4-2022

"A Mystifying and Distorting Factor": The Electoral College and American Democracy

Katherine A. Shaw
Benjamin N. Cardozo School of Law, kshaw2@yu.edu

Recommended Citation

Katherine A. Shaw, *"A Mystifying and Distorting Factor": The Electoral College and American Democracy*, 120 Mich. L. Rev. 1285 (2022).
https://doi.org/10.36644/mlr.120.6.mystifying

"A MYSTIFYING AND DISTORTING FACTOR": THE ELECTORAL COLLEGE AND AMERICAN DEMOCRACY

*Katherine Shaw**

LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE. By *Jesse Wegman*. St. Martin's Press. 2020. Pp. viii, 296. $27.99.

INTRODUCTION

As the 2020 presidential election made clear, the Electoral College is a profoundly dangerous institution. American constitutional democracy survived that election and its aftermath, emerging battered and bruised but still standing.[1] But the Electoral College is in large part to blame for how close it came to a fatal wound.

That's true as a technical matter. Joe Biden won the national popular vote by approximately seven million votes and prevailed in the Electoral College 306–232.[2] But just forty-four thousand more Trump votes across Arizona, Georgia, and Wisconsin would have resulted in a 269–269 tie in the Electoral College.[3] If that had happened, the House of Representatives, voting by state delegation, would likely have handed Donald Trump the presidency.[4] That

---

* Professor of Law, Benjamin N. Cardozo School of Law. My thanks to Ned Foley, Chris Hayes, and participants in Cardozo Law School's summer workshop series for helpful comments and suggestions; to Bella Pori for invaluable research assistance; and to the *Michigan Law Review* for terrific editorial work.

1. Susan D. Hyde & Elizabeth N. Saunders, Opinion, *Trump Didn't Break Our Democracy. But Did He Fatally Weaken It?*, N.Y. TIMES (Dec. 15, 2020), https://www.nytimes.com/2020/12/15/opinion/trump-democracy-america.html [perma.cc/Z6GY-4NHY]; George Packer, *A Political Obituary for Donald Trump*, ATLANTIC (Dec. 9, 2020), https://www.theatlantic.com/magazine/archive/2021/01/the-legacy-of-donald-trump/617255 [perma.cc/3MKJ-JZPP].

2. Benjamin Swasey & Connie Hanzhang Jin, *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 [perma.cc/4AD4-B3CE]; Caroline Linton, *All 538 Electors Have Voted, Formalizing Biden's 306-232 Win. Here's How the Electoral College Works.*, CBS NEWS (Dec. 15, 2020, 7:30 AM), https://www.cbsnews.com/news/electoral-college-votes-joe-biden-victory [perma.cc/X6YA-WZV3].

3. Swasey & Jin, *supra* note 2.

4. *See* U.S. CONST. amend. XII ("The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors

 doi:10.36644/mlr.120.6.mystifying

would have marked the third time in twenty years—and the second time in two cycles—that our anachronistic system of presidential selection produced a president who did not win the national popular vote.[5]

Following the election, President Trump worked ruthlessly to convert loss into victory, exploiting pressure points and ambiguities in the protracted and complex process, partly constitutional and partly statutory, that we refer to collectively as the Electoral College. Trump's campaign filed numerous lawsuits[6] designed to delay state certification beyond the statutory "safe harbor" deadline, after which a state's slate of electors is no longer conclusive in the event of a dispute.[7] Trump supporters attempted to disrupt the required meetings at which each state's electors actually cast their votes.[8] Ersatz Trump "electors" purported to cast competing votes in some states, seeking to lay the groundwork for later challenges to official state slates.[9] Trump pressured state

---

appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote . . . .").

5. In 2000, Al Gore won the national popular vote by just over five hundred thousand votes, while losing Florida's electoral votes and thus the presidency after the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). *See* David Stout, *Gore's Lead in the Popular Vote Now Exceeds 500,000*, N.Y. TIMES (Dec. 30, 2000), https://www.nytimes.com/2000/12/30/us/43rd-president-final-tally-gore-s-lead-popular-vote-now-exceeds-500000.html [perma.cc/XP8R-8SWH]. In 2016, Hillary Clinton won the national popular vote by almost three million votes, while losing the Electoral College 304–227. Nate Cohn, *Why Trump Had an Edge in the Electoral College*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html [perma.cc/HD2E-BUAJ].

6. Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More Than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, INSIDER (Feb. 22, 2021, 5:03 PM), https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11 [perma.cc/F2JS-HW4X].

7. 3 U.S.C. § 5; *see* Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 332–33 (2019).

8. The Twelfth Amendment directs that the electors "meet in their respective states and vote by ballot for President and Vice-President." U.S. CONST. amend. XII; 3 U.S.C. § 7.

9. Ronald J. Hansen, *Fake Electors Try to Deliver Arizona's 11 Votes for Trump*, AZCENTRAL (Dec. 14, 2020, 11:40 AM), https://www.azcentral.com/story/news/politics/elections/2020/12/14/arizona-groups-fake-electors-try-cast-11-electoral-votes-trump/6536056002 [perma.cc/8VQ2-KFGH]; Deanna Paul, *Republican Electors Cast Unofficial Ballots, Setting Up Congressional Clash*, WALL ST. J. (Dec. 28, 2020, 9:00 AM), https://www.wsj.com/articles/republican-electors-cast-unofficial-ballots-setting-up-congressional-clash-11609164000 [perma.cc/4KJR-P6V7]; Aishvarya Kavi, *No, Republican Attempts to Organize 'Alternate' Electors Won't Affect the Official Electoral College Tally.*, N.Y. TIMES (Dec. 14, 2020), https://www.nytimes.com/2020/12/14/us/no-republican-attempts-to-organize-alternate-electors-wont-affect-the-official-electoral-college-tally.html [perma.cc/X795-GAFG] (quoting Trump advisor Stephen Miller's statement that "an alternate slate of electors in the contested states is going to vote and we are going to send those results up to Congress"); *see also Read: Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 8:20 AM), https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html [perma.cc/CK7Y-C23U] (contending that "7 states have

election officials to "find" additional votes for him.[10] Trump loyalists in the Department of Justice sought to push state legislatures to take the radical step of discarding state returns on the basis of spurious fraud claims and appoint Trump electors themselves.[11] Trump himself reportedly urged Vice President Pence to refuse to count electoral votes from a number of states in which Biden received more votes.[12] Most significantly, what became the January 6, 2021, attack on the Capitol was an effort to disrupt the final event in the Electoral College timeline: a joint session of Congress over which the vice president presides.[13]

So the baroque and multistep process through which a candidate becomes president afforded Trump a number of postelection opportunities to contest or undermine, in terms framed in law and legal process, the results of an election he had plainly lost.[14] Might the College have also played a more subtle role in these events? That is, might its very existence have served to undermine the health and resilience of our system in ways that made us more susceptible to Trump's efforts to subvert democracy and the rule of law?

Consider here the political rhetoric around presidential elections, which, because of the College, frames elections more as complex puzzles or logic games than as singularly important moments in self-governance. We discuss "paths to 270";[15] on election night, pundits like MSNBC's Steve Kornacki ma-

---

transmitted dual slates of electors to the President of the Senate" and arguing that the vice president should use the existence of those slates to conclude that "there are no electors that can be deemed validly appointed in those States").

10. *See Transcript: President Trump's Phone Call with Georgia Election Officials*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-georgia-call-transcript.html [perma.cc/29RX-SZ63].

11. MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION (2021), https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf [perma.cc/V9ML-J7P7]; H. COMM. ON OVERSIGHT AND REFORM, 117TH CONG., SELECTED DOCUMENTS: PRESIDENT TRUMP PRESSURE CAMPAIGN ON DEPARTMENT OF JUSTICE (2021), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/COR-SelectedDOJDocuments-2021-6-15-FINAL.pdf [perma.cc/XZ4A-8Y96].

12. Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works.*, N.Y. TIMES (Jan 5, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html [perma.cc/J6B8-FUCX].

13. *See* U.S. CONST. art. II; *id.* amend. XII; 3 U.S.C. § 15.

14. *Cf.* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018) ("[A]utocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality.").

15. This sort of language appeared in numerous statements seeking to rationalize Trump's efforts: as late as mid-December, when some of Trump's congressional allies finally acknowledged that Joe Biden would be the next president, Trump loyalist Lindsey Graham continued to maintain that Trump still had a "narrow path" to retaining the presidency. *See, e.g.*, Marianne Levine, Burgess Everett & Andrew Desiderio, *'Time for Everybody to Move On': Senate GOP Accepts Biden's Win*, POLITICO (Dec. 14, 2020, 7:23 PM), https://www.politico.com/news/2020/12/14/senate-republicans-biden-win-445309 [perma.cc/S3UU-HHMT].

nipulate touch screens, enabling them with a wave of the index finger to fundamentally change our destiny ("What if we throw in NE-2?," "He's really got to run up the score in Broward County," etc.). Consider as well the way the College's winner-take-all logic means that we color code the country in red and blue, eliding the fact that Americans of all political identities reside in every county and every state. This coding may well have primed a portion of the electorate to accept outlandish claims of election fraud when a state like Georgia, one that had for decades been reliably "red," shifted to the "blue" column.[16] Perhaps all of this helped lay the groundwork for President Trump's stratagems after November 3—or at least lulled the country for a time into thinking that there was nothing wildly anomalous about a process in which an obviously defeated candidate delayed and exploited pressure points in a desperate attempt to cling to power.

It is tempting to dismiss these events as largely attributable to the identity of the incumbent president and not as fundamentally connected to the Electoral College. Certainly, any electoral system can be targeted by a sufficiently determined aspiring autocrat. But as Jesse Wegman's *Let the People Pick the President: The Case for Abolishing the Electoral College*[17] makes clear, not only questions of democratic legitimacy but also the specter of chaos and manipulation have stalked the Electoral College from the beginning (pp. 58, 86–102).

Wegman has contributed an important work to the literature calling for Electoral College reform. His book is an accessible, short, and almost breezy read. But to its credit, it doesn't oversimplify; it's a deeply sophisticated exploration of the central pathologies of this key feature of the American political and constitutional landscape. The book's urgency has only increased since its publication in March 2020. One hopes that this urgency is not lost as President Trump's tumultuous departure from office fades from view. While Trump was emphatically wrong in the particulars of his attack on the 2020 election, there *is* something deeply broken in our system of presidential selection. Perhaps an unexpected legacy of Donald Trump's presidency will be finally galvanizing us to fix it.

Part I of this Review describes the origins of the Electoral College. Part II assesses the College's performance over 235 years: routinely misfiring, the subject of a staggering number of constitutional amendment efforts, and likely responsible for exacerbating—if not causing—polarization, dysfunction, and division. Finally, Part III assesses prospects for Electoral College reform, including the National Popular Vote Interstate Compact.

16. *See* Perry Bacon Jr., *How Georgia Turned Blue*, FIVETHIRTYEIGHT (Nov. 18, 2020, 12:20 PM), https://fivethirtyeight.com/features/how-georgia-turned-blue [perma.cc/HLN3-8KUB].

17. Jesse Wegman is a member of the New York Times editorial board.

I. THE ELECTORAL COLLEGE: ORIGINS

We use the term "Electoral College" to describe our scheme of presidential selection, but those words do not appear in the Constitution.[18] The process, however, does. Indeed, more of Article II, which creates and empowers the office of the presidency, is devoted to presidential selection (together with removal and succession) than to presidential governance.[19] The relevant constitutional language provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[20] It then sets forth a multistep process in which the electors are to "meet in their respective States" to "vote by Ballot for two Persons," then transmit those sealed votes "to the Seat of Government of the United States," where the president of the Senate "shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."[21] Following this counting, the individual with the most votes becomes president and the runner-up vice president.[22] If no candidate commands a majority, the House chooses the president, with each state delegation having one vote, and the runner-up becomes vice president, unless there's a tie for the number two spot, in which case the Senate chooses the vice president.[23]

Phew. So how did this Rube Goldberg scheme come to be included in the Constitution? There is evidence in the records of the Constitutional Convention to support a number of distinct origin stories: an elitist fear of too much democracy and a perceived need to create some mediating body; a desire to maximize slave-state power;[24] a response to small states' concerns that presidential selection not be dominated by a few large states; or simply a byproduct of delegate exhaustion and resignation after months of stalemate. Wegman acknowledges that each of these accounts captures a real dynamic at play in Philadelphia in the summer of 1787, but the narrative he offers mostly supports the final theory—that the best reading of drafting history is that the Electoral College was a hasty, eleventh-hour solution to one of the most vexing problems the drafters faced, arrived at by delegates who initially punted on

---

18. Indeed, although there were scattered uses of the term in the Founding Era, it did not enter the lexicon as shorthand for our system of presidential selection until the twentieth century. *See* ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 393–94 (2020).

19. In Wegman's apt description, the 346 words that create the College constitute "the longest, most convoluted clause in the whole charter." P. 58.

20. U.S. CONST. art. II, § 1.

21. *Id.*

22. *Id.* cl. 3.

23. *Id.* These final provisions were subsequently altered by the Twelfth Amendment.

24. Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002); 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 [perma.cc/W5WV-RNLR].

this difficult question and then simply ran out of time to craft a more elegant solution.[25]

The protagonist of this portion of the book is James Wilson, a leading revolutionary thinker who had been educated in Scotland at the height of the Scottish Enlightenment, and who, on Wegman's telling, brought to the Convention a profound commitment to popular sovereignty.[26] Although not nearly as well-known as other leading lights of the Founding generation,[27] Wilson was a key constitutional architect and a vocal participant at the Convention (p. 48), and he was singularly focused on the office of the presidency. Throughout the Convention he argued for a single chief executive—a number of delegates supported the creation of a plural executive[28]—and he urged, initially with no support, direct popular election of that executive (pp. 62–63).

After the Convention had forged its compromises around the legislature, attention turned back to presidential selection, which Wilson described as "in truth the most difficult of all on which we have had to decide."[29] By now Wilson had gained the support of important players, including James Madison and Gouverneur Morris, for his position that the president "ought to be elected by the people at large" (p. 68). Opponents raised a range of concerns: some were grounded in obvious disdain for the masses,[30] while others turned on practical concerns about the challenges of informed choice in a genuinely national election.[31] The delegates debated a number of alternative methods,

---

25. Pp. 57–58. The subtitle of Wegman's "Origins" chapter is "A Last-Minute 'Frankenstein Compromise.'"

26. P. 48. One senses that a subsidiary goal of Wegman's book is a restoration of Wilson to his rightful place in constitutional history—much like that recently experienced by Alexander Hamilton, with whom Wilson shared an immigrant story, fortune and acclaim as a young lawyer, a central role in the framing of the Constitution, and an eventual fall into disgrace. *See* William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 903–04, 912–15 (2008).

27. Ewald, *supra* note 26, at 902 ("[R]elative to the magnitude of his accomplishments, [Wilson] has a good claim to be the most neglected of the major American founders.").

28. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE U.S. CONSTITUTION 215–17 (2016) (describing one proposal for a plural executive composed of "three men to be chosen from different regions of the country").

29. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 501 (Max Farrand ed., rev. ed. 1966).

30. Elbridge Gerry, for example, openly derided the people's ignorance. KLARMAN, *supra* note 28, at 228.

31. P. 68 ("In late eighteenth-century America, education was limited, transportation was slow, and mass communication was almost unheard of. Under these conditions, it was difficult for most people to get any reliable information about candidates beyond their local districts, and the framers feared that they would be inclined to vote for a charlatan, a smooth talker who was unfit to hold such a powerful job.").

including giving the power to pick the president to Congress,[32] state legislatures, or even governors.[33]

Agreement proved elusive,[34] and eventually a committee of eleven delegates[35] was convened to address several thorny remaining issues, including presidential selection. This Committee returned with a draft that created a unitary president who would serve a four-year term and be eligible for reelection. But, importantly, that executive would not be popularly elected; rather, he would be chosen by special "electors," appointed in each state in a manner chosen by the state legislature—an idea Wilson had floated several times previously. Each state's elector allocation would match its seats in Congress (House and Senate combined), thus importing into presidential selection the same advantage that small states and slave states enjoyed in congressional representation. This new proposal was adopted nearly unanimously with only one small modification: giving the House (with states voting by delegation) rather than the Senate the power to resolve elections in which no candidate received a majority (pp. 74–75, 79).

Of course, the origins of this scheme—ignominious, slapdash, misguided, all of the above—don't settle the role or value of the College today. But the history Wegman distills offers a powerful answer to the common critique that Electoral College reform would be inconsistent with the Framers' design and desires. At best, the scheme was chosen because it was deemed "on the whole to be liable to fewest objections"[36]—not because, in the considered judgment of the Constitution's drafters, it was the best way to choose a president.

Soon after the Convention, however, the spinning began. Perhaps the most famous Founding Era discussion of the College appears in *Federalist* 68, attributed to Alexander Hamilton. One senses a hint of defensiveness in Hamilton's insistence that the Constitution's "mode of appointment" of the president was, if "not perfect, . . . at least excellent."[37]

---

32. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 19 (Yale Univ. Press rev. ed. 1981) (1968).

33. *See* KLARMAN, *supra* note 28, at 229.

34. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 54 (2020) ("The delegates spent far more time debating how the president would be chosen, the length of his term, and the method of removal than they did debating presidential powers.").

35. *See* p. 73. This committee is alternately referred to as the "Committee on Unfinished Parts," the "Committee on Postponed Matters," and the "Committee of Eleven." *See* John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 169–70 (2006); Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020).

36. James Madison, Speech in the Federal Convention on Electing the Executive (July 19, 1787), *in* JAMES MADISON: WRITINGS 127, 128 (Jack Rakove ed., 1999).

37. THE FEDERALIST NO. 68 (Alexander Hamilton). The document goes on to argue that that the system sought to create "every practicable obstacle . . . to cabal, intrigue, and corruption," by conferring the power to choose the president on "men most capable of analyzing the qualities adapted to the station" and guaranteeing that the office of President will never fall to any man who is not "endowed with the requisite qualifications." *Id.*

Hamilton's rhetoric was clearly post hoc justification. Yet *Federalist* 68 remains the foundational text in a particular mythology of the Electoral College, the continuing allure of which Wegman highlights throughout his book. In reality, however, the Electoral College's flaws have been both evident and widely acknowledged virtually from the beginning.

II. MISFIRES, DISTORTION, AND EFFORTS AT REFORM

Hamilton's rosy characterization aside, many leading early thinkers—including Hamilton himself—quickly began to harbor doubts about the Constitution's system of presidential selection.[38] Both private exchanges and public debate in the post-Founding decades make clear how deeply contested the College was in those years. In an 1816 letter, Thomas Jefferson proposed amending the Constitution to provide for "an Executive chosen by the people."[39] Madison also expressed reservations,[40] referring to the House's role in presidential selection as an "evil" and a "great . . . departure from the republican principle of numerical equality" (p. 99). In 1816, Pennsylvania senator Abner Lacock introduced the first of many proposals to abolish the College outright and replace it with a national popular vote (p. 99). Wegman's cataloguing of these developments dovetails with recent scholarship suggesting that the post-Founding period was an important one for establishing the meaning of the Constitution, such that congressional and public elaboration during that time should be understood as a "crucial second phase" of constitutional creation.[41] In the case of the Electoral College, however, this period appears to have been more one of unsettling than of creation. Over time, the College's shortcomings and dangers have become still more apparent.

A. *Mistakes and Misfires*

Doubts about the College's design flaws were not abstract. The elections of 1796 and 1800 saw challenges created by the runner-up system for selecting

---

38. Such doubts were not limited to the College; indeed, a recent book argues that "the founders themselves were, particularly by the end of their lives, far less confident in the merits of the political system that they had devised, and . . . many of them in fact deemed it an utter failure that was unlikely to last beyond their own generation." DENNIS C. RASMUSSEN, FEARS OF A SETTING SUN 3 (2021).

39. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES; 1 MAY 1816 TO 18 JANUARY 1817, at 222, 225 (J. Jefferson Looney ed., 2013). As he explained, "in truth, the abuses of monarchy had so much filled all the space of political contemplation that we imagined every thing republican which was not monarchy. [W]e had not yet penetrated to the mother-principle that 'governments are republican only in proportion as they embody the will of their people." *Id.*

40. Joseph J. Ellis, Opinion, *Even the Founders Hated the Electoral College*, L.A. TIMES (Nov. 22, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-11-22/electoral-college-popular-vote-founders-james-madison-great-compromise [perma.cc/MY48-YKZZ].

41. Maeve Glass, *Fixing America's Founding*, 118 MICH. L. REV. 949, 950 (2019) (reviewing JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018)).

the vice president: in 1796, the installation of political rivals as governing partners; in 1800, a tied vote.[42] The Twelfth Amendment sprang out of a need to avoid these predicaments in the future, requiring electors to cast separate votes for president and vice president.[43] But it otherwise left intact the system of presidential selection, which has five times anointed as president someone who did not receive the most votes from the public.

The first was the election of 1824, in which Andrew Jackson defeated John Quincy Adams 41 percent to 31 percent in the popular vote and by a comfortable margin in the Electoral College. However, the presence of two other presidential candidates meant that Jackson did not receive a majority in the College (p. 100). As it had in 1800, the House selected the president, this time choosing Adams in a voting process that was much swifter, but if anything more controversial, than in 1800.[44]

The 1876 election was a moment of even more profound crisis, resulting in not just the installation of the popular-vote loser but the end of Reconstruction. Democratic candidate Samuel Tilden was the clear winner of the popular vote but fell short of an Electoral College majority (p. 110). Electoral votes in four states remained in dispute for months, with neither the Constitution nor federal law providing any clear mechanism for resolving them. Congress finally created a fifteen-member commission that awarded all the disputed votes, and thus the presidency, to Republican Rutherford Hayes.[45] The election of 1888 saw another such split, with Grover Cleveland winning a plurality of the popular vote but Benjamin Harrison securing a majority in the Electoral College and thus the presidency (pp. 116–17).

Elections after 1888 managed to align the popular and Electoral College votes for some time, but "popular vote" is somewhat misleading in this period. The end of Reconstruction meant that the notorious Three-Fifths Clause

---

42. Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1545 (2014).

43. *Id.* at 1548; Chiafalo v. Washington, 140 S. Ct. 2316, 2319 (2020) ("Ratified at the start of the 19th century, the Twelfth Amendment both acknowledged and facilitated the Electoral College's emergence as a mechanism not for deliberation but for party-line voting."); EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 27–45 (2020).

44. P. 100. Some scholars question the inclusion of the 1824 election in the list of "misfires," because some states' practice of legislative appointment meant there was no nationwide popular vote from which to assess potential deviation. Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 185 n.52 (2011). To my mind, Jackson's clear victory in both recorded popular vote and electoral votes makes this an example of College breakdown.

45. EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 117–49 (2016); Franita Tolson, *In the Messiest Contested Election, One Man Saved the System from Itself*, N.Y. TIMES (Nov. 6, 2020), https://www.nytimes.com/2020/11/03/us/samuel-randall-1876-election.html [perma.cc/V7NU-SBMU]. That election spurred the passage of the Electoral Count Act, the 1887 statute that aims to resolve some of the Constitution's ambiguities but arguably introduces still more uncertainty and instability into the process. *See* FOLEY, *supra*, at 152.

functionally became a "five-fifths" clause: African Americans in the post-Reconstruction South were counted for purposes of representation, including in the College, but were unable to vote, the Fifteenth Amendment notwithstanding.[46] The 1968 election, the first election following the enactment of the Voting Rights Act, was again nearly thrown to the House after third-party segregationist candidate George Wallace siphoned off nearly ten million votes and forty-six electoral votes (pp. 148–50). Although Richard Nixon managed to defeat Hubert Humphrey in the popular vote and to secure an Electoral College victory, only seventy-eight thousand votes stood between the country and a president selected by the House for the first time since 1824 (pp. 148–50).

Over the last two decades, the trend of popular and Electoral College vote splits has accelerated to an alarming degree. Two of the last six elections, those held in 2000 and 2016, produced a split between the popular vote and the Electoral College vote.[47] Two others came unnervingly close to that result: In 2004, incumbent George W. Bush won a 286–251 victory in the Electoral College, but if fewer than sixty thousand Bush voters in Ohio had switched their votes to John Kerry, Kerry would have become the president despite a popular vote loss of approximately three million.[48] And just tens of thousands of changed votes in a few key states would have handed Trump the presidency in 2020 despite a popular vote loss of approximately seven million.[49]

Taken together, these events amount to an astonishingly high rate of error and uncertainty.[50] And even when the College does not award the presidency to the loser of the popular vote or take us to the brink of national crisis, it profoundly impacts presidential campaigning and governance, as well as the grammar and vocabulary of our political debates.

B. *Distortion and Dysfunction*

Under both the original Constitution and the Twelfth Amendment, states are free to appoint their electors as they choose, and in the early years many state legislatures assigned that power to themselves (pp. 92–94). But by 1860, every state allowed its voters to choose their electors.[51] The Constitution is

---

46. KEYSSAR, *supra* note 18, at 9–10.

47. *See* p. 2; *see also supra* note 5.

48. Peter Fenn, *Has the Electoral College Outlived Its Usefulness?*, U.S. NEWS (Oct. 11, 2012, 3:25 PM), https://www.usnews.com/opinion/blogs/peter-fenn/2012/10/11/electoral-college-lets-obama-romney-ignore-80-percent-of-america [perma.cc/6HVN-74LJ].

49. *See* Swasey & Jin, *supra* note 2.

50. *See* Jamelle Bouie, Opinion, *The Electoral College Is the Greatest Threat to Our Democracy*, N.Y. TIMES (Feb. 28, 2019), https://www.nytimes.com/2019/02/28/opinion/the-electoral-college.html [perma.cc/66RG-B57Q] ("The history of the Electoral College . . . is of Americans working around the institution, grafting majoritarian norms and procedures onto the political process and hoping, every four years, for a sensible outcome. And on an almost regular schedule, it has done just the opposite.").

51. One hundred and sixty years of history evidently did not stop members of President Trump's 2020 team from seeking to persuade legislatures to make those appointments directly. Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020), https://www

silent on how electors are awarded within states, and today forty-eight states use a winner-take-all system in which the state's full slate of electors votes for the winner of the state's popular vote (p. 98). Two states, Maine and Nebraska, do things somewhat differently, awarding two electoral votes to the state popular-vote winner, and one electoral vote to the popular-vote winner in each congressional district (p. 98).

In our two-party system, winner-take-all means that most states are "safe" for either the Democratic or Republican candidate, and a shifting set of "swing" or "battleground" states decides the outcome of the election. A subset of states thus assume outsized importance, as do the issues of importance to the voters in those states. As Professor Lawrence Lessig points out, many more Americans work in solar energy than work in coal,[52] but because most solar jobs are in the safe states of California (Democratic) and Texas (Republican, at least so far), solar energy as a policy issue is virtually absent from presidential campaign debates and discourse. Coal, by contrast, remains important in the crucial battleground state of Pennsylvania, and presidential candidates thus spend considerable time answering coal questions and formulating coal policy.[53] Presidential candidates also visit battleground states at much higher rates during campaigns; apart from fundraising, they rarely set foot in states they have no realistic shot of winning.[54] The national neglect of safe states can have significant consequences for state party operations, turnout (which can be crucial for down-ballot races), and broader political participation (pp. 169–70).

This skewed emphasis also impacts governance. Political scientists Douglas Kriner and Andrew Reeves have shown that "the compulsion for presidents to court swing state voters does not end when the election is over."[55] Rather, because of the Electoral College and winner-take-all, presidents pursue policies with an eye to their own electoral fortunes rather than the national

---

.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424 [perma.cc/A2QM-DEGU] (quoting a state Republican Party leader reporting conversations about legislative appointment with the Trump national campaign). Although the Constitution does permit states to choose legislative appointment, it's highly doubtful that a state legislature could claw back the power to choose electors after giving that power to individuals, and it seems clear that it could not do so *after* the people had voted. NAT'L TASK FORCE ON ELECTION CRISES, A STATE LEGISLATURE CANNOT APPOINT ITS PREFERRED SLATE OF ELECTORS TO OVERRIDE THE WILL OF THE PEOPLE AFTER THE ELECTION, https://www.electiontaskforce.org/s/State_Legislature_Paper.pdf [perma.cc/7Z2T-K6E5].

52. Harvard L. Sch., *The Electoral College: Keynote Luncheon with Lawrence Lessig and Stuart Stevens*, YOUTUBE (Oct. 21, 2019), https://youtu.be/PPxwAPS_1S4; U.S. DEP'T OF ENERGY, U.S. ENERGY AND EMPLOYMENT REPORT 37, 40 (2017), https://www.energy.gov/sites/prod/files/2017/01/f34/2017%20US%20Energy%20and%20Jobs%20Report_0.pdf [perma.cc/ZNJ6-A49D].

53. Harvard L. Sch., *supra* note 52.

54. In the 2016 presidential election, for example, 94 percent of campaign events were held in twelve states, and two-thirds of those events occurred in just six swing states. *See Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/written-explanation [perma.cc/VZ6N-SRFX].

55. DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY 2 (2015).

interest.[56] This dynamic was on full display during the Trump administration. An aide reported that Trump sought to withhold federal disaster aid after California's devastating 2018 wildfires, citing the state's lack of political support for him.[57] In the early days of COVID-19, Trump downplayed the seriousness of the pandemic on the explicit grounds that its early impact was most severe in blue states.[58]

In addition to selectively advantaging a subset of states, the College also systematically advantages smaller states, an effect that becomes more acute the longer we go without increasing the size of the House. Wyoming's three electoral votes translate to approximately one vote for every 192,000 residents of the state; California's fifty-five votes translate to approximately one for every 719,000 residents.[59]

In many ways, the Electoral College system is the worst of all possible worlds. But because individuals *do* cast votes in the states, the system has the superficial features of a participatory democracy, allowing us to indulge the fiction that the president is popularly elected. This fiction is quite dangerous, with concrete consequences even beyond the electoral sphere. One such consequence, though outside the scope of Wegman's book, is the way it permits the Supreme Court to wield the idea of the president as popularly elected as a cudgel against institutions or mechanisms that might act as checks on the president.[60] Consider the 2020 decision *Seila Law v. Consumer Financial Protection Bureau*, the most recent successful effort by proponents of the so-called "unitary executive" theory.[61] In invalidating the CFPB's single-member director structure as an intolerable encroachment upon the president's Article II authority, the *Seila* Court relied heavily upon the Framers' decision to confer on the president "[d]ecision, activity, secrecy, and dispatch" that "characterise

56. Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 753–65 (2014).

57. Noah Bierman & Eli Stokols, *Trump Sought to Withhold California Fire Aid Because of Politics, Former Official Says*, L.A. TIMES (Aug. 17, 2020, 2:06 PM), https://www.latimes.com/politics/story/2020-08-17/trump-sought-to-withhold-california-fire [perma.cc/DZ8N-BNGR].

58. Peter Baker, *For Trump, It's Not the United States, It's Red and Blue States*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/17/us/politics/trump-america.html [perma.cc/A2MT-XGPL].

59. *See* Brynn Epstein & Daphne Lofquist, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment*, U.S. CENSUS BUREAU (Apr. 26, 2021), https://www.census.gov/library/stories/2021/04/2020-census-data-release.html [perma.cc/2AND-LYLP]; *see also* Nick Routley, *These Powerful Maps Show the Extremes of U.S. Population Density*, VISUAL CAPITALIST (Apr. 21, 2021), https://www.visualcapitalist.com/maps-extremes-us-population-density [perma.cc/WQ86-WUSR] (illustrating the relevant population-density dynamics).

60. *Cf.* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 762 (1992) (book review) (describing Ackerman's theory of the "plebiscitarian Presidency" as one where "presidential elections . . . are widely perceived to confer substantive mandates on the successful candidate").

61. 140 S. Ct. 2183 (2020).

the proceedings of one man."[62] The opinion acknowledged that this sort of intensely concentrated power was "unique in our constitutional structure," but insisted that there was no reason for concern, because *the people* acted as the ultimate check on the president: "[T]he Framers made the President the most democratic and politically accountable official in Government. Only the President . . . is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides 'a single object for the jealousy and watchfulness of the people.' "[63]

This is, of course, facially untrue. Although presidents (along with vice presidents) *are* the only elected officials with a national constituency, they are not in fact selected by the "entire nation." The Court's statement was particularly puzzling because it came just one week after the decision in *Chiafalo v. Washington*, in which the Court upheld state laws that permit states to enforce elector pledges to support their parties' presidential candidates.[64] Justice Kagan, who dissented in *Seila*, began the unanimous *Chiafalo* opinion by reminding readers (and perhaps her colleagues) that the votes Americans cast every four years "actually go toward selecting members of the Electoral College . . . . Those few 'electors' then choose the President."[65]

C. *Previous Attempts to Fix the College*

The Electoral College endures to this day, but not for lack of efforts to reform or abolish it. Wegman identifies over seven hundred such efforts, beginning in the decades immediately following the Founding, continuing through the first formal consideration of abolition in 1816, and coming closest to fruition in 1970.[66]

On Wegman's telling, 1970 was an agonizing defeat. The effort began in 1965 when President Lyndon Johnson, spurred by the possibility that rogue or "faithless" electors might pose a serious threat to a presidential election featuring a third-party candidate, asked Senator Birch Bayh to take up the issue of Electoral College reform.[67] Bayh agreed, initially exploring only modest reforms. His first proposal would have retained the basic structure of the College

62. *See Seila*, 140 S. Ct. at 2203 (alteration in original) (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

63. *Id.*; *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.").

64. 140 S. Ct. 2316, 2320 (2020).

65. *Chiafalo*, 140 S. Ct. at 2319.

66. Pp. 92–97; *see also* Williams, *supra* note 44, at 175 ("In the past two centuries, more proposed constitutional amendments have sought to replace or reform the Electoral College than any other feature of our constitutional order.").

67. Pp. 141–142. Bayh had been the principal drafter of the Twenty-Fifth Amendment, and Johnson approached him in the wake of that successful effort. Pp. 141–42; *see also* John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 923 (2010).

but eliminated actual electors, and thus the prospect of rogue electors (p. 143). His attention next turned to mandating that states award electors using methods other than winner-take-all (pp. 143–44). After holding hearings and studying the issue, however, Bayh came to believe that the Constitution should be amended to provide for direct popular election of the president, a position that he announced in a rousing speech on the Senate floor (p. 145).

Bayh's change of heart happened as the Supreme Court was in the process of radically reforming legislative representation through its one-person, one-vote cases. Wegman suggests that this may have primed the public for receptivity to Bayh's proposal; the design of the College, with its malapportionment of political power, is flatly inconsistent with the logic of political equality that underlies the one-person, one-vote cases (p. 140). Indeed, in 1966, when Bayh first introduced an amendment to abolish the College, popular support for that amendment was at 63 percent.[68]

Bayh's proposal gained momentum in 1967 and 1968. The 1968 election, in which third-party candidate George Wallace won nearly enough electoral votes to throw the election to the House, galvanized additional support for reform (pp. 148–52). In September 1969, Bayh's amendment passed the House overwhelmingly by a vote of 339–70 (p. 153). But within a year it was dead in the Senate, a victim of the filibuster that had nearly defeated the Civil Rights and Voting Rights Acts just a few years earlier. This time, however, the southern Democrats behind the filibuster had unlikely allies: Black and Jewish lawmakers from New York, then a swing state, who became convinced that they would be consigned to electoral irrelevance if the country moved to direct popular election, and who serve as a cautionary tale about the importance of taking the long view when it comes to the Electoral College (pp. 155–59).

The concern about faithless electors that inspired this nearly successful amendment has been with us since the beginning.[69] And although the possibility of elector defection has loomed larger than the reality of rogue electors, the 2016 election saw the live prospect of elector faithlessness as a genuine force in elections—in that case, deployed in the same spirit of reform that animated Bayh nearly half a century earlier. Wegman's book begins with one of these electors: 2016 Clinton elector Michael Baca, who styled himself a "Hamilton elector" after Donald Trump's unexpected victory and sought to foment a wave of elector defections that would deny Trump the presidency (pp. 2–4). Although the movement Baca sought to spark has largely faded from memory, it was a serious effort: Wegman pulls from the vault a star-studded video exhortation to electors to vote for someone, anyone, other than Donald Trump. The video opens with a direct-to-camera address by *The West Wing*'s Martin Sheen: "Republican members of the electoral college, this message is for

68. KEYSSAR, *supra* note 18, at 384–86.

69. Wegman cites a Federalist elector who betrayed the expectation of party loyalty in 1796 and instead cast his vote for Thomas Jefferson, inspiring an indignant letter to the editor: "What, do I choose Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be president? No! I choose him to act, not to think." P. 82.

you . . . . [O]ur Founding Fathers built the Electoral College to safeguard the American people from the dangers of a demagogue." Additional stars plead with electors to "vot[e their] conscience on December 19."[70]

The effort was unsuccessful, of course. In the end, only Baca and nine others, many of them Clinton rather than Trump electors, sought to cast their votes for individuals other than the popular-vote winner in their respective states. Seven such electors succeeded in casting those votes; Baca and two other "faithless" elector had their votes invalidated by state laws requiring electors to vote consistent with state returns (pp. 9–10). Those electors subsequently filed a lawsuit seeking the Supreme Court's blessing for a Hamiltonian vision of elector independence. The Court unanimously rejected that position in *Chiafalo v. Washington*, hewing closely to a 1952 opinion that had upheld elector-pledge laws.[71] The *Chiafalo* opinion noted that under the Electoral College as it has evolved, "electors are not free agents; they are to vote for the candidate whom the State's voters have chosen."[72] Ending on a note of popular sovereignty—a law binding electors "accords with the Constitution as well as with the trust of a Nation that here, We the People rule"[73]—*Chiafalo* was both clear-eyed about the distinctly un-Hamiltonian character of electors and the College today and may have represented an important salvo in the looming fights about the so-called "independent state legislature doctrine."[74]

Chiafalo was decided just months before the presidential election of 2020. If the Court had vindicated elector independence and the electoral vote had been tied, an active campaign of elector lobbying would surely have ensued; faithless electors might have changed the outcome of the election for the first time in American history. But even without a Supreme Court endorsement of a constitutionally grounded right to elector independence, increased public awareness of the possibility of elector independence after the 2016 election, together with the collapse of many of the norms of political culture, could well mean that future elections are more susceptible to disruption from large-scale faithlessness by rogue electors.[75]

---

70. Julia Zorthian, *These Celebrities Are Urging the Electoral College to Dump Donald Trump*, TIME (Dec. 15, 2016, 9:34 AM), https://time.com/4603254/celebrities-electoral-college-donald-trump-video [perma.cc/V6NW-488Y].

71. 140 S. Ct. 2316 (2020); *see* Ray v. Blair, 343 U.S. 214 (1952) (finding "no federal constitutional objection" to Alabama's elector-pledge law); *id.* at 234 (Jackson, J., dissenting) (describing the Electoral College as "a mystifying and distorting factor in presidential elections which may resolve a popular defeat into an electoral victory" and arguing that its abolition would be "a gain for [the] simplicity and integrity of our governmental processes").

72. *Chiafalo*, 140 S. Ct. at 2328.

73. *Id.*

74. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 738 (2021) (Alito, J., dissenting) (describing "whether the Elections or Electors Clauses . . . are violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted" as "an important and recurring constitutional question" (citations omitted)).

75. Indeed, increasing the chances of broad electoral reform seems to have been at least one goal of the litigation team behind the suit. Professor Lawrence Lessig, who argued the case,

III. FIXING THE ELECTORAL COLLEGE

This Part evaluates solutions to the problems posed by the Electoral College. It begins with the National Popular Vote Interstate Compact, a proposal that would not abolish the College—clearly a constitutional amendment is required for that—but would change its operation so that the winner it produced would, by definition, be the winner of the national popular vote.[76] After describing the Compact, this Part addresses the legal vulnerabilities and practical concerns it presents. It then turns to other prospects for Electoral College reform.

A. *The National Popular Vote Interstate Compact*

At the heart of this plan, which Wegman strongly supports as the most viable path for reform, is an interstate compact under which each state agrees to award all its electoral votes to the winner of the national popular vote rather than to the winner of the state's popular vote. The Compact has been around in various forms since the 1970s,[77] but its current incarnation was crafted in 2004 by John Koza, a computer scientist and inventor whose background as creator of the scratch-off lottery ticket made him an unlikely expert in interstate compacts (pp. 196–97). Koza's 1,100-plus-page tome *Every Vote Equal* is the enchiridion of the popular-vote compact, and in recent years that Compact has been quietly amassing support in the states. To date, fifteen states and the District of Columbia, representing 195 electoral votes, have enacted the Compact into law.[78] In nine additional states, one chamber has passed a bill approving the Compact.[79] By its terms, the Compact will go into effect when it is adopted by states representing an additional seventy-five electoral votes, for a total of 270 votes, the number required for an Electoral College majority.[80]

Wegman's journalistic chops are on full display in the passages describing the unlikely team of advocates behind the Compact: Koza is a fascinating character; so is Ray Haynes, a former Republican state senator and one-term chair of the American Legislative Exchange Council who now spends his days traveling the country persuading Republican lawmakers to join the Compact.[81]

---

76. *See Agreement Among the States to Elect the President by National Popular Vote*, *supra* note 54.

77. P. 199; *see also* Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html [perma.cc/7L6U-EF5W].

78. *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state-status [perma.cc/FRA8-SHNS]. The first state to join the Compact was Maryland in 2007, in an effort led by first-term state senator Jamie Raskin. P. 210.

79. *Agreement Among the States to Elect the President by National Popular Vote*, *supra* note 54.

80. *Id.*

81. Pp. 190, 195. Haynes's stump speech begins by reciting his conservative credentials and then explaining why a system that "leads candidates for President, by necessity, to ignore 35

Nevertheless, Wegman's discussion of the Compact is the least convincing portion of the book. Wegman provides scant details on the work being done to actually convince legislators. And if the effort contains any genuine grassroots components, there are no signs of them. In addition, Wegman's enthusiasm for the Compact crowds out any meaningful grappling with the legal and practical vulnerabilities of the plan. The book also sidelines other prospects for change, both smaller-bore efforts like encouraging more states to follow the lead of Maine and Nebraska in moving away from winner-take-all, and more ambitious reforms such as amending the Constitution.

These critiques notwithstanding, highlighting the work being done in support of the Compact may prove valuable even if the Compact never goes into effect. Constitutional change can be a slow and circuitous process; opening the eyes of a new generation of state activists and officials to the possibility of change in presidential selection may well lay the foundation for eventual constitutional amendment.[82]

B. *Legal and Practical Vulnerabilities*

One major question about the Compact is whether it is constitutionally suspect under the Compact Clause, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State."[83] Despite this facially clear congressional-consent language, the Supreme Court has suggested that consent is not required for all interstate agreements, but only for those "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[84] And the Court *has* upheld multistate compacts—for example, the Multistate Tax Compact—that have not been consented to by Congress.[85] So the Compact Clause may not be an insuperable obstacle, even if states cannot secure congressional consent. But it is certainly a potential complication that merits serious consideration.

The Compact could also be vulnerable to challenge on the grounds that awarding a state's electoral votes to someone the state's voters have *not* se-

---

to 45 states across the country if they wish to win the presidency . . . is not good for the presidency and not good for the country." *See* Ray Haynes, *Testimony Before the Michigan Legislature on the National Popular Vote Interstate Compact*, NAT'L POPULAR VOTE, https://www.national-popularvote.com/sites/default/files/haynes-testimony-2018-9-6.pdf [perma.cc/Y2UE-9RLN].

82. *Cf.* Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (describing what the authors term "democratic constitutionalism" as a mode of constitutional change "sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning . . . through constitutional lawmaking, electoral politics, and the institutions of civil society").

83. U.S. CONST. art. I, § 10, cl. 3.

84. Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

85. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 469 (1978).

lected functionally erases the votes of those individuals and is thus inconsistent with the principle of one person, one vote.[86] It could also be subject to challenge under Section 2 of the Fourteenth Amendment. Section 2 provides that when the right to vote, including for "the choice of electors for President and Vice President of the United States," is "denied" or "abridged," a state's congressional representation is reduced accordingly.[87] There is no relevant case law on Section 2,[88] but voters who objected to the Compact could theoretically ask the courts or Congress to reduce the congressional representation of a state whose award of electors to the national-popular-vote winner conflicts with the preference of the majority of voters in that state.

There could also be a general argument that the Compact is inconsistent with constitutional design and practice. The Framers rejected the idea of a direct popular election for president, the argument would run, and states have not previously sought to appoint presidential electors on the basis of votes cast outside the state, rendering this innovation suspect.[89]

None of these problems is necessarily fatal, and there is a real possibility that a court would decline to resolve any such case on political-question grounds.[90] But the arguments are not frivolous, and the prospect of litigation under one or more of these theories is important to consider in evaluating the Compact.

The Compact also presents serious questions of implementation and enforceability. What if a state adopts the Compact, then withdraws or attempts to withdraw after Election Day? On its face the Compact forbids states from withdrawing after July 20 of an election year (p. 202). But there's no real enforcement mechanism, and in any event it is not clear that this term would prevent one organ of state government from attempting to send to Congress a competing slate of electors that tracks the state's popular vote rather than the national popular vote. The states that have joined the Compact have enacted it like any ordinary legislation, so a state actor in this scenario would be engaged in plainly lawless activity. But in our hyperpolarized moment, it is

86. *See* Moore v. Ogilvie, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.").

87. U.S. CONST. amend. XIV, § 2.

88. The Supreme Court's most important precedent on Section 2, *Richardson v. Ramirez*, read Section 2 to permit states to disenfranchise felons. 418 U.S. 24 (1974). But *Richardson* did not touch upon the circumstances in which the Section 2 penalty of reduced representation might actually be triggered. *See* Franita Tolson, *What Is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 434 (2015) ("Congress has never imposed Section 2's penalty on offending states . . . .").

89. *See* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1935 (2020).

90. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) ("Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

not hard to imagine a governor siding with a co-partisan presidential candidate and seeking to award that candidate, rather than the national-popular-vote winner, the state's electors. Indeed, a governor pursuing such a strategy would presumably argue that the Compact itself undermines popular sovereignty by disregarding the will of the state electorate in favor of the preferences of voters in other states.

Once again, it is not clear that any of this would happen. But it could. And as we have seen, such uncertainty creates real danger in the context of a close or disputed presidential election.

C. *Other Paths to Reform*

Wegman's focus on the Compact means that he does not explore other reform possibilities. Two omissions are particularly conspicuous: the prospect of state-level reforms and the possibility of constitutional amendment.

Wegman is quick to dismiss the adoption of non-winner-take-all allocation schemes like the "congressional district method" used in Maine and Nebraska.[91] When Maine adopted this method in 1969 in response to the same fears that drove Bayh's contemporaneous efforts at constitutional amendment, it believed that other states would follow suit.[92] But so far only Nebraska has done so, in 1992, the result of a campaign by longtime state senator and former civil rights leader Ernie Chambers.[93]

Other states might consider doing the same. Wegman worries that gerrymandered congressional districts mean that a district allocation scheme could be even worse than winner-take-all (p. 183). But he does not consider the limits state courts have imposed on permissible gerrymandering in states like Pennsylvania and North Carolina,[94] or the fact that states like Arizona use independent redistricting commissions.[95] A move by additional states to join Maine and Nebraska would not entirely eliminate the problems with the College, but it would at least mitigate the effective political erasure of large swaths

---

91. *See* pp. 185–87; James Doubek, *How State Sen. Ernie Chambers Helped Keep Nebraska's Electoral College Votes Split*, NPR (Nov. 9, 2020, 6:26 PM), https://www.npr.org/2020/11/09/933215552/how-state-sen-ernie-chambers-helped-keep-nebraskas-electoral-college-votes-split [perma.cc/Z4DX-7TU4].

92. Meilan Solly, *Why Do Maine and Nebraska Split Their Electoral Votes?*, SMITHSONIAN (Nov. 5, 2020), https://www.smithsonianmag.com/smart-news/why-do-maine-and-nebraska-split-their-electoral-votes-180976219 [perma.cc/LC8V-JTR3]; Paul Mills, *The History of Maine's Distinctive Electoral College Voting System*, CENT. ME. (Oct. 9, 2016), https://www.centralmaine.com/2016/10/09/paul-mills-the-history-of-maines-distinctive-electoral-college-voting-system [perma.cc/Z9K7-TFXQ].

93. Doubek, *supra* note 91.

94. Jonathan Lai, *The Legal Team in the Pa. Gerrymandering Case Set Their Sights on N.C. They Just Won Again.*, PHILA. INQUIRER (Sept. 4, 2019), https://www.inquirer.com/politics/pennsylvania/nc-gerrymandering-case-used-pa-model-20190904.html [perma.cc/P678-GZMX].

95. *See, e.g.*, JOSEPH KANEFIELD & MARY O'GRADY, ARIZONA INDEPENDENT REDISTRICTING COMMISSION LEGAL OVERVIEW (2011), https://irc.az.gov/sites/default/files/media/AZ-Independent-Redistricting-Commission-Legal-Overview-070811.pdf [perma.cc/UBJ4-L2F6].

of the country. And it could change or at least complicate the partisan valence of reform debates today.

The political obstacles to implementing such a change are daunting. The party that prevailed in the most recent cycle would presumably resist an effort that might deprive it of electoral votes at the next election. (This, of course, is an important rationale for the Compact.) But if the possibility of unilateral adoption seems a bridge too far, perhaps states could proceed in pairs as they implement this change: the safe Democratic stronghold of New York with the increasingly conservative, once-consummate swing state of Florida, for example.

Regarding a potential constitutional amendment, Wegman points to the failure of amendment efforts during less polarized times to conclude that "a constitutional amendment is not in the cards" in today's hyperpolarized moment (p. 21). Wegman is of course right that changing the presidential-selection process through an Article V amendment, which requires a two-thirds vote in the House and the Senate and ratification in three-fourths of the states, would be extraordinarily difficult.[96] That's particularly true because the partisan benefits of today's status quo are strongly asymmetrical: Republican politicians benefit from the College's distortions, while changing demographic and political dynamics mean that Democrats are likely to continue enjoying an edge in the national popular vote.[97] But that is no reason not to undertake a serious effort. A recent article by David Pozen and Thomas Schmidt suggests that the two chambers of Congress do not need to act contemporaneously in the amendment process, so that the popular-vote amendment passed by the House in 1969 might still be live and ready for Senate action.[98] Adopting this view would mean that an amendment process would not need to start from scratch—though of course here the obstacle of the Senate would, if anything, be more daunting than it was in 1970.

Still, it is striking how often presidential selection and succession, as well as expansion of the franchise, *have* been the subjects of amendment: the Twentieth Amendment moved the start of the president's term and provided for succession, the Twenty-Second Amendment limited the president to two terms, the Twenty-Third Amendment gave the District of Columbia electoral

---

96. Article V's process would be required; the Electoral College is a constitutional creation that it is difficult to see subjecting to amendment through interpretation, or outside of Article V. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 267–68 (1991).

97. *See* Press Release, Rep. Thomas Massie et. al, Joint Statement Concerning January 6 Attempt to Overturn the Result of the Election (Jan. 3, 2021), https://massie.house.gov/news/email/show.aspx?ID=Z5MPA3CVK5FYZQ3KBYQIDSAWB4 [perma.cc/2PFFQCC4] ("From a purely partisan perspective, Republican presidential candidates have won the national popular vote only once in the last 32 years. They have therefore depended on the electoral college for nearly all presidential victories in the last generation.").

98. Pp. 152–59; *see* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2392 & n.422 (2021); *see also* Julie C. Suk, *Opening the Paths of Constitutional Change*, DEMOCRACY, Summer 2021, https://democracyjournal.org/magazine/61/opening-the-paths-of-constitutional-change [perma.cc/ZWA5-VBYT].

votes, and the Twenty-Fifth Amendment created procedures for responding to presidential incapacity or disability. Indeed, of the post–Bill of Rights amendments to the Constitution, nearly a third have involved the presidency. Perhaps more significantly, despite political opposition and the difficulty of amending the Constitution, we have managed to substantively expand the electorate in that same period through the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

Other efforts at formal amendment have faced rocky paths, including in polarized times.[99] A half century elapsed between women's initial attempts to achieve suffrage under the Constitution and the eventual passage and ratification of the Nineteenth Amendment.[100] The recent ERA revival movement could yet result in writing sex equality into the Constitution, despite the ERA having sat dormant for decades.[101] And as the ERA effort also reveals, sustained attention on constitutional amendment can galvanize other types of reform, including subconstitutional or state-level change. Whatever the final result, the momentum around reviving the ERA suggests that Electoral College abolition should not be off the table. Ending the Electoral College once and for all is emphatically a project that deserves continued attention and engagement—in Congress, state houses, civil society, and the streets.[102]

CONCLUSION

Closing the chapter on the Electoral College will undoubtedly require great political will. And it is possible that we've become inured to its distortions and dysfunction at the same time that we have lost the habit of meaningful democratic reform and constitutional amendment.[103] We last amended the Constitution in 1992, which means that young people, including most law students, have not seen a constitutional amendment in their lifetimes. (Even for those old enough to remember it, the Twenty-Seventh Amendment was hardly a moment of profound constitutional transformation.) At only two other periods in American history—the sixty-one years between the Twelfth and Thirteenth Amendments, and the forty-three years between the Fifteenth and Sixteenth Amendments—have we gone so long without changing the

---

99. *See* Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1382 (2020) ("Congressional polarization for most of American history was comparable to today's levels of hyperpartisanship, and voters were nearly as loyal to their parties as they are now.").

100. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951 (2002).

101. Sheryl Gay Stolberg, *House Votes to Extend Deadline to Ratify Equal Rights Amendment*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/equal-rights-amendment.html [perma.cc/2LAE-7V3K]. *See generally* JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT (2020).

102. *See* Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679 (2021).

103. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741 (2007) ("We have lost our ability to write down our new constitutional commitments in the old-fashioned way.").

written constitution. As for the College specifically, despite centuries of reform efforts, the Twelfth Amendment remains the only successful effort at constitutional change (p. 92).

But at previous points in our history, when our institutions have been insufficient to match the political and moral values of an inclusive and representative democracy, we have fixed the Constitution.[104] We should endeavor to do the same today, particularly in light of the experiences of 2016 and 2020. One significant contribution of Wegman's book is to reveal just how much reform energy has been directed at the College from the start—energy that we should now harness in pushing both for constitutional amendment and subconstitutional change.

The presidency is a massively powerful institution. We can debate the desirability of that power and its consistency with constitutional design, but no one should want an unchecked president. It is a truism that the people represent the ultimate check on the president. As long as we have the Electoral College, that is no meaningful check at all.

104. *See generally* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019).