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## States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons

William Josephson

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# States May Statutorily Bind Presidential Electors, the Myth of National Popular Vote, the Reality of Elector Unit Rule Voting and Old Light on Three-Fifths of Other Persons

WILLIAM JOSEPHSON\*

*This Article discusses the United States Supreme Court's July 6, 2020 decision in Chiafalo v. Washington State as it impacts the most in-depth analysis yet published of the proposed National Popular Vote ("NPV") Interstate Compact. NPV purports to provide for popular vote election of a President of the United States even if the winner of the popular vote did not win the Electoral College. It concludes that NPV cannot accomplish its purported purpose. The article also criticizes a recent article proposing dividing each state's electors vote in accordance with the popular vote proportions in each such state instead of, as is the case now, unan- imously, by the unit rule. Finally, the article criticizes an- other recent article asserting that the Electoral College is more than just an echo of slavery.*

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## INTRODUCTION

A. *Elector Discretion*

The eminent constitutional scholar, Laurence H. Tribe, wondered, if the conservative justices on the Supreme Court, who claim to know the Constitution's original meaning, will uphold the Founders' understanding of the Electoral College, even if it means empowering the presidential electors.<sup>1</sup> On July 6, 2020, Justice Elena Kagan for a unanimous Court in *Chiafalo v. Washington*, decided that states, if they wished, could statutorily require their presidential electors to vote in accordance with their popular votes for President and Vice President in their respective states.<sup>2</sup> The so-called originalist justices—Thomas, Alito, Gorsuch and Kavanaugh—concurred.<sup>3</sup> Justice Thomas wrote a concurrence in which Justice Gorsuch concurred.<sup>4</sup>

Nevertheless, as Justice Robert H. Jackson observed in his dissent in *Ray v. Blair*:<sup>5</sup>

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<sup>1</sup> *Going Rogue; The Electoral College*, THE ECONOMIST, May 9, 2020, at 19.

<sup>2</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020). The decision is discussed in detail in William Josephson, *Chiafalo v. Washington State: Justice Elena Kagan's Opinion That States May Bind Presidential Electors to Cast Their Ballots for the Winners of Their Popular Presidential Elections Raises Many Issues* (Nov. 9, 2020) (unpublished comment), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3728307](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728307). See discussion *infra* Section I.D.1. *Chiafalo* affirmed *In re Guerra*, 441 P.3d 807, 817 (Wash. 2019). Also on July 6, 2020, the Court reversed, for the reasons stated in *Chiafalo*, the judgment of the United States Court of Appeals for the Tenth Circuit in *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316, 2316 (2020) (mem.) (per curiam), reversing *Baca v. Colo. Dep't of State*, 935 F.3d 887, 956 (10th Cir. 2019). The Tenth Circuit had held for elector discretion. *Id.* Justice Sotomayor took no part in the *Baca* reversal. *Baca*, 140 S. Ct. at 2316. Justice Thomas concurred in that judgment for the reasons stated in his *Chiafalo* concurring opinion. *Id.* The Court's order does not state that Justice Gorsuch concurred with Justice Thomas, as he did in *Chiafalo*. *Id.*

<sup>3</sup> *Chiafalo*, 140 S. Ct. at 2319.

<sup>4</sup> *Id.*

<sup>5</sup> *Ray v. Blair*, 343 U.S. 214, 232 (1952) (Jackson, J. dissenting) (Douglas, J. joining in the dissent). *Accord* *McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *Williams v. Rhodes*, 393 U.S. 23, 43–44 (1968) (Harlan, J., concurring in result). Justice Kagan did not cite this famous quote in her *Chiafalo* opinion. See *Chiafalo*, 140 S. Ct. at 2319–28. *Ray v. Blair* upheld an Alabama political party elector-

No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices.<sup>6</sup>

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pledge statute but chose not to decide enforceability of the pledge. *But see* Opinion of the Justices No. 87, 34 So. 2d 598, 599 (1948). There is considerable literature about *Ray v. Blair*. *See, e.g.,* Zachary J. Shapiro, Comment, *Free Agency: The Constitutionality of Methods That Influence a Presidential Elector's Ability to Exercise Personal Judgment*, 26 J.L. & POL'Y 395, 419–21 (2018); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 677 (1996) [hereinafter *Popular Vote*]; CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 480 (2d Sess. 2017); THOMAS H. NEALE & ANDREW NOLAN, CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 3 n. 14 (2019) [hereinafter CONG. RSCH. SERV. R43823]; Cong. Rsch. Serv., *Constitution of the United States: Analysis and Interpretation*, <https://constitution.congress.gov> (last visited Aug. 16, 2019). Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 624 (2004) (“To be sure, it is always a serious matter to ignore the rules laid down by the text, even when they are incompetently drafted. But in our constitutional tradition, the rule of rules is only one component of a more complex understanding of the rule of law placed in a full historical context, Jefferson’s decision [to count a deficient Georgia electors’ certificate] provokes renewed appreciation for the complexities of constitutional interpretation . . .”). David A. Strauss discussed, in the context of construing the Necessary and Proper clause, the difficulties of strictly adhering to the canon of construction *expressio unius est exclusio alius*. David A. Strauss, *Foreward: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 45–46 (2015). He pointed out that one could infer from the several specific constitutional provisions authorizing the enactment of criminal laws that the canon might require the inference that Congress had no authority to enact criminal laws not specifically authorized. *Id.* Justice Miller in *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884), inferred from necessity congressional authority to legislate to protect the election of the President, notwithstanding the specific constitutional provision authorizing protection of the election of Senators and Representatives. *See id.*

<sup>6</sup> *Ray*, 343 U.S. at 232 (Jackson, J. dissenting).

## B. Purpose of this Article

### 1. 2016 PRESIDENTIAL ELECTION

In 2016, the presidential popular vote winner did not win the Electoral College; only the fourth time since 1876 that has happened, but twice in the last 20 years.<sup>7</sup> Consequently, since the 2000 presidential election, legal writing on presidential elections and the Electoral College has exploded.<sup>8</sup>

The principal purpose of this article is to analyze in depth the National Popular Vote (“NPV”) proposal to provide for popular election of the President and Vice President purportedly within the framework of the Electoral College. This article also analyzes the unit system and the history of the three-fifths of persons formula for apportionment.<sup>9</sup>

As was the case in previous articles on the Electoral College,<sup>10</sup> this author neither attacks nor defends the Electoral College, but rather takes it as a given, because at this time probably neither the House of Representatives, nor the Senate, would have two-thirds majorities necessary to adopt a constitutional amendment to change it. Nor, at this time, would three-quarters of the states adopt any such amendment.

### 2. MAJOR ARTICLES DISCUSSED HEREINAFTER

From a conscientious survey of all the post-2016 legal writing, two articles have been chosen for detailed discussion. The first treats

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<sup>7</sup> Jerry Schwartz, *EXPLAINER: They Lost the Popular Vote but Won the Elections*, AP NEWS (Oct. 31, 2020), <https://apnews.com/article/AP-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb>.

<sup>8</sup> See, e.g., Katherine Florey, *Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE W. RES. L. RSRV. 317, 317 (2017); Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1091–93 (2018).

<sup>9</sup> See discussion *infra* Section II.A.

<sup>10</sup> See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 151 (1996) [hereinafter *Repairing*]; *Popular Vote*, *supra* note 5, at 671; William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 599 (2009) [hereinafter *Senate Election*].

the related issue of elector voting by the unit rule, *i.e.*, unanimously.<sup>11</sup> The other asserts that the Electoral College is more than an “echo of slavery.”<sup>12</sup> These articles pay lip service to the NPV proposal without analyzing it.<sup>13</sup>

How to elect the President was one of the most debated issues at the 1787 Constitutional Convention.<sup>14</sup> At the last moment, the Elec-

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<sup>11</sup> Florey, *supra* note 8, at 336–37.

<sup>12</sup> See Perea, *supra* note 8, at 1091–93.

<sup>13</sup> See Florey, *supra* note 8, at 317, 336–37 (“creative and commendable”). She acknowledges that NPV’s time has not yet come. *Id.* at 381–85. See Perea, *supra* note 8, at 1091–93, 1102 (“the best option for reform today . . . the most plausible alternative today”). Lawrence Lessig calls NPV “a brilliant idea” without analyzing it. Lawrence Lessig, *On the Equal Protection Clause Argument and the National Popular Vote Project*, MEDIUM (Dec. 6, 2016), <https://medium.com/equal-citizens/on-the-equal-protect-clause-argument-and-the-national-popular-vote-project-f4d75901151b>. Shapiro argued before *Chiafalo* that “the states, through their own election laws, can restore the integrity and effectiveness of the institution [of the Electoral College], without the need of amending our founding document.” Shapiro, *supra* note 5, at 395. Apparently, Shapiro does not see the contradiction between his support of elector freedom and his support of NPV. NPV can work only if the member states’ electors are required to vote for the national popular vote winner, regardless of who won their respective states’ popular vote. See discussion *infra* Section I.D.1. Another exception to NPV lip service is Jillian Robbins, Comment, *Changing the System Without Changing the System: How the National Popular Vote Interstate Compact Would Leave Non-Compacting States Without a Leg To Stand On*, 2017 CARDOZO L. REV. DE NOVO 1, 3 (2017). Many of the earlier studies of NPV were substantive. See Alexander S. Belenky, *The Good, the Bad, and the Ugly: Three Proposals to Introduce the Nationwide Popular Vote in U.S. Presidential Elections*, 106 MICH. L. REV. FIRST IMPRESSIONS 110, 113 (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, 420–22 (2008), proposed amendments to the NPV interstate compact to remedy two of its deficiencies. Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 196–97 (2008) (providing a data-based defense of the Electoral College, but did not discuss the nuts and bolts of NPV). Jennings “Jay” Wilson, *Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way*, 5 ELECTION L.J. 384, 385–404 (2006) [hereinafter *Bloc Voting*] (grappling with many of NPV’s substantive issues).

<sup>14</sup> Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of the Ad Hoc Congress for Election of the President*, 73 J. AM. HIST. 35, 35 (1986).

toral College emerged as a compromise between congressional election of the President and popular election.<sup>15</sup> The compromise, arguably, reflected the states' sovereignty in a federal system of limited national government and of plenary power state governments, except as the Constitution limited states' powers.<sup>16</sup>

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<sup>15</sup> See *id.* at 57–58. Slonim is an excellent day-by-day distillation of JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 574 (Ohio Univ. Press 1966) (1787) and other primary sources, see *infra* note 256. Two of the most important scholarly books that discuss the origins of the College rely on Slonim. TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT 7–15 (1994); ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE 45–55 (Jennifer Carpenter et al. eds., 2019). Alexander has also published ROBERT M. ALEXANDER, PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE (2012) [hereinafter PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE]. Charles L. Black, Jr., a Texan, stated that the process gave the Convention “buck fever,” whatever that means. Charles L. Black, Jr., *The Year of Pride and Process*, 67 B.U. L. REV. 783, 790 (1987). EDMUND LINDOP, BIRTH OF THE CONSTITUTION 94 (1987) says 60 ballots were taken on this issue alone. The Supreme Court has, at least three times, referred to the Electoral College as a Constitutional Convention compromise. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 12 (1964) (discussing the Constitutional Convention’s “Great Compromise” of House of Representatives apportionment from which the Electoral College is derived); *Gray v. Sanders*, 372 U.S. 368, 377 (1963).

<sup>16</sup> See MADISON, *supra* note 15, at 627; THE RECORDS OF THE FEDERAL CONVENTION OF 1787 519 (Max Farrand ed., Yale Univ. Press 1934) (1911) [hereinafter Farrand]. The conflicting views about electing a President are well summarized in a paragraph in *McPherson v. Blacker*, 146 U.S. 1, 28 (1892). Arguably, the other most debated issue was if there should be one legislature or two legislative bodies, and if the latter, how would they be constituted and what would be their relationship. See The Eds. Of Encyc. Britannica, *Constitutional Convention*, BRITANNICA <https://www.britannica.com/event/Constitutional-Convention> (last visited Mar. 18, 2022). The compromise that created a Senate with equal state representation had implications for the Electoral College. See Amanda Onion, *How the Great Compromise and the Electoral College Affect Politics Today*, HIST. (Mar 21, 2019), <https://www.history.com/news/how-the-great-compromise-affects-politics-today>. The Electoral College awards each state two electors for their senators and the number of electors that it has representatives in the House of Representatives. See *id.*



## I. NATIONAL POPULAR VOTE

### A. *NPV Origins*

The discussion on NPV begins with Akhil Reed Amar and Vikram David Amar.<sup>17</sup> They argued that because the state legislatures have full constitutional power to appoint electors,<sup>18</sup> states could agree, by interstate compact, to bind the compact's member states' electors to vote for the winner of the national popular vote for President, regardless of the popular votes for President of their respective states.<sup>19</sup>

### B. *Substance of the Compact*

NPV purports to be a compact among the states for their presidential electors to cast their ballots for the “presidential slate” national popular vote winner, regardless of whether the winner won by

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<sup>17</sup> 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), <https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html>.

<sup>18</sup> See U.S. CONST. art. II, § 1, cl. 2. This is a power affirmed by *McPherson*, 146 U.S. at 1. It was also just reaffirmed by *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). New York's DeWitt Clinton is credited with advocating popular instead of state legislature election of electors. Andrew Arpy, *DeWitt Clinton's Other Legacy: Popular Elections of Electors*, 16 N.Y. ARCHIVES, 38, 38 (2016) (on file with author).

<sup>19</sup> Amar & Amar, *supra* note 17. Akhil Reed Amar describes his 2001 article as a “daydream,” pursues it at some length, never citing, let alone dealing with, any of the anti-NPV literature. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 456–63 (2012). Akhil Reed Amar, *The Inaugural Abraham Lincoln Lecture on Constitutional Law: Electoral College Reform, Lincoln-Style*, 112 NW. U. L. REV. 63, 75–76 (2017) tells how he came to these insights. 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, 239 (2011) [hereinafter *Subconstitutional Means*]. The best book on NPV remains ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 165–69 (2006), but Bennett acknowledged to the author, now some years ago, that NPV is flawed. Other useful surveys were more recently published. CONG. RSCH. SERV. R43823, *supra* note 5; see also Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 988–90 (2016).

a majority or a plurality.<sup>20</sup> It would take effect when states with a majority of elector votes join NPV, 270 including, questionably for this purpose, the District of Columbia's three elector votes.<sup>21</sup> Essential to the survival of NPV was the Court's *Chiafalo* decision that states could statutorily bind their electors, although *Chiafalo* did not address the issue of whether they could bind them to vote for the winner of the national popular vote for President, regardless of how their states may have voted.<sup>22</sup> If the Court had held that electors had discretion that the states could not restrain, as the 10th Circuit held in *Baca*, NPV could not have worked at all.<sup>23</sup>

### C. NPV Adoption

Only fifteen states, plus the District of Columbia, have adopted NPV: California (54 elector votes); Colorado (10 elector votes); Connecticut (7 elector votes); Delaware (3 elector votes); District of Columbia (3 elector votes); Hawaii (4 elector votes); Illinois (19 elector votes); Maryland (10 elector votes); Massachusetts (11 elector votes); New Jersey (14 elector votes); New Mexico (5 elector votes); New York (28 elector votes); Oregon (8 elector votes); Rhode Island (4 elector votes); Vermont (3 elector votes); and Washington (12 elector votes).<sup>24</sup> Combined, these fifteen states have

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<sup>20</sup> Justice Stanley Reed's comment, "It is true that the [Twelfth] Amendment says the electors shall vote by ballot" can only mean secret ballot, as his subsequent discussion of the erosion of that requirement in some states makes even clearer. *Ray v. Blair*, 343 U.S. 214, 228 (1951). In *Repairing*, *supra* note 10, at 172–73 & nn.199–209, Beverly J. Ross and I discussed the meaning of "ballot" and concluded that it means voting in secret. *Accord* CONG. RSCH. SERV., R43823, *supra* note 5, at 3 n.20. We also noted that some states depart from what we believe is the constitutionally required practice. *Repairing*, *supra* note 10, at 156. *Baca v. Colo. Dep't of State* 935 F.3d 887 *passim* (10th Cir. 2019) relied heavily on the fact that electors vote by ballot in upholding elector discretion. *Contra* *Matter of Guerra*, 441 P.3d 807, 816 n.8 (Wash. 2019) *aff'd sub nom*, *Chiafalo*, 140 S. Ct. at 2318. Justice Kagan also did not think much of the ballot argument for elector discretion. *Chiafalo*, 140 S. Ct. at 2325.

<sup>21</sup> See JOHN R. KOZA, ET AL. EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY POPULAR VOTE 58 (4th ed. 2013) [hereinafter EVERY VOTE EQUAL].

<sup>22</sup> See *Chiafalo*, 140 S. Ct. at 2320.

<sup>23</sup> *Baca v. Colo. Dep't of State*, 935 F.3d 887, 946 (10th Cir. 2019).

<sup>24</sup> *Status of Popular Vote in Each State*, NAT'L POPULAR VOTE <http://www.nationalpopularvote.com/state-status> (last visited Mar. 2022).

a total of 195 elector votes, a number well short of an absolute majority of 270 elector votes, even if D.C. is included.<sup>25</sup>

According to NPV's website, thirty-two states, mostly Red and small states, have not joined the NPV: Alaska (3), Alabama (9), Arkansas (6), Arizona (11), Florida (30), Georgia (16), Idaho (4), Indiana (11), Iowa (6), Kansas (6), Kentucky (8), Louisiana (8), Michigan (15), Minnesota (10), Mississippi (6), Missouri (10), Montana (4), Nebraska (5), New Hampshire (4), North Carolina (16), North Dakota (3), Ohio (17), Pennsylvania (19), South Carolina (9), South Dakota (3), Tennessee (11), Texas (40), Utah (6), Virginia (13), West Virginia (4), Wisconsin (10), and Wyoming (3), a total of 326 elector votes, a majority of states and elector votes.<sup>26</sup> All of the NPV states are either Blue or Purple states.<sup>27</sup> All, except Colorado, Illinois, and New Mexico, are east or west coast states.<sup>28</sup>

Red states would seem to be unlikely to join the NPV for the same reasons that they would likely keep the Electoral College.<sup>29</sup>

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See* William Josephson, *17 Reasons Why the National Popular Vote Initiative Is Likely to Fail*, N.Y.L.J. (Jan. 4, 2019), <https://www.law.com/newyorkslawjournal/2019/01/04/17-reasons-why-the-national-popular-vote-initiative-is-likely-to-fail/?sreturn=20220108203754> [hereinafter *17 Reasons Why*]; Nate Silver, *Why a Plan to Circumvent the Electoral College is Probably Doomed*, FIVETHIRTYEIGHT (Apr. 17, 2014, 5:49 PM), <https://fivethirtyeight.com/features/why-a-plan-to-circumvent-the-electoral-college-is-probably-doomed/> (describing Colorado as a swing state).

<sup>28</sup> *See 17 Reasons Why*, *supra* note 27.

<sup>29</sup> *See* MICHAEL J. GLENNON, *WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION* 67–77 (1992); Michael J. Glennon, *Nine Ways to Avoid a Train Wreck*, 27 *CARDOZO L. REV.* 1159, 1159–60 (2002). The last serious effort to amend the Constitution to substitute popular election of the President for the Electoral College began in 1966 and sought to institute popular presidential elections. *See generally* S. REP. NO. 96-111 (1979). In 1979, the Senate Judiciary Committee held extensive hearings on Senate Joint Resolution 28. 125 *CONG. REC.* 17,692–766 (1979). After prolonged Senate floor debate, the Resolution was defeated 51 to 48, well short of the required two-thirds majority. *Id.* at 17,766. Analysis of the senators voting reveals no pattern. *See id.* Democrat and Republican Senators from large states, small states, northern states, southern states, eastern states, and western states voted for or against. *See id.* The impetus for the long constitutional amendment effort was concern that Alabama Governor George Wallace's third-party candidacy could have thrown the 1968 presidential election into the House. *See id.* at 17,721. Over time, hundreds of constitutional

The thirty-four states that have taken no action to join, or have rejected the NPV, have sixty-six senate votes, almost twice the one-third that would defeat a popular vote Electoral College constitutional amendment.<sup>30</sup>

#### D. NPV Analysis

There are at least sixteen reasons why the NPV is unlikely to work.<sup>31</sup>

##### 1. BINDING ELECTORS TO VOTE

Robert Alexander says thirty-one states, Justice Kagan says thirty-two states, *The New York Times* says thirty-three states, including the District of Columbia, purport to bind each states' electors to vote in accordance with their respective popular votes.<sup>32</sup> So, states with 310 elector votes do so, although they do so in different ways.<sup>33</sup>

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amendments to change the Electoral College have been introduced. See CONG. RSCH. SERV. R43823, *supra* note 5, at 4–5; Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1524 (2012) [*hereinafter Why the NPV is Unconstitutional*] (estimating 1,000 such amendments have been introduced). S. J. RES. 16, 116th Cong. (2019); H. J. RES. 7, 116th Cong. (2019) both died with the adjournment of the 116<sup>th</sup> Congress. The latest is H. J. RES. 14, 117th Cong. (2021). For a complete history of all successful and unsuccessful constitutional amendment proposals, see generally STAFF OF S. COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY (1985) (Comm. Print 1985).

<sup>30</sup> See *Status of Popular Vote in Each State*, *supra* note 24.

<sup>31</sup> See *17 Reasons Why*, *supra* note 27.

<sup>32</sup> See PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra* note 15, at 134–35; *Chiafalo v. Washington* 140 S.Ct. 2316, 2321 (2020); Isabella Grullón Paz & Lisa Lerer, *The Electoral College is Voting Today. Here's What to Expect*. N.Y. TIMES, <https://www.nytimes.com/2020/12/13/us/politics/electoral-college.html> (Jan. 15, 2021).

<sup>33</sup> See PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra* note 15, at 134–35; *Chiafalo*, 140 S.Ct. at 2321. Paz & Lerer, *supra* note 32; see also Shapiro, *supra* note 5, at 396–97 (“To date, twenty-nine states and the District of Columbia have passed laws to curb a presidential elector’s ability to do so”). Justice Thomas in his concurrence in *Chiafalo* raised the issue of whether or not the different ways the states choose to bind could be material but does not indicate how these differences might affect outcomes. *Chiafalo*, 140 S.Ct. at 2331–33. Justice Kagan dismisses this point. *Id.* at 2324 n.6, 2328. Those states that rely

## 2. ENFORCEMENT I

Could an NPV state elector force a colleague to vote in accordance with the NPV, especially if their state did not vote for the national popular vote winner? No elector voting enforcement mechanism is provided by the NPV compact.<sup>34</sup>

Consider the 2016 presidential election. Let us suppose the NPV had been in effect, which improbably means that some large elector Red or Purple States—Georgia, Florida, Missouri, Texas—would have joined the NPV. Secretary Clinton convincingly wins the popular vote and wins a few Red states. But electors in Red NPV states that voted for President Trump would have been bound by the NPV to vote for her. Let us further assume, however, that at least some of the Republican electors in some of those Red NPV states would have refused to vote for her, as would have seemed to have been

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solely on political parties to enforce the faithfulness of electors obviously risk faithlessness and the uncertainties of enforcement. Because the Red States are unlikely to join NPV, NPV is unlikely ever to attain an Electoral College majority. *See, e.g., 17 Reasons Why, supra* note 27. A few years ago, the Uniform State Law Commissioners sent the Uniform Faithful Presidential Electors Act to the states. *Faithful Presidential Electors Act*, UNIFORM L. COMM’N. (Feb. 10, 2022), <https://www.uniformlaws.org/committees/community-home?CommunityKey=6b56b4c1-5004-48a5-add2-0c410cce587d>. Only Indiana, Minnesota, Montana, Nebraska, Nevada, and Washington have enacted it. *See id.* They were already binding states. *See Popular Vote, supra* note 5, at 690–92. Does this lack of adoption suggest that the states that do not bind their electors want to stay that way? Robert J. Delahunty answers this question, “no” for four reasons. Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, CARDOZO L. REV. DE-NOVO 165, 189–94 (2016). The Act’s remedy for elector faithlessness is automatic resignation and filling of a vacancy. *See id.* at 191. While the states legislatures have plenary constitutional power to appoint electors, that does not necessarily give them power to remove, as *Baca* held. *Baca v. Colo. Dept. of State* 955 F. 3d 887, 943 (10th Cir. 2019). Delahunty also could have said, as the dissenting Washington Supreme Court Justice in *Guerra* observed, “There is a meaningful difference between a power to appoint and the power to control.” *Matter of Guerra*, 441 P.3d 807, 818 (Wash. 2019) (Gonzalez, J., dissenting). The relationship between a power to appoint and the power to remove has a complicated constitutional history. *See Morrison v. Olson*, 487 U.S. 654, 685–96 (1988) (executive power of removal); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 703 (3rd ed. 2000). Delahunty’s next two reasons have been mooted by *Chiafalo*. *See Delahunty, supra*, at 191–92; *Chiafalo*, 140 S. Ct. at 2323. Finally, Delahunty makes an imaginative, but founded, argument for elector discretion based on the First Amendment. Delahunty, *supra*, at 193–94.

<sup>34</sup> *See 17 Reasons Why, supra* note 27.

likely. These states would have had Trump campaigning to vote for him regardless of their NPV membership. As a result, a predictable constitutional crisis of unprecedented proportions would have likely occurred for which the NPV offers no solution.

When the foregoing paragraphs were first written in 2018 or 2019, even this conjecture was not an idle one. House of Representatives Speaker Nancy Pelosi warned, “If we win [in 2020] by four seats, by a thousand votes each, he’s not going to respect the election.”<sup>35</sup> Given President Trump’s refusal to concede the 2020 presidential election to former Vice President Joseph H. Biden, what follows, written more than a year before, seems not only prescient but unduly cautious.<sup>36</sup>

Yet, Myths 9.10.1 and 9.10.2 in *Every Vote Equal* naively asserts, without evidence, that faithless electors would not be a problem under the NPV, because they would not need to be coerced to vote for the national popular vote winner instead of the winner of their state’s popular vote.<sup>37</sup> President Trump did not win the popular

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<sup>35</sup> Glen Thrush, *Pelosi Warns Democrats: Stay in the Center Trump May Contest Election Results*, N.Y. TIMES (May 5, 2019), <https://www.nytimes.com/2019/05/04/us/politics/nancy-pelosi.html>; see also Mara Liasson, *Why President Trump Refuses to Concede and What It Means For The Country*, NPR (Nov. 18, 2020), <https://apnews.com/article/donald-trump-ap-top-news-elections-joe-biden-virus-outbreak-aa07c0a980b3353b15f94442eb8191a5>. Princeton University historian Sean Wilentz states, “In his appearance before the House Oversight Committee in February, President Trump’s former fixer Michael Cohen saved his most disturbing words for his concluding statement, when he said he fears that if Trump loses to 2020 election, ‘there will never be a peaceful transition of power.’” Sean Wilentz, *How Our Politics Broke*, N. Y. REV. (May 9, 2019), <https://www.nybooks.com/articles/2019/05/09/how-our-politics-broke/>. Could a state elector sue another state elector? To finally answer the question in the text, Justice Kagan’s opinion in *Chiafalo*, contains the following dictum: “Article II and the Twelfth Amendment give States broad powers over electors, and give electors themselves *no rights*.” *Chiafalo v. Washington* 140 S. Ct. 2316, 2328 (2020) (emphasis added). While Article II and the Twelfth Amendment may confer no rights on electors, state laws and the United States Code provisions specifying the Electoral College procedures confer rights on electors to meet and cast their ballots, and then have their ballots counted, certified, and transmitted to Congress, where Congress then open the certificates and determine who is elected President. See, e.g., 3 U.S.C. §§ 5,7, 9,10.

<sup>36</sup> See Liasson, *supra* note 35.

<sup>37</sup> EVERY VOTE EQUAL, *supra* note 21, at 511–15; see also Aamer Madhani et al., *Trump Not Ready to Commit to Election Results if he Loses*, WCYB (Jul.

vote in any NPV state.<sup>38</sup> But if he had, almost certainly he would have done whatever he could to coerce its electors to vote for him and not for the winner of the national popular vote.

### 3. ENFORCEMENT II

Again, assume that new NPV states are added to the existing NPV states to constitute an elector majority. Further assume that President Trump runs for President as the Republican candidate in 2024 and wins the popular vote but *not* an elector majority. How likely is it that electors in Blue NPV states, like California and New York, all of which probably would *not* have voted for President Trump, would, as required by the NPV, actually cast their elector votes for President Trump?

### 4. ENFORCEMENT III

Could an NPV state sue another NPV state under the compact to force its electors to a vote in accordance with the NPV? Where? How quickly? In *Delaware v. New York*, the Supreme Court, in its original jurisdiction, declined to hear Delaware's one-person-one-vote challenge to the Electoral College.<sup>39</sup> A recent United States District Court decision, rejecting New Jersey's attempt, unilaterally, to withdraw from a *congressionally approved* interstate compact with New York, might indicate that the first question above could be answered, "in a United States District Court," and "not very

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19, 2020), <https://wcyb.com/news/nation-world/trump-not-ready-to-commit-to-election-results-if-he-loses> (highlighting that Trump said "I have to see" when asked if he would commit to accepting the results of the election).

<sup>38</sup> See Richard Winger, *2020 Presidential Vote*, BALLOT ACCESS NEWS (Jan 23, 2021), <https://ballot-access.org/2021/01/23/january-2021-ballot-access-news-print-edition/>.

<sup>39</sup> *Delaware v. New York*, 385 U.S. 895, 895 (1966); see RICHARD H. FALLON JR. ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 242–308 (4th ed. 2009) (discussing the Court's original jurisdiction).

quickly.”<sup>40</sup> But as we shall see in Section I.D.14, NPV has never been submitted to Congress for its approval.<sup>41</sup>

In this hypothetical case, would there be federal question jurisdiction? If so, would the plaintiff state have to sue in the Supreme Court’s original jurisdiction or in the defendant state’s courts? The Third Circuit decision in the New Jersey case indicates that the answer to these questions is, “yes.”<sup>42</sup>

## 5. ENFORCEMENT IV

If an NPV member state’s electors do not vote in accordance with the NPV, will Congress count their votes?

On December 19, 2016, President Trump received 304 elector votes, while Secretary Clinton received 227.<sup>43</sup> Neither received seven elector votes.<sup>44</sup>

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<sup>40</sup> *Waterfront Comm’n of N.Y. Harbor v. Murphy*, No. 18-650, 2018 WL2455927, at \*6 (D.N.J. June 1, 2018), *rev’d on other grounds, sub nom. Waterfront Comm’n of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 236, 243–44 (3d Cir. 2020), *cert. denied*, 142 S. Ct. 561 (2021) (New Jersey’s sovereign immunity deprived the District Court of jurisdiction).

*See also* Patrick McGeehan, *Judge Blocks New Jersey From Backing Out of Waterfront Commission*, N.Y. TIMES (June 4, 2018), <https://www.nytimes.com/2018/06/04/nyregion/new-jersey-waterfront-commission.html>.

<sup>41</sup> *See* discussion *infra* Section I.D.14.

<sup>42</sup> *See Waterfront Comm’n of N.Y. Harbor*, 961 F.3d at 236.

<sup>43</sup> Richard Winger, *January 2017 Ballot Access News Print Edition*, BALLOT ACCESS NEWS (Jan. 29, 2017), <https://ballot-access.org/2017/01/29/january-2017-ballot-access-news-print-edition/>.

<sup>44</sup> *See id.* Former Secretary of State Colin Powell received three elector votes (Washington State Clinton electors including the plaintiff in *Guerra/Chiafalo*), and one elector each voted for Ohio Governor John Kasich (Texas Trump elector), Faith Spotted Eagle (Washington State Clinton elector), former Representative Ron Paul (Texas Trump elector), and Senator Bernie Sanders (Hawaii Clinton elector). *Id.* For the ensuing litigation, *see* *Koller v. Brown*, 224 F. Supp. 3d 871, 873 (N.D. Cal. 2016) (denying a motion to intervene) *sub nom.* *Koller v. Harris*, No. 5:16-cv-07069, 2017 U.S. Dist. LEXIS 85199, at \*2–3 (N.D. Cal. June 2, 2017), *complaint dismissed*, *Koller v. Harris*, 312 F. Supp. 3d 814, 818 (N.D. Cal. 2018) (dismissing in part without prejudice); *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1142–43 (W.D. Wash. 2016) (denying motion for injunction pending appeal) *Chiafalo v. Inslee*, No. 16-36034, 2016 U.S. App. LEXIS 23392, at \*1–2 (9th Cir. Dec. 16, 2016) (dismissing as moot); *Abdurrahman v. Dayton*, No. 16-cv-04279, 2016 U.S. Dist. LEXIS 178222, at \*1–2 (D. Minn. Dec. 23, 2016) (denying preliminary injunction), *argued and submitted*, *Abdurrahman v. Dayton*,



Since the mid-1840s, when the two-party system became fairly established, Congress has *always* counted so-called faithless electors' votes, including in 1969, when the issue was extensively debated in the Senate.<sup>45</sup> Congress counted the "faithless" votes of the 2016 election in January 2017.<sup>46</sup>

## 6. SELF-EXECUTING

The NPV compact seems to assume that it is self-executing. Under the compact's Article III-1 and III-2, the chief election officer of *each* member state would determine the *national* popular vote winner.<sup>47</sup> What if the chief election officers disagree? Next, under Article III-3, the chief election officer of each member state would certify the appointment of the "elector slate nominated in that state *in association with* the national popular vote winner."<sup>48</sup> What does "in association with" mean? How did that slate get nominated? EVERY VOTE EQUAL does not answer these questions.<sup>49</sup>

Under the NPV, each state and the District of Columbia would have to change its presidential election laws to provide for only one

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903 F.3d 813, 815 (8th Cir. 2018) (dismissing as moot, petition for rehearing denied); *Abdurrahman v. Dayton*, No. 16-4551, 2018 U.S. App. LEXIS 31567, at \*1 (8th Cir. Nov. 7, 2018).

<sup>45</sup> See *Baca v. Colo. Dep't of State*, 935 F.3d 887, 949–50 (10th Cir. 2019); *Popular Vote*, *supra* note 5, at 730–37.

<sup>46</sup> See 163 CONG. REC. H189 (daily ed. Jan. 6, 2017). In 2004, a Minnesota elector cast one vote for John Edwards for President and one for John Edwards for Vice President. WORLD ALMANAC AND BOOK OF FACTS 504 (Sarah Janssen ed., 2018). Congress counted the vote for John Edwards. 151 CONG. REC. H85 (daily ed. Jan. 6, 2005).; see S. COMM. ON RULES AND ADMIN., 116TH CONG., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 116–1, § 1960 (2020). Because the elector was a Minnesotan and Edwards was a North Carolinian, the elector's vote did not involve the requirement of Article II, Section 1, Clause 3 and the Twelfth Amendment "of whom one at least shall not be an Inhabitant of the same State." U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII. But the Minnesota elector violated the constitutional requirement of separate votes for President and Vice President who could not both be from the same state. See U.S. CONST. art. II, § 1, cl. 3; *id.* at amend. XII.

<sup>47</sup> EVERY VOTE EQUAL, *supra* note 21, at 259.

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.*

slate of electors, the National Popular vote slate, except in the unlikely case of a popular vote tie, another NPV complication.<sup>50</sup>

Article III-6 of the NPV compact provides that, in the unlikely event of a national popular vote tie, the electors of each member state would vote, *not* in accordance with the NPV, but in accordance with their state's own popular vote, another required state law change.<sup>51</sup>

Thus, at a minimum, all of the ten or so elector binding NPV states—currently California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Maryland, Massachusetts, New Mexico and Oregon—would have to change their election laws to bind their electors vote for the national popular vote winner instead of the winner of each such state's popular vote, except in the case of a popular vote tie.<sup>52</sup> The current non-binding NPV member states—Illinois, New Jersey, New York, Rhode Island and West Virginia—would have to change their laws to become NPV elector binding states.<sup>53</sup>

In New York State, as we have seen, none of this has happened. New York enacted the NPV compact *haec verba*,<sup>54</sup> and probably is not a binding state.<sup>55</sup> New York has not amended its detailed statutes

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<sup>50</sup> See *id.* at 259.

<sup>51</sup> *Id.* at 259.

<sup>52</sup> See *id.*; *Status of Popular Vote in Each State*, *supra* note 24.

<sup>53</sup> See *Status of Popular Vote in Each State*, *supra* note 24; see also PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra* note 15, at 134.

<sup>54</sup> N.Y. ELEC. LAW §§ 12–402 (McKinney 2021).

<sup>55</sup> PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra*, note 15 at 134; *accord Popular Vote*, *supra* note 5, at 683 & nn. 92 & 93. New York's NPV membership is only *pro forma*. See William Josephson, *To Bind or Not to Bind*, N.Y.L.J. (June 3, 2020), <https://www.law.com/newyorklawjournal/2020/03/to-bind-or-not-to-bind/> [hereinafter *To Bind or Not to Bind*]. It has never been implemented by statute. *Id.* On December 4, 2019, Senate 6886 was introduced to require New York's electors to vote for its presidential popular vote winners. S6886D, 2019–2020 Sess. (N.Y. 2019). The Senate passed a D version of the bill on July 22, 2020, but it did not pass the Assembly before the Legislature adjourned. See S6886D, 2019–2020 Sess. (N.Y. 2020). A similar bill was introduced in the Assembly. Assemb. A103406, 2019–2020 Sess. (N.Y. 2020). Neither bill addressed New York's NPV membership. See *id.*; see also S6886D, 2019–2020 Sess. (N.Y. 2019). For the significant defects in the Senate bill, see *generally To Bind or Not to Bind*, *supra*. Such a bill was introduced in the Assembly on January 6, 2021, A765, but was not enacted. Assemb. A765, 2019–2020 Sess. (N.Y. 2021); see also *Assembly Bill A765*, The New York State Senate,

governing the voting by electors<sup>56</sup> that in turn comply with the detailed provisions of the United States Code.<sup>57</sup>

Indeed, NPV itself does not comply with those detailed federal statutes for the determination of elector appointment controversies, meetings, balloting, or signing and endorsement of certificates.<sup>58</sup>

## 7. WITHDRAWAL

NPV Article IV-2 says any state may withdraw, but not six months before the end of a presidential term and until a new president shall have “qualified,” whatever that means.<sup>59</sup> One or more withdrawing states could vitiate NPV.<sup>60</sup>

Moreover, because the Constitution gives each state legislature power to determine how its electors are appointed,<sup>61</sup> a state’s power to withdraw probably cannot be limited by a state law enacted NPV or even by a congressionally approved NPV compact.<sup>62</sup>

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<https://www.nysenate.gov/legislation/bills/2021/a765/amendment/original> (last visited Feb. 18, 2022). If New York statutorily binds its electors to vote for its presidential popular vote winners, it can no longer be an NPV member. *See 17 Reasons Why*, *supra* note 27.

<sup>56</sup> N.Y. ELEC. LAW art. 12 (McKinney 2021).

<sup>57</sup> *See, e.g.*, 3 U.S.C. §§ 5, 7, 9, 10 (2020).

<sup>58</sup> *See id.*

<sup>59</sup> EVERY VOTE EQUAL, *supra* note 21, at 259.

<sup>60</sup> *See id.*

<sup>61</sup> U.S. CONST. art. II, § 1, cl. 3; *McPherson v. Blacker*, 146 U.S. 1, 11 (1892); *see supra* note 43. *But see infra* Section I.D.7.

<sup>62</sup> *See infra* note 98. The following decisions have negative implications for NPV’s withdrawal provision. Michigan tax authorities interpreted a 2007 Business Tax Act to preclude taxpayers from using a Multistate Tax Compact formula. The Michigan Supreme Court disagreed. *IBM v. Dep’t of Treasury*, 496 Mich. 642, 667–68 (2014). In 2014, the state legislature repealed the Compact’s provision retroactively as of July 1, 2008. The Michigan Court of Appeals in effect upheld the retroactive repeal, and the Michigan Supreme Court denied review. *Gillette Comm’er Operations N. Am. & Subsidiaries v. Dep’t of Treasury*, 880 N.W.2d 230 (Mich. 2017). The United States Supreme Court denied certiorari in *Gillette*, *IBM*, and in three similar cases. *See, e.g.*, *Sunoco Prods. Co. v. Mich. Dept. of Treasury*, 878 N.W.2d 891 (Mich. Ct. App. 2015), *cert. denied*, 137 S. Ct. 2157 (2017) (mem.). Moreover, a dictum in the *Bush v. Gore* per curiam opinion implies that a state legislature can cast elector votes even after a state’s popular vote has chosen electors, 531 U.S. 98, 104 (2000), as the Florida Legislature threatened to do in 2000. *See* Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should be Changed*, 23 CARDOZO L. REV. 1159, 1162 (2002).

New Jersey's unsuccessful attempt, unilaterally, to withdraw from its congressionally approved compact with New York to create and maintain a Waterfront Commission of New York Harbor suggests that, even though NPV has not been congressionally approved, an NPV member state could stop another NPV state from withdrawing during the six-month period.<sup>63</sup>

#### 8. DISTRICT OF COLUMBIA NOT A STATE

The Twenty-third Amendment gave the District of Columbia three presidential elector votes.<sup>64</sup> It was ratified March 29, 1961, twelve years earlier than the District's home rule act.<sup>65</sup> The Amendment provides, "they shall be considered, for the purposes of the election of the President and Vice-President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided for by the twelfth article of amendment."<sup>66</sup>

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However, if the state is an elector statutorily binding state, that statute would have to be repealed first. If the state had a two-house legislature controlled by different political parties or if an executive was a member of the political party whose presidential candidate won that state's popular vote, the repeal might not pass. *Chiafalo* supports this argument, because it holds that the states can constitutionally by statute direct their electors to cast their ballots for the winners of their respective presidential/vice presidential popular elections. *Chiafalo v. Washington* 140 S. Ct. 2316, 2328 (2020). The so-called Independent State Legislature Doctrine is beyond the scope of this article, but it raises issues about the foregoing arguments. Justice Alito, with Justices Thomas and Gorsuch, dissented from the denial of an application for a stay in *Moore v. Harper*, 142 S. Ct. 1089 (2022). They argued that the North Carolina Supreme Court could not invalidate a redistricting statute for partisan Gerrymandering, because the state legislature was exercising a United States constitutional delegation of authority. *Moore v. Harper*, 90 U.S.L.W. 1, 1 (2022). In a separate opinion, Justice Kavanaugh explained his concurrence in the denial. *Id.* (Kavanaugh, J. concurring); see Jamelle Bouie, *A Theory of Election Sabotage Lives On*, N.Y. TIMES, Mar. 13, 2022 at SR.9; Noah Feldman, *Scalia's Ghost Is Haunting Conservative Justices*, <https://news.bloomberglaw.com/us-law-week/scalias-ghost-is-haunting-conservative-justices-noah-feldman>; Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 50 (2021).

<sup>63</sup> See *Waterfront Comm'n of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 236, 236 (3d Cir. 2020); see also *supra* discussion in note 40.

<sup>64</sup> U.S. CONST. amend. XXIII, § 1.

<sup>65</sup> *Id.*; *Presidential Vote for D.C.*, CONST. CTR., <https://constitution-center.org/interactive-constitution/amendment/amendment-xxiii> (last visited Mar. 14, 2022); *Popular Vote*, *supra* note 5, at 680–82.

<sup>66</sup> U.S. CONST. amend. XXIII, § 1.

Section 2 of the Twenty-third Amendment authorizes Congress to enforce “this article” by appropriate legislation.<sup>67</sup> It has not done so in any way relevant to these issues.<sup>68</sup> The Amendment’s legislative history is crystal clear that Congress did not intend the District to be considered a state for any other purpose.<sup>69</sup> Congress did not statutorily bind the District’s electors.<sup>70</sup> It did, no doubt following *Ray v. Blair*’s upholding of the Alabama party pledge, require them to swear to vote for the candidate their party nominated.<sup>71</sup> Neither Congress nor the District have enacted the legislation necessary to implement NPV.<sup>72</sup>

EVERY VOTE EQUAL, endeavors to rebut six Myths about the District of Columbia.<sup>73</sup> It argues that Congress, in the District of Columbia Home Rule Act of 1973,<sup>74</sup> *must have* implicitly delegated to the District a general, congressional power to enter into interstate compacts that it had previously exercised on behalf of the District.<sup>75</sup> But no exercise by Congress of its generalized power to legislate for

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<sup>67</sup> U.S. CONST. amend. XXIII, § 2.

<sup>68</sup> *Popular Vote*, *supra* note 5, at 680–82.

<sup>69</sup> *Id.* On June 26, 2020, the House of Representatives passed H.R. 51, which would make most of the District of Columbia a state. Richard Winger, *July 2020 Ballot Access News Print Edition*, BALLOT ACCESS NEWS (July 31, 2020), <https://ballot-access.org/2020/07/31/july-2020-ballot-access-news-print-edition/>. A companion bill, S.631, died in committee at the adjournment of the 116<sup>th</sup> Congress. S. 631 (116<sup>th</sup>): *Washington, D.C. Admission Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s631> (last visited Feb. 17, 2022). H.R. 51 was re-introduced in the House on January 4, 2021. H.R. 51, 117<sup>th</sup> Cong. (2021).

<sup>70</sup> *Popular Vote*, *supra* note 5, at 669.

<sup>71</sup> Act of Aug. 12, 1955, Pub. L. No. 87–389, § 13, 75 Stat. 818 (1961), *amended by* D.C. Code § 1-1001.08(g) (2021) (“Each person elected as elector of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he will vote for the candidate of the party he has been nominated to represent, and it shall be his duty to vote in such manner in the electoral college.”). Also, like New York and presumably other NPV states, this statute has not been amended to consider NPV. *See To Bind or Not to Bind*, *supra* note 55.

<sup>72</sup> *Popular Vote*, *supra* note 5, at 681–82.

<sup>73</sup> EVERY VOTE EQUAL, *supra* note 21, at 660–69.

<sup>74</sup> District of Columbia Home Rule Act of 1973, Pub. L. No. 93–198, 87 Stat. 774 (codified as amended at D.C. CODE §§ 1-201.01–1-201.71). The District of Columbia Self-Government and Governmental Reorganization Act contains no provision either authorizing or prohibiting the District from joining interstate compacts. *See generally id.*

<sup>75</sup> *See* EVERY VOTE EQUAL, *supra* note 21, at 223–29.

the District<sup>76</sup> could make the District a state for purposes of the Compact Clause.<sup>77</sup>

### 9. WHO WOULD BE THE NPV WINNER?

NPV Article III-2 says, “The chief election official of *each* member state shall designate the presidential slate with the *largest* national popular vote total as the ‘national popular vote winner.’”<sup>78</sup> What if the chief election officers do not agree? President Trump disputed Secretary Clinton’s and Vice President Biden’s popular votes.<sup>79</sup> NPV offers no solution.<sup>80</sup> “Largest” could mean any plurality.<sup>81</sup> EVERY VOTE EQUAL, has a useful history of recent Electoral College joint resolution constitutional amendment proposals.<sup>82</sup> Some provide for at least a forty-percent presidential plurality.<sup>83</sup>

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<sup>76</sup> U.S. CONST., art. I, § 8, cl. 17.

<sup>77</sup> See U.S. CONST., art. I, § 10, cl. 3; *Subconstitutional Means*, *supra* note 19, at 252 n. 72 (“the involvement of the District of Columbia—which is under Congress’s jurisdiction, and whose involvement without congressional approval perhaps should not count towards the magic 270 number . . .”). The Biden Administration is reported to be satisfied that Congress has the power to admit the District as a state; others are not so sure. See Charlie Savage & Emily Cochrane, *Biden Administration is Said To Quietly Push For Change in Effort for D.C. Statehood*, N.Y. TIMES, May 14, 2020, at A20. H.R. 51 would leave a rump seat of government District consisting of the Capitol, Supreme Court, White House, and principal federal buildings. *Id.* If the Twenty-third Amendment were not repealed, the rump District would still be entitled to three elector votes in addition to the five the new state would have. *Id.* Because the current Republican Senators are unlikely to vote for District statehood or to repeal the Twenty-third Amendment, H.R. 51’s future is problematic.

<sup>78</sup> EVERY VOTE EQUAL, *supra* note 21, at 259 (emphasis added). Myth 9.7.1 evades the issue raised by “largest” by rebutting a [non-existent] requirement for a majority. *Id.* at 488–90.

<sup>79</sup> Cleve R. Wootson Jr., *Donald Trump; ‘I Won the Popular Vote if You Deduct The Millions of People Who Voted Illegally’*, WASH. POST (Nov 27, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/27/donald-trump-i-won-the-popular-vote-if-you-deduct-the-millions-of-people-who-voted-illegally/>; Ella Lee, *Fact Check: Joe Biden Legally Won Presidential Election, Despite Persistent Contrary Claims*, USA TODAY (Dec. 15, 2020), <https://www.usatoday.com/story/news/factcheck/2020/12/15/fact-check-joe-biden-legally-won-presidential-election/6537586002/>.

<sup>80</sup> EVERY VOTE EQUAL, *supra* note 21, at 488.

<sup>81</sup> See *id.*

<sup>82</sup> *Id.* at 141–155.

<sup>83</sup> See *id.*

Others provide for at least thirty-percent from at least one-third of the states.<sup>84</sup> Other proposals delegate to Congress the power to determine the popular vote winner, as the most recent does.<sup>85</sup>

The absence of any NPV popular vote floor suggests that there would be more presidential candidates, reduced pluralities, and more recounts.<sup>86</sup> Those are reasons why constitutional amendment proposals for presidential popular vote usually require a majority of the popular vote or, at the least, a very substantial plurality.<sup>87</sup> Abraham Lincoln's, Woodrow Wilson's, and Bill Clinton's were the lowest first term election plurality percentages: Lincoln was just under and the other two were just over forty-percent, although each won comfortable elector vote majorities.<sup>88</sup>

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<sup>84</sup> *See id.*

<sup>85</sup> S.J. Res. 16, 116th Cong. (2019). H.J. Res. 14 was introduced in the 117<sup>th</sup> Congress on January 11, 2021. H.J. Res. 14, 117th Cong. (2021). It has not been reported by the House Judiciary Committee. *Id.*

<sup>86</sup> CONG. RSCH. SERV., R43823, *supra* note 5, at 10–11 (2019).

<sup>87</sup> *Id.* at 19.

<sup>88</sup> WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 504–05; Roy Blunt, Senate Manual, S. Doc. No. 116–1, at 680–81, 694–95, 714–15 (2d Sess. 2020) (showing elector votes for Lincoln, Wilson, and Bill Clinton). Plurality popular vote Electoral College winners are fairly common: Zachary Taylor in 1848, James Buchanan in 1856, Grover Cleveland in 1888, Woodrow Wilson in 1912, Harry Truman in 1948, Richard Nixon in 1968, Bill Clinton in both 1992 and 1996. WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 504–05. There were major third-party candidates in 1912 (former President Theodore Roosevelt) and 1948 (Senator Strom Thurmond and former Vice President Henry Wallace). *Id.* Ross Perot's unorthodox campaign in 1992 won only 19 percent of the popular vote. *See* Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 219–26 (1994). Post Twelfth Amendment popular vote winners, but Electoral College losers are rare: possibly Samuel Tilden in 1876, a very complicated case unlikely ever to be repeated, Grover Cleveland in 1884, Al Gore in 2000, another special case hopefully unlikely to be repeated, and Hillary Clinton in 2016. *See* WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 504. Rutherford B. Hayes over Samuel Tilden in 1876 and George W. Bush over Al Gore in 2000 were decided, in the former case by one Supreme Court Justice casting deciding votes on a panel delegated by Congress with resolving elector disputes, and in the latter by a bare majority of the Court itself. *See id.*; Bush v. Gore, 531 U.S. 98 (2000). This was followed by Gore's (premature) concession. *See* History.com Eds., *Al Gore Concedes Presidential Election*, HIST., <https://www.history.com/this-day-in-his->

The absence of any popular vote floor is a major flaw. A national popular vote threshold should be incorporated into NPV.

#### 10. DISPUTED POPULAR VOTES

One of the possible virtues of NPV is that every state and the District of Columbia are potential “battlegrounds.”<sup>89</sup> On the other hand, common sense tells us that this fact, plus the absence of any NPV floor,<sup>90</sup> increases the likelihood of more candidates, closer votes, and more recounts.<sup>91</sup> Scholarly opinion agrees.<sup>92</sup>

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tory/al-gore-concedes-presidential-election (last visited May 6, 2022); *see generally* MARK WESTON, *THE RUNNER-UP PRESIDENCY: THE ELECTIONS THAT DEFIED AMERICA’S POPULAR WILL (AND HOW OUR DEMOCRACY REMAINS IN DANGER)* (2016). Because no candidate had an Electoral College majority, the House elected John Quincy Adams over Andrew Jackson, the 1824 popular vote winner. Roy Blunt, Senate Manual, S. Doc. No. 116-1, 673, 116th Cong. (2d Sess. 2020). It also elected Thomas Jefferson over Aaron Burr in 1801, but that was before The Twelfth Amendment was adopted. *Id.* at 670. Ross Douthat, *Opinion A Case for the Electoral College*, N.Y. Times (Mar. 23, 2019), <https://www.nytimes.com/2019/03/23/opinion/electoral-college.html>, argues, “the electoral/popular split of 1888” and other close elections paved the way for “unifying majorities.” Your author did not find evidence that this is true. Letter from William Josephson to Ross Douthat (May 23, 2019) (on file with author); *see also* Robb, *supra* note 13, at 442–43.

<sup>89</sup> Surprisingly, EVERY VOTE EQUAL supports this proposition only obliquely. EVERY VOTE EQUAL, *supra* note 21, at 434–50. Myth 9.2 effectively rebuts the notion that “Candidates Reach Out to All the States under the Current System.” *Id.* *But see How Nationwide Presidential Campaigns Would Be Run*, NAT’L POPULAR VOTE (Jan. 7, 2017), <http://www.nationalpopularvote.com/sites/default/files/how-nationwide-campaign-would-be-run-v11-2018-1-8.pdf>, convincingly supports the proposition in the text above. *Cf.* Nate Cohn, *The Electoral College’s Real Problem: It’s Biased Toward the Big Battlegrounds*, N.Y. TIMES, Mar. 23, 2019, at A.13.

<sup>90</sup> *See supra* discussion in Section I.D.9.

<sup>91</sup> David Lubin was concerned about a plethora of recounts. *See* Stephanie Simon, *U.S. News: After Initial Success Electoral College Foes Set Sights on Higher Peaks*, WALL ST. J., Mar. 28, 2009, at A.4; David Lubin, *Popular Vote? Not Yet: Problems with a Plan to Kill the Electoral College*, WASH. POST, Jul. 16, 2007, at A.15.

<sup>92</sup> JOHN SAMPLES, *A CRITIQUE OF THE NATIONAL POPULAR VOTE PLAN FOR ELECTING THE PRESIDENT 9–11* (2008), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-622.pdf>; Smith, *supra* note 13, at 206–08; Hans. A. von Spakovksy, *Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme* (Oct. 26, 2011), <https://www.heritage.org/election-integrity/report/des>



Thus, in a close presidential election, the popular vote in many states may be disputed, as it was in the 2020 presidential election.<sup>93</sup> What do NPV states electors do, if these disputes remain unresolved by the day in December when ballots must be cast? Must they meet to cast their ballots,<sup>94</sup> as could have been the case in Florida in 2000?

#### 11. NPV UNCONSTITUTIONALLY AUTHORIZES POPULAR VOTE WINNER TO APPOINT ELECTORS

NPV Compact Article III-7 authorizes the popular vote winner, under certain circumstances, to nominate electors and requires the relevant states' presidential election officers to certify them.<sup>95</sup> Because the Constitution gives only state legislatures power to appoint electors,<sup>96</sup> NPV's delegation to the winning popular vote candidate

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troying-the-electoral-college-the-anti-federalist-national-popular. Vikram David Amar criticizes the NPV drafters because, among other things, “they did not build into the plan ‘uniform rules of voting eligibility, uniform presidential ballots, and an election dispute procedure.’” *Subconstitutional Means*, *supra* note 19, at 252. Of course, Congress has never fully exercised either its Article I, Section 4 power to “at any time by Law make or alter” the state legislatures prescriptions of “the Times, Places and Manners” of electing Senators and Representatives nor its implied power to do so for presidential election. U.S. CONST. art I, §4; *Ex parte Yarbrough*, 110 U.S. 651, 660 (1884).

<sup>93</sup> Ben Giles, *The Discredited GOP Election Review in Arizona's Largest County Also Finds Biden Won*, NPR, <https://www.npr.org/2021/09/24/1040327483/the-controversial-election-review-in-arizona-confirms-bidens-win> (last updated Sept. 24, 2021).

<sup>94</sup> 3 U.S.C. § 7 (“first Monday after the second Wednesday in December”). Professor Richard H. Pildes thinks that, though there are trade-offs, the Electoral College balloting could by law push ahead to late December or early January. Richard H. Pildes, Opinion, *State Legislatures Threaten Fair Elections*, N.Y. TIMES, Dec. 11, 2020, at A27. The difficulties that these suggestions raise are discussed at length in *Repairing*, *supra* note 10, at 168–177. This raises the issue under the Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §15). The so-called “Safe Harbor Provision” so grotesquely misconstrued in *Bush v. Gore* as to the timing of the appointment and balloting of electors. See William Josephson, *The Electoral Count Act of 1887*, N.Y.L.J. (Feb. 23, 2022, 10:00 AM), <https://www.law.com/newyorklawjournal/2022/02/23/the-electoral-count-act-of-1887/> (citing *Bush v. Gore*, 531 U.S. 98 (2000) (J. Stevens dissenting)) [hereinafter *The Electoral Count Act of 1887*].

<sup>95</sup> EVERY VOTE EQUAL, *supra* note 21, at 259.

<sup>96</sup> U.S. CONST. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 12 (1892).

of a power to appoint electors is almost certainly unconstitutional.<sup>97</sup> Even a congressionally approved compact, which NPV is not, is subject to constitutional limitations.<sup>98</sup>

## 12. UNDER NPV LARGE ELECTOR STATES COULD DOMINATE SMALL STATES

Pending post-2020 Census reapportionment, the twelve largest elector states,<sup>99</sup> California (54), Florida (30), Georgia (16), Illinois (19), Michigan (15), New Jersey (14), New York (28), North Carolina (16), Ohio (17), Pennsylvania (19), Texas (40) and Virginia (13) have 281 elector voters, a small but absolute majority.<sup>100</sup> Even if the current “Big Twelve” probably would not *now* vote for the same presidential candidate, the thirty-eight “small” states (many of which are losing population), mostly Red, are not likely to cede their presidential fate to any Big Twelve or whatever an NPV future majority may be.<sup>101</sup> The non-NPV states listed are mostly small by this

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<sup>97</sup> James W. Ceaser & Jamin Raskin, *Common Interpretation Article III, Section 1, Clauses 2 and 3*, THE CONST. CTR, <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/350> (last visited Feb 18, 2022).

<sup>98</sup> *James v. Dravo Contracting Co.*, 302 U.S. 134, 147–48 (1937); *Arizona v. California*, 292 U.S. 341, 348 (1934).

<sup>99</sup> The average number of state electors is 10.7. The mean—half of the difference between the largest, California with fifty-five, and the smallest, three—is twenty-six. This figure would leave only four “large” states. The median—twenty-five states with eight or more electors and twenty-five states with eight or less electors—does not seem right as a definition of the “largest” elector states. Four states have eleven electors, four states have ten electors, three states have nine electors, and four states have eight electors. Thirteen electors seems about right as this section’s definition of “largest.”

<sup>100</sup> Aaron Blake, *Which States Gain and Lose in the New Census Report? Here Are 3 Takeaways*, WASH. POST (Apr. 26, 2021), <https://www.washingtonpost.com/politics/2021/04/26/3-takeaways-which-states-gain-lose-new-census-report/>.

<sup>101</sup> See Dear Governor Letter, from then [House] Speaker John Boehner, then [Senate] Republican Leader Mitch McConnell, and then [Texas] Governor Rick Perry (Jun. 29, 2011) (June 29, 2011) (on file with author) (“to put the fate of every presidential election in the hands of the voters in as few as 11 states”).

The Electoral College is not some footnote to the founding of the Republic. Rather, after considerable debate over various options—from the national popular vote to election by the House of Representatives—it was decided upon as one of numerous checks on the aggregation of power in any one place or among

article's standard. From the small state's point of view, NPV would vitiate the purpose of the Electoral College which, of course, is NPV's intention.<sup>102</sup>

### 13. NPV IMPERMANENCE AND REAPPORTIONMENT

An Electoral College majority is not static, but NPV seems to assume that it is.<sup>103</sup> If the NPV states ever constitute an elector majority, demographic changes will almost certainly alter it. Yet, NPV ignores that, even though it must know that the allocation of electors among the states changes, as a result of reapportionment of House

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any particular group. It underscores the importance of federalism to the founders and it embodies the balance they aimed to achieve through deference to states with smaller populations and by ensuring that the interests of these states be reflected in national decision-making. *Id.*

Peter Baker & Maggie Haberman, *The Election is Over, But Trump Can't Seem to Get Past it*, N.Y. TIMES (May 14, 2017) <https://www.nytimes.com/2017/05/13/us/politics/election-is-over-but-trump-still-cant-seem-to-get-past-it.html>. President Trump was wrong. The extra two Electoral College votes each state gets favors the smaller, often rural, Republican states. Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html>. President H.W. Bush carried 40 states in 1988, President W. Bush carried 30 in 2000 and 31 in 2004, winning respectively 80 extra elector votes in 1988, 60 in 2000 and 62 in 2004. See U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 2012-2013, at 249 (2012) (showing elector votes in 1988, 2000 and 2004). However, the New York Times printed a map. Nate Cohn, *Trump's Electoral College Edge Could Grow in 2020, Rewarding Polarizing Campaign*, N.Y. TIMES (Jul. 19, 2019), <https://www.nytimes.com/2019/07/19/upshot/trump-electoral-college-edge.html>. The map shows states where President Trump's approval rating was 52 percent or more. *Id.* The elector votes of those states do not come close to an elector majority. *Id.* Since President Harry S. Truman's term ended in 1953, the Republican Party has elected seven presidents, three for two terms, and the Democratic Party six, two for two terms. See *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, HISTORY, ART, & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Presidents-Coinciding/Presidents-Coinciding/> (last visited Feb. 18, 2022); *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, HIST, ART, & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Presidents-Coinciding/Presidents-Coinciding/> (last visited Feb. 18, 2022).

<sup>102</sup> 9.4 *Myths About the Small States*, NAT'L POPULAR VOTE, [https://www.nationalpopularvote.com/section\\_9.4](https://www.nationalpopularvote.com/section_9.4) (last visited Feb 18, 2022).

<sup>103</sup> EVERY VOTE EQUAL, *supra* note 21, at 259.

of Representatives seats after the Census every ten years.<sup>104</sup> If any NPV member's Electoral College majority is no longer an elector majority, what happens to NPV? Is it suspended until it regains a majority? NPV does not say.<sup>105</sup> This is yet another complication for any NPV state legislature.

#### 14. NPV COMPACT NOT CONGRESSIONALLY APPROVED

The Constitution provides that interstate compacts are to be approved by Congress.<sup>106</sup> EVERY VOTE EQUAL says, “[t]he National Popular Vote plan is an interstate compact,”<sup>107</sup> but the NPV compact does not provide for congressional approval.<sup>108</sup> Akil Amar suggests

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<sup>104</sup> U.S. Const., art. I, § 3. No state can have less than one representative. *Id.* at art. I, § 2, cl. 4. Apportionment of representatives among the states after a census can never be perfect. *See* U.S. Dep’t of Commerce v. Montana, 503 U.S. 442, 442–43 (1992). The Trump Administration abandoned its effort to add a citizenship question to the 2020 Census after the Supreme Court in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019), remanded the case. Bob Van Voris, *Trump Administration Agrees to Order Ending Census Fight*, (Jul. 18, 2019), <https://www.bloomberg.com/news/articles/2019-07-16/trump-administration-agrees-to-final-order-ending-census-fight>. The Trump Administration also wanted the 2020 Census to end on September 30, 2020, but a federal district judge ordered it to continue until October 31. *Nat’l Urban League v. Ross*, 491 F. Supp. 3d 572, 575 (N.D. Ca. 2020). The Supreme Court decided that the September 30 deadline should not be extended, *Ross v. Nat’l Urban League*, 141 S. Ct. 18, 18 (2020), but the appeal actually significantly extended the Census. The Trump Administration also wanted the Census not to count immigrants, but the Supreme Court decided not to decide that issue. *Trump v. New York*, 141 S. Ct. 530, 536–37 (2020). As a result of these litigations, the 2020 Census results were not available by the December 31, 2020 deadline. Michael Wines & Emily Bazelon, *A New Delay for Census Numbers Could Scramble Congressional Elections*, N.Y. Times, (Feb. 12, 2021), <https://www.nytimes.com/2021/02/11/us/us-census-figures-delay.html>. Thus, House reapportionment has been delayed. *Id.* One of President Joseph H. Biden’s acts on January 20, 2021, his first day in office, was to sign an Executive Order, “Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census.” Exec. Order No. 13986, 86 Fed. Reg. 7015 (Jan. 14, 2021).

<sup>105</sup> EVERY VOTE EQUAL, *supra* note 21, at 259–260.

<sup>106</sup> U.S. CONST., art. I, § 10, cl.3. *Why the NPV is Unconstitutional*, *supra* note 29, at 1539, thinks this issue is “of secondary importance.” It is actually quite important.

<sup>107</sup> EVERY VOTE EQUAL, *supra* note 21, at 626.

<sup>108</sup> *Id.* at 259.

NPV may not be a compact, because it does not create a “new interstate governmental apparatus.”<sup>109</sup> However, this suggestion is not consistent with the Supreme Court’s jurisprudence on what is a compact.<sup>110</sup>

EVERY VOTE EQUAL argues, in Myth 9.16.5,<sup>111</sup> that “under established compact jurisprudence, congressional consent would not be necessary for the [NPV] compact to become effective,” although it also says that it is “working to obtain support for the compact in Congress.”<sup>112</sup>

House Concurrent Resolution No. 79 provided insight as to Congress’s views:

(1) Congress and the States should consider *a constitutional amendment* to reform the Electoral College and establish a process for electing the President and Vice President by a national popular vote; and

(2) Congress should encourage the States to continue to reform the Electoral College process through *such steps* as the formation of an interstate compact to award the majority of Electoral College votes to the national popular vote winner.<sup>113</sup>

This resolution did not emerge from the House Judiciary Committee.<sup>114</sup> No similar concurrent resolution was introduced in the Senate.<sup>115</sup> No such or similar resolution has been introduced in the 116th Congress, nor as of December 31, 2021, in the 117th Congress.<sup>116</sup>

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<sup>109</sup> Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO NORTHERN U.L. REV. 467, 478 (2007).

<sup>110</sup> See *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893); *Northeast Bancorp, Inc., v. Bd. of Governors of the Fed. Rsrv. Sys.*, 472 U.S. 159, 175–77 (1985); CONG. RSCH. SERV. R43823, *supra* note 5, at 21–26.

<sup>111</sup> EVERY VOTE EQUAL, *supra* note 21, at 631.

<sup>112</sup> *Id.*

<sup>113</sup> H.R. Con. Res. 79, 115th Cong. (2017) (emphasis added).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Tara Ross, writing at a very early stage in the development of NPV (which she calls “De Facto Direct Election”), said, “[t]his alternative plan would allow a handful of states to do an end-run around the [constitutional] amendment requirements.”<sup>117</sup> She developed these arguments with particular focus on the issues raised by lack of congressional NPV compact approval.<sup>118</sup>

Questions regarding the NPV’s status as an interstate compact and whether it is subject to congressional approval has engendered much disagreement among law review authors. There are articles arguing that congressional approval of the compact is necessary.<sup>119</sup> Alternatively, there are articles arguing that congressional approval is not required.<sup>120</sup>

The Supreme Court held in *United States Steel Corp. v. Multistate Tax Commission*, that the Multistate Tax Compact did not need congressional approval, because (1) it did not increase the political power of the states that are parties, (2) encroach on the political

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<sup>117</sup> TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 156–58 (2004) [hereinafter, ENLIGHTENED DEMOCRACY]. *But see* GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2004) (attacking the Electoral College as a political institution).

<sup>118</sup> Tara Ross, *Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 J. FEDERALIST SOC’Y PRACTICE GROUPS 37, 39–41 (2010). Myth 9.16.5 devotes pages to trying to refute her. *See* EVERY VOTE EQUAL, *supra* note 21, at 634–38.

<sup>119</sup> Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. LEGIS. 205, 213 (2007) (“The constitutionality of the NPV interstate compact has not been definitively established.”); *see* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L. J. 372, 393 (2007) [hereinafter *The Compact Clause and the National Popular Vote Interstate Compact*]; *see generally* Derek T. Muller, *More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks*, 7 ELECTION L. J. 227, 227 (2008) [hereinafter *More Thoughts*]; Michael T. Morley, *The Framers’ Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, 15 HARV. L. & POL’Y REV. 81 (2020). While Morley says congressional approval is probably not needed, the Constitutional critiques he makes of the NPV, support arguments that congressional approval is required. *See id.* at 94.

<sup>120</sup> *See generally* Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College*, 7 ELECTION L. J. 218, 219 (2008); Robb, *supra* note 13, at 454; Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717 (2007); Robbins, *supra* note 13, at 4.

power of the non-party states, or (3) encroach on federal supremacy.<sup>121</sup>

Here, the NPV should be congressionally approved. NPV increases the political power of states that are parties as opposed to states that are not, especially if the NPV states constitute a majority of elector votes but are a minority of the states.<sup>122</sup> NPV does this by requiring the states to cast their elector votes for the national popular vote winner, even if the people of those states did not so vote.<sup>123</sup> This increases the elector votes of the national popular vote winner, even if it lost the Electoral College as traditionally counted.<sup>124</sup> This would be to the disadvantage of non-NPV states whose voters and electors did not vote for the national popular vote winner, especially if their presidential candidate would have won an elector majority.<sup>125</sup>

NPV also encroaches on the United States interest in presidential elections that conform to the intent of the Framers and the Twelfth Amendment. As we have seen, the Framers rejected popular election and delegated the presidential election authority to the individual states legislatures.<sup>126</sup> NPV could become effective, as we have seen, if only the current twelve largest elector states joined.<sup>127</sup> Even if the people of *none* of the Big Twelve voted for the national popular vote winner, the Big Twelve, if NPV members, would still be required by NPV to elect the popular vote winner President.<sup>128</sup> That would be inconsistent with Article II, as amended by the Twelfth Amendment, and the intent of the Framers in rejecting popular election of the President.<sup>129</sup> As Tara Ross argued, NPV “would allow a handful of states to do an end-run around the [constitutional] amendment requirements[.]”<sup>130</sup>

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<sup>121</sup> 434 U.S. 452, 452 (1978); see also Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003) (challenging this decision).

<sup>122</sup> *The Compact Clause and the National Popular Vote Interstate Compact*, *supra* note 119, at 390–392.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

<sup>126</sup> Morley, *supra* note 119, at 89, 94.

<sup>127</sup> *See supra* Section I.D.12.

<sup>128</sup> ENLIGHTENED DEMOCRACY, *supra* note 117, at 157.

<sup>129</sup> Morley, *supra* note 119, at 89, 94.

<sup>130</sup> *See* ENLIGHTENED DEMOCRACY, *supra* note 117, at 156–57.

Vikram David Amar, one of the godfathers of NPV, grappled with the issues of Congress' power, in approving compacts, to legislate "a national uniform poll."<sup>131</sup> His arguments are replete with "might" (Fourteenth Amendment), "possibility" (general welfare power), "initial promise" (the Necessary and Proper Clause combined with compact approval) and "most promising so far" ("the federal power to safeguard elections of federal officers").<sup>132</sup>

Even if the NPV compact were submitted to Congress, it is unlikely to approve it, because the Red State senators and representatives would likely oppose it for the same reasons they have and would likely continue to oppose a constitutional amendment to provide for popular presidential election.<sup>133</sup>

Finally, if a Congress did approve the NPV compact, a Republican President would likely veto it, because the Electoral College works to that party's advantage and is likely to continue to do so.<sup>134</sup>

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<sup>131</sup> See *Subconstitutional Means*, *supra* note 19, at 250 n.65, 253, 257–260. Amar has recently said that NPV requires congressional approval. Vikram David Amar, *Three Observations About the (Limited) Impact of the Tenth Circuit's Recent Decision (in Baca v. Colorado Dep't of State) Concerning "Faithless" Electors in the Electoral College*, VERDICT (Sept. 5, 2019), <https://verdict.justia.com/2019/09/05/three-observations-about-the-limited-impact-of-the-tenth-circuits-recent-decision-in-baca-v-colorado-department-of-state-concerning-faithless-electors-in-the-electoral>.

<sup>132</sup> See generally *Subconstitutional Means*, *supra* note 19. Amar is probably referring to the two cases where the Supreme Court created an implied power in Congress to enact laws to protect from fraud or corruption the process by which legally qualified persons are chosen and vote as presidential electors. See *Ex parte Yarbrough*, 110 U.S. 651, 658–59 (1884); *Burroughs v. United States*, 290 U.S. 534, 544–45 (1934). Nothing in those cases nor in the Compact Clause jurisprudence would authorize Congress to enact a "national uniform poll." See *Subconstitutional Means*, *supra* note 19, at 253. Richard Winger of Ballot Access News wrote the author ". . . a congressional vote to approve the [NPV] compact only needs a majority vote, whereas a constitutional amendment needs two-thirds." E-mail from Richard Winger to William Josephson (July 4, 2018, 11:02 pm PDT) (on file with author). But as the author replied to Mr. Winger, the then eleven NPV states had only 22 votes in the Senate, and the states that had rejected NPV or not joined had 78 Senate votes.

<sup>133</sup> NEAL R. PIERCE, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY 183–86* (1968); Robb, *supra* note 13, at 451–52; *supra* Section II.D.12.

<sup>134</sup> See Dear Governor Letter, *supra* note 101.



Congressional compact approvals take the form of joint resolutions.<sup>135</sup> Joint resolutions, like acts, require a presidential signature.<sup>136</sup> There is at least one precedent for such a veto. President Franklin D. Roosevelt vetoed one compact.<sup>137</sup>

#### 15. FOURTEENTH AMENDMENT

David Gringer<sup>138</sup> argues that NPV would violate sections two and five of the 1965 Voting Rights Act.<sup>139</sup> Myth 9.20 devotes two and a half pages to rebutting Gringer's argument.<sup>140</sup> Its most telling point is its assertion that, after California joined NPV in 2011 (Assembly Bill No. 459), it received a section 5 pre-clearance.<sup>141</sup>

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<sup>135</sup> CONG. RSCH. SERV. R43823, *supra* note 5, at 26.

<sup>136</sup> U.S. CONST. art. I, § 7, cl. 3.; THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 115-177, at 1141 (2019). Constitutional amendment joint resolutions do not require presidential approval, although the Presentment Clause might suggest otherwise. U.S. CONST. art. I, § 7, cl. 3. Nevertheless, President Lincoln signed the Thirteenth Amendment Joint Resolution. U.S. CONST. amend. XIII. Both the Senate and the House objected. CONG. GLOBE, 38th Cong., 2d Sess. 629–631 (1865); S. JOURNAL, 38th Cong., 2d Sess. 144 (1865). No joint resolution amending the Constitution has since been signed by a President. *See Ratifying the Thirteenth Amendment, 1866*, GILDER LEHRMAN <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/ratifying-thirteenth-amendment-1866> (last visited on Mar. 16, 2022). Article V confers the power to admit new states on Congress, but not in the context of a legislative act subject to the presentation clause. U.S. CONST. art. V.

<sup>137</sup> CONG. RSCH. SERV. R43823, *supra* note 5, at 26 n.162.

<sup>138</sup> *See* David Gringer, *Note Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 183, 187–219, 227–29 (2008).

<sup>139</sup> 52 U.S.C. §§ 10302, 10304 (2020).

<sup>140</sup> EVERY VOTE EQUAL, *supra* note 21, at 654–56.

<sup>141</sup> *Id.* at 656 n.476 (citing Letter from T. Christian Harren, Civil Rights Division, Department of Justice, to Robbie Anderson, Senior Election Counsel, State of California (Jan. 13, 2012)).

Other NPV Equal Protection issues have been raised under the Fourteenth Amendment,<sup>142</sup> but the issue of federal power over presidential elections is fraught.<sup>143</sup>

## 16. UNCERTAINTY

As Robert Alexander says:

Lastly, because the NPV plan does not occur through the amendment process, it would be open to change from one election to another. The failure to establish a long-term resolution to the presidential selection process is viewed as a significant weakness. This concern is often coupled with the charge that the plan is an “end run” around the Constitution. One of the objectives of the NPV plan is to increase legitimacy in the presidential selection process. However, changing the Electoral College process through a compact among a minority of states would run counter to this aim. The promise of court battles, elector lobbying, and confusion among voters would represent significant hurdles for advocates of the NPV plan.<sup>144</sup>

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<sup>142</sup> See Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 881–87 (2002); Morley, *supra* note 119, at 107–116. *Contra* *McPherson v. Blacker*, 146 U.S. 1, 11 (1892) (rejecting Fourteenth and Fifteenth Amendment Equal Protection and related arguments against a state’s legislature’s plenary authority under Article II and the Twelfth Amendment to change its state’s method of appointing electors).

<sup>143</sup> See e.g., Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 839–41 (2001); James C. Kirby, Jr., *Limitations on the Powers of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 496 (1962).

<sup>144</sup> PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra* note 15, at 189; WESTON, *supra* note 88, at 130–34 (generally agreeing with these points). *But see* Jesse Wegman, *Why Do We Have an Electoral College Again?*, N.Y. TIMES, (Jan. 25, 2020), <https://www.nytimes.com/2020/01/25/opinion/sunday/electoral-college-supreme-court.html>; Jesse Wegman, *What if We Just Counted Up All the Votes for President and Saw Who Won?*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/opinion/sunday/presidential->

## II. THE REALITY OF ELECTOR VOTING BY THE UNIT RULE

### A. History

In all states, except Maine and Nebraska, and in the District of Columbia, presidential electors vote by the unit rule, that is to say unanimously, for their state's popular presidential vote winner.<sup>145</sup>

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election-popular-vote.html; a version of which article appeared under the title, Jesse Wegman, *The Electoral College Is Past Its Sell-By Date*, N.Y. TIMES, Mar. 15, 2020, at SR2; Jesse Wegman, *Electors, Now Even More Irrelevant*, N.Y. TIMES, July 7, 2020, at A18; Jesse Wegman, *The Electoral College Will Destroy America*, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/09/08/opinion/electoral-college-trump-biden.html>; accord JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT (2020). Cornell Law professor Josh Chafetz noted:

Wegman leaves largely unaddressed how the compact interacts with the patchwork of state laws governing elections. How do we count the popular vote in Maine, given that state's adoption of ranked choice voting? What would happen if a state lowered the voting age to 16? What if there is a dispute as to who actually won the nationwide popular vote?

Josh Chafetz, *Why We Should Abolish the Electoral College*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/books/review/let-the-people-pick-the-president-jesse-wegman.html>. Wegman's book has trappings of scholarship, pages of acknowledgements and endnotes. But in fact it is an anti-NPV polemic. It cites none of the many defenses of the Electoral College, nor any of the NPV analyses or criticisms. A recent suggestion is far more fanciful than NPV. AMERICAN ACADEMY OF ARTS AND SCIENCES, OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY IN THE 21ST CENTURY 22–24 (2020) (“[recommending] substantially enlarge[ing] the House of Representatives through federal legislation to make it and the Electoral College more representative of the nation's population.”).

<sup>145</sup> Maine and Nebraska each elect one elector for each congressional district. See *Repairing*, *supra* note 10, at 160 & n.98. Both are binding states. PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra* note 15, at 134. If either joined NPV, no change in state public policy would be required. See *id.* Both of Maine's congressional districts are politically competitive, while only Nebraska's second congressional district, encompassing Omaha, is politically competitive. Jillian Goodman & Zachary Mider, *The Little Blue Dot Irritating Nebraska's GOP*, BLOOMBERG BUSINESSWEEK, Sept. 28–Oct. 2, 2016, at 28; J. Miles Coleman, *The Electoral College: Maine and Nebraska's Crucial Battleground Votes*, UVA CTR FOR POL. (Jan. 9, 2020), <https://centerforpolitics.org/crystalball/articles/the-electoral-college-maine-and-nebraskas-crucial-battleground-votes/>. In 2020, President Trump won Maine's second congressional district, and former Vice President Biden won Nebraska's. Dionne Searvey, *Could Omaha Swing the Race? In 2020, Nothing is Impossible*, N.Y. TIMES,

The unit rule is also called “Winner-Takes-All,” but that is almost always used pejoratively.<sup>146</sup> *McPherson v. Blacker* carefully traces the emergence of unit rule elector voting by 1832.<sup>147</sup>

The drift to the general ticket [Wechsler’s phrase for the unit rule] was inevitable given the demand for popular participation in the choice and the fact that the choice of electors by districts . . . would normally divide the state’s electoral votes. . . . The most important consequence for present purposes is the casting of electoral votes in state units yields electoral majorities, despite third-party candidates . . . .<sup>148</sup>

The unit rule’s evolution is also summarized by Brandon H. Robb.<sup>149</sup> NPV has its own take on this history.<sup>150</sup>

#### B. *Arguments Against the Unit Rule*

As has often been the case in this article, scholarly opinion on the unit rule is divided.<sup>151</sup>

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<https://www.nytimes.com/2020/11/04/us/biden-nebraska-electoral-college.html> (Jan. 20, 2021). Colorado decided not to follow the Maine and Nebraska examples. Kirk Johnson, *Electoral Vote Redistribution Is Defeated*, N.Y. TIMES, Nov. 3, 2004, P9.

<sup>146</sup> *Id.* at 161 n.98.

<sup>147</sup> 146 U.S. 1, 32–33 (1892).

<sup>148</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 553 (1954). The unit rule enhances the importance of each state’s electors votes in contrast to their dilution if they were allocated to more than one candidate. See Jesse Wegman, *Joe Biden Won the Most Votes. It Doesn’t Matter.*, N.Y. TIMES (Dec. 13, 2020), <https://www.nytimes.com/2020/12/13/opinion/electoral-college-trump-election.html>. The foregoing was to have been an Op. Ed., not an Editorial, written by Jesse Wegman. See *Corrections: Dec. 15, 2020*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/pageoneplus/corrections-dec-15-2020.html>.

<sup>149</sup> Robb, *supra* note 13, at 435–39.

<sup>150</sup> *Equal Citizens Asks Supreme Court to Declare Winner-Take-All Unconstitutional*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/equal-citizens-asks-supreme-court-declare-winner-take-all-unconstitutional> (last visited Feb. 10, 2022).

<sup>151</sup> See discussion *infra* Sections II.B.1–2.

## 1. EQUAL PROTECTION

Lawrence Lessig was one of the attorneys for the Washington State “faithless” elector in *Guerra/Chiafalo* and for the Colorado “faithless” in *Baca*.<sup>152</sup> On December 4, 2016, he circulated “The Equal Protection argument against “winner-take-all” in the Electoral College.”<sup>153</sup> As an aside, Lessig asserted that his argument against the unit rule would not “render vulnerable” the NPV which he described as “a brilliant idea.”<sup>154</sup> But if a state adhered to NPV, it would *have to* instruct its electors to vote by the unit rule in any election to which NPV applied.<sup>155</sup>

Lessig’s Equal Protection argument against the unit rule is consistent with his unsuccessful arguments for elector discretion he made in *Guerra/Chiafalo* and *Baca*.<sup>156</sup> Lessig acknowledged that Christopher Duquette and David Schultz made the Equal Protection argument against the unit rule more than 15 years ago.<sup>157</sup> They knew that the Supreme Court in 1966 refused, in its original jurisdiction, to hear the suit by Delaware against the other 49 states and the District of Columbia to declare unconstitutional the application of the unit rule to elector voting.<sup>158</sup>

Michael J. O’Sullivan made this argument against the unit rule more than 30 years ago.<sup>159</sup> Neither Lessig nor Duquette and Schultz cited Sullivan.<sup>160</sup> Furthermore, neither Lessig, nor Duquette and

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<sup>152</sup> See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2316–19 (2020); *Colo. Dep’t of State v. Baca*, 140 S. Ct. 2316, 2316 (2020).

<sup>153</sup> Lawrence Lessig, *The Equal Protection Argument Against “Winner Take All” in The Electoral College*, MEDIUM (Dec. 4, 2016), <https://medium.com/equal-citizens/the-equal-protection-argument-against-winner-take-all-in-the-electoral-college-b09e8a49d777> [hereinafter *Argument Against Winner Take All*].

<sup>154</sup> *Id.*

<sup>155</sup> See *supra* Part I.

<sup>156</sup> See *Argument Against Winner Take All*, *supra* note 153.

<sup>157</sup> *Id.*; see Christopher Duquette & David Schultz, *One Person, One Vote and the Constitutionality of the Winner-Take-All Allocation of Electoral College Votes*, 2 TENN. J.L. POL’Y 453, 463 (2005).

<sup>158</sup> *Delaware v. New York*, 385 U.S. 895, 895 (1966).

<sup>159</sup> Michael J. O’Sullivan, Note, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2447 (1992).

<sup>160</sup> See *Argument Against Winner Take All*, *supra* note 153; Duquette & Schultz, *supra* note 157.

Schultz, cited Matthew J. Festa<sup>161</sup> who argued, convincingly, twenty years ago that such a lawsuit would fail as a violation of state sovereignty.

One of Lessig's Harvard 3L auditors, Brenden Cline, circulated *Problems with the Equal Protection Argument Against "Winner Take All" in the Electoral College*,<sup>162</sup> because the Supreme Court had already summarily upheld unit rule elector voting.<sup>163</sup>

As we have seen, *McPherson v. Blacker* also upheld elector unit rule voting against Fourteenth and Fifteenth Amendment attacks.<sup>164</sup>

Lessig promised a fuller Equal Protection argument that appeared in 2017.<sup>165</sup> As was true in the case of legal scholarly opinion

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<sup>161</sup> Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2142 (2001).

<sup>162</sup> Brenden Cline, *Problems with The Equal Protection Argument Against "Winner Take All" in the Electoral College*, MEDIUM (Jan. 7, 2017), <https://medium.com/@BrendenCline/problems-with-the-equal-protection-argument-against-winner-take-all-in-the-electoral-college-8cedc5b722b7>.

<sup>163</sup> *Williams v. Virginia St. Bd. of Elections*, 288 F. Supp. 622, 629 (E.D. Va. 1968), *aff'd per curiam*, 393 U.S. 320, 320 (1969) (three judge court). *Williams* has been followed in six recent District Court cases. Ross Todd, *Boies-Led Coalition Challenges "Winner-Take-All" Method of Electoral College*, LAW.COM (Feb. 21, 2018, 3:35 PM), <https://www.law.com/sites/therecorder/2018/02/21/boies-led-coalition-challenges-winner-take-all-method-of-electoral-college/>; *Rodriguez v. Brown*, No. 2:18-cv-001422, 2018 U.S. Dist. LEXIS 221795, at \*11 (C.D. Cal. Sept. 21, 2018) (granting defendant's motion to dismiss an attack on California's elector unit rule, rejecting various First and Fourteenth Amendment arguments and considering itself bound by *Williams*); The Ninth Circuit affirmed *sub nom.* *Rodriguez v. Newsom*, 974 F. 3d 998, 1011 (9th Cir. 2020). To a similar result, *Lyman v. Baker*, 352 F. Supp. 3d 81, 92 (D. Mass. 2018), *aff'd*, 954 F.3d 351 (1st Cir. 2020). The complaint was dismissed in *Baten v. McMaster*, 374 F. Supp. 3d 563, 571 (D.S.C. 2019), *aff'd*, 967 F. 3d 345 (4th Cir. 2020). The complaint was also dismissed in *League of United Latin American Citizens v. Abbott*, 369 F. Supp. 3d 768, 787 (W.D. Tex. 2019), *aff'd*, 951 F.3d 311, 318 (5th Cir. 2020); *Accord*, *Conant v. Brown*, 248 F. Supp. 3d 1014, 1028 (D. Or. 2017); *Schweikert v. Herring*, No. 16-cv-00072, 2016 U.S. Dist. LEXIS 166854, \*8 (W.D. Va. Dec. 2, 2016).

<sup>164</sup> 146 U.S. 1, 37–39 (1892).

<sup>165</sup> Lawrence Lessig, *The Equal Protection Challenge to Winner Take All: A Legal Guide*, MEDIUM (Sep. 14, 2017), <https://medium.lessig.org/the-equal-protection-challenge-to-winner-take-all-a-legal-guide-ce99747e5001>. The cases rejecting the equal protection challenge to the unit rule cited were all decided after Lessig published in 2017. *See surpa* note 163. It does not follow that the arguments he made in 2017 were before the courts in each of those cases, but the weight of authority continues to be against his equal protection argument.

on the congressional approval of the NPV compact, scholarly opinion with respect to merits of the unit rule is divided.<sup>166</sup>

## 2. PROPORTIONATE ELECTOR VOTING

Katherine Florey published the most comprehensive recent article against the unit rule.<sup>167</sup> She concludes that, “the winner-take-all mechanism stands out starkly as the most harmful and least defensible”<sup>168</sup> aspect of the Electoral College. Her argument begins:

[T]he electoral college allocates power among the states based on total population rather than voters, allowing groups such as nonvoters, children and disenfranchised felons to count in the determination of each state’s relative share of the electoral vote.<sup>169</sup>

These groups are part of the constitutional basis for apportionment of the electors, plus two for each state’s senators.<sup>170</sup>

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<sup>166</sup> See e.g., Smith, *supra* note 13, at 205–06 (defending the unit rule); Williams & MacDonald, *supra* note 88, at 264 (“[O]ne person, one vote’ should be extended to the presidential election process either by court challenge, or more preferably, by constitutional amendment.”). There are also at least two outliers. TWENTIETH CENTURY FUND TASK FORCE ON REFORM OF THE PRESIDENTIAL ELECTION PROCESSES, WINNER TAKE ALL 5 (1978) (supporting the unit rule by proposing to add 102 elector vote bonus, two for each state and two for the District of Columbia); Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 926–27 (1992) (proposing uncoupling elector votes for Vice President from those for President). Why the United States should revert to the pre-Twelfth Amendment situation of possibly politically incompatible Presidents and Vice Presidents is not clear.

<sup>167</sup> See generally Florey, *supra* note 8.

<sup>168</sup> *Id.* at 395. Of course, the unit rule was not part of the constitutional Electoral College. See Robb *supra* 13, at 336–39.

<sup>169</sup> Florey, *supra* note 8, at 320–21 (footnotes omitted). Though not central to her article, the one-person-one-vote Supreme Court cases state the historical basis for using population instead of voters and defend it on public policy and political grounds. See *Repairing* *supra* note 10, at 163–66. Florey omits immigrants from her list. See generally Florey, *supra* note 8. President Trump proposed to eliminate them from the determination of the total population for purposes of the Census. See generally *Trump v. New York*, 141 S. Ct. 530 (2020).

<sup>170</sup> U.S. CONST. art I, § 2, cl. 3; *Id.*, art. II, § 1, cl. 2, which Florey acknowledges, “[a]fter all, seats in the House . . . are apportioned the same way.” Florey,

She asserts that Secretary Clinton “would have won the electoral vote under a proportional scheme,” citing Lessig.<sup>171</sup> Two studies illustrate the difficulties of allocating elector votes proportionately to the popular vote in each state as Lessig also apparently advocates.<sup>172</sup> Using preliminary Associated Press results in 2000, *Ballot Access News* concluded that Governor Bush would have received 259 votes and Vice President Gore 257 votes, Ralph Nader seven and fifteen missing or unallocated elector votes.<sup>173</sup> No candidate would have had an absolute elector majority, thus throwing the election of the President to the House and of the Vice President to the Senate.<sup>174</sup>

The second study is credited by Lessig to Jerry L. Simms.<sup>175</sup> Under his 2016 allocation, Trump would have 263 votes, and Clinton 270 votes, a bare majority.<sup>176</sup> A third-party candidate would have gotten one Utah elector vote, presumably McMullin with 243,690 popular votes.<sup>177</sup> For Arkansas, Idaho, Montana, the Dakotas, West Virginia and Wyoming, Secretary Clinton’s popular vote margin was extremely narrow.<sup>178</sup> The possibility of default elections of the President by the gerrymandered House state delegations with one vote each and of the Vice President by an absolute majority of the Senate would have been real, thus creating the possibility that the President and/or the Vice President would not be the winners of the popular vote.<sup>179</sup> Under the Twelfth Amendment, the House would elect from the three persons with the most elector votes, the Senate from the two.<sup>180</sup>

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*supra* note 8, at 321. Apportionment is objectively determined based on the Census. *About Congressional Apportionment*, U.S. Census Bureau, <https://www.census.gov/topics/public-sector/congressional-apportionment/about.html> (Nov. 22, 2021).

<sup>171</sup> Florey, *supra* note 8, at 323 n.22.

<sup>172</sup> See *Argument Against Winner Take All*, *supra* note 153; see also Bob Bickford, *Apportioned 2000 Electoral Vote*, *BALLOT ACCESS NEWS*, <http://www.ballot-access.org/2000/apportion.html> (last visited Feb. 9, 2022).

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> See *Argument Against Winner Take All*, *supra* note 153.

<sup>176</sup> *Id.*

<sup>177</sup> Florey, *supra* note 8, at 359.

<sup>178</sup> *2016 Presidential Election Results*, *N.Y. TIMES* (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president>.

<sup>179</sup> See *Senate Election*, *supra* note 10 *passim*.

<sup>180</sup> See U.S. CONST. amend. XII.



Query, would the Twelfth Amendment's command override Senate Rule XXII which would require a super majority vote to make such election the pending Senate business or to close debate?<sup>181</sup>

And if no person have a majority [for Vice President], then from the two highest members on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice . . . .<sup>182</sup>

Ross Perot, Ralph Nader, John Anderson or other significant third-party candidates could have thrown presidential elections to the House and the vice presidential to the Senate.<sup>183</sup> In 1992, Mr. Ross Perot had 19% of the vote, the largest for a third candidate since former President Theodore Roosevelt in 1912 took votes from

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<sup>181</sup> SENATE MANUAL, S. Doc. No. 116-1, § 20.2 (2d Sess. 2020). The Senate Parliamentarian Emeritus, Alan Scott Frumin, citing in addition 3 U.S.C. §§ 15–17, thinks that a plausible argument could be made that consideration of the choice of the Vice President by the Senate might be ruled “privileged,” such that no debatable motion to proceed would be required, nor would cloture be applicable. Email from Alan Scott Frumin to June Little Sept. 9, 2019, 12:36 PM). (on file with author). The Twelfth Amendment requires the House of Representatives to begin voting to elect a President “immediately.” U.S. CONST. amend. XII. The Amendment contains no such requirement for the Senate vote to elect a Vice President, perhaps to enable the Senate to elect a compatible Vice President or, if the House fails to elect a President by March 4, a Vice President who could serve for the remainder of the term as Acting President. *See id.* Perhaps the closeness of the 2020 presidential elections in Arizona, Georgia, Nevada, Pennsylvania and Wisconsin will cause Florey and Lessig to rethink their opposition to the unit rule. *Narrow Wins In These Key States Powered Biden To The Presidency*, NPR, (Dec. 2, 2020 5:00 AM), <https://www.npr.org/2020/12/02/940689086/narrow-wins-in-these-key-states-powered-biden-to-the-presidency>. Such closeness increases the possibility of House election of the President and Senate election of the Vice President. *See* U.S. CONST. amend. XII.

<sup>182</sup> U.S. CONST. amend. XII.

<sup>183</sup> *See* Richard Winger, *July 2018 Ballot Access News Print Edition*, BALLOT ACCESS NEWS (Jul. 1, 2018), <https://ballot-access.org/2018/07/30/july-2018-ballot-access-news-print-edition/>.

President William Howard Taft, electing Woodrow Wilson President.<sup>184</sup> Perot probably contributed to President Bill Clinton's win over the first President Bush.<sup>185</sup> Mr. Nader continues to deny that he cost Vice President Gore the 2000 election.<sup>186</sup>

Florey argues that substituting some proportional system for the unit rule will make more states competitive.<sup>187</sup> That is probably true,

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<sup>184</sup> *Plurality Wins in the 1992 Presidential Race: Perot's Contribution to Clinton's Victory*, CTR. FOR VOTING AND DEMOCRACY, <http://archive.fairvote.org/plurality/perot.htm> (Dec. 10, 2009).

<sup>185</sup> *See id.*

<sup>186</sup> *See* Ralph Nader, Opinion, *From Ralph Nader: Don't Blame Third Parties*, N.Y. TIMES (Oct. 6, 2016) <https://www.nytimes.com/2016/10/06/opinion/from-ralph-nader-dont-blame-third-parties.html>; Richard Winger, *July 2018 Ballot Access News Print Edition*, BALLOT ACCESS NEWS (Jul. 1, 2018), <https://ballot-access.org/2018/07/30/july-2018-ballot-access-news-print-edition/> [hereinafter *July 2018 Ballot Access News*] (“Ralph Nader’s vote in Florida was widely credited with causing the election of George W. Bush instead of Al Gore.”). Is it likely that in 2000 Nader’s votes would have gone to Governor Bush? If not, and if substantial amounts of Nader’s votes were added to Gore’s, Gore would have won Florida, New Hampshire, and Oregon. WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 510, 524, 530.

<sup>187</sup> Florey, *supra* note 8, at 323–24. Florey asserts that “the two-vote [senatorial Electoral College] bonus plays a relatively small role in the electoral college’s operation.” *Id.* at 321. The “bonus” plays a large role. *See supra* note 101. She says, “Of the last four elections, for example, . . . in none of these elections would eliminating the bonus have altered the electoral result.” Florey, *supra* note 8, at 330 n.62. If the bonus were eliminated, of course by constitutional amendment, the elector vote total would drop by 102 from 538 to 436. So, the new majority would be 219. The total popular votes in 2004, 2008, 2016 and 2020 were not particularly close. *See United States Presidential Election of 2004*, Britannica, <https://www.britannica.com/event/United-States-presidential-election-of-2004> (last visited Mar. 16, 2022); *2016 Presidential Election Results*, *supra* note 178; *2020 Presidential Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> (last visited Mar. 16, 2022), But the election was close in 2000. *See* Michael Levy, *United States Presidential Election of 2000*, Britannica, <https://www.britannica.com/event/United-States-presidential-election-of-2000#ref285282> (last visited Mar. 16, 2022) Governor Bush carried 30 states. *Id.* If his elector total of 271 were reduced by 60 (30 x 2), his elector total would have been 211, not the new absolute majority, thus throwing the presidential election to the House. The House was meant to be the ‘grand repository of the democratic principle of government’ as distinguished from the Senate’s function as the forum of the states.” Wechsler, *supra* note 148, at 546 n. 6 (citing George Mason). However, Gerrymander has so distorted the political

but as we have seen, that also means more close votes in more states, more recounts, more opportunities for regional, sectional or third party spoilers, more incentives for voter fraud and for voter suppression, more likelihood that no one will have an elector majority, and thus more presidential elections by the gerrymandered House state delegations.<sup>188</sup> None of these are good outcomes.

At several points, Florey opines that the unit rule, “illustrate[s] some of the perils of disproportionately rewarding narrow victories,” without apparently realizing that “fraud and violence” are just as, or even more, likely, when the majorities are smaller, as they would be in proportioned plans.<sup>189</sup>

Florey is right to say that the unit rule, “heightens the risk of a popular-electoral split.”<sup>190</sup> She describes the popular elector votes splits in the elections of 1824, 1876, 1888 and 2016, but does not seem to believe that their rarity is material.<sup>191</sup> 1876–77 and 2000 were *sui generis*.<sup>192</sup> Only 1888 and 2016 were unambiguous popular elector votes splits.<sup>193</sup> Yet, she argues that these few splits “should

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composition of each House state delegation that Wechsler was prescient in arguing that presidential elections should be kept out of the House. *Id.* at 534; see *Senate Election*, *supra* note 10 *passim*. Gerrymander could have been called “Henrymander” or “Madisonmander.” Elizabeth Kolbert, *Drawing the Line How Redistricting Turned America from Blue to Red*, NEW YORKER, June 27, 2016, <https://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting> (discussing) the fascinating story of how Patrick Henry failed to redistrict Madison out of election to the first Congress from Virginia’s Fifth District. For the history of Gerrymander, see *The Natural and Political History of Gerrymander*, 1 AMERICAN HIST. REC. & REPOSITORY 504 (1872).

<sup>188</sup> See *Senate Election*, *supra* note 10, at 623–46. Florey acknowledges, in another context and in a footnote, the increased possibility of House presidential elections under a proportional system. Florey, *supra* note 8, at 326 n.40; see also CONG. RSCH. SERV. R43823, *supra* note 5, at 10–11. The Framers regarded the House as the ultimate “umpire” in presidential elections. THE FEDERALIST NO. 66, at 404 (Alexander Hamilton) (Clinton Rositer ed., 1961); *Id.* NO. 68, at 414 (Alexander Hamilton). See Slonim, *supra* note 14, at 56 n.48.

<sup>189</sup> Florey, *supra* note 8, at 342.

<sup>190</sup> *Id.* at 345.

<sup>191</sup> *Id.* at 338–44. The 1800–1801 elector tie was prior to the 1804 Twelfth Amendment. See *Document for December 9th: 12 Amendment*, NAT’L ARCHIVES, <https://www.archives.gov/historical-docs/todays-doc/index.html?dod-date=1209> (last visited Mar. 17, 2022).

<sup>192</sup> See Smith, *supra* note 13, at 206, 213.

<sup>193</sup> See *id.* at 207, 213–214.

prompt new reflection about both the likely frequency and the legitimacy of popular-electoral splits.”<sup>194</sup> Citing Lessig, she again asserts that “under the most commonly proposed system of proportional vote allocation, Clinton would have prevailed.”<sup>195</sup>

Close presidential popular votes like 1960 and 2000 are rare.<sup>196</sup> Indeed, President Kennedy’s 303 Electoral College votes presumably contributed to President Nixon’s concession and to popular acceptance of the Kennedy/Johnson presidency.<sup>197</sup> Yet, Florey thinks that such decisive elector votes are bad, “the winner-take-all system . . . [can] create ‘false mandates’—electoral-vote results that suggest a more decisive win than is reflected in the popular vote.”<sup>198</sup>

Some paragraphs are bewildering. She attributes to “happencestance” that President Trump’s “voters happened to be slightly more efficiently distributed,” though she acknowledges that “some might not see this outcome as happenstance . . . .”<sup>199</sup> In fact, President Trump followed the Nixon, W. Bush, strategy: Southern states, Midwestern states including Ohio, Great Plains states.<sup>200</sup> Moreover, Florey acknowledges that “Clinton’s campaign was heavily criticized

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<sup>194</sup> Florey, *supra* note 8, at 347.

<sup>195</sup> *Id.* at 348 n.167.

<sup>196</sup> O’Sullivan, *supra* note 159, at 2432.

<sup>197</sup> *See id.* at 2432 n.73.

<sup>198</sup> Florey, *supra* note 8, at 356. Questions have been raised about the 1960 Illinois popular vote count for Senator Kennedy. If Illinois’s then elector votes had been awarded to Vice President Nixon, Kennedy would still have had an absolute elector majority of 276. *See* Scott Bomboy, *The Drama Behind President Kennedy’s 1960 Election Win*, COST. DAILY (Nov. 7, 2007), <https://constitution-center.org/blog/the-drama-behind-president-kennedys-1960-election-win/>; Irwin F. Gellman, *CAMPAIGN OF THE CENTURY: KENNEDY, NIXON, AND THE ELECTION OF 1960*, YALE UNIVERSITY PRESS (2022) (*passim*) (describing alleged Texas vote fraud). But even if Texas’s elector votes had been added to Nixon’s, which seems unlikely since Kennedy’s margin in Texas exceeded 46,000 votes, Kennedy would still have had an Electoral College majority. *See* Jeff Shesol, *Did John F. Kennedy and the Democrats Steal the 1960 Election?*, N.Y. Times (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/books/review/campaign-of-the-century-kennedy-nixon-1960-irwin-f-gellman.html>. Senator Harry Byrd of Virginia had 15 elector votes. *See* *1960 Electoral College Results*, NAT’L ARCHIVES, <https://www.archives.gov/electoral-college/1960> (last visited Mar. 22, 2022).

<sup>199</sup> Florey, *supra* note 8, at 348.

<sup>200</sup> WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 503–04.

for devoting insufficient resources to the upper Midwest states she lost narrowly.”<sup>201</sup>

It is hard to see why it is desirable for an electoral system to require candidates to focus on gaining narrow tactical advantages, or skill that bears little relationship to governing and that, presumably, often comes at the expense of addressing concerns of the electorate as a whole[.]<sup>202</sup>

The quote above leaves one sometime vice-presidential campaign manager, election data analyst, and federal and state agency counsel wondering if campaigns are about anything but “narrow tactical advantages.”<sup>203</sup> One rarely has the exceedingly good fortune to work for predictably large popular vote winners like General then President Dwight D. Eisenhower in 1952 and 1956,<sup>204</sup> President Lyndon Baines Johnson in 1964,<sup>205</sup> and Governor then President Ronald Reagan in 1980 and 1984.<sup>206</sup> Nevertheless, they campaigned as if they had no assurance of victory.<sup>207</sup>

Florey is correct when she says that “winner-take-all creates little incentive on the part of campaigns to increase voter participation in states that are reliably red or blue,”<sup>208</sup> but wrong when she says, “winner-take-all provides a powerful incentive for campaigns to

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<sup>201</sup> Florey, *supra* note 8, at 348.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See* The Eds. of Encyc. Britannica, *United States Presidential Election of 1952*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1952> (last visited Mar. 17, 2022); The Eds. of Encyc. Britannica, *United States Presidential Election of 1956*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1956> (last visited Mar. 17, 2022).

<sup>205</sup> *See* Michael Levy, *United States Presidential Election of 1964*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1964> (last visited Mar. 17, 2022).

<sup>206</sup> *See* The Eds. of Encyc., *The United States Presidential Election of 1980*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1980> (last visited Mar. 17, 2022); The Eds. of Encyc., *The Presidential Election of 1984*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1984> (last visited Mar. 17, 2022).

<sup>207</sup> *See* Robb, *supra* note 13, at 446, 458.

<sup>208</sup> Florey, *supra* note 8, at 349; *see supra* Section I.D.10.

commit fraud in close states.”<sup>209</sup> Common sense and experience tell us that fraud *and voter suppression*, which Florey does not mention, are much more likely to take place in states where the elections are expected to be close,<sup>210</sup> such as, voter suppression in Wisconsin in the 2016 presidential election,<sup>211</sup> the Georgia gubernatorial race,<sup>212</sup> and the North Carolina congressional race in 2018.<sup>213</sup> In 2018, a North Carolina pastor took that risk and paid the price.<sup>214</sup> Florey quotes a Trump campaign official boasting that “we have three major voter suppression operations under way,” but she does not describe them.<sup>215</sup> Actually, these voter suppression efforts were directed at African Americans, young women, and white, educated liberals—not geographically.<sup>216</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See* Salvador Rizzo, *Hillary Clinton’s Claims About Voter Suppression in Georgia and Wisconsin*, WASH. POST (Mar. 6, 2019), <https://www.washingtonpost.com/politics/2019/03/06/hillary-clintons-claims-about-voter-suppression-georgia-wisconsin/>.

<sup>212</sup> *See* P.R. Lockhart, *The Lawsuit Challenging Georgia’s Entire Elections System, Explained*, VOX, <https://www.vox.com/policy-and-politics/2018/11/30/18118264/georgia-election-lawsuit-voter-suppression-abrams-kemp-race> (May 30, 2019, 5:00 PM).

<sup>213</sup> *See* Doug Bock Clark, *The Tearful Drama of North Carolina’s Election-Fraud Hearings*, THE NEW YORKER (Feb. 4, 2019), <https://www.newyorker.com/news/dispatch/the-tearful-drama-of-north-carolinas-election-fraud-hearings>.

<sup>214</sup> *See id.*

<sup>215</sup> Florey, *supra* note 8, at 352 (citing Joshua Green & Sasha Issenberg, *Inside the Trump Bunker, With Days to Go*, BLOOMBERG (Oct. 27, 2016, 6:00 AM), <http://www.bloomberg.com/news/articles/2016-10-27/inside-the-trump-bunker-with-12-days-to-go>). The New York Times’s Jim Rutenberg has long reported on voter suppression. *See, e.g.*, Jim Rutenberg, *A Dream Undone: Inside the 50-Year Campaign to Roll Back the Voting Rights Act*, N.Y. TIMES (Jul. 29, 2015), <https://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html> [hereinafter *A Dream Undone*]; Jim Rutenberg, *The Attack on Voting*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html> [hereinafter *The Attack on Voting*]; Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump’s Fraud Claims Died in Court, But the Myth of Stolen Elections Lives On*, N.Y. TIMES, <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> (Oct. 11, 2021).

<sup>216</sup> *See A Dream Undone, supra* note 215; *see also The Attack on Voting, supra* note 215.

Also counterintuitive is Florey's assertion that the unit rule makes more likely "Third Party Mischief and Spoiler Effects."<sup>217</sup> Again, common sense and experience suggest that mischief and spoilers are more likely to have election consequences when election systems produce close rather than decisive results. For example, Ralph Nader in Florida, New Hampshire, and Oregon in the year 2000.<sup>218</sup> As we have seen, since the two party system became entrenched in the mid-nineteenth century, no "spoiler" affected the presidential result, except for Nader in 2000 and when the Republican Party split in 1912.<sup>219</sup>

"Finally, winner-takes-all confers immense power on an entirely arbitrary group of voters: swing voters in battleground states."<sup>220</sup> Florey advocates instead of the unit rule, "a system of proportional allocation."<sup>221</sup> This "entirely arbitrary group" is exactly the appropriate target group for candidates.<sup>222</sup> Moreover, a proportioned system would confer immense power on a much larger group of voters: voters in any of the fifty states where the popular vote would be close.<sup>223</sup> This could be a good result, but it would further complicate presidential elections.

A proportional elector voting system would require fifty states and the District of Columbia, separately, to adopt identical or substantially identical, presidential election laws—an unlikely event.<sup>224</sup>

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<sup>217</sup> Florey, *supra* note 8, at 358.

<sup>218</sup> See WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 510, 524, 530; See *July 2018 Ballot Access News*, *supra* note 186; see also Charlie Cook, *The Next Nader Effect*, N.Y. TIMES (Mar. 9, 2004), <https://www.nytimes.com/2004/03/09/opinion/the-next-nader-effect.html>.

<sup>219</sup> See WORLD ALMANAC AND BOOK OF FACTS, *supra* note 46, at 503.

<sup>220</sup> Florey, *supra* note 8, at 354.

<sup>221</sup> *Id.* at 378. In American politics, as in certain sports, the winner usually does take all. See *supra* note 148. Proportional voting in the United States is rare. See Florey, *supra* note 8, at 362. Even where ranked choice voting is being adopted, the winner wins, and the loser or losers lose. See Anna Purna Kambhampaty, *New York Votes Just Adopted Ranked-Choice Voting in Elections. Here's How it Works*, TIME (Nov. 6, 2019, 5:45 PM), <https://time.com/5718941/ranked-choice-voting/>.

<sup>222</sup> Florey, *supra* note 8, at 354.

<sup>223</sup> See *id.* at 378.

<sup>224</sup> See Charlotte Hill & Lee Drutman, Opinion, *America Votes by 50 Sets of Rules. We Need a Federal Elections Agency*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/opinion/election-federal-agency-voting.html>

Florey concedes, “[t]he proportional system would be complicated, requiring not only the oddity of fractional allocation of votes but additional measures to prevent plurality-winner elections from being decided by the House.”<sup>225</sup>

She rejects runoffs in a footnote,<sup>226</sup> but then she says, “[l]ike-wise, if the role of the House in resolving presidential contests is problematic, it could be replaced by another mechanism such as a runoff.”<sup>227</sup> This would, of course, require a constitutional amendment, both House and Senate so voting by two-thirds majorities, and three-quarters of the states ratifying it<sup>228</sup>—also unlikely to happen.

Florey is against the congressional district elector voting system, like Maine and Nebraska, because it “would simply replicate the winner-take-all problem on a smaller scale,” even though it would actually be a form of proportional voting.<sup>229</sup>

Florey’s last section discusses the courts and the unit rule.<sup>230</sup> She dismisses *Williams v. Virginia State Board of Elections*,<sup>231</sup> which, as we have seen, sustained the unit rule against an Equal Protection attack.<sup>232</sup> The Supreme Court, in the seminal case, *McPherson v. Blacker*, rejected Fourteenth and Fifteenth Amendment arguments against the unit rule.<sup>233</sup> She only cites *Blacker* once.<sup>234</sup> She does not elaborate on its careful, step-by-step history of the unit rule’s evolution.<sup>235</sup> She is aware of two of the recent district court cases that follow *Williams*,<sup>236</sup> but does not appear to accord them any weight.<sup>237</sup>

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ml. The Constitution confers on Congress the power to regulate “Times, Places and Manner” of congressional elections, U.S. CONST. art. I, § 4, cl. 1, but the responsibility for places and manner has largely been left to state legislatures.

<sup>225</sup> Florey, *supra* note 8, at 389.

<sup>226</sup> *Id.* at 389 n.404.

<sup>227</sup> *Id.* at 378.

<sup>228</sup> U.S. CONST. art. V.

<sup>229</sup> Florey, *supra* note 8, at 378–80, 384–85.

<sup>230</sup> *Id.* at 392.

<sup>231</sup> *Id.* at 393.

<sup>232</sup> *Williams v. Virginia St. Bd. of Elections*, 288 F. Supp. 622, 627 (E.D. Va. 1968), *aff’d per curiam*, 393 U.S. 320 (1969).

<sup>233</sup> 146 U.S. 1, 37 (1892).

<sup>234</sup> Florey, *supra* note 8, at 394 fn. 434.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 393.

<sup>237</sup> *Id.*; *see supra* notes 44, 46.



Floreay concludes not with a plea for proportionality, but, “[d]irect popular election is, for fairly obvious reasons, an intuitively appealing alternative that has long been the favored choice of electoral college reformers.”<sup>238</sup>

### III. THREE-FIFTHS OF OTHER PERSONS: OLD LIGHT ON AN OLD ISSUE

The debate over the extent to which, if at all, the Electoral College had its origin in slavery continues seemingly unabated. Sean Wilentz, a Princeton University historian, recently published *No Property in Man: Slavery and Antislavery at The Nation’s Founding*.<sup>239</sup> Its publication was followed by his *New York Times* Op-Ed that began: “I used to favor amending the Electoral College, in part because I believed the framers put it into the Constitution to protect slavery. I said as much in a book I published in September. But I’ve decided I was wrong. That’s why a merciful God invented second editions.”<sup>240</sup> He was contemporaneously “rebutted” by Akhil Reed Amar.<sup>241</sup>

Nicolas Guyatt, a fellow of Jesus College, Cambridge, negatively reviewed *No Property in Man*.<sup>242</sup> This provoked a reply from

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<sup>238</sup> *Id.* at 381.

<sup>239</sup> See generally SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AT THE NATION’S FOUNDING* (2018).

<sup>240</sup> Sean Wilentz, Opinion, *The Electoral College Was Not a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 4, 2019), <https://www.nytimes.com/2019/04/04/opinion/the-electoral-college-slavery-myth.html>.

<sup>241</sup> Akhil Reed Amar, Opinion, *Actually the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html>.

<sup>242</sup> See Nicholas Guyatt, *How Proslavery Was the Constitution?*, N.Y. REV. (Jun. 6, 2019), <https://www.nybooks.com/articles/2019/06/06/how-proslavery-was-the-constitution/> (“Instead Wilentz focuses on the way in which the Deep South delegates, occasionally (but not always) supported by their fellow slaveholders in the upper South, were frustrated in their efforts to obtain an even more proslavery Constitution.”).

Wilentz, supported by another American historian, James Oakes, of the Graduate Center of The City University of New York.<sup>243</sup>

Juan F. Perea's discussion about slavery protection and the Electoral College,<sup>244</sup> sheds little light on this controversy. Perea's anal-

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<sup>243</sup> Sean Wilentz & James Oakes, *No Property in Man: An Exchange*, N.Y. REV. (Jun. 27, 2019), <https://www.nybooks.com/articles/2019/06/27/no-property-in-man-wilentz-guyatt-exchange/>. See ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 179, 258–259 (Kathleen McDermott ed., 2020); Alexander Keyssar, Opinion, *How Has the Electoral College Survived for This Long?*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/opinion/electoral-college-racism-white-supremacy.html> [hereinafter *How Has the Electoral College Survived?*]. In both his New York Times article and book, Keyssar argues that the Electoral College survived because of white supremacy. *Id.*; KEYSSAR, *supra*, at 190. He concedes that historians disagree about the centrality slavery played in the adoption of the Electoral College. *How Has the Electoral College Survived?*, *supra*. Central to Keyssar's argument are two 1970 Senate votes to close debate on Senator Birch Bayh's constitutional amendment to substitute for the Electoral College popular election of the President and Vice President. See KEYSSAR, *supra*, at 239–44. Two-thirds of senators present and voting were then required to close debate. *Id.* The vote on September 17 failed, 54 ayes to 36 nays; the second on September 23 failed, 53 ayes to 34 nays. See 116 Cong. Rec. 32357 & 34034 (1970). Keyssar attributes the defeats to southern senators. KEYSSAR, *supra*, at 259. Twenty senators from Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina and Virginia voted against cloture, plus one each from border states Kentucky, Oklahoma, Tennessee, Texas and West Virginia. Cong. Rec. 32357 & 34034 (1970), nowhere near enough to block cloture. Five of the 25 were Republicans. See *id.* They were joined by 17 Republican senators from 14 western and midwestern states, including party leaders or future party leaders like Senator Barry Goldwater of Arizona and Senator Robert Dole of Kansas. See *id.* Without those 22 Republican nay votes, cloture would have passed, presumably Senator Bayh's constitutional amendment would have been sent to the states, where it would have faced an uncertain future. How many of those Republicans would agree with Keyssar that they voted to uphold white supremacy? The debate roars on. See NOAH FELDMAN, THE BROKEN CONSTITUTION: LINCOLN, SLAVERY AND THE REFOUNDING OF AMERICA (2021); Sean Wilentz, *Was the Constitution Proslavery? Jefferson Davis Thought So. Abraham Lincoln Didn't.*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/books/review/noah-feldman-the-broken-constitution.html>; James Oakes, *Was Emancipation Unconstitutional?*, N. Y. REV. (May 2, 2022), <https://www.nybooks.com/articles/2022/05/12/was-emancipation-constitutional-feldman-oakes/>.

<sup>244</sup> See Perea, *supra* note 8, at 1087–91, 1102 (discussing the national popular vote and the unit rule in addition to slavery's impact on the Electoral College).

ysis cites some original sources including the Constitution, Madison's Notes, and *The Federalist*.<sup>245</sup> However, most of his citations are to secondaries.<sup>246</sup> He ignores, with one exception that he cites but does not discuss,<sup>247</sup> sources that address the complexity of the relationship between the "three-fifths of all other Persons" phrase and the Electoral College.<sup>248</sup> He also fails to address the significance of the College's two elector "bonus" votes that are derived from the constitutional structure of the Senate and are an equal, if not greater, factor in the Big State-Small State presidential election, Constitutional Convention compromise.<sup>249</sup>

Article I, section two, clause three of the Constitution begins, "Representatives and direct taxes shall be apportioned among the several States."<sup>250</sup> Apportionment mainly occupied the Constitutional Convention from early June 1787 to July 12, when the quoted language was, in principle, approved.<sup>251</sup>

Farrand prints the resolution from the Convention's Journal kept by its Secretary, William Jackson:<sup>252</sup>

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Perea also discusses voter qualification and suppression and felon disenfranchisement, issues beyond the scope of this article. *See, e.g.*, Juan F. Perea, *Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 101 (2011); Juan F. Perea, *Race and Constitutional Law Casebooks: Reorganizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1125–1127 (2012).

<sup>245</sup> Perea, *supra* note 8, at 1083–85 nn.7–14, 1088–89 nn.22–23, 1091 n.41, 1097 n.84.

<sup>246</sup> *See generally id.*

<sup>247</sup> *See id.* at 1086 n.17 (citing James Oakes, "The Compromising Expedient": *Justifying A Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2023–27 (1996)) [hereinafter *Compromising Expedient*].

<sup>248</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>249</sup> *See* U.S. CONST. art. II, § 1, cl. 2; *see also supra* note 187; Badger, *supra* note 101.

<sup>250</sup> U.S. CONST. art. I, § 2, cl. 3 (emphasis added). So important to the Framers was the requirement of fiscal apportionment that it was repeated, "No Capitation, or other direct, Tax shall be laid, except in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4. It was also repeated in section 2 of the Fourteenth Amendment. U.S. CONST. amend XIV, §2.

<sup>251</sup> Farrand, *supra* note 16, at 590–91.

<sup>252</sup> The Convention appointed William Jackson as its Secretary, but his journal is not regarded as reliable when compared to Madison's. *See* Farrand, *supra* note 16, at xvi. Jackson's journal was not published until 1818. *Id.* at xi–xii. Madison's Notes were published after his death in 1836. *Id.* at xv. As various Convention

It was moved and seconded so to alter the last clause adopted by the House that together with the amendment proposed the whole should read as follows namely

“Provided always that representation ought to be proportioned according to direct Taxation, and in order to ascertain the alteration in the direct Taxation which may be required from time to time by the changes in the relative circumstances of the States— Resolved that a Census be taken within two years from the first meeting of the Legislature of the United States, and once within the term of every \_\_\_\_ years afterwards of all the inhabitants of the United States in the manner *and according to the ratio recommended by Congress in their resolution of April 18. 1783*—and that the Legislature of the United States shall proportion the direct Taxation accordingly.”

It was moved and seconded to strike out the word “Two” and insert the word “Six”

which passed in the affirmative [Ayes—5; noes—4; divided—I.]

[To fill up the blank with the number “Twenty” in taking the Census. Ayes—3; noes—7.]

It was moved and seconded to fill up the blank with the word “Ten”

which passed in the affirmative [Ayes—8; noes—2.]

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journals and notes were published, Madison obtained copies and considered them. *See id.* at xvi. Farrand’s footnotes indicate changes that Madison made. *See generally id.* Nicolas Guyatt cites Mary Sarah Bilder, who believes that “on the subject of slavery . . . Madison tinkered with the transcript of 1787 to make himself seem more righteous than he actually had been.” Guyatt, *supra* note 242. Farrand’s footnotes do not support her assertion with respect to Electoral College issues, and neither Wilentz nor Oakes responded to it. *See* Farrand, *supra* note 16; Willentz & Oakes, *supra* note 243.

*It was moved and seconded to strike out the words “in the manner and according to the ratio recommended by Congress in their recommendation of April 18, 1783—and to substitute the following namely “of every description and condition” which passed in the negative. [Ayes—2; noes—8.]*

The question being about to be put upon the clause as amended—The previous question was called for, and passed in the negative. [Ayes—I; noes—8; divided—I.]<sup>253</sup>

The ratio recommended by the Continental Congress on April 18, 1783, was three-fifths.<sup>254</sup> Its resolution is printed in the appendix to the article.<sup>255</sup>

Note the eight to two rejection of the motion to strike the 1783 incorporation by reference of the three-fifths phrase made by Charles Cotesworth Pinkney of South Carolina with Georgia only voting with South Carolina rather than Virginia, North Carolina, Delaware, or Maryland.<sup>256</sup> Had it passed, Blacks would have been counted as whites, an enormous House of Representatives advantage to the southern states, but also an enormous revenue burden.<sup>257</sup> Because the Electoral College was not only not agreed to in July, but barely mentioned before the last days of the Convention in

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<sup>253</sup> Farrand, *supra* note 16, at 590 (emphasis added). The principal purpose of the Continental Congress’s resolution of April 18, 1783, was to provide financing for Revolutionary War debt. See History.com Eds., *Continental Congress*, HIST. (Feb. 4, 2010), <https://www.history.com/topics/american-revolution/the-continental-congress>; see also *U.S. Debt and Foreign Loans 1775-1795*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/loans> (last visited Mar. 17, 2022). On about March 15, 1783, preliminary peace with Britain was announced in the United States. GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 33 (2017). The Peace Treaty was signed in Paris on September 5. *Id.* at 34. He devotes little attention to the issues raised by slavery. *Id.* at 289. Van Cleve’s detailed discussion of 1783 taxes does not mention the three-fifths phrase. See generally *id.* at 89–96.

<sup>254</sup> See *infra* Appendix.

<sup>255</sup> See *id.*

<sup>256</sup> MADISON, *supra* note 15, at 281.

<sup>257</sup> See *id.*

September, it was not an explicit issue in the run up to the July 12, 1787 vote.<sup>258</sup>

The motion in its original form was made by large southern state representative Edmund Randolph of Virginia, later to become the first Attorney General of the United States, and seconded by small northern state representative Oliver Ellsworth of Connecticut.<sup>259</sup> The amended Randolph Ellsworth motion passed six ayes, two noes, two divided, with Massachusetts divided, Connecticut aye, New Jersey no, Pennsylvania aye, Delaware no, Maryland aye, Virginia aye, North Carolina aye, South Carolina divided, and Georgia aye.<sup>260</sup> Apparently, no delegates from New Hampshire or New York were present.<sup>261</sup> Note that on one of the most crucial votes of the Convention the slave states did not vote together, the small states did not vote together, the big states did not vote together, and the northern states did not vote together.<sup>262</sup>

The most important point is that three-fifths was *not* an invention of the Convention, but an incorporation by reference of a 1783 resolution of the Articles of Confederation Continental Congress.<sup>263</sup> Perhaps there are prior or subsequent Continental Congress precedents, but a search for them is beyond the scope of this article.

The Convention, in this respect, did what politicians and lawyers often do, fall back on precedent, especially with respect to politically charged and complex issues.<sup>264</sup> After a thorny issue is resolved and if its resolution still seems to work, politicians and lawyers adhere to the precedent.<sup>265</sup> In the case of the Convention, a substantial number of the delegates were lawyers.<sup>266</sup> Historian James Oakes is aware of this precedent but accords it little, or even no, weight.<sup>267</sup>

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<sup>258</sup> See generally Farrand, *supra* note 16.

<sup>259</sup> MADISON, *supra* note 15, at 279.

<sup>260</sup> *Id.* at 282.

<sup>261</sup> See MADISON, *supra* note 15, at 282.

<sup>262</sup> See *id.*

<sup>263</sup> See *infra* Appendix.

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> Nat'l Const. Ctr. Staff, *Law Day: 10 Famous People Who Were Lawyers*, INTERACTIVE CONST. (May 1, 2021), <https://constitutioncenter.org/interactive-constitution/blog/law-day-2013-10-famous-people-who-were-lawyers>.

<sup>267</sup> *Compromising Expedient*, *supra* note 247, at 2040–41.

Two readings of Madison's Notes make clear that there were several key issues to those at the Convention: (1) the limited sources of revenue and wealth available to the future United States Government, (2) land, (3) customs duties, (4) tariffs and (5) slaves.<sup>268</sup> Thus, Article I, section eight, clause one gives Congress the power to collect taxes, duties, imports and excises, though duties, imports and excises have to be "uniform throughout the United States."<sup>269</sup> Because of mainly southern states fears that the foregoing power could be exercised to abolish the slave trade, Article I, section nine, clause one limited the tax or duty thereon to "not exceeding ten dollars" per person.<sup>270</sup> Article I, section nine, clause five provides, "No Tax or Duty shall be laid on Articles exported from any state."<sup>271</sup> As we have seen, Article I, section nine, clause four, another Apportionment Clause, says, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."<sup>272</sup> Both Apportionment Clauses were modified only with respect to income taxes, by the Sixteenth Amendment.<sup>273</sup>

In this context, the Apportionment Clauses appear to be among the many compromises—like the limitation on the importation of slaves,<sup>274</sup> the Fugitive Slave clause,<sup>275</sup> tax-free exportation,<sup>276</sup> no preferential treatment among ports<sup>277</sup>—that the thirty-six delegates (of the original fifty-five) who signed the Constitution felt they had to produce a constitution that would be ratified by at least nine and hopefully all of the former colonies.<sup>278</sup>

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<sup>268</sup> See generally MADISON, *supra* note 15.

<sup>269</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>270</sup> U.S. CONST. art. I, § 9, cl. 1.

<sup>271</sup> U.S. CONST. art. I, § 9, cl. 5.

<sup>272</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>273</sup> See Daniel Hemel & Rebecca Kysar, Opinion, *The Big Problem with Wealth Taxes: Proposals by Senators Warren and Sanders May Not Pass Constitutional Muster. Then What?*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html> (fiscal apportionment remains an issue even today).

<sup>274</sup> U.S. CONST. art. I, § 9, cl. 1.

<sup>275</sup> U.S. CONST. art. IV, § 2, cl. 3.

<sup>276</sup> U.S. CONST. art. I, § 9, cl. 5.

<sup>277</sup> U.S. CONST. art. I, § 9, cl. 6.

<sup>278</sup> See U.S. Const. art. VII.

Perea views some of these compromises *only* as “Echoes of Slavery.”<sup>279</sup> His connecting the Apportionment Clauses to the Electoral College and slavery is an opinion held by others cited in his article.<sup>280</sup> His principal authority appears to be Paul Finkelman whom he cited half a dozen times.<sup>281</sup> Perea is particularly tough on James Madison. He quotes from the Notes one of his statements, citing two pages of Farrand.<sup>282</sup>

The quotation is part of Madison’s reply to Oliver Ellsworth, a small state (Connecticut) delegate fearful, like Patterson, of the big states:

But [Madison] contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: it lay between the Northern & Southern. *and if any defensive power were necessary, it ought to be mutually given to these two interests.* He was so strongly impressed with this important truth that he had been casting about in his mind for some expedient that would answer the purpose.<sup>283</sup>

However, Perea omits the crux of Madison’s statement that follows the foregoing quote immediately:

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<sup>279</sup> Perea, *supra* note 8, at 1083–87.

<sup>280</sup> *See id.* at 1082 n.5, 1086 n.17, 1088 n.21, 1089 n.26, 1090 n.28.

<sup>281</sup> *See id.*; *see generally* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1146–47 (2002); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE NAME OF JEFFERSON* (2d ed. 2001).

<sup>282</sup> Perea, *supra* note 8, at 1084 n.13. (Perea’s citation in footnote thirteen, specifically to page 322 of Farrand, is inaccurate because it marks the end of Madison’s June 19, 1787 eight part discourse on William Paterson’s New Jersey Plan that began on page 315. The quote appears on page 486; *see* Farrand *supra* note 16, at 486.

<sup>283</sup> Farrand, *supra* note 16, at 486 (emphasis added).



The one which had occurred was that instead of proportioning the votes of the States in both branches, to their respective numbers of inhabitants counting the slaves in the ratio of 5 to 3. They should be represented in one branch according to the free inhabitants only. . . . By this arrangement the Southern States would have advantage in the House, and the Northern in the other.<sup>284</sup>

This debate took place on June 30, 1787, nearly two weeks before the adoption in principle of the principal Apportionment Clause on July 12.<sup>285</sup> The context of this debate was how to provide for the common defense, given the great differences in wealth among states.<sup>286</sup> Ellsworth immediately replied, defending Connecticut's contribution of men to the Revolutionary War even in Virginia, thus confirming that their debate was about the common defense.<sup>287</sup>

Perea also cites the *Federalist No. 54*, explaining the three-fifths phrase and Madison's June 17, 1788, speech at the Virginia ratification convention.<sup>288</sup> But there Madison was defending the compromises that produced the Constitution that he and others desperately wanted ratified.<sup>289</sup>

Perea does not quote or cite Madison's Convention account on July 11, 1787, the day before adoption of the Apportionment Clause.<sup>290</sup> The account unwisely omitted is a plea for representation by total inhabitants particularly as western states join the Union.<sup>291</sup>

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<sup>284</sup> *Id.* at 486–87. Among the many seminal American histories grappling with these issues, Perea fails to cite one of the very first. See Henry Wiencek, *The Dark Side of Thomas Jefferson*, SMITHSONIAN MAG. (Oct. 2012), <https://www.smithsonianmag.com/history/the-dark-side-of-thomas-jefferson-35976004/>.

<sup>285</sup> Farrand, *supra* note 16, at 486–87, 590–91.

<sup>286</sup> See Farrand, *supra* note 16, at 487.

<sup>287</sup> See *id.*

<sup>288</sup> Perea, *supra* note 8, at 1084–85.

<sup>289</sup> See *id.*; see also *Compromising Expedient*, *supra* note 247, at 2052.

<sup>290</sup> See generally Perea, *supra* note 8.

<sup>291</sup> See Farrand, *supra* note 16, at 578. (“Unless some principle therefore which will do justice to them hereafter [the Southern States] shall be inserted in the Constitution, *disagreeable as the declaration was to him . . .*”). Perea does not mention the “Ordinance for the government of the Territory of the United States, North-West of the River Ohio,” passed unanimously by the Continental

Note the careful balance between five free and five slave states of the first ten admissions to the Union up to the Missouri Compromise of 1820:<sup>292</sup>

Vermont (1791)	Kentucky (1792)
Tennessee (1796)	Ohio (1803)
Louisiana (1812)	Indiana (1816)
Mississippi (1817)	Illinois (1818)
Alabama (1819)	Maine (1820)

Indeed, Madison’s Notes about admission of new states eerily foretells the debates over the admission of Missouri in 1820, the Compromise of 1850, and the Kansas Nebraska Act of 1854.<sup>293</sup>

For those who wish to better understand the Convention’s consideration of the slavery issue and its compromises, James Oakes’ study is comprehensive, objective, not ideological or polemical and, in the case of Madison, particularly poignant.<sup>294</sup> Oakes devotes the entire final section of his article to Madison.<sup>295</sup> Oakes meticulously

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Congress in New York on July 13, 1787, and its “Article the Sixth. There shall be neither Slavery nor involuntary Servitude . . . .” *The Northwest Ordinance of 1787*, HIST., ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1700s/Northwest-Ordinance-1787/> (last visited Feb. 19, 2022); 32 THE CONTINENTAL CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 343 (Roscoe R. Hill ed., 1936) (1787). This was the day after the Constitutional Convention in Philadelphia incorporated by reference the 1783 Continental Congress adoption of its apportionment compromise. See *Progress on Determining Representation*, NAT’L PARK SERVICE, <https://www.nps.gov/inde/learn/historyculture/progress-on-determining-representation.htm> (last visited Mar. 18, 2022), As the historian Staughton Lynd recently wrote, “the Northwest Ordinance serves to keep alive the notion that the Founders wished to put an end to slavery as soon as possible and in the Northwest Ordinance took the longest step toward its abolition that was possible at that time.” Staughton Lynd, Letter to the Editor, *The Missing Ordinance*, N.Y. REV. (Sept. 26, 2019), <https://www.nybooks.com/articles/2019/09/26/missing-ordinance/>.

<sup>292</sup> SENATE MANUAL, S. DOC. NO. 116-1 at 741 tbl.1991 (2d Sess. 2020). The effort to preserve the balance continued for 25 years after 1820: Arkansas (1836), Michigan (1837), Florida and Texas (1845), and Iowa (1846). *Id.* But after the Kansas Nebraska Act, no more potential slave states existed. See *id.*; see also History.com Eds., *Kansas-Nebraska Act*, HIST. (April 7, 2021), <https://www.history.com/topics/19th-century/kansas-nebraska-act>.

<sup>293</sup> See Farrand, *supra* note 16, at 578.

<sup>294</sup> See *Compromising Expedient*, *supra* note 247, at 2051–52.

<sup>295</sup> *Id.*

examines the Convention's record and, even more so, the Constitution ratification record.<sup>296</sup> He is particularly attentive to Madison's role in both.<sup>297</sup> In the Convention, Madison was, like Massachusetts' (Maine) Rufus King, Pennsylvania's James Wilson, Virginia's George Mason and others, an opponent of slavery and a proponent of direct popular presidential election.<sup>298</sup> Neither position prevailed.<sup>299</sup>

For a step-by-step description of the evolution of the Electoral College at the Convention, Shlomo Slonim is indispensable.<sup>300</sup> Perea sees the Electoral College as a uniquely hideous aberration.<sup>301</sup> Slonim sees, "[t]he device of a congress away from home represented, in sum, an adaptation of state experience modified by the need to resolve the central dispute at Philadelphia, namely the large state-small state controversy."<sup>302</sup>

#### IV. RUMINATIONS

National Popular Vote is creative, but regarding the proposal as creative does not necessarily mean it is workable, let alone good. This article argues that NPV in its present form cannot work. Could it be made to work? Robert Bennett, former Northwestern University Law School Dean, and I once thought that we might be able to craft an NPV that might work.<sup>303</sup> Now, this author is not so sure.

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<sup>296</sup> See generally *Compromising Expedient*, *supra* note 247 (analyzing throughout the work the Convention's record and the Constitutional ratification record).

<sup>297</sup> See *id.* at 2048–52, 2055.

<sup>298</sup> See *id.* at 2049; see also Joseph J. Ellis, Opinion, *Even the Founders hated the electoral college*, L.A. TIMES (Nov. 22, 2020), <https://www.latimes.com/opinion/story/2020-11-22/electoral-college-popular-vote-founders-james-madison-great-compromise>.

<sup>299</sup> See U.S. CONST. art. II, § 1, cl. 2–4; see also *id.* art. I, § 9, cl. 1.

<sup>300</sup> See Slonim, *supra* note 14 *passim*. Both Alexander and Kuroda rely on him, but neither really mention slavery in their discussions of the origins of the Electoral College. See generally KURODA, *supra* note 15; PRESIDENTIAL ELECTORS AND THE ELECTORAL COLLEGE, *supra* note 15.

<sup>301</sup> See Perea, *supra* note 8, at 1087.

<sup>302</sup> Slonim, *supra* note 14, at 57–58.

<sup>303</sup> See BENNETT, *supra* note 19, at 161.

Creative is not synonymous with sound or right. The Electoral College has its virtues and defects, as set forth by a long line of respected scholars, commencing, for example, with Judith Best<sup>304</sup> and continuing through Tara Ross,<sup>305</sup> including the many authors cited in this article.

In 1996, my colleague, Beverly Ross, and I accepted the Electoral College as a given which, in my opinion, it continues to be.<sup>306</sup> The Senate today is more conservative than the 1970 Senate that rejected the popular election of the President constitutional amendment.<sup>307</sup> Two-thirds of today's Senate will not vote for a popular election constitutional amendment, and three quarters of the states would not ratify it.

Ms. Ross and I thought the College's functioning could, and should, be improved by states action in some fourteen ways and by congressional action in six ways.<sup>308</sup> We still do, but unfortunately no such actions have followed.

An effort failed to persuade the Uniform Law Commission to deal with more elector issues than only the essentially irrelevant one of the so-called faithless electors, in its uniform law on that subject.<sup>309</sup> Nevertheless, their drafting of a comprehensive Electoral College uniform law would be a positive step.

One can, of course, argue that the College and the unit rule are undemocratic. But so are the composition of the Senate; the requirement that treaties be ratified by two-thirds votes of the Senate; an absolute majority of the states' House of Representative delegations electing a President voting by one-vote gerrymandered state delegations; the requirement that the Senate elect a Vice President by an absolute majority; two-thirds votes of both Houses for a constitutional amendment and ratification by three-quarters of the states;

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<sup>304</sup> See generally JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975); JUDITH BEST, *THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE* (1996).

<sup>305</sup> ENLIGHTENED DEMOCRACY, *supra* note 117.

<sup>306</sup> See generally *Repairing*, *supra* note 10.

<sup>307</sup> See 116 Cong. Rec. 32357; see also 116 Cong. Rec. 34034.

<sup>308</sup> See *Repairing*, *supra* note 10, at 190–92.

<sup>309</sup> See *Faithful Presidential Electors Act*, *supra* note 33. A recent letter to the chief counsel of the Uniform Law Commission reiterating this request was never answered. Letter from William Josephson to Benjamin Orzeske, Esq., (December 13, 2019) (on file with author).

that each state have a least one House representative; the two-thirds Senate vote required for a presidential impeachment conviction; and the two-thirds votes of the House and of the Senate to override a presidential veto. As James Madison is said to have said, our democracy is a “*representative* democracy.”<sup>310</sup>

The 2020–21 Electoral College events, specifically the challenges to the certification of the presidential election, have raised thorny issues concerning the interpretation of the Electoral Count Act of 1887.<sup>311</sup> Ms. Ross and I struggled to find a workable construction of “regularly given” elector vote requirement.<sup>312</sup> Subsequently, Vasana Kesavan asserted that the Act is unconstitutional.<sup>313</sup> Rethinking those issues is next on my agenda.<sup>314</sup>

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<sup>310</sup> MADISON, *supra* note 15, at xix–xx.

<sup>311</sup> See 3 U.S.C. § 15; see also Jerry H. Goldfeder, *Excessive Judicialization, Extra Legal Interventions, and Violent Insurrection: A Snapshot Of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335 (2021) (extensive catalog by states of legal actions attempting to overturn popular election results).

<sup>312</sup> *Popular Vote*, *supra* note 5, at 737–40.

<sup>313</sup> See Vasana Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1695 (2002).

<sup>314</sup> See *The Electoral Count Act of 1887*, *supra* note 94; William Josephson, *The Electoral Count Act of 1887 - Part 2*, N.Y.L.J. (Apr. 14, 2022, 10:00 AM), <https://www.law.com/newyorklawjournal/2022/04/14/the-electoral-count-act-of-1887-part-2/>. At least two, and perhaps three more parts will be forthcoming.

## APPENDIX

*April, 1783*

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Congress proceeded in the consideration of the report, and sundry amendments being made,

*Resolved, by nine states,* That it be recommended to the several<sup>1</sup> states, as indispensably necessary to the restoration of public credit, and to the punctual and honorable discharge of the public debts, to invest the United States in Congress assembled with a power to levy for the use of the United States the following duties upon goods imported into the said states from any foreign port, island or plantation:

Upon all rum of Jamaica proof per gallon, - - - - -dols. 4-90	Upon brown sugar per pound, - - - - -	½-90
Upon all other spirituous liquors, - - - 3-90	Upon loaf sugar per pound, - - - - -	2-90
Upon Madeira wine, - 12-90	Upon all other sugars, - - - - -	1-90
Upon all other wines, - 6-90	Upon molasses per gallon, - - - - -	1-90
Upon common bohea tea per lb. - - - 6-90	Upon cocoa and coffee per pound, - - -	1-90
Upon all other teas, - 24-90	Upon all other goods, a duty of five per cent. ad valorem at the time and place of importation.	
Upon pepper per pound, - - - - 3-90		

<sup>1</sup> From this point the entries in the Journal are by George Bond.

Provided, that none of the said duties shall be applied to any other purpose than the discharge of the interest or principal of the debts contracted on the faith of the United States, for supporting the war, agreeably to the resolution of the 16 day of December last, nor be continued for a longer term than twenty-five years: and provided, that the collectors of the said duties shall be appointed by the states, within which their offices are to be respectively exercised, but when so appointed, shall be amenable to, and removable by the United States in Congress assembled, alone; and in case any State shall not make such appointment within one month after notice given for that purpose, the appointment may be made by the United States in Congress assembled:

That it be further recommended to the several states, to establish for a term limited to twenty-five years, and to appropriate to the discharge of the interest and principal of the debts contracted on the faith of the United States for supporting the war, substantial and effectual revenues of such nature as they may judge most convenient, for supplying their respective proportions of one million five hundred thousand dollars annually, exclusive of the aforementioned duties, which proportion shall be fixed and equalized, from time to time, according to the rule which is or may be prescribed by the Articles of Confederation; and in case the revenues established by any State shall at any time yield a sum exceeding its actual proportion, the excess shall be refunded to it; and in case the revenues of any State shall be found to be deficient, the immediate deficiency shall be made up by such State with as little delay as possible, and a future deficiency guarded against by an enlargement of the revenues established: provided that until the rule of the Confederation can be carried into practice, the proportions of the said 1,500,000 dollars shall be as follows, viz.

<i>April, 1783</i>		259
New Hampshire, - -	52, 708	Maryland, - - - - 141, 517
Massachusetts, - -	224, 427	Virginia, - - - - 256, 487
Rhode Island, - - -	32, 318	North Carolina, - - 109, 006
Connecticut, - - -	132, 091	South Carolina, - - 96, 183
New York, - - - -	128, 243	Georgia, - - - - 16, 030
New Jersey, - - -	83, 358	1, 500, 000
Pensylvania, - - -	205, 189	
Delaware, - - - -	22, 443	

The said last mentioned revenues to be collected by persons appointed as aforesaid, but to be carried to the separate credit of the states within which they shall be collected.

That an annual account of the proceeds and application of all the aforementioned revenues, shall be made out and transmitted to the several states, distinguishing the proceeds of each of the specified articles, and the amount of the whole revenue received from each State, together with the allowances made to the several officers employed in the collection of the said revenues.

That none of the preceding resolutions shall take effect until all of them shall be acceded to by every State, after which unanimous accession, however, they shall be considered as forming a mutual compact among all the states, and shall be irrevocable by any one or more of them without the concurrence of the whole, or of a majority of the United States in Congress assembled.

That as a further mean, as well of hastening the extinguishment of the debts as of establishing the harmony of the United States, it be recommended to the states which have passed no acts towards complying with the resolutions of Congress of the 6th of September and 10th of October, 1780, relative to the cession of territorial claims, to make the liberal cessions therein recommended, and to the states which may have passed acts complying with the said resolutions in part only, to revise and complete such compliance.

That as a more convenient and certain rule of ascertaining the proportions to be supplied by the states respectively to the common treasury, the following alteration in the Articles



of Confederation and perpetual union, between these states be, and the same is hereby agreed to in Congress; and the several states are advised to authorise their respective delegates to subscribe and ratify the same as part of the said instrument of union, in the words following, to wit:

So much of the 8th of the Articles of Confederation and perpetual union, between the thirteen states of America, as is contained in the words following, to wit:

“All charges of war and all other expences that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each State granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint,” is hereby revoked and made void; and in place thereof it is declared and concluded, the same having been agreed to in a Congress of the United States, that “all charges of war and all other expences that have been or shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, except so far as shall be otherwise provided for, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint.”<sup>1</sup>

<sup>1</sup> This report is in the *Papers of the Continental Congress*, No. 26, folio 415. A printed copy of the report of March 18 was used, and altered by Charles Thomson, to satisfy the changes made by Congress. A printed copy of the resolutions, with those of February 17, is in No. 56, folio 447.