

12-1-2012

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Recommended Citation

Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. Rev. 1523 (2012).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2012/iss5/3>

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Why the National Popular Vote Compact Is Unconstitutional

Norman R. Williams^{*}

Unable to secure passage of a federal constitutional amendment abolishing the Electoral College, several opponents of the Electoral College have sought to establish the direct, popular election of the President via an interstate compact according to which individual signatory states agree to appoint their presidential electors in accordance with the nationwide popular vote. Ostensibly designed to prevent elections, such as the one in 2000, in which the Electoral College “misfired” and chose the candidate who received fewer popular votes, the National Popular Vote Compact has been adopted by several states, including California. In this Article, I argue that the National Popular Vote Compact violates the Presidential Elections Clause of Article II of the U.S. Constitution. Although the text of the Clause seems to give states unlimited power to select the manner in which each state’s presidential electors are chosen, a close reading of U.S. history suggests the need and propriety of limiting the scope of state authority under the Clause. Not only did the framers of the Constitution expressly reject the idea of a direct, popular election for President, but also not one state either in the wake of ratification or at any time thereafter has ever sought to appoint its presidential electors on the basis of votes cast outside the state, as the National Popular Vote Compact requires. In the same way that similar historical considerations led the U.S. Supreme Court to limit the scope of state authority with respect to federal legislative elections, this history regarding the Presidential Elections Clause likewise counsels in favor of a more limited understanding of state authority under Article II. As such, if opponents wish to abolish the Electoral College, the sole constitutionally proper mechanism for doing so is a federal constitutional amendment, not an interstate compact negotiated by a handful of states.

^{*} Ken & Claudia Peterson Professor of Law and Director of the Center for Constitutional Government, Willamette University. AB, Harvard University; JD, New York University. I thank the participants at the faculty workshops at the University of Illinois and Arizona State University for their helpful comments and suggestions regarding prior versions of this Article.

The 2000 presidential election was an eye opener for many Americans. To the consternation of many, the candidate who won the most popular votes nationwide actually lost the contest.¹ In the election's wake, popular attention centered upon the Electoral College and its role in the presidential election. Under the U.S. Constitution, the people do not directly vote for the President in a nationwide election; rather, the people in each state vote for electors from that state, who in turn cast the constitutionally decisive votes for President and Vice President. Moreover, not only is the people's influence indirect, the Electoral College's voting pattern does not necessarily track the national popular vote. The allocation of electors to each state based on their representation in Congress, coupled with the use of winner-take-all voting in forty-eight of the fifty states, has produced an electoral system in which the electoral vote for the winning candidate may differ significantly from the nationwide popular vote.² In rare instances, such as in 2000, this process may produce a President who received fewer popular votes nationwide than the losing candidate. The *New York Times* presumably spoke for many when, in the wake of the 2000 election, it labeled the Electoral College an "antidemocratic relic."³

To be sure, the Electoral College has long been the target of criticism. Of the 11,000 constitutional amendments proposed in Congress in its history, over 1,000 have dealt with the Electoral College, and many of those have sought to implement a direct popular election of the President. In fact, bills proposing a constitutional amendment to abolish the Electoral College are routinely introduced in every Congress. Nevertheless, these proposals have all failed to pass Congress. In fact, over forty years have passed since Congress seriously considered a constitutional amendment abolishing the College.⁴ Popular support for

1. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2000 (2000).

2. In 1980, for example, Ronald Reagan received only 50.8% of the national popular vote but won 44 states, comprising 489 (91%) of the 538 electoral votes. David Leip, *1980 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1980&off=0&f=1> (last visited Nov. 14, 2012).

3. Editorial, *Drop Out of the College*, N.Y. TIMES, Mar. 14, 2006, at A26.

4. L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL30804, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 15 (2001); William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 150 (1996). In 1969, the House of Representatives passed an amendment abolishing the College, but it failed to secure the necessary two-thirds majority in the Senate. Sanford Levinson, *Is Moderation Sufficient When Addressing the Ills of the Electoral College?*, 6 ELECTION L.J. 220, 222 (2007). In 1979, a

constitutional reform, it seems, is widespread but too shallow to overcome the high hurdle of Article V.

Dissatisfied with the failure of Congress to pass a constitutional amendment abolishing the Electoral College, several reform-minded citizens, including law professors Akhil Amar, Vikram Amar, and Robert Bennett, came up with a novel way to transform the manner in which the nation elects its President that avoided the time-consuming and daunting process required for a constitutional amendment.⁵ Their idea, known as the “National Popular Vote Interstate Compact” or “NPVC,” was to have a large group of states agree to appoint their presidential electors in accordance with the national popular vote rather than their respective statewide popular vote.⁶ Once states comprising a majority of the Electoral College signed on, the NPVC would go into effect and, according to its proponents, the national popular vote would conclusively decide the winner of the election regardless of whether all the states agreed or a constitutional amendment abolishing the college was adopted. In essence, these reformers sought to use the coordinated action of a number of states to turn the Electoral College into the vehicle of its own reform.

To date, eight states and the District of Columbia have formally joined the compact, and several other states have moved toward joining it.⁷ Moreover, public opinion polls show widespread, bipartisan popular support for moving to the direct popular election of the President, as the

similar amendment was rejected by the Senate by a vote of 51–48. 125 CONG. REC. 17,766 (1979).

5. See Robert W. Bennett, *State Coordination in Popular Election of the President Without a Constitutional Amendment*, 5 GREEN BAG 2d 141, 148 (2002); Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution: Part Three of a Three-Part Series on the 2000 Election and the Electoral College*, FINDLAW (Dec. 28, 2001), <http://writ.news.findlaw.com/amar/20011228.html>.

6. Robert Bennett, as well as the Amar brothers, originally proposed that each state implement this reform through coordinated, contingent legislation in each state. Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 244–45 (2001); Amar & Amar, *supra* note 5. Later, John Koza championed the idea that the agreement be formally memorialized in an interstate compact. JOHN KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 247 (2d ed. 2008).

7. See National Popular Vote Interstate Agreement Act of 2010, 57 D.C. Reg. 9869; Agreement Among the States to Elect the President by National Popular Vote, 2008 Haw. Sess. Laws 205; Act effective Jan. 1, 2009, 2008 Ill. Laws 1; Presidential Elections—Agreement Among the States to Elect the President by National Popular Vote, 2007 Md. Laws 855; Agreement Among the States to Elect the President by National Popular Vote, 2010 Mass. Acts ch. 229; Agreement Among the States to Elect the President by National Popular Vote, 2007 N.J. Laws 2094; Presidential Election—Popular Vote—States’ Agreement—Washington, 2009 Wash. Sess. Laws 1390.

NPVC seeks to do. Indeed, by one recent poll, seventy-two percent of Americans favor dispensing with the Electoral College and moving to a direct popular election.⁸ Calls to reform the Electoral College have an obvious and intuitive appeal to Americans, who have an abiding faith in the virtue and essential justice of majoritarian democracy.

As I have written elsewhere,⁹ claims that the Electoral College thwarts the majority will are grossly overstated; the Electoral College typically tracks rather than thwarts popular sentiment. As such, I am skeptical of the need for reform, but, even assuming, *arguendo*, that the Electoral College system should be replaced, the NPVC is the wrong way to go about such reform. Much has been written about the NPVC, including its constitutionality.¹⁰ Somewhat surprisingly, however, constitutional commentators have focused exclusively on the questions whether the NPVC violates the Compact Clause of Article I, Section 10, or the Guarantee Clause of Article IV.¹¹ No one has undertaken a sustained analysis of the more fundamental (and, in my view, analytically prior) question whether Article II, Section 1 permits states, acting alone or in concert with others, to appoint presidential electors in accordance with the national popular vote. To the extent that commentators acknowledge the issue, the conventional view is that states have absolute discretion to appoint their delegates in any manner they see fit. Indeed, for some commentators, the point is not even arguable.¹²

8. WASH. POST-KAISER FAMILY FOUND.-HARVARD UNIV. SURVEY PROJECT, SURVEY OF POLITICAL INDEPENDENTS 12-13 (2007), available at <http://www.nationalpopularvote.com/resources/Wash-Post-Kaiser-Harvard-June-2007.pdf>.

9. Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

10. See, e.g., David Gringer, *Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182 (2008); Brandon H. Robb, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419 (2008); Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009). In addition, the *Election Law Journal* held a symposium devoted entirely to the NPVC. See Jamin B. Raskin, *Neither the Red States nor the Blue States but the United States: The National Popular Vote and American Political Democracy*, 7 ELECTION L.J. 188 (2008).

11. See, e.g., Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205 (2007); Kristin Feeley, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009); Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 220 (2008); Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON. L. REV. 717 (2007); Tushnet, *supra* note 10, at 1500 n.5.

12. See, e.g., Raskin, *supra* note 10, at 193 (arguing that no one seriously contests the constitutionality of the NPVC "because it is so clearly within the plenary power of the states to

Disagreeing with this conventional wisdom, this Article concludes that the states lack the power to appoint their presidential electors on the basis of votes of citizens outside the state's jurisdiction and, therefore, states are without authority to adopt the NPVC.

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. Rather, that power is limited, and the extent of that limitation is borne out by the historical understanding of the scope of state authority under Article II. At the time of the Framing of the U.S. Constitution, the framers envisioned a system in which states would select electors in accordance with the sentiments of state citizens, not the nation generally. Moreover, in the years following the Framing, every single state, both original and newly admitted, established a system of selecting presidential electors based either directly or indirectly on the sentiments of state voters. At no point in our nation's history has any state sought to appoint its electors on the basis of voter sentiment outside the state, let alone the national popular vote. The Constitution's delegation of power to the state legislature must therefore 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.

While this conclusion may strike many as counterintuitive, a detailed examination of American constitutional history as it relates to presidential elections demonstrates its veracity. Part I briefly describes the presidential election process, the criticism of it, and how the NPVC seeks to transform the process. Part II then explores the debates at the Constitutional Convention in 1787, revealing that the framers expressly rejected the direct popular election of the President and instead settled on the Electoral College as a way to preserve the influence of the states, particularly smaller states, in the selection of the President. Significantly, this Part establishes that the framers expected state legislatures to select electors in accordance with state sentiment, not a national popular vote. Confirming this expectation, Part III then canvasses the manner in which the states exercised their constitutional authority to select presidential electors in the first few elections following the ratification of the

appoint their electors in any manner they see fit"); Mark Rush, *Legal Portrait of the United States Presidential Election of 2008*, 3 J. PARLIAMENTARY & POL. L. 81, 92 (2009) (characterizing the constitutional question as a "minor issue").

Constitution. In fact, as this Part shows, although the states have experimented over time with different systems for selecting their electors, every single system ever employed has selected the electors based on the expression of support among state voters, not the voters of the nation at large.

Building upon this history, Part IV then explores the ramifications for the constitutionality of the NPVC. As this history suggests, the requirement that states appoint electors committed to the candidate who won the national popular vote exceeds the power delegated to the states under Article II, Section 1. Moreover, even if the historical evidence were not so clear, considerations of constitutional structure likewise counsel against reading Article II in the broad manner that proponents of the NPVC do. If a majority of states have the power to select electors on any basis, there is nothing to stop a majority of states from agreeing to appoint electors committed to candidates only from those states or, more ominously, from one political party. The same reasons that would condemn the validity of such regionalist or partisan compacts likewise condemn the NPVC.

In short, whether or not one believes that the current system of electing the President should be changed, the NPVC is the wrong way to go about such reform. Indeed, it is a manifestly unconstitutional way to undertake it.

I. ELECTING THE PRESIDENT¹³

A. *The Current Process*

As the U.S. Supreme Court pointedly reminded the American people in *Bush v. Gore*,¹⁴ the President is not elected by the people but rather by electors appointed by the states—the so-called “Electoral College.” The framers adopted this system of indirect election to provide the President with a degree of independence from Congress. Were the President selected by Congress—the principal alternative to the Electoral College considered by the framers—the framers feared that he would be too dependent on Congress and that potential candidates for the office would seek congressional support by making undesirable, if not downright

13. Several sections of this Part’s summary of the presidential-election process, most notably its description of the current process and how the National Popular Vote Compact seeks to change it, are borrowed from an earlier article of mine. See Williams, *supra* note 9.

14. 531 U.S. 98, 104 (2000).

corrupt, promises in return for such support.¹⁵ Moreover, further reflecting the “Great Compromise” in which legislative power was split between the popularly apportioned House of Representatives and federally apportioned Senate, the framers specified in the Constitution that each state receives electors equal in number to the representatives and senators that state possesses in Congress.¹⁶

The Constitution leaves it to each state to determine how its electors are selected, specifying that the electors shall be appointed by each state “in such Manner as the Legislature thereof may direct.”¹⁷ Although many state legislatures originally appointed the electors directly, by the mid-1830s, all but one state (South Carolina) had moved to a system of holding popular elections to select the electors.¹⁸ Relatedly, while states at first used different electoral systems—some states used an at-large system that effectively gave all the state’s electors to the winning candidate, others used a district system, while still others used a combination of both the at-large and district systems—all of the states ultimately adopted the at-large system.¹⁹

In actuality, the at-large system was not a true “winner-take-all” system because citizens still voted for individual electors, which could result in some voters, intentionally or not, selecting electors who supported different candidates.²⁰ In the twentieth century, states moved to a true winner-take-all system with the adoption of the so-called “short ballot,” which removed the electors’ names from the ballot and listed only the presidential and vice presidential tickets. With the short ballot, regardless of the number of electors possessed by the state, citizens would cast only one vote for the presidential and vice-presidential ticket of their choice; the state would then award the winning ticket all of that state’s electors.²¹ Today, all states use the short ballot,²² and all but two

15. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69 (Max Farrand ed., 1911) [hereinafter Farrand, RECORDS].

16. U.S. CONST. art. II, § 1, cl. 2. By virtue of the Twenty-third Amendment, the District of Columbia participates in the presidential election and receives three electors. U.S. CONST. amend. XXIII.

17. U.S. CONST. art. II, § 1, cl. 2.

18. WHITAKER & NEALE, *supra* note 4, at 2. South Carolina’s legislature continued to appoint the state’s electors until after the Civil War. *Id.*

19. *McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892).

20. Josephson & Ross, *supra* note 4, at 161. For example, in 1912, California voters elected eleven Progressive and two Democratic electors, and, in 1916, West Virginia voters elected seven Republican and one Democratic elector. *Id.*

21. *See, e.g., ALA. CODE* § 17-6-23 (2007) (“When electors for the President and Vice-

states use this winner-take-all system. The two exceptions, Maine and Nebraska, award their two “senatorial” electors to the winner of the statewide election, but, in each state, the voters in each congressional district select an elector for that district. As a result, the presidential candidates can split the electors from those states, as took place in Nebraska in 2008.²³

As most Americans understand, the general election takes place in early November. That date, however, is not specified in the Constitution but rather has been set by Congress by statute. Congress has set the Tuesday after the first Monday in November as the date on which the general election must take place.²⁴ The presidential electors, in turn, cast their vote on the first Monday after the second Wednesday in December.²⁵ By virtue of the Twelfth Amendment, each elector casts two votes, one for President and one for Vice President.²⁶

Although by tradition American political scientists and constitutional commentators refer to it as a “college,” the Electoral College never meets as one body. Unlike Congress or other representative institutions, the Electoral College was not conceived as a deliberative body in which the electors would discuss and debate the relative merits of the candidates. Rather, the framers feared that, were all the electors to assemble in one place, they would engage in vote-swapping and collusion.²⁷ To prevent that eventuality, the framers specified in the Constitution that the electors

President of the United States are to be elected, the names of the candidates for President and Vice-President shall be listed on the ballot, but not the names of the electors.”); VA. CODE ANN. § 24.2-644(B) (2011) (“The qualified voter at a presidential election shall mark the square preceding the names and party designation for his choice of candidates for President and Vice President. His ballot so marked shall be counted as if he had marked squares preceding the names of the individual electors affiliated with his choice for President and Vice President.”).

22. KOZA ET AL., *supra* note 6, at 56.

23. Barack Obama lost the state of Nebraska (and two of its three congressional districts) but won a majority of support in one of the state’s congressional districts, thereby giving him one of Nebraska’s five electoral votes.

24. 3 U.S.C. § 1 (2012).

25. *Id.* § 7.

26. U.S. CONST. amend. XII. As originally enacted, the Constitution specified that the electors would cast two votes, but the electors could not designate which person they favored as President versus Vice President. As a result, in the 1800 election, Democratic-Republican electors cast the same number of votes for Thomas Jefferson and his running mate Aaron Burr, which deprived the former of an Electoral College majority and sent the election to the House of Representatives (which only selected Jefferson on the thirty-sixth ballot). That election ultimately prompted the passage of the Twelfth Amendment.

27. 2 Farrand, RECORDS, *supra* note 15, at 500; THE FEDERALIST NO. 68, at 412–13 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

for each state should meet in their respective states.²⁸ The framers further envisioned that the electors would be sage, independent men capable of evaluating the relative merits of the candidates and that, when separated into their various states, they would determine who among the presidential aspirants was best qualified in intellect and temperament to lead the nation.²⁹

Not surprisingly, the post-Framing-era rise of party politics has produced a presidential election system much unlike that envisioned by the framers. Far from being elite political sages, the presidential electors are almost invariably dedicated partisans, usually prominent officials in the state party apparatus who can be trusted to vote for the presidential candidate of their party. As a result, while there have been a handful of instances in which a “faithless elector” voted for some other candidate,³⁰ party loyalty typically ensures that the electors ultimately cast their vote for the candidate to which they are pledged.³¹ Since 1796, there have been only ten faithless electors out of the over 20,000 electors, and none of those faithless electors affected the outcome of the election.³² Hence, as a practical matter, the popular vote in each state conclusively determines which candidate receives that state’s electoral votes. It is for that reason that Americans typically know who has won the presidential election the night of the general election; no one waits with bated breath for the Electoral College ballots to be counted, even though it is that act, not the popular vote, that has constitutional significance.

While the Electoral College’s vote may be a formality, it is a formality that is and must be performed. After the electors cast their ballots in mid-December, the ballots are transmitted to Congress, which opens and counts the votes in early January.³³ To be elected President and Vice President, the winning candidates must receive a majority of the electoral votes of all the states. In the event that no candidate receives

28. U.S. CONST. art. II, § 1, cl. 3; *see also* 3 U.S.C. § 7 (2012) (specifying that electors shall meet at a location in the state designated by the legislature thereof).

29. THE FEDERALIST NO. 68, at 412–13 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

30. Josephson & Ross, *supra* note 4, at 147 & n.18; WHITAKER & NEALE, *supra* note 4, at 10.

31. Some states legally bind the electors to support the candidate to which they are pledged. WHITAKER & NEALE, *supra* note 4, at 9. The constitutionality of such provisions is hotly contested. *Id.* at 10 & n.47; *cf.* Ray v. Blair, 343 U.S. 214 (1952) (upholding requirement that elector pledge to support party’s candidate but distinguishing laws that bound electors to so vote).

32. Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 211 (2008).

33. 3 U.S.C. § 15 (2012).

a majority, the election for President is thrown to the House of Representatives to determine the President from among the top three vote recipients in the Electoral College's balloting.³⁴ In the House's voting, each state receives one vote with a majority of states necessary to elect the President. On only two occasions (1800 and 1824) has the election gone to the House under this contingent election procedure.³⁵

Today, there are 538 electors from the fifty states and the District of Columbia. As a result, a presidential candidate must receive 270 electors to be elected President. California has the most electors (fifty-five), while Alaska, Delaware, the District of Columbia, Montana, North Dakota, South Dakota, and Vermont have the fewest (three). As a theoretical matter, a candidate could win the presidency by winning the top eleven most populous states, which collectively possess the bare minimum 270 electoral votes. In actuality, since 1960 (the first election in a fifty-state union), no candidate has won the White House with less than twenty-two states, which John F. Kennedy did in 1960.³⁶

B. The Criticism of the Electoral College

As the foregoing summary indicates, for well over a century, people in every state have voted in the presidential election.³⁷ Moreover, with just a few exceptions, the electors selected by the people have faithfully voted the electorate's preferences.³⁸ Hence, while in form the Electoral College serves as a political intermediary between the people and the President, in practice, the votes of the people are transmitted almost automatically into electoral votes. In short, the popular provenance of the electors, coupled with the faithful transmittal of electoral preferences by

34. If no vice-presidential candidate receives a majority, the Senate elects the Vice President from among the top two vote recipients. U.S. CONST. amend. XII. There has been one election in which the election of the Vice President was thrown to the Senate. In 1836, Martin Van Buren's running mate, Richard Johnson, failed to receive the necessary majority (because Virginia's electors balked at his qualifications), but the Senate ultimately elected him anyway.

35. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 30–31 (1996).

36. *Id.* at 46–48. Two additional states, Alabama and Mississippi, went Democratic in the voting, but more voters in those states, protesting the national party's civil-rights platform, favored unpledged Democratic electors rather than electors pledged to the Democratic nominee John F. Kennedy. The unpledged electors ultimately voted for Sen. Harry Byrd. *Id.* at 57.

37. The last state to have its legislature appoint its electors was Colorado in 1876, which took place only because Colorado had been so recently admitted to the union as a state that its legislature did not have time to provide for a popular election for its presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 33 (1892).

38. *See* Smith, *supra* note 32, at 211.

the electors themselves, has fatally undermined any suggestion that the Electoral College is *antidemocratic*.³⁹ The President is truly elected by the people.

The principal charge against the Electoral College is that it is *antimajoritarian*.⁴⁰ Specifically, the controversy surrounding the Electoral College has centered upon the allocation of political power among the people in the states resulting from the fact that electors are allocated on a state-by-state basis, with each state receiving the number of electors corresponding to its number of representatives and senators. This allocation of electors departs from the majoritarian ideal in two ways. First, because of indivisible population variances among the states, the number of representatives allocated to each state does not map perfectly with the population of the states. Both Missouri and Minnesota, for example, have eight representatives (and therefore ten electors), but Missouri has at least 684,000 more inhabitants than Minnesota.⁴¹ Second, because each state receives two senatorial electors regardless of its population, less populous states receive more electors than a strict, population-based allocation would produce. Wyoming, for example, has three electors for its 563,000 residents (or one for every 187,600 residents in the state), while California has fifty-five electors for its thirty-seven million-plus residents (or one for every 677,000 residents).⁴² If electors were apportioned strictly on the basis of population, Wyoming would have only one elector, while California would have sixty-five.

The critics seize on this apportionment of electors and point to the fact that, as a consequence, the Electoral College can elect a President

39. See Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 165 (1986). Some commentators continue to decry the College as “antidemocratic.” See, e.g., Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1110 (2001). That is a misnomer, however. The substance of the commentators’ criticism—that the Electoral College does not guarantee the election of the candidate with the most votes—suggests that their concern is more properly viewed as one of antimajoritarianism than antidemocracy. Cf. Brannon P. Denning, *Publius for All of Us*, 26 CONST. COMMENT. 75, 85 (2009) (distinguishing between charges that the Electoral College is anti-democratic versus anti-majoritarian and declaring that latter is “more precise”); Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 868, 876–77 (2007) (arguing that the Electoral College does not respect majority vote and noting that the antidemocratic charge is synonymous with an antimajoritarian charge).

40. KOZA ET AL., *supra* note 6, at 16–17; James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1494 (2003); Levinson, *supra* note 39, at 868–69.

41. U.S. CENSUS BUREAU, 2010 CENSUS (2011), available at <http://2010.census.gov/2010census/data/apportionment-pop-text.php>.

42. See *id.*

who lost the nationwide popular vote. As evidence, the critics allege the Electoral College has “misfired” at least three times in our history.⁴³ In 1876, Republican Rutherford Hayes won a bare majority of Electoral College votes, even though Democrat Samuel Tilden received 250,000 more popular votes. In 1888, Republican Benjamin Harrison received a substantial majority of electoral votes, despite the fact that Democrat Grover Cleveland received 91,000 more popular votes. Most recently, in 2000, Republican George W. Bush won a bare majority of electoral votes, while Democrat Albert Gore received over half a million more popular votes nationwide.⁴⁴ In the critics’ view, the Electoral College is therefore a threat to American democracy; even though the people vote, the Electoral College so distorts the manner in which their votes are aggregated that the loser may actually win. For this reason, the critics urge that, like legislative appointment of U.S. senators, the Electoral College should be discarded in favor of the direct popular election of the President.⁴⁵

To be sure, throughout American history, there have been many efforts to reform or eliminate the Electoral College, but all have failed. Of the 11,000 constitutional amendments proposed in Congress, over 1,000 have dealt with the Electoral College, and many of those have sought to implement a direct popular election.⁴⁶ In the most recent

43. KOZA ET AL., *supra* note 6, at 16–18; NEIL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 116 (1981).

44. Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-For-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups”*, 12 *CORNELL J.L. & PUB. POL’Y* 503, 538 (2003) (“Gore lost not because we have an electoral college, but because we have an electoral college that is so profoundly malapportioned.”). The election of 1824 is also sometimes listed as an example of an election of a minority President, but the circumstances of that election cloud the picture. *E.g.*, KOZA ET AL., *supra* note 6, at 16. Four strong candidates (John Quincy Adams, Andrew Jackson, Henry Clay, and William Crawford) split the Electoral College vote, sending the election for the second and last time to the House of Representatives. The House ultimately selected Adams, even though Jackson had won more votes. Three points distinguish this election from the others. First, it was the House, not the Electoral College, that selected the President (and it is therefore the House who deserves the blame, if any). Second, the four candidates had split the popular vote too, such that Jackson received only forty-one percent of the popular vote. Third, and most importantly, six states, including the populous state of New York, which heavily favored Adams over the three Southern candidates, did not conduct a popular election and instead used legislative appointment for their presidential electors. It is simply impossible to know whether Adams lost the nationwide popular vote because there was none.

45. Levinson, *supra* note 39, at 868.

46. Thomas E. Cronin, *Foreword* to JUDITH BEST, *THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE* viii (1996); Chang, *supra* note 11, at 210.

Congress, there was one bill proposing a constitutional amendment to eliminate the Electoral College and move to a direct popular election, but it went nowhere.⁴⁷ Article V, though, imposes a high threshold for amendments: a proposed amendment must pass both houses of Congress by a two-thirds vote and then be ratified by three-quarters of the states.⁴⁸ In 1969, the House passed such an amendment, but it failed to secure the necessary two-thirds majority in the Senate.⁴⁹ In 1979, the Senate rejected a similar amendment by a vote of fifty-one to forty-eight.⁵⁰ Since then, other proposed amendments abolishing the Electoral College have died without floor action.⁵¹ Popular support for constitutional reform, it seems, is widespread but shallow.

C. The National Popular Vote Compact

In the wake of the 2000 presidential election, several critics of the Electoral College came up with a clever way to circumvent the Electoral College without, in their view, at least, the need for a constitutional amendment. Recognizing that the Constitution assigns to the state legislatures the power to direct the manner in which each state's electors are selected, these critics imagined that each state could decide on its own to award all of its electors to the candidate who won the nationwide popular vote. Of course, were only one or two individual states to do so, there would be no guarantee that their adoption of such an appointment system would ensure that the candidate who won the popular vote would win the Electoral College vote.⁵² At the same time, there could be substantial domestic political costs for states that unilaterally adopted such a system. Without the guarantee that the popular vote winner would actually prevail nationwide, few states would relish appointing electors pledged to the candidate who lost that state's poll.

47. H.R.J. Res. 36, 112th Cong. (2011). The resolution was referred to the House Judiciary Committee, which in turn referred it to the Subcommittee on the Constitution, where no further action on it was taken.

48. U.S. CONST. art. V. Amendments may also be proposed by a national convention, but that mechanism has never been used.

49. Levinson, *supra* note 4, at 222.

50. 125 CONG. REC. 17766 (1979).

51. WHITAKER & NEALE, *supra* note 4, at 15; Josephson & Ross, *supra* note 4, at 150.

52. One of the critics, law professor Robert Bennett, disagrees. Bennett argues that even if one or two large states decided to unilaterally adopt such an appointment process, the number of electors controlled by those states would make it nearly impossible for a candidate who lost the popular vote to amass an Electoral College majority out of the remaining states. Bennett, *supra* note 6, at 244.

Appreciating this collective-action problem, the proponents developed the idea of an interstate compact among the states. Under the terms of this proposed National Popular Vote Compact, each state agrees to hold a statewide popular election for President, as every state already does.⁵³ After the election, each signatory state's chief election official determines the number of votes cast for each presidential-vice presidential slate of candidates in her state and communicates those numbers to all other states' chief election officials.⁵⁴ Once all of the statewide popular election vote totals are ascertained and the national popular vote winner determined, the compact requires that each signatory state appoint the slate of electors committed to the candidate who won the national popular vote, regardless whether that candidate won that particular state's own poll.⁵⁵

For a measure that seeks to profoundly alter the manner in which the nation's chief executive is selected, the NPVC is otherwise surprisingly brief and cursory. To address the collective-action problem, the compact provides that it will not go into effect until states comprising a majority of the Electoral College sign on.⁵⁶ In that way, there is no obligation for a state to appoint electors contrary to its own voters' will until such time it can be sure that, in so doing, the national popular vote winner will secure the presidency thereby. To prevent states from triggering the implementation of the NPVC late in the presidential campaign, the NPVC governs only presidential elections in which the requisite college of states has ratified the NPVC by July 20 of the election year. Correspondingly, to prevent strategic defections by individual states late in the election cycle, the compact also specifies that a signatory state may withdraw from the compact only if it does so before July 20 in a presidential election year.⁵⁷ As to other important aspects of the election process, such as the conduct of the election in the states, the counting of

53. AGREEMENT AMONG THE STATES TO ELECT THE PRESIDENT BY NATIONWIDE VOTE, art. II [hereinafer AGREEMENT], available at <http://www.nationalpopularvote.com/pages/misc/888wordcompact.php>.

54. *Id.* art. III. Moreover, to instill public confidence in the counting of ballots, the official must make public those vote totals "as they are determined or obtained." *Id.*

55. *Id.*

56. *Id.* art. IV.

57. *Id.* If a state attempts to withdraw after that date, the compact purports to bind the state through the upcoming presidential election. The legal and practical problems with enforcing that requirement are discussed in Williams, *supra* note 9, at 216–22.

ballots, or the triggering and manner of conducting recounts, the proposed compact is silent.⁵⁸

Proponents of the NPVC believe that it will fundamentally transform American presidential elections. In their view, once the compact goes into effect, the presidential election would become solely the product of the nationwide popular vote; whether a candidate won a particular state, such as Florida in 2000, would be irrelevant. Indeed, supporters hope that even those states that refused to sign on to the compact would find themselves powerless to produce a victory for any other candidate.⁵⁹ By virtue of their Electoral College majority, the signatory states' pledge to appoint their electors to the national popular vote winner would be conclusive. The NPVC supporters also hope that its passage will change the nature of presidential campaigns. In their view, a few select swing states (such as Ohio, Pennsylvania, and Florida) currently receive too much attention from the presidential candidates, while "safe" states (such as California and New York for the Democrats and Texas and the South for the Republicans) receive too little.⁶⁰ By eliminating the importance of winning individual states, proponents of the NPVC believe that candidates will spend more time in other states, attempting to increase their national vote margins.

As of February 2012, eight states, including the electoral behemoth California, with its fifty-five electoral votes, and the District of Columbia have adopted the NPVC.⁶¹ Those states collectively possess 132 electoral votes, almost half of the electoral votes necessary for the NPVC to go into effect. Moreover, supporters are confident that political momentum is building in their favor. The NPVC has been passed in one or both houses of the legislature in a number of states.⁶² Together, those states comprise an additional 111 electoral votes. If those states ratified the NPVC, it would be only thirty-two electoral votes short of ratification. Based on these expressions of popular support, proponents of the NPVC hope that the NPVC will gather the requisite number of states to be in effect for the 2016 presidential election.⁶³

58. AGREEMENT, *supra* note 53, art. IV.

59. KOZA ET AL., *supra* note 6, at 247.

60. *See, e.g., id.* at xxix; Chang, *supra* note 11, at 218–19.

61. Those states are California, Illinois, Maryland, Massachusetts, New Jersey, Hawaii, Vermont, and Washington.

62. The Connecticut House, for example, approved the NPVC on May 11, 2009.

63. KOZA ET AL., *supra* note 6, at 281.

D. Criticism of the NPVC

As might be expected, the NPVC itself has attracted a great deal of academic interest. For many critics of the current Electoral College-based system, such as Akhil Amar and Robert Bennett, the NPVC offers a welcomed way to usher in the direct popular election of the President.⁶⁴ For others, however, the NPVC is a dangerous run around the constitutional requirement that any change in the presidential election process be accomplished by constitutional amendment.

Criticism of the NPVC falls into two, broad camps. First, many critics contest the desirability of the NPVC from a policy standpoint. In a prior article, I identified several problems with the NPVC.⁶⁵ Among other shortcomings, the NPVC permits the election of a President with a bare plurality of the popular vote; it fails to provide for a nationwide recount in the case of a close election; it fails to address the electoral and constitutional crisis if one or more states obstruct the calculation of a national popular vote or withdraw from the compact on the eve of—or worse, shortly after—the general election; and, finally, by virtue of the differences among the states with regard to each other’s electoral rules and procedures, the NPVC simply substitutes one form of malapportionment for another. While the current system ostensibly favors citizens in small states, the NPVC would favor citizens in those states with generous election rules and procedures.

Second, several critics contest the constitutionality of the NPVC. To date, these critics have founded their arguments on the Compact Clause of Article I, Section 10, which provides that no state may “enter into any Agreement or Compact with another State” without Congress’s consent.⁶⁶ Despite this seemingly categorical language which forbids states from “enter[ing] into any Agreement or Compact” with another state absent Congress’s consent, the U.S. Supreme Court has acknowledged that some interstate agreements do not qualify as compacts and therefore do not require congressional consent.⁶⁷ Seizing

64. See Bennett, *supra* note 5; Amar & Amar, *supra* note 5.

65. See Williams, *supra* note 9.

66. U.S. CONST. art. I, § 10.

67. See, e.g., U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 469 (1978); Virginia v. Tennessee, 148 U.S. 503 (1893) (“Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”).

upon this line of cases, proponents of the NPVC argue that congressional consent is not required to make the NPVC valid.⁶⁸

While I am sympathetic to the critics' constitutional claims, the Compact Clause strikes me as of secondary importance. After all, implicit in the critics' argument is that Congress could validate the NPVC by consenting to it. In my view, that concession is unwarranted for a reason unrelated to the Compact Clause. Rather, in my view, whether or not the Compact Clause requires Congress's consent to the NPVC, the NPVC is unconstitutional because it violates Article II of the Constitution. Given the seemingly categorical language of Article II, which provides that the manner of selecting presidential electors is left to the discretion of each state's legislature,⁶⁹ such a claim may at first blush seem improbable. Nevertheless, there is good reason to read the language of Article II more narrowly than do the proponents of the NPVC. In particular, the history of the adoption of Article II and its use by state legislatures in the past two centuries evince that, while states have the authority to appoint electors based on the results of a statewide or district election, they cannot appoint electors based on election results in other states.

II. THE ADOPTION OF THE ELECTORAL COLLEGE

To be sure, the Electoral College was not the product of some highly theorized conception of executive power. Nor was it the result of the framers copying and paying homage to an institutional construct whose bona fides had been demonstrated by time and experience. Indeed, unlike the new Congress, which followed upon the Continental and Confederation Congresses, the new presidency had no precursor in the colonial- or Confederation-era government, which lacked a national executive. While the framers could draw some lessons from the experience of the states, each of which had a chief executive, that lesson was primarily negative in character, illustrating what the new national government should avoid, not what it should emulate. The Revolution-era state constitutions, which had been drafted in response to the fears of replicating the abusive royal governors of colonial times, either provided for a popularly elected governor with a short term of office, sometimes no more than one year in length, or more typically vested the selection of the governor in the legislature, which made the former dependent upon

68. KOZA ET AL., *supra* note 6, at 439–45.

69. U.S. CONST. art. II, § 1, cl. 2.

and therefore ultimately subservient to the latter.⁷⁰ As a result, the Confederation-era state governors were an enfeebled lot, lacking the energy and independence that the framers fervently wished the new federal executive to possess.

In a very real sense, the framers who convened in Philadelphia in the summer of 1787 were writing upon a blank slate. Ultimately, the decision to vest the selection of the new President in an Electoral College was embraced by the delegates to the Constitutional Convention of 1787 not because anyone thought it was the best way to elect the President, but because it was preferable to the two primary alternatives: direct election by the people or appointment by Congress. As historian Jack Rakove accurately observed, the establishment of the Electoral College “owed more to the perceived defects in alternative modes of election than to any great confidence that this ingenious mechanism would work in practice.”⁷¹ For the framers, the Electoral College was a second-best solution.

Before condemning the framers for their lack of imagination, however, it is first necessary to understand the political forces that led the framers to embrace the Electoral College over the alternatives. And to do that, it is first critical to situate the debate over the process of selecting the President within the more fundamental political battle that divided the Constitutional Convention regarding the status and role of the states in the new national political union. Only after one appreciates the contours of that more fundamental battle over the nature of the union and the closely intertwined issue regarding the representative structure of the new Congress can one begin to appreciate the forces that led the framers to settle upon an institution that, to modern eyes at least, is a political anachronism.

70. Of the twelve states represented at the Constitutional Convention, eight of them had legislatively appointed governors. DEL. CONST. art. VII (1776); GA. CONST. art. II (1777); N.C. CONST. art. XV (1776); N.J. CONST. art. VII (1776); PA. CONST. ch. II, art. XIX (1776); S.C. CONST. art. III (1778). Only Connecticut, Massachusetts, New York, and New Hampshire had a popularly elected executive. *See* CONN. CHARTER (1662) (popularly elected for one-year term); MASS. CONST. pt. 2, ch. II, art. III (1780) (popularly elected for one-year term); N.H. CONST. pt. II (1784) (popularly elected for one-year term); N.Y. CONST. art. XVII, XVIII (1777) (popularly elected for three-year term).

71. JACK N. RAKOVE, ORIGINAL MEANINGS 267 (1996). *See also* PEIRCE & LONGLEY, *supra* note 43, at 22 (noting that the Electoral College was “the second choice of many delegates”).

A. The Nature of the Union

As its name suggested, the Articles of Confederation established a loose confederation among the thirteen states that declared and then won their independence from Great Britain in the Revolutionary War. Under the terms of the Articles, each state was a sovereign entity that stood on equal political footing with the other states in the confederation.⁷² As such, each state received one vote in the Confederation Congress, regardless of its population.⁷³ Not surprisingly, the large, populous states, such as Virginia and Pennsylvania, resented this system, which gave Virginia the same political power in the Congress as Rhode Island or Georgia. Even worse, alterations to the Articles required the unanimous consent of all the states, thereby empowering a single state to veto proposed changes endorsed by the other states.

In the years following the Revolution, the Confederation Congress found itself woefully unable to protect the new nation's interests abroad or to respond to emerging challenges at home. The Confederation Congress's failings were numerous, but most notable among them was its inability to raise funds to retire the Revolutionary War debt and to provide a uniform system of taxation and regulation for interstate and foreign commerce. Strikingly, the Articles of Confederation did not authorize Congress to lay taxes directly upon the people but rather left Congress in the untenable position of requisitioning funds from the state legislatures.⁷⁴ When Congress made such requisitions, states often failed to comply with them.⁷⁵ In response, Congress asked the states several times to consent to amendments to the Articles to vest Congress with the authority to lay its own duties on foreign imports, but the proposals were vetoed first by Rhode Island and then later by New York.⁷⁶ At the same time, and relatedly, the Confederation government found itself powerless to establish a coherent policy with respect to foreign or interstate commerce, leaving American commercial interests subject to a disparate web of regulations and taxes adopted by the states. Without the power to lay a tax or regulate commerce, Congress found itself both financially

72. ARTICLES OF CONFEDERATION OF 1781, art. II.

73. *Id.* art. V (allotting one vote per state). Interestingly, the Articles of Confederation described the Confederation as a "league of friendship" among the states. *Id.* art. III.

74. *Id.* art. VIII.

75. CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 15–16 (2005).

76. *Id.* at 26–29.

starved and constitutionally disabled from protecting the new nation's emerging commercial interests.

The manifest and apparent weakness of the Confederation Congress with respect to finances and commerce ultimately led to the Constitutional Convention that assembled in Philadelphia in May 1787. Though the Convention had been formally tasked merely with revising the Articles to establish a more robust national government capable of promoting American interests, many delegates saw the opportunity to use the Convention to bring about a more profound, fundamental change in the nature of the union. No one more clearly saw both the need for and the opportunity to undertake such a revolution in government than James Madison, who would play a critical role at the Constitutional Convention and ensuing ratification debates.⁷⁷ In Madison's view, the problem with the Confederation Congress was not merely that it lacked particular powers; rather, its dependence upon the states, particularly the state legislatures, ineluctably rendered it incapable of promoting the nation's interests. In Madison's view, the inherent parochialism of representatives deputized by and on behalf of the state governments would "never fail to render federal measures abortive."⁷⁸

The Constitutional Convention convened in May 1787, and on May 29, 1787, Governor Edmund Randolph of Virginia introduced the so-called "Virginia Plan." Primarily the work of Madison, the Virginia Plan reflected the profound ambitions of its author to remove the states from the center of the political galaxy that they occupied under the Articles of Confederation. Under the terms of the Virginia Plan, there would be a new national government composed of three separate branches. With respect to the legislative branch, the Confederation Congress would be replaced with a bicameral Congress apportioned on the basis of state population.⁷⁹ With the least populous state entitled to at least one representative, the Virginia Plan was not entirely majoritarian—representatives would be assigned on a state-by-state basis which would inevitably lead to some variances in population among congressional delegations from different states—but its underlying political theory was one in which political power tracked population. Moreover, in further contrast to the Articles of Confederation, the Virginia Plan specified that

77. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 472–73 (1998).

78. 9 *PAPERS OF JAMES MADISON* 352 (Robert Rutland et al. eds., 1975).

79. 1 *Farrand, RECORDS*, *supra* note 15, at 20–21.

members of the lower house of the new Congress would be elected directly by the people.⁸⁰ The members of the upper house, in turn, were to be selected by the lower house from a list of candidates nominated by the states.⁸¹ Unlike the Confederation Congress, the state legislatures would not control the selection of the members of either house of Congress.

The Virginia Plan was a direct assault upon the notion that each state was a political equal of the others, and it was understood as such not only by its supporters but, equally importantly, by its opponents in the smaller states, such as Delaware. Delegates from the smaller states viewed the Virginia Plan—correctly—as a threat to their political influence in the new Congress. In response, on June 15, they put forth the so-called “New Jersey Plan.” Their plan followed the Virginia Plan in creating a tripartite national government, but it preserved the pre-existing political structure of the Confederation-era Congress. Although Congress’s powers would be enlarged, it would remain a one-house assembly in which each state received an equal vote and whose members would be selected by the state legislatures.⁸²

Proponents of each plan viewed the other scheme not only as a threat to their own state’s interests but as fundamentally inconsistent with the political foundation of the new union. For proponents of the Virginia Plan, the new Constitution would create a new national government that derived its power not from the states but from the people directly. As such, the new Congress would be elected by the people to represent the people. As a corollary to this conception of the new union, the number of representatives necessarily had to be based on population so as to ensure equality of political power among the people. As James Madison, the author of the Virginia Plan, boldly asserted, “whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign States, it must cease when a national Govern[ment] should be put into place.”⁸³ In contrast, for proponents of the New Jersey Plan, the new union was to be very much like the old, consisting of a confederation of sovereign, coequal states. As such, each state was entitled to equal representation in the new Congress.

80. *Id.* at 20.

81. *Id.*

82. *Id.* at 242–45. See also RAKOVE, *supra* note 71, at 63.

83. 1 Farrand, RECORDS, *supra* note 15, at 37.

With the divide between the two sides based on deep theoretical disagreement about the nature of the union and the status of the states in it, the Constitutional Convention threatened to stalemate. The New Jersey Plan was rejected overwhelmingly,⁸⁴ but the delegates' opposition to the smaller states' gambit did not translate into support for the competing Virginia Plan.⁸⁵ When delegates from the larger states attempted to capitalize on the defeat of the New Jersey Plan, it became apparent that there was substantial support for some alternative formulation that would protect the smaller states' political influence in the new Congress. On June 29, Oliver Ellsworth of Connecticut proposed that each state be given an equal vote in the upper house.⁸⁶ That proposal was initially defeated on a tie vote,⁸⁷ but the closeness of the vote itself demonstrated both the lack of substantial support for the Virginia Plan and the fact that the delegates increasingly knew the contours of the ultimate compromise between the larger and smaller states that would be necessary.

The logjam was broken with the introduction on July 5 of the "Great Compromise," drafted by a committee specially charged to find a middle ground that could appease both the larger and smaller states.⁸⁸ Also known as the "Connecticut Plan" because of its similarity to Ellsworth's proposal, the proposed compromise would create a bicameral Congress. The lower house would be elected by the people of the individual states, with each state receiving the number of representatives based on its population.⁸⁹ Meanwhile, as Ellsworth had proposed just a week earlier, the upper house would maintain the Confederation Congress's system of equal political representation of the states. In an effort to mollify the larger states, the proposal specified that appropriation bills could only

84. *Id.* at 313.

85. RAKOVE, *supra* note 71, at 65.

86. 1 Farrand, RECORDS, *supra* note 15, at 468, 474.

87. *Id.* at 509.

88. *Id.* at 524–25.

89. *Id.* The representative nature of the lower house, like much of the Constitution, was compromised by the issue of slavery. As the new national government was understood to have the power to assess a direct tax upon the property of the various states, Southern states demanded that slaves be included in the calculation of their representation. Northern states were not prepared to give the white Southerners political influence based on disenfranchised, enslaved persons. Hence, the Convention used a compromise first made in the Confederation Congress with respect to a proposed national tax: slaves would be treated as three-fifths of a person for purposes of calculating a state's allocation of representatives in the lower house.

originate in the lower house. Even with the appropriation provision,⁹⁰ the larger states had significant misgivings about the proposal. Nevertheless, the discussion over the past month and a half had shown that the smaller states would never agree to the Virginia Plan. On July 16, the delegates narrowly approved the Great Compromise.⁹¹

The change in representation in the upper house profoundly altered the character of the new Congress. The delegates had previously agreed that members of the upper house would not be selected by the lower house, as Randolph had originally proposed, but rather selected by the state legislatures.⁹² Coupled with state legislative appointment, the change in representation ensured that the upper house would provide a lasting echo of the old Confederation Congress as a forum in which the states would be represented as equal, corporate bodies. As such, the Great Compromise wrought a fundamental transformation in the nature of the new union. The new Constitution did not establish an omnipotent national government in which the states played no formal role. Nor did it maintain a federal league in which the states played the central role. Rather, the new Constitution blended elements of both, with the new bicameral Congress reflecting the composite nature of the new union. As James Madison writing as Publius in the *Federalist Papers* would later characterize it, the new Constitution was “neither a national nor a federal Constitution, but a composition of both.”⁹³

The battle over the status of the states and their role in the new Congress was obviously important in its own right, but it also played a crucial part in the debates over the new presidency. No feature of the new government was considered in isolation, divorced from consideration as to how it would interact with other features. Hence, changes made by the framers with respect to one element would often produce “downstream” consequences regarding their approach to other features of the new government. So too it was with respect to the relationship between the Senate and the presidency. The smaller states had won a victory in preserving their political influence in the new

90. Madison, in particular, dismissed the “origination” provision as pointless since the Senate could simply refuse to pass appropriation bills with which it disagreed. *Id.* at 527.

91. 2 Farrand, RECORDS, *supra* note 15, at 13–14.

92. 1 Farrand, RECORDS, *supra* note 15, at 149.

93. THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961). Oliver Ellsworth had similarly defended his proposal to maintain the equal suffrage of the states in the upper house in these terms, arguing that the new Congress would be “partly national; partly federal.” 1 Farrand, RECORDS, *supra* note 15, at 468.

Senate, but their perceived influence profoundly shaped the framers' deliberations regarding the process for selecting the President.

B. The Presidency

The issue of presidential selection had arisen at the very outset of the Convention. The Virginia Plan had proposed that the President be selected by Congress to serve for a single term of seven years.⁹⁴ Given the fact of legislative appointment, the limitation to one term was an important one. In those states in which the governor was selected by the legislature, the desire to gain reappointment had made the governors unduly dependent on and subservient to the legislature in the framers' eyes. The proponents of the Virginia Plan hoped that by rendering the President ineligible for a second term, he would possess the requisite independence from Congress.

James Wilson of Pennsylvania opened the debate on the Virginia Plan by declaring his support for a popularly elected President. Wilson pointed to the experience in New York and Massachusetts, both of which had an elected governor, as proof that popular election was "a convenient and successful" method of selecting the executive.⁹⁵ Popular election would also eliminate the President's dependence on Congress for election. Strikingly, however, Wilson did not equate popular election with a direct vote by the people. When asked to transform his remarks into a formal proposal, Wilson moved that each state be divided into districts and that the citizens of each district elect a certain number of electors, who would then meet to elect the President.⁹⁶ Here, then, was the first mention of a college of electors, and most notably, it was introduced to the Convention as a method for implementing, albeit indirectly, the popular election of the President.

Unfortunately for Wilson, his proposal drew little support. Elbridge Gerry liked the quintessentially republican spirit of popular election, but he worried that the people were "too little informed" as to whom to select as electors and they would therefore be "liable to deceptions."⁹⁷ Hugh Williamson, meanwhile, saw no difference between entrusting the

94. The plan as introduced left the number of years of the term of office blank. 1 Farrand, RECORDS, *supra* note 15, at 21. Almost immediately, however, the delegates filled in the blank with a term of seven years. *Id.* at 64.

95. *Id.* at 68.

96. *Id.* at 77, 80.

97. *Id.* at 80.

President's selection to an electoral college and entrusting it to the state legislatures.⁹⁸ Wilson's proposal was overwhelmingly defeated.⁹⁹ The Convention then immediately returned to the Virginia Plan's proposal for a legislatively appointed President, which the Convention approved by an equally wide margin.¹⁰⁰

This early skirmish over the executive was significant in revealing the contours of the framers' initial thoughts regarding the executive, but its importance should not be overstated. The delegates had rejected the notion of a President selected by the people, albeit selected indirectly via an electoral college. Instead, they had settled upon congressional appointment as the appropriate mode of selection. Yet, they continued to worry whether the President would be sufficiently independent of Congress, to whom he would owe his appointment. Moreover, because the very nature of Congress was itself the subject of intense, ongoing controversy among the delegates at this point in the Convention's debates, this early approval of congressional appointment could be viewed as only tentative. Until the question of representation in Congress was settled, the issue of the President's mode of selection remained open to reexamination.

The debate over the presidency resumed in full force on July 17, the day after the passage of the Great Compromise. That debate, which lasted more than a week, revealed both the delegates' dissatisfaction with congressional appointment of the executive and their inability to find a satisfactory alternative.

Renewing the push for a popularly elected President, Gouverneur Morris proposed that the President be elected by "citizens of [the] U.S."¹⁰¹ Unlike Wilson's proposal of a month earlier, Morris's eschewed the intermediating device of an electoral college and provided that the people would vote for the President directly. Despite its republican bona fides, Morris's proposal drew substantial opposition. Roger Sherman protested that the people "will never be sufficiently informed of characters" to select the President and would therefore tend to support only "some man in their own State."¹⁰² Similarly, George Mason argued that "[t]he extent of the Country renders it impossible that the people can

98. *Id.* at 81.

99. *Id.* The vote was eight states against and two in favor.

100. *Id.* at 77, 81.

101. 2 Farrand, RECORDS, *supra* note 15, at 29.

102. *Id.*

have the requisite capacity to judge of the respective pretensions of the Candidates.”¹⁰³ Allowing the people to select the President was, according to Mason, akin to entrusting “a trial of colours to a blind man.”¹⁰⁴

More importantly for present purposes, several framers attacked the direct popular election of the President as too majoritarian. Charles Pinckney, for example, suggested that popular election would favor the more populous states, which could combine to elect a President of their own choosing.¹⁰⁵ Hugh Williamson was even more adamant, declaring that “[t]he people will be sure to vote for some man in their own State, and the largest State will be sure to succeed [sic].”¹⁰⁶ These criticisms found their mark: Morris’s proposal for the direct popular election of the President was defeated nine states against to one in favor—a margin of defeat even worse than that for the indirect popular election proposed a month earlier by Wilson.¹⁰⁷

At the same time, vesting the appointment of the President in Congress worried many of the delegates, who feared that a legislatively appointed President would be too dependent upon Congress. “If the Legislature elect,” Gouverneur Morris declared, “it will be the work of intrigue, of cabal, and of faction: it will be like the election of a pope by a conclave of cardinals.”¹⁰⁸ Elaborating, Morris warned that “[i]f the Executive be chosen by the [National] Legislature, he will not be independent [of] it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence.”¹⁰⁹

These concerns drew added force when the Convention voted to make the President eligible for reappointment. The Virginia Plan had made the President ineligible precisely so as to make him independent of Congress. Proponents of reappointment, however, argued that ineligibility sapped the executive of the interest and desire to work diligently on the nation’s behalf. As Gouverneur Morris put it, ineligibility “tended to destroy the great motive to good behavior, the hope of being rewarded by a re-appointment.”¹¹⁰ Congressional

103. *Id.* at 31.

104. *Id.*

105. *Id.* at 30.

106. *Id.* at 32.

107. *Id.* at 24, 32. Only Pennsylvania, James Wilson’s home state, supported the motion.

108. *Id.* at 29.

109. *Id.* at 31.

110. *Id.* at 33.

appointment, coupled with the possibility of reappointment, raised the specter of an executive fully dependent upon the Congress. Echoing Morris's fears, Madison warned the Convention:

If it be essential to the preservation of liberty that the Legisl[ative], Execut[ive], & Judicia[ry] powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. The Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a re-appointment. Why was it determined that the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; and then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.¹¹¹

The delegates found themselves on the horn of a dilemma. They wished the executive to be selected by some body of knowledgeable, patriotic individuals who could identify and evaluate worthy candidates; they wanted the executive to be energetic; and, finally, they wished him to be independent, capable of resisting congressional encroachments. None of the options that had been discussed, however, accomplished all three aims. The first pointed to legislative appointment, but to render the executive sufficiently independent required that he be limited to one term, which was thought to sap the office of its energy. Popular election with the possibility of reelection, on the other hand, would produce an independent, energetic executive, but the people could not be trusted to identify the most capable and wise characters, and, equally bad for delegates from the smaller states who had just fought to preserve their influence in the new Congress, a direct, nationwide popular election would favor the larger states over the smaller states.

A possible solution to the dilemma was suggested first by Elbridge Gerry, who, reprising an idea first advanced by James Wilson a month earlier, suggested that the President be selected by a college of electors.¹¹² Gerry preferred the electors to be chosen by the governors of each state, but there was no support for that option.¹¹³ Instead, seizing

111. *Id.* at 34.

112. *Id.* at 57.

113. *Id.* Gerry had suggested something very similar in early June, when he proposed that the President be chosen directly by the vote of the state governors, with each governor receiving the

upon Gerry's proposal, Oliver Ellsworth suggested that each state receive between one and three electors depending on its population and that each state's electors be chosen by the state legislature thereof.¹¹⁴ Though the allocation of electors was only weakly linked to each state's population, the contours of the body that would become the Electoral College were becoming clearer. With little debate, Ellsworth's proposal passed with substantial support.¹¹⁵

Despite the delegates' initial embrace of the Electoral College, dissatisfaction with it appeared almost immediately, prompting them to reconsider the matter. Several delegates worried that the position of elector was so insignificant that capable men would not seek the office.¹¹⁶ As Hugh Williamson tersely put it, the electors "would certainly not be men of the 1st nor even of the 2[nd] grade in the States."¹¹⁷ These opponents then moved that the Electoral College be replaced—again—by legislative appointment by Congress, which passed, again, with substantial support.¹¹⁸

The next few days were consumed in a tedious cycle of proposal–criticism counterproposal–countercriticism that illuminated the delegates' increasing frustration with their own inability to find a suitable formula for selecting the federal executive. James Wilson suggested that, to minimize the likelihood of intrigue and cabal, the President be selected by a handful of congressmen determined by lot and sequestered for the entirety of their deliberations until they selected a President.¹¹⁹ Oliver Ellsworth suggested that Congress appoint the President to his first term with reelection contingent on approval by a college of electors selected

number of votes his state received in the Senate. 1 Farrand, RECORDS, *supra* note 15, at 175. At the time, the representation of the Senate was deeply contested, but under the terms of the Virginia Plan then under discussion, the states' representation in the Senate would be based on population. Gerry's proposal failed unanimously, 10–0, with Delaware's delegation divided. *Id.* at 175–76.

114. 2 Farrand, RECORDS, *supra* note 15, at 57.

115. There were two separate votes on Ellsworth's motion. On the question whether the President be chosen by electors, there were six states in favor, three opposed, and one (Massachusetts) divided. *Id.* at 51. On the question whether the electors be chosen by the state legislatures, there were eight states in favor and two opposed. *Id.* The next day, the Convention approved a strict enumeration of electors to which each state was entitled "in the 1st instance," or the first election of the President, leaving uncertain what would happen as state populations changed over time. *Id.* at 60–64.

116. *Id.* at 99, 100.

117. *Id.* at 100.

118. *Id.* at 101.

119. *Id.* at 103. Wilson acknowledged that his was not a "digested idea" and was therefore "liable to strong objections." *Id.*

by the state legislatures.¹²⁰ Charles Pinckney, in turn, advanced the idea that Congress select the President but that, rather than being eligible for immediate reelection, the President would be eligible for reelection at some later date, subject to the proviso that no President could serve more than six years in any twelve-year period.¹²¹ The increasing complexity of these proposals, all of which failed,¹²² demonstrated both the difficulty of the problem and the delegates' desire to find some way to resolve the dilemma. George Mason summarized the views of many when he conceded that legislative appointment was liable to objections, but "it was liable to fewer than any other [mode of selection]."¹²³

The delegates' begrudging consensus in favor of congressional appointment collapsed entirely during the process of hammering out the details as to exactly how Congress would perform that task—specifically, whether the two houses of Congress would vote separately or by joint ballot. The former would give the smaller states, through their influence in the Senate, an effective veto over candidates favored by the larger states; the latter would give the larger states, through their influence in the House, substantial influence in the selection. As might be expected, the same divisions that had arisen during the debate over representation in Congress again manifested themselves. The delegates from the smaller states viewed the proposal for a joint ballot as a means to undo the Great Compromise.¹²⁴ In response, delegates from the larger states warned of the "[g]reat delay and confusion" that would result if each House were required to agree on a candidate.¹²⁵

The proposal to conduct the vote by joint ballot passed,¹²⁶ but dissatisfaction with the proposed system of selection by Congress was growing with each vote. In this respect, the course of debate was not symmetrical. A win by one side often created greater doubts about the entire selection process among the losers than faith in it among the winners. So it was with the decision to have Congress vote by joint ballot

120. *Id.* at 108–09. Ellsworth did not explain whether the electors would simply be asked whether to re-elect the President, the negative answer to which would send the issue back to Congress, or whether the electors could choose an alternative President.

121. *Id.* at 111–12.

122. *Id.* at 111, 115.

123. *Id.* at 119. At that point, the Convention endorsed the selection of the President by Congress for a single term, this time for a period of seven years. *Id.* at 120.

124. *Id.* at 401 (statement of Mr. Sherman).

125. *Id.* at 402 (statement of Mr. Ghorum). *See also id.* (statement of Mr. Wilson) (noting "danger of delay" if assent of both houses was required).

126. *Id.* at 403.

of each house. Even after the Great Compromise, the smaller states viewed Congress as an institution beholden to the larger states. In the smaller states' view, the joint ballot minimized their influence by submerging it within an institutional structure in which the population-linked House would dwarf the federal Senate.¹²⁷ Their concerns regarding the larger states' motives were only magnified when, immediately after the vote on the joint ballot, the larger states defeated a proposal to have the joint ballot conducted on a state-by-state basis with each state possessing one vote.¹²⁸ Yet, the adoption of the joint ballot did not enrage the larger states either. The primary problem with congressional appointment had not been that the smaller states would possess too much influence over the President's selection (something that the joint ballot partially redressed), but that congressional appointment threatened to make the President dependent on Congress (something left entirely unresolved by the adoption of the joint ballot).¹²⁹ In short, the adoption of the joint ballot alienated one group of states without endearing the selection process to the other states.

To resolve the impasse and devise a satisfactory compromise, the Convention delegates decided to entrust the matter to a committee on "postponed matters"—also known as the "Committee of Eleven"—in which each state had a representative.¹³⁰ Reporting back to the full Convention, the committee shelved the system of congressional appointment and instead endorsed selection by an Electoral College. Specifically, under the committee's proposal, the President would be selected by electors appointed by the states in the manner determined by each state's legislature.¹³¹ To allay smaller states' fears, each state would receive the same number of electors as it had representatives and senators in the Congress.¹³² The electors would meet in their own states and vote for two candidates, one of which could not be an inhabitant of their own state.¹³³ The candidate possessing the highest number of votes would become President, while the runner-up would become Vice President. Critically, however, the committee specified that, to become President, the winning candidate must receive an absolute majority of the

127. *Id.* at 402 (statements of Mr. Dayton and Mr. Brearly).

128. *Id.* at 403.

129. *Id.* at 403–04 (statement of Mr. Morris).

130. *Id.* at 473, 481.

131. *Id.* at 493–94.

132. *Id.* at 494.

133. *Id.*

Electoral College; a plurality would not suffice.¹³⁴ In the event that there was no majority candidate or a tie between the leading candidates, it would fall to the Senate to choose the President from among the top five vote recipients in the Electoral College balloting.¹³⁵ The President would serve a four-year term and be eligible for reappointment.¹³⁶

The committee's proposal attempted to respond to the criticisms that had been leveled against the process of legislative appointment that had emerged in the preceding weeks. To promote the energetic discharge of his duties, the President was eligible for reelection, but, to guard against legislative encroachment on his powers, his selection was now to be made by an independent body of electors, not Congress.¹³⁷ As to who would appoint the electors, the only two serious alternatives that had been discussed were selection by the people or selection by the state legislatures. Between the two, the former had drawn negligible support; indeed, Wilson's original proposal to that effect at the beginning of the Convention had been overwhelmingly defeated. Hence, the committee entrusted the selection of electors to the state legislatures. To preserve the contours of the Great Compromise, each state received the same number of electors as it had representatives and senators. To avoid cabal and intrigue among the electors, the electors would not meet together but separately in their own states,¹³⁸ and to ensure that the larger states did not simply appoint their own as President, each elector would vote for two candidates, one of which could not be an inhabitant of his own state. Finally, and perhaps most importantly for the delegates from the smaller states, an absolute majority of electors was necessary to elect the President, the absence of which would send the election to the Senate, where the smaller states had political power equal to that of the larger states.

Balancing the respective weights of the larger and smaller states was one of the central problems and tasks confronting the delegates at the Convention, and the process for selecting the President proposed by the Committee of Eleven reflected this fundamental divide. Ironically, the Electoral College was viewed as empowering the larger states at the expense of the smaller ones precisely because the more populous states

134. *Id.*

135. *Id.*

136. *Id.* at 493, 494.

137. *Id.* at 500–01 (statements of Mr. Morris and Mr. Butler).

138. *Id.* at 500 (statement of Mr. Morris).

would have more electors. To modern eyes, the inclusion of the two “senatorial” electors gives the smaller states undue political weight. That is because contemporary commentators use a “one person, one vote” standard as the appropriate baseline against which to evaluate political power. The framers, however, were not such pure majoritarians.¹³⁹ Rather, for the framers, the operative baseline against which to evaluate the Electoral College was the Confederation Congress, in which each state received an equal vote. Measured by that baseline, the proposed Electoral College expanded the political influence of the larger states at the expense of the smaller states. As James Madison observed, the inclusion of the Senate would lessen the larger states’ influence compared to what they would have under a fully population-based system, but, even so, the larger states would have much more power than smaller states.¹⁴⁰

The smaller states, in return, extracted two important concessions. The first was the inclusion of the two “senatorial” electors in the apportionment of electors among the states. Ironically, at the time, that feature was viewed as largely unimportant. That apportionment of electors had been implicitly endorsed by the delegates in the wake of the Great Compromise when they repeatedly approved congressional appointment of the President, and it had been expressly ratified when the Convention endorsed the notion that the President would be chosen by a joint ballot of both houses of Congress, which would have produced a system that allocated political power to each state in the same proportion as the proposed Electoral College. In fact, at the time of the debate regarding the joint ballot, the smaller states viewed the inclusion of the Senate as part of a joint ballot as insufficiently protective of their influence in the President’s election. For that reason, no delegate—from either larger or smaller states—pointed to the inclusion of the two “senatorial” electors as either sufficient to protect the smaller states’ influence or politically unfair to the citizens of the larger states.¹⁴¹

The second and more important change for the benefit of the smaller states was the requirement that the President receive a majority of the

139. This is revealed most conspicuously by their treatment of African American slaves, but it is also shown by the host of suffrage restrictions imposed by the states that limited this franchise, which restrictions were carried over and applied to the elections for the House of Representatives. Even the most “democratic” plan offered at the Convention—the Virginia Plan—apportioned Congress on the basis of the “free” population of each state.

140. *Id.* at 403 (statement of Mr. Madison).

141. PEIRCE & LONGLEY, *supra* note 43, at 17.

Electoral College. If no candidate received a majority, the election would go to the Senate. The framers doubted that there would be candidates who could receive an outright majority of electoral votes. Candidates of such national renown were likely to be few, and, because the Electoral College never actually met and balloted only once, there would be no second or ensuing rounds of deliberations in which a candidate could muster a majority. Hence, in the expectation of many framers, the election would regularly fall to the Senate. As George Mason imagined it, “nineteen times in twenty” the election would fall to the Senate.¹⁴² Of course, entrusting the ultimate election to the Senate favored smaller states, as each state possessed the same, equal influence in the Senate. To mollify the larger states, the committee’s proposal therefore limited the Senate to selecting among the top five vote recipients in the Electoral College. Thus, as Madison and other framers viewed it, the larger states would nominate the candidates (through their influence in the Electoral College), while the smaller states would ultimately select among those candidates (through their influence in the Senate).¹⁴³

Only one aspect of the Committee of Eleven’s proposal drew sustained criticism: the use of the Senate as the fallback forum for selection. Charles Pinckney and George Mason both pointed out that, by vesting the power of selection in the Senate, the committee’s plan courted the very danger it meant to avoid by rendering the President dependent upon legislative approval, albeit the approval of only one house rather than both.¹⁴⁴ Their concerns, however, were dismissed on the ground that the Senate could only select from among the top candidates nominated by the Electoral College.¹⁴⁵ The delegates were

142. 2 Farrand, RECORDS, *supra* note 15, at 500 (statement of Col. Mason). *See also id.* at 500 (statement of Mr. Madison), 501 (statement of Mr. Pinckney), 511 (statement of Mr. Rutledge), 524–25 (statement of Mr. Hamilton). Several delegates envisioned that national development would make the emergence of national candidates more likely over time, thereby moving the selection from the Senate to the Electoral College. *Id.* at 501 (statements of Mr. Baldwin and Mr. Wilson). Nevertheless, to increase the likelihood that the Electoral College would actually elect the President, Madison proposed to eliminate the majority requirement and instead insert a minimum floor of one-third of the electors as the necessary plurality, but Madison’s motion was defeated handily. *Id.* at 514. Elbridge Gerry declared that a plurality requirement would effectively give the larger states the exclusive power to elect the President. *Id.* (statement of Mr. Gerry).

143. *Id.* at 500 (statements of Mr. Madison and Mr. Morris), 512–13 (statement of Mr. Sherman); *see also* RAKOVE, *supra* note 71, at 266 (“[T]he prevailing expectation was that the electoral college would only limit, not eliminate, a legislative role in selecting the president.”).

144. 2 Farrand, RECORDS, *supra* note 15, at 511 (statement of Mr. Pinckney), 512 (statement of Col. Mason).

145. Interestingly, Madison viewed the use of the Senate as somewhat helpful to the larger

more apprehensive about the Senate's presumed aristocratic nature. James Wilson worried that, unlike representatives, senators would be much more prone to "influence [and] faction" owing to their longer terms and appointment by the state legislatures.¹⁴⁶ Hugh Williamson fretted that senatorial selection laid the foundation for "corruption [and] aristocracy."¹⁴⁷ Moreover, the framers' earlier decisions to vest the Senate with the power to approve presidential appointments and treaties gave added force to the concern that, augmented with the power to select the President, the Senate would be too powerful an entity.¹⁴⁸ As James Wilson warned, "the President will not be the man of the people as he ought to be, but the Minion of the Senate."¹⁴⁹ The solution, ingeniously proposed by Roger Sherman,¹⁵⁰ was to vest the fallback selection in the House, but with the proviso that the balloting be conducted on a state-by-state basis with each state receiving one vote. In that way, the selection would mimic the Senate with its equality of state political power, but it would be made by the House, whose members enjoyed a more democratic pedigree. Sherman's proposal passed overwhelmingly.¹⁵¹ A little over a week later, the delegates approved the full Constitution.¹⁵²

Modern observers are amazed by the extent to which the framers misperceived the forces that would shape presidential elections in the new republic. In the framers' views, the presidential electors would be quasi-platonic guardians possessing great wisdom, exhibiting superior character, and exercising independent judgment in selecting among the

states, who would then be encouraged to identify candidates who could prevail in the Electoral College so as to avoid having the smaller states make the ultimate selection in the Senate. *Id.* at 513 (statement of Mr. Madison). Mason's motion to remove the proviso that the President be elected by a majority of the Electoral College was defeated 9–2. *Id.* at 512–13. At the same time, efforts to change the number of candidates among which the Senate could choose also failed. Mason's motion to restrict the Senate to the top three vote recipients and Spaight's contrary motion to expand the number to thirteen (made with the transparent motive to allow each state to nominate a favorite son for the final balloting in the Senate) were both overwhelmingly defeated. *Id.* at 514–15. *See also* PEIRCE & LONGLEY, *supra* note 43, at 27.

146. 2 Farrand, RECORDS, *supra* note 15, at 502 (statement of Mr. Wilson).

147. *Id.* at 512 (statement of Mr. Williamson).

148. *Id.* at 513 (statement of Mr. Randolph) (arguing that granting power of presidential appointment to the Senate would "convert that body into a real [and] dangerous [a]ristocracy"); *id.* (statement of Mr. Dickinson). Gouverneur Morris worried that, in light of the Senate's role of confirming presidential appointments, senatorial selection would make the President too obedient to the Senate's will in appointing executive officials. *Id.* at 522 (statement of Mr. Morris).

149. *Id.* at 523 (statement of Mr. Wilson).

150. *Id.* at 527.

151. *Id.*

152. *Id.* at 633.

leading candidates of their day; they would not be servile party Brahmins committed to the election of their own party's candidate.¹⁵³ In the framers' view, the election of the President regularly would fall to the House, in which each state would possess an equal vote in the selection of the President; the Electoral College with its bias toward the larger states would not end up being the actual electoral forum. Perhaps most importantly, in the framers' view, the primary political division that the selection process had to mediate was between larger and smaller states and, to a lesser extent, between slave and free states; the framers could not (and did not) anticipate that these divisions would be eclipsed by other distinctions among the states (e.g., coastal v. interior; predominantly urban v. predominantly rural; agricultural v. industrial v. commercial) that could not be neatly salvaged by the inclusion of two "senatorial" electors for each state or the implicit promise of the election being conducted in the House of Representatives.¹⁵⁴ In fact, even before those more profound changes in the American socio-political landscape took place, the rise of national political parties united around a single presidential candidate subverted and ultimately dashed the framers' expectations, producing an electoral system substantively unlike (even if formally obeisant to) that contemplated in Philadelphia in 1787. In a very real sense, the presidential election for which the framers so earnestly planned never took place.

Nevertheless, several elements of the framers' deliberations bear particular significance for the debate over the NPVC's constitutionality. First, and less importantly, the framers expressly and overwhelmingly rejected vesting the selection of the President directly in the people. Despite their republican instincts, the delegates believed that the people would be unable to identify worthy candidates, most of whom (in the framers' expectations) would be unknown to the people at large. In a predominantly rural nation lacking a developed system of public education and a nationwide system of transportation or communication, theirs was not a trifling concern. Of course, the rise of national political parties, along with the establishment of public education and the development of mass communication among the states, has rendered this

153. *But see* *McPherson v. Blacker*, 146 U.S. 1, 36 (1892) (noting that the framers' expectation regarding electors has been "frustrated").

154. *See* RAKOVE, *supra* note 71, at 268 ("[P]recisely because the electoral college extended 'the Great Compromise' over representation, with its dubious expectation that the division between small and large states would persist beyond 1787, its formal logic proved irrelevant to the actual politics of presidential election.").

particular concern of less moment. Even by the early- to mid- nineteenth century, the two major political parties had succeeded in making the presidential campaign a national race in which the parties' candidates were well known across the nation. Today, with our system of state-funded public education for all and national media outlets, the suggestion that the people are too uninformed to vote intelligibly sounds deeply elitist and anti-republican.

Second, and of more contemporary relevance, the selection of the President was not to be a raw majoritarian process in which each person had an equal ability to influence the election of the President. Indeed, recall that in mid-July, when Gouverneur Morris proposed a nationwide, direct popular election, Charles Pinckney and Hugh Williamson had opposed it precisely on the ground that, in their view, it would favor more populous states.¹⁵⁵ As a result, the Convention overwhelmingly rejected Morris's proposal. Instead, by the end of the summer, the framers had settled on a presidential election process that echoed and preserved the essential contours of the Great Compromise. The Electoral College would reflect the hybrid nature of the bicameral Congress, with states receiving the number of electors equal to their joint House and Senate representation.

Ironically, the framers viewed the new Constitution's allocation of electoral weight as favoring the larger states. The smaller states would receive proportionately more influence than they would under a purely population-based system, but the larger states would still command greater power as a practical matter in the Electoral College. The fact that states received electors based in part on the number of representatives they had in the population-based House overshadowed the inclusion of the two "senatorial" electors. Moreover, given the expectation that the national population would grow and, with it, the size of the House of Representatives, the influence of the "senatorial" electors in the Electoral College would likely diminish over time. History, of course, has confirmed the framers' expectation in this regard: today, the "malapportionment" of the Electoral College is much less than it was in the first presidential election in 1788.

Third, and relatedly, the framers embraced a presidential election system in which the selection of presidential electors would be made on a state-by-state basis with each state's electors accountable to the people of that state. This last aspect of the process has been overlooked, but it

155. *See supra* text accompanying notes 103–05.

bears special relevance for the debate over the constitutionality of the NPVC. The framers did not specify how the state legislatures would select their electors—whether, for example, the electors would be appointed by the legislature or elected by the people of the state—but the expectation was that those electors would reflect directly or indirectly the choice of each state’s own electorate. It was for that reason that the inclusion of “senatorial” electors in the Electoral College mollified the concerns of the smaller states that the presidential election process would be too majoritarian. Had the framers thought it permissible for a group of states to agree to appoint their electors in accordance with some national popular election, most of the framers would have surely opposed it. Again, the overwhelming defeat of Gouverneur Morris’s proposal for a direct, national popular election is instructive. If the framers feared a direct, popular election as too majoritarian, they surely would have opposed even more vehemently the notion that a subgroup of populous states could adopt such a system.

For better or worse, the framers had created a presidential election system that, like the “Great Compromise” upon which it was based, combined elements of majoritarianism and federalism. The choice of President would be made not by an undifferentiated mass of people nationwide, but by electors accountable to the people of their individual states. To be sure, the framers did not make these expectations express. The notion that any state would appoint its electors in accordance with the wishes, even in part, of voters in other states was beyond the imagination of any at the time. Nevertheless, if any doubt about this expectation exists, it is negated by actual experience. As Part III will show, the actual practice of the states in the wake of the Constitutional Convention—a practice that has continued to this day—demonstrates the universal understanding among the states, both then and now, that presidential electors from each state are to be selected in accordance with the will of the voters in each state, not the entire national populace.

III. THE HISTORY OF THE ELECTORAL COLLEGE

As discussed above, the framers assigned the power to determine the selection of the presidential electors to the state legislatures.¹⁵⁶ The framers, though, did not discuss how the state legislatures would actually

156. See U.S. CONST. art. II, § 1 (providing that electors will be selected by each state “in such Manner as the Legislature thereof may direct”).

select their electors.¹⁵⁷ The states were left to their own devices in determining what process to use. Nevertheless, the states' actual use of this power in the decades following the Constitutional Convention belies the notion that states have the power to appoint their electors in accordance with a national popular vote. Not once in our over-two-hundred-year history has even one state appointed its electors on this basis. Rather, in every presidential election, every state has appointed its electors in accordance with the wishes of the people of the state. That uniform, long-standing practice informs the appropriate understanding of Article II, and, in so doing, condemns the NPVC.

A. *The Early History*

The brief time between the ratification of the Constitution in the summer of 1788 and the first presidential election that winter gave the states little opportunity to contemplate the proper method for selecting presidential electors. Even if they had given it much thought, the virtual certainty that George Washington would become the first President divested the choice of process of much importance as a practical matter. Coupled with the absence of any constitutional guidance, Washington's immense popularity made the determination of the process for selecting electors in each state largely meaningless. The result of the presidential election was a foregone conclusion. Hence, it is little surprise that the ten states that participated in the first election took widely divergent approaches to the appointment of their electors.¹⁵⁸

Of the ten states, four left the selection of their slate of electors entirely to the legislature.¹⁵⁹ Five of the ten states conducted popular elections for the presidential electors, but the electoral processes differed in significant respects. Three of the five states (Pennsylvania, Maryland, and New Hampshire) provided that their electors would be elected by the people in a statewide, at-large process, also known as a "general ticket" system, that allowed each voter to vote for as many electors as that state was entitled to appoint.¹⁶⁰ Virginia provided that its electors would be

157. PEIRCE & LONGLEY, *supra* note 43, at 24.

158. New York's legislature deadlocked regarding how to select its electors, resulting in its inability to participate in the first election. Meanwhile, North Carolina and Rhode Island had yet to ratify the Constitution.

159. Act of Nov. 4, 1788, § 4, 1788 S.C. Acts 4. New Jersey vested the selection of its electors in the upper house of the legislature—the legislative council—and included the governor in the council's voting. Act of Nov. 21, 1788, ch. 241, § 8, 1788 N.J. Laws 481.

160. Act of Dec. 22, 1788, ch. 10, § 6, 1788 Md. Laws 317, 319; Act of Oct. 4, 1788, ch. 166,

elected by the people in districts, with each voter entitled to elect one elector from his district.¹⁶¹ Meanwhile, Delaware established a unique system that combined features of an at-large and district contest: each citizen was allowed to vote for only one elector, who had to reside in his county, but the top three vote recipients statewide (not the top recipient from each county) became the state's electors.¹⁶² Finally, Massachusetts combined legislative and popular appointment in a hybrid process: the people in each congressional district voted for an elector for that district, but their vote was advisory. The legislature selected the elector for each congressional district from the top two vote recipients in that district. In addition, the Massachusetts legislature appointed the two "senatorial" electors without any popular consultation.¹⁶³

In the election of 1792, the experience of the first election and the passage of time gave the states the opportunity to reassess their selection systems, though few did so. Of the original ten states that participated in the first presidential election, eight maintained their existing systems. Massachusetts dispensed with its complicated hybrid system that combined popular consultation with legislative appointment and instead adopted an equally complex system of popular elections that was a cross between an at-large and district system.¹⁶⁴ Meanwhile, moving in the opposite direction, Delaware substituted legislative appointment for its complex, popular election system that combined features from the at-large and districting modes.¹⁶⁵ Delaware's shift to legislative

§ 3, 1788 Pa. Laws 140, 142–43; Act of Nov. 12, 1788, 1788 N.H. Laws 473, 473–74. Maryland required a degree of geographic diversity. Although each citizen was entitled to vote for up to eight electors, the Maryland statute provided that five of the eight electors must reside in the "western shore" and three electors reside in the "eastern shore." Act of Dec. 22, 1788, ch. 10, § 6, 1788 Md. Laws 317, 319. New Hampshire, meanwhile, required that each elector receive a majority of the votes cast, and if that did not work, the legislature would appoint the electors from the leading vote recipients. Act of Nov. 12, 1788, 1788 N.H. Laws 473, 474–75. The failure of any elector to receive the required majority left the New Hampshire Legislature with no choice but to select the electors itself. *See* *McPherson v. Blacker*, 146 U.S. 1, 30 (1892).

161. Act of Nov. 17, 1788, ch. 1, §§ 1–2, 1788 Va. Acts 3, 3.

162. Act of Oct. 28, 1788, §§ 1–3, 1788 Del. Laws 4–6.

163. Act of Nov. 19, 1788, Res. 49, 1788 Mass. Acts 52.

164. Act of June 30, 1792, Res. 80, 1792 Mass. Acts 25. Instead of allocating one elector to each congressional district, the legislature created four large, special districts, allotting five electors each to two of the districts and three electors each to the other two districts. *Id.* Citizens could vote for as many electors to which their district was entitled. As New Hampshire originally had provided, if a sufficient number of candidates did not receive a majority of votes, the legislature would appoint the remaining number of electors. *Id.*

165. Del. H.R. Journal, Nov. 1792 Sess., at 9–10. New Hampshire also made a more modest alteration. Under its original law, the legislature appointed electors to fill slots for which there was

appointment was telling—New York, along with the newly admitted states of Rhode Island, North Carolina, Vermont, and Kentucky, all opted for legislative appointment.¹⁶⁶ As a result, of the fifteen states participating in the election, ten states possessing sixty-six electoral votes—sixty-six percent of the total number of states and fifty percent of the Electoral College—used legislative appointment.

The 1796 election witnessed a modest shift away from legislative appointment. Georgia and North Carolina replaced legislative appointment with popular elections, the former employing an at-large system, the latter using a district system.¹⁶⁷ Somewhat bucking the trend, Massachusetts returned to its original system from 1789 in which the people of each congressional district voted for an elector therefrom and the legislature appointed the two “senatorial” electors.¹⁶⁸ Meanwhile, Tennessee, which had been recently admitted as a state, eschewed both legislative appointment and popular election, opting instead for a truly bizarre approach. The legislature divided the state into three districts, but, professing to want to cause “as little trouble to the citizens as possible,” it then appointed a group of private individuals in each district to select the elector for that district.¹⁶⁹ The net result of these developments was that, of the sixteen states participating in the election, eight states used legislative appointment, three states used a popular, at-large election system, three used a popular, district election system, and

no candidate receiving a majority of the vote. *See supra* text accompanying note 160. New Hampshire eliminated legislative appointment as the fall-back mechanism and provided instead that there would be a second popular election at which state citizens would choose from among the top candidates from the first round of balloting. Act of June 20, 1792, 1792 N.H. Laws 398.

166. *McPherson v. Blacker*, 146 U.S. 1, 32 (1892) (listing Kentucky among states that used legislative appointment in 1792 election). Unlike the other states that used legislative appointment, North Carolina’s legislature subdelegated its appointment power to smaller groups of legislators, creating four districts of three electors each and empowering the legislators in those districts to appoint their district’s electors. Act of 1792, ch. 15, N.C. Sess. Laws 8. North Carolina’s system resembled Massachusetts’s, except that the selection of electors was made by the legislators representing the specially constituted districts rather than by the people thereof.

167. Act of 1792, ch. 16, N.C. Sess. Laws 9; PEIRCE & LONGLEY, *supra* note 43, at 248–49 (reporting Georgia as using popular, at-large election in 1786). Relatedly, Maryland switched from an at-large to a district-based system. Act of Dec. 24, 1795, ch. 73, 647 Md. Laws 66.

168. Act of June 13, 1796, Res. 20, 1796 Mass. Acts 12–13. Unlike the original statute, the 1796 resolution made the people’s vote binding so long as the winning candidate received a majority of the vote. New Hampshire likewise returned to its original system in which, though the people voted in an at-large process for the state’s electors, the legislature appointed electors to fill positions if there were not a sufficient number of candidates receiving a majority of votes statewide. Act of June 16, 1796, 1796 N.H. Laws 544, 545–46.

169. Act of Aug. 8, 1796, ch. 4, 1796 Tenn. Pub. Acts. 109, 109–10.

one state used a hybrid model, with Tennessee's legislative-appointment-of-the-selectors-of-the-electors system posing an anomalous departure from the prevalent models of selection.

The election of 1796 was more noteworthy for the role that it played in the development of perhaps the most important extra-constitutional force in presidential elections—the establishment of national political parties. The Federalist John Adams narrowly won election as President over Republican Thomas Jefferson who, per the then-existing provisions of the U.S. Constitution, became Vice President. Adams and Jefferson's political differences, which had become apparent during the Washington administration, grew over the course of the Adams administration, which polarized American politics. Opponents of the Adams administration, along with former anti-Federalists who had opposed the Constitution, were drawn to Jefferson and James Madison, becoming the core of the new Republican (later named Democratic) party. Over the course of the next four years, both Federalists and Republicans prepared themselves for a hotly contested, partisan presidential election that they knew to be coming in 1800.

The emergence of a two-party system had profound ramifications for the process by which Presidents were elected. Electors would not be engaging in some deliberative, nonpartisan process of selecting the person that they thought would be the best President. That romantic view of electors had always been fanciful, but with the development of partisan politics, the notion of the Platonic elector was absurd. Electors would come from one of the two parties and would almost certainly vote for the candidate from their party regardless of his merits.

More importantly, the development of a two-party structure influenced the selection of the process used to select the electors. Precisely because the electors would be committed partisans, it became necessary for each party to ensure that its committed partisans were selected. And that, in turn, made the determination of the selection process deeply partisan. Whether a particular state opted for legislative appointment or popular election (and, if so, what form) turned less on abstract political theory and more on an acute, state-specific assessment as to whether appointment or election would favor one party or the other.¹⁷⁰

170. Josephson & Ross, *supra* note 4, at 154 (“In anticipation of the election of 1800, there was scrambling in state after state to revise the mode for choosing electors as one party or both tried to gain an edge.”).

B. The Election of 1800

Even with the development of the parties still in their infancy, the election of 1800 witnessed the first significant effects of political partisanship on the presidential selection process. Reversing the trend from the previous election in 1796, four states that had previously used popular election (New Hampshire, Massachusetts, Pennsylvania, and Georgia) opted for legislative appointment.¹⁷¹ Illustrating the emerging influence of partisanship, Massachusetts and New Hampshire, whose legislatures were controlled by Federalists, largely did so to ensure that the entire slate of electors in each state would be pledged to Federalist Adams.¹⁷² Meanwhile, in Pennsylvania, the Federalist-controlled Senate prevented the passage of a new election law to authorize a popular election for the state's electors, which the Federalists feared would lead to the politically ascendant Republicans securing the entire slate of electors. The Federalists then demanded a share of the legislatively appointed electors.¹⁷³ Only one state, Rhode Island, moved in the opposite direction, substituting popular election at-large for legislative appointment.

Nor were the Federalists alone in using their control of state legislatures to select the process most advantageous for their party's candidate. Virginia, whose legislature the Republicans controlled, shifted from its district-based system to an at-large system so as to ensure that Thomas Jefferson, its native son, would win all of the state's electoral votes. Pointing to the relative disadvantage to which the district system exposed the state, Jefferson defended Virginia's action as driven by the fact that "while ten States choose either by their legislatures or by a general ticket, it is folly and worse than folly for the other six not to do it."¹⁷⁴ Virginia's move was particularly noteworthy, as it presaged

171. Act of June 14, 1800, 1800 N.H. Laws 563; Act of June 6, 1800, res. 4, 1800 Mass. Acts 13; H.R. Journal, 11, 1st Sess., at 97 (Pa. 1800) (reporting that the two houses of the legislature would convene jointly that day to appoint electors); H.R. Journal, 1800 Sess., at 26 (Ga. 1801); S. Journal, 1800 Sess., at 25. (Ga. 1800).

172. PEIRCE & LONGLEY, *supra* note 43, at 38.

173. *Id.* The Pennsylvania legislature deadlocked over the slate of legislatively appointed electors. This was necessitated by its failure to provide for a popular election because the Federalist Senate refused to agree to a joint ballot, which the Federalists knew would allow the more numerous and Republican-dominated House to select the full slate of electors. Only after a compromise was reached that divided the state's electors between the two houses was the legislature able to appoint a slate of electors. *Id.*

174. Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800).

similar shifts to an at-large or winner-take-all system in other states in the years ahead.

The net result of these partisan-influenced moves was that, of the sixteen states participating in the 1800 election, only five states used a popular election system, two employing an at-large system (Rhode Island and Virginia) and three employing a district system (Maryland, Kentucky, and North Carolina).¹⁷⁵ In contrast, ten states possessing eighty-four electoral votes—which represented almost two-thirds of the total number of states and more than sixty percent of the Electoral College—used legislative appointment. The election of 1800 marked the high-water point of legislative appointment—never again would so many states comprising such a high percentage of the Electoral College use legislative appointment.¹⁷⁶

In addition to demonstrating the influence of partisanship in the selection of the elector appointment process, the election of 1800 was noteworthy for several other important reasons. First, it was the first time the election was thrown to the House of Representatives. The two Republican candidates, Thomas Jefferson and Aaron Burr, both received seventy-three electoral votes—the incumbent President Adams took third place with sixty-five votes. Because of the tie, the election was thrown to the lame-duck, Federalist-dominated House of Representatives.¹⁷⁷ Through thirty-five separate ballots lasting almost a week, the Federalists worked to prevent Jefferson's election.¹⁷⁸ Finally, on the thirty-sixth ballot, the Federalist representative in the Vermont delegation cast a blank ballot, thereby allowing his Republican colleague to cast the state's vote for Jefferson, which in turn gave Thomas Jefferson the necessary majority to become the third President of the United States.¹⁷⁹ While the

175. Tennessee—again—delegated the appointment power to a small group of individuals in each district as it had in 1796.

176. The election of 1800 was not the high water mark in terms of the absolute number of legislatively appointed electors. In the election of 1816, there were ninety-six legislatively appointed electors sent from nine states, but because the Electoral College had since been expanded to 217 electors, the legislatively appointed electors constituted a minority of the College.

177. The Federalists held a 60–46 advantage in the House, but because the House would vote by state, not per capita, on the presidency, Federalists could not translate their numerical dominance into a victory for Adams. Federalists controlled eight of the sixteen delegations, one short of the necessary majority, while the Republicans controlled seven delegations. Vermont's delegation was split equally between the two parties.

178. The Federalists generally voted for Burr, thereby producing a state vote for Burr in delegations in which they had a majority, or, equally as good, splitting the state, thereby depriving Jefferson from receiving the necessary majority of states. PEIRCE & LONGLEY, *supra* note 43, at 40.

179. *Id.* at 40–41.

House had finally succeeded in discharging its constitutional responsibility, the House deliberations did not even closely resemble the process that the framers had expected. For the framers, the assignment of the election to the House, voting on a state-by-state basis with each state possessing one vote, served to protect the smaller states from having a candidate favored by the larger states foisted upon them. As the debate in the House in 1800 revealed, however, the principal divide was between Republican-dominated House congressional delegations, who backed Jefferson, and Federalist-dominated ones, who, out of spite, backed Burr. Partisan divisions, not geopolitical ones, shaped the House proceedings.

Second, and relatedly, the election of 1800 prompted the passage of the Twelfth Amendment to the Constitution. Under the Constitution as originally enacted, each elector simultaneously cast two votes.¹⁸⁰ The candidate with the most votes receiving a majority of the number of electoral votes became President, while the runner-up became Vice President. This system had already shown one undesirable aspect in 1796, when the losing candidate (Jefferson) became the Vice President in the administration that he had opposed. The election of 1800, though, illustrated a different, darker problem with this system of balloting. Under the Electoral College's simultaneous voting system, there was no way for an elector to indicate his preference for President between the two candidates from his party for whom he was casting his vote. As a consequence, if each elector cast his two votes for the two candidates from his party (as partisan electors typically would), a tie among the winning party's two candidates would inevitably occur, as in fact happened in 1800. Worse still, the tie would throw the election into the House, where the losing party might have control and be able to elect its candidate (who had lost the election) or, only slightly less bad, choose the President from among the winning party's two candidates (which is effectively what had happened in the 1800 election). With the development of political parties and partisan electors, the Electoral College's simultaneous balloting system was out of step with American politics.

The ratification of the Twelfth Amendment in 1804 addressed these problems. Each elector would continue to cast two votes, but now the votes would be cast separately, one specifically for President and one specifically for Vice President. By allowing for a ticket system, the Twelfth Amendment thereby eliminated the prospect of a tie between the

180. U.S. CONST. art. II, § 1.

two candidates of the winning party. Moreover, it also ensured that the Vice President would come from the same party as the President—the fractured, antagonistic administration produced by the 1796 election would not be repeated. Less importantly, the Twelfth Amendment also reduced the number of candidates that the House would select among in case of an Electoral College tie from five to three.

C. The Rise of Winner-Take-All Popular Elections

The development of a two-party system, coupled with the Republican party's dominance of American politics in the decades immediately following the election of 1800, transformed the process by which states selected their electors. While newly admitted states often used legislative appointment in their first presidential election, "older" states that had used legislative appointment gradually began to replace it with popular elections for the electors.¹⁸¹ In the elections of 1812, 1816, and 1820, nine different states used legislative appointment, but the number began to fall dramatically thereafter. The rise of Jacksonian populism, which venerated popular elections and correspondingly distrusted appointed officers, put pressure on states to dispense with legislative appointment. In 1824, only six of the twenty-four states used legislative appointment, and, in 1828, only two did so.¹⁸² By 1836, all but South Carolina had moved to some form of popular voting for electors. South Carolina ultimately dispensed with legislative appointment after the Civil War. The last time a legislature appointed its electors was in 1876, when Colorado, which had just been admitted as a state, found itself with too little time to set up a popular election for its presidential electors.

More importantly, the continuing rise of party politics after 1800 pushed the states to dispense with district-based elections and instead adopt the at-large, or "winner-take-all" system prevalent today. In 1800, more states used district-based rather than at-large voting—a phenomenon that would never be repeated again. In 1804, of the eleven states that used popular elections, only four (Maryland, Kentucky, North Carolina, and Tennessee) used a pure district system, while six used at-

181. PEIRCE & LONGLEY, *supra* note 43, at 248–49. After 1800, only three states that had moved to popular elections returned to legislative appointment, and, even then, they did so only for specific elections: Massachusetts (in 1808 and 1816), New Jersey (in 1812), and North Carolina (in 1812). *Id.*

182. *Id.*

large voting.¹⁸³ As states dispensed with legislative appointment, they almost invariably chose at-large elections over district-based elections.¹⁸⁴ By 1824, there were still four states using district elections, but there were twelve states using at-large elections. Four years later, in 1828, there were only two states using district elections, while there were eighteen states using at-large elections. By 1832, only Maryland adhered to its district-based system.¹⁸⁵ That meant that, of the twenty-four states in the union at that time, twenty-two used an at-large popular election system for choosing the state's presidential electors.

The triumph of at-large voting did not eliminate district-based elections entirely. For the same reasons that at-large elections were favored by the dominant political party in a state, district elections were favored by the minority party as a way to fragment the state's electoral vote and award some electoral votes to their own voters. Hence, after the 1890 election, when Democrats took control of the state legislature in the then-predominantly Republican state, they immediately replaced Michigan's at-large process with a district-process.¹⁸⁶ As a result, in the 1892 presidential election, Michigan split its electoral votes, with nine going to the Republican incumbent, Benjamin Harrison, and five going to the Democratic candidate, Grover Cleveland. Two years later, when the Republicans retook the Michigan legislature, they immediately repealed the districting law and returned the state to an at-large system.¹⁸⁷ Besides illustrating the linkage between partisan politics and the method of election, the Michigan episode also revealed another distinctly American feature of presidential elections: the judicial challenge to election processes. Upset by the Democrats' actions, Michigan Republicans challenged the move to district elections as unconstitutional, resulting in the first U.S. Supreme Court decision regarding presidential elections, *McPherson v. Blacker*,¹⁸⁸ in which the Court upheld Michigan's decision to use district elections as within the

183. *Id.* at 248. Massachusetts used a hybrid system that combined the district and at-large process.

184. After 1800, only Massachusetts, which vacillated among the various processes until 1824 when it settled on at-large elections, Tennessee (in 1804), and Illinois (in 1820) adopted district-based election systems. *Id.*

185. *Id.*

186. Act of May 1, 1891, No. 50, 1891 Mich. Pub. Acts 50; see also GEORGE H. KNOLES, THE PRESIDENTIAL CAMPAIGN AND ELECTION OF 1892, at 226–27 (1942).

187. Act of Feb. 3, 1893, No. 3, 1893, Mich. Pub. Acts 4.

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

power delegated by Article II to the states. *McPherson* would come to play a central role in modern disputes involving the Electoral College.

Today, the Electoral College is comprised of 538 electors,¹⁸⁹ and every state uses popular elections to select that state's presidential electors. Moreover, every state but Maine and Nebraska use "winner-take-all" voting, in which all the state's electors go to the candidate who received the most votes in the statewide polling. Maine and Nebraska, meanwhile, use a hybrid system first adopted by Massachusetts in 1804 that combines the district and at-large voting system: one elector is selected by the people in each congressional district, with the state's two "senatorial" electors going to the winner of the statewide vote.¹⁹⁰

D. Lessons for Today

There is, of course, a deep irony with respect to the modern election system that has emerged over time. As a result of the states' decision to use popular elections, the modern process more closely resembles the system that James Wilson first advocated in the early days of the Constitutional Convention than the process the Convention actually adopted.¹⁹¹ Wilson's proposal for a college of electors elected by the people in districts was defeated overwhelmingly; yet, that is close to the system that has emerged. To be sure, the rise of party politics has shaped that system in ways that Wilson could not have foreseen. In particular, the electors exercise no independent judgment—they are party functionaries who loyally transmit the electorate's choice. Indeed, as a result of the development of the "short" ballot in which only the presidential candidates are listed, voters typically do not even know the identities of the electors that they are appointing. Nevertheless, Wilson's repeated calls to have the President selected by the people have ultimately carried the day.

At the same time, however, this history illuminates and informs the scope of state power under Article II. Throughout the nation's history,

189. As a result of a federal statute enacted in 1911, the House of Representatives is capped at 435 members, and the Senate currently has 100 members representing the fifty states. Act of Aug. 8, 1911, ch. 5, §§ 1, 2, 37 Stat. 13, 14. By virtue of the Twenty-third Amendment adopted in 1961, the District of Columbia receives the same number of electors to which it would be entitled if it were a state but in no event more than that possessed by the smallest state, which is currently three. U.S. CONST. amend. XXIII, cl. 1.

190. ME. REV. STAT. tit. 21, § 802 (1964); NEB. REV. STAT. § 32-1038 (2008). Maine adopted its system in 1969, which Nebraska copied in 1992.

191. See *supra* Part II.B.

states have used one of four processes for selecting their presidential electors: (1) legislative appointment, (2) popular election in which all electors are selected on the basis of the statewide vote (an at-large or winner-take-all system), (3) popular election by district, or (4) a combination of the latter two electoral systems—a hybrid process in which some electors are elected on the basis of the statewide vote and some on the basis of a district vote. Critically, under all four systems, each state’s electors are selected in accordance with the wishes of the people of the state, not the nation generally. Not once between 1880 and today, a period in which every state in the union has conducted a statewide popular election for its electors, has any state selected its electors based on the votes of individuals in other states. Rather, as the framers expected, states have selected their electors based on the will of state voters, not the nation at large.

IV. IMPLICATIONS FOR THE NATIONAL POPULAR VOTE COMPACT

So what does this history portend for the NPVC? Proponents of the NPVC seize upon Article II, Section 1’s delegation of power to each state to appoint its presidential electors “in such manner as the legislature thereof may direct.” In their view, this grant of authority is without limitation, authorizing state legislatures to choose any method of selection that they desire. For support, they point to the U.S. Supreme Court’s decision in *McPherson v. Blacker*, in which the Court stated that the states possess “plenary power” regarding the manner of selecting their electors.¹⁹² As this subpart demonstrates, the states’ power to regulate the manner of presidential elections is far more limited than the proponents of the NPVC contend. In fact, just as the U.S. Supreme Court has narrowly interpreted the states’ power to regulate congressional elections to prevent states from destabilizing the constitutional structure, so too should it deny states the power to undermine the stability of the presidential election process.

A. *Delegated Versus Retained Power*

That the states generally have the power to choose the manner in which their electors are selected begins the constitutional analysis; it does not end it. The states possess their electoral appointment power not by virtue of their preexisting sovereignty—as the federal presidency did

192. 146 U.S. 1, 35 (1892).

not exist prior to the Constitution, the states could not have possessed any such power with respect to it—but by delegation from the Constitution.¹⁹³ Hence, in assessing the scope of that power, the question is not whether there is any constitutionally imposed limit on state authority (as is the issue when the states use an authority derived from their pre-existing sovereignty), but rather whether the Constitution empowers the states to undertake the type of action under review.¹⁹⁴ And, in that vein, it is important to remember that the scope of a state's constitutionally delegated power does not include the power to reconfigure or undermine the federal constitutional structure.

The Court's decision in *U.S. Term Limits, Inc. v. Thornton* is instructive in this regard.¹⁹⁵ In the 1990s, several states imposed term limits on their members of Congress. Defenders of these laws pointed to seemingly categorical language of the Elections Clause of Article I, Section 4, which delegates power to the state legislatures to control the "Times, Places and Manner" of holding elections for Congress.¹⁹⁶ Much like the NPVC's proponents, term limit supporters argued that the categorical language of the Elections Clause provided state legislatures with plenary power to adopt any elections regulation not expressly forbidden by the Constitution, and, since no provision in the Constitution forbade term limits, they contended that state-imposed term limits were therefore constitutional. The U.S. Supreme Court disagreed.

In the Supreme Court's view, the adoption of term limits was tantamount to imposing another qualification for federal office above and beyond the three qualifications identified in the Qualification Clauses of Article I.¹⁹⁷ Hence, for the Court, the critical issue was whether the Elections Clause authorized states to impose additional qualifications for federal office.¹⁹⁸ In answering that question in the negative, the Court

193. See *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000); cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) (concluding that state power to regulate congressional elections is delegated by Constitution rather than reserved power of state).

194. *Thornton*, 514 U.S. at 805.

195. See *id.* at 779.

196. See U.S. CONST. art. I, § 4, cl. 1.

197. *Thornton*, 514 U.S. at 814–15; see U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

198. *Thornton*, 514 U.S. at 832–33.

identified three, mutually reinforcing considerations. First, and most importantly, the Court traced the historical understanding of Article I, both in the Constitutional Convention and thereafter.¹⁹⁹ For the Court, the absence of any suggestion at the Constitutional Convention or ratification debates that the states could use their power over congressional elections to establish additional qualifications for office in general, or term limits in particular, was telling.

Second, the Court looked to the history of congressional elections. At several points in American history, Congress had chosen to seat representatives or senators despite state laws that purported to render the person ineligible for office. Although these instances were limited in number, the Court found significant Congress's declaration in these cases that the states lacked the power to set additional qualifications.²⁰⁰ With respect to term limits in particular, the Court found it probative that, both in the wake of the Constitutional Convention and thereafter, no state had sought to impose term limits for federal office.²⁰¹

Third, the Court looked to democratic theory and constitutional structure. For the Court, the imposition of term limits undermined the power of the people to choose their own representatives by denying them the right to reelect a long-serving representative or senator.²⁰² Moreover, in the Court's view, the constitutional structure belied the notion that individual states could impose term limits for members of Congress even from their own states. The right to select U.S. representatives and senators, the Court ruled, belonged not to the individual states but to the people of the United States.²⁰³ What the Court meant by this aphorism is not entirely clear, but the Court seemed to be suggesting that each person, no matter in what state they lived, had an interest in ensuring that the qualifications for Congress remained uniform throughout the nation and that no state be allowed to impose additional qualifications for service in Congress. In essence, to allow Arkansas to impose term limits on its U.S. representatives and senators harmed not only the citizens of Arkansas who might support their reelection but also the citizens of other states, who likewise have an interest in how Arkansas structures its elections for its congressional representatives.

199. *Id.* at 806–15.

200. *Id.* at 816–19.

201. *Id.* at 826.

202. *Id.* at 819–22.

203. *Id.* at 820–21.

Although *Thornton* involved state power under Article I's Election Clause, the Court's analysis in that case sheds light on the analogous question whether Article II authorizes the states to appoint their presidential electors based on the outcome of a national popular election rather than state elections. At the outset, it is important to note the similarity in the constitutional provisions at issue. Article I's Elections Clause 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." Article II, Section 1, meanwhile, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." In both cases, the state legislatures are authorized to regulate the "[m]anner" of election, and, in both cases, that power is delegated in seemingly unlimited terms.

B. The Limited Scope of the States' Delegated Power over Presidential Elections

The same sources of law to which the Court turned in *Thornton* to conclude that the Elections Clause of Article I does not empower states to adopt term limits for Congress likewise point to the conclusion that Article II does not empower states to select presidential electors based on the outcome of the national popular vote. Let's begin with the history of the adoption of Article II. As noted above, at the Constitutional Convention, the framers expressly repudiated a nationwide popular election for the President.²⁰⁴ When Gouverneur Morris proposed just such a presidential election process, it was overwhelmingly defeated. Opponents worried not only that the people would not be sufficiently informed about candidates across the nation, but also that the process would be too majoritarian—that such a process would disadvantage voters in smaller states, who would be ignored in a purely majoritarian election system. Indeed, the desire to protect the interest of small states (and their citizens) explains not only the rejection of a direct, nationwide popular election for President but also the Convention's subsequent decision to replicate the contours of the Great Compromise in allocating electors among the states: states would receive the number of electors as they possessed both representatives and senators in Congress.

In fact, the framers created a presidential election process that was manifestly nonmajoritarian. Recall that the framers created a contingent

204. *Supra* Part III.A.

election procedure for elections in which no candidate receives a majority of the Electoral College. In the views of the framers, the presidential election would ordinarily be decided by the House of Representatives because few candidates would ever gain the required Electoral College majority.²⁰⁵ Indeed, the framers spent so much time crafting the contingent election process precisely because they thought it would be resorted to on a regular basis. Moreover—and this is a crucial point—the framers agreed that, when the presidential election fell to the House of Representatives under this process, each state’s delegation would act in a corporate capacity as a unit and cast one, equal vote on behalf of the state. Recall that the framers had originally decided to repose the contingent election procedure in the Senate, where each state receives an equal vote, but they feared the perceived aristocratic bias of the Senate. Allocating the contingent election procedure to the House but mandating that each state’s House delegation vote as a unit and cast one, equal vote replicated the Senate’s voting structure but without the aristocratic gloss. In essence, the framers not only expressly rejected a national popular election for President; they instead created an election process in which the crucial votes would be cast by individuals who almost assuredly would vote in accordance with the wishes of the voters in their state, not the undifferentiated nation at large.²⁰⁶ Moreover, popular sentiments would be aggregated in a manner that ignored population differences among the states.

Against this backdrop, it is simply inconceivable that the framers thought that they were empowering the states to appoint their electors in accordance with popular sentiment outside the state, let alone a national poll. Having rejected Gouverneur Morris’ proposal for a direct nationwide popular election and having spent weeks crafting a complicated process in which states, as corporate bodies, would play an important role, the framers could not have imagined that those decisions could be undone by states, either acting alone or in concert, deciding to appoint their electors in accordance with the national vote. To be sure, the framers did not envision that every state would use a statewide poll to select its electors (thereby creating a facsimile of a nationwide election), and therefore they could not imagine that some states might choose to

205. *See supra* text accompanying notes 144–45.

206. Recall that the U.S. Constitution does not require U.S. Representatives to be elected by district. That requirement was first imposed in 1842 by Congress by statute. *See* 2 U.S.C. § 2c (2012). In the first few years following ratification of the Constitution, many states elected their Representatives at large.

appoint their electors in accordance with the nationwide vote. Nevertheless, given the framers' rejection of a direct popular election and their rejection of election processes that were insufficiently protective of small state prerogatives (such as election by Congress by joint ballot), their reaction to the NPVC can be safely inferred.

Likewise, as in *Thornton*, the actual practice by states in the wake of the adoption of the Constitution informs the scope of state authority under Article II. In the first few presidential elections, some state legislatures appointed the electors themselves, while others provided for their selection through a popular election.²⁰⁷ Of those states that used popular elections, some used an at-large process that mimicked a winner-take-all system; other states used a district system, while others used a hybrid combination of the two.²⁰⁸ Notably, under all of these systems, the presidential electors were selected in accordance with the sentiments of the voters in the state (or a district within it). Every state ultimately moved to a system of popular election, and most states embraced a winner-take-all system so as to maximize their electoral clout.²⁰⁹ No state, however, has ever appointed its electors in accordance with the national popular vote, even though since 1880 every state has conducted a state poll, thereby providing the opportunity for states to do so if they wished.

Finally, considerations of democratic theory and constitutional structure point against reading Article II to permit states to appoint their electors on the basis of the national vote. At the outset, it is important to note that the NPVC does not promote democracy. Since 1880, every President has been selected via a process that is democratic. Because voters in every state vote for President and because those votes are transmitted faithfully into electoral votes—the winning electors almost invariably cast their ballots for the candidate to whom they were pledged—the current, state-by-state system is undeniably *democratic*. Rather, the charge leveled by critics of the Electoral College is that it is not sufficiently *majoritarian*—that the manner in which popular votes are aggregated into electoral votes may produce a President who received fewer popular votes than another candidate.²¹⁰ As I have written elsewhere, the current system is largely majoritarian in structure and

207. *See supra* Part III.C.

208. *See supra* Part III.C.

209. *See supra* Part III.C.

210. *See supra* text accompanying note 40.

effect.²¹¹ In only four presidential contests in the nation's history has the winning candidate received fewer popular votes than the candidate elected President, and in all but one of those elections, the losing candidate failed to win a majority of the popular vote, undermining the suggestion (based on a claim of political majoritarianism at least) that the wrong candidate won.

More importantly, though, majoritarianism is not synonymous with democracy. One can believe—as the framers very much did—in democracy but not majoritarianism, at least not in the strict sense urged by the NPVC's supporters. Indeed, the Constitution creates a federal political structure that contains several nonmajoritarian elements, such as the Senate, the bicamerality and presentment requirements for federal legislation, and, most obviously, judicial review. Indeed, no less an authority than James Madison expressly described the governmental structure created by the Constitution—including, most notably, the presidential election process—as a “mixed” system that blended, in his words, “national” and “federal” characteristics.²¹²

To be sure, the NPVC differs from term limits for federal officers in that the latter prevented voters from reelecting a long-serving representative or senator, while the NPVC does not formally preclude any voter from voting for the presidential candidate of their choice. In that respect, the NPVC is not anti-democratic, at least as a formal matter.²¹³

The NPVC, however, does resemble the state-imposed term limits invalidated in *Thornton* in another manner: like state-imposed term limits, the NPVC alters a federal election process in which the voters in every state have an interest and does so in a manner that disregards the sentiment of voters who wish to keep the current system. It should go without saying that every U.S. citizen has an interest in the presidential election process. Unlike representatives or senators, the President is the one federal official who represents the entire nation. Indeed, if Oregonians have an interest in how the voters of Arkansas elect the representatives and senators from that state—as the Court in *Thornton* seemed to suggest—it follows *a fortiori* that they likewise have an interest in how Arkansas, California, or any state selects its presidential

211. Williams, *supra* note 9, at 195–203.

212. THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961).

213. As I have written elsewhere, nonconsenting states may respond to the NPVC in nondemocratic ways, such that one might view the NPVC as encouraging such nondemocratic actions. See Williams, *supra* note 9, at 209–15.

electors. The significance of that interest should not be overstated—an Oregonian, for example, surely cannot complain about ordinary election regulations, such as ballot access laws, adopted in other states—but neither should it be ignored entirely. As *Thornton* seems to suggest (or at least a best reading of this portion of the *Thornton* ruling), our constitutional structure presumes that states may not use their constitutionally delegated powers over the election of federal officials in a manner that fundamentally interferes with the constitutional structure.

Both in structure and effect, the NPVC threatens the interest of voters in other states. The NPVC is a state-initiated interstate compact that will go into effect once a sufficient number of states comprising at least 270 electoral votes sign on to it. Once it does so, it does not matter whether voters in nonsignatory states desire to preserve the current state-by-state electoral system; the national popular vote will be conclusive. Whether or not Congress could by statute require states to appoint their electors in accordance with the national popular vote,²¹⁴ the notion that a group of states can, by their concerted action, transform the manner in which the President is elected cannot be right. If a group of states can agree to pledge their presidential electors on the basis of the national vote, then they must likewise be able to agree to pledge their electors to a candidate only from those states, only from one political party, or only in accordance with the wishes of a designated committee of “presidential experts.” In short, any interstate compact regarding the manner in which presidential electors are selected threatens to exclude the wishes of voters in nonsignatory states, and, therefore, it seems inconceivable that a Constitution that specifies how the President is to be elected and that lays out a process for amending its requirements would permit a group of states to alter so fundamental a part of our constitutional structure.

C. But What About McPherson v. Blacker?

Finally, *McPherson v. Blacker* does not contradict the foregoing analysis and suggest that state power over the manner in which presidential electors are selected is unlimited.²¹⁵ There, the Court upheld

214. Compare, e.g., *Bush v. Gore*, 531 U.S. 98, 112–14 (2001) (Rehnquist, C.J., concurring) (arguing that, under Article II, state legislature’s choices regarding appointment process must be respected), with 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, 238–39 (2011) (suggesting that Congress has the power to regulate the presidential election process).

215. 146 U.S. 1 (1892).

the Michigan legislature's decision to switch from an at-large to a district-based popular election system for its presidential electors.²¹⁶ To be sure, the Court used some expansive language, such as its untempered declaration that the Constitution "leaves it to the legislature exclusively to define the method [of selecting the electors]."²¹⁷ That language, however, must be read in the context of the case. The Court was adjudicating the constitutionality of an appointment system that had been used by numerous states over time, including several in the first presidential election in 1789. Indeed, after the Court construed the text of Article II as giving the states "plenary authority," it then conducted an extensive analysis of the Constitutional Convention and early, post-Constitution history regarding the various modes of appointment used by the states.²¹⁸ In particular, the Court gave substantial weight to the framers' expectation, voiced by Madison, that most states would adopt the district system.²¹⁹ Moreover, the Court repeatedly emphasized that numerous states had used a district system in the first few presidential elections.²²⁰ This "contemporaneous practical exposition of the Constitution" was, in the words of the Court, "too strong and obstinate" to call into question the validity of the district system for electing presidential electors.²²¹

Far from supporting the constitutionality of the NPVC, then, *McPherson* actually calls it into question. First, *McPherson*'s extensive review of the Constitutional Convention debates and the electoral practices of the states in the wake of the adoption of the Constitution confirms the analytical approach endorsed here. As suggested above, the framers' expectation regarding the method of appointment likely to be adopted by the states and the "contemporaneous practical exposition of the Constitution" necessarily informs the proper interpretation of state power under Article II. Second, *McPherson* validated a practice that both the framers expected to be used and that states had in fact used in the wake of the Constitution's adoption. Neither can be said on behalf of the NPVC. No Framer—not even James Wilson, the most vocal proponent

216. *Id.*

217. *Id.* at 27.

218. *Id.* at 27–35.

219. *Id.* at 29.

220. *Id.* at 29–33; *see also id.* at 36 (noting this "long continued" practice).

221. *Id.* at 27; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 816–19 (1994) (noting that congressional practice in early years of the Republic yields important insight into constitutional meaning).

of the direct election of the President—ever suggested that, under the system adopted by the Convention, the states could appoint their electors in accordance with a nationwide vote.²²² Moreover, at no point in the history of the United States, let alone in the first few presidential elections, has a state appointed its electors in accordance with the popular vote outside the state.

In sum, Article II gives states broad discretion to choose the manner of appointing their electors, but not every conceivable method of appointment falls within the scope of that discretion. States may choose to conduct popular elections, but the states' appointment of electors must be based on the results of each state's poll, not aggregated with those from other states. By attempting to provide for the direct popular election of the President, the NPVC attempts to reverse the framers' decision to eschew such manner of election, and it therefore exceeds the power delegated by the Constitution to the states.

V. CONCLUSION

The NPVC seeks to effect a fundamental change in the presidential election process. But like other state-initiated attempts to circumvent the federal constitutional framework for federal elections, the NPVC does so in a way that exceeds the states' constitutionally delegated authority. As the Court admonished in *Thornton*, change, if it is to be undertaken, “must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the amendment procedures set forth in Article V.”²²³

222. *Cf. Thornton*, 514 U.S. at 812–13 (noting absence of suggestion by framers of existence of state power to be constitutionally significant).

223. *Id.* at 837. To be sure, that process is difficult in practice, but it is not impossible. In fact, many of the most recent constitutional amendments adopted by the states involve the Presidency. The Twentieth Amendment moved the inauguration to January 20 and addressed what happens when the President-elect dies before taking office; the Twenty-second Amendment limits the President to two terms; the Twenty-third Amendment gives the District of Columbia membership in the Electoral College; the Twenty-fourth Amendment bans poll taxes in federal elections, including presidential elections; and the Twenty-fifth Amendment addresses presidential incapacity and succession.

