

AN ELECTORAL COLLEGE COMPROMISE CONSTITUTIONAL AMENDMENT: BRIDGING PARTISAN DIVIDES TO IMPROVE PRESIDENTIAL ELECTIONS

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Abolishing the Electoral College in favor of using a national popular vote to elect the president and vice president is unlikely to attract sufficient bipartisan support to reach the high thresholds for amending the U.S. Constitution. However, the Electoral College has flawed features that both Democrats and Republicans might support reforming because those defects can undermine either party's candidates. This Essay highlights three such defects. First, contingent elections—a process by which Congress selects the president and vice president if no ticket wins a majority of electoral votes—are deeply unrepresentative of the American electorate while also being subject to unpredictable dysfunction and partisan manipulation. Second, presidential electors—the individuals who are expected to transmit the will of voters—can attempt to exceed their ministerial roles to either party's detriment. Third, the constitutional provision that lets states determine how to appoint their electors is ambiguously drafted and makes it possible for states to bar voters from participating in presidential elections.

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INTRODUCTION

Over half a century ago, the last plausible chance of amending the U.S. Constitution to abolish the Electoral College failed.¹ In September 1969, the House of Representatives voted by a wide margin—338 to seventy—to use the popular vote, instead of the Electoral College, to choose the president and vice president.² But that measure was stopped the following year by a Senate filibuster.³

Since then, the possibility of abolishing the Electoral College has become close to nonexistent.⁴ Twice this century, the Electoral College has delivered the presidency to the candidate who lost the popular vote.⁵ Both times—in 2000 and 2016—the winner was a Republican.⁶ Notably, Republicans’ structural Electoral College advantage nearly disappeared in the 2024 election.⁷ However, their edge is likely to return following the 2030 census, when solidly Republican states are expected to gain electoral votes.⁸

1. See JOHN D. FEERICK, *THAT FURTHER SHORE: A MEMOIR OF IRISH ROOTS AND AMERICAN PROMISE* 270–79 (2020); Gillian Brockell, *Of the 700 Attempts to Fix or Abolish the Electoral College, This One Nearly Succeeded*, WASH. POST (Dec. 5, 2020), <https://www.washingtonpost.com/history/2020/12/04/abolish-electoral-college-george-wallace-trump-bayh/> [https://perma.cc/4RYR-BBQE].

2. See FEERICK, *supra* note 1, at 277.

3. JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* 126–28 (2020).

4. See ERWIN CHEMERINSKY, *NO DEMOCRACY LASTS FOREVER* 160–61 (2024). *But see* Jerry Goldfeder, *Can Trump Pull a Nixon?: The New President Can Help End the Outdated Electoral College*, N.Y. DAILY NEWS (Dec. 22, 2024, 5:00 AM), <https://www.nydailynews.com/2024/12/22/can-trump-pull-a-nixon-the-new-president-can-help-end-the-outdated-electoral-college/> [https://perma.cc/LUL3-X9CH]; Alexander Bolton, *Senate Democrats Push Plan to Abolish Electoral College*, HILL (Dec. 16, 2024, 6:47 PM), <https://thehill.com/homenews/senate/5043206-senate-democrats-abolish-electoral-college/> [https://perma.cc/VP9Y-UAHG]; Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Sept. 25, 2024), <https://www.pewresearch.org/short-reads/2024/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/> [https://perma.cc/TJ6U-JJZA].

5. See John D. Feerick, *The Electoral College: Time for a Change?*, 90 *FORDHAM L. REV.* 395, 399–402 (2021).

6. *See id.*

7. See Adrian Beaumont, *Republicans Soared in the Recent U.S. Elections, but Democrats Have Reasons for Optimism for 2026*, THE CONVERSATION (Dec. 11, 2024, 9:09 PM), <https://theconversation.com/republicans-soared-in-the-recent-us-elections-but-democrats-have-reasons-for-optimism-for-2026-245157> [https://perma.cc/S47B-LT3R]; *see also* Nate Cohn, *Republicans’ Electoral College Edge, Once Seen as Ironclad, Looks to Be Fading*, N.Y. TIMES (Sept. 25, 2024), <https://www.nytimes.com/2024/09/25/upshot/trump-electoral-college-harris.html> [https://perma.cc/3KBS-73PV] (discussing Republicans’ fading advantage before the 2024 election).

8. Michael Li, *Big Changes Ahead for Voting Maps After Next Census*, BRENNAN CTR. FOR JUST. (Dec. 20, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/big-changes-ahead-voting-maps-after-next-census> [https://perma.cc/3WB4-AX7W].

The way the system has benefited Republicans makes striking the Electoral College from the Constitution challenging. As a practical matter, constitutional amendments need bipartisan support.⁹ They require two-thirds support in both houses of Congress and ratification by three-fourths of state legislatures.¹⁰ It is hard to imagine enough lawmakers voting against their perceived partisan interests to reach those thresholds.¹¹

Nevertheless, constitutional reform to remove the Electoral College's most problematic features should be possible because those flaws are dangerous to both parties. Democrats might resist an amendment that stops short of abolition. But if the Electoral College continues to be how the president and vice president are chosen, improving how it works should be a priority. Statutory reforms at the state and federal levels have addressed serious flaws in the system,¹² but some defects can only be fully resolved with a constitutional amendment. Because some vulnerabilities stand to harm either party, a compromise constitutional amendment deserves consideration.

This Essay discusses flawed features of the Electoral College system that both Democrats and Republicans might support eliminating. Part I focuses on the contingent election process that allows Congress to choose the president and vice president if no candidate wins a majority of electoral votes. Part II addresses the involvement of presidential electors in the process of casting states' electoral votes. Part III highlights the constitutional provision that gives states authority to decide the procedure for allocating their electoral votes.

9. See CHEMERINSKY, *supra* note 4, at 160 (“The simple reality is that amendment is possible only if America[n]s share a widespread consensus that change is desirable.”).

10. U.S. CONST. art. V.

11. The National Popular Vote Interstate Compact (NPVIC), which seeks to implement popular election of the president and vice president without amending the Constitution, faces only slightly less daunting prospects than a constitutional amendment—but implementation currently appears unlikely due to lack of interest among states controlled by Republicans and with split partisan control. See *National Popular Vote*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/national-popular-vote> [<https://perma.cc/9UZZ-MGFX>] (Apr. 19, 2024). The NPVIC requires compacting states to assign their electoral votes to the winner of the national popular vote. See CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 7 (2019), <https://crsreports.congress.gov/product/pdf/R/R43823> [<https://perma.cc/F862-FLGS>]. It would take effect when states with collectively 270 electoral votes or more joined, but it would probably face constitutional challenges. See *id.*

12. See, e.g., *Understanding the Electoral Count Reform Act of 2022*, PROTECT DEMOCRACY (Sept. 18, 2024), <https://protectdemocracy.org/work/understanding-the-electoral-count-reform-act-of-2022/> [<https://perma.cc/GN8N-635T>] (summarizing federal statutory reforms to improve procedures for casting and counting electoral votes); *Enactments Relating to the Electoral Count Reform Act*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 17, 2024), <https://www.ncsl.org/elections-and-campaigns/enactments-relating-to-the-electoral-count-reform-act> [<https://perma.cc/6EA6-2GH3>] (collecting and summarizing state laws reforming presidential election procedures, especially by implementing provisions of federal statutory electoral reforms).

I. CONTINGENT ELECTIONS

The contingent election process is a wild card in the electoral system that could undermine any party's candidacy—and the legitimacy of the electoral process in the public's eyes. Thomas Jefferson called the contingent election provision “the most dangerous blot in our constitution.”¹³ More recently, in 1992, Republican Senator Mitch McConnell declared, “It is nonsense to have the House of Representatives choose the president.”¹⁴ The flaws in the contingent election process are extensive. It involves, by nature, extreme disproportionality in representation among the states, creates opportunities for partisan manipulation of the outcome and backroom dealing, and risks deadlocks—among other problems.

In the Electoral College, each state receives a number of electors that is equal to its combined representation in the Senate and House of Representatives.¹⁵ The states use the Election Day result to determine how to appoint their electors, who cast two votes: one for president and another for vice president.¹⁶ Candidates need a majority to win.¹⁷

A contingent election happens when no candidate wins a majority of electoral votes,¹⁸ either because the candidates tied or more than two candidates split votes in a way that prevented any candidate from reaching a majority. In a contingent election, the House of Representatives chooses the president from the candidates receiving the three highest amounts of electoral votes, while the Senate chooses the vice president from the top two finishers.¹⁹ A candidate who wins the popular vote and the most electoral votes can lose in a contingent election, which happened in the 1824 presidential election.²⁰

A. Flaws in the Contingent Election Process

States' unequal representation is an undemocratic flaw in contingent elections. Votes in a House contingent election for president are cast by states—not by individual lawmakers.²¹ Each state receives one vote, and the members of each state delegation decide how to cast their state's vote.²²

13. *Letter from Thomas Jefferson to George Hay, 17 August 1823*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-3707> [https://perma.cc/S7ND-EGQB] (last visited Apr. 2, 2025).

14. ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 321 (2020) (quoting *The Electoral College and Direct Election of the President: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 102d Cong. 14 (1992) (statement of Sen. Mitch McConnell)).

15. U.S. CONST. art. II, § 1, cl. 2.

16. *Id.* art. II, § 1, cl. 3.

17. *Id.* amend. XII.

18. *Id.*

19. *Id.*

20. Scott Bomboy, *Looking Back at the Last Presidential Election Settled by the House*, NAT'L CONST. CTR. (Feb. 9, 2023), <https://constitutioncenter.org/blog/the-day-that-the-12th-amendment-worked> [https://perma.cc/2M2M-D7CS].

21. *See* U.S. CONST. amend. XII.

22. *See id.*

Giving one vote to each state regardless of their populations leads to incredibly disproportionate representation among Americans. Wyoming—with a population of about 600,000²³—and California—with a population over thirty-nine million²⁴—receive exactly the same say in selecting the president. Also, the nearly 700,000 residents²⁵ of Washington, D.C. would receive no representation at all because they do not have a voting House member.²⁶ James Madison, one of the Constitution’s most influential framers, said allowing the House of Representatives to select the president “is so great a departure from the Republican principle of numerical equality” that a constitutional amendment was needed to improve the system.²⁷

These rules might seem to benefit Republicans. Even when they are the minority party in the House, Republicans have recently been more likely than Democrats to control a majority of state delegations.²⁸ Appearing to recognize this, Republicans attempted to convince Nebraska lawmakers to change how the state allocates electoral votes before the 2024 election. Their objective was to increase the chances of a contingent election.²⁹

However, a Republican presidential candidate would not be guaranteed to prevail in a contingent election—even if Republicans controlled a majority of state delegations. This is because there are few established rules for contingent elections,³⁰ which makes the process susceptible to partisan manipulation. The majority party would have potentially determinative influence over the outcome.

Consider what might happen if Democrats held the House majority while Republicans controlled a majority of state delegations. To block the Republican candidate from winning, Democrats could alter the rules to require candidates to reach supermajority or even unanimous support in state

23. U.S. CENSUS BUREAU, U.S. DEP’T OF COM., CHANGE IN RESIDENT POPULATION OF THE 50 STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO: 1910 TO 2020, <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-change-data-table.pdf> [<https://perma.cc/QXY7-WTYT>] (last visited Apr. 2, 2025).

24. *Id.*

25. *Id.*

26. CONG. RSCH. SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 14 (2020), <https://crsreports.congress.gov/product/pdf/R/R40504/7> [<https://perma.cc/8JRX-P6AG>].

27. KEYSSAR, *supra* note 14, at 90 (quoting *Letter from James Madison to George Hay, 23 August 1823*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0109> [<https://perma.cc/CKJ8-TLVF>] (last visited Apr. 2, 2025)).

28. *See, e.g.*, Kyle Kondik, *Republicans Retain Edge in Electoral College Tie*, CTR. FOR POL. (Mar. 1, 2023), <https://centerforpolitics.org/crystalball/republicans-retain-edge-in-electoral-college-tie/> [<https://perma.cc/47HM-9XSR>]; Kyle Kondik, *Republican Edge in Electoral College Tie Endures*, CTR. FOR POL. (Jan. 9, 2020), <https://centerforpolitics.org/crystalball/republican-edge-in-electoral-college-tie-endures/> [<https://perma.cc/494K-CQFN>].

29. *See* David Weigel & Burgess Everett, *The Late GOP Push to Deny Kamala Harris a Nebraska Electoral Vote*, SEMAFOR (Sept. 19, 2024, 3:55 PM), <https://www.semafor.com/article/09/19/2024/late-gop-push-deny-kamala-harris-nebraska-electoral-vote> [<https://perma.cc/CA8B-3PVT>].

30. *See* CONG. RSCH. SERV., *supra* note 26, at 10–12.

delegations to receive a state's vote.³¹ Under those rules, the House contingent election almost certainly would not produce a winner. The rules used for the two House contingent elections in the nation's history required majority support in the delegations,³² but the majority party would not be required to follow those precedents.

Manipulation of the rules is not the only way that a House contingent election could deadlock. Support from a majority of state delegations—twenty-six votes—is required to prevail,³³ and it is possible that no party would control a majority. Some delegations might be evenly divided, potentially preventing any candidate from winning unless some lawmakers voted for a candidate who did not belong to their own party. Reaching a majority could also be challenging if states' votes were divided among three candidates.³⁴

The challenge of reaching a majority was evident in the nation's first House contingent election, in 1801.³⁵ It took thirty-six rounds of voting for a candidate to win a majority of delegations.³⁶ Thomas Jefferson, who would ultimately prevail, remained one vote short of victory as two states cast divided ballots for the first thirty-five rounds.³⁷ Jefferson finally won a majority when lawmakers in two divided delegations abstained from voting, allowing Jefferson to win both delegations.³⁸

Even when the House does successfully select a president, the outcome might be tainted by backroom dealmaking. In fact, behind-the-scenes influence may have had a significant impact in the 1801 contingent election. Alexander Hamilton, who had personal animosity toward Jefferson's opponent, Aaron Burr,³⁹ played a key role in privately lobbying against

31. See UNITED TO PROTECT DEMOCRACY, THE RISK OF A CONTINGENT ELECTION: HIDDEN DANGERS IN THE 2024 RACE FOR THE WHITE HOUSE 12 (2023), <https://unitedtoprotectdemocracy.org/contingentelection.pdf> [<https://perma.cc/7BPB-QMNM>].

32. See Will Bernstein, Arianna Bufalino, Robert Debenedetti & John Greenberg, *Navigating Uncertainties in the Contingent Election Process*, LAWFARE (Nov. 5, 2024, 12:00 PM), <https://www.lawfaremedia.org/article/navigating-uncertainties-in-the-contingent-election-process> [<https://perma.cc/K3FX-XKK8>].

33. U.S. CONST. amend. XII; see also Beau Tremiere & Aisha Woodward, *Danger in Plain Sight: The Risk of Triggering a Contingent Election in 2024*, LAWFARE (Oct. 30, 2023, 4:57 AM), <https://www.lawfaremedia.org/article/danger-in-plain-sight-the-risk-of-triggering-a-contingent-election-in-2024> [<https://perma.cc/QRS8-DNZG>].

34. See U.S. CONST. amend. XII (providing that the House chooses from the top three candidates).

35. See CONG. RSCH. SERV., *supra* note 26, at 2–3.

36. See *id.* at 3.

37. See *id.*

38. See *id.*

39. Aaron Burr was Thomas Jefferson's running mate in the election's first round. The two candidates on the Democratic-Republican ticket received the same number of electoral votes, leading to the contingent election. See Feerick, *supra* note 5, at 17. A tie between candidates on the same ticket was possible then because the original Electoral College system did not allow electors to cast separate votes for president and vice president, as it does now under the Twelfth Amendment, which was added to the Constitution in response to the 1800 election. See U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII.

Burr.⁴⁰ Ultimately, one of the lawmakers Hamilton lobbied brokered a deal for Jefferson to support some priorities of the opposite political party in exchange for votes in the contingent election.⁴¹

Allegations of a “corrupt bargain” arose the second—and most recent—time the House selected the president. When none of the four candidates in the 1824 presidential election won an electoral vote majority, the House was charged with choosing from the top three finishers.⁴² John Quincy Adams prevailed, and Andrew Jackson, the runner-up, alleged Adams had agreed to appoint Speaker of the House Henry Clay as Secretary of State in exchange for his support.⁴³ Clay received the appointment, but he denied that it was connected to his vote.⁴⁴ His denial was plausible; Clay’s policy views seemed more closely aligned with Adams’ positions.⁴⁵ Yet the perception of a deal helped fuel Jackson’s successful presidential run in 1828 and supported calls to eliminate the contingent election process.⁴⁶

A future contingent election could again involve political jockeying. Given the sharp political division of the current moment, it might appear that lawmakers would have clear incentives to simply support their parties’ candidates. But, if a contingent election occurred, an independent or third-party candidate probably would have received substantial support—a nonmajor party candidate winning electoral votes in some states is the most likely way no candidate would win a majority. Lawmakers whose constituents voted for such a candidate in large numbers would have cover to withhold support from a major party candidate in exchange for concessions. Because votes are cast by state delegations, many lawmakers could be positioned to wield decisive votes.

The Senate contingent election process for choosing a vice president has its own problematic features. The Senate’s role could loom large if a House contingent election did not produce a winner. The Twentieth Amendment provides that if there is no president-elect on Inauguration Day, the vice president-elect serves as acting president.⁴⁷ So, the Senate would be choosing the acting president if the House deadlocked.

40. See RON CHERNOW, *ALEXANDER HAMILTON* 637–38 (2004).

41. See *id.*

42. See Karen J. Greenberg, *On a Wing and a Prayer: The Perilous Path of Our Contested Presidential Elections*, in *OUR NATION AT RISK: ELECTION INTEGRITY AS A NATIONAL SECURITY ISSUE* 15 (Julian E. Zelizer & Karen J. Greenberg eds., 2024); Eli Wizevich, *When No Candidate Won the 1824 Presidential Election, the House of Representatives Was Given the Rare Task of Deciding the Victor*, *SMITHSONIAN MAG.* (Dec. 1, 2024), <https://www.smithsonianmag.com/smart-news/when-no-candidate-won-the-1824-presidential-election-the-house-of-representatives-was-given-the-rare-task-of-deciding-the-victor-180985409/> [<https://perma.cc/WL8D-7RAP>].

43. See Greenberg, *supra* note 42, at 15.

44. See Margaret A. Hogan, ‘*Corrupt Bargain*’, *MILLER CTR.*, <https://millercenter.org/contested-presidential-elections/corrupt-bargain> [<https://perma.cc/P9G8-2TH7>] (last visited Apr. 2, 2025).

45. See *id.*

46. See *id.*

47. U.S. CONST. amend. XX, § 3.

In a Senate contingent election, each senator receives one vote.⁴⁸ Representation of the states is less disproportionate than in a House contingent election. But small states would still receive disproportionate influence because each state is entitled to two senators irrespective of its population.⁴⁹

It is almost guaranteed that whichever party held the Senate majority would choose their party's candidate to be vice president. The minority party could attempt to use the filibuster to block the Senate from choosing anyone, but the majority would probably modify the chamber's rules to override the filibuster.⁵⁰

The vice president's role in a Senate contingent election raises further concerns. Whether the vice president is authorized to cast a tie-breaking vote is unclear.⁵¹ Precedent suggests that there are no limitations on the vice president's authority to break ties in the Senate.⁵² But a vice president has never broken a tie in a contingent election⁵³ and some scholars have questioned whether the vice president is allowed to do so, reasoning that the Twelfth Amendment's language granting the decision to "a majority of the whole number [of senators]"⁵⁴ does not envision the vice president's participation.⁵⁵ Accordingly, if the vice president did exercise this power, it might come under a cloud of legal uncertainty and the appearance of illegitimacy. This perception would be heightened if the vice president were a candidate in the election who was casting a tie-breaking vote for themselves or their running mate.

A further problem with the contingent election procedure is that it can produce results that hamper executive branch leadership. The separate contests in the House and Senate could lead to the selection of a president and vice president from different parties. This could prevent the two elected officials atop the executive branch from developing an effective working relationship.⁵⁶ It could also undermine partisan and policy continuity in the executive branch if the vice president became president (in the event that the

48. *Id.* amend. XII.

49. *Id.* art. I, § 3, cl. 1.

50. *See* Bernstein et al., *supra* note 32.

51. *Id.*

52. *See* MITCH MCCONNELL & ROY E. BROWNELL II, *THE U.S. SENATE AND THE COMMONWEALTH* 20–21 (2019).

53. *See* CONG. RSCH. SERV., *supra* note 26, at 6.

54. U.S. CONST. amend. XII.

55. *See* William Josephson, *Senate Election of the Vice President and House of Representatives of the President*, 11 J. CONST. L. 597, 619 (2009) (citing LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 13 (1999)); *id.* at 691 n.61 (first citing ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 20 nn.39–40 & 94 (2006); and then citing Vasani Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1710 n.246 (2002)).

56. *See generally* JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN* (2016) (highlighting positive working relationships between presidents and vice presidents).

president died, resigned or was removed) or served as acting president (if the president became temporarily unable).⁵⁷

Finally, the possibility of a contingent election may prevent the presidential election system from evolving to better reflect voters' preferences in at least two ways. First, it may discourage states from experimenting with approaches to allocating their electoral votes. All but two states currently assign their electoral votes to the winner of the statewide popular vote.⁵⁸ Winner-take-all allocation prevents supporters of candidates who lose the popular votes in their states from impacting the national election.⁵⁹ Reforming the process to allocate electoral votes proportionally based on statewide popular vote or according to the outcomes in congressional districts would improve representation; the nationwide electoral vote totals would reflect more voters' preferences. But, when there are more than two candidates, using these methods would increase the risk of a contingent election because it would be easier for third-party or independent candidates to win electoral votes—and, therefore, harder for any candidate to secure a majority.

Second, and relatedly, concern about triggering a contingent election can disincentivize prospective third-party and independent candidates from running. There is significant support among Americans for alternatives to the major parties.⁶⁰ But the presence of three or more candidates in a presidential election who all won electoral votes would create a high risk of a contingent election, which, as discussed, would almost certainly involve the major parties determining the outcome.

B. Risk of a Future Contingent Election and Ideas for Reform

A contingent election has not happened in nearly two centuries,⁶¹ but the risk of contingent elections in future races is real. In modern times, there have been some close calls. Third-party candidate and then-Governor of South Carolina Strom Thurmond won thirty-nine electoral votes in the 1948 presidential election,⁶² and another third-party candidate, then-Governor of Alabama George Wallace, secured forty-six electoral votes in the 1968

57. See U.S. CONST. amend. XXV, §§ 1, 3–4.

58. Kira Barich & Amelia Sandhovel, *The Electoral College, Simplified*, BIPARTISAN POL'Y CTR. (Aug. 13, 2024), <https://bipartisanpolicy.org/explainer/the-electoral-college-simplified/> [https://perma.cc/2ZZJ-2SR9].

59. See, e.g., Kevin Johnson, *To Fix the Electoral College, Change the Way Its Votes Are Awarded*, GOVERNING (Dec. 11, 2020), <https://www.governing.com/now/to-fix-the-electoral-college-change-the-way-its-votes-are-awarded.html> [https://perma.cc/86QY-QVCQ]; Lee Drutman & Scott Mainwaring, *Proportional Representation and Presidentialism*, PROTECT DEMOCRACY (Sept. 12, 2023), <https://protectdemocracy.org/work/proportional-representation-and-presidentialism/> [https://perma.cc/R7HA-JRNB].

60. Mary Claire Evans, *Support for a Third Political Party in the U.S. Dips to 58%*, GALLUP (Oct. 1, 2024), <https://news.gallup.com/poll/651278/support-third-political-party-dips.aspx> [https://perma.cc/PHN3-LHXJ].

61. In addition to the contingent elections in 1801 and 1825, there was a contingent election for vice president in 1837. CONG. RSCH. SERV., *supra* note 26, at 6.

62. See KEYSSAR, *supra* note 14, at 147–48.

election.⁶³ In 1992, independent candidate Ross Perot received 19 percent of the national popular vote, but no electoral votes.⁶⁴ He had temporarily ended his campaign supposedly out of concern that it would cause a contingent election.⁶⁵

More recently, the 2020 election subversion efforts focused in part on triggering a contingent election. President Donald J. Trump and his allies wanted Vice President Michael R. Pence, who was presiding over Congress's electoral vote count, to reject the votes from several battleground states.⁶⁶ The plan was either to declare Trump the winner on the basis of winning a majority of the electoral votes that were successfully counted or to trigger a contingent election on the basis of no candidate receiving a majority of available electoral votes.⁶⁷

The chances of a contingent election would rise significantly in a future race with a viable third-party candidacy, which is notable as the public's interest in third parties increases.⁶⁸ During the 2024 presidential campaign, the group No Labels considered fielding a presidential ticket, and they viewed a contingent election as a desirable outcome.⁶⁹ The group believed a contingent election could lead to bargaining over Cabinet appointments or other concessions.⁷⁰ Robert F. Kennedy, Jr.'s campaign and some of its supporters also saw a contingent election as a viable path to the White House for the independent candidate's 2024 campaign, which ended in August 2024.⁷¹

Interest in reforming the contingent election process goes back centuries. The 1825 contingent election amplified reform discussions in Congress that had already been taking place in the early 1820s.⁷² In April 1826, nearly three quarters of the House voted to remove Congress's role in presidential elections.⁷³ But a select committee appointed to develop an alternative system failed to produce a result.⁷⁴ Eliminating the contingent procedure again received significant congressional interest in the late 1960s and 1970s

63. See Hillary Bendert, Jacqueline Hayes & Kevin Ruane, *Third Parties and the Electoral College: How Ranked Choice Voting Can Stop the Third-Party Disruptor Effect*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 332, 337–38 (2023); *1968 Electoral College Results*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/1968> [<https://perma.cc/H76R-VWRH>] (last visited Apr. 2, 2025).

64. KEYSSAR, *supra* note 14, at 320.

65. *Id.* at 319. Perot renewed his campaign that October. *Id.*

66. See H.R. REP. NO. 117-663, at 456 (2022).

67. See *id.*

68. See Bendert et al., *supra* note 63, at 335.

69. See Vaughn Hillyard & Dan Gallo, *No Labels Floats the Possibility of a Coalition Government or Congress Selecting the President in 2024*, NBC NEWS (Dec. 21, 2023), <https://www.nbcnews.com/politics/2024-election/no-labels-coalition-government-electoral-college-rcna130709> [<https://perma.cc/7SA4-5U42>].

70. See *id.*

71. Ethan Bauer, *Detour from Democracy*, DESERET NEWS (Apr. 24, 2024, 9:00 PM), <https://www.deseret.com/magazine/2024/04/24/constitution-contingent-election-2024/> [<https://perma.cc/TT2K-RVYP>].

72. See KEYSSAR, *supra* note 14, at 85–93, 99.

73. *Id.* at 104.

74. See *id.* at 104–07.

when lawmakers explored abolishing or reforming the Electoral College in response to Wallace's candidacy.⁷⁵ And Perot's formidable 1992 independent candidacy led many members of both parties to agree that Congress should have no role in selecting the president and vice president, but consensus did not emerge around alternative procedure.⁷⁶ Indeed, achieving reform has remained elusive.

Crafting an alternative to the contingent election procedure raises some challenges. The simplest reform option is to remove the possibility of a second round in presidential elections, allowing the winners of the most electoral votes for president and vice president to prevail. However, this would make it possible for candidates to win with low plurality support. A president who won with, say, 35 percent support would have a limited democratic mandate.

Two options for ensuring that candidates receive a form of majority support that have arisen in prior reform discussions are (1) selection by a joint vote of both houses of Congress,⁷⁷ or (2) a runoff election.⁷⁸ A joint vote could involve every senator and representative casting one vote in both the presidential and vice presidential contests, choosing from the top two finishers in the first rounds of those races. This system would provide states with representation roughly proportional to their population sizes—a significant improvement over the current system, which, as discussed, provides highly disproportionate voting power to small states. It would also be faster than a runoff, which would involve voters returning to the polls for a second time.

But this approach has drawbacks. The residents of Washington, D.C. might be unrepresented because they do not have voting members of Congress. Additionally, the election would be removed from voters' hands. Although voters would choose the finalists, the ultimate decision would rest with lawmakers. And the same concerns about backroom dealing and political horse trading that exist with the current contingent election system would be carried over into the reformed system.⁷⁹

A runoff system could allow voters to choose from the top two finishers if no candidate received an electoral vote majority in the first round. The runoff election could use the same rules as the first round, with voters choosing how to assign their respective states' electoral votes. This system would leave the choice with the people, but it would probably require an adjustment to the scheduling of presidential elections. Election Day would need to occur about a month earlier to guarantee that a president-elect and vice president-elect were chosen in time for the Inauguration on January 20.⁸⁰ There would also

75. *See id.* at 219–20.

76. *See id.* at 320–22.

77. *Id.* at 86.

78. *See id.* at 99, 222, 320–21.

79. *See supra* Part I.A.

80. U.S. CONST. amend. XX, § 1.

be increased administrative costs for states if a second round were necessary, but the federal government could consider providing funding as necessary.

Both major parties should be wary of the contingent election process. This deeply flawed procedure could backfire on either party, and, if it came into play, it would intensify division and undermine confidence in the election's outcome.

II. PRESIDENTIAL ELECTORS

The Constitution's framers envisioned that electors would deliberate to choose the president.⁸¹ But the system never ended up working that way. Instead, an expectation quickly developed that electors would have only a ministerial role of transmitting the will of voters.⁸² This function is unnecessary, and human electors have come to create needless vulnerabilities that could harm either party, meaning a constitutional amendment removing electors' role should attract bipartisan support.

When voters cast their ballots on Election Day, they are technically voting for electors who are expected to support a given presidential ticket during the Electoral College meeting in mid-December.⁸³ Electors are chosen by their political parties in advance of the November election, and they are typically party insiders, such as elected officials and others involved with their state political parties.⁸⁴

Since the earliest elections, rogue electors have attempted to exceed their ceremonial roles and politicians have attempted to use electors to influence election outcomes.⁸⁵ There are two categories of aberrant electors. The first category is the faithless elector—one who declines to vote for the candidate who won the popular vote in their state and whom they are expected to support.⁸⁶ The other category—the fake elector—is a more recent innovation. This concept first emerged in the 2020 election when individuals falsely represented themselves as electors to attempt to overturn the election's outcome.⁸⁷

A. Faithless Electors

Beginning with the first contested presidential election in 1796, political parties required that electors pledge to support their parties' candidates for

81. See Feerick, *supra* note 5, at 407.

82. See *id.*

83. See CONG. RSCH. SERV., RL32611, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 5–8 (2017), <https://crsreports.congress.gov/product/pdf/rl/rl32611> [<https://perma.cc/7R6G-UBHG>].

84. See *id.* at 5–6.

85. See Feerick, *supra* note 5, at 407.

86. John Rogan, *Presidential Electors Are a Flawed Feature of the Electoral College*, FORDHAM L. VOTING RTS. & DEMOCRACY F. (Nov. 28, 2023, 9:30 AM), <https://fordhamdemocracyproject.com/2023/11/27/presidential-electors-are-a-flawed-feature-of-the-electoral-college/> [<https://perma.cc/CVJ5-YH5U>].

87. *Id.*

president and vice president.⁸⁸ One elector in that election violated his pledge, making him the first faithless elector.⁸⁹ Over the following centuries, electors have cast 165 faithless votes—ninety for president and seventy-five for vice president.⁹⁰

None of these divergent votes have altered the outcome of an election. In fact, many—sixty-three—were cast in the 1872 election when Horace Greeley, the losing presidential candidate, died after Election Day, leading his electors to vote for other candidates.⁹¹ But half of the last twenty elections have featured at least one faithless vote.⁹² And the 2016 election saw the most faithless votes for a presidential candidate since Greeley's electors defected in 1872.⁹³

Following Donald Trump's 2016 victory, Republican electors faced significant pressure to block him from taking the White House. They were inundated with phone calls, mail, and emails, including death threats.⁹⁴ Nearly five million online petition signers⁹⁵ and a video featuring celebrities urged them not to vote for Trump.⁹⁶ Two members of Congress asked electors to consider Russia's interference in the election.⁹⁷ On the date of the nationwide Electoral College meeting, protests took place outside some of the locations where the electors met to vote.⁹⁸

Ultimately, electors cast seven faithless votes, while three attempted faithless votes were blocked.⁹⁹ Most faithless electors cast their votes as part of an effort to arrive at a consensus alternative to Trump.¹⁰⁰ Eight electors deviated from their pledges to Trump's opponent, former Secretary of State Hillary Clinton, but state laws and procedural rules prevented three of the

88. Scott Eckl, Note, *Faithless Electors: Keeping the Ties That Bind*, 88 FORDHAM L. REV. 1923, 1930 (2020).

89. See WEGMAN, *supra* note 3, at 80–84.

90. *Presidential Elections*, FAIRVOTE, <https://fairvote.org/resources/presidential-elections/> [https://perma.cc/723T-HGDK].

91. *Id.*

92. See Eckl, *supra* note 88, at 1931 (discussing elections through 2016); *2020 Electoral College Results*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/2020> [https://perma.cc/Z5X8-QF8R] (last visited Apr. 2, 2025); *2024 Electoral College Results*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/2024> [https://perma.cc/T6P4-ZQPD] (last visited Apr. 2, 2025).

93. See *Presidential Elections*, *supra* note 90.

94. Kyle Cheney, *Electors Under Siege*, POLITICO, <https://www.politico.com/story/2016/12/electors-under-siege-232774> [https://perma.cc/G78U-K8JT] (Dec. 18, 2016, 8:52 AM).

95. *Electoral College: Make Hillary Clinton President.*, CHANGE.ORG, <https://www.change.org/p/electoral-college-make-hillary-clinton-president-on-december-19-2017> [https://perma.cc/6TVG-6BUM] (last visited Apr. 2, 2025).

96. Cheney, *supra* note 94.

97. *Id.*

98. *Trump Wins Electoral College Amid Nationwide Protests*, BBC (Dec. 20, 2016), <https://www.bbc.com/news/world-us-canada-38374749> [https://perma.cc/33H5-UYUX].

99. See *Presidential Elections*, *supra* note 90.

100. See Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/> [https://perma.cc/2J9A-95R6].

attempted faithless votes from being cast.¹⁰¹ Only two electors who had been appointed to support Trump declined to do so.¹⁰²

Although faithless votes did not change the outcome in 2016, they could be consequential in a future election. If George W. Bush had lost two electoral votes in the 2000 election—the same number Trump lost in 2016—he would not have secured a majority,¹⁰³ which would have triggered a contingent election. The risk of faithless votes could be especially high in a similar race where only a few defections would alter the outcome. Additionally, if no candidate received an electoral vote majority, electors might face pressure or take it upon themselves to give one candidate a majority to avoid a contingent election.

The use of electors in presidential elections also creates opportunities for third-party or independent candidates to attempt to influence an election. In the 1968 election, third-party candidate George Wallace sought to win enough electors to prevent either of the major party candidates from winning a majority.¹⁰⁴ Then, he planned to play kingmaker by instructing his electors to back whichever candidate agreed to support his segregationist policies.¹⁰⁵ He even had his electors sign affidavits pledging to follow his instructions.¹⁰⁶ Wallace managed to win forty-six electoral votes, which was not enough to prevent Richard Nixon from winning a majority and becoming President.¹⁰⁷ Before the 2024 election, the organization No Labels considered a similar strategy when deciding whether to field a candidate.¹⁰⁸

It should not be possible for electors to change the outcome of an election. They have purely ceremonial roles that are firmly established by historical practice. Over 99 percent of electors in the nation's history have respected their pledges.¹⁰⁹ Voters, not electors, choose the president and vice president. Although the Constitution does not explicitly grant voters the right to vote in presidential elections, the U.S. Supreme Court has recognized that “[h]istory has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors.”¹¹⁰

The Court has held on two occasions that electors do not have absolute discretion. In 1952, the decision in *Ray v. Blair*¹¹¹ upheld a requirement that

101. See *Presidential Elections*, *supra* note 90. Two deviant votes were replaced while a third was ruled out of order. *Id.*

102. See *id.*; see also Christopher Suprun, Opinion, *Why I Will Not Cast My Electoral Vote for Donald Trump*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html> [<https://perma.cc/T74K-A7NF>].

103. See *2000 Electoral College Results*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/2000> [<https://perma.cc/R7YN-TFJP>].

104. S. REP. NO. 96-111, at 53 (1979).

105. See *id.*

106. *Id.*

107. *1968 Electoral College Results*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/1968> [<https://perma.cc/V443-KDMU>].

108. Hillyard & Gallo, *supra* note 69.

109. See *Presidential Elections*, *supra* note 90.

110. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

111. 343 U.S. 214 (1952).

electors pledge to support their parties' candidates as a condition of their appointment.¹¹² And, in *Chiafalo v. Washington*,¹¹³ the Court considered a challenge to state laws that penalized faithless electors in the 2016 election, ruling that states can punish electors who violate their pledges.¹¹⁴

State laws provide some protections against faithless electors. Thirty-eight states and Washington, D.C. have laws intended to prevent faithless electors.¹¹⁵ But only twenty-two of those state laws automatically cancel attempted faithless votes.¹¹⁶ The remaining laws have gaps. They impose a pledge requirement or penalize electors for casting faithless votes—without preventing faithless votes from being cast.¹¹⁷ Amending the Constitution to eliminate electors' role in presidential elections—instead of relying on all states to pass adequate laws—would provide a full solution.

The death of a candidate between Election Day in early November and the mid-December Electoral College meeting would raise the possibility of faithless electoral votes for a replacement candidate. This scenario illustrates another vulnerability created by electors' involvement. Electors should not take it upon themselves to choose a replacement because they do not have a genuine democratic mandate—most voters do not even know their identities. It might be slightly less problematic for the deceased candidate's political party to identify a replacement and instruct the electors to support that individual. But the election of the president and vice president should be up to voters, not party leaders.¹¹⁸

Another option is for the electors to cast their votes for the deceased candidate. This might allow for the Constitution's succession procedures to take effect. The Twentieth Amendment provides that the vice president-elect becomes president on Inauguration Day if the president-elect dies at any time following the Electoral College meeting.¹¹⁹ By voting for a deceased presidential candidate, the electors might effectively extend the Twentieth Amendment's succession provision to the time period before the Electoral College meeting. But this approach has drawbacks. The Twelfth Amendment requires electors to cast their votes for a "person,"¹²⁰ and it is not clear that a decedent qualifies.¹²¹ Additionally, Congress declined to count the electoral votes cast for Greeley following his death in 1872 before

112. *Id.* at 231.

113. 140 S. Ct. 2316 (2020).

114. *See id.* at 2328–29.

115. *Presidential Elections*, *supra* note 90.

116. *Id.*

117. *See* KRISTIN SULLIVAN, STATE FAITHLESS ELECTOR LAWS, CONN. LEGISLATURE OFF. OF LEGIS. RSCH. 1–4 (2021), <https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0023.pdf> [<https://perma.cc/9AJN-N7MN>].

118. *See* John Rogan, *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*, 90 FORDHAM L. REV. 583, 597–601 (2021).

119. *See* U.S. CONST. amend. XX, § 3; H.R. REP. NO. 72-345, at 6 (1932); Rogan, *supra* note 118, at 601.

120. U.S. CONST. amend. XII.

121. *See* Joel K. Goldstein, Commentary, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 76 (2010).

the Electoral College meeting, potentially setting a precedent against counting electoral votes for deceased candidates.¹²²

Ideally, the succession procedures in the Twentieth Amendment and the Presidential Succession Act of 1947¹²³ would apply during the entire pre-inaugural period, starting on Election Day.¹²⁴ Removing the electors' role in the Electoral College system would make this possible.

B. Fake Electors

Unlike faithless electors, fake electors do not have legal authority to cast electoral votes—they merely purport to cast valid votes.¹²⁵ Fake electors, despite their illegitimacy, can have a disruptive role in presidential elections.

In the 2020 election, the Trump campaign coordinated slates of fake electors in seven battleground states that President Joseph R. Biden won.¹²⁶ The fake electors were the individuals selected by their state Republican parties to serve as electors if Trump won those states.¹²⁷ Futilely attempting to comply with the legal requirements for casting electoral votes, they met on the date of the Electoral College meeting to purportedly cast their respective states' electoral votes.¹²⁸ They also created fraudulent documents that the campaign attempted to submit to Congress for the January 6th vote count.¹²⁹ The fake electors' supposed votes were a key part of the pressure campaign targeting Vice President Pence. Trump and others unsuccessfully urged Pence to overturn the election by using the fake electors' votes while Pence was presiding over the electoral vote count during the joint session of Congress on January 6, 2021.¹³⁰ Many fake electors subsequently faced criminal charges.¹³¹ Notably, however, some went on to serve as their party's electors again in the 2024 election.¹³²

The fake electors faced insurmountable barriers in federal and state law to having their votes recognized as legitimate. The federal Electoral Count Act,¹³³ enacted in 1887,¹³⁴ required the “executive” of each state to certify

122. Rogan, *supra* note 118, at 600.

123. 3 U.S.C. § 19.

124. See U.S. CONST. amend. XX, § 3; 3 U.S.C. § 19.

125. See *supra* note 87 and accompanying text.

126. See Rogan, *supra* note 86.

127. See *id.*

128. See H.R. REP. NO. 117-663, at 352–54 (2022).

129. See *id.*

130. See *id.* at 354–59, 461–65.

131. See Quinta Jurecic & Adam George, *Where the Fake Electors Cases Stand in State Court*, LAWFARE (Oct. 30, 2024, 3:02 PM), <https://www.lawfaremedia.org/article/where-the-fake-electors-cases-stand-in-state-court> [<https://perma.cc/DH27-BJAL>].

132. Hansi Lo Wang, *'Fake Electors' From 2020 Are Casting 2024 Votes for Trump While Facing Felony Charges*, NPR (Dec. 17, 2024), <https://www.npr.org/2024/12/17/nx-s1-5225588/trump-electoral-college-vote-nevada-fake-electors-michigan> [<https://perma.cc/WQ79-DTH9>].

133. 3 U.S.C. §§ 5–6, 15–18, amended by Electoral Count Reform Act of 2022, Pub. L. No. 117-328, 136 Stat. 5233.

134. Pub. L. 49-90, 24 Stat. 373.

the state's legitimate electors.¹³⁵ The electors created documents to serve as this certification, but no relevant government official recognized the fake electors.¹³⁶ State laws create additional procedures for the certification and casting of electoral votes.¹³⁷ The fake electors complied with some of these requirements, such as meeting in the designated location and times, but they failed to meet all of the state law requirements.¹³⁸ In response to the 2020 election subversion attempts, Congress amended the Electoral Count Act by passing the Electoral Count Reform Act of 2022 (the "Electoral Count Reform Act"),¹³⁹ which includes additional protections against future fake electoral plots.¹⁴⁰

Even though fake electors do not meet the legal requirements to cast electoral votes, they can have a disruptive impact on the system, as seen in the 2020 election. The prospect of future fake electors provides another justification for removing electors from the Electoral College system.

Removing electors from presidential elections has received widespread support from reform proponents since the nation's earliest years.¹⁴¹ Without people serving as electors, states could simply certify their election results and their electoral votes would automatically be cast, eliminating the possibility of interference from electors.

III. STATES' AUTHORITY TO DETERMINE HOW ELECTORS ARE APPOINTED

Article II of the Constitution empowers states to determine how their electors are appointed, providing, "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors . . ."¹⁴² All states currently let voters choose their electors on Election Day.¹⁴³ But state legislatures might try to authorize themselves to choose their states' electors, which would go against the long-established practice of leaving the choice to voters. A compromise Electoral College constitutional amendment could explicitly require a popular vote.

In early presidential elections, it was common for state legislatures to directly appoint electors without any involvement of voters.¹⁴⁴ The practice became rarer throughout the first half of the 1800s. By the 1830s, only one

135. *Id.* § 3. Although the Electoral Count Act has since been amended, this requirement remains. 3 U.S.C. § 5(a)(1).

136. See H.R. REP. NO. 117-663, at 352–55 (2022).

137. See SEAMUS CROWLEY, MOLLY JOHNSTON, ALEXANDER PAGET & WILLIAM RUSSELL, FORDHAM UNIV. SCH. OF L., RULE OF L. CLINIC, STATE LAWS FOR ADMINISTERING PRESIDENTIAL ELECTIONS: RECOMMENDATIONS AND CONSIDERATIONS FOR REFORM 19–22 (2024), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1006&context=rule_of_law_clinic [<https://perma.cc/376D-YLYV>].

138. See H.R. REP. NO. 117-663, at 354–55.

139. Pub. L. 117-328, 136 Stat. 5233 (codified as amended in scattered sections of 3 U.S.C.).

140. See *Understanding the Electoral Count Reform Act of 2022*, *supra* note 12.

141. See KEYSSAR, *supra* note 14, at 375.

142. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

143. See Barich & Sandhovel, *supra* note 58.

144. See KEYSSAR, *supra* note 14, at 32 tbl.1.1.

state, South Carolina, still allowed its legislature to appoint electors.¹⁴⁵ Colorado was the last state to use legislative appointment, employing it in 1876, the same year Colorado became a state.¹⁴⁶ States sometimes alternated between different appointment methods to seek partisan advantage. For example, the legislatures in North Carolina and New Jersey gave themselves the power to appoint electors in the 1812 election,¹⁴⁷ despite using different methods in the preceding elections.¹⁴⁸

The Supreme Court has recognized states' power to pass laws establishing how their electors are chosen. In *McPherson v. Blacker*,¹⁴⁹ the Court rejected a challenge to a state's decision to appoint electors based on the popular vote in congressional districts, instead of the statewide popular vote. States have "plenary"¹⁵⁰ power and the "broadest power of determination"¹⁵¹ under Article II to decide how electors are appointed, according to the 1892 *McPherson* decision.

Despite states' substantial authority, there are meaningful limitations on their power. A state cannot change the law after Election Day to override voters' choice. That would violate constitutional due process protections—a state cannot change the laws for an election after the election has begun.¹⁵² Additionally, federal law requires states to choose their electors on Election Day, meaning states have no authority to change the result after Election Day—even if they enact statutes before Election Day purporting to provide such power.¹⁵³ There are further restrictions on the procedures states can enact in advance of Election Day;¹⁵⁴ states cannot create procedures for selecting electors that violate candidates' or parties' rights, such as a system

145. *See id.*

146. Austin Sarat, *Could a Few State Legislatures Choose the Next President?*, THE CONVERSATION (Oct. 1, 2020, 8:26 AM), <https://theconversation.com/could-a-few-state-legislatures-choose-the-next-president-146950> [<https://perma.cc/S36E-3ATZ>].

147. *See* KEYSSAR, *supra* note 14, at 34, 66.

148. *Id.* at 32.

149. 146 U.S. 1 (1892).

150. *Id.* at 35.

151. *Id.* at 27.

152. Richard H. Pildes, *There Are Guardrails in Place to Avert Partisan Manipulation of the Election Outcome*, LAWFARE (Oct. 18, 2024, 2:46 PM), <https://www.lawfaremedia.org/article/there-are-guardrails-in-place-to-avert-partisan-manipulation-of-the-election-outcome> [<https://perma.cc/4JK7-PG65>]; Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1071 (2021) (citing *Roe v. Alabama*, 43 F.3d 574, 580–81 (11th Cir. 1995)).

153. 2 U.S.C. § 7; *see also* Pildes, *supra* note 152. There is one exception to the requirement that states select electors on Election Day. If there is an "extraordinary and catastrophic" "force majeure event[]," states are authorized by federal law to extend time for voting. 3 U.S.C. § 21(1). *See generally* Jason D'Andrea, Sonia Montejano & Matthew Vaughan, *Presidential Election Disruptions: Balancing the Rule of Law and Emergency Response*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 301 (2023) (discussing 3 U.S.C. § 21(1) and providing recommendations for reform).

154. *See State Discretion over Selection of Electors*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S1-C2-3/ALDE_00013800/ [<https://perma.cc/WKT6-LYEU>].

that unduly limits access to the ballot for third-party and independent candidates' electors.¹⁵⁵

States must also follow their ordinary lawmaking processes to create elector selection policies. This limitation is supported by the Supreme Court's recent rejection of the "independent state legislature theory" in *Moore v. Harper*.¹⁵⁶ Because the Constitution's text empowers state "Legislature[s]" to set many policies for elections,¹⁵⁷ proponents of the theory argued that legislatures could act outside of the regular lawmaking process, without approval from governors or review from state courts.¹⁵⁸ But *Moore* established that the use of the word "Legislature" in the Elections Clause does not grant legislatures unilateral power,¹⁵⁹ indicating, though not directly holding, that the grant of power to "Legislature[s]" to determine the manner of appointing electors has the same meaning.¹⁶⁰

There were attempts in the 2000 and 2020 elections to stretch and exceed the bounds of state legislatures' authority. When recounts in Florida during the 2000 election failed to yield a clear winner in the presidential race by mid-December, Republican lawmakers in the state legislature considered appointing electors for George W. Bush, their party's candidate.¹⁶¹ They cited a now-repealed federal law that allowed legislatures to "direct" the "manner" for appointing electors "[w]henver any State has held an election for the purpose of choosing electors, and has failed to make a choice" on Election Day.¹⁶² That provision's applicability was questionable in part because, as Professor Abner S. Greene observes, the date for the electors to cast their votes was still several days away when lawmakers considered taking over the choice—calling into question whether there had truly been a "fail[ure] to make a choice."¹⁶³ Additionally, Professor Justin Levitt's analysis of the "failed election" statute indicates that it only empowered legislatures to act through the ordinary lawmaking process and did not grant unilateral power to appoint electors.¹⁶⁴

The 2020 election involved more aggressive attempts to have lawmakers appoint electors. Even before Election Day, President Trump and his campaign plotted to have legislatures step in to override voters if he did not win the election.¹⁶⁵ Those plans were implemented after he lost. Trump and his allies launched an extensive pressure campaign to convince Republican

155. See *Williams v. Rhodes*, 393 U.S. 23, 30–34 (1968).

156. 143 S. Ct. 2065 (2023); see *id.* at 2089–90.

157. U.S. CONST. art. 1, § 4, cl. 1; see *Moore*, 143 S. Ct. at 2081–83.

158. See *Moore*, 143 S. Ct. at 2083.

159. See *id.* at 2086–87.

160. Cf. Levitt, *supra* note 152, at 1062–71 (arguing, prior to the decision in *Moore*, that states must follow the ordinary lawmaking process to chance elector-appointment methods).

161. See *id.* at 1075.

162. ABNER GREENE, UNDERSTANDING THE 2000 ELECTION 164–65 (2001) (quoting 3 U.S.C. § 2, repealed by Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 5233, Div. P, tit. I, § 102(a)).

163. See GREENE, *supra* note 162, at 163–67.

164. See Levitt, *supra* note 152, at 1075–83.

165. H.R. REP. NO. 117-663, at 266 (2022).

lawmakers in key battleground states to appoint Trump’s electors.¹⁶⁶ Some Trump allies, including former Speaker of the House Newt Gingrich, advocated a slightly different approach, suggesting that lawmakers block the appointment of any electors in order to trigger a contingent election.¹⁶⁷ For the reasons discussed, legislatures did not have the authority to appoint electors inconsistent with voters’ choices. No states had laws granting them the power to do so before Election Day, and, even if they had, Election Day—the only designated date for selecting electors—had come and gone. One aspect of the election subversion effort seized on the same “failed election” statute that came into focus during the 2000 election. At the suggestion of an acting assistant attorney general, Trump considered having the Department of Justice send letters to officials in swing states to evaluate whether the election had “failed” within the meaning of the statute.¹⁶⁸ In response to the 2020 plots, the bipartisan Electoral Count Reform Act eliminated that provision from federal law.¹⁶⁹

In future elections, states could try to act on their authority to determine the “manner” of appointing electors. The most aggressive option would be for state lawmakers to remove any role for voters and authorize themselves to choose the electors, as some did in the nation’s early years.¹⁷⁰ Before the 2024 election, the chairman of the Freedom Caucus in the House of Representatives said it would be “legitimate” for North Carolina to award its electoral votes to Trump in advance of Election Day due to potential voting disruptions caused by a hurricane.¹⁷¹ Even if lawmakers did not take it upon themselves before Election Day to appoint electors, a legislature might allow voters to cast ballots but empower itself to override them on Election Day. If one state did take such a step, it could set off a race to the bottom, with lawmakers in other states attempting to lock in an advantage for their party’s presidential candidates. It is unclear which party would ultimately benefit.

These possibilities are unlikely because there could be severe political consequences for lawmakers who limited or removed citizens’ ability to vote. Yet the chance that voters in any state could be prevented from participating in a presidential election should not exist. The Electoral College was not originally designed to guarantee that voters would have a say in selecting the president. But it evolved quickly to include voters. For nearly all of the nation’s history, voters have determined how their states’ electors are

166. *See id.* at 267–71, 276–91, 293–300.

167. *Id.* at 268.

168. *Id.* at 389–93, 397–403; *Read the Unsent Letter by Jeffrey Clark to Georgia Officials*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/interactive/2022/06/23/us/jeffrey-clark-draft-letter.html> [<https://perma.cc/E47M-GR33>].

169. 3 U.S.C. § 2, *repealed by* Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 5233, Div. P, tit. I, § 102(a).

170. *See* LAWRENCE LESSIG & MATTHEW SELIGMAN, *HOW TO STEAL A PRESIDENTIAL ELECTION* 115–25 (2024).

171. Curt Devine, Lauren Fox & Emily R. Condon, *House Freedom Caucus Chair Suggests North Carolina Legislature Could Assign Electors Before Votes Are Tallied*, CNN (Oct. 25, 2024, 4:39 PM), <https://www.cnn.com/2024/10/25/politics/house-freedom-caucus-chair-north-carolina-electors/index.html> [<https://perma.cc/J8WN-GTM3>].

appointed. This is how the public expects the system to operate. Taking the power away from voters in any state would undermine the credibility of presidential elections. Accordingly, the Constitution should guarantee voters the right to participate in presidential elections.

An amendment ensuring that voters' preferences guide electors' appointment should not remove all discretion from states. For example, it should still be possible for states to award electors based on the popular vote in districts or proportional to the statewide popular vote. However, updated constitutional language should remove ambiguities in the existing provision, especially by making clear that these policy decisions must occur according to states' normal legislative processes, instead of through unilateral action by legislatures, and must be enacted before Election Day.

CONCLUSION

There are additional areas of reform that deserve consideration. For example, policymakers might evaluate Congress's role in counting electoral votes. In recent elections, the process has involved frivolous objections to electoral votes from members of both parties. Additionally, the vice president, acting in their role as president of the Senate, is not an ideal official to preside over the joint session of Congress during which electoral votes are counted. The vice president might be a candidate in the election, creating a potential conflict of interest.

Constitutional amendments have been relatively rare in the nation's history. But the amendment process is a vital tool. When there are features of the Constitution that both parties can agree require reform, a constitutional amendment should be pursued. Both parties' interests align around reforming the most defective features of the Electoral College.

A contingent election in the House could easily deadlock and fail to produce a president-elect. A winner would probably only emerge if the party that happened to control the chamber could ensure that it was their candidate. No matter the outcome, the inherently undemocratic nature of the process would undermine the public's confidence in the election. Presidential electors also stand to harm election integrity—and both parties. They have played a role in efforts to undermine both Republican and Democratic candidacies. And the Constitution's authorization for states to choose how presidential electors are appointed is ambiguous and makes it possible for states to deprive voters of the chance to cast ballots in presidential elections. If one party seized on this power, the other party might follow suit. These defects in the presidential election system provide common ground for the parties to achieve bipartisan Electoral College reform through a compromise constitutional amendment.