

THE ELECTORAL COLLEGE: TIME FOR A CHANGE?

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“In the United States . . . [o]ne person, one vote is more than a clever phrase, it’s the cornerstone of justice and equality.”

—Senator Birch Bayh¹

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1. Birch Bayh, *Foreword* to JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* xxxi (4th ed. 2013).

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INTRODUCTION

Fifty-three years ago, I wrote an article for the *Fordham Law Review* advocating for a popular vote for president.² My experience serving as staff advisor to an American Bar Association (ABA) commission on Electoral College reform influenced my views. The House of Delegates authorized the commission in February 1966. A year later, after study and consideration, the ABA recommended such a reform, as did Senator Birch Bayh of Indiana, then serving as chair of the Senate Judiciary Committee's subcommittee on constitutional amendments.³

At the time, Senator Bayh was leading the charge for a constitutional amendment regarding presidential inability and filling a vacancy in the vice presidency. The ABA, in its report, called the system of electing a president and vice president "archaic, undemocratic, complex, ambiguous, indirect, and dangerous."⁴ The ABA's commission included in its membership former presidents of the association from every region of the country. E. Smythe Gambrell of Georgia said at the commission's wrap-up meeting, and I quote: "Mr. Chairman, this near unanimity here today surprises me. It is almost frightening. Do you suppose that we are truly representative of the profession or why haven't we had a fight today?"⁵ The commission's chair, Robert Storey of Texas, a former law school dean and president of the ABA, said, "Well, Smythe, you and I know that within our many battles within and

2. See generally John D. Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 FORDHAM L. REV. 1 (1968).

3. See *Electing the President: Recommendations of the American Bar Association's Commission on Electoral College Reform*, 53 A.B.A. J. 219 (1967) [hereinafter *ABA Recommendation*]; see also S. COMM. ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT, S. REP. NO. 91-1123, at 15 (2d Sess. 1970).

4. JOHN D. FEERICK, *THAT FURTHER SHORE: A MEMOIR OF IRISH ROOTS AND AMERICAN PROMISE* 272 (2020).

5. *Id.* at 271.

without the ABA, and in the ABA, when we debate and then come to a final conclusion or consensus, we stay with that conclusion.”⁶

In the ABA’s House of Delegates in February 1967, another former president of the ABA, Edward Kuhn of Tennessee, captured the mood of the moment by stating, “Gentlemen, we are American first, last, and always, and this is where we strike a blow . . . for the American people and our Nation.”⁷ Former ABA presidents from New York (Whitney North Seymour Sr.), Michigan (William Gossett), and Montana (Judge John Jameson) expressed the same sentiments as did the ABA House of Delegates, which, by a vote of 171–57, called for the adoption of a popular vote for president and vice president.⁸

1967 was not an isolated period of concern about the presidential election system.⁹ In 1965 and 1966, President Lyndon Johnson had sent messages to Congress, urging constitutional reform of the system.¹⁰ He noted failures and said they “should be eliminated in order to assure that the people’s will shall not be frustrated in the choice of their President and Vice President.”¹¹ In his message on January 20, 1966, he spoke of the exploitation of electors, the manipulation of their votes, and the absence of a constitutional provision for representing the District of Columbia if Congress had to decide an election.¹² President Johnson declared that our country’s “concepts of self-government and sound government require” that we address such constitutional defects.¹³

Gallup polls from the 1960s reflected massive support for a popular election amendment.¹⁴ Groups like the League of Women Voters and the U.S. Chamber of Commerce expressed support.¹⁵ On the other hand, strong special interest groups in New York worried about losing their Electoral College advantage with forty-one votes (now twenty-eight).¹⁶ In 1969, the U.S. House of Representatives, by a bipartisan vote of 339–70, adopted the proposed amendment.¹⁷ However, a filibuster led by Senators James Eastland, John L. McClellan, Sam Ervin, Roman Hruska, Hiram Fong, and Strom Thurmond brought the reform movement to an end.¹⁸

6. *Id.*

7. *Id.* at 272.

8. *See ABA Recommendation, supra* note 3, at 219.

9. *Id.*

10. *See generally* H.R. DOC. NO. 89-364 (2d Sess. 1966).

11. *Id.* at 5.

12. *Id.* at 5–6.

13. *Id.* at 6; *see also* H.R. DOC. NO. 89-64, at 4–6 (1st Sess. 1965).

14. *See* Dave Roos, *How the Electoral College Was Nearly Abolished 1970*, HIST. (Aug. 25, 2020), <https://www.history.com/news/electoral-college-nearly-abolished-thurmond> [<https://perma.cc/T5WZ-MG9N>].

15. *See id.*

16. *See id.*

17. *See generally* JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE (2020). *See also* JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 1, 20 (1975).

18. *See* S. COMM. ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT, S. REP. NO. 91-1123, at 24–51 (2d Sess. 1970).

During this period, voting rights continued to improve in America, leading to the Voting Rights Act of 1965¹⁹ and constitutional amendments. In 1957, states that had prevented the realization of voting rights for Native Americans born in the United States gave up these restrictions, thereby achieving the full potential of the Snyder Act of 1924.²⁰ In 1961, the Twenty-Third Amendment gave citizens of the District of Columbia the right to vote for three presidential electors. In 1964, the Twenty-Fourth Amendment outlawed voting barriers for failure to pay any poll or other tax. Then, in 1971, the Twenty-Sixth Amendment, gave citizens eighteen or older the right to vote.

For the rest of the 1970s, despite Senator Bayh's herculean efforts, there was limited progress on electoral reform. It wasn't until 1979 that the Senate took up the national popular vote amendment.²¹ A Senate majority voted in the affirmative on the ensuing vote but fell short of the requisite two-thirds. I was a young lawyer at the time and was, like others, filled with hope for electoral reform. Another young advocate for reform, Neal R. Peirce, noted in his splendid book that "careful analysis shows that the danger of an electoral misfire is not just historical but immediate in any close contest."²²

This Article returns to the subject of reform by examining in Part I the elections of this century and, as a prelude, the election of 1968. Part II examines weaknesses and threats in the system that public leaders, scholars, journalists, students, and observers of government have called attention to for many years. Part III charts out a path toward reform. Part IV discusses proposed reforms. Part V offers a few closing reflections.

I. CONTESTED ELECTIONS

A. *The Election of 1968*

The election of 1968 involved the dangerous presidential candidacy of George Wallace, a segregationist and then-governor of Alabama. He hoped to secure enough electoral votes so that neither major candidate could obtain an electoral majority.²³ Had neither candidate received the requisite number of electoral votes, it would have thrown the election of president into the House of Representatives under a one-state, one-vote formula.²⁴ Ultimately, Richard Nixon won the presidency by approximately 500,000 popular votes,

19. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

20. See Indian Citizenship (Snyder) Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).

21. See S. COMM. ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 96-111 (1st Sess. 1979). For dissenting views, see *id.* at 42-71.

22. NEIL R. PEIRCE, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE 141 (1968).

23. FEERICK, *supra* note 4, at 272-73.

24. *Id.* at 273.

or 0.7 percent of the total.²⁵ He received 55.9 percent of the electoral vote to Hubert Humphrey's 35.5 percent.²⁶ Wallace fell short of his goal of sixty-six votes, winning the electoral votes of only four states, with forty-six votes, and receiving 9,906,473 popular votes.²⁷

Leaders of both major parties reacted strongly to the threat of George Wallace's candidacy and sought significant reform of the system, as noted.²⁸ The election of 1968 was also made notable by its Democratic National Convention in Chicago.²⁹ Tensions were high within the Democratic Party due to disagreement over the Vietnam War.³⁰ Anti-war groups gathered in mass numbers to show their support for the withdrawal of U.S. troops from Vietnam. Chicago Mayor Daley deployed thousands of police officers and the National Guard to protect against demonstrators.³¹ The situation quickly spiraled out of control, with law enforcement gassing and beating protestors.³² Party leaders ultimately nominated Humphrey, though he did not participate in any of the primaries.

B. The Election of 2000

The election of 2000 was the first in over a century to reject the popular vote winner. A contentious election between Vice President Al Gore and Texas Governor George W. Bush led to a crisis that left the election's outcome unknown for weeks. Ultimately, the election focused on Florida.³³ The uncertainty was in part caused by "hanging chads" and Palm Beach County's confusing "butterfly ballot."³⁴ The county ballot fit on two pages with large text meant to help elderly voters read the ballot.³⁵ In between the two pages were punch holes where voters marked whom they were voting for by punching the holes next to their preferred candidate's name.³⁶ Many voters reported being confused by the design of the ballot.³⁷

25. *1968 Electoral College Results*, NAT'L ARCHIVES (Dec. 16, 2019), <https://www.archives.gov/electoral-college/1968> [<https://perma.cc/4722-STZH>].

26. *See id.*

27. *Id.*

28. FEERICK, *supra* note 4, at 273–74.

29. Corbin Duncan, *The Story of Primary Elections in America Part One: An Unfortunate Evolution*, NEW STATESMAN (Oct. 23, 2019), <https://www.newstatesman.com/world/north-america/2019/10/story-primary-elections-america-part-one-unfortunate-evolution> [<https://perma.cc/7FU9-JWMX>].

30. *Protests at Democratic National Convention in Chicago*, HIST. (July 21, 2010), <https://www.history.com/this-day-in-history/protests-at-democratic-national-convention-in-chicago> [<https://perma.cc/W3US-7ST4>].

31. *See id.*

32. *See id.*

33. Michael Levy, *United States Presidential Election of 2000*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-2000> [<https://perma.cc/9WXH-QNTB>] (last visited Sept. 17, 2021).

34. *See generally* Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793 (2001).

35. *Butterfly Ballot Designer Speaks Out*, ABC NEWS (Jan. 6, 2006, 5:51 PM), <https://abcnews.go.com/Politics/story?id=122175&page=1> [<https://perma.cc/KE2C-3FB5>].

36. *See* Wand et al., *supra* note 34, at 794.

37. *See id.* at 793.

The ballot design led to several issues. First, thousands of voters appeared to have mistakenly voted for a reform party candidate, Patrick Buchanan, instead of Gore.³⁸ The punch hole that corresponded to a vote for Buchanan was between the one for Bush (at the top of the page) and the one for Gore.³⁹ Buchanan received approximately 3400 votes⁴⁰ in a Democratic Party stronghold, which he had never visited or targeted for promotion.⁴¹ Second, the confusion resulted in an extraordinary number of overvotes (more than one vote in the same race).⁴² Lastly, the ballot design employed by several Florida counties created an irregularity called the “hanging chad,”⁴³ where many citizens did not completely punch through the hole for their desired candidate. The punch-card ballots resulted in many disqualified votes, which led to an order for election officials and poll workers to examine the state’s votes by hand to divine each voter’s intent.⁴⁴

Bush appealed, resulting in an order from the U.S. Supreme Court to halt the recount until it could hear arguments in the case.⁴⁵ It then ruled by a 7–2 majority that the use of different standards for counting votes (machine versus hand) in different counties violated the equal protection clause of the Fourteenth Amendment.⁴⁶ Subsequently, the Court held, 5–4, that no constitutionally valid recount could be conducted before the December 12 “safe harbor” date under 3 U.S.C. § 5.⁴⁷ This judgment decided the election for Bush, allowing his 537 vote margin in Florida to stand.⁴⁸ Gore had won the popular vote in the nation by approximately 500,000. However, Bush won the Electoral College by five votes.⁴⁹ His 271 electoral votes secured his presidential victory.⁵⁰

38. *See id.* at 803.

39. *See id.* at 794.

40. *See id.* at 795.

41. *See id.* at 793.

42. Approximately 19,000 ballots were thrown out due to overvotes, compared to 3000 in the 1996 election. *See* ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 140 (1st ed. 2001).

43. *How the 2000 Election Came Down to a Supreme Court Decision*, HIST. (Sept. 24, 2020), <https://www.history.com/news/2000-election-bush-gore-votes-supreme-court> [<https://perma.cc/PB4P-SUSV>].

44. *See* Samantha Levine, *Hanging Chads: As the Florida Recount Implodes, the Supreme Court Decides Bush v. Gore*, U.S. NEWS (Jan. 17, 2008, 5:00 PM), <https://www.usnews.com/news/articles/2008/01/17/the-legacy-of-hanging-chads> [<https://perma.cc/9A5C-EAXN>].

45. *See* *Bush v. Gore*, 531 U.S. 98 (2000).

46. *See id.* at 107, 111.

47. *See id.* at 121 (Rehnquist, C.J., concurring).

48. *See* GREENE, *supra* note 42, at 108.

49. FED. ELECTION COMM’N, 2000 PRESIDENTIAL GENERAL ELECTION RESULTS, https://www.fec.gov/resources/cms-content/documents/FederalElections2000_PresidentialGeneralElectionResultsbyState.pdf [<https://perma.cc/T549-XMGL>].

50. *2000 Electoral College Results*, NAT’L ARCHIVES, <https://www.archives.gov/electoral-college/2000> [<https://perma.cc/P3FR-UGPJ>] (last visited Sept. 17, 2021).

C. The Election of 2016

In 2016, Hillary Clinton won the popular vote by more than two million more votes than Donald Trump but lost the White House because Trump prevailed in the Electoral College.⁵¹ The election result was controversial for many reasons, one of which was suspected foreign interference.⁵² The Russian government had engaged in a vast campaign to influence the election in favor of Trump.⁵³ Its Internet Research Agency specifically targeted essential groups of voters to either reduce their turnout for Clinton or increase support for Trump.⁵⁴ The Internet Research Agency employed agents to post on social media, exploiting beliefs regarding people of color and immigrants.⁵⁵ In addition, Russian hackers infiltrated the systems of the Democratic National Committee, Democratic Congressional Campaign Committee, and Clinton campaign officials.⁵⁶ Russia released thousands of emails and files from these hacks, causing internal strife within the Democratic Party.⁵⁷ These leaks and social media campaigns disrupted the election and potentially swayed the outcome.⁵⁸

In response, many called on the presidential electors themselves to cast their votes against Trump.⁵⁹ Members of the Electoral College who advocated for electors to “vote their conscience” called themselves the “Hamilton Electors.”⁶⁰ They believed that they embodied the will of the founders by using their discretion.⁶¹ Several electors received immense pressure to vote against Trump.⁶² In the end, the electors cast seven faithless

51. David Leonhardt, Opinion, *Clinton’s Substantial Popular-Vote Win*, N.Y. TIMES (Nov. 11, 2016), <http://www.nytimes.com/2016/11/11/opinion/clintons-substantial-popular-vote-win.html> [<https://perma.cc/4C57-PF5M>].

52. Jane Mayer, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Sept. 24, 2018), <https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump> [<https://perma.cc/3QYJ-23TF>].

53. See ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 4 (2019).

54. See *id.* at 14–36.

55. See *id.* at 22–28.

56. See *id.* at 36–40.

57. See *id.* at 41–48.

58. See Mayer, *supra* note 52.

59. See, e.g., Unite For America, *A Message for Electors to Unite For America*, YOUTUBE (Dec. 14, 2016), <https://youtube.com/watch?v=0z0iuWh3sek> [<https://perma.cc/AM4W-92QA>]; Bill Lichtenstein, *The Way Out of Trumpland: Hail Mary Pass to Save the Nation*, HUFFINGTON POST (Nov. 16, 2016, 9:20 AM), https://www.huffpost.com/entry/the-way-out-of-trumpland-hail-mary-pass-to-save-the_b_582b2f65e4b0852d9ec21d4e [<https://perma.cc/ZV97-L55F>].

60. Lilly O’Donnell, *Meet the ‘Hamilton Electors’ Hoping for an Electoral College Revolt*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/> [<https://perma.cc/K9WF-D8HB>].

61. See *id.*

62. See Ruth Sherlock, *Thousands Send Letters, Death Threats, to Pressure Electoral College to Avert Outcome of Presidential Election*, TELEGRAPH (Dec. 19, 2016, 1:35 AM), <https://www.telegraph.co.uk/news/2016/12/19/thousands-send-letters-death-threats-pressure-electoral-college/> [<https://perma.cc/H6JH-Q47X>].

votes, with Clinton losing five and Trump losing two.⁶³ Three other electors attempted to vote contrary to their pledge, but state statutes prevented them from doing so prior to the vote.⁶⁴ Electors from two states, Washington and Colorado, sued their respective states, arguing that laws enforcing a pledge by a candidate are unconstitutional.⁶⁵ Along with statutes in four other states, the Washington statute fined the electors for a vote contrary to their pledge.⁶⁶ The reappearance of faithless electors, however, did not affect the election outcome.

D. *The Election of 2020*

The 2020 election took place during a pandemic that took the lives of people all over the world. In light of the pandemic, many states enacted or set forth voting innovations to allow citizens to vote for their presidential electors, resulting in a large number of absentee and mail-in ballots. Supporters and agents of Trump brought challenges to these innovations, but these efforts were almost uniformly unsuccessful, including in the Supreme Court.⁶⁷ On November 3, American citizens cast more votes than ever before in a presidential election.⁶⁸ It took several days to count the ballots and then recount and audit them. Finally, on December 16, the presidential electors met in their respective states in the context of external protests and riots. They cast their votes, confirming Biden's win of the presidency by an electoral vote of 306–232.

Thereupon, significant supporters of the president, including Vice President Pence and the Senate Majority Leader Mitch McConnell, accepted the outcome and treated Biden and his running mate, Kamala Harris, as the presumptive president-elect and vice president-elect.⁶⁹ Attorney General William Barr, a significant supporter of President Trump throughout his presidency, agreed that there was no basis for a fraud claim to overturn the

63. See Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html> [<https://perma.cc/6PNZ-6NE5>].

64. See Tyler Creighton, Note, *The Constitutional Case for State Power to Eliminate Faithless Electors*, 100 B.U. L. REV. ONLINE 33, 33 (2020); see also *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320, 2322 (2020) (upholding the state laws binding electors to vote). There are many states not affected by that ruling.

65. See Creighton, *supra* note 64, at 33–34.

66. See *id.*

67. See, e.g., *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 643 (2020) (mem.), *cert. denied*, 141 S. Ct. 732 (2021).

68. Hannah Miao, *2020 Election Sees Record High Turnout with At Least 159.8 Million Votes Projected*, CNBC (Nov. 4, 2020, 9:31 AM), <https://www.cnn.com/2020/11/04/2020-election-sees-record-high-turnout-with-at-least-159point8-million-votes-projected.html> [<https://perma.cc/3RLT-D4UZ>].

69. See Burgess Everett, *McConnell Recognizes Biden as President Elect*, POLITICO (Dec. 15, 2020, 7:23 PM), <https://www.politico.com/news/2020/12/15/mcconnell-recognizes-biden-as-president-elect-445450> [<https://perma.cc/M5FY-3ENB>].

election.⁷⁰ President Trump, however, continued to claim voter fraud. On January 2, 2021, he called the secretary of state of Georgia to ask if he could find enough votes to overturn the election.⁷¹ The secretary stood firm, finding that there was no basis for that—as did officials and judges in other states.⁷²

On January 6, 2021, when Congress assembled in a joint session in Washington, D.C., to certify the electoral votes, protesters and rioters converged at the U.S. Capitol. Nearby, President Trump held a “Save America” rally and stated, “[T]his election was stolen from you.”⁷³ He encouraged those present to walk to the Capitol to show some members of Congress “the kind of pride and boldness that they need to take back our country.”⁷⁴

As president of the Senate at the time, Vice President Pence began to proceed with the vote count when mayhem suddenly ensued in and around the Capitol building itself. The insurrection resulted in multiple deaths and injuries, damage to the Capitol, and an interruption of the congressional proceedings.

Nonetheless, party leaders collaborated and reconvened the proceedings that evening. Vice President Pence proceeded to open the electoral certificates, state by state, concluding the process in the early morning of the next day.⁷⁵ Finally, Biden and Harris were formally confirmed, and on January 20, 2021, they took the oaths of office as president and vice president of the United States. The day was a peaceful one, overshadowed by 25,000 national guard soldiers from several states with fences put in place to separate spectators from those invited to the inauguration, due in part to the risks of the COVID-19 pandemic.

Between January 6 and January 20, the House of Representatives passed a resolution calling on the vice president to invoke Section 4 of the Twenty-Fifth Amendment, which he declined to do.⁷⁶ On January 13, 2021,

70. See Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, AP NEWS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d> [<https://perma.cc/SMH2-BZER>].

71. See Amy Gardner & Paulina Firozi, *Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021, 1:15 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html [<https://perma.cc/QZJ7-FRFX>].

72. See *id.*

73. *Trump’s Full Speech at D.C. Rally on Jan. 6*, WALL ST. J., at 52:25 (Feb. 7, 2021), <https://www.wsj.com/video/trump-full-speech-at-dc-rally-on-jan-6/E4E7BBBBF-23B1-4401-ADCE-7D4432D07030.html> [<https://perma.cc/4DFJ-6HGP>].

74. *Id.* at 70:35; Editorial, *Jan. 6 Was Worse Than We Knew*, N.Y. TIMES (Oct. 2, 2021), <https://www.nytimes.com/2021/10/02/opinion/jan-6-trump-eastman-election.html> [<https://perma.cc/LPE3-UXNC>].

75. See Lauren Gambino & Daniel Strauss, *Congress Certifies Joe Biden as Next President Hours After Storming of Capitol*, GUARDIAN (Jan. 7, 2021, 5:27 PM), <https://www.theguardian.com/us-news/2021/jan/06/congress-certify-election-biden-republicans-object> [<https://perma.cc/C83Q-3FU4>].

76. See Nicholas Fandos, *The House Formally Called on Pence to Invoke the 25th Amendment to Strip Trump of Power. He Declined.*, N.Y. TIMES (Jan. 14, 2021),

the House adopted a resolution of impeachment of President Trump by a bipartisan vote of 232–197. Subsequently, the Senate trial resulted in an acquittal, with a bipartisan vote of fifty-seven for conviction and forty-three for acquittal—short of the two-thirds majority necessary for conviction.

II. THE ELECTORAL COLLEGE IN PRACTICE

Candidates, their zealous supporters, and members of Congress can exploit the weaknesses, defects, danger points, and ambiguities embedded in the Electoral College. Below, I address these features of the system.

A. *The Winner of the Popular Vote Losing the Election*

In 1787, the country was without a national executive. The Constitution that was proposed that year created an office of the president chosen through a system of intermediate electors. However, it left to the states the task of determining how to select these electors, requiring the vote of a majority of the electors to become president, with the runner-up in electoral votes becoming the vice president. Various methods of selecting electors were used by the states in early elections, including appointments by their legislatures. In time, a statewide popular vote took precedence in all states to choose the electors. That is to say, whoever wins the state popular vote receives all of its electoral votes. Known as the “winner-take-all” system, it became the operating rule in every state, except for two. Maine and Nebraska instead adopted a district vote system.⁷⁷

Under the Constitution, each state is entitled to three electoral votes. Two votes are allocated based on entitlement to equality in the Senate, and at least one is tied to representation in the House of Representatives. Each state has as many electoral votes as its representation in both houses of Congress. This disproportion between popular and electoral votes can lead to what Neal Peirce called a “misfire,” or rejection of the national popular winner.⁷⁸ In the 2020 election, for example, while Biden amassed almost eight million more popular votes than Trump in three states with a total of thirty-seven electoral votes, his margin of victory was less than 1 percent (Georgia by 1799 votes, Arizona by 1457 votes, and Wisconsin by 20,682 votes).⁷⁹ Had Trump carried these states, there would have been a tie in the electoral vote,

<https://www.nytimes.com/2021/01/12/us/the-house-formally-called-on-pence-to-invoke-the-25th-amendment-to-strip-trump-of-power-he-declined.html> [https://perma.cc/4RFV-79C6]; see also John D. Feerick, Opinion, *How to Invoke the 25th Amendment*, N.Y. DAILY NEWS (Jan. 8, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-how-to-invoke-the-25th-amendment-20210108-3ngx3yb6g5aclblepdq7kret2q-story.html> [https://perma.cc/8LRW-M8CH].

77. *Split Electoral Votes in Maine and Nebraska*, 270TOWIN, <https://www.270towin.com/content/split-electoral-votes-maine-and-nebraska/> [https://perma.cc/T7GG-FL53] (last visited Sept. 17, 2021).

78. See PEIRCE, *supra* note 22, at 141.

79. See *The American Presidency Project: Statistics*, UC SANTA BARBARA [hereinafter *The American Presidency Project*], <https://www.presidency.ucsb.edu/statistics/elections/2020> [https://perma.cc/JHU8-ZD4L] (last visited Sept. 17, 2021).

throwing the election into Congress for resolution. It is also noteworthy, in considering the election's closeness, that in Florida, Michigan, Nevada, North Carolina, Pennsylvania, and Wisconsin, where the margin of victory between the candidates was between less than 1 percent and 5 percent, totaling ninety-six electoral votes—Biden won fifty-two of these electoral votes, and Trump won forty-four of these votes in 2020.⁸⁰

B. *The Disfranchisement of Voters*

Among those who have attacked the winner-take-all feature of the present system was Senator Strom Thurmond, a third-party candidate for president in 1948 and later president pro-tempore of the Senate. In 1979, he condemned the winner-take-all system, stating that popular votes “are wasted when cast for a candidate who although receiving a large percentage of the State’s popular vote . . . does not receive any of its electoral vote.”⁸¹ He said that this feature “fosters the virtual disenfranchisement of, on many occasions, a high percentage of a state’s voting population.”⁸² In the election of 2020, the votes of almost sixty-seven million citizens were canceled without any reflection in the final vote.⁸³

C. *Population Changes*

The electoral vote allocation does not reflect population changes occurring between decennial censuses. The 2020 election took place based on the 2010 Census. Yet, the 2020 Census has reflected changes in the population since 2010. The recent numbers show that substantial population changes have altered the electoral vote positions of sixteen states.⁸⁴ Like California and New York, some states have experienced decreases in their allocation of electoral votes, while others, like Montana and Oregon, have experienced increases.⁸⁵ Based on their populations in 2020, the updated elector counts will be in effect for the 2024 and 2028 presidential elections.⁸⁶

80. *Election 2020 Results and Live Updates*, ABC NEWS (Dec. 18, 2020, 4:15 PM), <https://abcnews.go.com/Elections/2020-us-presidential-election-results-live-map/> [<https://perma.cc/RZ7Y-BJCK>].

81. See S. COMM. ON THE JUDICIARY, *DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES*, H.R. REP. NO. 96-111, at 71 (1st Sess. 1979).

82. *Id.*

83. See *The American Presidency Project*, *supra* note 79. The exact number—66,888,187—was calculated by manually tabulating the number of votes cast for the candidate who lost the statewide popular vote in each state.

84. See *Here’s How the 1st 2020 Census Results Changed Electoral College, House Seats*, NPR (Apr. 26, 2021, 3:56 PM), <https://www.npr.org/2021/04/26/983082132/census-to-release-1st-results-that-shift-electoral-college-house-seats> [<https://perma.cc/2XD7-HR2N>].

85. See *id.*

86. See *2016 Election with Projected 2024 Electoral Votes*, 270TOWIN, <https://www.270towin.com/custom-maps/projected-2024-electoral-vote-allocation> [<https://perma.cc/9W78-YUX4>] (last visited Sept. 17, 2021).

D. Voting Turnout

Voter turnout does not influence a state's electoral vote count. For example, in the election of 2020, Wyoming, with a voting population of 276,765, cast three electoral votes for president, as did Maine, whose voting population was three times that of Wyoming, numbering 819,461.⁸⁷ Five other states with three electoral votes had turnouts ranging from 344,356 (Washington, D.C.) to 603,640 (Montana).⁸⁸ This variance exists in other tiers as well. For example, in Oklahoma, which has seven electoral votes, the voter turnout in 2020 was 1,560,699, whereas in Oregon, which has the same number of electoral votes, 2,374,321 people voted.⁸⁹ In 2020, as in most other elections, the electoral/popular vote ratio ranged widely throughout the nation. For example, the ratio was one electoral vote to 381,636 popular votes in Florida, one electoral vote to 234,229 popular votes in Nevada, and one electoral vote to 92,255 popular votes in Wyoming.⁹⁰ Additionally, in 2020, the actual voting population in Colorado, which has nine electoral votes, was greater than in Tennessee, Maryland, and Missouri, each of which has ten votes, and Indiana, which has eleven votes.⁹¹

E. Swing and Safe States

In a presidential election, success rests on a candidate's ability to secure a majority of the electoral votes. Election outcomes frequently depend on the electoral votes of only a few states. Closely divided states whose electoral votes might swing the election from one candidate to the other—also known as swing states—receive most of a presidential candidate's time and campaign resources. When states are considered a guaranteed win or loss for a candidate, they are rarely paid any attention before an election. In the election of 2016, Trump was able to secure the electoral votes of three swing states—Michigan, North Carolina, and Wisconsin—to win the election. For decades, almost half of the states have voted only for the presidential candidates of the same major party. Over the past several decades, ten states have cast electoral votes for Republican candidates for president and vice president, and fourteen have voted only for Democratic candidates.

The electoral votes of Florida and Ohio often can make the difference in a presidential election, as Florida's electoral votes did in 2000 and as Ohio's could have in 2004 if John Kerry had won the popular vote of the state (even though Bush would have had almost two million more popular votes). Observers of presidential elections have noted that incumbent presidents seeking reelection keep these closely divided states in mind for government

87. *The American Presidency Project*, *supra* note 79.

88. *Id.*

89. *Id.*

90. *See id.*

91. *See Voting and Registration in the Election of November 2020*, tbl.4a, U.S. CENSUS BUREAU (Apr. 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> [<https://perma.cc/KCQ4-Z43Z>].

programs, benefits, and grants.⁹² The five states listed above comprise 32.6 percent of the necessary 270 votes for president.

F. Faithless Electors

The Framers of the Constitution did not intend to bind electors. Alexander Hamilton described the Electoral College as a body “capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation”⁹³ However, the contemplative nature of the Electoral College never came to fruition. The College’s independence began to diminish as early as 1796. Instead of deliberating on the presidential candidates, the electors pledged themselves to support candidates preferred by the emerging political parties. The influence of political parties on electors ended the Framers’ vision of a deliberative body made up of great political minds in each state. Today, electors overwhelmingly vote for the popular vote winner in their respective states. However, faithless electors instead vote for a different candidate against the will of their state’s voters. As already noted, in the 2016 election, seven unfaithful electors cast votes, although they did not influence the outcome. However, if only three electors switched their votes in the 2000 election, the president-elect may have been different. An elector’s grievances and political views could result in a catastrophe in our country.

G. Unpledged Electors

In recommending the elimination of unpledged electors, President Lyndon B. Johnson took account of their use in presidential elections.⁹⁴ In the 1964 election, in which he was elected president, Democratic electors were all unpledged in Alabama, and the names of the Democratic candidates did not appear on the ballot.⁹⁵ President Johnson described the use of unpledged electors as a threat to the stability of American democracy.⁹⁶ The presence of a third-party slate of electors, I would add, could also affect the vote in a state. For example, in the 2000 election, over 97,000 votes were collected by Ralph Nader of the Green Party in Florida. These votes had an evident impact on a tight and controversial election, which resulted in the national popular vote loser winning the presidency.⁹⁷

92. John Hudak, *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds 2* (Ctr. for the Study of Democratic Insts. Working Paper No. 01-2011, 2011), <http://www.vanderbilt.edu/csdi/research/CSDI-WP-01-2011.pdf> [<https://perma.cc/ZQN4-QHMV>]; see WEGMAN, *supra* note 17, at 168.

93. THE FEDERALIST NO. 68 (Alexander Hamilton).

94. See H.R. DOC. NO. 89-364, at 5 (2d Sess. 1966).

95. See WEGMAN, *supra* note 17, at 20–21.

96. See H.R. DOC. NO. 89-364, at 5 (2d Sess. 1966).

97. Bill Scher, *Nader Elected Bush: Why We Shouldn't Forget*, REAL CLEAR POL. (May 31, 2016), https://www.realclearpolitics.com/articles/2016/05/31/nader_elected_bush_why_we_shouldnt_forget_130715.html [<https://perma.cc/82NA-5NVR>].

H. Names on the Ballot

In my experience, few people know the names of the electors for whom they cast a vote for president in November. Some do not realize their votes are for a slate of electors instead of simply their desired national candidates. Indeed, these electors, whom citizens knowingly or unknowingly put their trust in, are not listed on the ballot in many states. In presidential elections in New York, I often ask to examine the lists with their names before casting my vote. Splitting a vote among electors from different party lists is not out of the realm of possibility. In 1960, controversy arose in Alabama due to pledged and unpledged electors being on the list for the Democratic electors and receiving different numbers of electoral votes. If done proportionally, John F. Kennedy would have lost the state's eleven electoral votes.⁹⁸ A plurality of the vote is the usual rule, even in states, such as Georgia, where a majority vote is necessary for nonpresidential elections; if no candidate receives a majority in Senate or House races, there is a runoff election.⁹⁹

I. Selection by the House of Representatives

If there is no Electoral College vote winner, a president's selection falls to the House of Representatives. For an election to occur in the House, under the Twelfth Amendment, a member or members, from two-thirds of the states are required for a quorum. Each state casts one vote, and support from a majority of the states is required to name a winner.¹⁰⁰ A tie for the presidency in 1800 threw the election into the House for decision. Seven days of balloting ensued, with a few state delegations divided in their voting. Finally, on the thirty-sixth ballot, with two states abstaining, Thomas Jefferson received the votes of ten states and was elected president.¹⁰¹

In 1824, the election again fell to the House.¹⁰² Four presidential candidates received electoral votes, but no one had the required majority.¹⁰³ John Quincy Adams received neither a plurality of the popular vote nor more electoral votes than the losing candidate in the House selection; however, he won the votes of a majority of the states in the House selection.¹⁰⁴

In the election of 1876, with the houses of Congress in the hands of different political parties, disputes arose over the electoral votes from four states, with three of the four presenting dual sets of electors. These disputes led Congress to establish a fifteen-member Electoral Commission, including five members from the U.S. Supreme Court and from each house of Congress.¹⁰⁵ The result was the selection, 8–7, along party lines, of the

98. See Feerick, *supra* note 2, at 14 & n.60.

99. See GA. CODE ANN. § 21-2-501(f) (2021).

100. See U.S. CONST. amend. XII.

101. See Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 976 (2016).

102. *Id.* at 976–77.

103. See *id.* at 977.

104. See *id.*

105. See *id.* at 980.

Republican Rutherford B. Hayes as president, who had lost the popular vote in the November election to Governor Samuel Tilden of New York.¹⁰⁶

In the election of 2020, as noted, had neither Biden nor Trump received a majority of the electoral votes, the House of Representatives would have chosen the victor. Moreover, at that time, twenty-six state delegations were in the control of the Republican Party and twenty-four in the control of the Democratic Party.¹⁰⁷

President Johnson urged the elimination of this contingent method, quoting Madison as saying that it was “so great a departure from the Republican principle of numerical equality, and even from the Federal rule . . . and is so pregnant, also, with a mischievous tendency in practice.”¹⁰⁸ In 1979, Senator Thurmond, also favoring its elimination, suggested, as Johnson did, a joint session of Congress to choose the president, with each member casting an equal vote.¹⁰⁹

J. Selection by the Senate

President Johnson, in his messages, also noted that the contingent election method left open the possibility for a president and vice president from different political parties to be elected.¹¹⁰ In the election of 2020, the Congress that convened in joint session on January 6, 2021, consisted, as noted, of a majority of Republican state delegations in the House and a Senate evenly divided between the two major parties.¹¹¹ Incumbent Vice President Pence, a candidate for reelection, was tasked with opening the electoral certificates,¹¹² per the Constitution and 3 U.S.C. § 15.¹¹³ I leave to the reader’s imagination what might have occurred had Vice President Pence not chosen to accept the outcome of the electoral vote on December 16, 2020; he later said it would be “un-American” to have acted otherwise.¹¹⁴

106. *See id.* at 980–81.

107. *See 2020 Election: President*, REAL CLEAR POL., https://www.realclearpolitics.com/elections/live_results/2020/president/ [<https://perma.cc/568B-FBYC>] (last visited Sept. 17, 2021).

108. *See* H.R. DOC. NO. 89-364, at 5 (2d Sess. 1966).

109. Christopher DeMuth, *The Man Who Saved the Electoral College*, 42 NAT’L AFFS., no. 1, 2020, at 70, 73–78, <https://www.nationalaffairs.com/publications/detail/the-man-who-saved-the-electoral-college> [<https://perma.cc/3SYC-HZKE>]; *see infra* note 163 and accompanying text.

110. *See supra* notes 11, 13.

111. *See* Meg Wagner et al., *Congress Finalizes Biden’s Win After Riot Disrupts Capitol*, CNN (Jan. 7, 2021, 5:15 PM), <https://www.cnn.com/politics/live-news/congress-electoral-college-vote-count-2021/index.html> [<https://perma.cc/F4D2-7XYG>].

112. *Id.*

113. 3 U.S.C. § 15 governs the counting of electoral votes in Congress.

114. *See* Edward B. Foley, Opinion, *It’s Time for Mike Pence to Choose: Trump, or the Truth*, WASH. POST (Dec. 22, 2020, 7:26 PM), <https://www.washingtonpost.com/opinions/2020/12/22/its-time-mike-pence-choose-trump-or-truth/> [<https://perma.cc/FDJ4-VYD3>]; *see also* David Brooks, Opinion, *What Will You Do If Trump Doesn’t Leave*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/09/03/opinion/trump-election-2020.html> [<https://perma.cc/246Y-CNRZ>]; Michael Warren, *Pence Contradicts Trump on January 6, Calling Plan to Decertify 2020 Election ‘un-American,’* CNN (June 25, 2021, 6:57 AM),

Professor Edward B. Foley, a scholar of constitutional and election law at Ohio State University Moritz College of Law, considered the possibility of the election of 2020 having to be decided by Congress if it had “metastasize[d] into a full-fledged constitutional crisis.”¹¹⁵ He found the language of the Twelfth Amendment and 3 U.S.C. § 15 ridden with ambiguities. Both party candidates and the speaker of the House (based on the Presidential Succession Act¹¹⁶) could have used the language to support their claims of entitlement to the presidency on Inauguration Day.¹¹⁷ He described § 15 as a “monstrosity, amounting to a virtually impenetrable maze of” a political process that could have led to a political impasse, damaging the offices of president and vice president and the Constitution itself.¹¹⁸

K. Succession Gaps

In my earlier writing on the presidential succession system, I noted serious concerns regarding what might happen should a candidate for president or vice president die before Inauguration Day.¹¹⁹ First, I noted gaps in the Constitution, such as a presidential or vice presidential candidate dying before or after the election, requiring resort to the political party rules as an aid in finding a replacement.¹²⁰ Second, I noted different views concerning where a candidate died after the electors voted but before the vote count occurred in January. Namely, if the deceased candidate received a majority of the electoral vote, I suggested that based on Section 3 of the Twentieth Amendment, the vice presidential candidate of that party could claim to be the next president. For a thoughtful and fuller examination of this subject, I refer to Fordham Professor John Rogan’s article in this issue of the *Fordham Law Review*, entitled *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*.¹²¹

L. Federal Regulation of the Electoral College System

In establishing an electoral system, the Framers contemplated the need for implementing legislation. At the outset, the Constitution provides that “each [s]tate shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”¹²² It further provides that “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their [v]otes, which Day shall be the same throughout the United

<https://www.cnn.com/2021/06/24/politics/mike-pence-donald-trump-january-6/index.html>
[<https://perma.cc/5XDA-TRZB>].

115. Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 309 (2020).

116. 3 U.S.C. §§ 1, 21–22.

117. Foley, *supra* note 115, at 325–28.

118. *Id.* at 329.

119. See Feerick, *supra* note 2, at 23, 24.

120. *Id.*

121. See generally John Rogan, *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*, 90 FORDHAM L. REV. 583 (2021).

122. U.S. CONST. art. II, § 1.

States.”¹²³ The Twentieth Amendment gives Congress the power to adopt legislation to manage two different scenarios.¹²⁴ The first scenario involves the death of any of the persons from whom the House is to choose a president. The second scenario handles the death of any of the persons from whom the Senate is to choose a vice president. However, such a situation has never occurred, and Congress has not acted to provide for these contingencies. The Twenty-Fifth Amendment covers a case of presidential disability and the filling of a vacancy in the vice presidency, giving Congress a role in each case.¹²⁵

The Constitution also highlights the role of the president of the Senate in receiving the electoral lists from the states.¹²⁶ It provides that the president of the Senate shall open all the certificates and count the votes while in the presence of the Senate and House of Representatives. In Professor Foley’s thoughtful 2020 article, he analyzes the federal laws that elaborate on these provisions.¹²⁷ He lays out hypotheticals and scenarios of possibilities of what could have happened in 2020 and supplements his treatment with a post-2020 election article.¹²⁸

III. THE PATH TO CONSTITUTIONAL REFORM

An appropriate starting point for a review of the electoral method is an understanding of its history.

A. The Birth and Evolution of the Electoral College

The Framers of the Constitution experienced difficulty in coming to grips with a method for selecting a president.¹²⁹ It was a time in history when America was an agrarian society, isolation and illiteracy were common, transportation and communication were in their infancy, there were severe restrictions on voting rights, and there lacked a firm establishment of the principle of popular sovereignty.¹³⁰ States in the South were particularly vocal in these debates.¹³¹ Small states worried that presidential candidates would come from large states and that their smaller populations would carry no sway.¹³²

The Electoral College emerged as a way of appeasing states that wanted the representation in Congress, counting enslaved persons as three-fifths of a person without having to extend to them the right to vote.¹³³ These states

123. *Id.*

124. *See id.* amend. XX.

125. *See id.* amend. XXV.

126. *See id.* amend. XII.

127. Foley, *supra* note 115, at 329–35.

128. *See id.* at 335–39; Foley, *supra* note 114.

129. John Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 250–52 (1968); WEGMAN, *supra* note 17, at 57–79 (2020).

130. *See* Feerick, *supra* note 129, at 249.

131. *See* WEGMAN, *supra* note 17, at 40.

132. *See id.* at 64.

133. *See id.* at 66.

wanted to maintain the representation advantage their large slave populations would give them. While some at the Constitutional Convention wished to abolish slavery, many did not.¹³⁴

The Framers considered more than fifteen proposals for selecting a president, with an election by Congress remaining a strong possibility.¹³⁵ It was put aside in the end because of the belief that a selection by Congress would lead to conspiracy, “cabal,” and corruption and would encourage interference by foreign powers.¹³⁶ Several leading Framers voiced that election by the people would be the “purest” and “fittest” system.¹³⁷ Gouverneur Morris, who wrote the last draft of the Constitution, said, “[i]f the President ‘is to be the Guardian of the people, let him be appointed by the people.’”¹³⁸ Other Framers expressed skepticism about the practicality of a popular election and questioned whether the people could judge the merits of national candidates.¹³⁹ Some thought the people were ill-suited because of their lack of knowledge and information.¹⁴⁰ Others suggested that designating men and demagogues would mislead the people.¹⁴¹ George Mason once said:

[I]t would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.¹⁴²

The Framers felt the people could alternatively express their views by use of the Electoral College.¹⁴³ By allocating electoral votes to the states in accordance with their representation in Congress, the Constitution gave something to every state.¹⁴⁴ The three-fifths phrasing for representation purposes of those in bondage, as noted, gave something to large states in the North in the form of tax revenue. The country counted the slaveholding population to determine state tax obligations and then allocated according to population.¹⁴⁵ States in the South, with a high percentage of the slave population, would thus receive increased representation in the House of Representatives.¹⁴⁶

134. *See id.* at 67.

135. *See generally* Feerick, *supra* note 129.

136. Feerick, *supra* note 2, at 6.

137. *Id.* at 7.

138. *Id.*

139. *See id.*

140. *See id.*

141. Michael Signer, *The Electoral College Was Created to Stop Demagogues Like Trump*, TIME (Nov. 17, 2016, 3:05PM), <https://time.com/4375262/history-demagogues-donald-trump/> [<https://perma.cc/HF6H-RWRY>].

142. Feerick, *supra* note 2, at 7.

143. WEGMAN, *supra* note 17, at 21.

144. *See id.* at 22.

145. *See id.* at 50–51.

146. *Id.*

In the decades that followed, the Constitution addressed the Electoral College in other ways.¹⁴⁷ First, it abolished slavery as a result of the Civil War and eliminated the three-fifths clause.¹⁴⁸ Second, it added provisions to the Fourteenth and Fifteenth Amendments to prohibit the abridgment of the right to vote on account of race.¹⁴⁹ Finally, in the twentieth century, the Seventeenth Amendment provided for the election of Senators by the “people thereof” of each state, with the provision: “The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”¹⁵⁰

The right to vote and Electoral College enhancements stayed on a dual-track throughout the twentieth century. The Nineteenth Amendment provided that the right to vote shall not be denied or abridged on account of sex.¹⁵¹ The Twentieth Amendment supplemented the Electoral College provisions by dealing with succession contingencies.¹⁵² A few decades later, the Twenty-Third Amendment was adopted, providing representation for the District of Columbia in presidential elections.¹⁵³ Then, more amendments were added, abolishing the failure to pay poll and other taxes as a condition of voting in the Twenty-Fourth Amendment and extending the right to vote to persons eighteen-years-old or older in the Twenty-Sixth Amendment. The result was a much fuller expression of the people in the voting for electors and the presidency.

In shaping a provision in the Twenty-Fifth Amendment for filling a vacancy in the vice presidency, Congress, however, rejected the idea of reconvening the Electoral College for such purpose, as recommended by Richard Nixon.¹⁵⁴ Professor Ruth Silva, a pioneer in the field of presidential succession, stated that “it would be a step away from democratic control, not a step toward it” for the college to have a role.¹⁵⁵ Congress instead chose itself for such a role, with each house assigned an equal role.¹⁵⁶ In 1965 and 1966, President Johnson called attention to the need for a constitutional provision guaranteeing the District of Columbia the right to participate if the nation had an election thrown into Congress.¹⁵⁷

The amended Constitution since the Civil War, as noted, took the nation forward, toward “a more perfect union.” America was becoming a model for

147. *Id.* at 109.

148. *Id.*

149. *Id.* at 109.

150. *See* U.S. CONST. amend. XVII.

151. *See id.* amend. XIX.

152. *See id.* amend. XX.

153. *See id.* amend. XXIII.

154. *See* John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 907, 924 (2011).

155. *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Committee of the Judiciary, Senate 89th Congress, 88th Cong., 2d Sess.* 164 (1965) [hereinafter *Hearings on Presidential Inability and Vacancies*].

156. U.S. CONST. amend. XXV, § II.

157. *See* H.R. DOC. NO. 89-364, at 1 (2d Sess. 1966).

the world at large in terms of democracy and the right to vote.¹⁵⁸ These developments were also expressed by decisions of the Supreme Court from *Brown v. Board of Education*¹⁵⁹ in 1954, outlawing racial discrimination against Black children in the country's public education system, through *Baker v. Carr*,¹⁶⁰ establishing the rule of one person one vote in the sphere of elections. Then, in *Reynolds v. Sims*,¹⁶¹ the court laid out: "[T]he basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives."¹⁶²

B. Understanding of the Electoral College System

Throughout my career, I have become aware of a chronic lack of understanding of the intricacies of our country's presidential election system. The history of the Electoral College, its basis for assigning electoral votes to the states, the role of largely unidentified presidential electors, and the two-month process that follows Election Day, are not widely understood. The system is complicated and abstract to many, defying a full explanation to friends from abroad, family members, or school children. Moreover, differentiating a presidential election from the popular vote used in other elections is no easy task. Many know, thanks to the media, that each state has a number of electoral votes, of which a presidential candidate must obtain 270 to win. The contested elections of this century have undoubtedly contributed to an increased public awareness of the system, but not necessarily favorable. In a country that sees itself as a democracy of the people, transparency in the election of its chief executive should be paramount.

C. Considerations for Change

In the 1970s, as reform was under study in the Senate, I was afforded a rare opportunity to testify before the Senate Judiciary Committee on behalf of the ABA to present its views supporting a national popular vote.¹⁶³ Each time, a senator questioned me with essentially the same message.¹⁶⁴ The following exchange took place when I testified in 1979¹⁶⁵:

158. WEGMAN, *supra* note 17, at 109.

159. 347 U.S. 483 (1954).

160. 369 U.S. 186 (1962); *see also* *Gray v. Sanders*, 372 U.S. 368, 370–71, 381 (1963) (finding Georgia's voting system unconstitutional where the vote winner in each county received a predetermined amount of unit votes toward the statewide total); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (holding that the Equal Protection Clause requires states to ensure that their congressional districts are roughly equal in population).

161. 377 U.S. 533, 536 (1964).

162. *See id.* at 567.

163. FEERICK, *supra* note 4, at 278.

164. *See id.* at 282.

165. *Id.* at 274–75.

Senator Thurmond: You noted last year [actually in 1977] that the concept of federalism was one tended to form the basis for the legislative branch rather than the executive branch . . .

Mr. Feerick: I believe I was reflecting a point of view of my own, and that point of view would have as important features of our federal system, certainly the legislative branch, certainly our State structure. I think the States, as an entity, as well as the legislative branch of government, play a very important part in our federal system.

Senator Thurmond: What is the historical evidence or source work that you relied upon in making this assertion?

Mr. Feerick: My statement was . . . based on certainly my study of the debates at the constitutional convention where the framers of the Constitution spent a considerable amount of time . . . focusing on the Federal structure in terms of the legislative branch of Government. And we had a great compromise that was reached with reference to the population element in the House and the State element in the Senate . . .

Senator Thurmond: Is the one-man/one vote rule the only principle that comes into play with respect to the executive branch?

Mr. Feerick: We believe—I believe—in the context of an election to the Executive Office, that ought to be the principle . . .

Senator Thurmond: Well, if the principle of American democracy, such as a simple numerical majority, should control, then I guess we have to consider changing all of our basic institutions.

Mr. Feerick: Which I would oppose personally . . . any change with reference to the legislative branch of Government; the one-person/one vote is the rule . . . with reference to election to the House and Senate and I simply urge in my testimony a similar rule in the case of the election of the President of the United States . . . We are talking about an election. I am simply urging the principle that applies in every other election; namely, one person, one vote . . .¹⁶⁶

At the time of my testimony, Senator Thurmond was urging adoption of an amendment to the Constitution that would abolish the office of presidential elector, eliminate the contingent election by the House of Representatives, and proportion the electoral votes of a state according to the popular votes received by candidates in the state.¹⁶⁷ His reforms, in essence, would provide a greater voice for the people of the United States and eliminate the risk of faithless electors trying to steal an election. Senator Thurmond's criticism of the winner-take-all disregard for popular votes in support of the state popular vote loser is reminiscent of criticism expressed by Senator Thomas Hart Benton of Missouri in 1824: "To lose their votes, is the fate of all minorities, and it is their duty to submit; but this is not a case

166. *Id.*

167. *See* S. COMM. ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 96-111, at 7-8 (1st Sess. 1979).

of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.”¹⁶⁸

Some who resist reform suggest that the Electoral College has provided our country with stability, especially during the Civil War and the wars of the twentieth century.¹⁶⁹ They argue that under the current system, every state, including the District of Columbia, has a role. They also note the Electoral College buttresses the two-party tradition.¹⁷⁰ On the other hand, every state will be attractive to candidates under the popular vote because every vote will matter, not simply the voters in swing states. As to the argument against the popular vote—that voters in large cities would be the ultimate election deciders—I must note that the same percentage of Americans live in rural areas.¹⁷¹

The ABA, in its report, reviewed arguments for and against reform, and said that under its proposal, states “would continue to play a vital role in the elective process.”¹⁷² “They would continue to have the primary responsibility for regulating the places and manner of holding the Presidential elections, for establishing qualifications for voting in such elections, and for controlling political activity within their state boundaries.”¹⁷³ A distinguished former majority leader of the Senate, Mike Mansfield of Montana, put it this way: “The Federal system is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal system by pitting groups of States against groups of States.”¹⁷⁴ He added:

[T]he Presidency has evolved, out of necessity, into the principal political office, as the courts have become the principal legal bulwark beyond districts, beyond States, for safeguarding the interests of all the people in all the States. And since such is the case in my opinion, the Presidency should be subject to the direct and equal control of all the people.¹⁷⁵

Furthermore, it can be said that elements that created the compromise that is the Electoral College no longer exist. Over time, we have identified problems in our country and attempted to make the union more perfect. Slavery was one of them. Still, while it was abolished, the effects, including racial injustices, persist in our civil society and require addressing.¹⁷⁶ The Electoral College is not without its racial biases, as is demonstrated by, for

168. LUCIUS WILMERDING, JR., *THE ELECTORAL COLLEGE* 82 (1958).

169. Phillip R. Schmidt, *The Electoral College and Conflict in American History and Politics*, 4 SOCIO. PRAC.: J. OF CLINICAL AND APPLIED SOCIO., Sept. 2002, at 195, 195.

170. See WEGMAN, *supra* note 17, at 247.

171. See Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 229–30 (2004); see also WEGMAN, *supra* note 17, at 223–25 (pointing out that areas with 50,000 or fewer people contain the same percentage—around 15 percent—of the population as the fifty largest cities).

172. See *ABA Recommendation*, *supra* note 3, at 221.

173. *Id.*

174. 107 CONG. REC. 350 (1961).

175. *Id.*

176. *Id.* at 413–16.

example, instances where a nonracial majority exists in a state along with a significant minority population whose votes are given no reflection in the final vote for president and vice president because of the winner-take-all system.

The push for democracy that has grown since the nation's founding, as previously stated, speaks to the need for reform of the Electoral College. The evolution of the primary process for nominating political candidates confirms that need for greater citizen participation.¹⁷⁷ We trust the people to select the candidates. We trust them to elect governors, members of Congress, and state and local officials. So, as Senator Bayh impassionedly argued on the Senate floor, why should we not trust them with the presidency?¹⁷⁸ The Electoral College makes the presidency vulnerable to a minority of voters electing the president without a valid, legitimate majority.

IV. THE PROPOSALS FOR REFORM

Of the ideas to change the Electoral College, several have been popular.

A. *The Congressional District Plan, Proportional Allocation Method, and Automatic Plan*

Of the many flaws of the Electoral College, the winner-take-all method is perhaps the most egregious.¹⁷⁹ As far back as 1823, a committee of the House of Representatives predicted that such a system would lead to geographical political parties and could destroy the harmony of the country and perhaps endanger its existence.¹⁸⁰

Two popular electoral proposals for reforming the winner-take-all system are the congressional district and the proportional allocation methods. Another proposal is the automatic plan, which abolishes the office of elector and allocates electoral votes automatically to candidates. Both Maine and Nebraska allocate electoral votes based on who receives more votes in each congressional district.¹⁸¹ Maine has four electoral votes, with two assigned based on the winner in each district and the other two assigned to the statewide vote winner. This allows for broader participation by the voting public. In 2016, Maine split its electoral votes 3–1, when Trump won the Second District and Clinton was the statewide winner and won Maine's First District.¹⁸² In 2008 in Nebraska, Barack Obama won one district but lost the

177. ELAINE C. KAMARCK, PRIMARY POLITICS: HOW PRESIDENTIAL CANDIDATES HAVE SHAPED THE MODERN NOMINATING SYSTEM 7–10 (2009).

178. See WEGMAN, *supra* note 17, at 146 (citing 112 CONG. REC. 10,998–11,000 (1966)).

179. *Id.*; see also PEIRCE, *supra* note 22, at 140–41.

180. See WILMERDING, *supra* note 168, at 19–22.

181. *Maine & Nebraska*, FAIRVOTE, https://www.fairvote.org/maine_nebraska [<https://perma.cc/F57L-YEGT>] (last visited Sept. 17, 2021).

182. Christopher Cousins, *Clinton Wins Maine, but Trump Takes One Electoral Vote*, BANGOR DAILY NEWS (Nov. 9, 2016), <https://bangordailynews.com/2016/11/09/news/clinton-leads-maine-but-trump-poised-to-take-one-electoral-vote/> [<https://perma.cc/2MN3-EYUJ>].

statewide vote and other districts, which gave John McCain four electoral votes.¹⁸³

A thoughtful study in the *Hofstra Law Review* finds that the congressional district method expands the electoral map geographically, turning long-ignored areas into competitive battlegrounds.¹⁸⁴ Under this method, author Craig Herbst states, candidates would be more incentivized to campaign in a much more comprehensive range of states; it would encourage greater voter turnout and would enable voters who are not in the states' plurality to participate in the election.¹⁸⁵ The district method, though, has its challenges. First, gerrymandering would become immensely more critical.¹⁸⁶ Drawing district lines favorably to one party could decide the outcome of presidential elections. Second, minority voters in a congressional district would still be unable to affect the allocation of the electoral votes.¹⁸⁷ If voters are not among the plurality in a district, their votes do not affect the electoral vote allocation in that district.¹⁸⁸ But it is possible that their votes could still assist their candidate in winning the two electors available to the winner of the statewide popular vote.¹⁸⁹ Lastly, the congressional district method still allows for electoral misfires—a national winner losing the election.¹⁹⁰

Under the proportional method, every vote impacts the election regardless of which candidate receives the most votes in that state.¹⁹¹ Thus, it puts every state in play and incentivizes voter turnout.¹⁹² However, it adds a layer of complexity to the electoral vote in counting the final vote. Since the votes are physical votes cast by electors, the proportional method forces states to round the statewide percentages to the nearest whole number of the electors.¹⁹³ Additionally, the allocation of electoral votes to third-party

183. Jean Ortiz, *Obama Wins 1 of Nebraska's Electoral Votes*, LINCOLN J. STAR (Nov. 13, 2008), https://journalstar.com/news/local/govt-and-politics/obama-wins-of-nebraska-s-electoral-votes/article_a5b75308-4ae0-58d8-9ba1-47e151b40604.html [<https://perma.cc/T5BK-ZJNR>].

184. Craig J. Herbst, Note, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 240–41 (2012).

185. *See id.* at 243–45.

186. Dennis A. Lienhardt, Jr., Note, *The Electoral College: An Analysis of Reform Proposals Through the Lens of Past Presidential Elections*, 61 WAYNE L. REV. 437, 451–52 (2016).

187. *See* GIANNI MASCIOLI ET AL., DEMOCRACY AND THE CONSTITUTION CLINIC, FORDHAM UNIV. SCH. OF L., PRESIDENTS MUST BE ELECTED POPULARLY: EXAMINING PROPOSALS AND IDENTIFYING THE NATURAL ENDPOINT OF ELECTORAL COLLEGE REFORM 17 (2020), https://www.fordham.edu/download/downloads/id/14401/Presidents_Must_Be_Elected_Popularly__Democracy_Clinic.pdf [<https://perma.cc/S6VL-F4RX>] [hereinafter DEMOCRACY CLINIC REPORT].

188. *See id.*

189. *See id.*

190. *See* Lienhardt, *supra* note 186, at 454.

191. *See id.* at 454–55.

192. *See* Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2007–09 (1993).

193. *See id.* at 2001.

candidates increases the possibility that no candidate receives the requisite electoral votes.¹⁹⁴ Raising the possibility of this outcome could be disastrous for our democracy.¹⁹⁵

Lastly, the automatic plan would eliminate the role of an elector and automatically allocate electoral votes to each state's winner.¹⁹⁶ This plan would rid the Electoral College of the uncertainty of faithless electors.

B. *The Rise of the National Popular Vote Interstate Compact*

The rise of the National Popular Vote Interstate Compact (NPVIC) evokes Americans' desire to democratize our country. It utilizes state legislatures' power to select the manner of appointing presidential electors and allocates their votes based on the outcome of the national popular vote.¹⁹⁷ Under the NPVIC, each state (as well as the District of Columbia) that enacts the agreement allocates its slate of electors to the nationwide popular vote winner.¹⁹⁸ The chief election official in each state determines the winner by adding up the number of votes for each slate of electors, producing a national popular vote total.¹⁹⁹ Once the winner is determined, the states allocate their electors to that candidate under the Electoral College.

The NPVIC requires states that add up to at least 270 electoral votes to control the outcome, and the compact is not triggered unless states with at least that number of electoral votes sign onto it.²⁰⁰ Currently, states (and the District of Columbia) accounting for 195 electoral votes have signed on to the NPVIC.²⁰¹

However, this plan is not without issues. First, the Constitution requires that interstate compacts receive congressional consent before becoming operational.²⁰² The Supreme Court has interpreted this provision to mean that the Constitution requires congressional approval for compacts that "encroach upon or interfere with the just supremacy of the United States."²⁰³ Second, the census may affect the implementation of the NPVIC every

194. See DEMOCRACY CLINIC REPORT, *supra* note 187, at 15.

195. See *id.*

196. See Margaret Judson, *The Automatic Plan Could Fix the Electoral College*, BUSTLE (Oct. 21, 2016), <https://www.bustle.com/articles/190377-what-is-the-automatic-plan-it-could-be-the-answer-to-electoral-college-concerns> [<https://perma.cc/FL3Q-NUG5>].

197. See THOMAS H. NEALE & ANDREW NOLAN, CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 7 (2019), <https://fas.org/sgp/crs/misc/R43823.pdf> [<https://perma.cc/552U-YWAX>].

198. See *id.*

199. See Nat'l Popular Vote, Agreement Among the States to Elect the President by National Popular Vote (Apr. 27, 2021), <https://www.nationalpopularvote.com/sites/default/files/1-pager-npv-v211-2021-4-27.pdf> [<https://perma.cc/45NT-4EED>].

200. See NEALE & NOLAN, *supra* note 197.

201. *Status National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/state-status> [<https://perma.cc/TG8K-C8AN>] (last visited Sept. 17, 2021).

202. U.S. CONST. art I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .").

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

decade when it reallocates electoral votes. For example, if the total number of electors in states that have passed the NPVIC falls below 270, then Article III of the NPVIC is no longer binding.²⁰⁴

C. *Abolishing the Electoral College via an Amendment*

The recommendation made by the ABA Commission on Electoral College Reform may still be, in the final analysis, the best method for solving the problems of the Electoral College. Its report in 1967 recommended instituting a direct national popular vote for president and vice president with a minimum of 40 percent of the popular vote required for election.²⁰⁵ The recommendation also provided for a runoff election between the top two presidential candidates if no candidate met the 40-percent threshold.²⁰⁶

A direct national popular vote instituted via amendment, for the reasons stated in Parts I through III, may be the best way to address the issues with the Electoral College. There are no faithless electors, the census does not change anything, and the methodology is enshrined in the Constitution. It equalizes the weight of every vote, promotes competition and voter turnout in every state, enhances every voter's voice, and simplifies the process of electing the president. The direct national popular vote is the most intuitive method of electing the president and is the logical progression of democratic values in American politics. Senator Birch Bayh put it this way: "In the United States . . . [o]ne person, one vote is more than a clever phrase, it's the cornerstone of justice and equality."²⁰⁷ Notably, many presidents have received less than a majority popular vote, but two presidents received less than 40 percent. One was President Abraham Lincoln, who received 39.37 percent in the election of 1860, when his name did not appear on the ballot in ten states. In 1824, when the president was elected by the House of Representatives, John Adams received 30.54 percent of the vote.²⁰⁸ In that election, six states did not choose their electors by popular vote, and Andrew Jackson received 43.13 percent of the popular vote.²⁰⁹

204. See Bayh, *supra* note 1, at 274–75; see also DEMOCRACY CLINIC REPORT, *supra* note 187. In the Democracy Clinic Report, Fordham Law School students made an addition worthy of consideration: ranked choice voting of the president to ensure an automatic runoff election. See *id.* Ranked choice voting, they suggested, prevents the inevitable political jockeying and confusion regarding a nationwide runoff election. See *id.*

205. See DEMOCRACY CLINIC REPORT, *supra* note 187, at 19; ABA Recommendation, *supra* note 3, at 220–22.

206. See ABA Recommendation, *supra* note 3, at 8–11.

207. Bayh, *supra* note 1, at xxxi; John D. Feerick, *It's Time to Rethink the Electoral College*, AM. MAG. (May 8, 2020), <https://www.americamagazine.org/politics-society/2020/05/08/its-time-rethink-electoral-college> [<https://perma.cc/9VHV-46FB>].

208. S. COMM. ON THE JUDICIARY, DIRECT POPULAR ELECTION OF THE PRESIDENT, S. REP. NO. 91-1123, at 12 (2d Sess. 1970).

209. See ABA Recommendation, *supra* note 3, at 222.

V. A FINAL REFLECTION ON CHANGE

Major reform of the Electoral College may not be attainable at this time. As Cyrus Vance, a lawyer statesman, reminded me at another time, it is important to keep a good idea alive in the context in which we find ourselves. Quite clearly, the election of 2020 has exposed weaknesses and threats that require examination. Herbert Brownell, another one of the finest public servants I have known, made clear in congressional testimony and elsewhere that not everything is controllable by law. There comes a time when the nation must depend on the good faith of those who serve in office and exercise power. That happened in 1961, 2000, and 2016, when the losing candidate accepted the results of a disputed election. Again, it occurred in the election of 2020, when Vice President Pence acknowledged that Biden and Harris had won the election, and then again on January 6, 2021, when Pence made clear, as president of the Senate, his responsibility to open the electoral certificates and announce the votes cast by the presidential electors, state after state. A bipartisan majority of Congress stood firm and voted to uphold the election after affording members, who had objected, an opportunity to state their views.

Beyond the Congress of the United States, the courts of America in 2020 stood firm in dismissing lawsuits to overturn the voting, playing an instrumental role in bringing a contested presidential election to a conclusion. As to a future contested election, history suggests that an impartial and independent judiciary, applying the rule of law, may have to be the ultimate arbiter of the outcome. However, the election of 2016 has raised profound questions about the future viability of an Electoral College in which a change of the vote in one state may change the election and award the presidency and vice presidency to the popular vote loser. The 2016 election also added a complexity of a different kind, one that analogously the Framers worried about: the possibility of foreign interference through invasive uses of cyber.²¹⁰ The Framers, as previously noted, dictated that electors meet separately, in their respective states, rather than jointly, to minimize the risks of foreign influence. Might the threat of such attacks, given the presence of swing states and close elections, be another reason to support a popular election, since the votes of millions of citizens would be dispersed throughout the country? Finally, in a country in conflict from within, might a system that treats every vote equally encourage a greater sense of community than the present divide of blue and red states?

CONCLUSION

As one grapples with change of the Electoral College, I am reminded of the words of Republican Senator Kenneth Keating of New York, who said, as the Congress was trying to deal with a constitutional amendment on presidential inability:

210. See MUELLER, *supra* note 53, at 4.

The death of Estes Kefauver and John F. Kennedy provides a dual lesson for us. First, it is a grim reminder of the universality of tragedy, that no man, no matter his station, is immune from the accidents of fate that befall ordinary mortals.

Secondly, however, it cautions those who survive of the difficulty of foreseeing the absolutely incredible. Human legislation partakes always of human fallibility. No act of lawmaking, no matter how carefully conceived and executed can possibly safeguard against all the freak contingencies of our existence. The best we can hope to achieve is the best practical solution²¹¹

211. See *Hearings on Presidential Inability and Vacancies*, *supra* note 155, at 22.