

# The Best Laid Plans: Unintended Consequences of The American Presidential Selection System<sup>1</sup>

Samuel S.-H. Wang and Jacob S. Canter

April 1, 2020

## Summary

The mechanism for selecting the President of the United States (the “Electoral College”) causes outcomes that weaken American democracy and that the delegates at the Constitutional Convention never intended. The core selection process described in Article II, Section 1 was hastily drawn in the final days of the Convention based on compromises made originally to benefit slave-owning states and states with smaller populations. The system was also drafted to have Electors deliberate and then choose the President in an age when travel and news took weeks or longer to cross the new country. In the four decades after ratification, the Electoral College was modified further to reach its current form, which includes most states using a winner-take-all method to allocate Electors. The original needs this system was designed to address have now disappeared. But the persistence of these Electoral College mechanisms still causes severe unanticipated problems, including (1) contradictions between the electoral vote winner and national popular vote winner, (2) a “battleground state” phenomenon where all but a handful of states are safe for one political party or the other, (3) representational and policy benefits that citizens in some states receive but not others, (4) a decrease in the political power of non-battleground demographic groups, and (5) vulnerability of elections to outside interference. These outcomes will not go away without intervention. Several paths for reform can address these problems and have an identifiable path to success. The most promising of these is the formation of interstate compacts to allow aggregate action by multiple states at once. Any proposal to reform the Electoral College will likely face legal and policy challenges. But given the substantial and pervasive problems of the current system, citizens and lawmakers must sooner rather than later seriously consider reform.

## Introduction

Today’s institution for selecting the President of the United States is a creature of its founding moment. In the late Eighteenth Century, slave owners dominated the leadership class, few citizens could vote, and communication and travel were slow.<sup>2</sup> At the Constitutional

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<sup>1</sup> Samuel S.-H. Wang is Professor of Neuroscience and Director of the Princeton Election Consortium at Princeton University. We thank Jonathan D. Blake and Reed Hundt for mentorship, David Hollander and Richard F. Ober Jr. for legal scholastic assistance, Hope Johnson for data presentation assistance, and Brian A. Remlinger and Jesse Wegman for helpful discussion. Jacob S. Canter was supported in part by The Making Every Vote Count Foundation.

<sup>2</sup> About 25 of the 55 delegates to the Constitutional Convention were slaveowners. Steven Mintz, Historical Context: The Constitutional and Slavery, GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-now/teaching-resource/historical-context-constitution-and-slavery> The right to vote was restricted to white, property-owning males. BARCK, OSCAR T.; LEFLER, HUGH T. COLONIAL AMERICA

Convention, delegates from slave-owning states and states with small populations had considerable influence over the drafting process.<sup>3</sup> And while the delegates eventually resolved their differences over the legislative branch through systematic compromises, they did not reach easy agreement on to how to select the Chief Executive. Out of these circumstances Article II, Section 1 arose.<sup>4</sup>

Today, the mechanism for selecting the President includes not just Article II, Section 1, but also the 12th, 22nd, and 23rd Amendments.<sup>5</sup> Importantly, it also includes the near-uniform choice by individual states to assign Electors through a winner-take-all method.<sup>6</sup> This cumulative institution reached its current form in the 1820s, and for simplicity's sake we refer to it by its commonly known name, the Electoral College. This patchwork of adaptations and repairs was aimed at addressing the political and social interests of that era. Many of those interests no longer exist today – but the Electoral College remains. Unfortunately, this antebellum creature now causes problems that were not anticipated and are not always readily apparent to modern observers, and it will not go away on its own. The primary objective of this article is to describe the harms of the Electoral College to American democracy, and to link them to proposed reform alternatives.

In this article we identify and describe five unanticipated consequences of the Electoral College. First, the Electoral College allows the national popular vote winner to lose the election. Second, the Electoral College causes a “battleground state” phenomenon, in which a small number of closely-fought states have outsized influence over the Presidential outcome. Third, state-level winner-take-all mechanisms and the system of Electors results in representational and policy benefits for citizens in some states but not others. Fourth, minority communities that are concentrated outside battleground states have disproportionately little political influence over

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258–260 (1958).. Travel in colonial America was difficult, dangerous, and expensive. *Colonial Travel*, THE FOUNDERS LIBRARY, <https://www.constitutionfacts.com/founders-library/colonial-travel/>

<sup>3</sup> At the Constitutional Convention James Madison stated on July 14, 1787: "It seems now to be pretty well understood that the real difference of interests lies not between the large and small but between the northern and southern states. The institution of slavery and its consequences form the line of discrimination." *Writings of James Madison*, 3 JOURNAL OF THE CONSTITUTIONAL CONVENTION I 1787 434 (Gaillard Hunt ed, 1902).

<sup>4</sup> For a detailed account of how the Electoral College was designed, see Jesse Wegman. *Let The People Pick The President: The Case For Abolishing The Electoral College*. All Points Books (2020).

<sup>5</sup> U.S. CONST. Amend. XII, XXII, XXIII.

<sup>6</sup> JOHN R. KOZA, BARRY F. FADEM, MARK GRUESKIN, MICHAEL S. MANDELL, ROBERT RITCHIE, JOSEPH F. ZIMMERMAN. *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 79-83, (4th ed. 2013).

Presidential contests. Finally, the Electoral College makes Presidential elections vulnerable to interference.

The severity of these unanticipated consequences demonstrates the need to update the Presidential selection mechanism. We do not use the traffic laws, military training, or public health standards of the Founding era. In the face of newer technology, modern science, and new social arrangements, such standards would lead to disastrous consequences. It is similarly undesirable to live with the consequences of early-19th-century political needs.

Fundamentally, the unanticipated consequences of the Electoral College are problems of representation and incentives. Policy change is the appropriate way to address such problems, either through a Constitutional amendment or legislative action. Any effort to reform the Electoral College will face substantial policy and legal hurdles. But given the serious harms that the Electoral College currently causes, alternatives that remediate most of the harms and have an identifiable path to becoming law would be preferable to the current situation.

Part I of this article briefly describes the rules of the Electoral College and how it grew into its current form. Part II argues that Article II, Section 1 was hastily designed to accomplish goals that are no longer relevant. Part III explains and quantifies the unintended consequences of the Electoral College in modern America. Finally, Part IV considers different approaches to reform the Presidential selection system.

## **I. The Mechanics of the Presidential Selection System**

Article II, Section 1 of the United States Constitution defines the number of Presidential electors each state receives. The section states in pertinent part that

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.<sup>7</sup>

Electors have the first opportunity to decide by a majority vote who becomes President.<sup>8</sup> The intent was that Electors deliberate over who should be chosen. There is very little evidence that

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<sup>7</sup> U.S. CONST. Art. II, Sect. 1.

<sup>8</sup> U.S. CONST. Art. II, Sect. 1. Section 1 goes on to state that the person with the second most votes becomes Vice-President. *Id.* If no person receives a majority of votes, then the members of the House of Representatives decide, based on a majority vote, who becomes President from the top-five candidates with electoral votes, where each state

such deliberation has ever occurred.<sup>9</sup> Instead, in 99.9% of cases, electors have voted for the candidate to which they were initially assigned. Reinforcing this pattern, nearly half of the states now have laws that penalize Electors who make faithless choices.<sup>10</sup>

Today, the Electoral College includes not just Article II, Section 1, but also the 12th Amendment, which established separate voting for the President and Vice-President.<sup>11</sup> The need for this Amendment became apparent soon after ratification, an early example of the system failing to anticipate future consequences. After the election of 1800, Thomas Jefferson and Aaron Burr, both of the Democratic-Republican Party, received the same number of electoral votes. Plans were supposedly made for Electors to cast one less vote for Burr to make him Jefferson's Vice-President, but this did not occur. It took 36 rounds of balloting in the House of Representatives to eventually select Jefferson as President.<sup>12</sup>

In the first two Presidential elections, eight different types of methods for appointing Electors were used.<sup>13</sup> Four states used a direct vote by eligible citizens (usually white men with

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delegation gets one vote. *Id.* Under this original design, the second place in the House became Vice-President. *Id.* When the delegates at the Constitutional Convention established the method for selecting the President, it appears that they thought most contests would be sent to the House of Representatives. See Stanley Chang, *Updating the electoral college: the national popular vote legislation*, 44 HARV. J. LEG. 205, 208 (2007). The House of Representatives has chosen the President twice, in 1800 and in 1824.

<sup>9</sup> In regards to the intent of the delegates, see 2 The Records of the Federal Convention of 1787 (Farrand ed. 1911 & 1937) (herein: 2 Farrand) at 500; John D. Feerick, *The Electoral College: Why It Was Created*, 54 AMERICAN BAR ASSOCIATION JOURNAL 252 (1968). Out of 23,529 total Presidential electors through American history, only 24 have been "faithless" to their state officials (0.1% of the time). Koza, *supra* note 6 at 111-18 (describing examples of faithless electors through the elections up to 2012) (*herein Every Vote Equal*); Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, The New York Times (Dec. 19, 2016) available at <https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html>.

<sup>10</sup> See e.g., N.C.G.S.A § 163A-1231 (a Presidential elector who fails to or refuses to vote for the candidate he or she consented to select will lose his or her position as an elector and owe a penalty fee of \$500). The faithless elector laws vary in their enforceability. See Koza, *supra* note 6 at 116-17. The principle that electors are free to be "faithless" is currently being tested in Federal Court. Trip Gabriel, *Electoral College Members Can Defy Voters' Wishes*, COURT RULES, N.Y. TIMES (Aug. 22, 2019) available at <https://www.nytimes.com/2019/08/22/us/politics/electoral-college-faithless-electors.html>

<sup>11</sup> U.S. CONST. Amend. XII.

<sup>12</sup> See Wegman, *supra* note 4 at 90. Since then, the 22nd Amendment and the 23rd Amendment were ratified, though these do not change the selection process. See U.S. CONST. Amend. XXII (setting Presidential term limits); U.S. CONST. Amend. XXII (granting three electors to the District of Columbia).

<sup>13</sup> See Koza *supra* note 6 at 67-87 for a detailed account of the types of methods the states used. In 1796, Tennessee used perhaps the most peculiar method, specifically naming citizens from different counties to appoint Presidential electors. See An Act providing for the election of electors to elect a President and Vice-President of the United States, 1796 Tenn. Laws, Chap. 4. The purpose of the Tennessee statute was to ensure that Presidential electors would be chosen "with as little trouble to the citizens as possible." *Id.* States are relatively unconstrained in how to appoint Presidential electors, and the Supreme Court has never held that a method for doing so violates the Constitution. The Supreme Court has only once reviewed a State's method for appointing electors. See *McPherson v. Blacker*, 146 U.S. 1 (1892). In *McPherson*, the Supreme Court held that Michigan's method for appointing electors does not violate the U.S. Constitution.

property) to choose Electors.<sup>14</sup> But this diversity of methods did not last long. Variety in Elector selection methods decreased after Thomas Jefferson's narrow defeat in 1796, the third Presidential contest. Jefferson's loss to John Adams included one electoral vote for Adams from a district in Jefferson's home state of Virginia.<sup>15</sup> By the election of 1800, Jefferson convinced the Virginia legislative body to establish a winner-take-all contest.<sup>16</sup> Under winner-take-all rules, also known as first-past-the-post, all of a state's electors are awarded to the candidate who receives the highest number of votes, whether a majority or a plurality.<sup>17</sup> Several states had established winner-take-all contests for the 1796 election, and Jefferson wrote to Virginia Governor James Monroe that "it is folly [and] worse than folly" for the other states to not do the same.<sup>18</sup> In the 1800 election, all 21 of Virginia's electors went to both Jefferson and Burr. They each received a total of 73 electoral votes, while Adams and his running mate Charles Pinckney only received 65.<sup>19</sup>

From the standpoint of a state's self-interest, a winner-take-all contest seems logical because it maximizes that state's impact on the national total. If all the state's Electors are allocated to one candidate, then that state has a larger impact on the candidate's likelihood of victory. This allows the political party that controls the state government to give the largest possible boost to its preferred candidate. Moreover, as Jefferson aptly noted, as long as other states allocate Electors through a winner-take-all contest, any state that chooses a different method gives away its own power. In this way, pressure to achieve electoral success and political influence for one candidate's party strongly disfavors any method that divides electors between candidates.<sup>20</sup> By the mid-1820s, nearly every state had established a winner-take-all rule.<sup>21</sup>

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<sup>14</sup> See Koza, *supra* note 6 at 70.

<sup>15</sup> See Koza, *supra* note 6 at 73-78.

<sup>16</sup> See Koza, *supra* note 6 at 78-80.

<sup>17</sup> For example, in Utah during the 2016 election, 515,231 voters chose Donald Trump (45.5%), 310,676 voters chose Hillary Clinton (27.5%), 243,690 chose Evan McMullin (21.5%), and 61,833 voters chose another candidate (5.5%). Under winner-take-all rules, Donald Trump received 100% of Utah's six electoral votes. Federal Election Commission, *Official 2016 Presidential General Election Results*, Jan. 30, 2017 at <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf> (last accessed Feb. 15, 2019).

<sup>18</sup> PAUL LEICESTER FORD, *THE WORKS OF THOMAS JEFFERSON* (1905).

<sup>19</sup> See Wegman, *supra* note 4 at 91.

<sup>20</sup> In recent years, a proposal has been made in Pennsylvania to assign electoral votes by Congressional district. Because Pennsylvania's districts were heavily gerrymandered at the time, this plan would have had an average effect that was beneficial to Republicans. It would also have reduced Pennsylvania's national influence. The proposal did not advance. Katharine Q. Seelye, *Pennsylvania G.O.P. Weighs Electoral Vote Changes for 2012*, N.Y. TIMES (Sep. 19, 2011) available at <https://www.nytimes.com/2011/09/19/us/politics/pennsylvania-republicans-weigh-electoral-vote-changes.html>

<sup>21</sup> See Koza, *supra* note 6 at 82; see also *McPherson*, 146 U.S. at 32.

Today, 49 of the 51 jurisdictions that hold elections for Presidential electors use winner-take-all contests.<sup>22</sup>

## **II. The Presidential Selection System Was Hastily Designed to Accomplish its Goals that are No Longer Relevant**

The Constitution was drafted in a single summer in Philadelphia, starting on May 25, 1787.<sup>23</sup> By September 10 the Convention's work was largely done, when a committee was convened to make non-substantive, stylistic changes to the Constitution.<sup>24</sup> The Convention was ended by a vote of the delegates to send the proposed Constitution to the states for ratification on September 17, 115 days from when the Convention began.<sup>25</sup>

For 29 of those 115 days, between June 19 and July 17, the primary topic was how to design the Legislature.<sup>26</sup> The largest hurdles were how to accommodate the interests of slave-owning states and small-population states.<sup>27</sup> Slave-owning states were the seats of economic and political power in the young country.<sup>28</sup> Their delegates were influential, and included George Washington and James Madison.<sup>29</sup> Another key constituency was small-population states, which had less economic and political power but whose votes were still necessary to establish and ratify any proposal.<sup>30</sup> The delegates ultimately decided that there would be a lower house, the House of Representatives, with members based on state population size and each slave being counted as

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<sup>22</sup> The exceptions are Maine and Nebraska, in which Presidential electors are assigned on a winner-take-all basis by Congressional district, and the two remaining "Senator-based" electors are appointed to the winner of the statewide popular vote. *See* ME. STAT. tit. 21 §805; NEB. REV. STAT. § 32-548. We note that only 51 jurisdictions include Presidential contests because one jurisdiction in the United States of America – Puerto Rico – does not have a Constitutional right to Presidential electors. Also, American citizens who live outside the United States and lack a home state also cannot vote for Presidential electors.

<sup>23</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911 & 1937) at 2 (herein: 1 Farrand); *see also* Feerick *supra* note 5 at 250.

<sup>24</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911 & 1937) at 565 (herein: 2 Farrand); *see also* Feerick, *supra* note 5 at 253.

<sup>25</sup> 2 Farrand *supra* note 5 at 648-649; *see also* Feerick, *supra* note 5 at 253.

<sup>26</sup> *See* Feerick, *supra* note 5 at 250-51. These are not the only days that the legislative branch was discussed, as much of the discussion during the first portion of the Convention (between May 25 and June 19) revolved around the legislature as well.

<sup>27</sup> *See* Wegman, *supra* note 4 at 66.

<sup>28</sup> Alice Hanson Jones, *Wealth and Growth of the Thirteen Colonies: Some Implications*, 44 JOURNAL OF ECONOMIC HISTORY 239, 250 (1984)

<sup>29</sup> *See* Wegman, *supra* note 4 at 61.

<sup>30</sup> *See* Wegman, *supra* note 4 at 39.

three-fifths of a person; and an upper house, the Senate, where each state received two members (the “Three-Fifths Compromise”).<sup>31</sup>

The rules for selecting the President did not receive the same focused attention from the delegates. This question was decided hastily in the last few days of the Convention after a series of disparate unsuccessful efforts. From the beginning to the end of the Convention, the delegates voted thirty times on how to select the Chief Executive.<sup>32</sup> A few days before the end of the Convention, on August 31, the delegates convened a “Committee of Eleven” to handle issues which had been postponed or not acted upon, including this question.<sup>33</sup> The committee presented a report on how to select a Chief Executive on September 4, and the delegates debated the topic for three days.<sup>34</sup> The committee’s proposal had several features that were not previously proposed—notably, the decision to appoint a number of electors from each state based on Congressional apportionment.<sup>35</sup> On September 6, two days before they would stop making any substantive changes, the delegates finally voted in favor of a Presidential selection system that became Article II, Section 1.

Article II, Section 1’s lack of detail is a product of that hasty and unfocused process. The delegates tried, but failed, to actually agree on a specific method for selecting the Chief Executive: James Wilson endorsed a direct election, Roger Sherman suggested that the national legislature decide, and William Houston proposed that state legislatures decide. None of these proposals nor several others were accepted.<sup>36</sup> Instead, the state legislatures were directed to choose Electors who then would vote for a candidate, thus interposing Electors between legislators and the eventual choice. This was not done for a principled reason; it was done because the delegates could not settle on a plan, and did not want to spend more time trying.<sup>37</sup>

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<sup>31</sup> See Feerick, *supra* note 5 at 250-51. The Three-Fifths Compromise was also used for apportionment of taxes. U.S. CONST. Art. I, sec. 2. Catherine Locks, Sarah Mergel, Pamela Roseman, Tamara Spike, *History in the Making: A History of the People of the United States of America to 1877*, at page 406, The University Press of North Georgia, 2013.

<sup>32</sup> See Wegman, *supra* note 4 at 57.

<sup>33</sup> 2 Farrand, *supra* note 5 at 481; Feerick, *supra* note 5 at 252.

<sup>34</sup> See Feerick, *supra* note 5 at 252-53. There were ten formal votes among the delegates on how to select the Chief Executive before September.

<sup>35</sup> The delegates discussed the number of Presidential electors per state on only two dates before September, July 19, 1787, and July 24, 1787. On neither date did a delegate suggest the number of electors should be the number of Senators and Representatives a state is entitled to in Congress. See 2 Farrand, *supra* note 5, at 60-70; 97-106.

<sup>36</sup> 2 Farrand, *supra* note 5 at 24 (direct election and election by the individual legislatures votes on July 17), 98 (national legislature vote on July 24). For other votes on this subject, see *generally* 2 Farrand, *supra* note 5.

<sup>37</sup> See Feerick, *supra* note 5 at 252. On September 4, after the Committee of Eleven introduced its proposal, Gouverneur Morris listed the committee’s reasons for the plan. He noted that the proposal did not have Congress

The result is a short Constitutional provision that left pressing challenges of a national election for later: How should the Electors be appointed? What if the Electors ignore the will of the state and its legislature? In this way fundamental decisions about how to choose a Chief Executive were simply left unresolved.

The method for selecting the President only passed at the Convention after the Three-Fifths Compromise was baked into its design. Thus the legislative branch’s design of empowering slave-owning states and states with smaller populations was applied to the Executive Branch. These advantages can be represented by calculating the impact of “Senate-based” Electors and Electors based on the number of slaves (hereafter “slaves-based”) on each state’s voting power in Presidential contests. Table 1, composed using 1796 population data, displays the sixteen states in order of increasing number of non-slave persons per Presidential elector. In this ordering, voters from states at the top of the table have more influence on a per-elector basis.

	Non-slave population	Slave population	Senate-based electors	Slave-based Electors	Total Electors	Non-slave persons per elector (1000)
Tennessee	32,374	3,417	2	0.1	3	11
Georgia	53,284	29,264	2	<b>0.5</b>	4	13
Kentucky	61,258	11,830	2	0.2	4	15
Delaware	50,209	8,887	2	0.1	3	17
Rhode Island	68,158	952	2	0	4	17
S. Carolina	141,979	107,094	2	<b>1.9</b>	8	18
Vermont	85,399	17	2	0	4	21
Virginia	454,881	293,427	2	<b>5.3</b>	21	22

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select the President due to the danger of corruption and the difficulty of finding a body other than Congress to handle impeachments. He also noted that as the Electors would be required to vote at the same time across the country, it would be impossible to corrupt their decisions. *Id.* He did not cite as relevant the issue of state legislative participation in the Presidential selection process.



Maryland	216,692	103,036	2	<b>1.8</b>	10	22
N. Carolina	293,179	100,572	2	<b>1.7</b>	12	24
New Hampshire	141,741	158	2	0	6	24
New Jersey	172,716	11,423	2	0.2	7	25
Connecticut	235,382	2,759	2	0	9	26
New York	318,796	21,324	2	0.4	12	27
Pennsylvania	430,636	3,737	2	0.1	15	29
Massachusetts	475,257	0	2	0	16	30
TOTAL	3,231,930	697,897	32	12.2	138	23

**Table 1.** Total number of Presidential electors in each State of the Union, broken down by elector type, after 1790 Census. Tennessee joined the Union in 1796 and is thus included. Slave-based electors that round to 1 or more are indicated in **boldface**.

This ordering quantifies the Electoral College’s benefit to small-population and slave-owning states. The six states with the least power per voter – New Hampshire, New Jersey, New York, Pennsylvania, and Massachusetts – all had populations greater than 100,000 and not enough slaves to account for even one elector. And in terms of total power (*i.e.* total number of electoral votes), even though the three largest states, Virginia, Pennsylvania, and Massachusetts, had similar-size populations, Virginia had five or six more electors than the other two. Indeed, Virginia had more electoral votes than the five smallest-population states combined.

In such an arrangement, slaveowner interests were not easily neglected. The five states with the largest slave populations were Virginia, Maryland, South Carolina, North Carolina, and Georgia.<sup>38</sup> These states together had 55 electors in total, 12 of which were “slaves-based”. Their slave populations increased their voting power by 28%. None of the other states received slaves-based electors. Such electors made it easier for slave-owning states to reach the majority threshold necessary to win the Presidential contest. In the 1796 Presidential election, 70 electors

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<sup>38</sup> See Table 1.

were needed to win the Presidency.<sup>39</sup> If there had been no slaves-based electors, then a nominee would have needed 64 electoral votes to win, and the five states with the largest slave populations would have together possessed 67% of the needed electoral votes to choose a President. But given that slaves-based electors were part of the calculus, these same states possessed 79% of the needed electors.

This relative advantage was associated with pro-slavery political success during the Founding era. Four of the first five Presidents – holding the office for 32 of the first 36 years of the Republic – were slaveholders from Virginia.<sup>40</sup> Without slaves-based electors, one of the four, Thomas Jefferson, would not have unseated John Adams in 1800.<sup>41</sup> Eighteen of the first 31 Supreme Court justices were slaveholders.<sup>42</sup> Congress consistently declined to pass anti-slavery laws.<sup>43</sup> There would be no anti-slavery President until the election of Abraham Lincoln in 1860.<sup>44</sup>

The five states with the smallest populations – Tennessee, Delaware, Georgia, Kentucky, and Rhode Island – had 18 electors in total, 10 of whom were Senate-based. Their Senate-based electors increased their voting power by 125%. However, these electors were offset somewhat by the fact that larger states also had Senate-based electors. Senate-based electors would not affect a Presidential contest until 1876.<sup>45</sup> The overall pattern of Presidential contests and victories demonstrates that during the Founding era the Electoral College achieved some of its original

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<sup>39</sup> 1796 Presidential Electoral Vote Results. Dave Leip's Atlas of U.S. Presidential Elections. Dave Leip. Retrieved March 28, 2020.

<sup>40</sup> Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (November 26, 2018 1:16 PM ET), <https://time.com/4558510/electoral-college-history-slavery/>; Akhil Reed Amar, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (April 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html>; see also GARY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 6 (2003). Indeed, in 50 out of the first 61 years of the Republic, a slaveholder held the Presidency.

<sup>41</sup> See Wegman, *supra* note 4 at 105.

<sup>42</sup> LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860 9 (2000).

<sup>43</sup> *Id.*

<sup>44</sup> The Republican Party was founded in opposition to slavery's expansion. In 1856, its first Presidential nominee was John C. Fremont, who was not elected. *Republican National Conventions 1856-2006*, LIBRARY OF CONGRESS, <https://www.loc.gov/rr/main/polcon/republicanindex.html> (last visited April 1, 2020).

<sup>45</sup> See Jonathan R. Cervas and Bernard Grofman, *Are Presidential Inversions Inevitable? Comparing Eight Counterfactual Rules for Electing the U.S. President*, 100 *Social Science Quarterly* 1322, 1331 (2019). Senate-based electors also impacted the Presidential contests in 1916 and 2000. In 1876 and 2000, Senate-based electors were sufficient to create a Presidential winner who received a smaller national popular vote than his main opponent. The 1876 election was particularly notable for causing a national crisis that eventually led to a compromise in which federal troops were withdrawn from former Confederate states, leading to a century-long curtailment of black civil rights and the Jim Crow era. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION*. (1st ed. 1988).

design goals (e.g. power for slave states) but failed to achieve others (e.g. fostering a deliberative process, as noted in Part I).

Whatever the track record of the Electoral College in meeting its original goals, those same Presidential selection mechanisms now exist in a very different political environment. Slavery is now unconstitutional, so no slave-owning states exist to obtain a political advantage.<sup>46</sup> Barriers to voting have fallen for many citizens, and political norms about the right to vote and the meaning of representation have evolved.<sup>47</sup> Moreover, the structural challenges from colonial times no longer exist: long-distance travel and communication are now routine, and the major political parties now can unify citizens across the country with similar political views.

The Electoral College was built to serve the needs of a different time. As stated in Part I, even to meet those needs its mechanisms had to be amended. In other words, the Electoral College was poorly designed and had to be repaired almost immediately. The conditions of that time, most prominently the institution of slavery, are now gone. We now analyze how those mechanisms behave when applied under conditions of modern technology and politics.

### **III. Unanticipated Consequences of the Presidential Selection System in Modern Times**

The Electoral College mechanism has not changed since the early 1800s. Today, those mechanisms cause new harms to American democracy. These problems are *unanticipated* because they were not envisioned by the delegates who designed this system. This arises as an indirect consequence of the fact that technology and mores have changed. Just as a horse-drawn carriage would cause havoc on an airport runway, the Electoral College generates consequences that the Founders could never have imagined. We now identify and analyze five of these unanticipated consequences.

#### ***A. Contradictions between the electoral vote and the national popular vote***

In every other major democracy where voters select the chief executive, the outcome is based directly on the popular vote.<sup>48</sup> However, the Electoral College creates a high risk that in a

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<sup>46</sup> See U.S. CONST. Amend. XIII.

<sup>47</sup> See *Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (recognizing an evolving “equality among voters within a State”). To be sure, voting barriers still remain. See e.g., Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245.

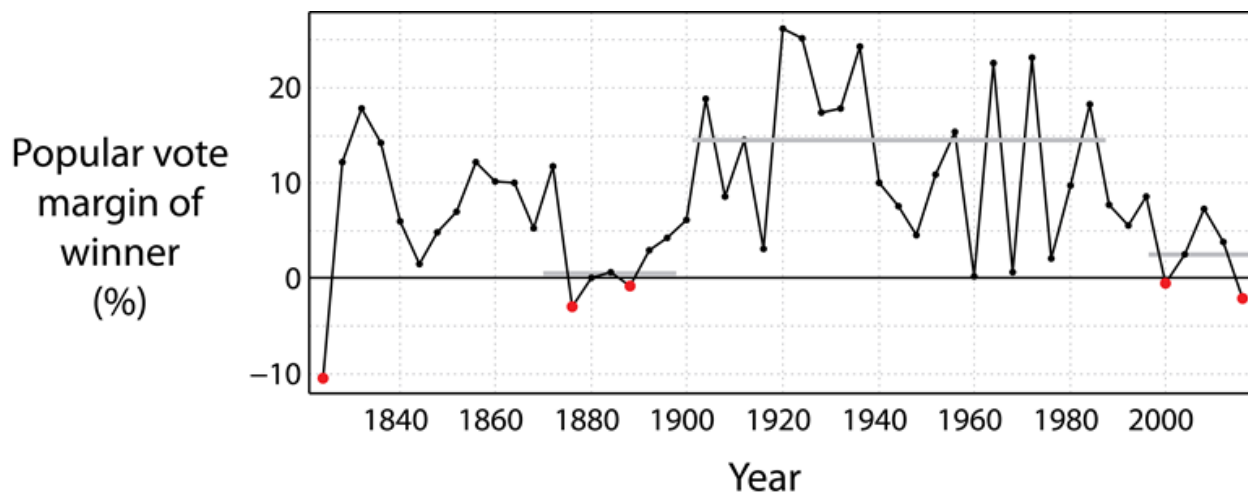
<sup>48</sup> Drew Desilver, *Among Democracies, U.S. Stands Out in How it Chooses its Head of State*, PEW RESEARCH CENTER (Nov. 22, 2016),

<https://www.pewresearch.org/fact-tank/2016/11/22/among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/>

close election, the winner of the electoral vote will not be the same as the candidate who wins the national popular vote. Concordance between the popular vote and the electoral vote arises because of the approximate proportionality between state population and electoral strength. However, in recent years, elections have been close enough to disrupt that concordance.

The Electoral College mechanism of winner-take-all state legislation across the country allows the possibility of a mismatch between the electoral-vote winner and the popular-vote winner. For example, it is mathematically possible for a candidate to win an electoral-vote majority with as little as one-fourth of the popular vote. But that outcome requires the winning candidate's votes to be contained perfectly in those winning states. Such a circumstance does not occur in real life. In practice, how often does a popular vote/electoral vote mismatch occur?

Until 2000, mismatches between the electoral vote and popular vote were uncommon, occurring in only three of the 44 elections where the popular vote has been counted (Figure 1). Two such occasions occurred within twelve years of each other, in 1876 and 1888, so for most of American history there was no expectation that such a disruption would occur. However, since 2000 two out of the last five elections have resulted in the second-place popular vote finisher becoming President.<sup>49</sup> In both cases, the mismatch attracted considerable attention in the press and among voters at large.<sup>50</sup>



**Figure 1.** Popular vote margin of the Presidential winner in U.S. elections, 1824-2016. Red dots indicate elections in which the second-most-popular finisher became President.

<sup>49</sup> The five contests were the Presidential elections in 1824 (John Quincy Adams), 1876 (Rutherford Hayes), 1888 (Benjamin Harrison), 2000 (George W. Bush), and 2016 (Donald Trump).

<sup>50</sup> For example, the controversy around the 2000 recount was one of the top issues of public interest in 2000. See *Rising Price of Gas Draws Most Public Interest in 2000*, PEW RESEARCH CENTER (Dec. 25, 2000), <https://www.people-press.org/2000/12/25/rising-price-of-gas-draws-most-public-interest-in-2000/>.

This uptick in mismatches has occurred because Presidential elections have been more closely contested in recent years. Because electoral votes are awarded in groups of varying size and because electors are not proportional to state population, winning more votes is not guaranteed to translate into more electoral votes. Regraphing the historical data of Figure 1 in order of lower to higher popular margin shows that in elections where the popular vote margin across the country was less than 3%, the likelihood of a mismatch was approximately 3 in 10. The same point emerges from computer simulations of a broad variety of coalitions based on the last four decades of electoral alignments. These simulations show that the Presidency would be expected to go to the popular-vote loser about 1 in 3 times (Figure 2).<sup>51</sup> Taken together, these lines of evidence prove that both in historical fact and as a general principle, close elections in the United States would be expected to lead to a high risk of a popular vote / electoral vote split.

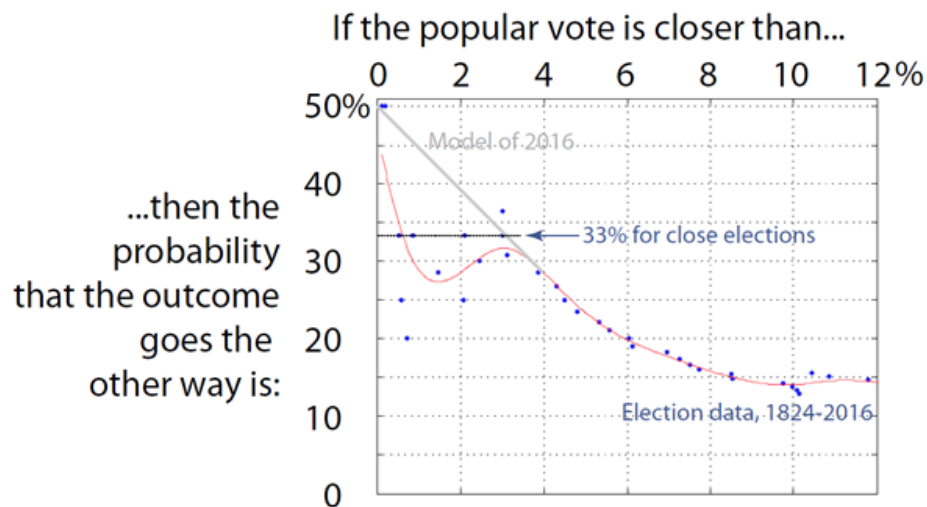
Our analysis demonstrates that the risk of a popular vote / electoral vote mismatch is substantial under conditions of closely divided popular opinion. In election law and as a matter of fairness, the democratic precept against seating a popular-vote loser is taken as a fundamental principle. In the words of 26<sup>th</sup> President Theodore Roosevelt, “If the minority is as powerful as the majority there is no use of having political contests at all, for there is no use in having a majority.”<sup>52</sup> Seating a popular-vote loser as President should be, at a minimum, normatively problematic. Even without a legal cause of action, as is now the case, a popular vote / electoral vote split produces substantial popular dissatisfaction with the Electoral College.<sup>53</sup> Such conflict can cause voters to lose faith in the legitimacy of the democratic process.

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<sup>51</sup> See Vinod Bakthavachalam, Jake Fuentes, *The Impact of Close Races on Electoral College and Popular Vote Conflicts in US Presidential Election*, PRINCETON ELECTION CONSORTIUM [http://election.princeton.edu/wp-content/uploads/2017/10/bakthavachalam\\_fuentes17\\_MEVC\\_popular-electoral-split-model-8oct2017.pdf](http://election.princeton.edu/wp-content/uploads/2017/10/bakthavachalam_fuentes17_MEVC_popular-electoral-split-model-8oct2017.pdf) (last visited April 1, 2020); see also Vinod Bakthavachalam, Reed Hundt, *How Trump is Running to Snatch Victory from the Jaws of Defeat, Again*, N.Y. TIMES, Feb. 20, 2020, <https://www.nytimes.com/2020/02/12/opinion/electoral-college-2020.html?action=click&module=Well&pgtype=Homepage&section=Contributors>.

<sup>52</sup> Theodore Roosevelt, *Address to the Federal Club, New York City, March 6, 1891*, in 14 THE WORKS OF THEODORE ROOSEVELT 129 (Hagedorn, Hermann ed., 1926). See also ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

<sup>53</sup> *The Public, the Political System and American Democracy* Pew: *The Electoral College, Congress and Representation*, RESEARCH CENTER (April 26, 2020, 11:14 AM), <https://www.people-press.org/2018/04/26/5-the-electoral-college-congress-and-representation/>



**Figure 2: Probability that the popular-vote winner will attain the Presidency.** Data points and red curve are derived directly from past election data. The gray curve represents numerical simulations of hypothetical scenarios by Vinod Bakthavachalam and Jake Fuentes.

### ***B. Battleground States***

For the last 20 years, Presidential races have been marked by three features: close partisan division, entrenched voter preference, and voter behavior that can be predicted through polling and data analytics. Consequently, the selection of a President comes down to the outcome of a small number of “battleground states” which are known in advance of the election. The other remaining states are reliably for one of the major candidates. In every Presidential contest since 2000 there have been up to about a dozen battleground states, varying slightly from election to election.<sup>54</sup>

Under the Electoral College – where 49 of the 51 jurisdictions (or 531 of the 538 total electors) use the winner-take-all method to appoint electors – the Presidential campaigns have strong incentives to focus almost exclusively on battleground states and to ignore other states. A major party’s nominee has limited resources (*e.g.* money, staff, volunteers) and time (usually no more than twelve weeks after the party convention) to maximize the chances of winning 270 electoral votes. And with high partisan loyalty supplemented by polling technology, the candidate can estimate his/her likely margin of victory or defeat in every state.

<sup>54</sup> *Dave Leip’s Atlas of U.S. Presidential Elections*, <https://uselectionatlas.org> (last visited April 1, 2020).

Under these conditions, a candidate has little incentive to campaign in states where the projected margin of defeat is large. Consider Texas, which has more electoral votes than any state but California.<sup>55</sup> In 2016, the likelihood of any Democratic candidate taking the statewide contest away from the Republican would have been too low to justify the effort. Yet in election after election, millions of Texans vote for Democratic candidates.<sup>56</sup> In the Presidential race, Democratic voters are written off – and Republican voters are taken for granted. Time and money spent there would reduce the likelihood of winning other states.

Candidates also have little incentive to campaign in states where winning is assured. The likelihood of a Republican opponent flipping the statewide contest in California is extremely low. A campaign in such a large state would take an enormous proportion of a campaign's money, time and energy, all for no added payoff at the end. Knowing this, a hypothetical Democratic candidate would feel no need to focus on California voters, and will likely be happy to see his/her Republican opponent spend substantial efforts there. In short, as a matter of resource optimization, it is in the interest of a Presidential campaign to act as if all the non-battleground states are already decided.<sup>57</sup>

In recent elections the two major-party Presidential candidates have followed this optimization strategy in their travel schedules. In the 2016 general election campaign, 375 out of 399 Presidential candidate events by Hillary Clinton or Donald Trump, or 94%, were held in just 12 states (see Figure 3).<sup>58</sup> The three largest states, California, New York, and Texas, accounting for 122 electoral votes, received 2 visits, or 0.5% of all visits. Small non-battleground states were similarly ignored: the eight smallest states received no visits at all.<sup>59</sup> In this sense, the Founders' vision of protecting the power of small states has withered.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> To be clear, this is a highly simplified model. No state is truly decided, and the candidates do spend money in noncompetitive, non-battleground states for myriad reasons (notably, in efforts to raise money, or, less often, to support down ballot candidates). But, as Part III.B shows below, there is a lot of truth to this simplified model.

<sup>58</sup> See NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016> (last accessed Feb. 10, 2018).

<sup>59</sup> Those states were Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Rhode Island, and Montana.



**Figure 3:** Post-convention visits in 2016. From nationalpopularvote.com.

A similar pattern held in 2012. From the end of the 2012 Democratic National Convention to the election, the Presidential and Vice-Presidential candidates for both major parties visited only 12 states across 253 visits, and made no visits at all to 38 states or the District of Columbia.<sup>60</sup> And during the 2008 general election, 97.7% of Presidential and Vice-Presidential campaign visits from both parties occurred in just 14 states.<sup>61</sup>

Presidential campaign advertising spending has followed the same patterns as travel. In 2004, 73% of all campaign advertising dollars were spent in just Florida (27%), Ohio (18%), Pennsylvania (12%), Wisconsin (8%), and Iowa (8%).<sup>62</sup> In 2008, 98.2% of Presidential campaign spending for both major parties was focused on just 15 states.<sup>63</sup> And in 2012, from April 11 until Election Day, President Barack Obama’s reelection campaign spent over 99% of its \$330 million advertising budget in just ten states.<sup>64</sup> His opponent, former Governor Mitt Romney, had \$158 million for that same period, and spent 99.9% of it in those same ten states.<sup>65</sup>

<sup>60</sup> See FAIR VOTE, *Presidential Tracker 2012*, [http://www.fairvote.org/presidential\\_tracker\\_2012#2012\\_campaign\\_spending](http://www.fairvote.org/presidential_tracker_2012#2012_campaign_spending) (last accessed Feb. 10, 2018).

<sup>61</sup> See Koza, *supra* note 6 at 21-22.

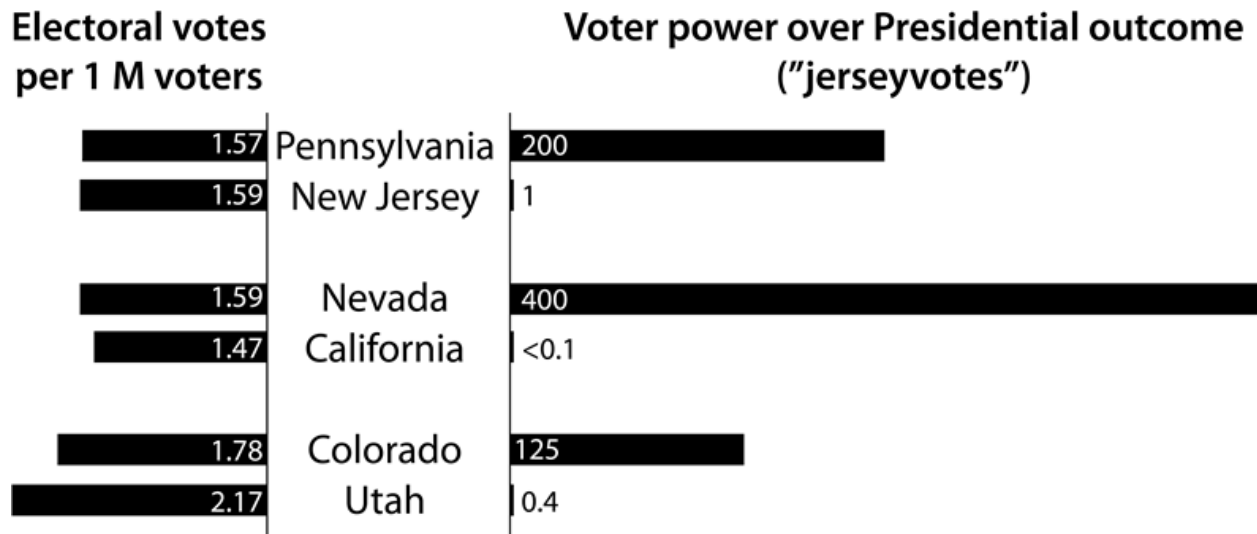
<sup>62</sup> See FAIR VOTE - THE CENTER FOR VOTING AND DEMOCRACY’S PRESIDENTIAL ELECTIONS REFORM PROGRAM, *Who Picks the President?*, <https://fairvote.app.box.com/v/who-picks-the-president> (last accessed Feb. 10, 2018).

<sup>63</sup> See Table 2 at <http://archive.fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230> (last viewed February 10, 2018).

<sup>64</sup> See FAIR VOTE, *Presidential Tracker 2012*, [http://www.fairvote.org/presidential\\_tracker\\_2012#2012\\_campaign\\_spending](http://www.fairvote.org/presidential_tracker_2012#2012_campaign_spending) (last accessed Feb. 10, 2018).

<sup>65</sup> *Id.* For additional details on campaign travel and spending, see Koza, *supra* note 5 at 12-51.





**Figure 4: Comparison of two measures of voter power.** *Left*, the number of electoral votes per million voters. *Right*, quantification of the relative influence of voters over Presidential outcome based on 2016 election results.

The battleground state phenomenon has a substantial impact on political representation. Political representational challenges are relatively common in modern election law. The Supreme Court has held that the Constitution prohibits certain electoral schemes (most often apportionment plans) that give certain voters substantially more influence over who wins the election than others.<sup>66</sup> Also, under the Voting Rights Act, a federal court can require that changes be made to electoral processes based on findings of a history of discrimination and barriers to political access for minority populations.<sup>67</sup> These types of Constitutional injuries seem similar to the harm that the battleground state phenomenon causes. However, there is no legal cause of action for political representational inequalities due to state citizenship that arise because of strategic decisions made by political campaigns.

### ***C. Differential Benefits and Harms to the Citizens of Individual States***

Enfranchisement gives political influence to new people as they gain the right to vote. Communities that lack voting rights often are deprived of political opportunities or benefits, so their entry into the voting population is likely to come with intentions to change the state of affairs. Politicians in power who work to expand individual voting rights take a risk of upsetting

<sup>66</sup> See *Reynolds*, 377 U.S. at 560.

<sup>67</sup> See *Thornburg v. Gingles*, 478 U.S. 30 (1985).

existing power alignments. Indeed, the franchise has only ever been significantly expanded in America out of political necessity.<sup>68</sup>

These natural pressures to avoid expanding the right to vote are enhanced by Electoral College mechanisms. Under the Electoral College, the number of Electors a state has does not change if more people or fewer people vote. In a sense, it operates as if all of a state's citizens vote, even if many do not. Accordingly, in terms of the Presidency, no incentive exists to expand the franchise or even to increase overall turnout in any particular state.

This lack of incentive becomes apparent when one considers the battleground-state phenomenon. Voters who live in battleground states have more power than other voters over the outcome of Presidential elections. The advantage that battleground states have under the Electoral College far exceeds any benefits that states with small populations have due to the Senate-based Electors. One of us has defined a mathematical measure of voter power that represents the per-vote change in national win probability as exerted by voters in a particular state.<sup>69</sup> This is a more useful index of true voter leverage than the nominal measure of electors per voter used in Table 1.

Consider the case of a New Jersey voter.<sup>70</sup> Perennially, his/her vote (or even a thousand such votes) will have extraordinarily little impact on the state outcome, and an even smaller effect on overall likelihood of which Presidential candidate will win the Electoral College.<sup>71</sup> However, in neighboring Pennsylvania, which has been a battleground state since 2004, votes have much more leverage and are therefore worth much more.<sup>72</sup>

The power of a vote can be quantified by asking: In a neck-and-neck race, how much does one vote (or some larger number of votes) affect a candidate's probability of winning the Presidency? As it turns out, this problem gives exactly the same result whether one is a Republican or a Democrat.<sup>73</sup> For example, a thousand voters in New Jersey, a safe Democratic state, have far less influence on the national election outcome than a thousand voters in

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<sup>68</sup> See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

<sup>69</sup> Samuel S.-H. Wang, *Origins of Presidential poll aggregation: A perspective from 2004 to 2012*, 31 INT. J. FORECASTING 898 (2015).

<sup>70</sup> Sam Wang, *The power of getting out the vote*, PRINCETON ELECTION CONSORTIUM BLOG (Nov. 2, 2008), <http://election.princeton.edu/2008/11/02/the-power-of-getting-out-the-vote/>

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Pennsylvania, a battleground state.<sup>74</sup> On a state-by-state basis, voters in battlegrounds possess far more power than voters in other states.<sup>75</sup> Figure 2 shows that battleground state voter power varies by a factor of thousands, whereas the number of electors per unit population varies at most by a factor of three.<sup>76</sup>

Battleground-state voters appear to be aware of their relative power. Turnout in battleground states tends to be higher than the rest of the country.<sup>77</sup> The 12 most competitive states had an average turnout approximately 8 percentage points greater than all the others in 2004, 6 points greater than all the others in 2008, and 9 points greater than all the others in 2012.<sup>78</sup> In 2016, ten of the fourteen states with the highest percentage turnout were battleground states (see Figure 3).<sup>79</sup> In 2016, the turnout in those ten states was over 3.5 million votes greater than if turnout had matched the national average.<sup>80</sup> This difference was greater than the entire turnout in the smallest seven non-battleground states combined.<sup>81</sup>

The Electoral College's consequences for turnout and enfranchisement exemplify the idea that harms to social engagement and participation emanate naturally from such a system of selecting a President. Since participation in democratic processes and trust in government are closely related, the current Presidential system is a potential cause of loss of trust in the national government.<sup>82</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> When first constructed, the win-probability-focused voter power was scaled to the power of a vote in New Jersey. As New Jersey is not a battleground state, "Jerseyvotes" are worth little.

<sup>76</sup> See Wang, *supra* note 70.

<sup>77</sup> Danielle Kurtzleben, *Is The Electoral College Dragging Down Voter Turnout In Your State?* NATIONAL PUBLIC RADIO (Nov. 26, 2016), <https://www.npr.org/2016/11/26/503170280/charts-is-the-electoral-college-dragging-down-voter-turnout-in-your-state>

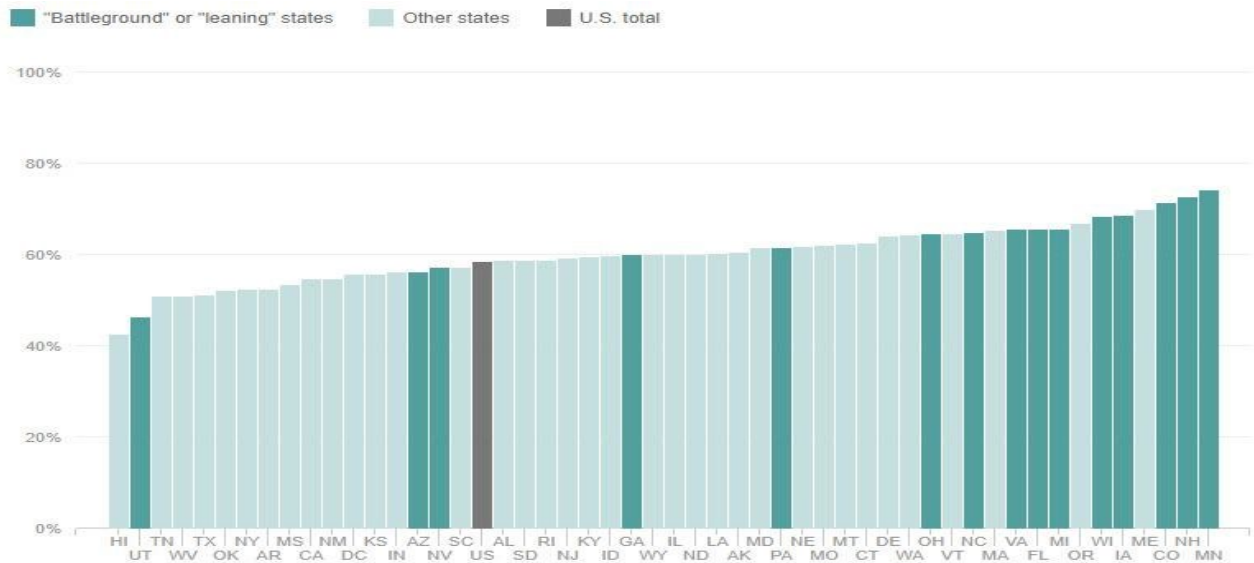
<sup>78</sup> Robert Richie & Andrea Levien, *The Contemporary Presidency: How the 2012 Presidential Election Has Strengthened the Movement for the National Popular Vote Plan*, 43 *PRESIDENTIAL STUDIES QUARTERLY* 353 (2013).

<sup>79</sup> Kurtzleben, *supra* note 77.

<sup>80</sup> These values were calculated from data at *Dave Leip's Atlas of U.S. Presidential Elections*, <https://uselectionatlas.org> (last visited April 1, 2020).

<sup>81</sup> *Id.*

<sup>82</sup> Trust and Elections, <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190274801.001.0001/oxfordhb-9780190274801-e-17>; Pew Key Findings about Trust in Government, <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/>



**Figure 5.** Voter turnout in battleground states, measured as the percentage of eligible voters who participated in the election. Credit: Danielle Kurtzleben, National Public Radio.

Battleground states can also receive more benefits from the federal government than other states. Battleground states are more likely to receive federal discretionary grants, and more money on average per grant.<sup>83</sup> And because of their travel schedules and campaign priorities, Presidents come into office with more familiarity with battleground-state needs.<sup>84</sup> Notably, President George W. Bush signed into law the senior prescription-drug benefit Medicare Part D after the 2000 campaign, which featured close contests in Florida and Pennsylvania, two states with large senior-citizen populations.<sup>85</sup> In the current administration of President Donald Trump, hurricane relief to Florida was prompt and aggressive, in contrast to slower efforts for Puerto Rico, whose residents are predominantly U.S. citizens but which has no electoral votes.

Recently it has come to the forefront that safe partisan states may be treated differently based on their political loyalty. Since 2017, President Donald J. Trump has made a pattern of policy decisions and public statements consistent with such bias. Examples include changes in tax policy that fall more heavily on Democratic states, responses to natural disasters, and

<sup>83</sup> JOHN HUDAK, *PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS* (2014).

<sup>84</sup> Michael Lind, *If a Swing State Cares, It's An Issue*, N.Y. TIMES, October 2, 2000.

<sup>85</sup> *United States: Two Big 'Gators Pounding Away*, ECONOMIST, October 28, 2000, at 23-27.

requests from individual governors for aid during the 2020 coronavirus epidemic.<sup>86</sup> President Trump has explicitly tied his attitude toward states to how their electoral votes were assigned in the 2016 election. The disparate policy treatment across the states violates the idea that the Chief Executive should treat citizens across the nation similarly.

#### ***D. Less Political Power for Non-Battleground Demographics***

The Electoral College gives different amounts of political power to different demographics because of the battleground-state phenomenon. In 2016, battleground states had smaller minority populations than the nation as a whole. Over two-thirds of Presidential campaign events in 2016 were held in six states: Florida, North Carolina, Pennsylvania, Ohio, Virginia, and Michigan. These states had a smaller percentage of Hispanic individuals (9.8%) than nationwide (11.9%) and a larger percentage of the population 65 years or older (16.6%) compared to 15.4% nationwide.<sup>87</sup> Four of the five states with the largest total number of African-Americans – Georgia, New York, Texas, and California – received only five visits from the Presidential campaigns in 2016.<sup>88</sup>

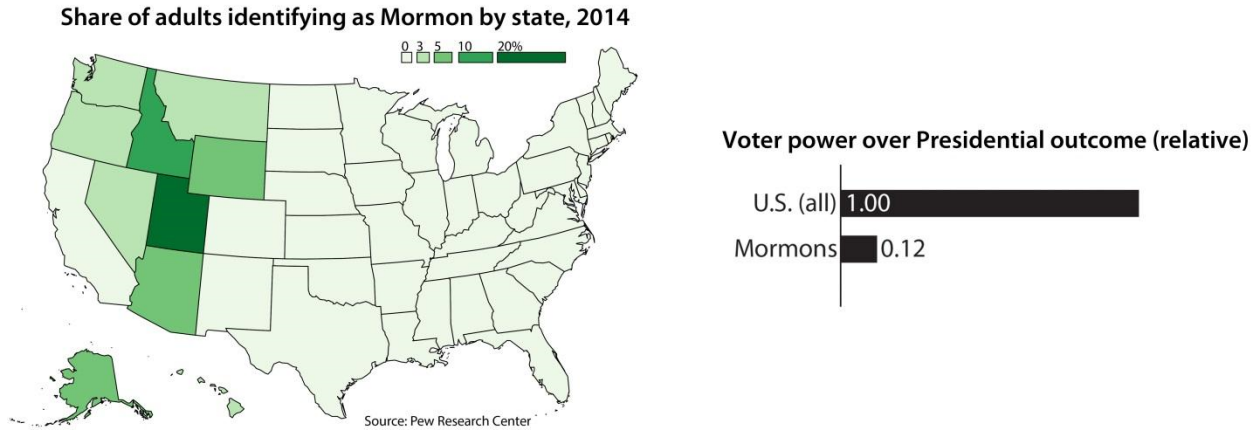
When a demographic is concentrated in noncompetitive states, it will have less influence. For example, Puerto Rican voters who live outside of Puerto Rico live largely in non-battleground states and therefore have lower average voter power. Mormons, who live largely in Western states, are also concentrated in non-battleground states and are likewise disempowered by Electoral College mechanisms (Figure 6).

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<sup>86</sup> Brett Arends, *Trump's tax cuts are punishing states that voted for Clinton, data suggest*, MARKETWATCH, (March 28, 2020), <https://www.marketwatch.com/story/trumps-tax-cuts-are-punishing-states-that-voted-for-clinton-data-suggests-2019-03-07>; Sophia Tesfaye, *Trump's politics of revenge: He's still picking winners and losers in a pandemic*, Salon (March 25, 2020 10:00 AM), <https://www.salon.com/2020/03/25/trumps-politics-of-revenge-hes-still-picking-winners-and-losers-in-a-pandemic/>; Toluse Olorunnipa, Josh Dawsey, Chelsea Janes and Isaac Stanley-Becker, *Governors plead for medical equipment from federal stockpile plagued by shortages and confusion*, Washington Post (March 31, 2020 3:39 PM), [https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d\\_story.html](https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html).

<sup>87</sup> See “Two-thirds of Presidential Campaign Is in Just 6 states,” at <https://www.nationalpopularvote.com/campaign-events-2016> (herein: “Just 6 states”). The population data comes from the 2010 Census results. See UNITED STATES CENSUS BUREAU, *QuickFacts* (<https://www.census.gov/quickfacts/fact/table/US/PST045219>). The six states are Florida, North Carolina, Pennsylvania, Ohio, Virginia, and Michigan.

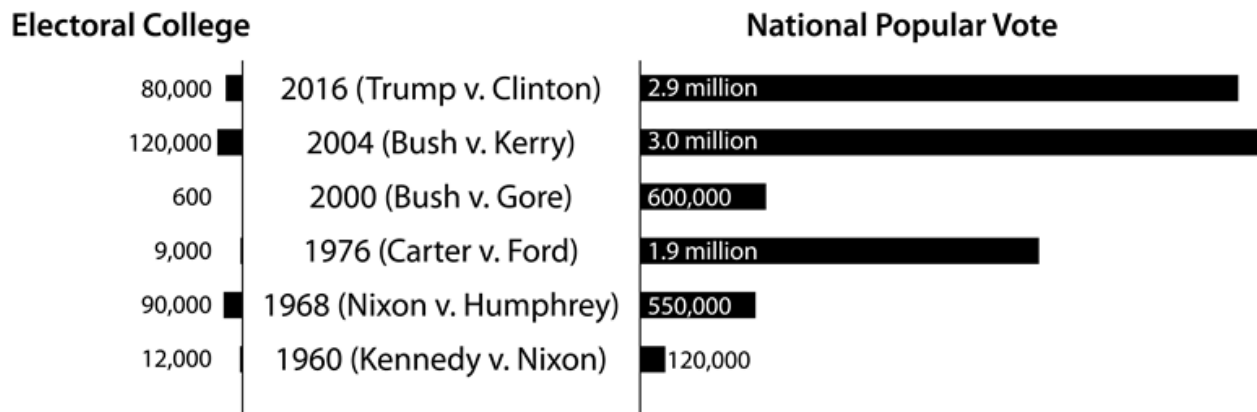
<sup>88</sup> See Just 6 states, *supra* note 57. The population data comes from the 2010 census results. Georgia has 3,150,435 African-Americans; New York has 3,073,800; Texas has 2,979,598; and California has 2,299,072. See UNITED STATES CENSUS BUREAU, *QuickFacts* (<https://www.census.gov/quickfacts/fact/table/US/PST045219>).



**Figure 6.** Per-voter power influence over Presidential outcome by Mormon voters, 2016.

### *E. Election Interference*

Finally, the Electoral College makes elections more vulnerable to interference. The importance of a few key states creates a security risk because adversaries that wish to interfere with the Presidential election need only focus on a few battleground states. Even when hundreds-of-thousands of raw votes, or more, separate the two candidates for President, during certain elections since the 1960's as few as 600 votes could have led to a different outcome (Figure 7):



**Figure 7.** Number of votes needed to reverse Presidential outcome. Left, based on Electoral College mechanisms. Right, based on a national popular vote.

This risk can favor either party depending on circumstances. The famous election of 2000 made Republican George W. Bush president despite Democratic Vice President Albert A. Gore Jr. winning the national 600,000 more votes nationwide. Just four years later, President Bush narrowly escaped the converse experience. If his challenger, Democratic Senator John Kerry,

had won 120,000 more votes in Ohio, he would have received more electoral votes and prevailed over Bush despite losing the popular vote by 3.0 million votes.

Battleground states also make it easier for an adversary to create disruptions to U.S. politics.<sup>89</sup> Interfering in election processes in even a few states would create problems lasting long past Election Day. A focused attack by hostile actors could have an outsized effect on a Presidential election - or at a minimum throw the American political system into chaos.

#### **IV. Desirable Reform Proposals Should Address the Existing Problems and Have an Identifiable Path to Success**

The substantial harms that the Electoral College causes are fundamentally about representation and incentives. The current system deprives most Americans of a meaningful voice in Presidential contests, and encourages political actors to treat the needs of different states or demographics with unequal attention. This system also allows external bad actors to have an outsized impact by focusing their effort on just a few states. These problems will recur under the current system whenever a Presidential election is closely fought. The incentive for states to maximize their individual power exerts a strong pull for them to retain the winner-take-all method to allocate Electors advocated by Thomas Jefferson. Accordingly, the strong incentives on Presidential campaigns to focus on battleground states will also persist.

Finding a remedy to these problems is challenging. The general nature of a solution is obvious: use the total number of votes cast for a candidate to select the President. But federal courts have not located this principle in the Constitution, under the one-person-one-vote principle or otherwise.

Making the Presidency dependent on a popular vote would require either a Constitutional amendment to change the entire system, or legislative action across multiple states. This final Part considers the fate of such proposals to date, and under what conditions they might successfully become law.

One route to popular vote-based selection is through an amendment of the Constitution. A Constitutional amendment could completely replace an elector-based rule for selecting a

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<sup>89</sup> Matthew Olsen and Benjamin Haas, *The Electoral College Is a National Security Threat*, POLITICO, <https://www.politico.com/magazine/story/2017/09/20/electoral-college-threat-national-security-215626>; see also Issie Lapowsky, *Russia Could Easily Spread Fake News Without Team Trump's Help*, WIRED, <https://www.wired.com/story/russia-trump-targeting-fake-news/>

President. The path is spelled out in Article V, which states that amendments may be proposed by a two-thirds vote of the House and the Senate, or alternately by a convention of states called by two-thirds of state legislators. Passage would then require ratification by three-fourths of the states.<sup>90</sup>

These requirements were put in place as intentional hurdles to make amendment difficult.<sup>91</sup> Only the 12th Amendment, ratified in 1803, has succeeded in altering the Presidential selection procedure of Article II, Section 1. Since 1800, over 700 attempts have been made to amend this Presidential selection rule, more than any other subject.<sup>92</sup> All of these attempts failed, as have later attempts.<sup>93</sup> In one attempt that advanced relatively far, in 1969 Senator Birch Bayh and Representative Emmanuel Celler proposed an amendment that would have established a direct national election in which the winner would need to receive forty percent of the vote, or failing that, win a subsequent runoff election between the top two candidates.<sup>94</sup> The Bayh-Celler proposal received a two-thirds majority in the House of Representatives, but failed to receive a vote in the Senate due to procedural maneuvers led by segregationist Senators.<sup>95</sup> In 1979, Senator Bayh finally succeeded in getting a floor vote on the amendment. It won 51 votes, well short of the 67 votes needed for a two-thirds vote to approve a Constitutional amendment.<sup>96</sup>

However, even if an amendment were to pass Congress, the next step would be ratification by three-fourths of states, i.e. thirty-eight out of fifty. Under current conditions of close political division, this would have to include a combination of Democratic-leaning, Republican-leaning, and battleground states. It would seem a very difficult task to muster this

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<sup>90</sup> U.S. CONST. Art. V.

<sup>91</sup> See e.g., James Madison, Federalist, No. 43, 296 (Jan. 23, 1788); Alexander Hamilton, Federalist No. 85, August 13-16, 1788. See also Slate “It’s Very Difficult to Change the Constitution on Purpose” available <https://thehill.com/opinion/immigration/414897-its-very-difficult-to-change-the-constitution-on-purpose> and “Amending the Constitution is Much Too Hard Blame the Founders. Available at <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html>.

<sup>92</sup> See Thomas H. Neale, “The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compacts,” Congressional Research Service Updated October 28, 2019, p. 1 (“Notwithstanding Hamilton’s endorsement, the first proposal to change the electoral college system by constitutional amendment was introduced as early as 1800, and since that time more than 700 proposals to reform or eliminate the college have been introduced”). See also NEALE WHITAKER, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 14-15 (Congressional Research Service 2004).

<sup>93</sup> For example, in 2005, Representative Gene Green introduced the Every Vote Counts Amendment, which would have established a direct national election and explicitly granted Congress the power to establish uniform voting qualifications. See <https://www.govtrack.us/congress/bills/109/hjres8/text>

<sup>94</sup> See H.R.J. Res. 681, 91st Cong. (1969) and S.J. res. 1, 91st Cong. (1969).

<sup>95</sup> S.J. Res. 1, 91st Congress (1969) and 115 Cong. Rec. 30793-30843 (1970). See also Wegman, *supra* note 2 at \_\_\_.

<sup>96</sup> Wegman, *supra* note 2 at 160.



level of cross-cutting support. Indeed, the Electoral College has recently benefited the Republican Party twice, creating the perception that reform is a partisan question. Overall, the difficulty of amending the Constitution in the near future seems about as likely as winning the lottery.

Another route is for states to change how they appoint Electors. State legislatures have substantial leeway over this process, and, as noted in Part I, many different options were used in the first few Presidential contests. For example, states could appoint Electors proportionally, based on the statewide vote totals. Alternately, states could follow Maine and Nebraska, and appoint Electors based on the results in each Congressional district, and appoint the two Senate-based Electors based on the statewide result. Compared to Article V, state legislation is easier at first, requiring only the work of passing laws in individual state legislatures. If such a law passed in one state, it could weaken the norm of winner-take-all laws and put indirect pressure on other states to change their laws as well.

A central challenge of state-level legislation is one of incentives. Some proposed reforms, if implemented uniformly across all states, would likely reduce the number of mismatches between popular vote and electoral vote.<sup>97</sup> However, the entrenchment of existing winner-take-all laws creates a powerful incentive to leave existing rules in place.<sup>98</sup> For example, if one state acted alone to assign its Electors to the national popular vote winner, that state would be at a political disadvantage. In pursuit of a national-level benefit, that state would have to commit to unilateral disarmament.

The Constitution offers a mechanism that can encourage many states to act together to implement nationwide change: interstate compacts. The Constitution envisions that states will on occasion pass reciprocal legislation which binds multiple states to an agreement, even if no change to the Constitution occurs.<sup>99</sup> States would also have wide flexibility to appoint Electors as they choose under an ‘interstate compact’ as they do when acting alone. In the early 2000s, separate works by Professor Robert Bennett and Professors Vikram Amar and Akhil Amar outlined how an interstate compact could lead effectively to a national popular vote for the

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<sup>97</sup> Based on historical data, awarding electoral votes proportionally at a statewide level would have led to two elections with a popular vote-electoral vote mismatch, as opposed to the four that have occurred since 1876. Paradoxically, assigning electors by Congressional district would have increased the number of mismatch elections to five. See Cervas, *supra* 46 at 1328.

<sup>98</sup> Paul Starr, *Entrenchment: Wealth, Power, and the Constitution of Democratic Societies*. Yale University Press (2019).

<sup>99</sup> U.S. Const. Art. I, Sect. 10, Cl. 3.

Presidency.<sup>100</sup> They proposed that if states representing enough electoral votes (currently 270) to win the Electoral College enter a compact requiring them to allocate all their votes to the national popular vote winner, then the winner of the national popular vote would *de facto* become President.

Indeed, such an effort to pass an interstate compact for Presidential selection reform that would establish a national popular vote has already begun. Fifteen states and the District of Columbia have passed legislation titled the “Agreement Among the states to Elect the President by National Popular Vote.”<sup>101</sup> These sixteen jurisdictions together have power over 196 electoral votes. Passage by states representing 74 more electoral votes would cause the interstate compact to go into effect. This could be done by the action of 7 additional states, for a total of 21 jurisdictions.<sup>102</sup> This is considerably fewer than the 38 states required by an Article V approach.

The example of a National Popular Vote Compact shows how a compact structure removes the disincentive of acting alone. In this case, an agreement to implement a *de facto* national popular vote would not take effect until it affected all states equally. Compacts also allow for greater creativity and aggregate power while removing the fear of acting alone. For example, a smaller group of states could appoint their shared Electors to the winner of the national popular vote.<sup>103</sup> States could agree to only add Presidential candidates to the ballot if the candidate visits all of the compacting states (a “Campaign Visits Compact”). States could join a compact where pooled financial resources are distributed to campaigns based on their campaign visits (a “Presidential Election Campaign Compact Fund”). Although these hypothetical

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<sup>100</sup> See Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241; Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President without Amending the Constitution*, FINDLAW’S WRIT (December 28, 2001), <http://writ.news.findlaw.com/amar/20011228.html>.

<sup>101</sup> CA ELEC §6920; CT ST §9-175a; CO ST §24-60-4001; DC CODE §1-1051.01; DE ST TI 15 §4300A; HI ST §14D-1; IL ST CH 10 §20/1; MA 2010 ACTS 229; MD ELEC LAW §8-5A-01; NJ ST 19:36-4; NM ST §1-15-4; NY ELEC §12-400; OR ST §356, §1; RI ST §17-4.2-1; VT ST T. 17 §2751; WA ST 29A.56.300.

<sup>102</sup> The following seven states have passed a National Popular Vote bill in at one legislative chamber: Michigan (16 electoral votes under apportionment based on the 2010 Census), North Carolina (15), Virginia (13), Arizona (11), Minnesota (10), Oklahoma (7), and Arkansas (6), for a total of 78 electoral votes. See <https://www.nationalpopularvote.com/state-status> As few as three additional states could be enough to reach the 270 electoral-vote threshold: for example, Texas, Michigan, and Pennsylvania together possess 74 electoral votes.

<sup>103</sup> The states of California and Texas command 93 electoral votes in total, more than one-third of the number necessary to win the Presidency. Yet together they received only two visits in the 2016 general election campaign. See Figure 3. In a hypothetical California-Texas Compact, both states could agree to award all of their electors to the winner of the national popular vote. This agreement between two states, one safely Democratic and one safely Republican, would have prevented the electoral/popular mismatches of 2000 and 2016, and make future mismatches favoring either party much less likely.

proposals do not have the same effect on the Electoral College, they can remedy some of the unintended consequences we have listed, and make it easier for states to have nationwide impact without bearing the burden alone.<sup>104</sup>

Barriers to enacting interstate compacts exist, but are surmountable. Article I, Section Ten, Clause Three states that “[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another state.”<sup>105</sup> Under current Supreme Court precedent, Congressional approval is only required if the interstate compact encroaches on federal power or the rights of non-compacting states.<sup>106</sup> As the National Popular Vote Compact only changes the legislation of compacting states, it might not require approval at all. The Supreme Court has never ruled on how Congress may sufficiently grant approval. Consent is clearly sufficient if both houses of Congress pass an Act affirming the interstate compact language.<sup>107</sup> Consent can also be granted implicitly, by Congress not acting but nonetheless allowing an interstate compact to function.<sup>108</sup> Arguably, Congress has already granted implicit consent to the National Popular Vote Compact, as the District of Columbia passed legislation to become a member of the compact, and Congress did not overrule this law under its home rule authority.<sup>109</sup> To date, the Supreme Court has never invalidated an interstate compact for requiring, but lacking, Congressional approval.

The National Popular Vote Compact would potentially face other legal and policy hurdles. If all votes are counted in the same electoral contest, then the different voter qualification laws in the states may cause Constitutional problems of not treating persons and votes equally.<sup>110</sup> Difficult questions about how to properly count the national vote total, or what to do if ballots are lost or unreliable, would need to be made. While these problems are

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<sup>104</sup> The National Center for Interstate Compacts has a database which includes over 1,500 statutes establishing interstate compact membership. The compacts cover a diverse array of issues, including state border lines, Port Authority Agreements, law enforcement, education, and more. *See generally* NATIONAL CENTER FOR INTERSTATE COMPACTS, <http://apps.csg.org/ncic/> (last accessed March 28, 2018).

<sup>105</sup> U.S. CONST. Art. I, Section 10, Cl. 3

<sup>106</sup> *See U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452, 470-72 (1978). Most recently, the Supreme Court stated that the Compact Clause only requires Congressional approval for compacts “which might affect injuriously the interests of the other states.” *Texas v. New Mexico*, 583 U.S. \_\_\_, 138 S. Ct. 954 (2018) (citing *Florida v. Georgia*, 17 How. 478, 494 (1855)).

<sup>107</sup> *See e.g.*, Pub. Law 114-357, The FAST Act (Sect. 11301 “[a]uthorizes DOT to make grants to a state (or group of states), an Interstate Compact, a public agency, a state political subdivision, Amtrak or other rail carrier providing intercity rail passenger transportation”). Joint Resolutions also provide sufficient consent from Congress.

<sup>108</sup> *See Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

<sup>109</sup> *See* The District of Columbia Home Rule Act of 1973.

<sup>110</sup> Michael Morley, “The Framers’ Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact.” *Harvard Law and Policy Review* 2020.

significant, they should be balanced against the problems that are present under the current system. In light of the problems that the Electoral College already causes, a nationwide discussion of such tradeoffs is overdue.

## **Conclusion**

The Electoral College is a creature of a different world. Its original goals either no longer exist (protection of slaveowner power) or are no longer addressed (small-state leverage). Yet keeping Electoral College mechanisms has unintended effects of discouraging voter turnout, artificially amplifying voter power in battleground states, disempowering demographic groups that are concentrated elsewhere, and increasing the risk of election interference. These unintended consequences can be addressed by realistic reforms that do not require amending the Constitution, such as single-state action or the formation of interstate compacts. These reforms may become more likely to succeed if the negative consequences of maintaining the status quo are appreciated by as many citizens as possible.