despite losing the popular vote by 3.0 million votes.

Battleground states also make it easier for an adversary to create disruptions to U.S. politics.[94] Interfering in election processes in even a few states would create problems lasting long past Election Day. A focused attack by hostile actors could have an outsized effect on a presidential election—or at a minimum throw the American political system into chaos.

IV. Desirable Reform Proposals Should Address Existing Problems and Have an Identifiable Path to Success

The substantial harms that the Electoral College causes are fundamentally about representation and incentives. The current system deprives most Americans of a meaningful voice in presidential contests, and encourages political actors to treat the needs of different states or demographics with unequal attention. This system also allows external bad actors to have an outsized impact by focusing their effort on just a few states. These problems will recur under the current system whenever a presidential election is closely fought. The incentive for states to maximize their individual power exerts a strong pull for them to retain the winner-take-all method advocated by Thomas Jefferson. Accordingly, the strong incentives on presidential campaigns to focus on battleground states will also persist.

Finding a remedy to these problems is challenging. The general nature of a solution is obvious: use the total number of votes cast for a candidate to select the President. But federal courts have not located this principle in the Constitution, under the one-person-one-vote principle or otherwise.

Making the Presidency dependent on a popular vote would require either a constitutional amendment to change the entire system, or legislative action across multiple states. This final Part considers the fate of such proposals to date, and under what conditions they might successfully become law.

One route to popular vote-based selection is through an amendment to the Constitution. A constitutional amendment could completely replace an elector-based rule for selecting a President. The path is spelled out in Article V, which states that amendments may be proposed by a two-thirds vote of the House and the Senate, or alternately by a convention of states called by two-thirds of state legislators. Passage would then require ratification by three-fourths of the states.[95]

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[94] *See* Matthew Olsen & Benjamin Haas, *The Electoral College Is a National Security Threat*, Politico (Sept. 20, 2017), https://www.politico.com/magazine/story/2017/09/20/electoral-college-threat-national-security-215626 [https://perma.cc/DGM3-PDKB]; *see also* Issie Lapowsky, *Russia Could Easily Spread Fake News Without Team Trump's Help*, Wired (July 13, 2017, 2:51 PM), https://www.wired.com/story/russia-trump-targeting-fake-news/ [https://perma.cc/9WRK-6S3F].

[95] *See* U.S. Const. art. V.

These requirements were put in place as intentional hurdles to make amendment difficult.[96] Only the Twelfth Amendment, ratified in 1803, has succeeded in altering the presidential selection procedure of Article II, Section 1. Since 1800, over seven hundred attempts have been made to amend this presidential selection rule, more than any other subject.[97] All of these attempts failed, as have later attempts.[98] In one attempt that advanced relatively far, in 1969 Senator Birch Bayh and Representative Emmanuel Celler proposed an amendment that would have established a direct national election in which the winner would need to receive forty percent of the vote, or failing that, win a subsequent runoff election between the top two candidates.[99] The Bayh-Celler proposal received a two-thirds majority in the House of Representatives, but failed to receive a vote in the Senate due to procedural maneuvers led by segregationist Senators.[100] In 1979, Senator Bayh finally succeeded in getting a floor vote on the amendment. It won fifty-one votes, well short of the sixty-seven votes needed for a two-thirds vote to approve a constitutional amendment.[101]

However, even if an amendment were to pass Congress, the next step would be ratification by three-fourths of states, i.e. thirty-eight out of fifty. Under current conditions of close political division, this would have to include a combination of Democratic-leaning, Republican-leaning, and battleground states. It would seem a very difficult task to muster this level of cross-cutting support. Indeed, the Electoral College has recently benefited the Republican Party twice, creating the perception that reform is a partisan question. Overall, the difficulty of amending the Constitution in the near future seems about as likely as winning the lottery.

Another route is for states to change how they appoint electors. State legislatures have substantial leeway over this process, and, as noted in Part I,

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[96] *See, e.g.*, THE FEDERALIST NO. 43 (James Madison), NO. 85 (Alexander Hamilton); *see also* Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html [https://perma.cc/R7AH-SBH4]; Kim Wehle, *It's Very Difficult to Change the Constitution — on Purpose*, THE HILL (Nov. 5, 2018, 11:30 AM), https://thehill.com/opinion/immigration/414897-its-very-difficult-to-change-the-constitution-on-purpose [https://perma.cc/P8PR-SCHK].

[97] *See* THOMAS H. NEALE & ANDREW NOLAN, CONG. RESEARCH SERV., THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACTS 1 (2019) ("Notwithstanding Hamilton's endorsement, the first proposal to change the electoral college system by constitutional amendment was introduced as early as 1800, and since that time more than 700 proposals to reform or eliminate the college have been introduced in Congress."); *see also* NEALE WHITAKER, CONG. RESEARCH SERV., THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 14–15 (2004).

[98] For example, in 2005, Rep. Gene Green introduced the Every Vote Counts Amendment, which would have established a direct national election and explicitly granted Congress the power to establish uniform voting qualifications. *See* H.R.J. Res. 8, 108th Cong. (2005).

[99] *See* H.R.J. Res. 681, 91st Cong. (1969).

[100] *See* S.J. Res. 1, 91st Congress (1969); 115 Cong. Rec. 30793-30843 (1970); *see also* WEGMAN, *supra* note 3, at 125–28.

[101] *See* WEGMAN, *supra* note 3, at 160.

many different options were used in the first few presidential contests. For example, states could appoint electors proportionally, based on the statewide vote totals. Alternately, states could follow Maine and Nebraska, and appoint electors based on the results in each congressional district, and appoint the two Senate-based electors based on the statewide result. Compared to Article V, state legislation is easier at first, requiring only the work of passing laws in individual state legislatures. If such a law passed in one state, it could weaken the norm of winner-take-all laws and put indirect pressure on other states to change their laws as well.

A central challenge of state-level legislation is one of incentives. Some proposed reforms, if implemented uniformly across all states, would likely reduce the number of mismatches between popular vote and electoral vote.[102] However, the entrenchment of existing winner-take-all laws creates a powerful incentive to leave existing rules in place.[103] For example, if one state acted alone to assign its electors to the national popular vote winner, that state would be at a political disadvantage. In pursuit of a national-level benefit, that state would have to commit to unilateral disarmament.

The Constitution offers a mechanism that can encourage many states to act together to implement nationwide change: interstate compacts. The Constitution envisions that states will on occasion pass reciprocal legislation which binds multiple states to an agreement, even if no change to the Constitution occurs.[104] States would also have wide flexibility to appoint electors as they choose under an 'interstate compact,' as they do when acting alone. In the early 2000s, separate works by Professor Robert Bennett and Professors Vikram Amar and Akhil Amar outlined how an interstate compact could lead effectively to a national popular vote for the Presidency.[105] They proposed that if states representing enough electoral votes (currently 270) to win the Electoral College enter a compact requiring them to allocate all their votes to the national popular vote winner, then the winner of the national popular vote would *de facto* become President.

Indeed, such an effort to pass an interstate compact for presidential selection reform that would establish a national popular vote has already begun. Fifteen states and the District of Columbia have passed legislation ti-

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[102] Based on historical data, awarding electoral votes proportionally at a statewide level would have led to two elections with a popular vote / electoral vote mismatch, as opposed to the four that have occurred since 1876. Paradoxically, assigning electors by congressional district would have increased the number of mismatch elections to five. *See* Cervas & Grofman, *supra* note 45, at 1328.

[103] *See generally* PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES (2019).

[104] *See* U.S. CONST. art. I, § 10, cl. 3.

[105] *See* Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 241, 243–44 (2001); Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html [https://perma.cc/4B3X-3YVX].

tled the "Agreement Among the States to Elect the President by National Popular Vote."[106] These sixteen jurisdictions together have power over 196 electoral votes. Passage by states representing seventy-four more electoral votes would cause the interstate compact to go into effect. This could be done by the action of seven additional states, for a total of twenty-one jurisdictions.[107] This is considerably fewer than the thirty-eight states required by an Article V approach.

The example of a National Popular Vote Compact shows how a compact structure removes the disincentive of acting alone. In this case, an agreement to implement a *de facto* national popular vote would not take effect until it affected all states equally. Compacts also allow for greater creativity and aggregate power while removing the fear of acting alone. For example, a smaller group of states could appoint their shared electors to the winner of the national popular vote.[108] States could agree to only add presidential candidates to the ballot if the candidate visits all of the compacting states (a "Campaign Visits Compact"). States could join a compact where pooled financial resources are distributed to campaigns based on their cam-

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[106] CAL. ELEC. CODE § 6920 (West, Westlaw through Ch. 3 of 2020 Reg. Sess.); COLO. REV. STAT. § 24-60-4001 (West, Westlaw through legis. effective April 1, 2020 of 2020 Reg. Sess.); CONN. GEN. STAT. § 9-175a (West, Westlaw with enactments of Public Act 20-1); D.C. CODE § 1-1051.01 (West, Westlaw through Mar. 19, 2020); DEL. CODE tit. 15, § 4300A (West, Westlaw through ch. 236 of 150th General Assemb. (2019-2020)); HAW. REV. STAT. § 14D-1 (West, Westlaw through end of 2019 Reg. Sess.); 10 ILL. COMP. STAT. 20/1 (West, Westlaw through P.A. 101-629); MD. CODE ANN., ELEC. LAW § 8-5A-01 (West, Westlaw through Chapters 1 to 11 from 2020 Reg. Sess. of General Assemb.); 2010 MASS. ACTS ch. 229; N.J. STAT. ANN. § 19:36-4 (West, Westlaw through L.2019, c. 518 and J.R. No. 33); N.M. STAT. ANN. § 1-15-4 (West, Westlaw through Ch. 84 of 2nd Reg. Sess. of 54th Leg. (2020)); N.Y. ELEC. LAW § 12-400 (McKinney, Westlaw through L.2019, chapter 758 & L.2020, chapter 25); OR. REV. STAT. ANN. § 248 (West, Westlaw through laws enacted in 2020 Reg. Sess. of 80th Legis. Assemb., which adjourned sine die March 3, 2020, pending classification of undesignated material and text revision by Oregon Reviser); 17 R.I. GEN. LAWS ANN. § 17-4.2-1 (West, Westlaw through Chapter 20-6 of 2020 2nd Reg. Sess.); VT. STAT. ANN. tit. 17, § 2751 (West, Westlaw through acts 1 - 85, and 88 of Adjourned Sess. of 2019-2020 Vermont General Assemb. (2020)); WASH. REV. CODE. ANN. § 29A.56.300 (West, Westlaw through Chapter 92 of 2020 Reg. Sess. of Wash. Leg.).

[107] The following seven states have passed a National Popular Vote bill in at least one legislative chamber: Michigan (sixteen electoral votes under apportionment based on the 2010 Census), North Carolina (fifteen), Virginia (thirteen), Arizona (eleven), Minnesota (ten), Oklahoma (seven), and Arkansas (six), for a total of seventy-eight electoral votes. *See Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state-status [https://perma.cc/TLG9-K6B3]. As few as three additional states could be enough to reach the 270 electoral-vote threshold: for example, Texas, Michigan, and Pennsylvania together possess seventy-four electoral votes.

[108] The states of California and Texas command ninety-three electoral votes in total, more than one-third of the number necessary to win the Presidency. *See Distribution of Electoral Votes*, U.S. NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/electoral-college/allocation [https://perma.cc/WD9Y-VKPU]. Yet together they received only two visits in the 2016 general election campaign. *See* Figure 3. In a hypothetical California-Texas Compact, both states could agree to award all of their electors to the winner of the national popular vote. This agreement between two states, one safely Democratic and one safely Republican, would have prevented the electoral / popular mismatches of 2000 and 2016, and make future mismatches favoring either party much less likely.

paign visits (a "Presidential Election Campaign Compact Fund"). Although these hypothetical proposals do not have the same effect on the Electoral College, they can remedy some of the unintended consequences we have listed, and make it easier for states to have nationwide impact without bearing the burden alone.[109]

Barriers to enacting interstate compacts exist, but are surmountable. Article I, Section Ten, Clause Three states that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another state."[110] Under current Supreme Court precedent, congressional approval is only required if the interstate compact encroaches on federal power or the rights of non-compacting states.[111] As the National Popular Vote Compact only changes the legislation of compacting states, it might not require approval at all. The Supreme Court has never ruled on how Congress may sufficiently grant approval. Consent is clearly sufficient if both houses of Congress pass an Act affirming the interstate compact language.[112] Consent can also be granted implicitly, by Congress not acting but nonetheless allowing an interstate compact to function.[113] Arguably, Congress has already granted implicit consent to the National Popular Vote Compact, as the District of Columbia passed legislation to become a member of the compact, and Congress did not overrule this law under its home rule authority.[114] To date, the Supreme Court has never invalidated an interstate compact for requiring, but lacking, congressional approval.

The National Popular Vote Compact would potentially face other legal and policy hurdles. If all votes are counted in the same electoral contest, then the different voter qualification laws in the states may cause constitutional problems of not treating persons and votes equally.[115] Difficult questions about how to properly count the national vote total, or what to do if ballots are lost or unreliable, would need to be made. While these problems are significant, they should be balanced against the problems that are present

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[109] The National Center for Interstate Compacts has a database which includes over 1,500 statutes establishing interstate compact membership. The compacts cover a diverse array of issues, including state border lines, port authority agreements, law enforcement, education, and more. *See National Center for Interstate Compacts*, COUNCIL ST. GOV'TS, http://apps.csg.org/ncic/ [https://perma.cc/M28R-93FQ].

[110] U.S. CONST. art. I, § 10, cl. 3.

[111] *See* U.S. Steel v. Multistate Tax Comm'n, 434 U.S. 452, 470–72 (1978). Most recently, the Supreme Court stated that the Compact Clause only requires congressional approval for compacts "which might affect injuriously the interests of" other states. *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (quoting Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1855)).

[112] *See, e.g.*, Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 11301, 129 Stat. 1312, 1644 (2015). Joint Resolutions also provide sufficient consent from Congress.

[113] *See* Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

[114] *See* The District of Columbia Home Rule Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (1973).

[115] *See* Michael Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, 15 HARV. L. & POL'Y REV. __ (2020).

under the current system. In light of the problems that the Electoral College already causes, a nationwide discussion of such tradeoffs is overdue.[116]

Conclusion

The Electoral College is a creature of a different world. Its original goals either no longer exist (protection of slaveowner power) or are no longer addressed (small-state leverage). Yet keeping Electoral College mechanisms has unintended effects of discouraging voter turnout, artificially amplifying voter power in battleground states, disempowering demographic groups that are concentrated elsewhere, and increasing the risk of election interference. These unintended consequences can be addressed by realistic reforms that do not require amending the Constitution, such as single-state action or the formation of interstate compacts. These reforms may become more likely to succeed if the negative consequences of maintaining the status quo are appreciated by as many citizens as possible.

[116] The results of the 2020 election have confirmed key defects of the American Presidential selection system. Although Vice-President Joseph R. Biden, Jr. won the popular vote by a margin of more than 7 million votes and won 306 electors to President Trump's 232, a switch of 70,000 votes from Biden to Trump in Arizona, Georgia, Pennsylvania, and Wisconsin would have been enough to make Trump a second-time Presidential winner and popular-vote loser. For election data, *see Presidential Election Results: Biden Wins,* N.Y. Times (Dec. 22, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html [https://perma.cc/8XCP-4N5L]. In addition, a threat of domestic election interference arose: President Trump and his lawyers attempted to change the outcome of the election by targeting battleground states through litigation to change the outcome, and even by requesting that legislatures override the law by which electors are assigned.

Student Loan Purpose and the *Brunner* Test

John Patrick Hunt[*]

This Article offers a new rationale for making student loans more readily dischargeable in bankruptcy: Doing so advances Congress's purpose in creating federal student loan programs in the first place. Empirical research indicates that if it is too hard to discharge loans in bankruptcy, students are less likely to pursue higher education, more likely to drop out, less likely to consider lower-income but valuable career paths, and more likely to be harmed rather than aided by their student loans. All these effects undermine Congress's express aims for the student loan programs.

Courts have ignored Congress's larger purpose in setting the standard for student-loan dischargeability. Specifically, in construing the Bankruptcy Code's requirement that a debtor show "undue hardship" to get a discharge of student loans, the court that announced the prevailing Brunner *test and many courts following it have focused narrowly on furthering the purposes of the specific provision that makes student loans harder to discharge than most other debts. They have not, in interpreting the open-ended "undue hardship" requirement, been guided by the overarching purposes of the student loan programs.*

As a result, "undue hardship" is often interpreted too harshly, hindering federal student loan programs from accomplishing their purposes. The Article proposes a replacement for the Brunner *test that would align the interpretation of "undue hardship" more closely with Congress's goals. The Article suggests that undue hardship should be presumed to exist when the debtor cannot repay student loans in a reasonable (10-20 year) period of time while maintaining a middle-class standard of living. The presumption could be rebutted by a showing that the debtor is engaged in the opportunistic abuse that Congress tried to combat by restricting discharge. The proposal would further Congress's student-loan program goals of expanding the middle class and moderating the length of time borrowers are in repayment.*

The Article concludes by observing that considering the overarching purposes of the student-loan programs as it proposes does not just support its specific suggestion, but also offers a new basis for adopting other recent proposals for liberalizing student-loan dischargeability.

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INTRODUCTION

"While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program."[1] These words, drawn from the most influential student-loan bankruptcy opinion of all time,[2] are bracing and candid—and correct only until you get to the comma. The "draconian" decision in *Brunner v. New York State Higher Education Services Corp.*, which purported to "strip [student-loan debtors] of the refuge of bankruptcy in all but the most extreme circumstances,"[3] is in fact based on no evidence of any student loan program's purposes.[4] This Article undertakes the task that *Brunner* incorrectly claimed to have completed: fashioning a general test for bankruptcy discharge of student loans that takes account of the overall purposes of the federal student loan programs.

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[1] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

[2] *Brunner* sets out a test for whether repayment of student loans would create an "undue hardship," which is the central question in student-loan bankruptcy law. Nine federal circuits have adopted the *Brunner* test. *See* Dear Colleague Letter on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings from Lynn Mahaffie, Deputy Assistant Sec'y for Policy, Planning, and Innovation, Office of Postsecondary Educ., U.S. Dep't of Educ. 16 (July 7, 2015), https://ifap.ed.gov/sites/default/files/attachments/dpcletters/GEN1513.pdf [https://perma.cc/HE9F-9DR7] [hereinafter 2015 Dear Colleague Letter] (reporting that the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have adopted the *Brunner* test).

[3] *Brunner*, 46 B.R. at 756.

[4] Although the *Brunner* opinion discusses the legislative history of the specific provision restricting student-loan dischargeability, 11 U.S.C. § 523(a)(8) (2019), *see Brunner*, 46 B.R. at 753–54, it supplies no basis for its claim about the "purposes" of the student loan program generally.

Many scholars have advocated liberalization of student-loan bankruptcy law,[5] and *Brunner* itself has come under fire from many quarters.[6] This Article contributes to the literature in two ways.

First, it offers a new rationale for attacking the *Brunner* test, at least as it was conceived and is often applied: that "undue hardship" should be interpreted to promote the overarching purposes of the federal student loan programs themselves.[7] The Article demonstrates that making student loans very difficult to discharge, as the *Brunner* test was designed to do and often has

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[5] *See, e.g.*, Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 33–43 (2010); Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329 (2013); Douglas J. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549, 556 (1995); Matthew Bruckner et al., *A No-Contest Discharge for Uncollectable Student Loans*, 91 COLO. L. REV. 183 (2020); Linda E. Coco, *Mortgaging Human Potential: Student Indebtedness and the Practices of the Neoliberal State*, 42 SW. L. REV. 565, 599–600 (2013); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1774 (2004); Richard Fossey, *The "Certainty of Hopelessness": Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J. L. & EDUC. 29 (1997); John Patrick Hunt, *Consent to Student-Loan Bankruptcy Discharge*, 95 IND. L.J. 1137 (2020) [hereinafter Hunt, *Consent*]; John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287 (2018) [hereinafter Hunt, *Help*]; John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. REV. 725 (2019) [hereinafter Hunt, *Tempering*]; Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 FLA. L. REV. 377, 391 (2016); Dalié Jiménez et al., *Comments of Bankruptcy Scholars on Evaluating Hardship Claims in Bankruptcy*, 21 J. CONSUMER & COM. L. 114, 115 (2018); C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 107 (2007); C. Ray Mullins et al., *Consumer Bankruptcy Panel Undue Hardship: An Analysis of Student Loan Debt Discharge in Bankruptcy*, 31 EMORY BANKR. DEV. J. 215 (2015); Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115 (2016); Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101 (2014); Rafael I. Pardo, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139 (1996); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185 (2012); Anne E. Wells, *Replacing Undue Hardship with Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy,* 33 CAL. BANKR. J. 313 (2016).

[6] *See, e.g.*, Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2002) ("We prefer a less restrictive approach [than *Brunner*] . . . ."); Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920–23 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring) (stating that the *Brunner* test "is too narrow, no longer reflects reality, and should be revised by the Ninth Circuit when it has the opportunity to do so"); Kevin J. Smith, *Defining the* Brunner *Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 251 (2013); Kurtis K. Wiard, Brunner's *Folly*: *The Road to Discharging Student Loans Is Paved with Unfounded Optimism*, 52 WASHBURN L.J. 357, 385-87 (2013); Ryan Freeman, Comment, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of § 523(a)(8) Under Appellate Review*, 30 EMORY BANKR. DEV. J. 147, 158–59 (2013); Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. TIMES (July 17, 2015), https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html [https://perma.cc/MEW8-PRQH] (quoting statements of several judges and law professors to the effect that the *Brunner* test is too harsh).

[7] *See* discussion *infra* Sections II.A–II.B.

done, is in conflict with the reasons the federal government issues and guarantees student loans in the first place.[8]

Second, the Article offers a concrete replacement for *Brunner*.[9] The Article's proposal supports the overall aims of the student loan programs by making the test for discharge easier to meet.[10] It also ties to specific goals Congress articulated in the course of enacting the programs.[11]

By way of background, student loans cannot be found dischargeable in a bankruptcy case unless the borrower shows that repayment would "impose an undue hardship."[12] *Brunner* set forth a test for undue hardship that the federal courts of appeals for nine circuits have explicitly adopted.[13] These circuits cover territory where nearly 90% of the population of the United States resides.[14] The *Brunner* test provides that a student-loan debtor can get a bankruptcy discharge only by showing that (1) the debtor cannot maintain a "minimal" standard of living while repaying based on "current income and expenses"; (2) "additional circumstances" indicate that this situation is "likely to persist for a significant portion of the repayment period;" and (3) the debtor has made "good faith efforts to repay the loans."[15]

The Article starts in Section I.A by describing the facts and reasoning of *Brunner* itself and the reasons courts have given for adopting its test. The *Brunner* test has been applied with varying degrees of stringency in different

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[8] *See* discussion *infra* Sections II.B.

[9] *See* discussion *infra* Sections III.A.

[10] *See* discussion *infra* Sections III.A.

[11] *See* discussion *infra* Sections III.A.1–3.

[12] 11 U.S.C. § 523(a)(8) (2018). Describing Section 523(a)(8) as covering "student loans" is shorthand. The provision defines its scope in a somewhat cumbersome way, *see* 11 U.S.C. § 523(a)(8)(A)–(B) (2018), that has been the subject of litigation, *see, e.g.*, Crocker v. Navient Sol'ns, L.L.C. (*In re* Crocker*)*, 941 F.3d 206, 217–24 (5th Cir. 2019) (concluding that the provision did not cover a private bar review loan). Scholars also have discussed the sweep of Section 523. *See, e.g.*, Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 277-81 (2019). Among other things, the provision covers any "educational . . . loan" that is "made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by any governmental unit." 11 U.S.C. § 523(a)(8)(A) (2018). This language covers the federal student loans discussed in this Article.

[13] In addition to the Second Circuit, the *Brunner* test has been adopted in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1308–09 (10th Cir. 2004); Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); United Student Aid Funds v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305 (3d Cir. 1995); *In re* Roberson, 999 F.3d 1132, 1135 (7th Cir. 1993). A minority test, the totality-of-the-circumstances test, is followed in the Eighth Circuit. *See* Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 703–04 (8th Cir. 1981), and, reportedly, by most courts in the First Circuit. *See* Brown v. Educ. Credit Mgmt. Corp., 581 B.R. 695, 699 (D. Me. 2017).

[14] *United States Courts of Appeals*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_courts_of_appeals [https://perma.cc/PN6D-2XYS] (giving population residing within the territory of each federal circuit using 2010 census figures, indicating that over 88% of U.S. population lives in circuits that have adopted *Brunner*).

[15] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

cases across the country, with the recent *Rosenberg* decision from the Southern District of New York standing as an important recent example of leniency. Nevertheless, many courts have applied *Brunner* quite harshly, as described in Section I.B. The Fifth Circuit's recent decision in *Thomas* is a stunning example.[16] The court held there that a 62-year-old debtor with incurable diabetic neuropathy who had not worked steadily in nearly three years and had an income consisting entirely of under $200 per month in food stamps could not discharge her student loans in bankruptcy.[17] The panel wrote that circuit precedent applying *Brunner* compelled its decision.[18]

With this and other severe applications of *Brunner* as motivation, the Article then turns to what the text of the Bankruptcy Code actually requires. Section II.A shows that "undue hardship" does not necessarily entail suffering that is exceptionally dire in comparison to that of other bankrupt debtors, as *Thomas* and other decisions have held.[19] Instead, the statutory text permits "undue hardship" to be understood simply as unjustifiable difficulty.[20]

Section II.B considers this exceptionally open-ended requirement in light of two sets of statutory purposes. The first set of purposes is the overall goals of the student loan programs. These global goals include providing equality of access to higher education, educating the population for the benefit of the country, enabling free choice of career for students, and benefiting students.[21] Excessive and unmanageable student debt undermines each and every one of these goals. For example, such indebtedness deters further education, pushes students to choose work based on pay without regard to personal interest or societal value, and is robustly associated with direct harms such as increased risk of mental illness, drug and alcohol problems, and suicide.[22] By preventing escape from unmanageable debt, unduly narrow interpretations of "undue hardship" likely do the same things.[23]

The second set of purposes is the narrow goals of nondischargeability taken in isolation. These are fighting abuse of the bankruptcy system and ensuring financial recoveries for student lenders.[24] Narrow interpretations of undue hardship may help advance these goals, although the evidence for that appears scant and the anti-abuse goal in particular is poorly defined.[25]

Courts have made extensive use of the second set of goals in interpreting "undue hardship" but have in effect completely ignored the counter-

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[16] *See* discussion *infra* Part I.

[17] The account of Thomas's condition comes from the bankruptcy court's findings of fact, which were not disturbed on appeal. *See* Thomas v. Dep't of Educ. (*In re* Thomas), 581 B.R. 481, 483–84 (Bankr. N.D. Tex. 2017).

[18] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 452–53 (5th Cir. 2019).

[19] *Id.* at 454.

[20] *See* discussion *infra* Section II.A.

[21] *See* discussion *infra* Section II.B.1.

[22] *See* discussion *infra* Section II.B.1.

[23] *See* discussion *infra* Section II.B.1.

[24] *See* discussion *infra* Section II.B.2.

[25] *See* discussion *infra* Sections II.B.2–3.

vailing first set.[26] By ignoring one side of the scale, courts have constructed an unbalanced doctrine that badly needs to be righted.[27]

Section III.A offers a proposal for defining "undue hardship" in light of these conflicting sets of goals: the debtor should be able to make out a prima facie case of undue hardship by showing an inability to repay the student debt in a reasonable (10-20 year) time while maintaining a middle-class standard of living.[28] If discharge would be granted in the first five years of repayment, the opposing creditor or servicer should be able to rebut the prima facie case by showing that the debtor is engaged in the type of abusive opportunism that nondischargeability was enacted to combat.

Section III.A also shows that the overall goals of the student loan programs, specific aspects of the programs' legislative history, and general societal expectations around higher education support the middle-class and reasonable-time aspects of the proposal.[29] The five-year limit on the creditor's ability to defeat undue hardship by showing abusive opportunism arises from the fact that Congress's special concern about abuse by student borrowers was limited to such a five-year period.[30]

Section III.B explains how the Article's proposal interacts with income-driven repayment (IDR) programs. These programs base repayment on the borrower's income and hold out the promise of loan forgiveness if the income-driven payments do not pay off the balance.[31] Although these programs can reduce the hardship of repayment, they entail risks and burdens that make them an imperfect substitute for bankruptcy discharge. These risks and burdens include extension of repayment, potentially increasing loan balances while in IDR, administrative burdens of the programs, uncertainty about whether the loan balance will actually be forgiven on completion of the program, and potential tax liability if the debt is in fact forgiven.[32]

The Article argues that borrowers who cannot maintain a middle-class standard of living while making IDR payments suffer undue hardship.[33] Importantly, this is true when the debtor's income is so low that the IDR payment would be zero. Because a zero IDR payment produces no financial recovery, there is no reason to subject the debtor to the risks and burdens IDR programs entail.[34]

Some debtors may be able to maintain a middle-class standard of living while making IDR payments but would not be able to do so on a full-repayment plan. In such cases, courts should carefully weigh how much the poten-

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[26] *See* discussion *infra* Section II.B.3.
[27] *See* discussion *infra* Section II.C.
[28] *See* discussion *infra* Section III.A.
[29] *See* discussion *infra* Sections III.A.1–2.
[30] *See* discussion *infra* Section III.A.3.
[31] *See* discussion *infra* Section III.B.
[32] *See* discussion *infra* Section III.B.
[33] *See* discussion *infra* Section III.B.
[34] *See* discussion *infra* Section III.B.

tial drawbacks of IDR affect the particular debtor in question in determining whether repayment entails undue hardship.[35]

Section III.C discusses how the Article's proposal could be implemented under current precedent. It notes that only some actors, such as Courts of Appeals sitting en banc, are free to completely reformulate *Brunner*.[36] However, existing precedent does not foreclose adoption of the proposed test in some *Brunner* jurisdictions, such as the Second Circuit.[37]

The Article closes by noting, in Section III.D, that the overarching purpose of the loan programs supports reform proposals other than the specific one the Article presents. Diverse parties—an American Bankruptcy Institute commission,[38] a pair of public interest law firms,[39] and a group of law professors[40]—have recently put forward proposals for easing the harsh effects of the *Brunner* test as it is often applied. This piece's discussion of the purpose of the student loan programs provides additional support for each of these valuable suggestions.[41] The overall direction of change is more important than the particular form it takes.

I. The *Brunner* Test: Origin, Adoption, and Outcomes

This Part first describes in Section I.A how the *Brunner* test came into being and the reasons courts have given for adopting it. Section I.B then discusses recent illustrative cases to show how the *Brunner* test's interpretation of "undue hardship" has led to harsh results. In particular, it highlights a 2019 decision of the Fifth Circuit Court of Appeals that applied the *Brunner* standard with almost unbelievable severity.

A. The Origin and Adoption of the Brunner *Test*

Marie Brunner, namesake of the *Brunner* test, faced in late 1982 and early 1983 what appears to be a daunting plight. Suffering from depression and anxiety,[42] she was surviving on a monthly income of $258 in public assistance and $49 in food stamps, plus Medicaid.[43] Her rent was $200 per month.[44] She had sent out over a hundred resumes seeking a job at which she could use the master's degree in social work she received in May 1982,

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[35] *See* discussion *infra* Section III.B.
[36] *See* discussion *infra* Section III.C.
[37] *See* discussion *infra* Section III.C.
[38] *See* ABI Comm'n on Consumer Bankruptcy, Am. Bankruptcy Inst., Final Report of the ABI Commission on Consumer Bankruptcy 2 (2019).
[39] *See* Brief of Amici Curiae National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys at 21, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449 (5th Cir. 2019) (No. 18-11091).
[40] *See* Bruckner et al., *supra* note 5, at 6–7; Jiménez et al., *supra* note 5, at 115.
[41] *See* discussion *infra* Section III.D.
[42] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 757 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).
[43] *See id.*
[44] *See id.*

but had been unable to find a job.[45] She had been pursuing higher education since 1972.[46] In the intervening decade she had, in the court's words "supported herself . . . through a variety of full- and part-time jobs, student loans, and educational stipends."[47] During that time she had never earned more than $9,000 per year.[48] Coincidentally, she owed about $9,000 in student loans.[49]

Brunner filed bankruptcy and ultimately received a discharge of her student loans from the bankruptcy court.[50] The New York State Higher Education Services Corporation, which had guaranteed Brunner's loans and assumed the loans from her original lender,[51] appealed the decision to the district court. There, as that court wrote, Brunner's counsel, "apparently deserted her, for no responsive brief was filed on her behalf."[52] The creditor unsurprisingly prevailed in this one-sided contest, and the district court reversed the bankruptcy court's grant of discharge.[53] Brunner appealed the decision to the Second Circuit, again without a lawyer,[54] and predictably lost again: the appellate court affirmed the district court "[f]or the reasons set forth in the district court's order."[55]

The district court set forth those reasons in a fairly detailed opinion. It started by finding that "the existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient excuse"[56] but that "the statute otherwise gives no hint of the phrase's intended meaning."[57] It therefore turned to the legislative history of the undue-hardship requirement, specifically the 1973 *Report of the Commission on the Bankruptcy Laws of the United States*, which formally proposed restricting student-loan dischargeability.[58] The report asserted that "a loan . . . that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt."[59] It therefore proposed that student loans be nondischargeable during the first five years of repayment absent a showing of "undue hardship."[60] As for the definition of "undue hardship" itself,

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[45] *See id.*
[46] *See id.* at 756–57.
[47] *Id.* at 757.
[48] *See id.*
[49] *See id.* at 753.
[50] *See id.*
[51] *See id.*
[52] *Id.*
[53] *See id.* at 757.
[54] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987).
[55] *Id.*
[56] *Brunner*, 46 B.R. at 753. This Article disputes the court's conclusion. *See* discussion *infra* Section II.A.
[57] *Id.*
[58] H.R. Doc. No. 93-137 (1973).
[59] *Brunner*, 46 B.R. at 753 (quoting H.R. Doc. No. 93-137, at 140, n.15).
[60] *See id.* Congress enacted the Commission's suggestion in 1976. *Id.*

the report called for assessing whether the debtor could maintain a "minimal standard of living" into the future while repaying the loans.[61] The first element of the *Brunner* test, the debtor's present inability to maintain a minimal standard of living while repaying, thus comes from the Commission's report.

The second element of the test, that additional circumstances indicate that the debtor's inability to repay is likely to persist for a significant portion of the repayment period, reflects a greater degree of judicial editorializing. Although the Commission's report contemplated considering future inability to repay, the additional-circumstances requirement comes from the court's view that bankrupt student-loan debtors typically "have only recently ended their education,"[62] so that "they are in all likelihood at the nadir of their earning power."[63] The court thus thought it inappropriate to determine future ability to pay by extrapolating current income, hence the requirement that the debtor show additional circumstances such as "illness," "lack of usable job skills," and/or "the existence of a large number of dependents," indicating likely future incapacity to repay.[64] It was in this connection that the *Brunner* court endorsed the unfortunate phrase "certainty of hopelessness."[65]

The third element of the *Brunner* test, the debtor's good-faith efforts to repay, has an even weaker basis. The court acknowledged that "[t]here is no specific authority for this requirement,"[66] but found indirect support for it in the Commission report. The court said the report justified free dischargeability of student loans after five years on the ground that a debtor might be "unable to repay his or her debts due to 'factors beyond his reasonable control'"[67] and inferred from that idea that only "external circumstances"[68] should be "permitted to justify discharge prior to that time."[69] In addition to this dubious inference, the court relied on "the stated purpose for § 523(a)(8)": curbing abuse of the bankruptcy system in imposing the good-faith-efforts requirement.[70]

The court buttressed its specific arguments for adopting each factor with a general justification for the "draconian" result that student loans were to become a "very difficult burden to shake."[71] As mentioned in the Introduction, the court's ground for this outcome was that it "plainly serves the purposes of the guaranteed student loan program."[72] The court explained its

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[61] *Id.*
[62] *Id.* at 754.
[63] *Id.*
[64] *Id.* at 755.
[65] *Id.* (stating that the phrase, which appeared in an earlier decision, was "perhaps the best articulation" of the idea that courts should require "more than a showing on the basis of current finances that loan repayment will be difficult or impossible").
[66] *Id.*
[67] *Id.* (quoting H.R. Doc. No. 93–137, pt. 1, at 140 n.16 (1973))
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 756.
[72] *Id.*

view—unsupported by citations—that the "quid pro quo" that the government "exacts" for extending credit without considering the student borrower's creditworthiness is "strip[ping] [borrowers] of the refuge of bankruptcy in all but extreme circumstances."[73] Thus, the court's view of the purposes of nondischargeability underlay both its announcement of the individual elements of its test and its general defense of making bankruptcy discharge of student loans very difficult.

As for Marie Brunner, the court found that she "at most proved that she . . . was at the time of the hearing . . . unable both to meet her minimal expenses and pay off her loans."[74] She failed to meet the additional-circumstances element because she was "skilled, apparently capable, well, and without dependents."[75] She failed the good-faith-efforts element because she "filed for discharge within a month of the date the first payment of her loans came due," had "made virtually no attempt to repay," and had not requested deferment of payment.[76] Whether these observations reflect a full or fair account of the situation of the debtor, a pro se litigant who did not know she had to meet the two elements she failed, will probably never be known.

As noted, the *Brunner* test has enjoyed great success in the appellate courts and is followed in eight circuits other than the Second Circuit.[77] In giving reasons for adopting the *Brunner* test, courts have stressed the simplicity and perceived workability of its three-element formulation,[78] as well as the view that *Brunner's* formulation is broad enough to take account of many potentially relevant factors.[79] As the test became better established, courts adopting it began to mention its wide adoption and the importance of uniformity across circuits.[80]

Courts adopting *Brunner* have also relied on their conception of the nature and needs of the student-loan programs. In discarding a test that took account of whether the student actually benefited from the loan-funded education, the Seventh Circuit pronounced that this consideration "conflicts with the basic concept of government-backed student loans."[81] The court did not back its big-picture pronouncement with citations to record or other empirical evidence or grapple with Congress's purpose in creating the student-loan programs.[82]

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[73] *Id.* at 756.
[74] *Id.* at 757.
[75] *Id.* at 758.
[76] *Id.*
[77] *See supra* note 13 and accompanying text.
[78] *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Pa. Higher Educ. Assistance Auth. v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995).
[79] *See Oyler*, 397 F.3d at 385; Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1309 (10th Cir. 2004).
[80] *See Oyler*, 397 F.3d at 385; Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); *Polleys*, 356 F.3d at 1307; *Gerhardt*, 348 F.3d at 91; Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003).
[81] *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).
[82] *See id.* at 1136–37. The *Roberson* court stated in conclusory fashion that "Congress' decision to increase the availability of higher education through student loans does not neces-

Other courts have considered evidence of congressional purpose, but have looked solely at the nondischargeability provision without considering the overall purposes of the programs.[83] This narrow focus was part of what led the Fourth Circuit, for example, to conclude that any student-loan bankruptcy test should promote the congressional purpose of narrowing discharge.[84] Section II.B.3 discusses the error of this out-of-context analysis of statutory purpose.

B. Harsh Results Under the Brunner *Test*

The text of the *Brunner* test is open-ended enough to support reasonable outcomes in some cases. One high-profile example is the recent decision of the Bankruptcy Court for the Southern District of New York in *In re Rosenberg*.[85] In that case, the court—despite being bound by *Brunner*—allowed a distressed debtor to discharge over $220,000 in law-school and undergraduate debt.[86] More broadly, it appears that some 40–60% of student-loan debtors who complete the burdensome process of seeking relief from their student loans in bankruptcy court enjoy at least some degree of success.[87]

Even so, as this Section demonstrates, the text of the *Brunner* test also supports extremely harsh outcomes. Beyond just permitting pitiless results, *Brunner* encourages them in at least two ways. First, a certain degree of harshness is probably inherent in the *Brunner* test. For example, *Brunner* requires the bankrupt debtor to try to repay even if doing so entails a subminimal standard of living, as long as the debtor cannot prove that "additional circumstances" show that the period of penury will cover a "significant portion" of the repayment period.[88] Second, the expressed intent of *Brunner* is to create a that reserves bankruptcy relief for "extreme circumstances," de-

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sarily equate to a decision to insure the future success of each student taking advantage of that opportunity." *Id.* at 1136. It did not explain the basis for this assertion or explain why it did not further pursue the possibility that Congress's purposes for the programs might be relevant to interpreting "undue hardship" even if they did not "necessarily equate" to a decision to "insure" students. *Id.*

[83] *See Frushour*, 433 F.3d at 399–400; *Polleys*, 356 F.3d at 1306–07; *Faish*, 72 F.3d at 304–05. *Faish* cited "our recognition of the Congressional objectives of preventing abuse of the bankruptcy process and protecting the financial integrity of the student loan program." *Faish*, 72 F.3d at 303. It cited *In re Pelkowski*, 990 F.2d 737 (3d Cir. 1993), which considered the legislative history of the nondischargeability provision in isolation. *See* 72 F.3d at 303 (citing *Pelkowski*, 990 F.2d at 740–43).

[84] *See Frushour*, 433 F.3d at 400 (adopting the *Brunner* test in part because it "best incorporates the Congressional mandate to allow discharge of student loans only in limited circumstances"). The *Frushour* opinion also contains a textual argument for limiting dischargeability. *See* discussion *infra* Section II.A.

[85] 610 B.R. 454 (Bankr. S.D.N.Y. 2020).

[86] *See id.* at 457.

[87] *See* Hunt, *Consent, supra* note 5, at 15 n.109 (reviewing studies that have found rates of relief from 39–57%).

[88] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (enumerating the minimal standard of living and additional circumstances/significant portion requirements as separate elements of the test).

spite the fact that that result "may seem draconian."[89] Thus, *Brunner* always encourages, and may sometimes require, great stringency in evaluating applications for discharge.

Many courts have taken up *Brunner*'s invitation to extreme strictness. It is common, for example, to require that the debtor live in or near poverty to satisfy the "minimal standard of living" element of the test.[90] Accounts of some particularly noteworthy cases reaching harsh outcomes follow.

The Fifth Circuit's recent decision in *Thomas v. Department of Education* (*In re Thomas*)[91] illustrates just how heavy-handed application of the *Brunner* test can be. In *Thomas*, the debtor was 62 years old[92] and suffered from incurable diabetic neuropathy, which made it impossible for her to stand for extended periods of time.[93] Her only income was $194 per month in food stamps;[94] her monthly living expenses were $640.[95] Her car had been repossessed[96] and she faced eviction.[97] She had lost her job as a customer service representative in September 2016 for wearing headphones and listening to music during her lunch break,[98] and she had not been able to find a job that did not require standing between then and the bankruptcy court's decision in December 2017.[99]

The bankruptcy court repeatedly expressed sympathy for her situation,[100] but denied discharge. Fifth Circuit precedent had interpreted the *Brunner* test to require the debtor to show that circumstances beyond her control created a "total incapacity" to repay the loan in the future[101]—a standard so demanding, the bankruptcy judge noted, that he had not discharged a single student loan over a lender's objection in 15 years on the bench.[102]

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[89] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

[90] *See* Tingling v. U.S. Dep't of Educ., No. 19-CV-2307, 2020 U.S. Dist. LEXIS 16428, at *26 (E.D.N.Y. Jan. 30, 2020) (stating that the *Brunner* test requires "poverty or near poverty with little possibility of supplemental income" (quoting *In re* Williams, 296 B.R. 298, 303 (Bankr. S.D.N.Y. 2003))); Southard v. Educ. Credit Mgmt. Corp. (*In re* Southard), 337 B.R. 416, 420 (Bankr. M.D. Fla. 2006) ("[A] debtor, 'must show that her financial resources will allow her to live only at a poverty level standard for the foreseeable future if she is obligated to repay her student loan.'" (quoting *In re* Webb, 132 B.R. 199, 202 (Bankr. M.D. Fla. 2006))). Other courts have required poverty without applying the *Brunner* test. *See In re* Medeiros, 86 B.R. 284, 286 (Bankr. M.D. Fla. 1988); *In re* Frech, 62 B.R. 235, 241 (Bankr. D. Minn. 1986); *In re* Erickson, 52 B.R. 154, 157 (Bankr. D.N.D. 1985) (requiring "subsistence or poverty level standard of living").

[91] 931 F.3d 449 (5th Cir. 2019).

[92] *See* Thomas v. Dep't of Educ., 581 B.R. 481, 483 (Bankr. N.D. Tex. 2017), *aff'd*, 931 F.3d 449, 450 (5th Cir. 2019). The Bankruptcy Court's factual findings were not disturbed on appeal.

[93] *See id.*

[94] *See id.* at 484.

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See id.* at 483.

[99] *See id.*; Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450 (5th Cir. 2019).

[100] *See Thomas*, 581 B.R. at 482, 485.

[101] *Id.*

[102] *See id.* at 482.

The debtor "conceded that she [was] unable to show she is completely incapable of any employment now or in the future,"[103] so she failed to meet the "very high hurdle"[104] created by the "taxing"[105] standard of *Brunner*, at least as interpreted in the Fifth Circuit.

The district court affirmed on the same ground,[106] and the appeal came before a panel of the Fifth Circuit. Like the bankruptcy court, the panel also found Ms. Thomas a "sympathetic debtor[ ]."[107] But based on the possibility that she could work a sedentary job, the panel—ignoring the fact that Thomas had not been able to work steadily for over two years—found "no evidence that Ms. Thomas's present circumstances, difficult as they are, are likely to persist throughout a significant portion of the loans' repayment period"[108] and affirmed the denial of discharge.[109] Significantly, the panel thought that the *Brunner* test compelled the harsh result[110] and that under existing Fifth Circuit precedent it had no authority to depart from that test.[111]

Despite its statement that precedent bound its hands, the panel nevertheless went on to defend the position that the in-its-view draconian *Brunner* test is correct. It presented a textual argument that "undue hardship" must mean hardship "greater than the ordinary circumstances that might force one to seek bankruptcy relief."[112] The Article explains why this argument is incorrect in Section II.A, which addresses the ordinary meaning of "undue hardship."

The panel also argued that because Congress had expanded the set of loans subject to the "undue hardship" requirement several times, that "clearly evince[d] an intent to limit bankruptcy's use as a means of offloading student loan debt except in the most compelling circumstances."[113] The court did not explain why expanding the subject matter a requirement covers is relevant to the stringency of the requirement itself.

The decision in *Thomas* confirmed that the Fifth Circuit could be just as severe as the bankruptcy court in *Ward v. United States* (*In re Ward*)[114] apprehended. In that case, the court found that the debtors—a married couple with two children and a third on the way who lived in a 530 square-foot house[115] and were running a monthly deficit[116]—could not maintain a "minimal" standard of living while repaying student loans and therefore met

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[103] *Id.* at 485.
[104] *Id.*
[105] *Id.*
[106] *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 451 (5th Cir. 2019).
[107] *Id.* at 454.
[108] *Id.* at 452.
[109] *See id.* at 455.
[110] *See id.* at 452–53.
[111] *See id.*
[112] *Id.* at 454.
[113] *Id.* at 453.
[114] No. 02-34594-H4-7, slip op. (Bankr. S.D. Tex. May 25, 2004).
[115] *See id.* at 4.
[116] *See id.*

the first element of the *Brunner* test.[117] However, the court denied discharge, finding that their decision "to have children and start a family," though "normal and understandable," was after all within the couple's control.[118] They thus failed to demonstrate that they met the second and third elements of *Brunner* as interpreted in the Fifth Circuit: that circumstances beyond their control indicated that their difficulties would persist[119] or that they had made good-faith efforts to repay the loan.[120] The court concluded: "[T]he Fifth Circuit's view of the choices made by the debtors in this case would not be a sympathetic one."[121] *Thomas* suggests the court's assessment was accurate.

Harsh decisions under *Brunner* are by no means limited to the Fifth Circuit. In the Maryland case of *Stitt v. U.S. Department of Education*,[122] for example, the district court upheld the bankruptcy court's 2014 denial of discharge to a debtor,[123] certified with a disability by the Social Security Administration, who had not worked since 2008,[124] owned personal property valued at $210,[125] and had total annual income, derived from various forms of public assistance,[126] of $10,068,[127] or less than 150% of the poverty level.[128] It upheld the denial even though it apparently assumed for the sake of argument that her disability caused her unemployment.[129] The stated reason was that she had not made a good-faith effort to repay the loans because she did not voluntarily use any of her $11,000 income in 2008 for repayment. That she in fact did pay $774.47 (or 7 percent of her gross income) on the loans that year did not move the court because the government had withheld the amount from her pay: The $774.47 was not paid voluntarily, and as the court chided her, she "used none of the remaining $10,225.53 . . . to repay any portion of her loans."[130]

Although the text of the *Brunner* test allows for both harsh and relatively lenient application, these decisions illustrate that courts frequently apply the test as the *Brunner* court contemplated, so that only the bleakest of life prospects lead to discharge. The Article now turns to whether the statutory text and purpose support such oppressive outcomes.

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[117] *Id.* at 6.
[118] *Id.* at 6–7.
[119] *See id.* at 7.
[120] *See id.*
[121] *Id.*
[122] 532 B.R. 638 (D. Md. 2015).
[123] *See id.* at 645.
[124] She had not been employed since 2008, *see* 532 B.R. at 640, and the bankruptcy court's decision denying discharge was dated February 12, 2014, *see id.* at 641.
[125] *See id.* at 641.
[126] *See id.*
[127] *See id.* at 643.
[128] *See id.*
[129] *See id.* at 644.
[130] *Id.* The court also found that the debtor's failure to consolidate her loans and participate in an income-driven repayment program contributed to the finding of bad faith, but acknowledged that "it is not *per se* lack of good faith to fail to consider such a plan." *Id.* at 643. The failure to repay more than $774.47 of her $11,000 income in 2008 appears necessary to the judgment. *See id.*

C. Summing Up: The Brunner *Test Lends Itself to Harsh Outcomes*

The district court's opinion in *Brunner* proclaims the court's desire to impose a strict, even "draconian," test on student borrowers seeking bankruptcy discharge. Appellate courts across the country have adopted the test in part because they have seen it as simple and workable, but also because it comports with overall views, sometimes derived from the legislative history of the discharge provision taken in isolation, that student-loan discharge should be exceptionally difficult.

To be sure, lower courts bound by *Brunner* often grant relief to student-loan debtors. Nevertheless, the test pushes courts to deny relief to suffering debtors. To some extent, this is inherent in the test itself, which denies relief if the repayment imposes a sub-minimal lifestyle on the debtor, as long as the debtor cannot prove that additional circumstances indicate that the condition will continue for a significant portion of the repayment period and that the debtor has made good-faith efforts to repay. Perhaps more important, the spirit and intent of the test is to reserve relief for the direst cases, thus countenancing harsh results.

And courts continue to reach such outcomes; the Fifth Circuit's *Thomas* case is an important recent example. Cases like *Thomas* raise the question whether a proper interpretation of the statute yields a test that would discourage or even prevent such harsh outcomes, rather than definitely permitting and probably encouraging them.

II. "Undue Hardship" and the Federal Student loan programs: Text and Purpose

This Part discusses how the statutory text "undue hardship" has been and should be interpreted in light of legislative purpose. It first demonstrates that the statutory text is open-ended so that inquiry into legislative purpose is necessary. Then it discusses both the overall purposes of the student loan programs and the narrow purposes of the bankruptcy nondischargeability provision, arguing that the text should be interpreted in light of both sets of purposes and that the general purposes of the programs favor a broad interpretation of the undue-hardship exception to nondischargeability. Finally, Part II demonstrates that courts have ignored the broad purposes of the programs, indicating that judicial interpretation of "undue hardship" has typically been too narrow.

A. The Text of the Statute

The statutory phrase "undue hardship" is not further defined in the Code.[131] Critically, as courts have recognized,[132] the text itself is open-ended and imposes little constraint on judicial discretion.

1. The Ordinary Meaning of "Undue Hardship"

The ordinary meaning of "hardship" does not require a particularly high degree of suffering. The *Oxford English Dictionary* defines "hardship" simply as "something which is hard to bear."[133] Other dictionaries define the term variously as "a condition of life that causes difficulty or suffering,"[134] "a condition that is difficult to endure,"[135] and as "something that makes your life difficult or unpleasant, especially a lack of money, or the condition of having a difficult life."[136] Although other definitions equate "hardship" with "privation" and thus may be more demanding,[137] it is well within the range of normal meanings simply to find that simple difficulty amounts to "hardship."

As previous work has noted,[138] the usual meaning of "undue" is "unjustifiably great."[139] Thus, a showing of hardship, coupled with a showing that

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[131] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Acosta-Conniff (*In re* Acosta-Conniff), 686 F. App'x 647, 648 (11th Cir. 2017); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358 (6th Cir. 2007); Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 943 (9th Cir. 2006); Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 190 (1st Cir. 2006) (noting that "Congress did not attempt to give specific guidance" as to how to apply the undue-hardship standard).

[132] *See, e.g.*, Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 759 (7th Cir. 2015) (describing undue-hardship standard as "open-ended"); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 885 (7th Cir. 2013) (same).

[133] *Hardship*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), https://www.oed.com/view/Entry/84192?rskey=BQfSKs&result=1&isAdvanced=false#eid [https://perma.cc/36E3-BC2B].

[134] *Hardship*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/hardship [https://perma.cc/MVK3-ZZM8].

[135] *Hardship*, DICTIONARY.COM, https://www.dictionary.com/browse/hardship [https://perma.cc/R7RD-F5FW].

[136] *Hardship*, LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH, https://www.ldoceonline.com/dictionary/hardship [https://perma.cc/4TQD-W5SQ]; *see also Hardship*, MACMILLAN DICTIONARY https://www.macmillandictionary.com/us/dictionary/american/hardship [https://perma.cc/4RQ4-A8AL] ("something that makes your life more difficult or unpleasant"); *Hardship*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) ("[t]he condition of lacking necessities or comforts; privation or suffering").

[137] *Undue*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("privation; suffering or adversity").

[138] *See* Hunt, *Tempering*, *supra* note 5, at 764–65.

[139] *See Undue*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("excessive or unwarranted"); *Undue*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), https://www.oed.com/view/Entry/212679?redirectedFrom=undue#eid [https://perma.cc/E4GN-WGNM] ("not appropriate or suitable; improper"; "not in accordance with what is just and right; unjustifiable; illegal"; "going beyond what is appropriate, warranted, or natural; excessive"); *Undue*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/undue [https://perma.cc/TQ9K-D3CM] ("more than is necessary, acceptable, or reasonable"); *Undue*, LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH, https://www.ldoceonline.com/dictionary/

the hardship is unjustifiable, would seem to satisfy the ordinary meaning of the statutory phrase "undue hardship."[140] The use of the modifier "undue" indicates that hardship is not inherently unacceptable under the statute.[141] But beyond that, courts and the Department of Education are left to themselves, armed with legislative purpose and other tools of statutory interpretation, to determine what counts as a hardship and what hardships are unjustifiable.

The Bankruptcy Code uses the formulation "undue hardship" in one context other than student loan nondischargeability.[142] When a debtor seeks to reaffirm a debt, so that it will be enforceable after discharge, the debtor's attorney must file an affidavit stating that the reaffirmed loan will not impose an undue hardship on the debtor.[143] If the debtor is not represented by an attorney, the court generally must determine whether reaffirmation will cause undue hardship.[144] The author's search for a case in which a court has stated that the modifier "undue" means that "undue hardship" under this provision is inherently "uncommon," "rare," "infrequent," "unusual," or other than "garden variety," to list the search terms used, has turned up nothing.

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undue [https://perma.cc/PS9D-K4AJ] ("more than is reasonable, suitable, or necessary"); *Undue*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/undue [https://perma.cc/VPE9-M2S3] ("not necessary or reasonable"); *Undue*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/undue [https://perma.cc/45DG-ZQSQ] ("exceeding or violating propriety or fitness: excessive"). A Google search on "define undue" returned the result "unwarranted or inappropriate because excessive or disproportionate." Search for "Define Undue," GOOGLE, https://www.google.com/ [https://perma.cc/6AMQ-QGL4] (search "define undue").

[140] The author found no relevant dictionary definition of "undue" that omitted the element of justifiability. ("Undue" can also mean "not properly owing or payable," *Undue*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), https://www.oed.com/view/Entry/212679?redirectedFrom=undue#eid [https://perma.cc/C8U4-6QFF], which is irrelevant here.) The *Oxford English Dictionary*'s "going beyond that which is . . . natural" seems, based on the quotations it cites, to use "natural" in a normative sense, not one that purely denotes frequency. *See id.* ("He seems to own they are both chargeable with some instances of undue Warmth and Zeal;" "Pleasure admitted in undue degree, Enslaves the will."). At least one appellate court recognized that the "ordinary meaning" of "undue" is "unwarranted" or "excessive," but, curiously, immediately thereafter stated that "[b]ecause Congress selected the word 'undue,' the required hardship . . . must be more than the usual hardship that accompanies bankruptcy." *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 399 (4th Cir. 2005).

[141] Interpreting "undue hardship" to mean "any hardship" arguably renders the word "undue" surplus. As one leading treatise puts it, courts "usually" state that they "assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally," although "[c]ourts may eliminate or disregard words in a statute to effect legislative intent or meaning." 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:37 (7th ed. 2018). The argument that "undue" must be given some meaning excludes only those interpretations that define all hardship as inherently undue. As long as an interpretation of "undue hardship" allows for the possibility that some hardship may be acceptable, the interpretation may encompass all actually existing hardships as "undue."

[142] *See* Ashley M. Bykerk, Comment, *Student Loan Discharge: Reevaluating Undue Hardship Under a Presumption of Consistent Usage*, 35 EMORY BANKR. DEV. J. 509, 519 (2019).

[143] *See* 11 U.S.C. § 524(c)(3)(B) (2018 & Supp. I 2019).

[144] *See id.* § 524(c)(6)(A)(i). The judicial-determination requirement of Section 524(c)(6) does not apply to reaffirmation of consumer debts secured by real property. *See id.* § 524(c)(6)(B).

Thus, the notion that "undue" hardship is by its nature uncommon does not appear to be applied consistently in the bankruptcy context. The phrase "undue hardship" does not require that discharge be granted only for unusual or extreme hardships. As noted, the ordinary meaning of "undue" is "unjustifiable," not "uncommon."[145] Unjustifiable hardships may be common or uncommon.

2. Courts' Misplaced Textual Arguments

Thus, the district court in *Brunner* erred when it pronounced that Congress's use of the word "undue" in itself means "Congress viewed garden-variety hardship as insufficient."[146] The Fourth Circuit made the same mistake when it adopted the *Brunner* test in *Educational Credit Management Corp. v. Frushour* (In re *Frushour*).[147] After a promising start, stating that "undue" means "unwarranted," the court passed without explanation to the assertion that "[b]ecause Congress selected the word 'undue,' the required hardship under § 523(a)(8) must be more than the usual hardship that accompanies bankruptcy."[148]

The Fifth Circuit's recent *Thomas* decision, discussed above, propagated the error. It also relied on the "plain text" of Section 523(a)(8), apparently believing that the *Oxford English Dictionary*'s definitions of "undue" as "going beyond what is appropriate, warranted, or natural" or "excessive" and of "[h]ardship" as a "state of want or privation" compelled the following conclusion:

> The threshold by definition must be greater than the ordinary circumstances that might force one to seek bankruptcy relief. As the *Frushour* court explained, "Inability to pay one's debts by itself cannot be sufficient; otherwise all bankruptcy litigants would have undue hardship. The exception would swallow the rule, and Congress's restriction would be meaningless."[149]

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[145] One dictionary does give a definition of "undue" as "exceeding what is appropriate or normal," thus incorporating the concepts both of unjustifiability and infrequency. *See Undue*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011). This is the only dictionary the author has located that includes the concept of infrequency, as such, at all, and it does not exclude the idea of unjustifiability. It thus provides no support for the proposition that "undue" *must* mean "infrequent," as some courts have held. *See* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 454 (5th Cir. 2019) ("The threshold by definition must be greater than the ordinary circumstances that might force one to seek bankruptcy relief."); *Frushour*, 433 F.3d at 399. Moreover, this dictionary provides only very limited support for the proposition that "undue" even *can* mean "infrequent," divorced from any idea of justifiability: the term "normal" connotes a favorable evaluation, that is, a positive normative judgment. *See Normal*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), https://www-oed-com.ezp-prod1.hul.harvard.edu/view/Entry/128269?redirectedFromN%rmal#eid [https://perma.cc/6446-TC8Y] (defining "normal" as "[c]onstituting or conforming to a type or standard").

[146] Brunner v. N.Y. State Higher Educ. Servs. Corp. *(In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[147] 433 F.3d at 400 ("We now adopt the *Brunner* test for Chapter 7.").

[148] *Id.* at 399.

[149] 931 F.3d at 454 (citation omitted).

Thus, at least two circuit courts have cited the text for an infrequency requirement that it simply does not provide. In fact, the ordinary meaning of the text contains very little to guide or constrain courts or the U.S. Department of Education[150] in deciding what hardships are "undue." These actors should therefore look to statutory purpose to aid in interpretation.[151] The Article now turns to that issue.

B. The Purposes of the Statute

In selecting from the many possible definitions of "undue hardship" that are consistent with the statutory text, courts and the Department of Education should be guided not just by the narrow purpose of the nondischargeability provision itself, but also the broader purpose of the overall statutory scheme, that is, the overarching purposes of the student loan programs.[152] Unfortunately, to date courts have concentrated narrowly on the purposes of the nondischargeability provision in isolation, which naturally disfavor discharge. They have largely ignored the overall purposes of the student loan program, which favor discharge. For its part, the Department has given only cursory explanations of its discharge consent policies and has ignored statutory purpose altogether.[153]

1. Broad Goals of the Federal Student Loan Programs

As previous research has demonstrated, Congress has, at various times, embraced at least four overarching goals in designing the federal student loan programs. These are providing equality of access to higher education,[154]

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[150] The Department of Education has a role in interpreting "undue hardship" insofar as it creates the rules governing when federal student-loan holders will consent to bankruptcy discharge, and those regulations use the concept of "undue hardship." *See* John Patrick Hunt, *The Development of Federal Student Loan Bankruptcy Policy*, 45 J.C. & U.L. 85, 88 (2020) (tracing the Department of Education's regulations governing bankruptcy of debtors in federal student loan programs). The Department has said that Congress "has not delegated to the Department the authority to" define undue hardship and that the phrase in its regulations invokes the "legal standard" that "[f]ederal courts have established." 2015 Dear Colleague Letter, *supra* note 2, at 3. Nevertheless, the Department interprets the statutory term when it makes decisions to consent to or to oppose discharge under its own regulations, which use the statutory phrase. *See* Hunt, *Consent, supra* note 5, at 1173-74. However, records of these decisions and their basis are not to the author's knowledge made public.

[151] *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 81 (2010) (nothing that judges "faced with open-ended language and a difficult interpretive question rely heavily on purposes and related consequences."); John F. Manning, *The New Purposivism*, 2013 SUP. CT. REV. 113, 173 ("Certainly . . . when an interpreter makes sense of an open-ended statute, it is appropriate if not necessary to read such a statute in light of the broad purposes that inspired its enactment."); *see also* Hunt, *Tempering, supra* note 5, at 763–66 (arguing that "undue hardship" requirement should be interpreted in light of statutory purpose).

[152] *See* Hunt, *Tempering, supra* note 5, at 764–65. In general, key arguments of this section are outlined in *id.* at 763–66. They are developed here in somewhat more detail with additional support.

[153] *See* Hunt, *supra* note 150, at 111–12 (2020).

[154] *See* Hunt, *Tempering, supra* note 5, at 732–36.

educating the population for the benefit of the country,[155] enabling free choice of career for students,[156] and benefiting students.[157]

Likewise, previous research has demonstrated that expansive student-loan nondischargeability[158] likely interferes with achieving each of these goals.[159] Each goal is discussed briefly here in turn.

Nondischargeability probably interferes with equality of access to education. Low-income,[160] Latinx,[161] and possibly Asian-American[162] students exhibit greater reluctance than other groups to incur student debt that might make higher education possible.[163] Nondischargeability exacerbates the pain of educational expenses that do not lead to economic success, so it stands to reason that nondischargeability not only reduces access directly, but also makes access to education less meaningful for members of these groups. As Professor Jonathan Glater has written, "[a]ccess is meaningful when education opportunity extends beyond enabling matriculation to encompass the chance both to excel while enrolled and to pursue a career unburdened by excessive debt."[164]

A broad interpretation of nondischargeability reduces education's benefit to the country not only because the fear of unmanageable and nondischargeable debt probably deters students from pursuing education in the first place, but also because unmanageable debt has been linked to dropping out

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[155] *See id.* at 736–38.

[156] *See id.* at 738–40.

[157] *See id.* at 740–42.

[158] As noted, student loans are dischargeable in bankruptcy if, and only if, the borrower demonstrates that repayment would impose an undue hardship. *See* 11 U.S.C. § 523(a)(8) (2018 & Supp. I 2019). This article uses the shorthand term "nondischargeability" to refer to this conditional nondischargeability of student-loan in debt.

[159] The empirical research that is the basis for the claim that an overly restrictive interpretation of "undue hardship" undermines the goals of the student loan programs is discussed in more detail in previous work. *See* Hunt, *Tempering, supra* note 5, at 742–62.

[160] *See* THOMAS G. MORTENSON, ACT STUDENT FINANCIAL AID RESEARCH REPORT SER. 88-2, ATTITUDES OF AMERICANS TOWARD BORROWING TO FINANCE EDUCATIONAL EXPENSES 1959–1983, at 14 (1988) ("The group that thinks least favorably toward loans is the lowest income population."); Claire Callender & Geoff Mason, *Does Student Loan Deter Higher Education Participation? New Evidence from England*, 671 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 20 (2017) ("Debt-averse attitudes remain much stronger among lower-class students than among upper-class students."); Claire Callender & Jonathan Jackson, *Does the Fear of Debt Deter Students from Higher Education?*, 34 J. SOC. POL'Y 509, 509 (2005) ("[T]hose from low social classes are more debt averse than those from other social classes.").

[161] *See* MORTENSON, *supra* note 160, at 21; Angela Boatman et al., *Understanding Loan Aversion in Education: Evidence from High School Seniors, Community College Students, and Adults*, 3 AERA OPEN 1, 1 (2017); *see also* ALISA F. CUNNINGHAM & DEBORAH A. SANTIAGO, INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T? 18 (2008) (reporting Latinx students have lower-than-average rates of borrowing).

[162] *See* CUNNINGHAM & SANTIAGO, *supra* note 161, at 18 (reporting that Asian-American students have lower-than-average rates of borrowing and reporting debt-averse attitudes expressed in focus groups).

[163] *See* Hunt, *Tempering, supra* note 5, at 743–45 (reporting in detail on empirical studies of debt aversion and its relationship to access to higher education).

[164] Jonathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 LAW & CONTEMP. PROBS. 89, 91 (2016).

of educational programs once enrolled.[165] High undergraduate debts also have been found to cause students not to attend graduate school.[166] Moreover, a basic proposition of American bankruptcy law is that unmanageable debts deter full participation in the economy and society.[167] Inability to escape student debts in bankruptcy perpetuates such "debt overhang" and prevents educated debtors from using their learning to benefit the nation.

Overly far-reaching interpretations of nondischargeability undermine freedom of career choice. Student debt leads students not to choose lower-paying public interest careers,[168] and nondischargeability increases the risk of doing so.[169] Moreover, courts routinely tell bankrupt debtors that they should abandon low-paying fields for which they have been trained in order to make more money to service debt.[170] Finally, if an overwhelmed debtor gives up in despair because debt payments make it pointless to work—in other words, because of debt overhang—the debtor is not meaningfully exercising freedom of career choice.[171]

And broad nondischargeability renders much student debt harmful rather than helpful for students. Much research documents that unmanageable consumer debt in general[172] and unmanageable student-loan debt in

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[165] *See* Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133, 1146 fig. 2 (2012) (reporting that for students at four-year public universities, increases in debt beyond $10,000 were associated with a lower probability of graduation, especially for students from families in the bottom 75% of the income distribution); *see also* Holtorf v. Ill. Student Assistance Comm'n (*In re* Holtorf), 204 B.R. 567, 568 (Bankr. S.D. Cal. 1997) (reporting, in findings of uncontested fact, that depression over prospects of repaying student loans contributed to debtor's dropping out of medical school); Hunt, *Tempering, supra* note 5, at 747–48 (describing studies in more detail).

[166] *See* Vyaceslav Fos et al., Debt and Human Capital: Evidence from Student Loans 1, 3 (Aug. 2017), https://site.stanford.edu/sites/g/files/sbiybj8706/f/debt_humancapital_v14.pdf (reporting that study of 265,000 student debtors "strongly supports a causal interpretation" of the association between high undergraduate student debt and not enrolling in graduate school).

[167] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934); *see also* Hunt, *Tempering, supra* note 5, at 753–56 (developing this argument in further detail).

[168] *See* Jesse Rothstein & Cecelia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. PUB. ECON. 149, 149 (2011) (finding based on study of one college's transition from loan-based to grant-based aid that "debt causes graduates to choose substantially higher-salary jobs and reduces the probability that students choose low-paid 'public interest' jobs").

[169] *See* Hunt, *Tempering, supra* note 5, at 749–50.

[170] *See, e.g.*, U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 92–93 (5th Cir. 2003); Matthews-Hamad v. Educ. Credit Mgmt. Corp. (*In re* Matthews-Hamad), 377 B.R. 415, 422 (Bankr. M.D. Fla. 2007); *see also* Hunt, *Tempering, supra* note 5, at 751–53 (describing such cases in more detail).

[171] *See* Hunt, *Tempering, supra* note 5, at 753.

[172] *See, e.g.*, Thomas Richardson et al., *The Relationship Between Personal Unsecured Debt and Mental and Physical Health*, 33 CLINICAL PSYCH. REV. 1148, 1153 (2013) (reporting, based on meta-analysis of sixty-five studies with a pooled sample size of 34,000, that debt is associated with "presence of a mental disorder, depression, suicide completion, suicide completion or attempt, problem drinking, drug dependence, neurotic disorders . . . and psychotic disorders"); *see also* Hunt, *Tempering, supra* note 5, at 758-59 (describing this body of research in more detail).

particular[173] can cause harm and that such harm is distributed along racial and ethnic lines,[174] although little addresses whether the benefits of debt-funded education outweigh the harms of debt.[175] The scant findings that do exist seems to suggest that debt-funded education is beneficial on net in most cases.[176] But for student-loan debtors who seek bankruptcy protection, it is much more likely that the harm of debt outweighs the benefits of education. Nondischargeability perpetuates such net harms.

Thus, overbroad nondischargeability appears to be in conflict with the overall goals of the federal student loan programs. That is not a reason to read Section 523(a)(8) out of the statute, but it is a reason to interpret the nondischargeability provision more narrowly than would be the case if these broader purposes did not exist.

2. The Narrow Purposes of the Nondischargeability Provision

Congress had two major purposes in enacting student-loan nondischargeability: preventing abuse of the bankruptcy system and promoting financial recovery from debtors.[177] Each is discussed in turn.

Student-loan nondischargeability has an unmistakable moralistic basis. Scholars[178] and courts[179] agree that part of nondischargeability's purpose is to

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[173] *See* Hunt, *Tempering, supra* note 5, at 759–60 (describing studies linking student-loan debt to lower post-graduation income, lower future net worth (excluding student loans from net worth), lower satisfaction with personal finances, lower probability of owning a house or car or of getting married, higher risk of future financial difficulties, lower probability of pursuing further education, lower self-reported mental health, greater risk of material and health-care hardship and of financial difficulty, and lower life satisfaction and overall well-being).

[174] *See, e.g.*, JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION 1 (2016), https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf [https://perma.cc/TBC9-4JP5] (reporting that upon graduation, African American college graduates owe $7,400 more on average than White graduates); Michal Grinstein-Weiss et al., *Racial Disparities in Education Debt Burden Among Low- and Moderate-Income Households*, 65 CHILDREN & YOUTH SERVS. REV. 166, 166 (2016) (finding based on a study of a low- and medium-income sample that "the odds of student loan indebtedness are twice as high for LMI Black students as for White students"); Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS tbl. 4 (Oct. 16, 2017), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/ [https://perma.cc/8SW4-DGND] (reporting that among students who entered college in 2003–2004 and took out federal loans for undergraduate education, 49% of African American borrowers and 21% of White borrowers defaulted within twelve years after entry); *see also* Hunt, *Tempering, supra* note 5, at 760–61 (describing empirical research on this subject in more detail). Moreover, higher education seems less likely to protect African-American people from bankruptcy than White people. *See* Atkinson, *supra* note 5, at 11–12.

[175] *See* Hunt, *Tempering, supra* note 5, at 761.

[176] *See* Hunt, *Tempering, supra* note 5, at 761–62.

[177] *See* Hunt, *Help*, *supra* note 5, at 1310–11 (summarizing results of review of legislative history).

[178] *See* Hunt, *Help*, *supra* note 5, at 1310 (purpose of countering "abuse"); Pardo & Lacey, *Undue Hardship*, *supra* note 5, at 419–32 (discussing the "stereotype of the abusive student loan debtor" and its importance to the enactment of the dischargeability limit); John A.E. Pottow, *The Nondischargeability of Student Loans in Bankruptcy: The Search for a Theory*, 44 CAN. BUS.

block some form of abusive behavior by student-loan borrowers. However, just what behavior is "abusive," and therefore is to be curbed by nondischargeability, is less clear.

Based on the legislative history of student-loan nondischargeability, scholars have concluded that the core abuse Congress was determined to prohibit was the use of bankruptcy to discharge student-loan debt soon after graduation and early in a high-paying career that the education loans themselves made possible.[180] Accordingly, we might define a "core opportunist" as someone who seeks to discharge loans at or around graduation before starting out on a career that (a) was made possible by the loans and (b) pays more than the career the debtor could have pursued without the loans. Even under a narrow construction of undue hardship, any hardship core opportunists suffer arguably is not undue.

Beyond such core cases, the legislative history gives only general guidance about what conduct counted as the "abuse" Congress intended to prohibit. The Bankruptcy Commission report that introduced the idea of limiting student-loan discharge expressed concern over the discharge of student loans "without any real attempt to repay"[181] and without "extenuating circumstance."[182] The House committee report on the first statute limiting student-loan dischargeability expressed a concern with crafting a limit that reflected the "student's ability to repay."[183] In the House debate over student-loan dischargeability in the 1978 Bankruptcy Reform Act, Representative Michel viewed the "moral" issue as being combating "irresponsibility."[184] Together, these statements add up to an unmistakable, if vague, sense that students who have the "ability" to repay have a "moral" duty not to be "irresponsible" and to make a "real attempt" to repay—at least absent "extenuating circumstances."[185]

L.J. 245, 248 n.16 (2006) (noting concern of Bankruptcy Commission with "potential abuses").

[179] *See* 4 Collier on Bankruptcy ¶ 523.14 (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2020) (stating that "preventing abuses of the educational loan system by restricting the ability to discharge a student loan shortly after graduation" is one of two purposes courts have focused on in applying student-loan nondischargeability).

[180] *See* Hunt, *Help*, *supra* note 5, at 1310–11; Pardo & Lacey, *Undue Hardship*, *supra* note 5, at 427 (discussing the importance to nondischargeability of "the stereotype of the abusive student loan debtor—that is, the recent graduate on the eve of a lucrative career."); Pottow, *supra* note 5, at 276 (stating the theory for student-loan nondischargeability that "comes closest to persuasion" is "that of the opportunistic debtor, 'softly' defrauding the system if she walks away from publicly subsidized debt that enables a high-income career").

[181] H.R. Doc. No. 93-137, pt. 1, at 170 (1973).

[182] *Id.* at 177.

[183] H.R. Rep. No. 94-1232, at 14 (1976).

[184] 124 Cong. Rec. 1,795 (1978) (statement of Rep. Michel).

[185] For more complete accounts of the legislative record, consistent with the description given in the text, see Hunt, *Help*, *supra* note 5, at 1300–12; Pardo & Lacey, *Undue Hardship*, *supra* note 5, at 419–28.

3. Courts' Promotion of Narrow Statutory Goals But Not Broad Ones

In interpreting the statutory phrase "undue hardship," courts have relied extensively on the narrow purpose of the student-loan nondischargeability provision, including on its legislative history.[186] Most notably, the district court's reasoning in *Brunner* itself was "[b]ased on legislative history,"[187] specifically the legislative history of the nondischargeability provision.[188] The appellate opinion in *Brunner* "explicitly incorporated the reasoning of the district court *in toto*,"[189] and many other appellate decisions interpreting Section 523(a)(8) have relied on its legislative history.[190]

By contrast, courts generally have not considered how nondischargeability relates to the federal student loan programs' broad purposes when they have construed "undue hardship." To be sure, courts often state (without citing evidence) that nondischargeability helps ensure the programs' survival,[191] and at least two have explicitly drawn the connection between

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[186] *See* Hunt, *Tempering, supra* note 5, at 763 & n.265 (collecting cases). For recent examples, see Holguin v. Nat'l Collegiate Student Loan Tr. 2006-2 (*In re* Holguin), 609 B.R. 878, 884 (Bankr. D.N.M. 2019) ("Making student loans non-dischargeable in bankruptcy serves the purpose of 'safeguarding the financial integrity of government entities and nonprofit institutions that participating in educational loan programs." (quoting 4 COLLIER ON BANKRUPTCY ¶ 523.14(1) (Richard Levin & Henry J. Sommer eds., 16th ed.))); Juber v. Conklin (*In re* Conklin), 606 B.R. 664, 678 (Bankr. W.D.N.C 2019) (concluding that the "congressional purpose of § 523(a)(8)" is "to ensure the availability of educational financing"). A less detailed version of the argument in this section appears in Hunt, *Tempering, supra* note 5, at 765–66.

[187] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

[188] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753–54 (Bankr. S.D.N.Y. 1985) (reviewing legislative history of nondischargeability provision), *aff'd*, 831 F.2d 395 (2d Cir. 1987); *id.* at 755 (citing legislative history as justification for imposing good-faith requirement on debtor). The *Brunner* court asserted that nondischargeability "plainly serves the purposes of the guaranteed student loan program," 46 B.R. at 756, but did not actually explain why this was the case. Its subsequent discussion explains that the government "exacts a *quid pro quo*" in return for its "largesse" in making loans available to students who otherwise wouldn't be able to get them. *Id.* The court's argument attempts to show that nondischargeability is fair to the borrower, not that it serves the purposes of the loan program.

[189] Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 943 (9th Cir. 2006).

[190] *See, e.g.*, *id.* at 943 ("[B]ecause the legislative history was influential in the development of the *Brunner* test, we discuss it again here."); Boston Univ. v. Mehta (*In re* Mehta), 310 F.3d 308, 315 (3d Cir. 2002) (relying on a previous decision's analysis of the legislative history of Section 523(a)(8)); Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 86–88 (2d Cir. 2000); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 302 (3d Cir. 1995) (adopting *Brunner* test based in part on Congressional intent as revealed by legislative history of Section 523(a)(8)); Santa Fe Med. Servs. v. Segal (*In re* Segal), 57 F.3d 342, 348–49 (3d Cir. 1995); Hiatt v. Indiana State Student Assistance Comm'n, 36 F.3d 21, 23–24 (7th Cir. 1994); United States v. Wood, 925 F.2d 1580, 1583 (7th Cir. 1991); Nunn v. Washington (*In re* Nunn), 788 F.2d 617, 618–19 (9th Cir. 1986); Johnson v. Edinboro State Coll., 728 F.2d 163, 164–65 (3d Cir. 1984); Wis. Higher Educ. Aids Bd. v. Hogan (*In re* Hogan), 707 F.2d 209, 211 (5th Cir. 1983); Bd. of Regents of the Univ. Sys. of Ga. v. Williamson (*In re* Williamson), 665 F.2d 683, 685 (5th Cir. 1982); Wis. Higher Educ. Aids Bd. v. Lipke, 630 F.2d 1225, 1229–31 (7th Cir. 1980); N.Y. State Higher Educ. Servs. Corp. v. Adamo (*In re* Adamo), 619 F.2d 216, 219–21 (2d Cir. 1980).

[191] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 399–400 (4th Cir. 2005) (citing avoiding "fiscal doom" and "ensuring public support" as rea-

survival and accomplishing the programs' purposes.[192] But beyond the generic assertion that nondischargeability advances the student loan programs' purposes by helping them survive, courts apparently have not considered overarching purpose at all.[193] Much less have they addressed the conflict between nondischargeability and the programs' overall goals discussed in this Article.

The argument that nondischargeability helps secure the programs' existence is speculative: No court seems to have cited any evidence that nondischargeability actually improves the financial health or public standing of the loan programs, much less that full dischargeability would actually imperil their survival. Nor is the author aware of such evidence. Moreover, even assuming that nondischargeability aids the programs' viability, courts should weigh the countervailing effects on achieving the programs' purposes discussed here.

As a practical matter, courts probably cannot require rigorous scientific proof for every empirical proposition they rely on. The assumptions that nondischargeability builds public support for student loan programs and increases collections may be within the range of reasonable inference. But courts that are willing to entertain such propositions on the ground that they are plausible certainly should not insist on unrealistically exacting standards of empirical proof for more plausible propositions on the other side of the scale: that nondischargeability interferes with equality of access, benefiting society through education, freedom of career choice, and conferring aid on students.[194] As previous work has shown, the existing empirical case for these effects is strong, even if more work would further confirm them.[195] The evidence for them already clears the low bar that courts have set for considering consequences of student-loan nondischargeability.

C. Summing Up: One-Sided Consideration of Purpose Warps Doctrine

To sum up, Congress acted to combat abuse and promote financial recovery by creating an undue-hardship requirement, the stringency of which is unclear. In setting the difficulty of meeting the requirement, courts have

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sons for nondischargeability). The discussion in *Frushour* has been cited repeatedly, including by courts outside the Fourth Circuit. *See* Doernte v. Educ. Credit Mgmt. Corp. (*In re* Doernte), Bankr. No. 10-24280-JAD, 2017 WL 2312226, at *2 (Bankr. W.D. Pa. May 25, 2017); Jones v. Educ. Credit Mgmt. Corp. (*In re* Jones), 495 B.R. 674, 684 (Bankr. E.D Pa. 2013).

[192] *See, e.g.*, Williams v. N.Y. State Higher Educ. Servs. Corp. (*In re* Williams), 296 B.R. 298, 302 (S.D.N.Y. 2003) (concluding Congress intended nondischargeability "to reduce bankruptcy defaults, and thereby advance the original purposes of student loan programs, *i.e.* to assure that students . . . would have . . . access to low interest rate loans" (quoting Elmore v. Mass. Higher Educ. Assistance Corp. (*In re* Elmore), 230 B.R. 22, 25 (Bankr. D. Conn. 1999))).

[193] This conclusion is based on the author's review of the 113 results of the following search in Westlaw's federal cases database on January 23, 2020: "student loan" and "undue hardship" and (purpose /s "student loan" /s program).

[194] *See* discussion *supra* Section II.B.1.

[195] *See* discussion *supra* Section II.B.1; *see also* Hunt, *Tempering*, *supra* note 5, at 742–62.

fixed on controlling abuse and recovering money—the narrow goals of nondischargeability taken in isolation. They have not considered how the difficulty level they set might affect achievement of the overall goals of the federal student loan programs: equality of access, promotion of higher education, freedom of career choice, and benefiting students. Making it too difficult to discharge student loans interferes with all these goals, as previous research has shown.[196] Considering Congressional purposes that suggest that discharge should be difficult while ignoring those that suggest that discharge should not be difficult has led to a body of doctrine that, while varied, on the whole makes it too difficult to escape student loans in bankruptcy.

III. Reformulating or Reinterpreting *Brunner*

The overall purposes of the student loan programs counsel a narrow application of student-loan bankruptcy nondischargeability. Previous work has addressed how this idea should play out in certain specific factual settings.[197] However, scholars (and courts and the Department of Education) have not addressed how taking the broad purposes of the student loan programs affects the overall formulation of the undue-hardship standard.

This Part undertakes that task. It puts forth a proposal for defining "undue hardship" and shows how the proposed standard effectuates Congress's purpose, then discusses how income-driven repayment programs would figure into the analysis under the proposal, and then addresses how the suggested standard could be implemented. The Part then shows that the call for leniency here supports not just the Article's specific recommendations, but also other recent calls for re-envisioning "undue hardship" under the Code. It closes by summarizing the argument.

A. A Proposal for Defining "Undue Hardship"

This Article proposes that a student-loan borrower who can show by a preponderance of the evidence[198] that they cannot entirely repay their loans

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[196] *See* discussion s*upra* Section II.B.1; *see also* Hunt, *Tempering, supra* note 5, at 742–62.

[197] These settings include situations where borrowers have been educated in low-paying fields, have especially high debt-income ratios, or are particularly likely to have been harmed by their student loans. *See* Hunt, *Tempering*, *supra* note 5, at 773–83.

[198] The appellate courts that have addressed the burden of proof under the *Brunner* test have stated that the debtor must meet each element by a preponderance of the evidence. *See* Educ. Credit Mgmt. Corp. v. Acosta-Conniff (*In re* Acosta-Conniff), 686 F. App'x 647, 649 (11th Cir. 2017); Lepre v. Dep't of Educ. (*In re* Lepre), 530 F. App'x 121, 123 (3d Cir. 2013); Traversa v. Educ. Credit Mgmt. Corp (*In re* Traversa), 444 F. App'x 472, 474 (2d Cir. 2011); Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 543–44 (4th Cir. 2008); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358–59 (6th Cir. 2007); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559, 565 (7th Cir. 2003); *see also* Walker v. Sallie Mae Serv'g Corp. (*In re* Walker), 650 F.3d 1227, 1230 (8th Cir. 2011) (preponderance-of-the-evidence burden of proof applies where the totality-of-the-circumstances standard is applicable).

in a reasonable period while maintaining a middle-class standard of living has made a prima facie case of undue hardship. If discharge would take effect during the first five years in repayment, the creditor or servicer could rebut the borrower's showing by proving that the borrower did not engage in good-faith efforts to repay. The inquiry into good-faith efforts to repay would focus on whether the debtor is or closely resembles a "core opportunist" as this Article has defined the term,[199] and would therefore be much more closely tailored to Congress's purpose in enacting the undue-hardship requirement than it is under some applications of the *Brunner* test today. As described in more detail in Section III.B, making the proposed showing would be sufficient to show undue hardship, but not necessary.

The test has three open-ended terms: "middle-class standard of living," "reasonable period," and "good-faith efforts to repay." Each is explained in further detail below. With these terms fleshed out as described, the proposed test exhibits the supposed virtues that have made the *Brunner* test so attractive to appellate courts: it is just as simple[200] as the *Brunner* test, is more determinate,[201] and gives due regard to Congress's purpose in enacting nondischargeability.[202] And it has one major advantage over the *Brunner* test from the standpoint of statutory purpose: by taking account of how nondischargeability interferes with the overall goals of the student loan programs, it honors the global purpose of the statutory scheme rather than focusing narrowly on the purpose of nondischargeability in isolation.

Although this Article focuses on congressional purpose as the primary justification for adopting the new test, there are other good reasons to make bankruptcy relief more readily available. A critical one is that doing so stands to alleviate the racial disparities in the harm of excessive student debt. Professors Dalié Jiménez and Jonathan Glater have recently completed a major study of student debt as a civil rights issue. They observe that African-American students "are disproportionately likely to borrow, to borrow larger amounts, to take out student loans to attend for-profit schools with worse career outcomes, and to default on their loans relative to their White peers."[203] Latinx student borrowers borrow nearly as much as White students, and are more likely to attend a for-profit institution and more likely to default than White students.[204] The for-profit schools African-American and Latinx students are more likely to attend have lower graduation rates

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[199] *See* discussion *supra* Section II.B.2.

[200] *See, e.g.*, Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005) ("[W]e opt to join other circuits in adopting the simpler rubric of the *Brunner* test.").

[201] *See, e.g.*, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 455 (5th Cir. 2019) (nothing that using *Brunner* standard avoids risk of "intolerable inconsistency of results").

[202] *See, e.g.*, *id.* at 454 ("Congress intended to make student loan debt harder to discharge than other types of consumer debt [and *Brunner* standard] fulfills that intent.").

[203] *See* Dalié Jiménez & Jonathan Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 132–33 (2020).

[204] *See id.* at 133.

than other institutions,[205] and many for-profit institutions have closed amidst lawsuits and investigations.[206]

Thus, the evidence suggests that African-American and Latinx borrowers can benefit disproportionately from a more forgiving bankruptcy standard. Easing bankruptcy relief by reformulating the undue-hardship standard is, like the measures Jiménez and Glater propose in their article, a "socioeconomically egalitarian reform that [is] facially race-neutral but . . . disproportionately benefit[s] members of historically subordinated groups."[207]

1. "Middle-Class Standard of Living"

The proposed standard ties to the statutory text through the notion that living a sub-middle-class lifestyle, or being saddled with student loans for too long a period, is "hardship." This notion has support in the scholarly literature; Robert Salvin argued in 1996 (on different grounds) that borrowers should be eligible for discharge if they cannot maintain a middle-class lifestyle while repaying student loans.[208]

As noted, nondischargeability perpetuates unmanageable debt and therefore interferes with the student loan programs' goals of providing equal access, increasing the nation's educational level, promoting freedom of career choice, and benefiting students. The higher the income level at which discharge is possible, the smaller these effects are likely to be: if borrowers know that loans will not sentence them to penury, it is reasonable to assume they will be more willing to invest in themselves,[209] not discontinue their education because of hopeless debt,[210] and take on useful careers that promise fewer financial rewards.[211] Moreover, raising the income level for which discharge is possible will directly reduce the harm student loans inflict on some unfortunate debtors.[212] These heretofore ignored benefits are as relevant to congressional purpose and the proper construction of "undue hardship" as are the countervailing values of combating abuse and promoting financial recovery.

Courts and the Department of Education should balance these countervailing values when they set a specific threshold for bankruptcy relief. In

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[205] *See id.* at 145, 147.

[206] *See id.* at 147.

[207] *Id.* at 140.

[208] *See* Salvin, *supra* note 5, at 139 (arguing that because of bankruptcy's general fresh-start policy, "undue hardship should be found to exist for any debtor who will not be able to maintain a middle-class lifestyle and at the same time repay student debt"). Salvin's argument is not, however, based on the purposes of the federal student-loan programs.

[209] *See, e.g.*, Fos et. al., *supra* note 166, at 3.

[210] *See, e.g.*, Dwyer et. al., *supra* note 165, at 1146 fig.2.

[211] *See* Rothstein & Rouse, *supra* note 168, at 149.

[212] *See* Richardson et al., *supra* note 172, at 1153 (reporting, based on meta-analysis of sixty-five studies with a pooled sample size of 34,000, that debt is associated with "presence of a mental disorder, depression, suicide completion, suicide completion or attempt, problem drinking, drug dependence, neurotic disorders . . . and psychotic disorders").

doing so, they should take heed of the fact that Congress has designed the student-programs with a distinct purpose of helping students "make it to the middle class,"[213] to quote a senator who spoke in support of the 2007 legislation that eased repayment.[214] As amended by that legislation, federal student loan programs are designed to "expand[ ]"[215] or "grow[ ],"[216] and to "strengthen[ ],"[217] the middle class by making college more affordable for student borrowers.[218] In supporting the legislation, one senator made repeated reference to the G.I. Bill, which he said "helped establish the middle class . . . . We built the middle class on the pillars of education, on the pillars of educational opportunity."[219] This description ignores the fact that the G.I. Bill's educational benefits were—to say the least—unequally distributed along racial lines,[220] but nevertheless indicates congressional purpose that student loans pave the way to the middle class. One senator expressed her support for the repayment-easing legislation as follows:

> It is no coincidence that the rise of the American middle class coincided with the explosion of college attendance. It unlocks eco-

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[213] 153 CONG. REC. S9,447 (daily ed. July 17, 2007) (statement of Sen. Sanders).

[214] The 2007 College Cost Reduction and Access Act cut student-loan interest rates, *see* Pub. L. No. 110-84, § 201, 121 Stat. 784, 790–92 (2007); it also expanded income-driven repayment by creating the Income-Based Repayment program, *see id.* § 203, 121 Stat. at 792–95; and it created the Public Service Loan Forgiveness program, designed to forgive public servants' student loans after ten years of employment, *see id.* § 401, 121 Stat. at 800–01.

[215] 153 CONG. REC. H7,535 (daily ed. July 11, 2007) (statement of Rep. Pelosi).

[216] 153 CONG. REC. H7,530 (daily ed. July 11, 2007) (statement of Rep. Miller).

[217] *See* H.R. REP. 110-210, at 43 (2007) (describing Income-Based Repayment under the heading "Strengthening the Middle Class by Making College More Affordable"); *see also* 153 CONG. REC. H7,530 (daily ed. July 11, 2007) (statement of Rep. Miller); 153 CONG. REC. H7,532 (daily ed. July 11, 2007) (statement of Rep. Green); *id.* H7,535 (daily ed. July 11, 2007) (statement of Rep. Pelosi); *id.* H7,540 (daily ed. July 11, 2007) (statement of Rep. Shea-Porter); *id.* H7,541 (daily ed. July 11, 2007) (statement of Rep. Maloney); *id.* H7,552 (statement of Rep. Jackson-Lee); *id.* H10,268 (daily ed. Sept. 7, 2007) (statement of Rep. Jackson-Lee) ("This bill strengthens the middle class by making college more affordable.").

[218] *See* 153 CONG. REC. S9,442 (daily ed. July 17, 2007) (statement of Sen. Kennedy) ("[W]e are providing assistance to the middle class in relieving them of a good deal of the pressure they have in paying off student loans in the future . . . ."); 153 CONG. REC. S11,255 (daily ed. Sept. 7, 2007) (statement of Sen. Kennedy) (supporting "loan forgiveness for students who want to go into public service careers, for some relief for the middle class").

[219] 153 CONG. REC. 23,862 (2007) (statement of Sen. Kennedy). Kennedy made the point several times in the course of the debates. *See* 153 CONG. REC. S9,553 (daily ed. July 17, 2007); *id.* S9,461; *id.* S,9570; *id.* S11,255 (daily ed. Sept. 7, 2007); *id.* S11,255; *see also* 153 CONG. REC. H7,540 (daily ed. July 11, 2007) (statement of Rep. Shea-Porter) (noting that the G.I. Bill "built the middle class in this country").

[220] *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 128–34 (2005) (explaining that although the G.I. Bill was facially neutral with respect to educational benefits, it did nothing to challenge racial segregation in higher education, with the results that there were far fewer places available per capita for African Americans and that the institutions they could attend had far fewer resources). Katznelson also cites research concluding that the G.I. Bill "exacerbated rather than narrowed the economic and educational differences between blacks and whites," at least for people "more likely to be limited to the South in their collegiate choices." *Id.* at 134 (citing Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, 63 J. ECON. HIST. 145 (2003)).

> nomic potential, and it gives students access to the American dream—to a career and a life that they, then, can build.[221]

Saddling student borrowers with loan payments that keep them out of the middle class or further depress their economic situation below a middle-class level runs directly counter to the congressional purpose just discussed. Congress's purpose to create, or at least, ease, the path to middle-class life reflects a larger cultural belief that higher education is the "entry ticket"[222] or the "clearest pathway,"[223] to the middle class. The Department of Education itself—which reportedly holds 92% of outstanding U.S. student loans[224]—communicates this belief to the public, including prospective students.[225] That the belief appears largely grounded in fact only strengthens the point.[226] The brutal truth that postsecondary education may increasingly be a necessary, but not sufficient, condition for middle-class lifestyles[227] does little to assuage the harm to student borrowers who find themselves locked out of the middle class despite having "done everything right."[228]

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[221] 153 CONG. REC. S9,451 (daily ed. July 17, 2007) (statement of Sen. Clinton).

[222] RICHARD V. REEVES ET AL., BROOKINGS INST., GOWN TOWNS: A CASE STUDY OF SAY YES TO EDUCATION 5 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180612_Gown-Towns-Reeves.pdf [https://perma.cc/XW35-QHMU] ("Postsecondary education is the entry ticket to the middle class.").

[223] *Higher Education*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/issues/education/higher-education [https://perma.cc/2B5X-9UFH] ("With the average earnings of college graduates at a level that is twice as high as that of workers with only a high school diploma, higher education is now the clearest pathway into the middle class.").

[224] *See* MEASUREONE, THE MEASUREONE PRIVATE STUDENT LOAN REPORT 7 (2019).

[225] *See* Press Release, U.S. Dep't of Educ., Fact Sheet: Increasing College Access by Making Loans Easier to Pay (Mar. 18, 2016), https://www.ed.gov/news/press-releases/fact-sheet-increasing-college-access-making-loans-easier-pay [https://perma.cc/3AQW-ESTS] ("Higher education continues to be the single most important investment students can make in themselves and the surest engine to enter the middle class."); *see also* Ted Mitchell, *America's College Promise: A Ticket to the Middle Class*, U.S. DEP'T OF EDUC.: HOMEROOM (Jan. 21, 2015), https://blog.ed.gov/2015/01/americas-college-promise-a-ticket-to-the-middle-class/ [https://perma.cc/XD4L-EZUT].

[226] *See The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), https://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/ [https://perma.cc/SC54-S4TZ] ("On virtually every measure of economic well-being and career attainment—from personal earnings to job satisfaction to the share employed full time—young college graduates are outperforming their peers with less education."); *see also* Josh Boak & Emily Swanson, *Many College Grads Feel Their Grip on the Middle Class Loosening*, AP NEWS (May 1, 2019), https://apnews.com/0a3584abcadb4482974a19fbdc42bfff [https://perma.cc/9XYC-VSGW] (reporting that 35% of college graduates and 60% of Americans without a college degree described themselves as working or lower class).

[227] *See, e.g.*, David Karen & Kevin J. Dougherty, *Necessary But Not Sufficient: Higher Education as a Strategy of Social Mobility*, *in* HIGHER EDUCATION AND THE COLOR LINE 33 (Gary Orfield et. al. eds., 2005); Boak & Swanson, *supra* note 226 (reporting analysis of 2018 General Social Survey data indicating that 35% of college graduates described themselves as working or lower class, up from 20% in 1983).

[228] Journalist and author Alissa Quart described this encountering this phenomenon in her reporting in a Wharton School interview: "'Shame' is a word that comes up. People are blaming themselves, saying, 'What did I do wrong? I did everything right. I got these degrees. I worked hard. Why is this not coming together?" *Why Middle-Class Families Can No Longer Afford America*, KNOWLEDGE@WHARTON (Aug. 15, 2018), https://knowledge.wharton.up

Assuming bankruptcy relief is appropriate for those who cannot otherwise repay their loans while remaining in the middle class, it remains to define the term "middle class" more precisely. The concept is notoriously elusive, but courts have used it on occasion in defining what is too generous for student-loan debtors to be allowed, suggesting that judges think they know what it is.[229] *Collier on Bankruptcy*, a leading treatise, equates another bankruptcy standard, that of "reasonably necessary" expense under Chapter 13, to what is "enjoyed by an average American family."[230] This parallel suggests that Chapter 13 precedents under that section could be relevant in deciding what is a "middle-class" lifestyle.[231] Another possible benchmark is the Economic Policy Institute's calculator, based on government and nonprofit data, that provides the income needed for a "modest yet adequate standard of living" by locality and family size.[232]

2. Repayment in a "Reasonable Length of Time"

The second major element of the Article's proposal is that debtors should be able to get a discharge if they cannot, while maintaining a middle-class lifestyle, pay off their debts in a reasonable length of time. The basic

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enn.edu/article/why-is-the-middle-class-in-such-a-precarious-position/ [https://perma.cc/XJN2-NCUK].

[229] *See* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005) ("[A] minimal standard of living under § 523(a)(8) does not equate to a middle-class standard of living."); McLaney v. Ky. Higher Educ. Assistance Auth. (*In re* McLaney), 375 B.R. 666, 674 (M.D. Ala. 2007) ("[A] minimal standard of living lies somewhere between poverty and mere difficulty." (citation omitted)); Hunt, *Help*, *supra* note 5, at 1336 n.335 (collecting six additional cases from courts in the Ninth Circuit following *Howe* in holding that a "middle-class" standard of living is in excess of a "minimal" standard of living). In addition, a number of decisions deny discharge on the ground that the debtor has a middle-class lifestyle. *See* Johnson v. Sallie Mae (*In re* Johnson), 577 B.R. 895, 903 & n.21 (Bankr. D. Kan. 2017) (debtors with "firmly middle class" status "could easily" make payments on student loans while maintaining a minimal standard of living); *In re* Clarke, Bankr. No. 99-16596DAS, 1999 Bankr. LEXIS 1842, at *2–3 (Bankr. E.D. Pa. Dec. 10, 1999) (concluding that "middle-class standard of living" precluded student-loan bankruptcy discharge); Myers v. Pa. Higher Educ. Assistance Auth. (*In re* Myers), 150 B.R. 139, 141 (Bankr. W.D. Pa. 1993) (noting debtor "is well-dressed and coifed and appears to enjoy the amenities available to a middle class professional" in denying discharge); N.D. State Bd. of Higher Educ. v. Frech (*In re* Frech), 62 B.R. 235, 242 (Bankr. D. Minn. 1986) (denying discharge to debtor who "has derived salaries which have enabled him to live an adequate middle-class existence"). Under the test proposed here, a middle-class standard of living would not disqualify a debtor from discharge unless the debtor could maintain that standard while repaying the debts in a reasonable time.

[230] 8 COLLIER ON BANKRUPTCY ¶ 1325.11(4)(c)(ii) (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2020).

[231] Courts have considerable experience applying the "reasonably necessary" standard. A search on "('reasonably necessary' /s expens!) and 'Chapter 13'" carried out on February 7, 2020 in the All Federal Cases database on LEXIS retrieved 941 results.

[232] *See* Elise Gould, Zane Mokhiber, & Kathleen Bryant, *The Economic Policy Institute's Family Budget Calculator: Technical Documentation* ECON. POL'Y INST., (March 13, 2018) *https://www.epi.org/publication/family-budget-calculator-documentation/* [https://perma.cc/LUL5-TVYT]. In some respects the EPI's calculator seems to provide for a middle-class standard of living: its estimates of housing costs are set at the 40th percentile of expenditures in the relevant market. *Id.* In other respects the calculator seems to fall short of the middle-class standard, for example in its assumption that the family almost never eats out. *Id.*

reason is simple: remaining in debt prolongs the empirically demonstrated harms of unmanageable indebtedness.[233] By making financially unsuccessful investments in education less tolerable, prolonging unmanageable debt undermines the overall goals of the student loan programs in much the same way as affording relief only for very low standards of living does: it makes investing in education less attractive, exacerbates debt-induced hopelessness that can lead to dropping out, makes socially valuable but financially unrewarding careers more risky, and directly harms borrowers.[234]

As with the middle-class threshold for the debtor's standard of living, there is support for the Article's proposal in the student loan programs' legislative record. These materials reflect a longstanding concern that loans might hang over students' heads for too long.[235] For example, the House version of legislation that created the first IDR program provided for an unlimited repayment period.[236] Several witnesses then criticized this aspect of the proposal in Senate hearings. For example, a college president testified that an unlimited repayment period would "threaten . . . the rationality of the proposal"[237] and a college student asked, "Will I be using my Social Security checks to pay off my student loans after I retire?"[238] The Clinton administration proposed loan cancellation after twenty-five years of IDR,[239] and the enacted statute provided for the Secretary of Education to set the repayment period, with a maximum term of twenty-five years.[240]

A lower bound for the "reasonable period" in which borrowers ought to be able to repay their debts might be the 10-year period offered for the government's "standard" repayment program.[241] Apart from this program's designation as "standard," the ten-year repayment period it offers is the shortest available for federal student loans.[242] It seems at least arguably reasonable for student borrowers to expect that it might take at least ten years to repay. An upper bound, reflecting the longest period borrowers should be expected to struggle with their debts, might be the twenty-year period of-

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[233] *See* Thomas Richardson et al., *supra* note 172, at 1153; Hunt, *Tempering, supra* note 5, at 758–62 (collecting empirical studies documenting harms inflicted by debt in general and student debt in particular).

[234] *See supra* notes 209–12 (citing studies providing empirical support for each of these effects).

[235] *See* Hunt, *Help*, *supra* note 5, at 1315–16 (describing 1993 Senate testimony opposing too-long repayment periods).

[236] *See* H.R. REP. No. 103-213, at 447 (1993) (Conf. Rep.).

[237] *Student Loan Reform: Hearing on S. 920 Before the S. Comm. on Labor & Human Res.*, 103d Cong. 54 (1993) (statement of Rev. Bartley MacPhaidin, President, Stonehill College).

[238] *Id.* at 62 (statement of J.L. Nelson, Student, Iowa State University).

[239] *See id.* at 67 (statement of Sen. Nancy Kassebaum).

[240] *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 4021, 107 Stat. 312, 348 (codified at 20 U.S.C. § 1087e(d)(1)(D)).

[241] *See Standard Plan*, FED. STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/understand/plans/standard [https://perma.cc/29R4-LZNM] (providing for payments of "up to ten years" on standard repayment plan for federal loans other than consolidation loans).

[242] *See Repayment Plans*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans [https://perma.cc/KF2X-URME] (giving repayment periods for all federal student loan repayment plans and indicating that ten years is the shortest such period).

fered by the most recently enacted IDR programs.[243] Because the law provides for loan balances to be cancelled after twenty years of IDR, even if a large amount remains to be repaid,[244] the federal government has already decided that borrowers should not have to be in repayment for more than that length of time.

3. "Good-Faith Effort" to Repay

Thus, "hardship" may be defined as the inability to repay loans in a reasonable time while maintaining a middle-class standard of living. It remains to define what hardship is "undue."

Presuming that Congress's goal was not to promote pointless suffering, hardship is "undue" unless it is justifiable.[245] What is justifiable depends on Congress's purpose. As it happens, that purpose in turn depends on how long the loan in question has been in repayment. When the undue-hardship requirement was first enacted, it had a five-year time limit: after five years in repayment student loans were freely dischargeable.[246] Members of Congress advanced an anti-abuse rationale for nondischargeability in this context.[247] Congress later extended the time limit to seven years,[248] then removed the limit altogether.[249] Congress did not take these actions to curb abuse; the only objective put forward for them was promoting creditor recovery.[250]

This shift in reasoning accompanying the removal of the five-year limit suggests that any definition of "undue" tied to heightened suspicion of abuse, such as the good-faith requirement of *Brunner*,[251] should apply only to debtors seeking discharge shortly after entering repayment. If a debtor is a "core

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[243] *See* Hunt, *Help*, *supra* note 5, at 1317 (indicating that the Health Care and Education Reconciliation Act of 2010, the most recent IDR legislation, provided for a maximum repayment period of twenty years).

[244] *See Income-Driven Repayment Plans*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven [https://perma.cc/5WFS-EWJV] ("Under all four [IDR] plans, any remaining loan balance is forgiven if your federal student loans aren't fully repaid at the end of the repayment period.").

[245] *See* discussion *supra* Section II.A.1.

[246] *See* Education Amendments of 1976, Pub. L. No. 94-482, § 439(a), 90 Stat. 2081, 2141 (1976) (codified as 20 U.S.C. § 1087-3 (2018)) (enacting conditional nondischargeability of student-loan debt and imposing a five-year limit on nondischargeability); *see also* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590-91 (1978) (codified as 11 U.S.C. §523 (2018)) (incorporating conditional student-loan nondischargeability with a five-year time limit into the new Bankruptcy Code).

[247] *See* Hunt, *Help*, *supra* note 5, at 1311.

[248] *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4965 (1990).

[249] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (1998).

[250] *See* Hunt, *Help*, *supra* note 5, at 1311.

[251] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755-56 (Bankr. S.D.N.Y. 1985) (imposing good-faith requirement despite "no specific authority for this requirement" based on "stated purpose" of Section 523(a)(8) "to forestall students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans"), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

opportunist"— previously defined as someone who seeks to discharge loans at or shortly after actual completion of a program and before starting out on a career that (a) was made possible by the loans and (b) is more remunerative than the career the debtor could have pursued without the loans[252]—then the debtor's hardship presumably would not be undue. Following this line of reasoning, the Article proposes that the creditor or servicer be able, for debts in the first five years of repayment, to rebut the debtor's prima facie case of undue hardship with a showing that the debtor was or closely resembled a "core opportunist."

Any abuse-combating requirement should be tethered closely to the specific ills nondischargeability was intended to combat and should therefore be applied only to debtors who are, or closely resemble, core opportunists. Five years of repayment, the period after which the anti-abuse activists of the 94th and 95th Congresses made student debt freely dischargeable,[253] represents an outer time limit on the application of any such requirement. Moreover, courts should be circumspect in what they require under this prong—someone who cannot make ends meet because of family obligations,[254] low pay,[255] or simple inability to hold down a job[256] is not a core opportunist like a newly minted surgeon laughing all the way to the bank.

For debtors who have been in repayment for a considerable period of time—perhaps the five years of the original nondischargeability provision—the only Congressional purpose nondischargeability serves is financial recovery.[257] Thus, in these cases it is no longer appropriate to ask, "Could the debtor pay if they had made the right choices or would make them in the future?" Instead, the only relevant inquiry is, "Will the debtor actually repay if denied discharge?"

Here, it seems that permitting discharge when the debtor cannot repay the loans in a reasonable time while maintaining a middle-class standard of living appropriately reconciles the narrow interest in financial recovery with

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[252] *See* discussion *supra* Section II.B.2.

[253] *See* Education Amendments of 1976, Pub. L. No. 94-482, § 439(a), 90 Stat. 2081, 2141 (1976) (codified as 20 U.S.C. § 1087-3 (2018)) (imposing undue-hardship requirement with five-year time limit); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (1978) (codified as 11 U.S.C. § 523 (2018)) (enacting undue-hardship provision with five-year time limit as part of Bankruptcy Code).

[254] *See, e.g.*, *In re* Ward, No. 02-34594-H4-7, slip op. at 6–7 (Bankr. S.D. Tex. May 25, 2004) (finding that under Fifth Circuit precedent, debtor's decision to have children counted against good-faith efforts at repayment).

[255] Some courts applying the *Brunner* good-faith element require debtors to "maximize income" as a prerequisite to discharge. *See, e.g.*, Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 760 (7th Cir. 2015); Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 852 (9th Cir. 2013); Coco v. N.J. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 227 (3d Cir. 2009); Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 544–45 (4th Cir. 2008). Courts applying the totality-of-the-circumstances test have also required the debtor to show efforts to maximize income. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 782 (8th Cir. 2009).

[256] *See, e.g.,* Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 450 (5th Cir. 2019) (recounting debtor's inability to keep several jobs).

[257] *See* Hunt, *Help*, *supra* note 5, at 1311.

the broader goals of the programs. Debtors who can repay their loans in a reasonable time while maintaining a middle-class standard of living are precisely those from whom the largest financial recoveries are available. It might be objected that the proposed standard grants discharge to debtors who could pay off a substantial portion of their loans, just not all of them. But, again, the narrow goal of financial recovery must be balanced against the broader goals of equality of access, educating the country, freedom of career choice, and benefiting students. It is reasonable to presume that hardship after a prolonged period of repayment is "undue" and in that case not to impose anti-abuse requirements beyond those generally applicable under the Bankruptcy Code.[258]

The test proposed here would require the debtor to make the required showing by a preponderance of the evidence. This standard is in tension with a statement in the district court's decision in *Brunner* that the debtor must show a "certainty of hopelessness" of repayment.[259] Although neither the district court nor the appellate court used this language in setting forth the test itself,[260] five circuit courts applying *Brunner* have adopted "certainty of hopelessness" as a requirement.[261] Adopting such a burdensome requirement—one at odds with the normal burden of proof in civil proceedings—seems to result from a single-minded fixation on the goals of the nondischargeability provision taken in isolation.[262] It is precisely the kind of distorted result that looking to previously ignored countervailing purposes should correct.

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[258] *See, e.g.*, 11 U.S.C. § 707(b)(1) (2018 & Supp. I 2019) (providing that the court may dismiss a Chapter 7 case if "granting of relief would be an abuse of the provisions of this chapter"); *id.* § 707(b)(3)(A)–(B) (directing the court, in evaluating whether a filing is abusive, to consider whether the debtor filed "in bad faith" and whether the "totality of the circumstances . . . of the debtors financial situation" justifies dismissal).

[259] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 755 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

[260] *See id.* at 756; Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). The district court did reference the formulation as "[p]erhaps the best articulation" of the idea that undue hardship requires continued inability to pay. 46 B.R. at 755.

[261] *See* Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1326 (11th Cir. 2007); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 401 (4th Cir. 2005); Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 328 (3d Cir. 2001); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).

[262] *Roberson* was the first appellate decision to adopt the certainty-of-hopelessness requirement, and it based its decision to do so on the legislative history of the nondischargeability provision. *See Roberson*, 999 F.2d at 1135–36. Subsequent decisions adopting the test in turn relied on *Roberson*, *see Oyler*, 397 F.3d at 386, or their own view of the purposes of nondischargeability, *see Frushour*, 433 F.3d at 399–400 (citing Congress's "tak[ing] into account the viability of the student-loan program" as a reason for concluding it enacted an "imperative that the debtor's hardship be more than the normal hardship that accompanies any bankruptcy," which in turn undergirded the certainty-of-hopelessness requirement, and basing certainty-of-hopelessness requirement on legislative history of nondischargeability provision). The reference to certainty of hopelessness in the district court's opinion in *Brunner* is inextricably tied to its view of the purpose of nondischargeability. *See Brunner*, 46 B.R. at 754–55.

B. Income-Driven Repayment Plans and the Proposed Definition

Income-driven repayment, or IDR,[263] programs are available for most current student-loan borrowing.[264] These programs base required monthly payments on the debtor's income and promise loan forgiveness if the required payments do not pay off the principal over a specified period. For example, one IDR plan, the Income-Based Repayment program, requires that a debtor make payments of 10% of "discretionary income"[265] and provides for forgiveness of any loan balance remaining after 20 years.[266]

Thus, IDR programs can reduce payments for lower-income borrowers, and they hold out at least the promise of debt cancellation. They potentially offer repayment with less hardship than full-repayment plans. But IDR plans have drawbacks that make them imperfect substitutes for bankruptcy discharge. Despite the availability of IDR, repayment still entails undue hardship for many debtors.

IDR programs come with risks and burdens that a bankruptcy discharge does not. Perhaps the most fundamental is that the debtor does not know that the debt actually will be cancelled upon completion of the IDR period: It is not clear that any debt has yet been cancelled on this basis,[267]

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[263] "Income-driven repayment" is a collective term for several programs that use income to determine monthly payments. These programs include Income-Based Repayment ("IBR"), Income-Contingent Repayment ("ICR"), Pay as You Earn ("PAYE") and Revised Pay as You Earn ("REPAYE"). *See Income-Driven Repayment Plans*, *supra* note 244.

[264] *See Income-Driven Repayment Plans*, *supra* note 244 (indicating that all types of federal student loans displayed are eligible for some form of IDR, at least if consolidated). Not all student borrowing is eligible: IDR is a federal loan program and private loans do not qualify. *See id.* Moreover, Direct PLUS loans made to parents, Federal Family Education Loan Program loans, and Federal Perkins loans are ineligible for IDR unless consolidated. *See id.* The latter two programs are no longer issuing loans. *See* Hunt, *Consent, supra* note 5, at 8–9.

[265] *See Income-Driven Repayment Plans*, *supra* note 244. "Discretionary income" for the IBR plan is defined as income in excess of 150% of the poverty level. *See id.*

[266] *See Income-Driven Repayment Plans*, *supra* note 244. Older IDR programs, such as "old IBR" and Income-Contingent Repayment ("ICR") offer forgiveness only after 25 years. *See id.*

[267] The author has been unable to find information on this question, although it appears possible that the time has come for at least a few cancellations to take place. The statute making ICR generally available was enacted in 1993. *See* Hunt, *Help*, *supra* note 5, at 1313. ICR has a twenty-five-year repayment period, which could suggest that the first debt cancellations under the program should have occurred in 2018. Moreover, Congress provided for a pilot IDR program at a small number of schools in 1992, and borrowers using this program might have been eligible for cancellation before 2018. *See* Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 765 n.149 (2001). On the other hand, the Department apparently adopted the first regulations setting up ICR on July 1, 1994, *see* Federal Direct Student Loan Program, 59 Fed. Reg. 34,278, 34,278, 34,291 (July 1, 1994), and apparently did not become fully effective until September 23, 1994, *see* Federal Direct Student Loan Program, 59 Fed. Reg. 52,704, 52,704 (Oct. 10, 1994). This suggests that borrowers who chose ICR at the earliest opportunity might not have been eligible for cancellation until at least late 2019. Finally, it is not clear that any early ICR borrowers actually stayed in the program for twenty-five years. Very few borrowers took up ICR, at least in early years. *See* Schrag, *supra*, at 831 ("[F]ewer than 1% of new borrowers at schools that offer direct federal loans chooses income-contingent repayment."). It appears that no borrowers will be eligible for cancellation under other IDR programs until at least 2030. *See* Hunt, *Help*, *supra* note 5, at 1312–18 (reviewing dates of enactment and repayment periods for IDR programs and indicating that IDR programs created in 2010 with a 20-

and recent results of other loan-forgiveness programs are not encouraging.[268] Moreover, the future of IDR is currently in flux, as the Trump administration has repeatedly proposed to increase required payments under the program, lengthen the repayment period for graduate borrowers, and eliminate the Public Service Loan Forgiveness Program, which promises forgiveness of federal student loans after ten years of public service.[269] Even if debt is ultimately cancelled at the completion of an IDR program, under current law the debt cancellation apparently would be treated as taxable income, potentially generating a tax liability.[270]

Other risks and burdens relate to the debtor's experience while trying to complete the program. Perhaps the most salient is that IDR typically extends the period of indebtedness.[271] As noted, the condition of being indebted is harmful,[272] so extending the repayment period inflicts a form of hardship on the student-loan debtor. Relatedly, the loan balance will increase during the IDR period if the income-driven payments are not enough to cover the interest on the debt.[273] In light of the literature on the harms of high debt

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year repayment period appear to be the non-ICR programs that promise cancellation at the earliest date).

[268] *See Public Service Loan Forgiveness (PSLF) Program Data*, FED. STUDENT AID (Sept. 29, 2019), https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data [https://perma.cc/QA4Z-7G49] (click "September 2019 PSLF Report") (reporting that out of 109,932 unique borrowers submitting PSLF applications, 1,139 unique borrowers had had PSLF discharges processed, so that success rate was 1.04%). A temporary program set up with broader eligibility requirements designed to give failed PSLF applicants a second chance at forgiveness had an applicant success rate of under one percent through May 2019. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-595, PUBLIC SERVICE LOAN FORGIVENESS: IMPROVING THE TEMPORARY EXPANDED PROCESS COULD HELP REDUCE BORROWER CONFUSION 11 (2019), https://www.gao.gov/assets/710/701157.pdf [https://perma.cc/J73T-JE8U].

[269] Administration budget proposals made in both 2019 and 2020 called for elimination of PSLF and consolidation of existing IDR programs into a single program calling for loan payments of 12.5% of discretionary income and providing debt cancellation after 15 years for undergraduate borrowers and 30 years for graduate borrowers. *See* OFFICE OF MGMT. & BUDGET, A BUDGET FOR AMERICA'S FUTURE: MAJOR SAVINGS AND REFORMS 132, 134 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/msar_fy21.pdf [https://perma.cc/YJ6L-LE9V]; *see also* Robert Farrington, *Trump Proposes to Change Student Loan Repayment for Millions*, FORBES (Mar. 15, 2019), https://www.forbes.com/sites/robertfarrington/2019/03/15/trump-proposes-to-change-student-loan-repayment-for-millions/#5422 3d727995 [https://perma.cc/25S9-32MU] (reporting that the administration made the same proposals in 2019).

[270] *See* 26 U.S.C. § 61(a)(11) (2019) (defining gross income for tax purposes to include "income from discharge of indebtedness"). Special exemptions exclude such cancellation-of-indebtedness income from taxable income when it results from bankruptcy discharge, *see id.* § 108(a)(1)(A), or from certain types of service such as PSLF, *see id.* § 108(f)(1). No such exemption currently covers forgiveness under IDR. *See* Hunt, *Help*, *supra* note 5, at 1340–42.

[271] The standard repayment plan for student loans made under federal programs is ten years, while the repayment periods for IDR programs range from 20 to 25 years. *See Repayment Plans*, *supra* note 244.

[272] *See supra* notes 177–79 and accompanying text.

[273] *See Income-Driven Plans Questions and Answers*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven/questions [https://perma.cc/Z7JR-V5HR] (describing negative amortization under IDR plans and rules calling for capitalization of all or some interest if borrower leaves an IDR plan).

balances,[274] such "negative amortization" would be another reason not to deny discharge.[275]

Finally, there is the risk that the debtor will not be able to comply with the IDR program's administrative requirements. Debtors in IDR plans are required to recertify income and family size each year.[276] If they fail to do so, they are required to make (generally higher) non-income-based payments going forward.[277] Moreover, accumulated interest is "capitalized," or added to principal, upon failure to recertify.[278] Capitalization increases interest charges going forward.[279] Although failure to recertify can be cured,[280] the recertification requirement makes IDR a less-than-perfect substitute for bankruptcy's fresh start.

Because the IDR programs entail unique risks and burdens, making a monthly payment of, say, $250 under an IDR program is a greater hardship than making a monthly payment of $250 that will lead to complete repayment within the standard repayment period of ten years.

In analyzing how the availability of IDR should affect the analysis of undue hardship under the standard proposed here, debtors can be divided into three broad classes: (1) debtors who can maintain a middle-class standard of living while making monthly payments under either full-repayment or IDR programs, (2) debtors who cannot maintain a middle-class standard living while making monthly payments under either full-repayment or IDR programs, and (3) debtors who can maintain a middle-class standard of living while making payments under an IDR plan, but not while making payments under a full-repayment plan.

The proposed standard is easiest to apply to debtors in the first category: absent circumstances unforeseen by this author, repayment typically would not cause these debtors undue hardship. The analysis is also often simple for debtors in the second category: monthly student-loan debt repayments often push these debtors farther away from a middle-class standard of living and thus work an undue hardship.

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[274] *See* Jinhee Kim & Swarn Chatterjee, *Student Loans, Health, and Life Satisfaction of US Households: Evidence from a Panel Study*, 40 J. FAM. & ECON. ISSUES 36, 36, 46 (2019) (reporting a negative association between the amount of student debt and life satisfaction and well-being in general and a negative association between the amount of student debt and health for Latinx students); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status: Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197, 1211 (2005) (reporting association between high debt-asset ratios and negative health effects); Justin Weidner, Does Student Debt Reduce Earnings? 1 (Nov. 11, 2016) (unpublished manuscript), https://scholar.princeton.edu/sites/default/files/jweidner/files/Weidner_JMP.pdf [https://perma.cc/C5AD-FH3R]) ("I find that graduates with an additional ten thousand dollars of debt have 1-2% lower income one year after graduation.").

[275] *See* Hunt, *Help*, *supra* note 5, at 1339–40 (arguing that negative amortization under IDR weighs in favor of granting discharge).

[276] *See Income-Driven Repayment Plans*, *supra* note 244.

[277] *See id.*

[278] *See id.*

[279] *See id.*

[280] *See id.*

One subcategory of debtors in the second class merits further discussion. These are debtors whose incomes are so low that their IDR payments would be zero. Typically, debtors with incomes of 150% of the poverty level or less would fall into this group.[281] Zero-IDR payments have divided the courts, with some finding that a zero payment in itself inflicts no hardship[282] and others finding it pointless to require the debtor to sign up for a payment plan that entails no payments.[283]

The latter position has greater merit. As previous research has shown, the only interest weighing against discharge when the debtor has been in repayment for more than five years is the interest in creditor recovery.[284] Given that all IDR programs entail repayment periods of more than five years[285] and that zero-repayment IDR produces no creditor recovery, no congressional purpose is served by requiring zero-payment IDR. There is thus no reason in this case to subject the debtor to the risks and burdens of IDR identified above.[286]

Debtors in the third category, those whose monthly payments permit a middle-class standard of living under IDR but not under full repayment, must be analyzed carefully on a case-by-case basis. Because of the risks and burdens of IDR, such debtors may face undue hardship even if they can make monthly student loan payments while maintaining a middle-class standard of living. The situation of debtors in this category illustrates the fact that inability to repay while maintaining a middle-class standard of living is sufficient but not necessary to show undue hardship.

Courts would have to determine whether the risks and burdens of IDR themselves present "undue hardship." Case-specific considerations to be weighed include how much IDR would prolong the repayment period,[287] the

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[281] *See id.* (indicating that "discretionary income" is income above 150% of the poverty level for all IDR programs except ICR, for which the threshold is 100% of the poverty level).

[282] *See, e.g.*, Greene v. Dep't of Educ., No. 4:13cv79, 2013 U.S. Dist. LEXIS 143678, at *12–13 (E.D. Va. Oct. 2, 2013) (noting that the debtor "has put forth no arguments as to how her monthly payment of $0 causes her to fall below her current standard of living"), *aff'd*, 573 F. App'x 300 (4th Cir. 2014).

[283] *See, e.g.*, Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 919–20 (B.A.P. 9th Cir. 2013) (concluding that requiring zero-payment IDR is "futile"); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 803 (B.A.P. 1st Cir. 2010) (concluding that zero-payment IDR is "meaningless").

[284] *See* Hunt, *Help*, *supra* note 5, at 1311–12.

[285] *See Income-Driven Repayment Plans*, *supra* note 244.

[286] It is possible that a debtor's income might rise, so that even if the debtor's IDR payment would currently be zero, future years would yield more for creditors. *See* Nielsen v. ACS, Inc. (*In re* Nielsen), No. 09-04888-als7, 2013 Bankr. LEXIS 2116, at *24–25 (Bankr. S.D. Iowa May 24, 2013) (noting that even with zero current payment, IDR "affords an opportunity for [the creditor] to be repaid if [the debtor's] financial situation changes"), *aff'd*, 518 B.R. 529 (B.A.P. 8th Cir. 2014). It may be rare that a debtor who currently has an IDR payment of zero (and therefore an income below 150% of the poverty line) would be able in the future to maintain a middle-class lifestyle while making substantial IDR payments. However, if a creditor can present evidence that there is a concrete, foreseeable prospect of such improvement, they should be able to present it.

[287] Months in which the debtor made a payment under the standard 10-year repayment plan, made a payment at least as large a standard payment, or was in an economic hardship

extent of likely negative amortization and the extent to which negative amortization is likely to harm the debtor in question,[288] and any particular difficulties the debtor might have in complying with IDR program administrative requirements,[289] as well as the tax considerations mentioned above.[290] Courts should also take into account the uncertainty about whether debt will actually be forgiven at completion of the program.

The defendant's income should be a major factor in the analysis. Higher incomes are associated with less debtor hardship. Moreover, under IDR higher incomes also lead to higher payments, which in turn create higher creditor recoveries and less negative amortization. Thus, for higher incomes there is less reason to grant discharge and at the same time more reason to deny it.

A few words on procedure. In the typical case under current law the debtor is not enrolled in IDR, and the creditor argues that the debtor's failure to enroll evidences lack of good-faith effort to repay the loans.[291] Under this Article's suggestion, the debtor's showing of inability to maintain a middle-class lifestyle while repaying debts in a reasonable time would make a prima facie showing of undue hardship. The creditor would then be able to attempt to rebut the debtor's showing by showing that under IDR the debtor could stay in the middle class while repaying. At a minimum, the creditor would have to show that the debtor is actually eligible for IDR[292] and that

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deferment typically count toward the IDR repayment periods. *See Income-Driven Plans Questions and Answers*, *supra* note 273.

[288] For example, it would be relevant here that the debtor had shown susceptibility to any of the documented problems associated with indebtedness, such as depression, attempted suicide, problem drinking, drug dependence, or neurotic or psychotic disorders. *See* Richardson et al., *supra* note 172, at 1153 (meta-analysis of 65 studies with a pooled sample size of 34,000).

[289] *See, e.g.*, 28 C.F.R. § 35.130(b)(8) (2019) (forbidding public entities from using eligibility criteria "that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity" unless the criteria are "necessary for the provision of the service, program, or activity").

[290] At a minimum, the creditor's attempt to demonstrate that IDR enables the debtor to maintain a middle-class lifestyle while repaying should include a showing that the debtor can amass enough reserve funds to cover the estimated tax liability. *See* Hunt, *Help*, *supra* note 5, at 1347 (describing proposed process for determining if debtor can reserve funds to cover tax liability).

[291] *See, e.g.*, Hedlund v. Educ. Res. Inst., 718 F.3d 848, 853 (9th Cir. 2013); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 883–84 (7th Cir. 2013); Coco v. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 227 (3d Cir. 2009); Roe v. Coll. Access Network (*In re* Roe), 295 F. App'x 927, 931 (10th Cir. 2008); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 363–64 (6th Cir. 2007); Frushour v. Educ. Credit Mgmt. Corp. (*In re* Frushour), 433 F.3d 393, 402–03 (4th Cir. 2005). Cases where the debtor is already enrolled in IDR during the bankruptcy seem less common. In such instances, the debtor would have to show either that they cannot maintain a middle-class lifestyle while repaying under IDR or that the additional risks and burdens of IDR make out an undue hardship.

[292] One important class of debtors who cannot enter an IDR program is those who are currently in default on their student loans. *See Understanding Delinquency and Default*, FED. STUDENT AID, https://studentaid.gov/manage-loans/default [https://perma.cc/6UZG-6SS2]. Depending on the circumstances, debtors may be able to leave default by rehabilitating or consolidating their loans. *See* Nick Dvorscak, *3 Ways to Get Out of Student Loan Default*, U.S.

the debtor more likely than not could maintain a middle-class lifestyle while enrolled in IDR. The debtor and creditor both could present evidence on how the additional risks and burdens of IDR would affect the particular debtor.

C. Implementation of the Proposal in Light of Precedent

This Article has argued that the *Brunner* test was created without due regard for the overall goals of the federal student loan programs and has proposed a replacement. Some actors have the authority to implement the proposed replacement directly. In an en banc sitting, a court of appeals that has adopted the *Brunner* test could revisit the standard,[293] abandoning *Brunner* if it finds that the panel that adopted *Brunner* engaged in a "fundamentally flawed"[294] statutory interpretation. The Department of Education, in making decisions not to oppose discharge in student borrower bankruptcies, could adopt a different definition of "undue hardship" either on the ground that doing so does not overrule the courts' *Brunner* test[295] or on the ground that the Department has authority under various deference doctrines to override the precedent.[296]

In most jurisdictions, however, appellate panels and lower courts are bound to apply the *Brunner* test.[297] As others have noted,[298] the test as written can in fact be applied somewhat flexibly, despite its "draconian" origin.[299] Thus, in many instances appellate panels or lower courts could harmonize the test proposed here with *Brunner*. Courts could find that inability to maintain a middle-class standard of living while repaying student debt in a reasonable time equates to *Brunner's* requirement of inability to maintain a minimal standard of living for a significant portion of the repayment period

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DEP'T OF EDUC.: HOMEROOM (July 31, 2017), https://blog.ed.gov/2017/07/3-ways-to-get-out-of-student-loan-default/ [https://perma.cc/E2EG-5TJ8].

[293] *See* 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3981.1 (5th ed. 2019) ("[O]ne reason to grant en banc consideration is to overrule circuit precedent.").

[294] United States v. Burwell, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc); *see also* Al Bahlul v. United States, 767 F.3d 1, 11 (2014) (en banc) (citing *Burwell* in reversing prior statutory interpretation).

[295] *See* Hunt, *Consent, supra* note 5, at 40–43 (arguing that the Department can decline to oppose discharge where "undue hardship" is absent).

[296] *See* Hunt, *Consent, supra* note 5, at 38–39 (arguing that the Department may be able to adopt its own interpretation of "undue hardship," which need not conform to the definition adopted by courts).

[297] *See* 16AA WRIGHT & MILLER, *supra* note 293, § 3981.1 ("The courts of appeals generally follow a practice that one panel is bound by the holdings in a prior decision of another panel of that court.").

[298] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 458 (Bankr. S.D.N.Y. 2020) ("The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner*."); ABI COMM'N ON CONSUMER BANKRUPTCY, AM. BANKRUPTCY INST., *supra* note 38, at 6 ("If reasonably applied, *Brunner*'s three-factor undue-hardship standard can allow appropriate bankruptcy relief . . . .").

[299] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

while repaying debt. It appears that precedent in many jurisdictions generally does not foreclose discharge to protect a middle-class standard of living.[300] Indeed, some courts have suggested under existing law that the absence of undue hardship entails a middle-class lifestyle.[301]

As for *Brunner*'s good-faith requirement, courts in some jurisdictions could find that a debtor acts in good faith—at least presumptively—when the debtor has not sought discharge in the first five years or repayment or otherwise does not resemble a "core opportunist."[302] Thus, even many courts that must apply the *Brunner* test could adopt the Article's proposal.[303]

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[300] As discussed, some courts have found that a middle-class standard of living is above the minimal standard of living the *Brunner* test requires of the borrower. *See supra* note 232. It appears that only the Ninth Circuit Bankruptcy Appellate Panel and the District Court for the Middle District of Alabama have made pronouncements to this effect that potentially would bind bankruptcy courts within their respective jurisdictions. *See id.* The binding precedential effect of Ninth Circuit Bankruptcy Appellate Panel decisions apparently is "an open question." Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1225 n.3 (9th Cir. 2002); *see also* State Comp. Ins. Fund v. Zamora (*In re* Silverman), 616 F.3d 1001, 1005 (9th Cir. 2016) (noting that the Ninth Circuit has never addressed the issue); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (declining to decide issue). The Ninth Circuit has not decided whether decisions of the Bankruptcy Appellate Panel bind bankruptcy courts throughout the circuit. For its part, the Panel has claimed the authority to bind bankruptcy courts, *see* Phila. Life Ins. Co. v. Proudfoot (*In re* Proudfoot), 144 B.R. 876, 878–79 (B.A.P. 9th Cir. 1992), and some bankruptcy courts have acceded, *see, e.g.*, *In re* Tucker, 479 B.R. 873, 876 (Bankr. D. Or. 2012). *See In re* Grant, 423 B.R. 320, 321 (Bankr. S.D. Cal. 2010) (declining to decide whether it was bound by B.A.P. because it agreed with the B.A.P.'s result).

[301] *See* Pollard v. Superior Cmty. Credit Union (*In re* Pollard), 306 B.R. 637, 645 n.5 (Bankr. D. Minn. 2004) (non-*Brunner* jurisdiction) (granting student-loan discharge and finding that a "powerful personal computer and home Internet access" were "reasonably necessary" to the debtor and her dependent's maintenance because such expenses are "a *de facto* necessity for the maintenance of a middle-class lifestyle, even a modest one"); *see also* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 n.3 (B.A.P. 9th Cir. 2005) (reporting bankruptcy judge's statement that "I don't think it's the intent of Congress to force middle-class people into poverty in order to repay student loans"). The Bankruptcy Appellate Panel itself did reject that contention in *Howe*. *See* 319 B.R. at 889.

[302] *Cf.* ABI Comm'n on Consumer Bankruptcy, Am. Bankruptcy Inst., *supra* note 38, at 2, § 1.01(c)(1)(A)(iii); *id.* at 13 (recommending that the *Brunner* test be interpreted so that the good-faith element is satisfied unless "the debtor has . . . acted in bad faith in failing to pay the loan prior to the bankruptcy filing"). Courts already find on occasion that, when the debtor is otherwise blameless, a "good-faith effort" to repay can be found even if the debtor has actually made no, or minimal, voluntary payments. *See, e.g.*, Hedlund v. Educ. Res. Inst., 718 F.3d 848, 852 (9th Cir. 2013); *id.* at 850, 853, 855 (finding that bankruptcy court did not err in finding that debtor acted in good faith where he had made reasonable efforts to maximize income and minimize expenses, even though his only voluntary payment on loans totaling $85,000 at the beginning of repayment was $950); Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 884 (9th Cir. 2006) ("[A] history of making or not making payments is, by itself, not dispositive . . . .").

[303] The standard proposed here is also consistent with the "totality-of-the-circumstances" test, the leading alternative to *Brunner*. This test has been described as "less restrictive" than *Brunner*. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003). The Eighth Circuit Bankruptcy Appellate Panel identified three factors that are evaluated in applying the totality-of-the-circumstances test: (1) the debtor's past, present, and future financial resources; (2) the debtor's and dependents' reasonably necessary living expenses, and (3) "any other relevant facts and circumstances." Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 4 (B.A.P. 8th Cir. 2017). The court listed nine types of such "facts and circumstances" that "may be relevant to determining undue hardship": (a) total incapacity to pay for reasons beyond debtor's control; (b) good-faith effort to negotiate deferment or forbearance;

The Second Circuit is an example of a jurisdiction where the test here could be implemented under existing law, at least if one discounts *Brunner's* extravagant rhetoric and concentrates on the test it actually articulated and on subsequent decisions applying that test. It does not appear that any decision of the Second Circuit Court of Appeals forecloses application of the test proposed here.[304] Bankruptcy judges in that jurisdiction would therefore generally appear free to follow the suggestion presented here.[305] Indeed, the highly publicized *Rosenberg* decision of the Bankruptcy Court for the Southern District of New York, mentioned earlier,"certainty of hopelessness" standard,[306] which this Article criticizes but which some district courts in the circuit had embraced.[307]

To be sure, some courts may not be free to adopt the proposed test. In the Ninth Circuit, for example, the Bankruptcy Appellate Panel has flatly held that the "minimal standard of living" *Brunner* requires does not "equate to a middle class standard of living,"[308] and this ruling may bind bankruptcy courts in the Ninth Circuit.[309] More broadly, five circuits require the debtor to show a "certainty of hopelessness" that they can repay while maintaining a

(c) whether hardship is long-term; (d) whether the debtor has made payments; (e) permanent or long-term disability; (f) ability to find employment in the field of study; (g) good-faith effort to maximize income and minimize expenses; (h) whether discharging the student loan is the dominant purpose of the bankruptcy; and (i) the ratio of student-loan debt to total indebtedness. *Id.* Evaluating whether the debtor is able to repay the debt in a reasonable time while maintaining a middle-class standard of living will involve analysis of factors (1) and (2), as well as 3(a)–(c), (e), and (f). Evaluating whether the debtor is a core opportunist involves analyzing factors 3(d) and 3(g)–(i).

[304] The assertion in the text is based on review conducted on January 31, 2020 of decisions of the Second Circuit Court of Appeals in LEXIS using the search "('student loan' or 'education loan' and 'undue hardship' and Brunner)."

[305] Some district court decisions in the Second Circuit are arguably inconsistent with the test proposed here. *See In re* Lozada, 604 B.R. 427, 436–37 (S.D.N.Y. 2019) (requiring a showing of "unique or exceptional circumstances" to meet *Brunner*'s additional-circumstances element and a showing that inability to pay arises from "factors beyond [the debtor's] reasonable control" to meet the good-faith element); Mossburg v. N.Y. State Higher Educ. Servs. Corp., No. 07-CV-6195, 2010 U.S. Dist. LEXIS 154893, at *8 (W.D.N.Y. March 31, 2010) (requiring "certainty of hopelessness" to satisfy additional-circumstances element of *Brunner*); Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 29–30 (D. Conn. 2006) (requiring "certainty of hopelessness"). Whether these precedents bind bankruptcy courts in those districts is unclear. The stare decisis effect of district-court decisions on bankruptcy courts is unsettled as a general matter. *See* 18 MOORE'S FEDERAL PRACTICE § 134.02 n.22.1 (Matthew Bender ed., 3d ed. 2019). The Court of Appeals for the Second Circuit does not appear to have addressed the issue, although the District Court for the Western District of New York has claimed the authority to set binding precedent for bankruptcy courts. *See* Dorey v. Torsell, 229 B.R. 593, 597 (Bankr. W.D.N.Y. 1999).

[306] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), No. 18-35379, 2020 WL 130302, at *7 (Bankr. S.D.N.Y. Jan. 7, 2020).

[307] *See Mossburg*, 2010 U.S. Dist. LEXIS 154893, at *8; *Curiston*, 351 B.R. at 29–30 (requiring "certainty of hopelessness").

[308] *See* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005). At least one bankruptcy court in the Ninth Circuit seems to have pushed back a bit on the ruling in *Howe*. *See* Coplin v. U.S. Dep't of Educ. (*In re* Coplin), No. 13-46108, 2017 Bankr. LEXIS 4153, at *20 (Bankr. W.D. Wash. Dec. 6, 2017) (concluding that the minimal standard of living includes "some modest amount of diversion or recreation").

[309] *See supra* note 305.

minimal standard of living,[310] which seems inconsistent with the preponderance-of-the-evidence standard suggested here. Thus, replacement of *Brunner* in en banc sittings remains an important part of reform.

D. Support for Existing Proposals

It is important to stress again that the central point of this Article is that the overarching goals of the student loan program favor making discharge more readily available generally than it currently is. The Article has presented and defended its own blueprint for doing so. But analysis here of the student loan programs' purpose and its relevance to the undue-hardship standard is relevant beyond the specific proposal set forth in this Article. The arguments presented here provide additional support for many existing calls for leniency, support in addition to that which the authors of such calls themselves have offered. A few examples follow.

The recent report of the American Bankruptcy Institute Consumer Bankruptcy Commission calls for a finding of undue hardship if the debtor cannot maintain a reasonable standard of living while repaying the loan according to the initial contractual schedule (typically 10 years), as long as the debtor has not acted in bad faith in failing to repay.[311] The arguments in this Article, which are based on the purposes of the student loan programs, complement the ABI Commission's rationale for its recommendations, which does not rely on the overall purposes of the student loan programs and is by and large based on bankruptcy policy.[312]

The National Consumer Bankruptcy Rights Center (NCBC) and the National Association of Consumer Bankruptcy Attorneys (NACBA) argued in the *Thomas* case discussed at the beginning of the Article that the *Brunner* test should reformulated to focus on whether the debtor will unable in the immediate, foreseeable future[313] to maintain a reasonable standard of living while repaying student loans.[314] As these entities note, their recommended approach is more lenient than that courts often follow.[315] NCBC and NACBA did not in their brief make reference to the overall purposes of the student loan programs, and consideration of those overall purposes strengthens their plea for mercy.

Finally, a group of bankruptcy scholars has recently put forth a proposal that the Department of Education consent to student-loan bankruptcy when

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[310] *See supra* note 265.

[311] *See* ABI COMM'N ON CONSUMER BANKRUPTCY, AM. BANKRUPTCY INST., *supra* note 38, at 2.

[312] *See id.* at 6–15 (presenting justifications for Commission recommendations).

[313] *See* Brief of Amici Curiae National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys at 21, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449 (5th Cir. 2019) (No. 18-11091).

[314] *See id.* at 18.

[315] *See id.* at 16 ("Courts requiring a 'certainty of hopelessness' or 'total incapacity' have simply strayed too far from the statute's plain meaning and its legislative history."); *id.* at 20 (noting that courts "often" adopt such requirements).

certain bright-line criteria are met.[316] The ABI Commission has advanced a similar idea.[317] These scholars propose to "ease the debtor's path to discharge" in such cases,[318] and taking the purpose of the student loan programs into account as suggested here provides further support for the proposition that such easing is appropriate.[319]

E. Summing Up: Inability to Repay While Maintaining a Middle-Class Standard of Living Should Make a Prima Facie Case of Undue Hardship

A borrower who can show an inability to repay student loans within a reasonable time while maintaining a middle-class standard of living should be deemed to have made a prima facie showing of undue hardship. This formulation draws support from the student loan programs' purpose of securing middle-class life for borrowers and from legislative acknowledgment that prolonged indebtedness causes hardship.

More broadly, the proposed test, properly applied, would foreclose unduly harsh applications of *Brunner* and thus more appropriately balance the overall goals of the student loan programs with the narrow purposes of the nondischargeability provision. The proposed test respects the latter goals by providing that opportunistic conduct within the first five years of repayment should bar discharge, thus preserving the anti-abuse purpose of the nondischargeability provision.

Because the test proposed focuses on the debtor's lifestyle during repayment, it does not capture all forms of hardship. In particular, it does not capture the risks and burdens posed by IDR programs, such as the risks that debt will not be cancelled as promised and that any cancellation will bring a hefty tax bill. Thus, if an IDR program would allow a borrower to maintain a middle-class lifestyle, courts should still balance the drawbacks of these programs against the likely monetary recovery from denying discharge on a case-by-case basis.

The test proposed here could be implemented as an interpretation of the *Brunner* test in some jurisdictions, such as the Second Circuit. In such jurisdictions lower courts and appellate panels can adopt the Article's proposal without rejecting *Brunner*. In other jurisdictions, appellate decisions have further restricted discharge under the *Brunner* test. Courts in such jurisdictions may not be able to follow this Article's suggestions absent an en banc rehearing to modify the circuit's gloss on *Brunner* or possibly to reject the *Brunner* test altogether.

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[316] *See* Bruckner et al., *supra* note 5, at 6-7; Jiménez et al., *supra* note 5, at 115.

[317] *See* ABI COMM'N ON CONSUMER BANKRUPTCY, AM. BANKRUPTCY INST., *supra* note 38, at 8–10.

[318] *See* Bruckner et al., *supra* note 5, at 6.

[319] The desirability and legal foundation for bright-line rules such as those proposed by the scholars just mentioned are discussed in Hunt, *Consent*, *supra* note 5, at 22–29.

This Article offers an argument that the attention to the purposes of the student loan programs counsels a relatively lenient approach to bankruptcy discharge. This basic point is relevant beyond the specific formulation of undue hardship offered here and provides for support for other recent proposals for lightening the burden of student borrowers facing unmanageable debt.

Conclusion

The Bankruptcy Code's test for student-loan dischargeability, "undue hardship," is exceptionally open-ended and leaves almost limitless room for interpretation. In construing the provision, the *Brunner* court and many courts following it have considered how to promote the purposes of nondischargeability itself without considering the larger goals of the federal student loan programs.

The narrow construction of "undue hardship" that has resulted is badly out of balance. The empirical evidence indicates that constricting bankruptcy dischargeability deters higher education, particularly among low-income and some nonwhite groups of borrowers; distorts career choice; and harms students. An overly harsh undue-hardship standard thereby undermines the aims Congress sought to achieve in creating the federal student loan programs in the first place.

Thus, the prevailing interpretation of "undue hardship" should move in a more liberal direction. This Article suggests that undue hardship should be presumed to exist when a debtor cannot repay student loans in a reasonable time while maintaining a middle-class standard of living. This interpretation furthers the aims of the federal student loan programs. It encourages pursuing higher education and lower-income but socially worthwhile careers while mitigating the harm excessive debt inflicts on student borrowers. The Article's proposed interpretation also honors Congress's specific goals of using student loans to expand the middle class without imposing too long a repayment period.

To honor Congress's purposes in enacting nondischargeability, a party opposing discharge should be able to rebut the debtor's prima facie case of undue hardship by showing that the debtor is engaging in behavior that closely resembles the abusive conduct Congress feared: seeking discharge shortly after graduation and before embarking on a lucrative career the student loans made possible.

The availability of income-driven repayment (IDR) programs generally should not bar discharge if the debtor cannot lead a middle-class life while making the IDR payments. If, on the other hand, reduced payments under IDR would make a middle-class lifestyle possible, discharge should be evaluated on a case-by-case basis that takes account both of how the risks and burdens of IDR are likely to affect the particular debtor and of the debtor's income.

That the overall purposes of the student-loan programs favor a broad interpretation of undue hardship supports not just this Article's proposal, but also other recent proposals for reconceiving the statutory test. Regardless of the specific form change takes, some reformulation of "undue hardship" to protect excessively indebted student borrowers is long overdue.

How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor

*Heather L. Pickerell**

This Note serves as a surgeon general's warning that not all progressive prosecutors are alike and provides a "weighted constellation" framework that advocates can use to assess which district attorneys deserve the progressive name. Although the justice system's structural landmines inhibit district attorneys' efforts to substitute law-and-order policies with more forward-thinking approaches, local prosecutors still wield enormous power; they can reduce incarceration and more equitably enforce the law. Participants in local politics should elect and support district attorneys who effect authentically progressive policies. Because not all seemingly progressive district attorneys are in fact pursuing meaningful criminal justice reform, this Note aims to help advocates separate the bona fide progressives from tough-on-crime prosecutors in sheep's clothing. Those keen to assess their district attorney can use this Note's proposed analytical framework, which accounts for the totality of each district attorney's circumstances but draws clear lines between progressive and non-progressive prosecution practices. This Note presents fourteen metrics of prosecutorial policies that further a more dignified and fair American justice system. Advocates should use these fourteen metrics to evaluate a district attorney and—depending on the history of the prosecutor's office and the local justice system—assign weights to each of the metrics. Advocates should then examine the district attorney's performance for each metric, including whether the prosecutor falls outside the metric's outer bounds, the distance between the prosecutor's policies and the theoretically most progressive iteration of the metric, and the prosecutor's policies compared with their peers' policies. To aid with the last analytical step, this Note provides a comparative analysis of twenty-one prosecutors' performance against a subset of seven of the metrics—the death penalty, bail reform, decarceration and the New Jim Crow, non-prosecution and diversion, wrongful convictions, police accountability, and prosecutorial accountability.

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INTRODUCTION

I understand I'm in one more race in the United States where all the candidates on the Democratic side are using the P word. It turns out they're all 'progressives.' And they're all progressive at least from the beginning of the campaign until the end. Well here's the truth: words are cheap. It is easy to say that you are what you have not shown yourself to be.

—Larry Krasner's endorsement of Tiffany Cabán's candidacy for Queen's District Attorney[1]

Over the past few campaign cycles, a single book has emerged as a favorite among candidates who present themselves as a progressive option for the office of district attorney[2] (DA)—*The New Jim Crow* by Michelle Alexander. Alexander's seminal page-turner—which dissects the role of racism in America's carceral state—has stirred an entire generation's conscience. For district attorney candidates who wish to convey that they have done their criminal justice homework, *The New Jim Crow* is the go-to book to name-drop in a stump speech.[3] In 2018, Philadelphia DA Larry Krasner greeted his new class of Assistant District Attorneys (ADAs) with "who here has read Michelle Alexander?"[4] Posing next to a copy of *The New Jim Crow*, Hillar C. Moore III of East Baton Rouge told the *New Orleans Times-Picayune* that criminal defendants are some of the "least fortunate people" and that he was working to keep them out of courtrooms.[5] When a reporter pressed Los Angeles's Jackie Lacey on how she was addressing racial disparities in prosecution, she responded "I don't keep statistics . . . but I expose myself to all kinds of literature. I've read *The New Jim Crow*. I'm familiar

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[1] *Endorsements*, CABÁN FOR QUEENS DISTRICT ATTORNEY (Nov. 20, 2019), https://www.cabanforqueens.com/endorsements/ [https://perma.cc/RZ5T-XDXR].

[2] This paper uses "District Attorney" and "DA" to refer to the offices of District Attorney, State Attorney, Commonwealth's Attorney, County Attorney, and Attorney, largely interchangeable titles for the same office—an elected prosecutor. This paper does not examine Attorneys General. States' Attorneys General usually engage entirely in civil prosecution; however, they occasionally have some criminal prosecutorial responsibilities and some small states subsume the office of the District Attorney into the Attorney General office. Because this paper is focused particularly on criminal justice, Attorney General offices are outside this paper's scope.

[3] *See* Jessica Pishko, *"I've Read the New Jim Crow . . .": How to Tell if a Prosecutor Is Only Pretending to Be a Criminal Justice Reformer.*, SLATE (Apr. 13, 2017), https://slate.com/news-and-politics/2017/04/how-to-tell-if-a-prosecutor-is-only-pretending-to-be-a-criminal-justice-reformer.html [https://perma.cc/TGK8-W9NH].

[4] Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 29, 2018), https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration [https://perma.cc/UJM3-2F8V].

[5] Emily Lane, *Baton Rouge DA Hillar Moore Is BRAVE-ly driven in the fight against crime*, NOLA.COM (Dec. 11, 2013), https://web.archive.org/web/20181005200243/https://www.nola.com/crime/baton-rouge/index.ssf/2013/12/baton_rouge_da_hillar_moore_is.html [https://perma.cc/972A-YVZ5] ("A stack of books with names like, 'Don't Shoot,' 'The New Jim Crow,' 'Comeback Cities' and 'The Tipping Point,' serve as the centerpiece of the conference table—a cornucopia devoted to his passion: absorbing as much information as he can about violence prevention and public safety."); *see also* Pishko, *supra* note 3.

with the dialogue around mass incarceration. Michelle Alexander."[6] Cook County State Attorney Kim Foxx has spoken publicly about how *The New Jim Crow* has affected her views of race and mass incarceration.[7] Manhattan DA Cyrus Vance tipped his hat to the tome in a 2015 speech: "But while the crimes [that I was prosecuting] were diverse, no thinking person could stand in the well of that court for long without noticing that the defendants being arraigned were disproportionately young men of color. Even back then, long before the term 'mass incarceration' entered the general conversation."[8]

But some of these seemingly progressive prosecutors are unlike the others. Although Krasner and Foxx work to enact forward-looking reforms in their districts, Lacey's, Moore's, and Vance's track records are worryingly similar to those of their tough-on-crime peers who sustain the carceral state that Alexander slams in her oft-cited book.[9]

Voters are increasingly interested in electing district attorneys who reject traditional tough-on-crime policies and aim to reform prosecution. The first nation-wide public opinion poll of voters' views on prosecutors—which the ACLU conducted in 2017—found strong bipartisan and geographically diverse support for prosecutors committed to alleviating mass incarceration, reducing racial bias in the justice system, and holding police officers accountable for wrongdoing.[10] Yet, law-and-order incumbents consistently win elections. In 2018, 84% of elected prosecutors ran unopposed in their general

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[6] L.A. Sentinel Newspaper, *(Part 3) DA Jackie Lacey speaks on being fair*, YOUTUBE (Feb. 25, 2017), https://www.youtube.com/watch?v=TPE1RW_jN0Q&feature=emb_title [https://perma.cc/P26L-42AS].

[7] *See* Micah Uetricht, *The Criminal-Justice Crusade of Kim Foxx*, CHI. READER (Mar. 9, 2016), https://www.chicagoreader.com/chicago/kim-foxx-bid-unseat-anita-alvarez-cook-county/Content?oid=21359641 [https://perma.cc/K3B8-DJ8A].

[8] *District Attorney Vance Delivers Commencement Address at New York Law School's 123rd Graduation Ceremony*, MANHATTAN DIST. ATT'Y'S OFF. (May 9. 2015) [hereinafter *Commencement Address*, https://www.manhattanda.org/district-attorney-vance-delivers-commencement-address-at-new-york-law-school-s-123rd-graduation-ceremony/ [https://perma.cc/S43F-CJTU]. Perhaps the most prominent person to pay lip service to the book is Senator Kamala Harris, the former San Francisco DA, whose sister is friends with Michelle Alexander and proofread *The New Jim Crow* when the book was a manuscript. *See* Jamilah King, *Can Harris' Sister Help Her Overcome the "Kamala Is a Cop" Rap?*, MOTHER JONES (Feb. 13, 2019), https://www.motherjones.com/politics/2019/02/kamala-maya-harris-progressive-prosecutor-campaign-criminal-justice/ [https://perma.cc/9NHM-AXM3].

[9] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

[10] According to the ACLU study, 89% of voters say it is "very important" for prosecutors to actively work towards ending mass incarceration with non-prison options. Eighty-eight percent of voters are more likely to support a prosecutor who believes in reducing racial bias in the criminal justice system. Ninety-one percent believe that it is important for a prosecutor to prioritize reducing unequal treatment of individuals because of race, including 90% of white voters, 90% of Latino voters, and 95% of Black voters. Seventy-nine percent of voters say they are much more likely to support a candidate for prosecutor who believes it is their responsibility to hold officers that break the law accountable and will work to increase overall transparency in the criminal justice system. *See Americans Overwhelmingly Support Prosecutorial Reform, Poll Finds*, ACLU (Dec. 12, 2017) (citing DAVID BINDER RESEARCH, NATIONAL VOTER SURVEY SUMMARY MEMO (2017), https://www.aclu.org/sites/default/files/field_document/171212_dbr_aclu_campaign_for_smart_justice_memo_v5.pdf [https://perma.cc/E8JM-GFP5]), https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds [https://perma.cc/5V9Y-9FYE].

election;[11] challengers won only 18% of the few contested races.[12] Evidently, voters, progressive organizations, and funders lack the mechanism to—and fail to—identify candidates who deserve the progressive prosecutor name.

Although the justice system's other actors persistently shackle progressive prosecution policies, a truly reformist district attorney will far better serve a local community than a law-and-order prosecutor would. But members of the polity face a quandary: how can they determine who, among the plethora of district attorneys wearing the "progressive" badge, is pursuing genuine reform? Advocates cannot use an attorney's impeccable taste in critical race theory literature as a litmus test; this Note provides a more robust answer.

Part I addresses the common criticism that a true progressive prosecutor cannot exist and contends that it is nonetheless essential that voters identify and support genuinely reformist prosecutors. Part II provides a three-step "weighted constellation" framework that readers should use to evaluate whether a district attorney is a genuine progressive prosecutor: (1) assigning weights to fourteen metrics; (2) examining the district attorney's performance for each metric, including (a) whether the prosecutor falls outside the metric's outer bounds; (b) how far the prosecutor's policies fall from the theoretically most progressive iteration of the metric; and (c) the prosecutor's policies' relative progressiveness compared with their peers' policies. This section also explains the framework's methodology and provides a dataset of twenty-one supposedly progressive prosecutors. Part III compares twenty-one prosecutors across seven of these fourteen metrics—the death penalty, bail reform, decarceration and the New Jim Crow, non-prosecution and diversion, wrongful convictions, police accountability, and prosecutorial accountability—to illustrate the comparative element of the framework's second step, i.e., step (2)(c).

I. Can Prosecutors Ever Be Progressive?

Prosecutors are significant policymakers in the American penal system; they have "more control over life, liberty, and reputation than any other person in America."[13] Unavoidably, structural forces will shackle a theoretically perfectly progressive prosecutor. Nonetheless, a project that instructs voters about how to identify truly forward-thinking prosecutors is still worthwhile.

According to some, judges', the police's, and subordinate prosecutors' intransigence blunt district attorneys offices' power to enact meaningful

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[11] *See* Evan Hughes, *America's Prosecutors Were Supposed to Be Accountable to Voters. What Went Wrong?*, Politico (Nov. 5, 2017), https://www.politico.com/magazine/story/2017/11/05/cyrus-vance-jr-americas-prosecutor-problem-215786 [https://perma.cc/JFP9-UR2K].

[12] *See id.*

[13] Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. Rev. 171, 173 (2019) (citing Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 3 (1940)).

change.[14] This is undeniable. Police unions have forcefully criticized Larry Krasner,[15] Rachel Rollins,[16] and Kim Foxx.[17] State court judges have constrained DAs' efforts to replace long-standing prosecutorial practices[18] with

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[14] *See generally* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. (forthcoming 2020).

[15] The Philadelphia Fraternal Order of Police (FOP) President John McNesby has called Krasner "anti-police," has demanded that Krasner resign, and has taken out billboards along I-95 that read "Help Wanted: New Philadelphia District Attorney. Please contact FOP Lodge #5." *'Help Wanted': Philadelphia Police Union Calling For New District Attorney In I-95 Billboards*, CBS PHILLY (June 27 2019), https://philadelphia.cbslocal.com/2019/06/27/help-wanted-philadelphia-police-union-calling-for-new-district-attorney-in-i-95-billboards/ [https://perma.cc/Y3P4-FRDJ]; *see also* Kimberly Davis, *'He Betrayed Us, He Lied To Us': Police Officer's Widow, FOP Call For DA Krasner's Resignation Over Abu-Jamal Appeal*, CBS PHILLY (Apr. 23, 2019), https://philadelphia.cbslocal.com/2019/04/23/daniel-faulkner-widow-fop-call-for-da-larry-krasners-resignation-mumia-abu-jamal-appeal/ [https://perma.cc/Z9A9-TZQ8]; Kristen Johansen, *'He's Anti-Law Enforcement': Head Of Philly's Police Union Expresses Concern Over DA's Race*, CBS PHILLY (May 17, 2017), https://philadelphia.cbslocal.com/2017/05/17/hes-anti-law-enforcement-head-of-phillys-police-union-expresses-concern-over-das-race/ [https://perma.cc/B9T4-NE9N]. Recently, FOP has ratcheted up its war with Krasner by suing him over his publishing a "not-to-call" list of police officers to testify in court who had a history of lying and racial bias. *See Judge Throws Out FOP Lawsuit Over District Attorney's So-Called 'Do Not Call' List*, CBS PHILLY (Aug. 23, 2019), https://philadelphia.cbslocal.com/2019/08/23/judge-throws-out-fop-lawsuit-over-district-attorneys-so-called-do-not-call-list/ [https://perma.cc/82SD-A6MH].

[16] One week before Rollins took office, the National Police Association filed a Massachusetts state bar complaint against her, alleging that she was violating ethics rules by promising to refuse to prosecute non-violent property crimes. *See* adminpolice, *National Police Association Files Bar Complaint Against District Attorney Elect Rachael Rollins,* NAT'L POLICE ASS'N. (Dec. 28, 2018), https://nationalpolice.org/national-police-association-files-bar-complaint-against-district-attorney-elect-rachael-rollins/ [https://perma.cc/9JL3-N4YM]; Kaitlin Flanigan, *Police Group Accuses Suffolk DA-Elect of 'Reckless Disregard' for Massachusetts Laws*, NBC BOS. (Dec. 28, 2018), https://www.nbcboston.com/news/local/Rachael-Rollins-Suffolk-District-Attorney-Elect-National-Police-Association-Bar-Complaint-503616441.html [https://perma.cc/3DQ2-5T5A].

[17] Chicago's police union slammed Kim Foxx for pandering to a "powerful anti-police movement" after she exonerated defendants whose wrongful convictions were obtained through police coercion and unlawful interrogation methods and demanded that Foxx resign for refusing to charge shoplifting as a felony unless the value of what allegedly was stolen was more than $1,000. Mitchell Armentrout, *Police Union President Slams Foxx, Prosecutors After Exonerations*, CHI. SUN-TIMES (Nov. 18, 2017), https://chicago.suntimes.com/2017/11/18/18401698/police-union-president-slams-foxx-prosecutors-after-exonerations [https://perma.cc/T42L-QRS8]; *see also* Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance From Within*, BRENNAN CTR. JUST. (June 19, 2019), https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within [https://perma.cc/67V8-2PJK].

[18] For example, Philadelphia's elected judges have consistently refused to sign off on plea deals recommended by Krasner's office as too lenient. *See* Cohen, *supra* note 17. Further, the Pennsylvania Supreme Court recently construed the state's law in a fashion that severely limits Larry Krasner's attempts to reform his office's death penalty practices. *See* Julie Shaw, *DA Larry Krasner Gives Up Fight in More Death-row Appeals, Stirring Concern from Courts, Families*, PHILA. INQUIRER (May 23, 2019), https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-death-penalty-cases-20190523.html [https://perma.cc/4UNV-R6SK]. According to Krasner, a defendants' 2005 trial was "tainted by substandard performance," and Krasner has argued to the court that Pennsylvania's law's grant of wide prosecutorial discretion should give him the power to decide whether to continue to seek the death penalty in this case. *Id.* The state's high court disagreed and denied Krasner's attempt to toss out the death sentence. *See id.*

forward-looking approaches.[19] Subordinate line prosecutors often work to subvert their boss's agenda.[20]

Nonetheless, this argument understates the breadth of prosecutorial power. Prosecutors cannot unilaterally dismantle the justice system's entrenched structural obstacles; yet, prosecutors greatly influence local justice. Handling 95% of all criminal cases in America, local prosecutors wield the authority to lock up fewer people and alleviate unnecessarily harsh punishment.[21] Indeed, prosecutors' impact on criminal justice likely dwarfs that of any other actor.[22] Their massive discretion over prosecution, case strategy,

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[19] A recent conflict about cash bail in Harris County, Texas is illustrative. In 2016, a federal judge ruled that the Harris County bail system for misdemeanors was unconstitutional. In response, fourteen county judges spent more than $6 million of taxpayer money appealing the ruling. To convey to the public that cash bail reform was socially undesirable, the judges proceeded to grant low cash bonds to higher risk defendants and release defendants without supervision or reminders to return to court. Although the judges' appeal ultimately failed, the case brought legislative bail reform to a grinding halt. *See* Maura Ewing, *Harris County Judges May Face A Reckoning Over Bail On Election Day*, APPEAL (Nov. 4, 2018), https://theappeal.org/harris-county-judges-may-face-a-reckoning-over-bail-on-election-day/ [https://perma.cc/7525-8AXC].

[20] Emily Bazelon has described her observations of Brooklyn line prosecutors refusing to comply with DA Eric Gonzalez's official policies on bail, non-prosecution, and evidence disclosure. After shadowing members of Gonzalez's office, she found that Brooklyn ADAs were still relying on police officers who had histories of constitutional violations in making arrests and issuing charges. *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 280 (1st ed. 2019); *see also* @CourtWatchNYC, TWITTER, https://twitter.com/courtwatchnyc?lang=en [https://perma.cc/S2YW-4NX9]. And before Wesley Bell was even sworn into office as the new St. Louis District Attorney, prosecutors in his own office voted to join the St. Louis County Police Association, the county's largest police union that had endorsed Bell's opponent in the election. This unprecedented move was criticized as a conflict of interest by watchdog groups such as the ACLU. The union also called for the reinstatement of prosecutors that Bell had discharged. *See* Alice Speri, *Five Years After Ferguson, St. Louis County's New Prosecutor Confronts a Racist Criminal Justice* System, INTERCEPT (Jan. 24, 2019, 1:58 PM), https://theintercept.com/2019/01/24/wesley-bell-st-louis-prosecutor-ferguson/ [https://perma.cc/6NQH-G7FP]; *see also* Abdul Rad & Arthur Rizer, *A Dangerous Conflict of Interest*, ST. LOUIS POST-DISPATCH (Jan. 15, 2019), https://www.stltoday.com/opinion/columnists/a-dangerous-conflict-of-interest/article_527bcecb-603d-5044-a96e-e6901b5190e3.html [https://perma.cc/S2YW-4NX9]; David Hunn, *St. Louis County Prosecutors Vote to Unionize*, ST. LOUIS POST-DISPATCH (Dec. 18, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutors-vote-to-unionize/article_e8422a8f-0fbb-584c-96b6-ff4391b6c6b0.html [https://perma.cc/2QAN-PW75].

[21] *See* Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html [https://perma.cc/V8GH-FZYT].

[22] John Pfaff contends that prosecutors are the most important factor in the increase of prison populations. *See generally* JOHN PLAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION-AND HOW TO ACHIEVE REAL REFORM (2017). President Barack Obama has allegedly stated that DAs have more power than the President of the United States to effect change in the criminal justice system. *See* Hughes, *supra* note 11; *see also* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 845–46 (2004) ("[P]rosecutors have been criticized for bringing cases that are too weak or poorly investigated, for bringing prosecutions that are unduly harsh, and for other purported excesses."); Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-crim-

and bail decisions positions district attorneys to enact local reforms.[23] Who your prosecutor is also matters to each individual defendant—just ask Curtiss Flowers,[24] Randall Dale Adams,[25] or the many other defendants whom prosecutors wrongfully prosecuted or sought overly harsh sentences for.

Others caution against advocates' paying undue attention to progressive prosecutors. One variation of this argument is that there can never be enough forward-looking prosecutors to effect systemic change.[26] Tough-on-crime is clearly still the mainstream approach to prosecution.[27] Paul Butler

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inal-justice-reform/ [https://perma.cc/3FDB-2J95]; Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 11, 2015), https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment [https://perma.cc/9HBW-3N68]; Brooklyn Defender Servs., *Power of Prosecutors*, YOUTUBE (Sept. 10, 2017), https://www.youtube.com/watch?time_continue=1&v=zrgvlx7MnqA [https://perma.cc/C3WN-K833].

[23] Jeffrey Bellin has compiled a long list of articles that have espoused the "prosecutors are all-powerful" viewpoint. *See* Bellin, *supra* note 13, at 189 (citing ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) ("'[Prosecutors are] the most powerful actors in the criminal justice system' . . . and I blame them for '[m]uch of what is wrong with American criminal justice.'")); *see also* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1076 (2017) (arguing that "the Prosecutor Problem" is "what modern scholars claim is responsible for the astronomical increase in incarceration in America in the last fifty years"); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) ("Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad."); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 678 (2016) ("No serious observer disputes that prosecutors . . . hold most of the power in the United States criminal justice system.").

[24] *See* Gilbert et al., *Reversed*, APM REPORTS (June 21, 2019), https://www.apmreports.org/story/2019/06/21/curtis-flowers-wins-scotus-appeal [https://perma.cc/AN9P-DRAU].

[25] *See* Michael L. Radelet, *Randall Dale Adams: Filmmaker Helped Free Innocent Man*, BLUHM LEGAL CLINIC, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/randall-dale-adams.html [https://perma.cc/5US6-J4DB].

[26] Academics such as Rachel Barkow question if the recent progressive prosecution surge has any staying power. To enact serious criminal justice reform, argues Barkow, the politics of district attorney elections cannot merely shift to the left. Indeed, the role of politics and elections must be minimized in district attorney elections—serious criminal justice reforms cannot be enacted by prosecutors "playing a political game differently." *See* BAZELON, *supra* note 20, at 289. Those in Barkow's camp are wary that the voting public's comfort with progressive prosecutors is dependent on current low crime levels and predict that the prosecutorial reform movement will "fizzle" should crime rise again. *See id.*

[27] *See* Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019), https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms [https://perma.cc/RME5-SNGW] (quoting Angela J. Davis on the promise of progressive prosecutors and Jonathan Blodgett, the President of the National District Attorneys Association). The continuing presence and legacy of the prosecutors who disavow the progressive prosecution model is evidence of the failure of the reformist prosecution model to gain national acceptance. Notably, Attorney General William Barr publicly chastised progressive prosecutors as "dangerous to public safety." At a FOP convention in New Orleans, Barr slammed progressive prosecutors as "anti-law enforcement" and "dangerous to public safety"—progressive prosecutors "style themselves as 'social justice' reformers . . . but they spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law." *Id.* Tellingly, when New York sought to establish an independent state commission on prosecutorial misconduct in 2017, the New York District Attorney's association pulled no punches in lobbying heavily against the commission and threatened to sue and boycott it. *See* BAZELON, *supra* note 20, at 289.

estimates that he considers fewer than 100 of America's 2,400 to be "progressive."[28] In the last two years, traditional prosecutors defeated progressive candidates in DA elections in Sacramento,[29] San Diego,[30] and Las Vegas.[31] Another riff on this argument: advocates should train their sights on systemically reforming the police—the most helpful avenue for criminal justice reform—rather than prosecutorial reform.

Still, there is value in voters' elevating prosecutors who will use their office's broad powers to effect change in their communities. Although few, "progressive" prosecutors oversee jurisdictions that cover a significant portion of the U.S. population. Forty million Americans (i.e., more than 12% of America's population) live in a city or county with a "progressive" prosecutor.[32] The Black Lives Matters movement has drawn much-needed attention to municipal policies to defund the police as in fact the best avenue for local criminal justice reform—these include abolishing paid leave for officers under investigation, cutting pensions and refusing to hire officers who have committed excessive force, creating liability for officer misconduct, cutting the size of the police force, and redirecting funds from the police to other community resources. Although meaningful local criminal justice reform is impossible without defunding the police, advocates cannot ignore the actual and potential impact of progressive prosecutors, whose increasing national prominence represents the burgeoning national push to reform the role of the modern American prosecutor.

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[28] *See* Paul Butler, *Prosecutors' Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019), https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html [https://perma.cc/S7EE-S3PB].

[29] *See* Marcos Bretón, *Sacramento's DA Race is Done: Why Progressives Never Should Have Backed Noah Phillips*, SACRAMENTO BEE (June 15, 2018), https://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article213205949.html [https://perma.cc/PCK3-PD8L].

[30] *See* Greg Moran, *DA Race: Stephan Easily Defeats Challenger Jones-Wright, Earns Full Term*, SAN DIEGO UNION-TRIBUNE (June 6, 2018), https://www.sandiegouniontribune.com/news/public-safety/sd-me-elex-da-20180531-story.html [https://perma.cc/6WP2-8KAL].

[31] *See* Rachel Crosby, *Wolfson Beats Langford to Retain Clark County DA Seat*, LAS VEGAS REV.-J. (June 12, 2018), https://www.reviewjournal.com/news/politics-and-government/clark-county/wolfson-beats-langford-to-retain-clark-county-da-seat/ [https://perma.cc/7A3A-3VRF].

[32] *See id.*

II. METHODOLOGY

A. The Metrics

TABLE 1

Column I: Metric and Justification	**Column II: Theoretically Most Progressive Stance**	**Column III: Potential Progressive Policies**	**Column IV: Outer Limit**
1. Bail Reform *Cash bail only serves to imprison those who cannot afford bail*[33]	Refuse to seek cash bail in any case, including felonies	Request cash bail only for non-major or non-violent crimes, support efforts to eliminate cash bail, allow defendants to use unsecure bonds in place of cash bail, place caps on the amount of bail that subordinate prosecutors can request for "crimes of poverty," and support bail funds	Refuse to reduce request for cash bail at in any case, even for minor crimes
2. Death Penalty *The death penalty is more cruel, inhumane, and degrading than other punishments and the state imposes death disproportionately on black, male defendants accused of crimes against white victims*[34]	Publicly oppose the death penalty and refuse to seek death sentences in any inherited or new cases	Publicly oppose the death penalty and refuse to seek death sentences in any inherited or new cases	Request the death penalty in any case, even if for only a small subset of the "worst" defendants or even if the state does not carry out executions

[33] *See* FAIR & JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 6–7 (2018) https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [https://perma.cc/S2KQ-WWAL]; *see also* Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36–37 BUFF. PUB. INT. L.J. 29, 32 (2019).

[34] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 23–24; *see generally* HUGO BEDAU, THE DEATH PENALTY IN AMERICA (1998); Stephen Nathanson, *Does It Matter If The Death Penalty is Arbitrarily Administered?*, 14 PHIL.& PUB. AFF. 115 (1985); Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty*, 14 PHIL. & PUB. AFF. 115 (1985); Carol Steiker, *No, Capital Punishment Is Not Morally Required*, 58 STAN. L. REV. 751 (2010).

3. Decarceration and the New Jim Crow *America incarcerates en masse; black and brown men are systematically imprisoned at higher rates than white men*[35]	Abolish prison and eliminate racially discriminatory effects in prosecution	Reduce prison population and address racially discriminatory prosecutorial policies	Fail to decrease prison populations or mitigate prosecutorial practices that disproportionately impact marginalized groups
4. Diversion and Non-Prosecution *There are too many prosecutions of non-violent, victimless crimes, which feeds mass incarceration*[36]	Refuse to prosecute any crime	Institute non-prosecution policies that result in everyone in a community benefitting equally from those policies, including non-prosecution of crimes that the police have historically used to target people of color (e.g., marijuana prosecutions)	Prosecute minor or non-violent crimes

[35] *See generally* ALEXANDER, *supra* note 9; Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/PGW3-77PB]; UC Berkeley Sch. of Law, *Professors Devon Carbado and Priscilla Owen: Police Violence and Black Women*, YOUTUBE (Apr. 6, 2018), https://www.youtube.com/watch?v=66830_oEgaM; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020,* PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/W9CW-A8KC]; *Excessive Punishment*, EQUAL JUST. INITIATIVE, https://eji.org/issues/excessive-punishment/ [https://perma.cc/4L6U-HF2E]; *Mass Incarceration*, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration [https://perma.cc/22FV-S4E8].

[36] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 4–5; *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 CUNY L. REV. 203, 229–31 (2008); *see generally* ALEXANDER, *supra* note 9; MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. BUDGET & POL'Y PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION (2014), https://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf [https://perma.cc/M9QF-LE3X]; Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 6 (2006); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 145 (2014).

5. Sentencing Reform *Punitive sentencing statutes drive mass incarceration, and prosecutors recommend disproportionately higher sentences for people of color*[37]	Abolish prison and expunge and seal all criminal records	Support elimination of mandatory minimums, support sentencing reform legislation, support efforts to commute existing sentences, set up expungement and sealing mechanisms for criminal records	Completely refuse to advocate for forward-looking or backward-looking sentencing reform (commutations, expungements, sealings)
6. Evidence Disclosure *Weak constitutional and statutory requirements permit prosecutors to avoid disclosing key evidence to defendants, leading to widespread miscarriages of justice*[38]	Institute total "open-file" and "open discovery" policies (i.e., disclosure of all relevant evidence and all information received from law enforcement to defendants)	Increase amount of relevant evidence disclosed to the defense through versions of open file and open discovery policies	Systematically fail to disclose relevant evidence to the defense
7. Fines, Forfeitures, Fees *Fines, forfeitures and fees are a regressive poverty tax; they stymie rehabilitation, exacerbate indigent defendants' debt, and fail to improve public safety*[39]	Refuse to collect fines, forfeitures, or fees	Impose fines, forfeitures, and fees with thoughtful consideration of defendants' ability to pay	Persistently collect fines, forfeitures, fees

[37] *See* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 447–69 (2013); Eileen Hirsch & Martha Askins, *Juvenile Lifers: Reforming Extreme Sentences*, WIS. LAW., Jan. 2019, at 12, 13; *see generally* FAIR & JUST PROSECUTION, REVISITING PAST EXTREME SENTENCES: SENTENCING REVIEW AND SECOND CHANCES (2020), https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP_Issue-Brief_SentencingReview.pdf [https://perma.cc/W5RY-BGB5].

[38] *See* David A. Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. R. ONLINE 25, 33–34 (2017); *see also* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 539 (2007); Vida B. Johnson, *Federal Criminal Defendants Out of the Frying Pan and into the Fire? Brady and the United States Attorney's Office*, 67 CATH. U. L. REV. 321, 332–34 (2018); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 151–53 (2012); *see generally* FAIR & JUST PROSECUTION, PROMOTING TRANSPARENCY AND FAIRNESS THROUGH OPEN AND EARLY DISCOVERY PRACTICES (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief_Discovery.pdf [https://perma.cc/CYZ8-PRGF].

[39] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 20–21; *see also* CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 13–15 (2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf [https://perma.cc/QZF4-H8UY]; FAIR & JUST PROSECUTION, FINES, FEES, AND THE POVERTY PENALTY (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief_Fines.Fees_.pdf [https://perma.cc/GT3C-AKJL]; MATTHEW MENDNDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP

8. Immigration *The justice system disproportionately harms non-US citizens, who are a particularly vulnerable group*[40]	Refuse to levy criminal charges against any non-US citizens and refuse to cooperate with ICE	Institute policies that reduce criminal charges levied against non-US citizen defendants and reduces the exposure of non-US citizens to the justice system (e.g., calling fewer non-US citizen witnesses)	Consistently charge non-US citizens with criminal offenses and persistently comply with ICE detainers
9. Juveniles *Those under the age of 25 have yet to fully develop emotionally or neurologically; prosecutors should treat them as the juveniles that they are and not as adults*[41]	Refuse to seek criminal punishment for any juveniles (i.e., people under 25)	Institute policies including not prosecuting juveniles for minor or non-violent crimes, not prosecuting juveniles as adults, and diverting juveniles	Consistently charge juveniles as adults and seek criminal punishment for juveniles who allegedly committed minor and non-violent crimes

COSTS OF CRIMINAL JUSTICE FEES AND FINES (2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final4_0.pdf [https://perma.cc/LR6T-UJBD].

[40] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 11; *see generally* Heidi Altman, *Prosecuting Post-Padilla: State Interests and the pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1 (2012); Hillary Blout et al., *The Prosecutor's Role in the Current Immigration Landscape*, CRIM. J., Winter 2018, https://www.ilrc.org/sites/default/files/resources/prosec_role_immig_landscape-rc-20180215.pdf [https://perma.cc/3AQW-L9B6]; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); *Collateral Consequences, Immigration And Second Chances*, FAIR & JUST PROSECUTION, https://fairandjustprosecution.org/issues/collateral-consequences-immigration-and-second-chances/ [https://perma.cc/AG2C-GSHC].

[41] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 9; *see generally* FAIR & JUST PROSECUTION, YOUNG ADULTS IN THE JUSTICE SYSTEM (2019), https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP_Brief_YoungAdults.pdf [https://perma.cc/VY9V-PF9Y]; Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103 (2013).

10. Police Brutality and Accountability *Police brutality in communities of color is widespread, and prosecutors encourage police misconduct by relying on unreliable police testimony in prosecuting defendants*[42]	Completely eliminate police brutality and corruption and publicly support police abolition; eradicate prosecutors' use of unreliable police testimony	Charge police officers who commit police brutality, publicly advocate that municipalities defund the police; reduce reliance on testimony from unreliable police officers	Fail to prosecute police officers who commit acts of brutality, remain silent about police reform; rely on police officers who have provided unreliable evidence in court
11. Prosecutorial Accountability *Prosecutors face little-to-no accountability for unethical or illegal behavior, leading to miscarriages of justice*[43]	Completely eliminate illegal and unethical prosecutorial conduct	Accord appropriate punishments—including job termination and criminal charges when necessary—for subordinate prosecutors who behave unethically or illegally	Make no gains in establishing prosecutorial accountability or exacerbate prosecutorial accountability
12. Office Culture and Diversity *DA offices often have overly combative, win-at-all-costs cultures or tolerate prosecutors' casually using racist, sexist, or other bigoted language that reinforce anti-defendant attitudes*[44]	Successfully cultivate culture of seeking justice over winning cases and maintain zero tolerance for racist, sexist, or other bigoted language in the workplace	Make gains orienting office culture towards justice and reduce racist, sexist, or other bigoted language in the workplace	Fail to tackle win-at-all-cost culture or racist, sexist, or other bigoted language in the workplace

[42] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 19; *see generally* FAIR & JUST PROSECUTION, PROMOTING INDEPENDENT POLICE ACCOUNTABILITY MECHANISMS (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Police-Accountability.9.25.pdf [https://perma.cc/8BCF-VFAF]; Sklansky, *supra* note 38, at 38–40; BLACK LIVES MATTER, https://blacklivesmatter.com/ [https://perma.cc/Z89N-5PE9].

[43] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 14–15; *see generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 U.C. DAVIS L. REV. 275 (2004).

[44] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 14–15; Sklansky, *supra* note 38, at 39–40.

13. Probation and Parole *Probation and parole increase the likelihood that a person will reoffend purely because of technical violations, trapping the person in the penal system at the expense of rehabilitation or reducing recidivism*[45]	Substitute all probation and parole with non-supervised diversion programs	Limit probationary terms, increase the usage of non-supervised diversion programs in the stead of probation or parole, reduce technical violations	Consistently ask for lengthy probation or parole accompanied with myriad technical violations
14. Wrongful Convictions *America has a longstanding history of wrongful prosecutions and convictions—the epitome of miscarriage of justice*[46]	Exonerate every defendant whom the county has wrongfully convicted	Set up well-resourced conviction integrity units to examine past convictions and administer exonerations	Tepidly address wrongful convictions

Promulgating a list of metrics is difficult because it is impossible to generate a single progressive roadmap for prosecutors. David Sklansky rightfully points out that there is no consensus on what "best practices" are for prosecutors' offices because people have mixed expectations of prosecutors and because prosecutors serve different communities with distinct needs.[47] By offering recommendations with diverging levels of generality, existing literature reflects scholars' struggle to pin down the policies that progressive prosecutors ought to pursue. At a high level of particularity: the Brennan Center's list of twenty-one "practical steps"[48] and Fair and Just Prosecution's "briefs" for newly elected prosecutors.[49] At the abstract end of the spectrum, Joseph Margulis recommends seven high-level goals—such as "be purposeful" and "minimize harm"—as part of his "alternative organizing vision

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[45] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 13; *see generally* Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL'Y 51 (2013).

[46] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 16; *see generally* FAIR & JUST PROSECUTION, CONVICTION INTEGRITY UNITS AND INTERNAL ACCOUNTABILITY MECHANISMS (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJP-Brief.ConvictionIntegrity.9.25.pdf [https://perma.cc/2PG3-3ERM]; H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 11; Peter A. Joy, *Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (2006); Dennis J. Stevens, *Forensic Science, Wrongful Convictions, and American Prosecutor Discretion*, 47 HOW. J. CRIM. J. 31 (2008); Fred C. Zacharias & Bruce A Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009); *Wrongful Convictions*, EQUAL JUST. INITIATIVE, https://eji.org/issues/wrongful-convictions/ [https://perma.cc/U4QV-UETE.

[47] *See* Sklansky, *supra* note 38, at 27.

[48] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33.

[49] *See Issues at a Glance Briefs*, FAIR & JUST PROSECUTION, https://fairandjustprosecution.org/resources/issues-at-a-glance-briefs/ [https://perma.cc/4S88-X8X6].

that guides the operation of the prosecutorial function."[50] Sklansky's "handbook" occupies a space between these two poles; it provides ten "suggestions" ranging from "make clear how you want to be judged" to "diversify your staff."[51]

These existing approaches are helpful for prosecutors who are seeking guidance on running progressive offices. But no clear guidance exists for voters, funders, progressive groups, or other members of the polity who aspire to support progressive prosecutors. This Note provides assessors with a substitute framework that accounts for the totality of each DA's circumstances while drawing clear lines between progressive and non-progressive prosecution practices.

As a conceptual starting block, an American criminal justice system can be theoretically progressive only if the government (1) treats everyone with dignity; and (2) carries out justice equitably and fairly. Abolitionists would contend that the state can only accomplish these twin goals through abolition of police, prosecutors, and prison. Accepting abolition's lofty goals, this paper instead turns to two avenues to make progress towards these theoretical goals in today's America: the state should (1) police, prosecute, and lock up far fewer people; and (2) not disproportionately police, prosecute, and lock up members of marginalized groups (specifically racial and ethnic minorities, sex workers, the LGBTQ+ community, immigrants, and so forth). Drawing on the plethora of existing criminal justice literature—including publications by the aforementioned Brennan Center, Fair and Just Prosecution, and Professor Sklansky—there are fourteen buckets of prosecutorial policies that affect these two theoretical goals and their practical counterparts. Readers can use these fourteen buckets as metrics to assess whether a DA is a bona fide progressive. These metrics are not an Emily's List- or NRA-style scorecard; readers should not expect prosecutors to hit a certain score for each metric or to check every single box from this list. Rather, readers should combine and weigh these fourteen metrics depending on the DA's county.

First, assessors should run down the list of fourteen metrics[52] (Column I) and add weights to each metric depending on the specific context and history of that county's DA office, criminal justice system, politics, and community needs. When assigning weights, the assessor should avoid assigning a binary value or a scale value to each metric; rather, the assessor should assign weights per a legal balancing test.[53] Second, assessors should examine the DA's specific policies for each relevant metric (i.e., start with Row 1.) If a

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[50] Joseph Margulies, *Seven Steps for Progressive Prosecutors*, VERDICT (Apr. 30, 2019), https://verdict.justia.com/2019/04/30/seven-steps-for-progressive-prosecutors [https://perma.cc/NWZ3-5W5L].

[51] *See* Sklansky, *supra* note 38, at 28, 40.

[52] The metrics are not listed in order of importance. Each of the fourteen metrics is at a mid-level of generality and includes many important sub-metrics for assessors' consideration.

[53] Although imprecise, courts commonly use balancing tests to measure the relative importance of interests. *See generally* T. A. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

prosecutor's policies fall outside the "outer limit" (Row 1, Column IV) of a given metric, the assessor can potentially shift the prosecutor from progressive to not progressive, or even regressive, status. As for a prosecutor who is pursuing any of a variety of progressive policies (i.e., they fall into Row 1, Column III), assessors can compare those policies with the, theoretically, most progressive stance on each issue (Row 1, Column II) and with the policies of prosecutor peers who find themselves in Column III (refer to Part III: Comparative Analysis for guidance). The assessor should move onto the next metric (i.e., move down to Row 2) and repeat this step for all fourteen metrics. Finally, the assessor should conduct a totality analysis accounting for the analysis from steps one and two, i.e., the weights given to each metric, if and how many times a prosecutor crossed the outer limits of the metrics, how far away the prosecutor's policy was from the theoretically most progressive iteration of the metric, and how the prosecutor's policies for a metric compare with their peers.

No two prosecutors serve the exact same community—this demands a "weighted constellation" approach. Not every metric applies to every prosecutor in equal fashion. For example, readers cannot compare the capital policies of DAs in non-death penalty districts with DAs in death penalty states. Further, this approach accommodates prosecutors who focus on a specific policy because of their county's history and crime trends. Assessors should assign weight to a metric according to a county's relationship with that metric. Take, for example, a district with a troubling history of wrongful convictions; a DA that stakes out progressive stances on the other thirteen metrics but has done little to tackle wrongful convictions is perhaps undeserving of the progressive prosecutor title. But take Aramis Ayala and Melissa Nelson, who have focused on death penalty and wrongful conviction respectively because those issues have a special history in their counties; their failure to address other criminal justice issues may not be evidence of their regression but rather an indicator of how they are prioritizing their communities' needs. Similarly, assessors should not relegate DAs of smaller jurisdictions to regressive or nonprogressive status for failing to develop a policy for a particular metric—they do not have the staff, budget, or bandwidth to enact the same breadth of policies as DAs in metropolitan areas.

Although a totality analysis is, necessarily, a fluid endeavor, each metric allows assessors to draw clear lines between progressive and regressive prosecutorial policies. Each metric has outer-limits and crossing these limits could move a prosecutor from progressive to non-progressive—or even regressive—status. None of these metrics are binary, but some metrics are brighter lines than others. Take the death penalty. Capital punishment supersedes other punishments in its cruelty and degradation of dignity, and the state imposes death in a racially disproportionate manner. Consequently, a truly progressive prosecutor should refuse to pursue the death penalty in any case. Therefore, of the DAs who serve capital districts, it is relatively easy for advocates to separate the genuinely progressive prosecutors from the rest of the pack—they are either seeking the death penalty or they are not. On the

other hand, assessors may have more trouble using the non-prosecution of minor crimes to sieve the progressives from the non-progressives. Prosecutors draw different lines between minor and non-minor crimes, and alternatives to prosecution—such as issuing citations, charging fines, and mandatory classes—have distinct implications for different communities, cases, and contexts. Therefore, each non-prosecution policy on its face tells us little about a prosecutor's progressiveness. Yet an outer-bound still exists—a DA who prosecutes defendants for the same subset of minor crimes at the same rate as their law-and-order counterparts is not a reformer; it would be intellectually dishonest if they portrayed themselves as a progressive prosecutor.

The framework also lays down guideposts at the other end of the scale—the most progressive policies for each metric. These are the best policies for prosecutors seeking to help create a justice system that treats everyone with dignity and serves justice fairly and equitably. Practically, it may be impossible for even the most well-intentioned prosecutors to attain some of these theoretical limits for political reasons and other actors' interference. Nonetheless, this Note serves up these metrics and their bright lines as a helpful yardstick for assessors.

To aid assessors who are evaluating a prosecutor's performance for a specific metric, this Note provides a comparative analysis of "progressive" prosecutors' records on seven of the fourteen metrics: the death penalty, bail reform, decarceration and the New Jim Crow, non-prosecution, wrongful convictions, police accountability, and prosecutorial accountability. The comparative analysis demarcates the outer limits for each of the seven metrics and identifies the prosecutors who have crossed those lines and could therefore be considered non-progressive or regressive. This subset was selected because the media has adequately covered the track record of many of the prosecutors who form this Note's dataset (see "Part B. The Prosecutors") for each of these metrics; this paper trail is conducive to a thorough comparative analysis for each of these seven metrics. Because the other seven metrics have a smaller media paper trail, conducting a robust comparative analysis without delving into federal government and municipal records is a difficult exercise that exceeds this Note's methodological scope.

B. The Prosecutors

Who identifies as a "progressive prosecutor"? The phrase "progressive prosecutor" crept into the national conscience after a succession of attorneys donning the progressive prosecutor mantle—Larry Krasner of Philadelphia, Kim Foxx of Cook County, Kim Ogg of Houston, and Rachel Rollins of Sussex County—won elections in 2017 and 2018. Since their headline-grabbing electoral successes, progressive district attorney candidates have hit the

campaign trail all over the nation[54]—including in Queens, St. Louis, Sacramento, and Denver—to offer an alternative choice to traditional "law-and-order" incumbents.[55] But cabining the phrase "progressive prosecutor" with the Krasner-era squad is an improperly narrow conception of the diverse set of attorneys who seek to portray themselves as liberal reformers.

First, several DAs have explicitly portrayed themselves as progressive reformers since the early 2010s—long predating the 2017 and 2018 wave. As early as 2011, former San Francisco DA George Gascón supported propositions that would end criminal punishments for nonviolent offenders, helped lower California's prison population, and expunged many convictions.[56] Back in 2012, Jackie Lacey of Los Angeles touted her support for progressive policies—including using more alternative courts, probation, drug treatment programs, programs that treat the mentally ill—and she has publicly emphasized her own racist experiences with the police.[57] During the Obama Administration, Hillar Moore III of Louisiana advocated for progressive prosecution and criminal justice reform at a White House roundtable discussion and several progressive organizations' panels.[58]

Second, many DAs who did not initially hold themselves out to be "progressive" in their first campaign and early years in office have changed their tune and have publicly tacked leftward. Perhaps the most obvious example is Cyrus (or "Cy") Vance. When he first took office in 2010, Vance's "win-at-all-costs" attitude fostered a cohort of line prosecutors who refused to disclose evidence to the defense and vigorously prosecuted minor crimes—such as turnstile jumping and marijuana possession—in a racially discriminatory fashion.[59] But as the public increasingly scrutinized Vance's office in the late oughts, Vance created a conviction integrity unit and announced that he would no longer prosecute marijuana possession.[60]

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[54] *See* Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFPOST (May 12, 2018, 7:00 AM), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06 [https://perma.cc/L885-TPKE].

[55] *See* Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 353–55 (2001).

[56] *See* Evan Sernoffsky, *George Gascón Was a Progressive DA in Progressive San Francisco. Why Did He Make So Many Enemies?*, S.F. CHRONICLE (Oct. 21, 2019, 9:59 AM), https://www.sfchronicle.com/crime/article/Gasc-n-made-enemies-as-SF-s-reformer-district-14545705.php [https://perma.cc/UHQ8-92U2]. Gascón is running against Jackie Lacey in the 2020 election for Los Angeles County's District Attorney. *Id.*

[57] *See* Ann Garrison, *Jackie Lacey – First Black, First Woman – in Run-Off for LA DA, as California Prisoners Head Home*, S.F. BAYVIEW NAT'L BLACK NEWSPAPER (June 10, 2012), https://sfbayview.com/2012/06/jackie-lacey-first-black-first-woman-in-run-off-for-la-da-as-california-prisoners-head-home/ [https://perma.cc/WEZ6-76Z2].

[58] *See* Roy L. Austin, Jr. & Meg Reiss, *Focusing on Prosecutors Is Vital to Criminal Justice Reform*, WHITE HOUSE PRESIDENT BARACK OBAMA (Dec. 16, 2016, 3:28 PM), https://obamawhitehouse.archives.gov/blog/2016/12/16/focusing-prosecutors-vital-criminal-justice-reform [https://perma.cc/3FSS-2WDR].

[59] *See* Tom Robbins, *The People vs. Cy Vance*, MARSHALL PROJECT (Apr. 29, 2018, 9:00 PM), https://www.themarshallproject.org/2018/04/29/the-people-vs-cy-vance [https://perma.cc/N3N8-XUSY].

[60] *See id.* Another example hails from across the Hudson. Melinda Katz narrowly defeated Tiffany Cabán in the 2019 Queens District Attorney Democratic primary. Cabán caught na-

Third, neither party membership nor geography circumscribe this group. Republican DA Melissa Nelson's creating Florida's first conviction integrity unit sent a shockwave through local politics.[61] And these prosecutors are not confined to metropolises on the coasts: Wesley Bell, Jim Stewart, Kim Ogg, Mark Gonzalez, and Beth McCann are southern and southwestern reformers.

Although the umbrella of self-espoused liberals may be broader than the group that many intuitively associate with the concept of progressive prosecution, such prosecutors are still a tiny slice of America's roughly 2,437[62] elected prosecutors.[63] Pinpointing the DAs who identify as progressive prosecutors is surprisingly difficult. In 2015, the Reflective Democracy Campaign published a dataset of every single elected prosecutor who held office in the summer of 2015;[64] a more updated dataset does not exist. Assuming that each of these 2,437 offices still exist in 2020, there is no available literature on how many of these prosecutors self-identify as progressive or provide a method to make such identifications. Although Paul Butler estimates that fewer than 100 of America's elected prosecutors identify as progressive,[65] he has not specified the prosecutors he includes on his list of 100 or how he drew up that number.

This Note does not present an updated dataset of America's elected prosecutors; nor does it name every prosecutor that self-identifies as progressive or list all of their policies.[66] Rather, this Note presents a subset of the

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tional attention for her progressive platform, and Katz clearly ran to Cabán's right. *See* Vivian Wang, *Tiffany Cabán Concedes Queens D.A. Race, Dashing Progressives' Hopes*, N.Y. TIMES (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/nyregion/tiffany-caban-queens-da-concedes.html [https://perma.cc/DQL9-CL5J]. But after her primary victory, Katz has repositioned herself as a progressive reformer and has radically shifted from her primary platform—Katz has since suggested that she aims to eliminate cash bail, and plans on declining to prosecute marijuana possession, decriminalizing sex work, and closing down Rikers. *See* Christine Chung, *After Primary That Veered Left, Dem Stalwart Katz Lands in Progressive Camp*, CITY (Sept. 5, 2019), https://thecity.nyc/2019/09/katz-says-shes-ready-to-take-a-left-turn-as-queens-da.html [https://perma.cc/6NYM-2XKU].

[61] *See* Larry Hannan, *SA Melissa Nelson (Office of the State Attorney for Florida's Fourth Judicial Circuit) Elections Matter: Florida's 4th Judicial Circuit*, APPEAL (July 10, 2017), https://theappeal.org/elections-matter-floridas-4th-judicial-circuit-f0daa8a80edd/ [https://perma.cc/WH8D-4QZ4].

[62] *See* Press Release, Women Donors Network, White Men Dominate Elected Prosecutor Seats Nationwide; 60% of States Have No Elected Black Prosecutors, at 1 (July 7, 2015), https://womendonors.org/wp-content/uploads/2015/07/press-release.pdf [https://perma.cc/5PF2-XSTZ].

[63] America's DAs are a remarkably homogenous and un-diverse group—98% are white, 80% are male, and 75% run for office unopposed. *See* Speri, *supra* note 20; Color of Change, *Winning Justice: Taking on Prosecutors Narrated By Common*, YOUTUBE (Jan. 11, 2019), https://www.youtube.com/watch?v=lkwMGEiRBe4&feature=youtu.be; *see* Women Donors Network, *supra* note 62, at 1.

[64] *See* JUSTICE FOR ALL, https://wholeads.us/justice/ [https://perma.cc/KZ33-278V]. It is worth noting that this dataset includes Attorney Generals, which are outside this paper's scope.

[65] *See* Paul Butler, *Prosecutors' Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019), https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html [https://perma.cc/S7EE-S3PB].

[66] However, these projects would fill a hole in the existing literature.

twenty-one incumbent DAs—whom the media and academia have named "progressive prosecutors"—to illustrate how many prosecutors who lean into their progressive image are less reformist than meets the eye. This Note relies on media and academic coverage as an, albeit imperfect, indicator of district attorneys' self-proclaimed image. Using online media and journal search tools,[67] searching iterations of the phrases "progressive prosecutor" and "reformist district attorney" yielded the names of thirty-three attorneys mentioned in articles containing the aforementioned phrases.[68] Those who are not incumbent DAs were removed from the dataset.[69] Of the incumbent DAs, those who did not meet any of the following four criteria were also removed from the dataset: 1) prosecutors who have explicitly referred to themselves as a "progressive" or "reform" prosecutor; 2) prosecutors who have otherwise presented themselves as a "progressive" or "reform" prosecutor without using those literal words; 3) prosecutors whom mainstream media outlets, a journal article, or criminal justice organizations have cited as a "progressive" or "reform" prosecutor; or 4) prosecutors who have announced policy proposals that are progressive by mainstream criminal justice standards. The remaining twenty-one attorneys are incumbent DAs whom the public heavily associate with the progressive prosecutor label.

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[67] These include Google News, LexisNexis, Westlaw, and Bloomberg.

[68] The thirty-three attorneys yielded by this search were Aramis Ayala, Beth McCann, Charles Todd Henderson, Chesa Boudin, Cyrus Vance, Darcel Clark, Eric Gonzalez, George Gascón, Jackie Lacey, James Stewart, John Chisholm, John Creuzot, Kamala Harris, Ken Thompson, Kim Foxx, Kim Ogg, Kym Worthy, Larry Krasner, Leon Cannizzaro, Marco Serna, Mark Gonzalez, Marilyn Mosby, Margaret Moore, Mark Dupree, Mark Gonzalez, Melissa Nelson, Michael O'Malley, Parisa Dehghani Tafti, Rachel Rollins, Scott Colon, Stephanie Morales, Tiffany Cabán, and Wesley Bell. This is not to say that other prosecutors who are either considered to be progressive or self-identify as progressive do not exist. There may be local prosecutors who have not received generous local or national media attention for their progressive campaign platforms or policies. This is an unfortunate limitation of a study that delves into candidates for office who portray themselves as a particular image—those who fail to make their image known are necessarily excluded from the dataset.

[69] Because this paper illustrates its argument by casting a critical eye on what supposedly progressive prosecutors have done in office, this subset is cabined to incumbent DAs and excludes unsuccessful progressive prosecutor candidates, such as Tiffany Cabán, or recently elected reformist district attorneys who had not taken office when this article was finished, such as Chesa Boudin.

TABLE 2

Prosecutor	Factor I: Explicitly referred to themselves as a "progressive" or "reform" prosecutor	Factor II: Otherwise presented themselves as a "progressive" or "reform" prosecutor	Factor III: Presented by mainstream media outlets, a journal article, or criminal justice organizations as a "progressive" or "reform" prosecutor	Factor IV: Announced policy proposals that are progressive by mainstream criminal justice standards
1. Aramis Ayala *Florida's Ninth Judicial Circuit State Attorney*[70]			X	X
2. Beth McCann *Denver District Attorney*[71]	X	X	X	X
3. Cyrus Vance *Manhattan District Attorney*[72]	X	X		X
4. Eric Gonzalez *Brooklyn District Attorney*[73]	X	X	X	X

[70] *See Aramis Ayala*, POLITICO, https://www.politico.com/interactives/2017/politico50/aramis-ayala/ [https://perma.cc/XSX3-P3J3].

[71] *See* FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 27; Collier Meyerson, *Prosecutors Keep Their Jobs by Putting People in Jail. Can They Be Leaders in the Fight for Criminal-Justice Reform?*, NATION (Nov. 14, 2017), https://www.thenation.com/article/prosecutors-keep-their-jobs-by-putting-people-in-jail-can-they-be-leaders-in-the-fight-for-criminal-justice-reform/ [https://perma.cc/2Z8L-3C3T]; Elise Schmelzer, *Denver District Attorney's Office to Examine Past Cases for Potential Racial Bias as McCann Aligns Herself with National Prosecutor Reform Movement*, DENVER POST (Aug. 19, 2019, 6:00 AM), https://www.denverpost.com/2019/08/19/denver-district-attorney-beth-mccann/ [https://perma.cc/3KFQ-GB48].

[72] *See* Josie D. Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html [https://perma.cc/8LSS-AXZM]; Robbins, *supra* note 59.

[73] *See* Kori Chambers, *The 'Progressive Prosecutor:' Why the Brooklyn DA Wants Criminals Released from Prison Sooner*, PIX11 (May 14, 2019, 10:45 PM), https://pix11.com/2019/05/14/the-progressive-prosecutor-why-the-brooklyn-da-wants-criminals-released-from-prison-sooner/ [https://perma.cc/U2KH-3RT5]; *Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office Is Implementing as Part of the Justice 2020 Initiative, Establishing a National Model of a Progressive Prosecutor's Office*, BROOKLYN DISTRICT ATTORNEY'S OFFICE (Mar. 11, 2019), http://www.brooklynda.org/2019/03/11/brooklyn-district-attorney-eric-gonzalez-unveils-sweeping-reforms-his-office-is-implementing-as-part-of-the-justice-2020-initiative-establishing-a-national-model-of-a-progressive-prosecutors/ [https://perma.cc/LT59-MAU3]; ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN (2020), http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf [https://perma.cc/BB2F-SLG6].

5. Hillar Moore III *East Baton Rouge District Attorney*[74]		X	X	
6. Jackie Lacey *Los Angeles District Attorney*[75]		X	X	
7. James Stewart *Caddo Parrish District Attorney*[76]		X	X	X
8. John Chisholm *Milwaukee District Attorney*[77]			X	
9. John Creuzot *Dallas District Attorney*[78]		X	X	
10. Kim Foxx *Cook County State Attorney*[79]	X	X	X	X

[74] *See* Lane, *supra* note 5; Pishko, *supra* note 3.

[75] *See* Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, APPEAL (Nov. 12, 2019), https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/ [https://perma.cc/6UZS-LAYU].

[76] *See* Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016), https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519 [https://perma.cc/5E56-2QNS]; Alec, *LA: Reform Candidate James Stewart wins Caddo Parish DA Election*, OPEN FILE BLOG (Nov. 24, 2015), https://www.prosecutorialaccountability.com/2015/11/24/la-reform-candidate-james-steward-wins-caddo-parish-da-election/ [https://perma.cc/7ZU6-WCES]; Meyerson, *supra* note 71.

[77] *See* Angela J. Davis, *The Progressive Prosecutor: An Imperative For Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 3 (2018).

[78] *See* Michael Barajas, *Dallas County DA John Creuzot Calls New Reforms 'A Step Forward in Ending Mass Incarceration'*, TEX. OBSERVER (Apr. 11, 2019, 1:19 PM), https://www.texasobserver.org/dallas-county-da-john-creuzot-calls-new-reforms-a-step-forward-in-ending-mass-incarceration/ [https://perma.cc/QEF3-XUVH]; Ariel Ramchandani, *A Texas Prosecutor Fights for Reform*, ATLANTIC (Oct. 24, 2019), https://www.theatlantic.com/politics/archive/2019/10/can-john-creuzot-reform-texas-prosecution/600592/ [https://perma.cc/53CS-EH6W]; Shawn Shinneman, *The Atlantic Profiles Dallas DA John Creuzot*, ATLANTIC (Oct. 25, 2019, 3:53 PM), https://www.dmagazine.com/frontburner/2019/10/the-atlantic-profiles-dallas-da-john-creuzot/ [https://perma.cc/5LV6-N837].

[79] *See* Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 758 (2018); Bazelon & Krinsky, *supra* note 21; Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018, 6:00 AM), https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx [https://perma.cc/K9C4-XD3J]; Daniella Gibbs Léger et al., *Kim Foxx: What Does It Mean To Be a Progressive Prosecutor?*, CTR. AM. PROGRESS (Mar. 21, 2019, 10:08 AM), https://www.americanprogress.org/issues/criminal-justice/news/2019/03/21/467603/kim-foxx-mean-progressive-prosecutor/ [https://perma.cc/6Y9Y-GB3F].

11. Kim Ogg *Houston District Attorney*[80]	X	X	X	X
12. Kym Worthy *Detroit District Attorney*[81]			X	
13. Larry Krasner *Philadelphia District Attorney*[82]	X	X	X	X
14. Leon Cannizzaro *Orleans Parish District Attorney*[83]		X		X
15. Mark Gonzalez *Nuces County District Attorney*[84]	X	X	X	X
16. Margaret Moore *Travis County* District Attorney[85]		X	X	X

[80] *See The Paradox of "Progressive Prosecution"*, *supra* note 79, at 758; Bazelon & Krinsky, *supra* note 21.

[11] *See* Lauren N. Williams, *ESSENCE Unveils List of 100 Woke Women for the May 2017 Issue*, ESSENCE (Apr. 16, 2017), https://www.essence.com/entertainment/100-woke-women-may-2017-issue/ [https://perma.cc/QE5Z-VXBU].

[82] *See Progressive Prosecution: 2 Years in with DA Larry Krasner*, HARV. L. SCHOOL, https://hls.harvard.edu/event/opias-progressive-prosecution-2-years-in/ [https://perma.cc/5GPS-5F6V]; Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html [https://perma.cc/Q7YH-Q9QK].

[83] *See* Nicholas Chrastil, *'Who's Going to Be Smarter on Crime?' A Look Ahead at the 2020 DA's Race*, LENS (Mar. 1, 2019), https://thelensnola.org/2019/03/01/whos-going-to-be-smarter-on-crime-a-look-ahead-at-the-2020-das-race/ [https://perma.cc/FB9B-Y97J]; Rice, *supra* note 72.

[84] *See* Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO MAG. (May 6, 2018), https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322 [https://perma.cc/6LYZ-WVD5]; Henry Gass, *Meet a New Breed of Prosecutor*, CS MONITOR (Jul. 17, 2017), https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor [https://perma.cc/F6T4-DGBT]; Justin Miller, *The New Reformer DAs*, AMERICAN PROSPECT (Jan 2., 2018), https://prospect.org/health/new-reformer-das/ [https://perma.cc/76HT-GQDK].

[85] *See* Ryan Autullo, *Outside PAC Directs Money into Travis DA's Race, Targeting Margaret Moore*, STATESMAN (Aug. 10, 2019), https://www.statesman.com/news/20190810/outside-pac-directs-money-into-travis-das-race-targeting-margaret-moore [https://perma.cc/MK7Q-XRL7]; Michael King, *District Attorney Margaret Moore Announces Re-Election Campaign*, AUSTIN CHRONICLE (May 24, 2019), https://www.austinchronicle.com/daily/news/2019-05-24/district-attorney-margaret-moore-announces-re-election-campaign/ [https://perma.cc/4SZ2-LYCJ]; Jeff Stensland, *'Progessive Prosecution' Concerns Austin Police Union*, SPECTRUM NEWS (Dec. 7, 2018, 6:30 PM), https://spectrumlocalnews.com/tx/austin/news/2018/12/08/progessive-prosecution-concerns-austin-police-union [https://perma.cc/Z6C9-2MFC].

17. Melissa Nelson *Florida's Fourth Judicial Circuit State Attorney*[86]		X	X	X
18. Michael O'Malley *Cuyahoga County District Attorney*[87]		X	X	
19. Rachel Rollins *Suffolk County District Attorney*[88]	X	X	X	X
20. Stephanie Morales *Portsmouth Commonwealth Attorney*[89]		X	X	X
21. Wesley Bell *St. Lois District Attorney*[90]	X	X	X	X

III. Comparative Analysis

A. Bail Reform

Cash bail only serves to imprison those who cannot afford bail. Most state prison inmates have not been charged with any crime; they languish

[86] *See* Stensland, *supra* note 85.

[87] *See* Cory Shaffer, *Activists Demand Cuyahoga County Prosecutor Follow Progressive Prosecutors Elsewhere, Bar Requests of Cash Bail for Low-Risk Defendants*, Cleveland.com (Aug. 6, 2019) [hereinafter Shaffer, *Activists*], https://www.cleveland.com/court-justice/2019/08/activists-demand-cuyahoga-county-prosecutor-follow-progressive-prosecutors-elsewhere-bar-requests-of-cash-bail-for-low-risk-defendants.html [https://perma.cc/M32G-BXZP]; Cory Shaffer, *Michael O'Malley Topples Cuyahoga County Prosecutor Timothy McGinty*, Cleveland.com, https://www.cleveland.com/metro/2016/03/michael_omalley_topples_cuyaho_1.html (last accessed Nov. 21, 2019) [https://perma.cc/3BJZ-NY33].

[88] *See* Catherine Elton, *The Law According to Rachael Rollins*, Bos. Mag. (Aug. 6, 2019, 9:47 AM), https://www.bostonmagazine.com/news/2019/08/06/rachael-rollins/ [https://perma.cc/8FJS-TPXD].

[89] *See* Maryam Saleh, *Prosecutor Who Convicted White Police Officer for Killing Black Teen Is Re-Elected in Contentious Race*, Intercept (Nov. 7, 2017, 8:58 PM), https://theintercept.com/2017/11/07/prosecutor-who-convicted-white-police-officer-for-killing-black-teen-is-re-elected-in-contentious-race/ [https://perma.cc/96LT-JR78].

[90] *See* Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, Guardian, https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty [https://perma.cc/MG9P-EN5W]; Speri, *supra* note 20.

behind bars simply because they cannot afford bail.[91] Countless studies show that bail is not necessary to serve its ostensible policy rationale, namely to force untrustworthy criminal defendants to show up to court;[92] other forms of bail, such as unsecured bonds, are just as effective.[93] Cash bail compounds the justice system's disproportionate impact on racial minorities and indigent defendants[94] by forcing marginalized defendants to plead to higher sentences and charges than those given to defendants who can afford bail.[95] Cash bail enriches bail bondsmen at the expense of the thousands of poor people—whom prosecutors have not charged with a crime—who are stuck in state prisons.[96] The most progressive stance that a prosecutor could take is to refuse to seek cash bail in any case. Well-meaning prosecutors could limit their requests for cash bail to non-major or non-violent crimes, support efforts to eliminate cash bail in their states, allow defendants to use unsecure bonds in place of cash bail, place caps on how the amount of bail that their prosecutors can request for "crimes of poverty,"[97] and support bail funds.[98] This metric's obvious outer-limit is refusing to offer cash bail, even for minor crimes.

There is no record of any prosecutor adhering to the most theoretically progressive version of this metric. Those who fall on the more progressive

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[91] *See* Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36–37 BUFF. PUB. INT. L.J. 29, 32 (2019).

[92] *See id.*; Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail [https://perma.cc/7Y9V-39F3]; Stephanie Wykstra, *Bail Reform Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality [https://perma.cc/HTG4-5HCS]. The advocacy organization Robert F. Kennedy Human Rights demonstrated this point by spending $ 1.2 million to bail out 102 defendants from Rikers. Only two of those defendants failed to show up for their next court hearing. *See* Jeffery C. Mays, *105 New York City Inmates Freed in Bail Reform Experiment*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/nyregion/bail-reform-rikers-rfk-nyc.html [https://perma.cc/NV6L-6YGM].

[93] The Vera Institute has found that out of 99 people who were released on unsecured bail or partly secured bond, 88% returned to court, and only 8% were arrested before trial for another felony charge. *See* Wykstra, *supra* note 92 (citing *The State of Justice Reform 2017*, VERA, https://www.vera.org/state-of-justice-reform/2017 [https://perma.cc/A4LE-4PWN]).

[94] *See* Johnson, *supra* note 91, at 32–34.

[95] *See* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), https://www.nber.org/papers/w22511.pdf [https://perma.cc/V48T-5538].

[96] *See* COLOR OF CHANGE & ACLU, $ELLING OFF OUR FREEDOM 12–15 (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [https://perma.cc/562W-YLCW].

[97] *See* Rosa Goldensohn, *New York's Most Desperate Caught Up in 'Crimes of Poverty'*, CITY (Oct. 14, 2019), https://thecity.nyc/2019/10/new-yorks-most-desperate-caught-up-in-crimes-of-poverty.html [https://perma.cc/8WCR-J4GU]; *see also* Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 L. & INEQ. 1, 3–4 (2015).

[98] Bail funds are charitable funds that are used to put up bail for defendants too poor to pay their way out of jail. *See* Alysia Santo, *Bail Reformers Aren't Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2019), https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform [https://perma.cc/D8UZ-5UQB].

end of this metric's spectrum—including Wesley Bell,[99] Larry Krasner,[100] Kim Foxx,[101] and Michael O'Malley[102]—have ended cash bail requests for non-violent, minor crimes and have commanded their prosecutors to stop requesting unnecessarily lofty bail. A little to Bell's, Krasner's, Foxx's, and O'Malley's right stand Beth McCann and Rachel Rollins; both refuse to eliminate cash bail outright for non-violent or minor crimes. McCann permits her prosecutors to allow release on personal bond "when appropriate."[103] Rollins's 2019 "Policy Memo" asks her prosecutors to get their supervisors' approval to request cash bail.[104]

But other members of the set have troublingly nonprogressive bail policies. Jackie Lacey and Leon Cannizzaro adamantly seek cash bail for even non-violent, minor crimes. Indeed, Cannizzaro has gone so far as to slam New Orleans's bail funds[105] as "extremely disturbing" and providing defendants "a get-out-of-jail-free card."[106] During their campaigns, Travis County's

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[99] *See* Speri, *supra* note 20.

[100] Krasner's office identified twenty-five nonviolent, non-sex-related charges that constitute up to 61% of all the office's cases, where the bail was set so low it was "effectively only a punishment for those too poor to pay it." Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor [https://perma.cc/DPQ5-PUVV]. Krasner instituted a policy of not recommending bail for those charges; as a result, nearly 1,750 defendants were released without cash bail in 2018. *See id.*

[101] In 2017, Kim Foxx announced that her office would recommend releasing people pretrial when the defendant has no violent criminal history, when the defendant's current offense is a misdemeanor or low-level felony, and when there are no other risk factors. *See State's Attorney Foxx Announces Major Bond Reform*, COOK COUNTY ST.'S ATT'Y (Jun. 12, 2017), https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform [https://perma.cc/3GR6-J3SF]. In doing so, Foxx followed through on her campaign pledge to release people in jail who could not afford to post bail of $1,000 or less. *See id.*

[102] Michael O'Malley announced that he instructed his prosecutors to defer to the judge to set bond in non-violent cases and to seek non-cash bail for non-violent felony cases. *See* Shaffer, *Activists*, *supra* note 87.

[103] Schmelzer, *supra* note 71.

[104] *See* SUFFOLK CTY. DIST. ATTORNEY, THE RACHAEL ROLLINS POLICY MEMO 15 (2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf [https://perma.cc/5DZB-EUUF]; *see also* Walter Wuthmann, *Rachael Rollins, 100 Days in: What Has Changed, and What Hasn't, Under the Reformer DA*, WBUR NEWS (Apr. 12, 2019), https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days [https://perma.cc/88N5-395L]. It is worth noting that Rollins's memo contradicts her campaign promise to refuse to ask for cash bail. *See* Wuthmann, *supra*.

[105] *See* Ramon Antonio Vargas, *Cannizzaro Rails Against Incarceration Reduction Efforts, Saying They Threaten Public Safety*, NOLA.COM (Feb. 5, 2019, 4:49 PM), https://www.nola.com/news/crime_police/article_d91ad729-21a5-5083-ae36-fa644405cfc8.html [https://perma.cc/EZD7-LBCZ].

[106] *See* Raven Rakia, *New Orleans Prosecutor Calls New Bail Fund 'Extremely Disturbing'*, APPEAL (Nov. 28, 2019), https://theappeal.org/new-orleans-da-stokes-fears-over-bail-fund/ [https://perma.cc/5NV8-NBTH]. Cannizzaro probably dislikes bail funds because Louisiana has a "user-pay" justice system. In user-pay systems, the courts, district attorneys, law enforcement, and public defenders derive their revenue through payments from defendants. *See generally* MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS (Jan. 2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf (describing New Orleans's user-pay justice system). Because all the aforementioned players are dependent on defendants' fees and fines, user-pay systems are

Margaret Moore and Nueces County's Mark Gonzalez refused to acknowledge whether they would reduce their requests for cash bail in their districts. Now in office, both Moore and Gonzalez seek cash bail for non-violent, minor crimes.[107]

Some DAs' espoused bail policies contradict their offices' practices. Officially, the two self-proclaimed reformist New York DAs, Cy Vance and Eric Gonzalez, bar their prosecutors from seeking bail for misdemeanors. But Manhattan and Brooklyn line prosecutors still seek bail for some minor crimes. One culprit: Vance's bail policy's many exceptions have swallowed the policy.[108] New York public defenders and Court Watch NYC have witnessed Vance's prosecutors repeatedly seek bail for non-flight risk defendants charged with misdemeanors and nonviolent felonies.[109] In 2016, Vance's office detained 17% of defendants whom prosecutors charged with misdemeanors and minor infractions.[110] Vance's bail policies probably contribute to Manhattan's having the highest level of incarceration of the five boroughs.[111] A similar tale unfolds in Brooklyn; Court Watch NYC attended a hearing where a Gonzalez ADA requested $1500 bail for a defendant who allegedly stole four bars of soap.[112] Notwithstanding their line prosecutors' insubordination,[113] Vance's and Gonzalez's offices' failure to administer thoughtful cash bail policies sets the two DAs apart from their more progressive peers.

Kim Ogg—who has shifted rightward on bail—falls into the same camp as Cy Vance and Eric Gonzalez. When campaigning for the Harris County DA office, Ogg supported a lawsuit challenging the county's cash bail system for misdemeanor cases.[114] Ogg joined advocates who argued that Harris County kept poor people and minorities locked up simply because they could not afford cash bail, which, in turn, forces many defendants to

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structured to motivate a state's criminal justice system to over-prosecute. Progressive prosecutors should take it upon themselves to advocate that their state move away from user-generated funding systems and shift towards a system where the state funds criminal justice through a general fund.

[107] *See 'Progressive Prosecutors' Not All So Progressive on Bail Reform*, GRITS BREAKFAST (Sep. 30, 2019), https://gritsforbreakfast.blogspot.com/2019/09/progressive-prosecutors-not-all-so.html [https://perma.cc/RA9W-NVJJ].

[108] *See* Jake Offenhartz, *Vance's DAs Won't Stop Throwing the Book at Petty Crime*, VILLAGE VOICE (Feb. 8, 2018), https://www.villagevoice.com/2018/02/08/vances-das-wont-stop-throwing-the-book-at-petty-crime/ [https://perma.cc/BU4Q-RJAM].

[109] According to Tina Luongo, a chief attorney for Legal Aid Society's criminal practice division, "We're still getting bail requested on people who are not a flight risk charged with misdemeanors and nonviolent felonies." Robbins, *supra* note 59. Court Watch NYC reported attending a hearing where a Manhattan ADA requested $700 bail for a misdemeanor shoplifting case, even though the defendant's last warrant was from 1992. *See id.*

[110] *See id.*

[111] *See id.*

[112] *See* Beth Schwartzapfel, *The Prosecutors*, MARSHALL PROJECT (Feb. 26, 2018, 10:00 PM), https://www.themarshallproject.org/2018/02/26/the-prosecutors [https://perma.cc/87VW-GN92].

[113] *See* BAZELON, *supra* note 20, at 274.

[114] *See* Bazelon & Krinsky, *supra* note 21.

plead guilty to heavy charges to secure release.[115] Three months after her election victory, Ogg told reporters "holding low-level offenders who can't bond out because they're too poor is against the basic principles of fairness."[116] Agreeing with the challengers, a judge found that Houston's cash bail system unconstitutionally discriminated by race. A settlement emerged that would end the challenged cash bail policies via a court-supervised consent decree, and criminal justice advocates praised the proposed agreement.[117] But Ogg pulled a political 180 on bail. Contravening her campaign platform, Ogg—in lockstep with Houston's police chief—now opposes the proposed settlement.[118] She claims that the consent decree would precipitate the release of violent individuals: "[w]e are all for bail reform as long as it protects the public."[119]

Ogg maintains that her prosecutors recommend that defendants charged with minor offenses should be released on personal bonds rather than cash bail;[120] yet Ogg sent an email commanding her subordinate prosecutors to request high bond amounts for certain defendants. Ogg dictated that "misdemeanor high bond requirements should be $15,000."[121] She made it clear: "this directive is coming directly from me."[122] Members of Houston's elected judiciary have begun to push back on Ogg's prosecutors' astronomical bail requests. In 2019, Ogg's ADAs requested $15,000 bond for a man charged with misdemeanor theft, $15,000 for a man possessing less than two ounces of marijuana, $20,000 for a defendant accused of trespass, and $100,000 for a man charged with misdemeanor violation of a protective order for messaging someone he was forbidden from contacting.[123] Houston judges set the defendants' bonds at $1,000, $1,000, $3,000 and $10,000.[124] The judges' refusal to defer to Ogg's high bond requests is telling, as judges normally defer to prosecutors' requests or ratchet up requests that judges

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[115] *See* Juan A. Lozano, *Discord over Deal to Settle Houston-Area Bail Lawsuit*, AP NEWS (Oct. 26, 2019), https://apnews.com/9d4f92ba715b4d22ae3986dfa1b76f37 [https://perma.cc/6AJG-JLDG].

[116] Tom Dart, *Houston's New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017, 7:00 AM), https://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas [https://perma.cc/MGY2-NWTX].

[117] *See* Lozano, *supra* note 115. Criminal justice activists have praised the proposed settlement. Civil Rights Corps attorney Elizabeth Rossi: "The [Houston] settlement is going to keep tens of thousands of people out of cages every year going forward, which is a really exciting prospect." *Id.*

[118] *See id.*; *A First-Cut Reaction to Harris-County DA Kim Ogg's Reasons for Opposing Bail Reform*, GRITS BREAKFAST (Aug. 23, 2019), https://gritsforbreakfast.blogspot.com/2019/08/a-first-cut-reaction-to-harris-county.html [https://perma.cc/KQG5-ALD3].

[119] Lozano, *supra* note 115.

[120] *See* Dart, *supra* note 116.

[121] Alex Hannaford, *Harris County D.A. Ran As A Reformer. So Why Is She Pushing High Bail For Minor Offenses?*, APPEAL (Aug. 9, 2018), https://theappeal.org/harris-county-kim-ogg-bail-reform-jail/ [https://perma.cc/HQG2-LLHK].

[122] *Id.*

[123] *See id.*

[124] *See id.*

deem too low. Ogg's bail policies are regressive, punitive, and inconsistent with the concept of progressive prosecution.

B. Death Penalty

Progressive academics and organizations agree that the death penalty is more "cruel, inhuman and degrading"[125] than any other punishment and that the state disproportionately sentences to death black, male defendants accused of crimes against white victims.[126] This metric's outer limits are clear: in a death penalty jurisdiction, a progressive prosecutor should publicly oppose death penalty and refuse to seek death sentences in inherited or new cases. Supporting the death penalty for only a small subset of defendants—the "worst" defendants—is incompatible with a progressive approach to criminal justice. Each death sentence is immoral, and jurisdictions never successfully cabin their executions to a small number because prosecutors inevitably succumb to the politically irresistible pressure to broadly seek the death penalty.[127]

There are "progressive" prosecutors in death penalty states who publicly oppose and do not seek the death penalty. In 2017, the Orange-Osceola state attorney Aramis Ayala announced that she would seek the death penalty no longer.[128] Similarly, Beth McCann,[129] Larry Krasner[130] and Wesley Bell[131] have pledged that their offices would never seek the death penalty.[132]

Unlike Ayala, McCann, Krasner, and Bell, other members of the dataset seek death sentences. Jackie Lacey of Los Angeles officially supports the death penalty. Since she assumed office in 2012, she has secured capital

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[125] *Death Penalty*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/death-penalty/ [https://perma.cc/DXM8-D8NW].

[126] *See generally* BEDAU, *supra* note 34, Reiman, *supra* note 34, Nathanson, *supra* note 34, Steiker, *supra* note 34.

[127] CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT, 160–62 (2016).

[128] The subsequent fallout of Ayala's announcement—including Governor Rick Scott reassigning Ayala's first-degree murder cases to another prosecutor and impending litigation between Ayala and Scott at the Florida Supreme Court—has drawn national attention. *See Aramis Ayala*, *supra* note 70.

[129] *See New Denver District Attorney Will Not Seek Death Penalty*, EQUAL JUST. INITIATIVE (Jan. 11, 2017), https://eji.org/news/new-denver-district-attorney-will-not-seek-death-penalty/ [https://perma.cc/5455-QCS5].

[130] Krasner has asked the Pennsylvania Supreme Court to rule that the death penalty is impermissible under the state's constitution. *See* Akela Lacy, *Reformist District Attorney Larry Krasner Argues Pennsylvania Death Penalty Is Unconstitutional*, INTERCEPT, https://theintercept.com/2019/07/15/larry-krasner-pennsylvania-death-penalty-unconstitutional/ [https://perma.cc/3DNX-T53Q].

[131] Notably, Bell refused to seek the death penalty in a notorious murder and sexual assault case that took place in at a Catholic Supply Store in his county. *See* Speri, *supra* note 20.

[132] It is worth noting that Ayala and McCann cite the death penalty's huge financial drain on the state's coffers in justifying their opposition to the death penalty. *See Aramis Ayala*, *supra* note 70; EQUAL JUST. INITIATIVE, *supra* note 129. Although it is true that the death penalty trials are extraordinarily expensive, it would be bolder and braver for reformist prosecutors to condemn the death penalty as immoral in and of itself. But regardless of rationale, Ayala's and McCann's opposition to the death penalty is still commendable.

sentences for twenty-two defendants;[133] all were people of color.[134] Lacey's prosecutors secured four death sentences in 2017 alone.[135] Under Lacey's aegis, Los Angeles has become "the nation's leader in generating death sentences."[136] Likewise, East Baton Rouge's Hillar Moore III supports capital punishment.[137]

Other "progressive" prosecutors either equivocate about the merits of the death penalty or confine their support for capital punishment to "extreme cases." Kim Ogg, for example, claims that she only seeks the death penalty in "rare circumstances," such as for murderers of police officers, mass murderers, serial murderers, and killers who "torture and enjoy the suffering of their victims."[138] Nueces County DA Mark Gonzalez did not mention capital punishment during his campaign and claims that his views on the death penalty "change every single day."[139] Yet capital creep is already evident in Ogg's and Gonzalez's offices. Ogg is pursuing the death penalty in eight separate cases.[140] Ogg has publicly opposed executing people with intellectual disabilities; yet she is seeking the death penalty for three defendants despite strong evidence that all three have intellectual disabilities.[141] Gonzalez is pursuing the death penalty against a defendant accused of murdering his wife.[142]

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[133] ACLU, THE CALIFORNIA DEATH PENALTY IS DISCRIMINATORY, UNFAIR, AND OFFICIALLY SUSPENDED. SO WHY DOES LOS ANGELES DISTRICT ATTORNEY JACKIE LACEY STILL SEEK TO USE IT? 2 https://www.aclu.org/sites/default/files/field_document/061819-dp-whitepaper.pdf [https://perma.cc/5GFT-EVKD].

[134] Of the 22 cases, eight defendants had lawyers who were previously or subsequently disbarred, suspended or charged with misconduct. *See id.*

[135] *See id.*

[136] *Id.*

[137] *See* Miller, *supra* note 84. It is worth noting that Moore did support Constitutional Amendment 2, which repealed Louisiana's non-unanimous jury verdict death sentence law. *See* Dillon Lowe, *Louisiana Might Finally Get Rid of Its Century-Old, Racist Jury System*, SLATE (Oct. 22, 2018, 2:27 PM), https://slate.com/news-and-politics/2018/10/louisiana-unanimous-jury-verdict-constitutional-amendment.html [https://perma.cc/7T58-RYG8].

[138] Mike Tolson, *A New Era of the Death Penalty in Houston*, HOUS. CHRON. (Dec. 20, 2017, 10:44 AM) https://www.houstonchronicle.com/local/gray-matters/article/A-new-era-of-the-death-penalty-in-Houston-12444244.php [https://perma.cc/5XGQ-KUVS].

[139] *See* Carimah Townes, *Is Mark Gonzalez the Reformer He Promised to Be?*, APPEAL (Nov. 21, 2017), https://theappeal.org/is-mark-gonzalez-the-reformer-he-promised-to-be-462f199a60c/ [https://perma.cc/HRG8-HCE5]. Another DA who cropped up in the original list of thirty-three progressive prosecutors is Charles Todd Henderson, who was elected Birmingham's DA in 2016. *See* Rory Fleming & Stephen Cooper, *When Politicians Perpetuate the Death Penalty Against the Will of the People*, COUNTERPUNCH (Dec. 6, 2017), https://www.counterpunch.org/2017/12/06/when-politicians-perpetuate-the-death-penalty-against-the-will-of-the-people/ [https://perma.cc/JF99-MAVV]. During his campaign, Henderson promised to only seek the death penalty "in the most heinous cases." *Id.* But Henderson was charged with felony perjury just before he took office, so Governor Ivey appointed a new Republican head prosecutor to take Henderson's place. *See id.* Because Henderson is not an incumbent DA, he is not included in this paper's dataset.

[140] *See* Susan Buchanan, *Ogg Promised Death Penalty Reform in Harris County, but Hasn't Delivered It*, TRIBTALK (July 3, 2019), https://www.tribtalk.org/2019/07/03/ogg-promised-death-penalty-reform-in-harris-county-but-hasnt-delivered-it/ [https://perma.cc/8KRH-63UM].

[141] The three defendants are Dexter Johnson, Robert Jennings, and Harlem Lewis. *See id.*

[142] *See id.*

Unlike Texas—which regularly executes people on death row—California has not executed a defendant since 2006, and California's governor issued an execution moratorium in 2019.[143] Realistically, Lacey's defendants face a far lower chance of execution compared with Ogg's and Gonzalez's defendants. But the state imposes the death sentence in a discriminatory manner; sending a defendant to death row is in itself cruel and unusual.[144] Therefore, Lacey's capital policies still contravene the first aspiration—human dignity—and second aspiration—equitable justice—of a theoretically progressive criminal justice system. Lacey necessarily joins Ogg and Gonzalez outside the bounds of this metric's outer-limits.[145] In short, even if a DA operates in a capital state that realistically does not execute those on death row, seeking capital punishment in any case is still inconsistent with the concept of progressive prosecution.

Some progressive prosecutors have not sought capital punishment in any new cases but pursue death penalty cases inherited from their predecessors. James Stewart, of Caddo Parrish, Louisiana, is most illustrative. Criminal justice advocates know Caddo Parrish as the death penalty capital of America; some consider it one of the country's "most racist places."[146] Dale Cox—Stewart's predecessor—is partially responsible for the county's notoriety; Cox's office secured the death sentence for one-third of all Louisiana death row inmates tried since 2011.[147] Even though Caddo Parrish accounts for 5% of Louisiana's population and 10% of the state's homicides, nearly half of all the state's death sentences in the past twelve years came out of Caddo Parrish. Almost all the condemned were men of color, and there is overwhelming evidence that ADAs in Scott's office pursued capital sentences in bad faith and with shaky evidence.[148] In short, Stewart inherited

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[143] *See* Scott Wilson & Mark Berman, *California Gov. Gavin Newsom to Impose Moratorium on Death Penalty*, WASH. POST (Mar. 12, 2019, 10:31 PM), https://www.washingtonpost.com/national/california-gov-gavin-newsom-to-impose-moratorium-on-death-penalty/2019/03/12/3a3ad1dc-4520-11e9-8aab-95b8d80a1e4f_story.html [https://perma.cc/EE5U-VKYE].

[144] *See* Glossip v. Gross, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting).

[145] It is worth noting that Lacey's seeking of death sentences is also out-of-step with the needs of her own constituents, given that Los Angeles voters overwhelmingly supported the 2016 ballot initiative that would have eliminated capital punishment in the state. *See* DEP'T OF REGISTRAR-RECORDER/CTY. CLERK, CTY. OF L.A., FINAL OFFICIAL ELECTION RETURNS NOVEMBER 6, 2012 GENERAL ELECTION 4 (2012), https://www.lavote.net/documents/nov-6-2012-official-election-returns.pdf [https://perma.cc/J5AM-W8WL].

[146] Yolanda Young, *America's Death Penalty Capital: Can a Black DA Really Change the System?*, GUARDIAN (Mar. 13, 2016, 8:00 AM), https://www.theguardian.com/us-news/2016/mar/13/caddo-parish-louisiana-death-penalty-capital-district-attorney [https://perma.cc/RZ29-YZKH].

[147] *See id.*

[148] *See id.* The county's high volume of death sentences and racially disparate sentencing decisions drew enormous national attention and even caused Justice Stephen Breyer to question the constitutionality of the death penalty. *See Reed v. Louisiana*, 137 S. Ct. 787, 787 (2017) (Breyer, J., dissenting from denial of certiorari) ("Marcus Dante Reed was sentenced to death in Caddo Parish, Louisiana, a county that in recent history has apparently sentenced more people to death per capita than any other county in the United States. . . . The arbitrary role that geography plays in the imposition of the death penalty, along with the other serious

an office with a troubling relationship with capital punishment. Yet against this startling backdrop, Stewart supports the death penalty. Stewart—similarly to Ogg, Moore, and Gonzales—ostensibly reserves capital punishment for the "worst of the worst" and has not requested the ultimate sentence in any new cases. But Stewart is seeking the death penalty, instead of dropping the capital charges, in capital cases inherited from Cox's office.[149]

In sum, a district attorney that seeks the death penalty in any case is not a progressive prosecutor. Progressive prosecutors cannot seek the ultimate sentence in few "extreme" cases or in cases inherited from predecessor DAs. Supporting the death penalty in any form is fundamentally incompatible with the concept of progressive prosecution.

C. Decarceration and the New Jim Crow

America is the biggest incarcerator in the world; today, over 2.2 million people are behind bars.[150] Race plays a particular role in mass incarceration[151]—the phenomena known widely as "the New Jim Crow."[152] The state locks up black and brown men for longer sentences than their similarly situated white peers. Sixty percent of people in prison are people of color, and black men are six times more likely to be incarcerated than white men.[153] Prosecutors should help reduce their state's prison population and address racially discriminatory prosecutorial policies; prosecutors can achieve these twin goals through non-prosecution and diversion—two separate but related metrics. Prosecutors who make no effort to decrease—or in fact increase—prison populations cross the outer limit of this metric.

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problems I have previously described, has led me to conclude that the Court should consider the basic question of the death penalty's constitutionality.").

[149] Stewart's office may also be culpable in perpetuating the sins of his predecessor's office. For example, Stewart is seeking the death penalty for Grover Cannon and has opposed the release of an audio recording by the police that Cannon's legal team claim exonerates Cannon. *See* Joshua Vaughn, *In Louisiana, a Messenger of Change Disregards His Message*, APPEAL (Jun. 21, 2019), https://theappeal.org/in-louisiana-a-messenger-of-change-disregards-his-message/ [https://perma.cc/DJN2-UEQ4]. Even though a judge determined that pretrial media coverage made it impossible to select an impartial jury to try Cannon in Caddo Parrish, Stewart has attempted to transfer the case back to Caddo. *See id.* In seeking the death penalty for Marcus Reed (the plaintiff whose case caused Justice Breyer to question the death penalty), Stewart's office has blocked all motions to compel discovery, issued redacted documents to Reed's defense team, and even requested that Reed's attorneys financially compensate the DA's office for their time. *See id.* When Rodricus Crawford petitioned to have his death sentence overturned, Stewart channeled Dale Cox's pro-death penalty language in his opposition brief. Crawford was convicted for allegedly murdering his son. *See* Young, *supra* note 146. A senior attorney at the Justice Center contends that Crawford's conviction was "implausible" and "supported by evidence based on abject stereotypes." *Id.*

[150] *See* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2019), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf [https://perma.cc/C53C-KHV3].

[151] *See generally* ALEXANDER, *supra* note 9; 13TH (Netflix 2016).

[152] *See generally* ALEXANDER, *supra* note 9.

[153] *See Trends in U.S. Corrections*, *supra* note 150, at 5.

Many members of the set have made headway in reducing their local prison populations. Wesley Bell's office's policies have reduced St. Louis's jail population by 20% in six months.[154] In tandem with Philadelphia's mayor, Larry Krasner helped reduce Philadelphia's population by about 30% over two years.[155] During Kim Foxx's tenure, Cook County's incarcerations have dropped by 19%.[156] Other DAs—like Beth McCann and Margaret Moore—have committed to study racist incarcerations patterns. McCann hired a researcher to examine her office's felony filings to look for racial bias patterns in charging and plea deal offerings.[157] Moore commissioned a study to pinpoint where racial disparities occur in prosecutions.[158] When the study concluded that racial disparities largely occurred because of the police's disproportionately arresting African Americans, Moore announced that she would work with the county's police department and advocates to tackle racism in prosecution.[159]

At least one member of the set outright rejects decarceration as part-and-parcel of progressive prosecution. Leon Cannizzaro of Orleans Parish castigated efforts to reduce Louisiana's prison population as "ill-conceived"[160] and a "grand social experiment espoused by sheltered academics and naive politicians."[161] Since Cannizzaro took office in 2009, his office's acceptance rate of cases has jumped from fifty to 90%. Although incarceration rates throughout Louisiana have declined, the state inmate population from Orleans Parish has increased.[162] Cannizzaro did support a grant application for a study aimed at reducing Orleans Parish's jail population, but he vocally criticized the project after the state cut his office out of the grant award.[163]

At least two members of the set—Hillar Moore III and Cy Vance—are supposedly concerned with mass incarceration and racial discrimination in prosecution. Yet their offices make little headway in reducing incarceration and may, in fact, be increasing the prison population. In 2013, Hillar Moore III posed next to copies of *The New Jim Crow*, David M. Kennedy's *Don't*

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[154] *See* Parisa Dehghani-Tafti et al., Opinion, *Reform Prosecutors Are Committed to Making Society Fairer — and Safer*, WASH. POST (Aug. 16, 2019), https://www.washingtonpost.com/opinions/reform-prosecutors-are-committed-to-making-society-fairer—and-safer/2019/08/16/eba231ce-bf85-11e9-a5c6-1e74f7ec4a93_story.html [https://perma.cc/4YQM-SZ7P].

[155] *See id.*

[156] *See* Nancy Loo, *Incarceration Rates Drop 19% Under Kim Foxx, Report Says*, WGNTV (July 30, 2019, 12:49 PM), https://wgntv.com/2019/07/30/incarceration-rates-drop-19-under-kim-foxx-report-says/ [https://perma.cc/WMM5-QTM7].

[157] *See* Schmelzer, *supra* note 71.

[158] *See* Michael King, *How Much Reform Is Enough in the Travis County District Attorney Race?*, AUSTIN CHRON. (Aug. 23, 2019), https://www.austinchronicle.com/news/2019-08-23/how-much-reform-is-enough-in-the-travis-county-district-attorney-race/ [https://perma.cc/3BAQ-893G].

[159] *See id.*

[160] Vargas, *supra* note 105.

[161] Chrastil, *supra* note 83.

[162] *See* Andru Okun, *Orleans Parish and the Terrible, Horrible, No Good, Very Bad DA: On the Ruthless Tactics Of Leon Cannizzaro*, ANTIGRAVITY (June 2017) http://antigravitymagazine.com/feature/orleans-parish-and-the-terrible-horrible-no-good-very-bad-da-on-the-ruthless-tactics-of-leon-cannizzaro/ [https://perma.cc/25GK-Q2YF].

[163] *See* Vargas, *supra* note 105.

Shoot, and Paul Grogan and Tony Proscio's *Comeback Cities* while telling a local reporter "I believe I am a progressive DA" and "I'm not proud that we have the highest incarceration rate in the world."[164] That same year, Moore claimed that he was "hell-bent on finding a way to keep them out courtrooms," as a person who sees criminal defendants as some of the "least fortunate people," and a prosecutor who is not looking to fill the "traditional role of the DA's office."[165] Yet Moore has opposed nearly every measure in a set of criminal justice reforms proposed by a Louisiana task force that would decrease Louisiana's prison population and reduce the state's $625 million annual prison budget.[166] Indeed, Moore appears bent on imprisoning *more* people. In 2015, Moore proposed opening a "misdemeanor jail" that would imprison 100,000 people with unpaid misdemeanor warrants; traffic tickets constituted 60% of the warrants,[167] the "jail" would be located in a large basement without a kitchen, and the state would feed inmates from a nearby McDonalds.[168] Insisting that these jails would "encourage" people to show up to court, Moore only backed down after local Baton Rouge leaders slammed the proposed "jail" as "obscene," "loan sharking, "backwards," and an "embarrassment."[169]

Cy Vance is Moore's bedfellow for this metric. In 2015, Cy Vance told New York University Law School's graduating class, "I recognized racism in the criminal justice system long before the term 'mass incarceration' entered the general conversation."[170] He has also supported advocacy supporting the closure of Rikers Island.[171] Yet the Manhattan DA's office accounts for a disproportionate number of Rikers' prisoners. Although Vance's office only handles 29% of New York City's criminal cases, his prosecutors locked up almost 38% of the city's jail population.[172] The Manhattan DA's office's fondness for incarceration perpetuates racism in New York's justice system. In 2014, the Vera Institute found that the state was more likely to detain black and Latino defendants prosecuted by Vance's office at booking than it would similarly situated white defendants.[173] In 2017, 51% of marijuana cases involving black defendants in Manhattan ended in conviction—but

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[164] Pishko, *supra* note 3.
[165] Lane, *supra* note 5.
[166] *See* Pishko, *supra* note 22; Pishko, *supra* note 3.
[167] Pishko, *supra* note 3.
[168] *See id.*
[169] *Id.*
[170] *Commencement Address*, *supra* note 8.
[171] *See* Rice, *supra* note 72.
[172] *See* Robbins, *supra* note 59. A special commission on Rikers Island issued a report on the prison. Referring to Vance's office's disproportionate contribution to the prison's population, the report states "no other borough comes close" to Manhattan. *Id.* Even though Brooklyn has 1 million more residents than Manhattan, Brooklyn only accounts for 22% of those detained at Rikers. *See id.*
[173] *See Race and Prosecution in Manhattan*, VERA INST. JUST. (Jul. 2014), https://www.vera.org/publications/race-and-prosecution-in-manhattan [https://perma.cc/6STJ-FKXN].

only 23% involving white defendants did.[174] Indeed, Vance's office is more punitive towards defendants who are poor and of color than other New York City DAs are.[175] Because their offices fail to decarcerate and disproportionately prosecute black and brown defendants, Moore and Vance fall past the outer-bounds of this metric.

Other members of the set are dangerously close or cross the outer bounds of this metric. In Caddo County, James Stewart's office frequently initiates peremptory challenges to strike black jurors from trials; doing so perpetuates racially biased court proceedings. A study found that Stewart's prosecutors were three times as likely to strike black potential jurors than white potential jurors.[176] Likewise, Kim Ogg requested that Houston provide funding for her office to hire an additional 102 prosecutors in 2019—a signal that her office was going to increase prosecutions and therefore increase incarceration. Academics and legal scholars condemned Ogg's request.[177] Relatedly, two other members of the set incarcerate a startlingly high number of youths—an intersection of both the "Decarcaration" and "Juveniles" metrics. Cannizzaro prosecutes more youths as adults than any other prosecutor in Louisiana.[178] Since Michael O'Malley became Cuyahoga County's DA in 2017, the jurisdiction's crime rate has flattened or fallen. But the number of young people the DA's office is sending to adult court has more than doubled.[179] In 2017, O'Malley's office tried 100 young people as adults and transferred ninety-one to adult court—up from forty-nine the year before.[180] Sending large numbers of juveniles to jail is out-of-step with decarceration; progressive prosecutors must treat young people as the juveniles that they are.

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[174] *See* Brendan Cheney, *For Non-White New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO (May 9, 2017, 5:06 AM), https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807 [https://perma.cc/8PW7-MZZ9]. Relatedly, Vance has come under fire for his refusal to prosecute high profile white defendants. In particular, he refused to bring charges against Harvey Weinstein despite the existence of an audio recording of Weinstein admitting to groping a woman, and Vance declined to prosecute Ivanka Trump and Donald Trump Jr. for fraud in 2012. *See* Robbins, *supra* note 59.

[175] *See* Robbins, *supra* note 59.

[176] Stewart's comments about slavery are problematic: "One of my biggest questions about slavery has always been: how do you have eight people on a plantation who are white and 85 who are black, and they don't change something?" Young, *supra* note 146.

[177] Although Ogg claimed that her office needed more prosecutors to handle a case backlog, an independent study found that Ogg had overstated her office's caseload and that additional prosecutors were unnecessary. *See* Keri Blakinger, *Academics Raise Concerns About Report Finding Harris County DA Overburdened, Understaffed*,. HOUS. CHRON. (Oct. 16, 2019, 2:52 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/Academics-raise-concerns-about-report-finding-14539787.php [https://perma.cc/4UQW-AFVA].

[178] *See* Katy Reckdahl, *In New Orleans, 'Eligible' Delinquents Increasingly Routed to Adult Courts, Prisons*, NOLA.COM (Mar. 31, 2015, 7:54 AM), https://www.nola.com/news/article_62d8dfec-9bca-5f1c-84cb-4e708876c662.html [https://perma.cc/TKB3-844D].

[179] Elizabeth Weill-Greenberg, *Despite Flat Crime Rates, More Cleveland-Area Young People Are Being Tried as Adults*, APPEAL (Oct. 22, 2019), https://theappeal.org/despite-flat-crime-rates-more-cleveland-area-young-people-are-being-tried-as-adults/ [https://perma.cc/5B65-ALVA].

[180] *See id.*

D. Diversion and Non-Prosecution

Starting in the 1980s, federal and state criminal justice legislative initiatives stimulated massive growth in prosecution and, consequently, incarceration.[181] In particular, an explosion of drug prosecutions played a significant role in creating America's modern carceral state.[182] Over the past four decades, prosecutors have tried an ever-growing number of people—especially those of color—for certain crimes; prior to 1980, prosecutors enforced these crimes more loosely and legislation coupled these crimes with shorter prison sentences.[183] Non-prosecution and diversion of defendants into non-penal programs is an essential tool to promote decarceration (see Part III. C.)

Unlike the death penalty—perhaps the brightest-line of the fourteen metrics—progressive non-prosecution policies vary far more because prosecutors must tailor them to communities' specific needs. This metric's outer limit may be less obvious, but assessors can still draw some clear boundaries. Everyone in a community should equally benefit from a DA's non-prosecution policies. This means that DAs should not prosecute marijuana possession or other crimes that prosecutors have historically used to punish people of color, for example, gravity knife laws in New York. Also, the alternative to prosecution must equally impact all defendants. For example, prosecutors' substituting criminal punishment with fines and fees—an intersection with the "Fines, Fees, Forfeitures" metric—is a better, but still inequitable, solution. Forcing defendants to cough up cash as punishment stymies rehabilitation, exacerbates indigent defendants' debt, and does not improve public safety.[184] Because courts usually impose fees and fines without considering defendants' ability to pay, fees and fines act as a regressive poverty tax.[185] Jurisdictions' jailing those who cannot pay their fees and fines renders the entire enterprise moot;[186] thoughtful diversion programs can be a more equitable substitute.

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[181] *See generally* ALEXANDER, *supra* note 9.

[182] *See generally* King & Mauer, *supra* note 36; Lauren Carroll, *How the war on drugs affected incarceration rates*, POLITIFACT (July 20, 2016), https://www.politifact.com/factchecks/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates/ [https://perma.cc/K97D-CYPL].

[183] *See* MITCHELL & LEACHMAN, *supra* note 36, at 5; Angela J. Davis, IN SEARCH OF RACIAL JUSTICE: THE ROLE OF THE PROSECUTOR 6 N.Y.U. J. LEGIS. & PUB. POLICY 821, 830 (2013).

[184] *See* MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 9–10 (2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final4_0.pdf [https://perma.cc/H56U-C2RC].

[185] *See id.*

[186] *See id.*

Many prosecutors, including Kim Ogg,[187] Larry Krasner,[188] John Creuzot,[189] Kim Foxx,[190] Wesley Bell,[191] and Margaret Moore[192] have all rolled out non-prosecution and expungement policies for marijuana possession. Members of the set have expanded their non-prosecution policies and diversion programs outside the realm of drug possession and refuse to prosecute so-called "crimes of poverty," including low-level shop-lifting, criminal trespass, failure to pay child support, and theft cases involving low amounts of money.[193] Some members of the set have opted for the less-than-ideal fines and fees approach; for example, Kim Ogg[194] and Mark Gonzalez[195] allow possessors of small amounts of marijuana to avoid criminal charges by paying a fine and taking drug education classes.

Cyrus Vance, Eric Gonzalez, Rachel Rollins, Mark Gonzalez, and Hillar Moore III have also publicly announced non-prosecution policies, but their enforcement disproportionately affects marginalized members of the community. In the past two years, Vance's office officially reduced penalties for marijuana possession and re-committed to not prosecuting most cases of

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[187] Ogg announced that her office will no longer charge people for possession of less than four ounces of marijuana; instead, her office will divert defendants to drug education classes. *See* Dart, *supra* note 119.

[188] Krasner announced that his office would be dropping all outstanding marijuana possession charges and would no longer pursue criminal charges against anyone arrested for marijuana possession; Instead, $25 citations would be issued for possession and $100 citations would be issued for those consuming marijuana in public. *See* Joe Trinacria, *Larry Krasner Sues Big Pharma, Drops All Marijuana Possession Charges*, PHILA. MAG. (Feb. 16, 2018, 9:17 AM), https://www.phillymag.com/news/2018/02/16/krasner-big-pharma-marijuana-possession/ [https://perma.cc/9339-ZP3Q].

[189] Creuzot dismissed more than one thousand drug possession cases during his first three months in office. *See* Andrea Lucia, *Dallas County District Attorney John Creuzot Announces He Won't Prosecute 'Low-Level' Crimes*, CBS DFW (Apr. 11, 2019, 9:33 PM), https://dfw.cbslocal.com/2019/04/11/dallas-county-district-attorney-john-creuzot-low-level-crimes/ [https://perma.cc/8M3U-TBZS].

[190] As Illinois plans to legalize marijuana in January 2020, Kim Foxx has announced that—in partnership with a tech non-profit—her office will expunge tens of thousands of marijuana convictions. *See* Megan Crepeau, *Thousands of Weed Convictions Will Be Automatically Expunged in Cook County: 'We Are Righting the Wrongs of the Past'*, CHI. TRIBUNE (Aug. 28, 2019, 5:40 AM), https://www.chicagotribune.com/news/criminal-justice/ct-marijuana-conviction-expungement-kim-foxx-20190827-3zytvgvmdzf4jlx4crnz5dbfae-story.html [https://perma.cc/5WVG-23JN].

[191] Wesley Bell issued a detailed memo to his prosecutors that announced that he would no longer prosecute possession of less than 100 grams of marijuana. *See* Speri, *supra* note 20.

[192] *See* King, *supra* note 158.

[193] John Creuzot announced that he will dismiss many criminal trespass cases because such charges are most often levied against the poor and mentally ill and will no longer prosecute theft cases involving personal items worth less than $750. *See* Lucia, *supra* note 189. Kim Foxx will no longer prosecute low-level shoplifting. *See* Schmelzer, *supra* note 71. Beth McCann instituted a diversion program where some people between the ages of 18 and 26 facing minor charges can avoid charges if they complete certain requirements. *See id.* Wesley Bell officially does not prosecute failure to pay child support and has announced treatment and diversion programs in partnership with local health organizations to address addiction and mental illness. *See id.*

[194] *See* Brian Rogers, *DA's Pot Program Draws Mixed Reaction*, HOUS. CHRON. (Feb. 16, 2017, 11:14 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/DA-s-pot-program-draws-mixed-reaction-10939161.php [https://perma.cc/2M8W-GXCD].

[195] *See* Townes, *supra* note 139.

fare evasion;[196] by recommitting, Vance admits that his office ignored his original order. Vance claims that, since 2014, his office has prosecuted 26% fewer misdemeanors and dropped prosecutions for small-time offenses (such as unlicensed vending or taking up more than one subway seat) by 87%.[197] Yet in 2015, Vance was more likely to prosecute a misdemeanor charge than any other New York City DA. Activists claim that Vance's prosecutors pursue charges for a range of low-level offenses, including fare-beating, "aggressive begging in a public space," and criminal contempt—all offenses that are disproportionately levied against indigent New Yorkers.[198] Even though Vance has publicly supported repealing New York's gravity knife law—which prosecutors disproportionately enforce against people of color—[199] the Manhattan DA's office prosecutes a disproportionate number of New York's gravity knife cases.[200] Vance's office has prosecuted four times as many felony gravity knife cases as the rest of the city's district attorneys' gravity knife cases combined.[201]

Officially, Eric Gonzalez's office does not pursue low level marijuana possession charges; he claims Brooklyn marijuana possession prosecutions fell 98% between 2017 and 2018.[202] But Gonzales still prosecutes cases of *smoking* marijuana in public that constitute nuisance; thus, his office still prosecuted more than 80% of all low-level marijuana offenses in 2018.[203] The police predominantly arrest people of color for smoking cannabis.[204] Outside of drug prosecutions, Gonzales's prosecutors have sought hefty charges against indigent defendants accused of trespass[205] and resisting ar-

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[196] *See* Offenhartz, *supra* note 108.

[197] *See id.*

[198] Court Watch NYC witnessed an arraignment of two defendants who were charged with fare-beating and "aggressive begging in a public space." *Id.* Both defendants accepted plea bargains that included a $200 surcharge to the court. *See id.* Vance's prosecutors also pursued charges of criminal contempt against a pregnant, homeless woman in relation to a family dispute. *See id.* The judge granted the prosecutors recommended bail of $25,000 bond or $15,000 in cash. *See id.* Because the defendant could not afford bail, she was sent to Rikers. *See id.*

[199] 84% of defendants in New York gravity knife cases were people of color. *See* Hughes, *supra* note 11.

[200] *See* Offenhartz, *supra* note 108.

[201] To make matters worse, Vance has not prosecuted any of the hundreds of stores in Manhattan that sell gravity knives and instead has entered into "deferred prosecution agreements" with those stores. Five of those retailers have violated the agreements. *See* Jon Campbell, *New York Just Saved a Law Used to Jail Thousands of Minorities*, DAILY BEAST (Oct. 24, 2017, 11:49 AM), https://www.thedailybeast.com/new-york-just-saved-a-law-used-to-jail-thousands-of-minorities [https://perma.cc/E64Y-NJY6].

[202] *See* Mary Frost, *Brooklyn DA: Prosecution of Low-Level Marijuana Cases Down 98 Percent*, BROOKLYN DAILY EAGLE (Feb. 20, 2019), https://brooklyneagle.com/articles/2019/02/20/brooklyn-da-prosecution-of-low-level-marijuana-cases-down-98-percent/ [https://perma.cc/V24M-GEYW].

[203] New York classifies smoking and possession of marijuana as the same misdemeanor (criminal possession in the fifth degree). *See* Beth Fertig & Jenny Ye, *Brooklyn DA's Pledge to Reduce Marijuana Prosecutions Makes Little Difference*, WNYC (Sept. 7, 2017), https://www.wnyc.org/story/despite-das-change-marijuana-policy-brooklyn-defendants-still-come-court/ [https://perma.cc/Y4WU-XQ23].

[204] *See id.*

[205] Emily Bazelon examines the case of "Kiki" in her book, *Charged*. A Brooklyn ADA pressed for burglary charges with prison time for Kiki for squatting in a Brooklyn home and

rest.[206] While campaigning, Rachel Rollins of Suffolk County promised to stop prosecuting fifteen charges.[207] But her office's non-prosecution practices may not line up with her campaign promise. Court Watch MA members have observed Rollins's subordinates prosecute 259 cases that included charges off Rollins's list; her prosecutors advanced 118 of those cases in criminal court.[208] Court Watch MA claim that the "racial disparities" in Rollins's prosecutions "are incredibly stark" and that "charges on the do-not-charge list are being prosecuted all the time."[209]

Mark Gonzalez's and Hillar Moore III's policy initiatives have undermined their own non-prosecution programs. Mark Gonzalez's pretrial diversion program for domestic violence offenders is illustrative. During Gonzalez's first year in office, his prosecutors enrolled only two men in the program; one of the men was a minor celebrity athlete.[210] Instead of course-correcting and sending more defendants through diversion, Gonzalez announced that the program "had failed" and, instead, he would increase domestic violence prosecutions.[211] In Baton Rouge, Hillar Moore III championed "smart prosecution," a seemingly-progressive collective policing

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stealing a laptop to buy food, alcohol, and pot. *See* BAZELON, *supra* note 20, at 276–78. Kiki was homeless, undocumented, and charging Kiki with burglary would expose him to potential deportation; the ADAs were unswayed. *See id.* The ADA's actions were completely in line with Gonzalez's official non-prosecution policies. Gonzalez eventually intervened in Kiki's case, but refusing to prosecute individual cases is ineffective. *See id.*

[206] Gonzalez's office pressed charges of resisting arrest against Jazmine Headley, who was sitting on the floor of a food stamp application office because there were no available chairs. *See* Bazelon & Krinsky, *supra* note 21; Ashley Southall, *'Appalling' Video Shows the Police Yanking 1-Year-Old From His Mother's Arms*, N.Y. TIMES (Dec. 9, 2018), https://www.nytimes.com/2018/12/09/nyregion/nypd-jazmine-headley-baby-video.html?module=inline [https://perma.cc/6L9Q-VS2F].

[207] *See Charges To Be Declined*, RACHEL ROLLINS, https://rollins4da.com/policy/charges-to-be-declined/ [https://perma.cc/TC7K-D8NH].

[208] *See* Eoin Higgins, *Progressive DA Rachael Rollins Hasn't Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious.*, INTERCEPT (Mar. 24, 2019, 6:00 AM), https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/ [https://perma.cc/L85Z-4NPB]; Emma Whitford, *Suffolk County D.A. Rachael Rollins's Office Is Still Prosecuting Cases She Pledged to Drop*, APPEAL (Feb. 6, 2019), https://theappeal.org/suffolk-county-da-rachael-rollinss-office-is-still-prosecuting-cases-she-pledged-to-drop/ [https://perma.cc/7NDJ-2G2S].

[209] Higgins, *supra* note 208; *see also* Whitford, *supra* note 208.

[210] *See* Justin Jouvenal, *From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018, 6:25 PM), https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fcead2ab1story.html [https://perma.cc/4DNV-XRKH].

[211] *Id.* Gonzalez faced substantial pressure to dump his diversion program after it was revealed that one of the two men who were enrolled in the program was a minor league baseball player. *See id.* A video emerged of the man "savagely punching and slapping" his fiancé after Gonzalez dropped the charges. *See id.*

model that theoretically relied on non-prosecution practices;[212] instead, Moore's model increased prosecutions.[213]

This metric's outer bounds are obscure, but Cy Vance, Mark Gonzalez, Rachel Rollins, Mark Gonzalez, and Hillar Moore hug this metric's outer limits. One member of the set clearly fails this metric—Leon Cannizzaro. On the Orleans Parish DA's website, Cannizzaro highlights his alleged achievements in non-prosecution and diversion.[214] Apparently, he has "exponentially expanded pre-trial Diversion upon taking office," he "first proposed to New Orleans' City Council in August 2009 that cases of simple marijuana possession should no longer be prosecuted in Criminal District Court," and he "executed a policy to move non-violent misdemeanors from Criminal District Court to Municipal Court."[215] Yet Cannizzaro has sought 150 arrest warrants for witnesses—many of whom are themselves victims of crimes—to force them to testify in court.[216] Arresting victims of sex trafficking, a shooting, and assault because they do not wish to testify[217] does not cohere with the twin goals of treating people with dignity and meting out justice fairly and equitably.

E. Police Accountability

The most progressive prosecutors would publicly campaign to defund the police; more specifically, prosecutors should call on their municipalities to redirect policing budgets towards other public spending priorities.[218] However, prosecutors do not hold their county's purse strings and cannot unilaterally abolish the police. Instead, assessors can evaluate prosecutors' police accountability record on two other fronts. First, prosecutors rarely

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[212] *See* Max Rivlin-Nadler, *How a Group Policing Model Is Criminalizing Whole Communities*, NATION (Jan. 12, 2018), https://www.thenation.com/article/how-a-group-policing-model-is-criminalizing-whole-communities/ [https://perma.cc/9JYK-7GUE].

[213] *See id.* Moore also supports locking elementary school children for up to six months for bringing fake guns to schools. *See* Larry Hannan, *Is the "Incarceration Capital of the World" Finally Ready to Lose Its Title?*, SLATE (Apr. 6, 2017, 6:58 PM), https://slate.com/news-and-politics/2017/04/is-louisiana-finally-ready-for-criminal-justice-reform.html [https://perma.cc/883X-4CB2].

[214] *See District Attorney Leon Cannizzaro Jr.*, ORLEANS PARISH DISTRICT ATT'Y, https://www.orleansda.com/district-attorney-leon-a-cannizzaro-jr/ [https://perma.cc/C6ZM-WAFD].

[215] *Id.*

[216] *See* Aviva Shen, *'Like A Bad Dream': In New Orleans, Witnesses Are Going To Jail Instead of Perpetrators*, APPEAL (May 21, 2018), https://theappeal.org/like-a-bad-dream-in-new-orleans-witnesses-are-going-to-jail-instead-of-perpetrators-604243d9faff/ [https://perma.cc/UR6W-5WPH].

[217] *See id.*

[218] *See* Brian Highsmith, *Defund Our Punishment Bureaucracy*, AM. PROSPECT (Jun. 2, 2020), https://prospect.org/justice/defund-our-punishment-bureaucracy/; Sarah Jones, *We Are Asking the Police to Do Too Much*, N.Y. (Jun. 2, 2020), https://nymag.com/intelligencer/2020/06/killing-of-george-floyd-shows-our-over-reliance-on-police.html [https://perma.cc/4CDG-9VHA].

charge police officers who commit unlawful acts of violence.[219] Second, when pursuing cases, prosecutors often rely on non-credible police officer testimony and evidence. A study found that the state has charged or imprisoned thousands of people based partially on testimony from law enforcement officials whom their bosses and prosecutors deemed to have credibility problems.[220] And at least 300 prosecutors' offices have no list tracking dishonest police officers.[221] A bona fide reformist prosecutor should publicly condemn and criminally charge police officers who commit misconduct and brutality, and they should refuse to use unreliable law enforcement testimony and evidence to prosecute defendants; total failure to progress on either front contravenes this metric's outer bounds.

As to the first prong, some members of the set have made progress condemning and addressing police brutality against people of color. Kim Foxx, Wesley Bell, and Michael O'Malley defeated their counties' incumbents[222] by highlighting the incumbents' failure to prosecute the police officers who shot LaQuan McDonald, Michael Brown, and Tamir Rice.[223] Virginia's Stephanie Morales attained national fame for being one of the few prosecutors who has prosecuted and won a conviction for a white police officer who wrongfully killed a black person.[224] Other prosecutors have leveraged other tools to promote police accountability. Margaret Moore created a Civil Rights Unit that reviews all police use-of-force cases instead of deferring to police-friendly grand juries to indict bad cops.[225] Likewise, Wesley Bell is working with fifty-five police departments to streamline law enforcement's interactions with his office.[226]

But other members of the set have a less-than-stellar track record of prosecuting police officers who commit acts of brutality. Jackie Lacey has not charged a single Los Angeles Police Department officer for a shooting since she took office in 2012 even though over 400 people were killed by law enforcement or died in custody during her tenure.[227] Lacey opposed a California law that raised the standard for law enforcement's use of deadly force

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[219] *See* Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 552–54 (2017); BLACK LIVES MATTER, https://blacklivesmatter.com/what-we-believe/ [https://perma.cc/73XV-S985].

[220] *See* Mark Nichols & Steve Reilly, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY (Oct. 15, 2019, 12:49 PM), https://www.usatoday.com/story/news/2019/10/15/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/3986273002/ [https://perma.cc/9EPR-RE7V].

[221] *See id.*

[222] The incumbents were Anita Alvarez, Bob McCulloch, and Tim McGinty.

[223] *See, e.g.*, Speri, *supra* note 20.

[224] *See* Saleh, *supra* note 89.

[225] *See* Tony Plohetski, *Travis County DA Makes Major Shift in Oversight of Police Shootings*, STATESMAN (Apr. 12, 2017, 12:01 AM), https://www.statesman.com/NEWS/20170412/Travis-County-DA-makes-major-shift-in-oversight-of-police-shootings [https://perma.cc/QU9Z-2D44].

[226] *See* Dehghani-Tafti et al., *supra* note 154.

[227] *See* Pishko, *supra* note 75.

to "necessary."[228] Hillar Moore III openly disdains police accountability and opposes police body cameras. "[I'm] not a big fan of police cameras. . . . Why not put them on the public defender?"[229] Police accountability advocates have castigated John Chisholm[230] and John Creuzot,[231] for their mixed record on charging police who have committed brutality.

As for the second prong, members of the set have mixed records on using unreliable police testimony in criminal cases. Larry Krasner released a "do-not-call" list of twenty-nine non-credible police officers; his office also installed a computer system that automatically flags those officers for his ADAs.[232] Eric Gonzalez released the names of seven police officers that he deemed to be not credible and whose testimony he will eschew in criminal cases.[233] He also released the names of forty police officers that trial judges deemed to be not credible, but he stipulated that he would "sometimes" rely on those officers' testimony in prosecutions.[234] Advocates who believe that a trial judge's determination of unreliability is enough to land a police officer on a do-not-call list have denounced Gonzalez for leaving such officers of his list. Other prosecutors are less transparent about their do-not-call policies. Kim Ogg claims that she maintains a private do-not-call list, but she has not released the list to the public.[235] Relatedly, Beth McCann's electorate

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[228] Samantha Michaels, *LA's First Black District Attorney Is Battling for Reelection. Black Activists Want Her Out.*, MOTHER JONES (Mar. 2, 2020), https://www.motherjones.com/crime-justice/2020/03/jackie-lacey-george-gascon-rachel-rossi-los-angeles-black-lives-matter-district-attorney-police-use-of-force/ [https://perma.cc/6EM7-F8FS]. In March, 2020, Lacey's husband drew national attention after he pulled a gun on Black Lives Matters protestors. *See District Attorney's Husband Pulls Gun on Protesters*, CNN, https://www.cnn.com/videos/us/2020/03/03/los-angeles-district-attorneys-husband-pulls-gun-protesters-mxp-vpx.hln [https://perma.cc/CXE8-ARLT].

[229] Pishko, *supra* note 3.

[230] Chisholm did charge four Milwaukee police officers with crimes related to their involvement in the unlawful rectal probing of a detained suspect, but Chisholm refused to press charges against a white police officer who shot Dontre Hamilton, an unarmed black man, fourteen times. *See* Erik Gunn, *Invisible No More*, MILWAUKEE MAG. (Jan. 21, 2013), https://www.milwaukeemag.com/InvisibleNoMore/ [https://perma.cc/ZLV4-T2B6].

[231] Creuzot successfully prosecuted Amber Guyger, a white police officer who shot Botham Jean. Jean, a black man, was sitting unarmed in his own apartment when Guyger killed him. *See* Eliott C. McLaughlin & Steve Almasy, *Amber Guyger Gets 10-year Murder Sentence for Fatally Shooting Botham Jean*, CNN (Oct. 3, 2019), https://www.cnn.com/2019/10/02/us/amber-guyger-trial-sentencing/index.html [https://perma.cc/7MBV-6K7D]. But Creuzot declined to bring charges or dismissed charges in three recent high-profile incidents of police brutality in Dallas. *See* Ramchandani, *supra* note 78.

[232] *See* Julie Shaw & Chris Palmer, *Here Are the 29 Philly Cops on the DA's 'Do Not Call' List*, PHILA. INQUIRER (Mar. 6, 2018), https://www.inquirer.com/philly/news/crime/29-philly-officers-do-not-call-list-krasner-20180306.html [https://perma.cc/J5UA-JYHX].

[233] The presence of only seven officers on Gonzalez's do-not-call list is "absurd" to the Brooklyn Defenders. Joseph Goldstein, *Why 7 Police Officers Were Blacklisted in Brooklyn*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/nyregion/police-credibility-brooklyn-district-attorney.html [https://perma.cc/7QRF-4VR6].

[234] *See id.*

[235] *See* Keri Blakinger, *Advocates Call on Harris County DA to Release Name of Untrustworthy Cops*, HOUS. CHRON. (Jul. 19, 2019, 2:46 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/Advocates-call-on-Harris-County-DA-to-release-14108434.php [https://perma.cc/8MWZ-KHTP].

gave her heat when she failed to file misdemeanor charges against Denver Police Chief Robert White and Deputy Chief Matt Murray who had illegally withheld a letter requested under the Colorado Open Records Act.[236]

F. Prosecutorial Accountability

As explained in Part I, one common critique is that the legal system enables "all-powerful" prosecutors to lock up countless defendants using unlawful and unethical tactics. A truly progressive prosecutor would hold badly behaved subordinate prosecutors accountable for failing to disclose appropriate evidence to the defense, for relying on unreliable evidence in pursuing a conviction, or for behaving unethically in other ways. Prosecutors should carry out accountability programs and terminate line prosecutors if necessary.

Some have attempted to enforce ethical standards and have indicated that they will curb prosecutorial misconduct. Kim Ogg created an Office of Professional Integrity to hold prosecutors to ethical guidelines about turning over evidence to defendants.[237] Almost immediately after taking office, Wesley Bell fired the veteran assistant prosecutor who oversaw the district attorney's office's lackluster prosecution of Darren Wilson, the police officer who killed Michael Brown in 2014.[238] By firing many line attorneys,[239] Larry Krasner has publicly signaled that the Philadelphia DA's office does not welcome prosecutors who do not support progressive prosecution.

Other members of the set have failed to hold their subordinates accountable at the expense of defendants' rights. One of Mark Gonzalez's ADAs allegedly withheld a key piece of exculpatory evidence in a case resulting in a wrongful conviction;[240] a court sentenced the defendant to forty years in prison for a murder she did not commit before a judge overturned the conviction.[241] Gonzalez has retained the ADA on his staff and is appealing the judge's decision to free the defendant.[242] Both Cyrus Vance and Eric Gonzalez opposed New York's first major attempt to address widespread

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[236] *See* Natasha Gardner, *Meet Denver's New District Attorney: Beth McCann*, 5280 (Nov. 2017), https://www.5280.com/2017/10/meet-denvers-new-district-attorney-beth-mccann/ [https://perma.cc/X36B-QU3Y].

[237] *See* Brian Rogers, *Ogg Taps Former Judge for Ethics Post in DA's Office*, HOUS. CHRON. (Jan. 11, 2017, 9:41 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/Ogg-taps-former-judge-for-ethics-post-in-DA-s-10851523.php [https://perma.cc/B8ST-5946].

[238] *See* Joel Currier, *Bell Fires Veteran St. Louis County Prosecutor Who Presented Grand Jury Evidence in Michael Brown Case*, ST. LOUIS POST-DISPATCH (Jan. 3, 2019), https://www.stltoday.com/news/local/crime-and-courts/bell-fires-veteran-st-louis-county-prosecutor-who-presented-grand/article_be622ab7-b377-52dd-ba71-546847835d2d.html; Speri, *supra* note 20.

[239] *See* Lacy, *supra* note 130.

[240] *See* Eleanor Dearman, *Here's Why the Innocence Project is Looking at Courtney Hayden's Case*, CALLER TIMES (Jan. 7, 2019), https://www.caller.com/story/news/crime/2019/01/07/heres-why-innocence-project-looking-courtney-haydens-case/2381571002/ [https://perma.cc/3EC3-KNQF].

[241] *See id.*

[242] *See id.*

prosecutorial misconduct. In 2019, New York moved to create the state's first prosecutor disciplinary committee.[243] Despite overwhelming evidence from the ProPublica study, mentioned in Part I, that courts and DAs do not hold accountable New York prosecutors who unlawfully obtain convictions, Vance and Gonzalez opposed the committee's creation.[244] Once again, Leon Cannizzaro is in a league of his own. Court Watch NOLA revealed that the Orleans Parish jail recorded calls between prisoners and their attorneys.[245] The jail turned the recordings over to Cannizzaro's prosecutors, who used them in prosecutions.[246] Cannizzaro did not discipline any of his prosecutors for their involvement in this unethical and illegal practice.[247]

G. Wrongful Convictions

There are three exonerations per week in the United States,[248] and wrongful convictions have stolen 22,315 years from 2,521 exonerees.[249] DNA technology spurred the initial wrongful conviction movement, and the emergence of conviction integrity units—which review old, questionable prosecutions—contributed to exonerations reaching a record high in the late 2000s.[250] Prosecutors should set up well-resourced conviction integrity units (CIUs) to examine past convictions and help administer exonerations. A DA who does not institute a robust CIU despite their office's history of wrongful convictions moves beyond the outer limit of this metric.

Larry Krasner,[251] Kim Foxx,[252] Wesley Bell,[253] and Melissa Nelson,[254] set up robust CIUs and enacted vigorous conviction review policies that have exonerated many of the wrongfully convicted. Other prosecutors—such as

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[243] *See* Joaquin Sapien, *Bill Proposes Greater Accountability for New York Prosecutors Who Break the Law*, PROPUBLICA (Aug. 16, 2018, 2:58 PM), https://www.propublica.org/article/bill-proposes-greater-accountability-for-new-york-prosecutors-who-break-the-law [https://perma.cc/8Q4B-C75D].

[244] *See* BAZELON, *supra* note 20, at 289.

[245] *See* Johanna Kalb, Opinion, *Protect the Right to Counsel: Stop Recording Attorney-Client Calls*, NOLA.COM (Jun. 23, 2018), https://www.nola.com/opinions/article_42e1c94a-692d-5ecb-9d87-b8731e3f927f.html [https://perma.cc/6K6T-V973].

[246] *See id.*

[247] *See id.*

[248] *See The Wrongfully Convicted*, TIME, https://time.com/wrongly-convicted/ [https://perma.cc/8ZNN-E6RR].

[249] NATIONAL REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/7ZVT-9N62].

[250] *See The Wrongfully Convicted, supra* note 248.

[251] Before Larry Krasner assumed office, Philadelphia's Conviction Review Unit (CRU) was "notoriously ineffective." Christopher Moraff, *New Philadelphia DA Larry Krasner Hits Reset on the Office's Troubled Conviction Review Unit*, APPEAL (Feb. 15, 2018), https://theappeal.org/new-philadelphia-da-larry-krasner-hits-reset-on-the-offices-troubled-conviction-review-unit-acc2c14412b4/ [https://perma.cc/SR8H-RHMC]. Between 2014 and 2018, the CRU had only exonerated four people. Krasner has since hired Patricia Cummings, a nationally-known innocence advocate and former head of the Dallas District Attorney's CIU, to run the CRU. *See id.* The CRU exonerated nine people in Krasner's first 19 months in office. *See Philadelphia District Attorney Exonerates 9 people in 19 Months*, CBS NEWS (Sep. 3, 2019, 9:29 AM) https://www.cbsnews.com/news/philadelphia-district-attorney-larry-krasner-exonerates-nine-people-in-19-months/ [https://perma.cc/8768-4533].

Kim Ogg[255] and Beth McCann[256]—do not maintain a systematic method for exonerations and instead opt for a piecemeal approach. This does not necessarily indicate Ogg's and McCann's lack of commitment to freeing the wrongfully convicted—perhaps the Houston and Denver DA offices have a relatively less fraught history with improper prosecutions than the offices in Philadelphia, Chicago, Ferguson, Duval, and Nassau do. Nonetheless, local progressive groups have expressed disappointment in James Stewart's failure to set up a CIU despite the Caddo Parish DA office's long history of wrongful, racially motivated convictions.[257]

Other members of the set have created CIUs but failed to give these structures enough support to exonerate anyone. Cy Vance deserves credit as the first New York DA to create a CIU.[258] But, for nine straight years, Vance refused to publicly disclose whether his unit had fully exonerated a single person.[259] After the Marshall Project pressured Vance's office, the DA eventually released the names of seven alleged exonerees in 2019.[260] But the Project found that the state retried and convicted one of the exonerees and released another exoneree only after he pled guilty to lower charges. So Vance's CIU has only officially exonerated five people in nine years.[261] Advocacy organizations refer to Vance's CIU as a "conviction-rejustification unit" that fails to free the wrongfully convicted.[262] In Vance's neighboring borough, Eric Gonzalez's Conviction Review Unit (CRU) has brought exonerations in Brooklyn to a halt. Under Gonzalez's predecessor, Ken Thompson, Brooklyn's CRU overturned twenty-one convictions between 2014 and

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[252] Kim Foxx's CIU has exonerated dozens of people. Her office has focused on wrongful convictions that it had obtained because of the Chicago police's employing coerced interrogations and other unlawful tactics. *See* Cohen, *supra* note 17; *18 Exonerated in Chicago's Second Mass Exoneration*, INNOCENCE PROJECT (Sep. 24, 2018), https://www.innocenceproject.org/second-mass-exoneration-in-chicago/ [https://perma.cc/UEJ7-Q7D7].

[253] Wesley Bell's "Conviction and Incident Review Unit" investigates officer-involved shootings and possible wrongful prosecutions. *See* Mary Harris, *"I Could Care Less About Conviction Rates"*, SLATE (Aug. 9, 2019, 2:04 PM), https://slate.com/news-and-politics/2019/08/wesley-bell-progressive-prosecution-ferguson.html [https://perma.cc/2X5T-GW72].

[254] Melissa Nelson set up Florida's first CIU. *See* Hannan, *supra* note 61.

[255] Kim Ogg exonerated death row inmate Dewayne Brown. *See Alfred Dewayne Brown Declared Actually Innocent*, DEATH PENALTY INFORMATION CTR. (Mar. 4, 2019), https://deathpenaltyinfo.org/news/alfred-dewayne-brown-declared-actually-innocent [https://perma.cc/3C9L-SZFQ].

[256] After significant public pressure, Beth McCann opted to not file an opinion in Clarence Moses-El's attempt to claim $1.9 million in damages from Colorado for his wrongful conviction. *See* Denver Justice Project, *UPDATE: Beth McCann Changes position, Cynthia Coffman Denies Clarence's Compensation*, CHANGE.ORG (Jan. 27, 2018), https://www.change.org/p/da-beth-mccann-and-ag-cynthia-coffman-da-mccann-ag-coffman-don-t-put-an-innocent-man-back-on-trial-let-moses-el-move-on/u/22302011 [https://perma.cc/TAF6-GYBL].

[257] *See* Young, *supra* note 146.

[258] *See* Robbins, *supra* note 59.

[259] *See id.*

[260] *See id.*

[261] A former member of Vance's transition committee describes Vance's CIU as "much more interested in preserving convictions than in taking a fresh, objective look at all the evidence." *Id.*

[262] *See id.*

2017. Gonzalez assumed the role of DA in 2017. Since then, the CRU has only overturned three or four convictions;[263] in 2018, the CRU exonerated no one.[264] There are eighty cases pending before the Brooklyn CRU.[265]

Gutting your own CIU is not a New York City special. Kym Worthy of Detroit—whom a nationally circulated magazine listed as one of its "Woke 100"[266]—has repeatedly refused to admit error in cases where there is compelling evidence of actual innocence. She has admitted that her CIU is "not staffed with any attorneys."[267] In 2014, Leon Cannizzaro announced a "Conviction Integrity and Accuracy Project" that would review wrongful convictions.[268] He pulled the plug on the Project after one year; it exists no longer.[269] Cannizzaro is known to fight exoneration cases for years and exhaust every appellate option. By charging witnesses who recant false trial testimony with perjury, Cannizzaro's office has discouraged such witnesses from exonerating the wrongfully convicted.[270] In fact, a study found that Worthy and Cannizzaro are two of the six elected prosecutors who are "most unwilling to admit the innocence of wrongfully convicted people despite overwhelming evidence of error."[271]

Society's infatuation with stories of actual innocence and wrongful conviction can distract from other areas of much-needed prosecutorial reform, especially reducing over-punitive sentences for those who are unlikely to be found innocent. But a prosecutor's treatment of the wrongfully convicted still speaks volumes about the sincerity of their progressive agenda. The failure of Stewart, Vance, Gonzalez, Worthy, and Cannizzaro to launch effective CIUs fails this metric.

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[263] *See* James Ford, *Families of Wrongly Convicted Rally for Change Outside Brooklyn DA's office*, PIX11 (May 16, 2019), https://pix11.com/2019/05/16/families-of-wrongly-convicted-rally-for-change-outside-brooklyn-das-office/ [https://perma.cc/G7KL-PAQ4]. Families of the Wrongfully Convicted say three cases; the Brooklyn DA's website says four cases. Noah Goldberg, *Critics Say DA's Conviction Review Unit is "No Longer Functional,"* BROOKLYN DAILY EAGLE (May 16, 2019), https://brooklyneagle.com/articles/2019/05/16/critics-say-das-conviction-review-unit-is-no-longer-functional/ [https://perma.cc/2L89-GLXM].

[264] *See* Ford, *supra* note 263.

[265] *See id.*

[266] *See id.*

[267] Jessica Pishko, *Kym Worthy Refuses to Admit Fault, Again*, APPEAL (Aug. 29, 2017), https://theappeal.org/kym-worthy-refuses-to-admit-fault-again-118f9a2133b0/ [https://perma.cc/H5J7-574E].

[268] *See* Naomi Martin, *Orleans DA Leon Cannizzaro announces new unit to ensure fair convictions*, NOLA.COM (Aug. 20, 2014, 7:29 AM), https://www.nola.com/news/politics/article_2472bbe9-73e4-5bc6-b9b5-b95194396a6d.html [https://perma.cc/Q76J-5KQB].

[269] *See* John Simerman, *Cannizzaro, Innocence Project Call It Quits on Project to Unearth False Convictions*, NOLA.COM (Jan. 11, 2016), https://www.nola.com/news/article_44ce1702-dd2b-5100-87de-f6e3e5b7c9f6.html [https://perma.cc/2KA6-JR4N].

[270] *See* Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html [https://perma.cc/5Q63-B32R].

[271] Rory Fleming, *Portland Is No Progressive Paradise—Just Look at Its District Attorney*, FILTER (May 9, 2019), https://filtermag.org/portland-is-no-progressive-paradise-just-look-at-its-district-attorney/ [https://perma.cc/VTW2-BTZK].

Conclusion

> [The prosecutor] is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
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> —*Berger v. United States*, 295 U.S. 78, 79 (1935)

Academics can agree to disagree about whether a progressive prosecutor can truly exist. In an era when the public is increasingly interested in electing prosecutors who stress criminal justice reform, academics must educate communities about what their district attorneys are doing and how to evaluate them. This framework and these comparative illustrations merely provide the groundwork for members of the polity to size up their local prosecutor and vote wisely.